IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1148

ANDREW LENNETTE, Individually and on behalf of C.L., O.L., and S.L., minors,
Plaintiff-Appellants,

vs.

STATE OF IOWA, MELODY SIVER, AMY HOWELL, and VALARIE LOVAGLIA,
Defendant-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE MARY E. CHICCHELLY, JUDGE

APPELLEES' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in granting Appellees' summary judgment based on absolute and qualified immunity

33 Carpenters Constr., Inc. v. State Farm Life and Cas. Co., 939 N.W.2d 69 (Iowa 2020)

Baldwin v. City of Estherville, 915 N.W.2d 259 (Iowa 2018)

Blanton v. Barrick, 258 N.W.2d 306 (Iowa 1977)

Buckley v. Fitzsimmons, 509 U.S. 259 (1993)

Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234 (Iowa 2006)

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Minor v. State, 819 N.W.2d 383 (Iowa 2012)

Slaughter v. Des Moines Univ. Coll. Of Osteopathic Medicine, 925 N.W.2d 793 (Iowa 2019)

Venckus v. City of Iowa City, 930 N.W.2d 792 (Iowa 2019)

Wagner v. State, 2020 WL 7775949 (Iowa Dec. 31, 2020)

Iowa Code § 669.14(1)

Iowa R. App. P. 6.903(3)

Iowa R. Civ. P. 1.981(5)

Restatement (Second) of Torts § 700

II. Whether the district court erred in granting Appellees' summary judgment based on sovereign immunity

Berkovitz v. United States, 486 U.S. 531 (1988)

Blanco Ayala v. United States, 982 F.3d 209 (4th Cir. 2020)

Callahan v. State, 385 N.W.2d 533 (Iowa 1986)

Earl v. State, 910 A.2d 841 (Vt. 2006)

Garling v. United States Envtl. Prot. Agency, 849 F.3d 1289 (10th Cir. 2017)

Godfrey v. State, 847 N.W.2d 578 (Iowa 2014)

Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)

Goodman v. City of LeClaire, 587 N.W.2d 232 (Iowa 1998)

Graber v. City of Ankeny, 656 N.W.2d 157 (Iowa 2003)

Greene v. Friend of Court, Polk County, 406 N.W.2d 433 (Iowa 1987)

Linder v. United States, 937 F.3d 1087 (7th Cir. 2019)

Minor v. State, 819 N.W.2d 383 (Iowa 2012)

Olson v. Ramsey Cty., 509 N.W.2d 368 (Minn. 1993)

Ortega v. Sacramento Cnty. Dep't of Health & Human Servs., 74 Cal. Rptr. 3d 390 (Cal. Ct. App. 2008)

Porter v. Williams, 436 F.3d 917 (8th Cir. 2006)

Rivera v. Woodward Res. Cntr., 830 N.W.2d 724 (Iowa 2013)

Smith v. Iowa State Univ. of Sci. and Tech., 851 N.W.2d 1 (Iowa 2014)

Spotts v. United States, 613 F.3d 559 (5th Cir. 2010)

Thomas v. Gavin, 838 N.W.2d 518 (Iowa 2013)

Trobaugh v. Sondag, 668 N.W.2d 577 (Iowa 2003)

Wagner v. State, 2020 WL 7775949 (Iowa Dec. 31, 2020)

Walker v. State, 801 N.W.2d 548 (Iowa 2011)

28 U.S.C. § 2680(a)

Iowa Code § 232.67

Iowa Code § 232.71B

Iowa Code § 669.14

Iowa Code § 669.14(1)

Iowa Code § 669.14(4)

Iowa Code § 669.2(3)

Iowa Code § 669.5(2)(a)

Iowa Code § 670.4

III. Whether the district court erred in granting Appellees' summary judgment based on section 232.73 immunity

Garvis v. Scholten, 492 N.W.2d 402 (Iowa 1992)

Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)

IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001)

Jackson v. State Bank of Wapello, 488 N.W.2d 151 (Iowa 1992)

Nelson v. Lindaman, 867 N.W.2d 1 (Iowa 2015)

Venckus v. City of Iowa City, 930 N.W.2d 792 (Iowa 2019)

Iowa Code § 4.1(20)

Iowa Code § 232.73

Iowa Code § 232.73(1)

Iowa Code § 669.14

IV. Whether the district court erred in granting Appellees' summary judgment based on the merits of Appellants' common law claims

Barreca v. Nickolas, 683 N.W.2d 111 (Iowa 2004)

Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178 (Iowa 1991)

Engstrom v. State, 461 N.W.2d 309 (Iowa 1990)

J.C. v. County of Los Angeles, 2020 WL 854199 (C.D. Cal. Jan. 2, 2020)

Lansky v. Lansky, 449 N.W.2d 367 (Iowa 1989)

Smith v. Iowa State Univ. of Sci. and Tech., 851 N.W.2d 1 (Iowa 2014)

Van Baale v. City of Des Moines, 550 N.W.2d 153 (Iowa 1996)

Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108 (Iowa 1984)

Wolf v. Wolf, 690 N.W.2d 887 (Iowa 2005)

Wood v. Wood, 338 N.W.2d 123 (Iowa 1983)

Iowa Code § 232.71C(1)

Iowa Code § 232.82(1)

Iowa Code § 238.78

Iowa Code § 710.9

Restatement (Second) of Torts § 46

Restatement (Second) of Torts § 700

V. Whether the district court erred in granting Appellees' summary judgment on the merits of Appellants' Iowa constitutional claims

Abdouch v. Burger, 426 F.3d 982 (8th Cir. 2005)

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2019)

Blumenthal Inv. Trusts v. City of West Des Moines, 636 N.W.2d 255 (Iowa 2001)

County of Sacramento v. Lewis, 523 U.S. 833 (1998)

DeShaney v. Winnebago Cnty. Dept. of Social Services, 489 U.S. 189 (1989)

Dornheim v. Sholes, 430 F.3d 919 (8th Cir. 2005)

Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17 (Iowa 2012)

Estelle v. Gamble, 429 U.S. 97 (1976)

Franks v. Delaware, 438 U.S. 154 (1978)

Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004)

Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)

Hughes v. City of Cedar Rapids, 112 F. Supp.3d 817 (N.D. Iowa 2015)

Hutson v. Walker, 688 F.3d 477 (8th Cir. 2012)

Interest of C.M., 2020 WL 1550685 (Iowa Ct. App., April 1, 2020)

Matthews v. Eldridge, 424 U.S. 319 (1976)

Meyer v. Herndon, 419 F. Supp. 3d 1109 (S.D. Iowa 2019)

Santi v. Santi, 633 N.W.2d 312 (Iowa 2001)

State v. White, 887 N.W.2d 172 (Iowa 2016)

State v. Wilkes, 756 N.W.2d 838 (Iowa 2008)

Strutton v. Meade, 668 F.3d 549 (8th Cir. 2012)

United States v. Duvall, 846 F.2d 966 (5th Cir. 1988)

Venckus v. City of Iowa City, 930 N.W.2d 792 (Iowa 2019)

Wagner v. State, 2020 WL 7775949 (Iowa Dec. 31, 2020)

Whisman Through Whisman v. Rinehart, 119 F.3d 1303 (8th Cir. 1997)

Article I, § 1 of the Iowa Constitution

Article I, § 8 of the Iowa Constitution

Article I, § 9 of the Iowa Constitution

Iowa Code § 232.67

Iowa R. Civ. P. 1.981(5)

ROUTING STATEMENT

This case should be retained by the Supreme Court. The Court should resolve the entire case by application of the well-settled legal principle of absolute judicial process immunity. But if the Court concludes that the district court erred in granting summary judgment on that ground, Lennette's claims of error in the district court's alternative grounds for summary judgment present numerous issues justifying retention of this case. *See* Iowa R. App. P. 6.1101(2)(a), (c), (d), and (f).

These alternative grounds in the case present substantial issues of first impression including: the applicability of section 232.73 immunity to Department of Human Services' employees and to constitutional claims; whether *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017), should be extended to claims for monetary damages under sections 1 and 8 of Article I of the Iowa Constitution; the applicability of the discretionary function limitation on the waiver of sovereign immunity in section 669.14(1) to intentional torts; and the availability of a tortious interference with custody claim when the State seeks and obtains a removal order. And it presents substantial questions of changing legal principles including the continued viability

of *Godfrey* and the proper standard for applying a due process claim for monetary damages under *Godfrey*. In light of the potential broad applicability of these issues to suits against the State and the fiscal and public policy ramifications of adverse rulings, these issues are also fundamental and urgent issues of broad public importance.

STATEMENT OF THE CASE

Nature of the Case

Plaintiff Andrew Lennette, individually and on behalf of his minor children ("Lennette"), attempts to transform a negligence claim into intentional and constitutional torts against Defendants State of Iowa, Melody Siver, Amy Howell, and Valerie Lovaglia (collectively, "the State"[1]). Lennette's claims stem from an Iowa Department of Human Services ("DHS") employee seeking, and a juvenile court order granting, a temporary removal of Lennette from his home and children after S.L., one of his children, alleged Lennette sexually abused her.

[1] The State of Iowa should be the only named defendant because all claims against the individually-named defendants are based on actions taken within the individuals' scope of employment. *See* Iowa Code § 669.5(2)(a); *Wagner v. State*, No. 19-1278, 2020 WL 7775949, at *15 (Iowa Dec. 31, 2020) (stating that section 669.5(2)(a) applies to Iowa Constitutional tort claims).

Course of Proceedings

Lennette's course of proceedings are adequate and essentially correct. Iowa R. App. P. 6.903(3). But Lennette also originally brought common law negligence and breach-of-fiduciary-duty claims against the State. The district court granted the State's motion to dismiss those claims. App. 9-23. Lennette has not challenged that ruling.

Facts

On January 12, 2015, DHS received a report that S.L. "has vaginal redness and stated that her dad touches her, has put his fingers inside her and moved them around, rubbed his privates on hers, and then peed in her mouth." App. 70. By January 13, 2015, Melody Siver, Social Worker III with DHS, was assigned to the case. App. 137:11-12. When Siver was assigned the case, she had the intake and one past assessment. App. 137:21-22. That same day, at the St. Luke's Child Protection Center ("CPC"), Siver met with: (1) Jennifer Roberts of the Cedar Rapids Police Department ("CRPD"); (2) Rachel Haskins, an interviewer with the CPC; (3) Rebecca Duffy, a nurse with the CPC; and (4) Nancy Schueman, a Family Advocate. App. 120. The CPC conducted a recorded interview with S.L., which Siver observed, and at which S.L. stated that:

- "[Lennette] rubs his penis on my back until I'm sleeping, and he also kind of puts his penis in my mouth."
- Lennette did it "[m]ore than one time" and that Lennette "can't stop doing it."
- "every time I say can I go to mom's room, [Lennette] says no. Then he kind of won't let me."
- when she "wake[s] up[,] [Lennette] pull[s] up his pants—well he has his pants down actually. He pulls up his pants and he kind of rubs his penis on my tushy and bottom too. He puts on back my diaper—he puts back on my diaper, and then he keeps doing it until I go to sleep."
- she "wake[s] up and I feel something squishy in my mouth" and that "[Lennette] accidentally pees in my mouth, but I spit it out in his face."
- Lennette "pulls down his pants and then he starts doing the penis thing."
- Lennette "doesn't want to make me awake."
- Lennette "rubs his penis on my tushy and my bottom. . . . He just gets me bare naked."

App. 71-76. On January 15, 2015, Siver also observed a CPC interview

of S.L.'s siblings, C.L. and O.L. App. 104-106.

On January 16, 2015, Siver submitted an affidavit to the Linn County Juvenile Court in which she requested that a Child in Need of Assistance (CINA) petition be filed on behalf of the minor children. App. 77-78. On the same day, the Linn County Juvenile Court entered an ex parte order removing Lennette from the family home, ordering Lennette to have no contact with his minor children, and setting a date for a hearing on its order for one week later, January 23, 2015. App. 79-80. On January 19, 2015, Siver spoke with Roberts, and Roberts informed Siver that CRPD contacted Lennette to request that he sit for an interview with CRPD. App. 106.

By January 20, 2015, at the latest, Lennette had notice of the State's intended action. App. 81. Lennette indicated that he first wanted to consult with an attorney before submitting to an interview. App. 106. On January 20, 2015, Siver spoke with Rich Mitvalsky, who was Lennette's lawyer at the time. App. 106. Mitvalsky indicated that he would not make Lennette available to be interviewed by DHS. App. 106. On January 23, 2015—the date set for the hearing on the juvenile court's ex parte removal order—Mitvalsky spoke with Siver, telling her that Lennette agreed to continue the no contact order with S.L. but

wanted visitation with C.L. and O.L. App. 107. Lennette also agreed to stay out of the family home until the issues could be set for trial. App. 106. Mitvalsky informed Siver that the Lennette children were receiving therapy in October 2014. App. 107-108. Also on January 23, 2015, Lennette represented to the juvenile court that he did not wish to proceed to evidentiary hearing on that date. App. 118.

On January 28, 2015, Siver and Heather Lantz, who was a Social Worker II with DHS, met with the Lennette children and Holly Lennette—Lennette's then-spouse and mother of his minor children—at the family home. App. 108. On February 3, 2015, Mitvalsky emailed Siver, asking Siver to investigate several matters pertaining to Lennette's divorce proceedings. App. 82-86. Starting around February 4, 2015, Lennette's new attorney, Natalie Cronk, sent several emails to Siver, Howell, Lantz, and Lance Hereen, the assistant Linn County attorney who represented the State in the juvenile proceedings. App. 87-92. In those emails, Cronk advocated on behalf of Lennette, and she asked all parties to review documents that Cronk deemed relevant and exculpatory. App. 93-97. Cronk also urged Siver not to issue a finding in the assessment. App. 93-94. On February 17, 2015, Siver and Amy Howell met with Lennette and Cronk and interviewed Lennette. App.

108-110.

On March 12, 2015, Siver spoke with Bekah Andrews from Grace C. Mae Advocate Center, who was providing therapy for S.L. App. 111-112. Andrews recommended S.L. not have visits with Lennette. App. 111-112. On March 13, 2015, Siver completed an addendum to her report—as ordered by the juvenile court—which indicated that the allegation of sexual abuse is founded. App. 115-116; App. 98. DHS submitted the report to the court in the juvenile proceedings. App. 124. Siver testified before the juvenile court at the trial. App. 125. On January 4, 2017, Lennette filed claims with the State Appeal Board. App. 141. On July 6, 2017, Lennette sent a letter to the State Appeal Board advising that he was amending his claims to include state constitutional torts. App. 141. On August 22, 2017, Lennette withdrew his claims for consideration from the State Appeal Board. App. 142.

ARGUMENT

Lennette's remaining claims include the following common law and constitutional claims: (1) tortious interference with custody; (2) intentional infliction of emotional distress; and (3) violations of Article I, §§ 1, 8, and 9 of the Iowa Constitution. The district court correctly concluded that the State is immune from all of Lennette's common law

and constitutional claims pursuant to: (1) the judicial process immunity; (2) the limitations on the State's waiver of sovereign immunity in section 669.14; and (3) section 232.73 immunity. Affirming the district court on any one of these grounds would be dispositive. The district court also correctly concluded the State has qualified immunity for Lennette's constitutional claims. Finally, the district court correctly concluded the State is entitled to summary judgment on the merits of all of Lennette's claims.

I. The District Court Correctly Granted Summary Judgment Based on Absolute and Qualified Immunity.

Preservation of Error

The State agrees with Lennette that he preserved error on his judicial process absolute immunity argument. It is less clear whether Lennette preserved error on the qualified immunity argument.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *33 Carpenters Constr., Inc. v. State Farm Life and Cas. Co.*, 939 N.W.2d 69, 75 (Iowa 2020) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). "To preserve error for appeal after the district court fails to rule on the party's properly raised issue, the party must file a motion requesting a ruling," and the Court

"routinely hold[s] that when an issue is raised in a motion but not decided in the district court ruling, the issue is not preserved for review." *Id.* However, the Court will also "assume the district court rejected each defense to a claim on its merits, even though the district court did not address each defense in its ruling." *Meier*, 641 N.W.2d at 539.

In the district court, Lennette argued in resistance to summary judgment that the proper standard was "all due care" and that the State did not establish the immunity. Lennette Brief in Support of MSJ Resistance at 44-46. In reply, the State applied the all due care standard and argued the evidence established it exercised all due care. State MSJ Reply at 5-6. The district court recognized both parties' arguments regarding all due care when it granted summary judgment. App. 1154-55. Lennette did not move the district court to explicitly address the all due care argument before he appealed.

Accordingly, either: (1) Lennette did not preserve error because, as he argues, the district court failed to rule on the all due care argument; or (2) he did preserve error because the district court implicitly ruled that the State established it exercised all due care, and the issue is properly before this Court.

Standard of Review

The State agrees with Lennette that Iowa appellate courts review grants of summary judgment for correction of errors at law. *See* Iowa R. App. P. 6.903(3); Lennette Final Brief at 36, *Slaughter v. Des Moines Univ. Coll. Of Osteopathic Medicine*, 925 N.W.2d 793, 800 (Iowa 2019).

Merits

The district court correctly held that: (1) the State has absolute immunity pursuant to the judicial process immunity for all claims; and (2) the State has pled and proven that it exercised all due care for actions taken prior to the juvenile court's entry of its removal order.

A. The State Has Absolute Judicial Process Immunity for All Claims.

The State is entitled to absolute immunity pursuant to the judicial process immunity for all acts giving rise to Lennette's cause of action. Such immunity applies to both the common law claims and the constitutional claims. *Venckus v. City of Iowa City*, 930 N.W.2d 792, 800 (Iowa 2019) (stating that "[i]t is well established the judicial process immunity applies to common law torts" and that "the judicial process immunity applies to state constitutional torts."). The judicial process immunity "bars suit and damages against government officials

for conduct intimately associated with the judicial process." *Id.* at 802. It exists to "benefit[] the public by protecting government officials involved in 'the judicial process from the harassment and intimidation associated with litigation.'" *Id.* at 801 (quoting *Minor v. State*, 819 N.W.2d 383, 394 (Iowa 2012)). "The immunity applies even when the [official] is accused of acting maliciously and corruptly . . . ." *Id.* at 804 (quoting *Blanton v. Barrick*, 258 N.W.2d 306, 308 (Iowa 1977)) (alteration in original).

In deciding whether a state actor is entitled to absolute immunity, Iowa courts use a functional approach "to determine whether those actions 'fit within a common-law tradition of absolute immunity.'" *Minor*, 819 N.W.2d at 3. That is, "[a] government official may be entitled to absolute immunity where the official performs a function analogous to that of a government official who was immune at common law." *Id.* With respect to social workers, the Iowa Supreme Court stated:

> We believe an appropriate application of the functional analysis prohibits us from making a broad decision about the type of immunity available to social workers when they file an affidavit allegedly containing false statements or misrepresentations. Accordingly, if the social worker is acting as a complaining witness, then the social worker is not entitled to absolute immunity because complaining witnesses were not absolutely immune at common law.

> However, if the social worker is functioning as an ordinary witness, then the social worker is entitled to absolute immunity.

Id. at 397 (internal citations omitted).

Lennette argues on appeal that the district court failed to separate the State's acts as a complaining witness versus acts as an ordinary witness as set out in *Minor*. Lennette Final Brief at 39. But despite ample opportunity, it remains unclear which particular acts or omissions of the State Lennette argues were tortious, or even which conduct should be considered that of a complaining witness. *See* App. 127-134; Lennette Brief in Support of Resistance at 43; Lennette Final Brief at 38. The failure to identify specific facts should alone be fatal to Lennette's claims. *See Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 245 (Iowa 2006) ("Our rules require a nonmoving party to identify the specific facts that show the existence of a genuine issue for trial. Iowa R. Civ. P. 1.981(5)"). Even now, Lennette argues only in very broad terms that his "claims are premised on a non-existent investigation." Lennette Final Brief at 38 (emphasis removed). This argument is unsupported by any reference whatsoever to the record.

Lennette focuses on the State's conduct after the juvenile court entered its removal order and after the County Attorney filed the CINA

petition.[2] Such conduct is entitled to absolute immunity pursuant to the State's conduct as "investigatory" to skirt around the judicial process immunity. However, Lennette's theory is missing a crucial logical step. Despite numerous general complaints about why the "investigation" was flawed, Lennette does not state what *actions* the State should have taken had it performed an investigation that would have satisfied Lennette. While not stated explicitly, it seems the only actions Lennette contends the State should have taken would be to cease the CINA action. *See, e.g.*, Brief in Support of Resistance at 107 (citing Restatement (Second) of Torts § 700 for proposition that DHS should have returned S.L. to Lennette).

This is precisely the sort of conduct the immunity was designed to protect. "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence . . . and appropriate preparation for its presentation at trial . . . ." *Buckley v. Fitzsimmons*,

[2] The State's conduct is the same in both cases: Siver's affidavit was filed in both the application for ex parte order and in the County Attorney's CINA petition. App. 1139-1143.

509 U.S. 259, 273 (1993). Indeed, Lennette's theory here is the social-worker equivalent of the *Venckus* case, and this Court clearly held that such conduct is entitled to absolute immunity:

> Venckus's primary complaint is the prosecutor defendants continued a "reckless crusade" to convict Venckus in the face of "overwhelming evidence" of Venckus's innocence. Venckus argues the prosecutors refused to drop the charges because they did not want to admit they had charged an innocent man. **However, the decisions to initiate a case and continue prosecution are at the core of the judicial process immunity. This is true without regard to motive or intent.**

Venckus v. City of Iowa City, 930 N.W.2d 792, 804 (Iowa 2019) (emphasis added) (internal quotations and citations omitted). Like in *Venckus*, here Lennette appears to believe that the State continued the CINA proceeding in the face of evidence that Lennette did not abuse S.L. or, most charitably, Lennette believes: (1) the State performed an inadequate "investigation"; (2) had it performed an adequate investigation, it would have concluded Lennette did not abuse S.L.; and (3) therefore the State should have caused the county attorney to stop the CINA proceeding in juvenile court. And like the plaintiff in *Venckus*, Lennette must necessarily be arguing here that the State should have either: (1) themselves withdrawn the CINA petition; or (2) have caused the county attorney to drop the CINA petition. In either

case, such decisions are clearly entitled to the judicial process immunity, and the Court should affirm the district court's conclusion that the State is entitled to absolute immunity for all of Lennette's claims.

B. The State Has Qualified Immunity for Constitutional Claims.

In addition to absolute immunity, state actors are entitled to a form of qualified immunity for direct claims made under the Iowa Constitution. *Minor*, 819 N.W.2d at 400; *Baldwin v. City of Estherville*, 915 N.W.2d 259, 279 (Iowa 2018). For a direct constitutional claim under the Iowa Constitution, defendants may "plead and prove as an affirmative defense that they exercised all due care to conform to the requirements of the law." *Baldwin*, 915 N.W.2d at 279. This standard "bears resemblance to one of the immunities set forth in the ITCA . . . ." *Wagner v. State*, No. 19-1278, 2020 WL 7775949, at *5 (Iowa Dec. 31, 2020) (citing Iowa Code § 669.14(1)) (emphasis removed).

Lennette relies on his expert report to argue Siver did not act with all due care. This reliance is curious—Lennette's expert merely offers her opinion that Siver's conduct amounted to "deliberate indifference." Lennette also seems to argue—without support—that the

defense of "all due care" *requires* an expert. Lennette Final Brief at 40. A conclusory legal conclusion by a purported expert is not evidence. Indeed, such opinion testimony is not even admissible in this case—this expert has offered no admissible testimony that would assist the fact-finder in determining whether the State committed intentional or constitutional torts, much less whether the State exercised all due care.

Lennette's expert also opines that Siver "failed to follow the law." First, whether Siver complied with Iowa law is a question for the Court, not for Lennette's expert—and Lennette's expert in any event is not an expert in compliance with Iowa law. But more importantly, Lennette's expert does not even attempt to identify what law was not complied with, nor how it was not complied with. Such conclusory allegations are not evidence showing Siver failed to act with all due care. The Court must look at Siver's actions as laid out in the State's statement of facts: Siver received the abuse report, organized and observed an interview conducted by experts at the CPC, deemed S.L.'s allegations to be credible, and sought a temporary removal order. These actions prove Siver acted with all due care. Accordingly, the Court should affirm the district court that the State has qualified immunity for the alleged constitutional torts.

II. The District Court Correctly Granted Summary Judgment Based on Sovereign Immunity.

Preservation of Error

The State agrees that Lennette preserved on this ground.

Standard of Review

The State agrees with Lennette that the Court reviews for errors at law.

Merits

The State has not waived its sovereign immunity for any of Lennette's remaining claims: tortious interference with custody, intentional infliction of emotional distress, and violations of the Iowa Constitution. Under common law, the State of Iowa had sovereign immunity from torts committed by State employees. *See Rivera v. Woodward Res. Cntr.*, 830 N.W.2d 724, 727 (Iowa 2013); *see also Wagner*, 2020 WL 7775949, at *8-9. The legislature partially waived the immunity, but only as provided under Iowa Code Chapter 669, the Iowa Tort Claims Act ("ITCA"). *See Rivera*, 830 N.W.2d at 727 ("[The ITCA] covers all tort claims against the state, subject to exceptions identified by the legislature."). Thus, while the ITCA gives private citizens the right to sue the State and its employees acting within the scope of their employment, it does so only to the extent to which

consent has been given by the legislature. *Id*. Lennette brought his tort claims under the ITCA. *See* Petition ¶ 170; App. 142. If the defendant is "an employee of the state acting within the scope of the employee's office or employment at the time of the incident upon which the claim is based, the suit commenced upon the claim shall be deemed to be an action against the state under the provisions of this chapter[.]" Iowa Code § 669.5(2)(a).

Lennette's claims against Siver, Howell, and Lovaglia arise from conduct they took in their role as DHS employees. Lennette does not allege in the petition or produce any admissible evidence that the named Defendants acted outside the scope of their employment. In fact, the named Defendants' actions complained of in this suit could only occur if they acted within the scope of their employment. *See Godfrey*, 847 N.W.2d at 587 ("When there is no factual dispute as to whether the employee was acting within the scope of his or her employment, the certification procedure relieves the employee of personal liability by substituting the State as the only defendant."). Therefore, Lennette's claims are against the State and are subject to the ITCA, including the exceptions outlined in Iowa Code § 669.14.

Iowa Code § 669.14 outlines certain claims for which the State

has not waived its sovereign immunity. Lennette's claims are excepted under: (1) Iowa Code § 669.14(1), the discretionary function exception; and (2) Iowa Code § 669.14(4) as the functional equivalent of misrepresentation and deceit.[3]

A. Lennette's Claims are Barred Pursuant to the Discretionary Function Exception

Lennette argues that: (1) Iowa Code § 232.71B divests the State of discretion and the State's actions were not the type of decision the immunity was designed to protect; and (2) the discretionary function exception does not apply to intentional torts. Lennette is incorrect.

1. The State Exercised its Discretion, and the Discretionary Function Exception was Intended to Apply to Such Decisions.

[3] All of Lennette's claims fall within the definition of a claim under Iowa Code § 669.2(3). *See Wagner*, 2020 WL 7775949, at *5-8 (holding that chapter 669 applies to constitutional claims). And Lennette correctly pursued his common law and state constitutional claims through Iowa Code chapter 669. Rather than holding that the limitations on sovereign immunity in section 669.14 are unavailable for constitutional claims, the *Wagner* Court merely reasoned that the potential applicability of section 669.14 would not be a basis to avoid applying chapter 669 to a constitutional claim. *See Wagner*, 2020 WL 7775949, at *8-11. To the extent that applying these limitations to constitutional claims is in tension with *Godfrey*, 898 N.W.2d, the Court should limit or overrule *Godfrey* and reaffirm the continued viability of long-standing Iowa precedent that the State is immune from suit absent a waiver of sovereign immunity. *See Wagner*, 2020 WL 7775949, at *8-9.

Iowa Code § 669.14(1) retains the State's sovereign immunity for: "[any] claim based . . . upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an officer or employee of the state, whether or not the discretion is abused." The State retains its sovereign immunity for its employees' discretionary actions taken in this case.

The discretionary function immunity attaches to acts of discretion in carrying out government functions, whether or not the discretion is abused, and whether or not negligence is alleged to have occurred. *Goodman v. City of LeClaire*, 587 N.W.2d 232, 237 (Iowa 1998)[4]. Courts analyze discretionary function immunity by determining: (1) whether the act in question was a matter of discretion for the acting employee; and (2) whether the judgment was the kind the exception was designed to protect. *See Walker v. State*, 801 N.W.2d 548, 555 (Iowa 2011); *see also Berkovitz v. United States*, 486 U.S. 531, 536 (1988) ("[C]onduct cannot be discretionary unless it involves an element of judgment or choice."). "A fully discretionary

[4] The *Goodman* Court was analyzing the nearly identical provision for municipal immunity in Iowa Code § 670.4. Because the language is for all intents and purposes identical, the same reasoning applies to State immunity under the ITCA.

judgment is one that balances incommensurable values in order to establish settled priorities." *Walker*, 801 N.W.2d at 563 (internal citation and quotations omitted). "[A]n immune governmental action is one that weighs competing ideals in order to promote those concerns of paramount importance over the less essential, opposing values." *Id.* (internal citations and quotations omitted).

Whether the action is amenable to a policy-based decision is all that is required for the discretionary function exception to apply. *Graber v. City of Ankeny*, 656 N.W.2d 157, 165 (Iowa 2003) (stating in a case involving a municipality's assertion of discretionary function immunity that "[w]hether or not the city actually made its decision with policy considerations in mind is not determinative . . . the circumstances must show the city legitimately *could have* considered social, economic, or political policies when making judgments" (emphasis added)). Such immunity is based upon the desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Goodman*, 587 N.W.2d at 237 (quoting *Berkovitz*, 486 U.S. at 536-37 (analyzing the analogous provision in the Federal Tort Claims Act)).

DHS is charged with the protection of children in Iowa. *See Callahan v. State*, 385 N.W.2d 533, 537 (Iowa 1986) (citing Iowa Code § 232.67). Here, the State was tasked with deciding whether S.L.'s allegations that Lennette sexually abused her were credible and whether the Lennette children needed the court's intervention to protect their safety. Siver, in conjunction with a team of trained professionals, observed the interview of S.L. and determined that S.L.'s allegations that Lennette sexually abused her were credible. Siver exercised her discretion to submit an affidavit to the court requesting that a CINA be initiated to protect the children from Lennette. Once the case was initiated, the juvenile court ordered the State to conclude the child abuse assessment report and submit it to the court. Siver considered the evidence she deemed relevant and, under the supervision of Howell and Valerie Lovaglia, determined that the child abuse allegation should be founded against Lennette.

Lennette does not identify anything that divested the State of its discretion. Lennette cites Iowa Code § 232.71B for the proposition that "[i]nvestigations are mandatory and conducting them pursuant to certain standards and rules does not permit discretion." Lennette Final Brief at 44. Iowa Code § 232.71B is a lengthy statute composed of

thirteen subsections. Lennette does not identify how the State did not comply with Section 232.71B, which subsection of Section 232.71B divests the State of discretion, what actions the State was required to take but did not, or cite anything in the record whatsoever in support of his argument. Lennette does not identify the "certain standards and rules" that divest the State of discretion. Lennette fails to identify—much less show with admissible evidence—that the discretionary function is inapplicable because "a statute, regulation, or policy requires a course of action for an employee to follow . . . ." *Walker*, 801 N.W.2d at 555. The discretionary function immunity applies when, like here, the opponent of the immunity fails to identify a "policy or procedure that required a specific course of action." *Id.* at 557; *see also Graber*, 656 N.W.2d at 161 (holding that failure to present evidence that a statute, regulation, or policy "eliminate[d] all aspects of discretion or judgment" was not enough to show the action was not an element of choice under the first prong in *Berkovitz*).

The State's actions here are textbook examples of decisions amenable to policy-based decisions. Its decisions weighed the interests of a minor child's safety from a sexually-abusive father with the interests of family integrity and parental rights, all while seeking to

promote the concern of paramount importance to DHS's purpose—the protection of the child. Lennette's criticism of how the State considered evidence or his disagreement with the State's investigation are irrelevant to a discretionary function analysis. It is immaterial whether the State abused its discretion[5]; the relevant question is whether these are the types of determinations amenable to policy-based considerations. Lennette disagrees with the State's decisions in seeking his temporary removal and in issuing a founded report. This disagreement does not divest the State of its discretion.

Other jurisdictions analyzing similar exceptions to waivers of sovereign immunity hold that a social worker's decisions relating to allegations of child abuse fall under the discretionary function exception. *See Ortega v. Sacramento Cnty. Dep't of Health & Human Servs.*, 74 Cal. Rptr. 3d 390, 404 (Cal. Ct. App. 2008) (holding that social worker's alleged failure to gather pertinent and specific sources of facts was immune under the discretionary function exception because exercising discretion invariably entails the collection and evaluation of information.); *Earl v. State*, 910 A.2d 841, 851–52 (Vt.

[5] Even if this analysis were relevant, the record contains ample evidence the State did not abuse its discretion in seeking Lennette's temporary removal from S.L.

2006) (holding that social workers who failed to remove abusive foster child and mother from the plaintiff's home were immune under state's discretionary function exception); *Olson v. Ramsey Cty.*, 509 N.W.2d 368, 371 (Minn. 1993) (stating that in making a placement decision of a child, social workers make decisions weighing competing policy concerns and are protected by discretionary function immunity.); *see also Porter v. Williams*, 436 F.3d 917, 921 (8th Cir. 2006) ("Generally, a social worker's handling of the care of a child may be considered inherently discretionary.")

The State is entitled to immunity under the discretionary function exception because the acts of filing an affidavit requesting a CINA for the protection of a suspected child-sex-abuse victim and the determination that the evidence supported a founded child abuse assessment report are the type of actions that are amenable to a policy-based analysis. Like *Callahan*, this case arises out of a report of child abuse and the subsequent actions the State took to protect children. Balancing competing interests in pursuit of the need to protect children from abuse is at the heart of Lennette's claims and the State's actions. *See Callahan*, 385 N.W.2d at 537–38. This Court should affirm.

2. The Discretionary Function Exception is not Limited to Negligence Claims.

Lennette argues the discretionary function exception does not apply to intentional torts. He reasons that because the *Callahan* court allowed an intentional infliction of emotional distress claim to proceed against a social worker when a negligence claim was not available, the discretionary function exception cannot ever apply to intentional infliction of emotional distress claims. Lennette Final Brief at 44. The discretionary function exception to the ITCA was not at issue in *Callahan*. *See generally Callahan*, 385 N.W.2d 533. Lennette's argument lacks any support in *Callahan*, and Lennette does not cite any other authority for this novel argument.

Lennette also argues that the discretionary function immunity can never apply to an intentional tort because such conduct can never be supported by public policy or discretion. Lennette Final Brief 44. The Seventh Circuit Court of Appeals explained the error of this argument succinctly[6]:

Still, [Plaintiff] insists, just as no one has discretion to

[6] Iowa courts "have . . . been guided by interpretations of the FTCA, which was the model for the ITCA, when the wording of the two Acts is identical or similar." *Wagner*, 2020 WL 7775949, at *8 (quoting *Thomas v. Gavin*, 838 N.W.2d 518, 525 (Iowa 2013)). The discretionary-function-exception language in the ITCA is identical to the FTCA. *Compare* Iowa Code § 669.14(1) *with* 28 U.S.C. § 2680(a).

> violate the Constitution, no one has discretion to commit a tort such as malicious prosecution or intentional infliction of emotional distress. That's true, in the sense that a tort is a civil wrong. No one should commit a civil wrong. But unless [the discretionary function exception] is to be drained of meaning, it must apply to discretionary acts that are tortious. That's the point of an *exception*: It forecloses an award of damages that otherwise would be justified by a tort. Nothing in [the discretionary function exception] suggests that some discretionary but tortious acts are outside the FTCA while others aren't.

Linder v. United States, 937 F.3d 1087, 1091 (7th Cir. 2019).

The discretionary function immunity applies to intentional torts, including to claims of intentional infliction of emotional distress. Nothing in the text of the discretionary function exception supports Lennette's argument, nor does he point to any statutory text to support his argument. *See generally* Iowa Code § 669.14(1). The State is unaware of, nor has Lennette cited, any authority to the contrary. Federal courts routinely apply the equivalent exception in the Federal Tort Claims Act ("FTCA") to intentional torts, including to claims of intentional infliction of emotional distress. *See Blanco Ayala v. United States*, 982 F.3d 209, 215-18 (4th Cir. 2020) (holding that the discretionary function exception applies to claims of "assault, battery, false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress"); *Linder*, 937 F.3d at 1088-

92 (holding that the discretionary function exception applies to, among other things, intentional infliction of emotional distress claims); *Garling v. United States Envtl. Prot. Agency*, 849 F.3d 1289, 1297 (10th Cir. 2017) ("[Plaintiffs'] intentional infliction claim also falls under the discretionary function exception . . . ."); *Spotts v. United States*, 613 F.3d 559, 565, 574 (5th Cir. 2010) (applying the discretionary function exception to a claim of intentional infliction of emotional distress). Accordingly, the district court correctly concluded that the State retains its sovereign immunity under the discretionary function exception for all of Lennette's claims, and this Court should affirm.

B. Functional Equivalent of Misrepresentation and Deceit.

In addition to the discretionary function exception, Iowa Code § 669.14(4) further limits the State's waiver of sovereign immunity for certain claims. "[I]f a claim is the functional equivalent of a section 669.14 exception to the ITCA, the State has not waived its sovereign immunity." *Smith v. Iowa State Univ. of Sci. and Tech.*, 851 N.W.2d 1, 20-21 (Iowa 2014). That is, "where 'the gravamen of plaintiff's claim . . . is the functional equivalent' of the causes of action listed in Iowa Code section 669.14(4), the claim cannot be pursued successfully

against the State." *Trobaugh v. Sondag*, 668 N.W.2d 577, 584 (Iowa 2003) (quoting *Greene v. Friend of Court, Polk County*, 406 N.W.2d 433, 436 (Iowa 1987)). For a claim to be the functional equivalent of a claim excepted under § 669.14(4), the elements do not need to be identical—the question is whether the substance of the claim establishes a nexus of functional equivalency. *See Minor*, 819 N.W.2d at 406.

Trying to cast his claims as something other than claims for misrepresentation and deceit, Lennette argues the gravamen of his complaint is that the State inadequately investigated and refused to consider exculpatory evidence; he claims that any allegations of misrepresentation or deceit are merely a cover up for this "foundational claim." *See* Lennette Final Brief at 45-46. To describe his claims as something other than the functional equivalent of a misrepresentation and/or deceit claim, Lennette again dresses up a negligence claim as intentional torts, and specifically intentional torts not explicitly excepted by section 669.14(4).

The district court correctly concluded that the gravamen of Lennette's claims is that the State deceived the juvenile court, which resulted in harm when the juvenile court ordered the separation of

Lennette from his children. Specifically, Lennette claims that Siver's affidavit to the court to initiate his removal contained misrepresentations and failed to disclose relevant facts; that her child abuse assessment report contained misrepresentations; and that she made misrepresentations to the court when she testified at the trial. *See* App. 130-134; App. 43-44 at ¶¶ 134-136; App. 45-46 at ¶¶ 146-148; App. 52-53 at ¶¶ 1(a)-(g).

This case is similar to *Minor*. In *Minor*, the plaintiffs brought claims of intentional infliction of emotional distress and tortious interference with the parent child relationship against the State and its child protection workers. *Minor*, 819 N.W.2d at 405-06. The court analyzed whether the basis of the plaintiffs' claims were the functional equivalent of the misrepresentation and deceit exceptions under section 669.14(4). *Id.* at 407. At the heart of plaintiffs' claims in *Minor* was that a state child protection worker elicited false information and communicated the false information to the juvenile court, which the juvenile court relied on to separate the parent and child. *Id.* at 407. The *Minor* court held that the claims were excepted under § 669.14(4) because the basis of the plaintiffs' claims were the functional equivalent of misrepresentation and deceit. *Id.* at 408.

Here, like in *Minor*, the basis for Lennette's claims is that the State misrepresented information and deceived the court—either affirmatively or by omission—when Siver represented to the juvenile court that she believed Lennette sexually abused S.L. Lennette alleges that although the State knew that he wasn't responsible for any abuse, it nonetheless caused his removal from his children. These claims are premised solely on allegations of misrepresentation or deceit; that is, if the State had communicated to the court what Lennette alleges was the truth, he would not have suffered any harm. *See id*. ("This principle makes sense because the basis of [the plaintiff's] claims would not exist but for [the defendant's] alleged misrepresentation to the juvenile court. Further we find the reasoning underlying this principle equally applicable to the deceit exception.").

Lennette also argues that because intentional infliction of emotional distress is not listed in section 669.14, such a claim can never be the functional equivalent of an excepted tort. Lennette Final Brief at 46-47. But the *Minor* Court did exactly that—it found that the plaintiffs' claims for infliction of emotional distress were barred as the functional equivalent of an excepted claim. Indeed, the whole purpose of the "functional equivalent" analysis is to prevent a plaintiff from

pleading around 669.14 exceptions when the State has not waived its sovereign immunity for the gravamen of a plaintiff's complaint.

Lennette also argues that, like in *Smith*, 851 N.W.2d 1 (Iowa 2014), the underlying conduct is broader than misrepresentation/deceit. In *Smith*, the State argued that the plaintiff's claim for intentional infliction of emotional distress ("IIED") was the functional equivalent of defamation, excepted under Iowa Code § 669.14(4). 851 N.W.2d at 20. The *Smith* Court found that defamatory statements made in an email were only part of the underlying basis for the plaintiff's IIED claim *Id.* at 21. The Court found there were other facts that were not the functional equivalent of a defamation claim sufficient to support an IIED claim.[7] But Lennette's claims here are unlike the claims in *Smith* because no other alleged underlying conduct goes beyond a claim for misrepresentation and/or deceit. *See* Lennette Final Brief at 47. Here, as in *Minor*, Lennette's claims are the functional equivalent of misrepresentation and/or deceit. Unlike *Smith*, if the misrepresentation/deceit allegations were removed, no remaining conduct gives rise to a cause of action.

[7] The State did not argue, and the Court did not address, whether other exceptions under Iowa Code § 669.14(4) applied, such as misrepresentation and deceit. *Smith*, 851 N.W.2d at 21 n.16.

If misrepresentations and deceptions are not the gravamen of Lennette's claims then, at best, his complaint is merely that the State was negligent in its investigation. The district court, however, already dismissed Lennette's negligence claim at the motion to dismiss stage, finding that the State did not owe any duty to Lennette in this case to investigate or otherwise. *See* App. 9-23. Lennette has not challenged that ruling here. Indeed, beyond mere conclusory and inadmissible statements from his purported expert, Lennette offers no *facts* to support intentional or reckless tortious acts of the State. Again, Lennette is merely dressing up a negligence claim as intentional and constitutional torts. The Court should affirm.

III. The District Court Correctly Granted Summary Judgment Based on Section 232.73 Immunity.

Preservation of Error

The State agrees that Lennette preserved on this ground.

Standard of Review

The State agrees with Lennette that the Court reviews for errors at law.

Merits

The district court correctly found the State is entitled to section 232.73 immunity because Lennette's claims "stem from [the State's]

investigation of a child abuse allegation, and the actions they took participating in the judicial proceedings." App. 1162. In finding the State acted in good faith, the district court correctly concluded "[t]here are simply no specific evidentiary facts in the record showing that [the State] acted without good faith in producing the affidavit and abuse report about which [Lennette] complain[s]." App. 1162.

Lennette argues that Iowa Code § 232.73 provides immunity to everyone except DHS employees. Lennette Final Brief at 49.[8] There is no textual support for this argument: the statute grants immunity to any *person* aiding and assisting in an assessment of a child abuse report or in the investigation or appearing in any judicial proceeding resulting from the report when that person acts in good faith. *See* Iowa Code § 232.73(1). The word "person" is not defined in Chapter 232. However, "[u]nless otherwise provided by law, 'person' means

[8] Lennette also argues—without any reasoning or citation to authority—that section 232.73 immunity does not apply to his constitutional claims. Lennette Final Brief 48. The Court should reject that argument and broadly apply the immunity to all of Lennette's claims. Exposing the State to civil liability for otherwise-protected conduct by pleading an alternative claim under the Iowa Constitution defeats the purpose of a statute providing broad protection, and such exposure would discourage all those involved in the child abuse process from assisting abused children. To the extent that applying section 232.73 to constitutional torts is in tension with *Godfrey*, 898 N.W.2d 844, the Court should limit or overrule *Godfrey*.

individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity." Iowa Code § 4.1(20). DHS employees are clearly persons and are entitled to the immunity provided by section 232.73.

The statute is also not ambiguous, making Lennette's interpretation of the legislative intent improper. See *IBP, Inc. v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001) ("The court applies the rules of statutory construction *only* when the terms of the statute are ambiguous.") (emphasis in original). Lennette has cited no authority in support of his argument. Instead, Lennette cites cases showing only that the statutory immunity under Iowa Code § 232.73 is applied broadly. Lennette Final Brief at 49; *see also Nelson v. Lindaman*, 867 N.W.2d 1, 9 (Iowa 2015) (stating that the "immunity provision in section 232.73 [is construed] liberally . . . consistent with our general approach to construe statutory immunity provisions broadly."). Even if the statute did not apply to DHS workers, it only lends further support that other statutes, such as Iowa Code § 669.14, already protects the conduct immune under Iowa Code § 232.73, but without the good faith criterion.

Next, Lennette argues that even if section 232.73 applies to the State, he has shown the State did not act in good faith. "[G]ood faith" under section 232.73 "rests on a defendant's subjective honest belief that the defendant is aiding and assisting in the investigation of a child abuse report." *Garvis v. Scholten*, 492 N.W.2d 402, 404 (Iowa 1992). The *Garvis* Court explained:

> As good faith means only honesty in fact, negligence ordinarily has no significance. That is, the honesty in fact that constitutes good faith merely requires honesty of intent and it is not necessary to show that the person was diligent or non-negligent. Bad faith, then, is obviously something far more extreme than a failure to observe reasonable . . . standards or the standards of a reasonably prudent [person]. It is irrelevant that the person in question was negligent in forming a particular belief. All that is required . . . is the actual belief or satisfaction of the criterion of "the pure heart and empty head."

Id. (quoting *Jackson v. State Bank of Wapello*, 488 N.W.2d 151, 156 (Iowa 1992)). Thus, section 232.73 immunity applies unless Lennette can show the State acted dishonestly.

Despite another opportunity on appeal, Lennette still has not identified any specific evidentiary facts in the record that the State acted in bad faith. Instead, Lennette merely refers the Court generally to his Statement of Facts and Appendix, as well as the inadmissible conclusions of his expert. Lennette Final Brief at 51. Lennette,

however, fails to identify exactly which *facts* contained in these more than one thousand pages support an inference of bad faith. *See Venckus*, 930 N.W.2d at 806 (Iowa 2019) ("Judges are not like pigs, hunting for [meritorious] truffles buried in [the record]"). Lennette has not identified any facts because he cannot. Arguments that the State should have done more during their investigation is not evidence of bad faith. *See Nelson*, 867 N.W.2d at 8 ("To avoid summary judgment, the plaintiff must have evidence the defendant acted dishonestly, not merely carelessly[.]").

Indeed, after arguing that the underlying basis for his claims is not misrepresentation or deceit to avoid section 669.14, Lennette here argues that the State actually acted dishonestly. The State either acted honestly or dishonestly. If the State acted honestly, section 232.73 immunity applies. If the State acted dishonestly, then Lennette's claims are the functional equivalent of misrepresentation and deceit, and the State retains its sovereign immunity. Besides the fact that these two arguments taken together make no logical sense, Lennette presents no admissible evidence that supports a genuine issue of material fact that the State acted without good faith.

IV. The District Court Correctly Granted Summary Judgment Based on the Merits of Lennette's Common Law Claims.

Preservation of Error

The State agrees that Lennette preserved on this ground.

Standard of Review

The State agrees with Lennette that the Court reviews for errors at law.

Merits

Even if none of the immunities applied, the district court correctly granted summary judgment on the merits of Lennette's common law claims of tortious interference with custody and intentional infliction of emotional distress.

A. Tortious Interference with Custody

A tortious interference with custody claim is not cognizable against a DHS worker obtaining a court order removing a parent from a child. Even if such a claim were cognizable, DHS has a privilege to interfere with custody.

This Court first recognized a claim for tortious interference with custody in Iowa when it recognized and applied Restatement (Second) of Torts, § 700. *Wood v. Wood*, 338 N.W.2d 123, 127 (Iowa 1983).

Section 700 states that '[o]ne who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent." To establish a claim of tortious interference with custody, a plaintiff must show: "(1) the plaintiff has a legal right to establish or maintain a parental or custodial relationship with his or her minor child; (2) the defendant took some action or affirmative effort to abduct the child or to compel or induce the child to leave the plaintiff's custody; (3) the abducting, compelling, or inducing was willful; and (4) the abducting, compelling, or inducing was done with notice or knowledge that the child had a parent whose rights were thereby invaded and who did not consent." *Wolf v. Wolf*, 690 N.W.2d 887, 892 (Iowa 2005).

A plain reading of the elements for tortious interference with custody shows Lennette does not have a cause of action. First, Lennette did not have an unlimited legal right to maintain a parental relationship with his children. On January 16, 2015, the juvenile court, pursuant to Iowa Code § 232.82(1), ordered Lennette's exclusion from the family residence for the protection of the children. App. 79-80. The juvenile court's January 16 order, as well as subsequent modifications

to it, limited Lennette's legal rights to custody of his children. The State complied with all such orders.

Second, the State did not take any actions that can qualify as abduction, compulsion, or inducement of a child to leave their parent. The State used the legal system for the protection of children, consistent with DHS's purpose. Its actions consisted of requests to a court, which after reviewing them, entered appropriate orders based on its judgments. And the children were not even removed from their family home: rather, Lennette was excluded from the home and ordered to not have unsupervised contact with them.

Third, Lennette cannot show any evidence that the State's conduct was willful. The most Lennette can characterize it as is negligence, which is barred by *Callahan* and the district court's ruling on the State's motion to dismiss.

Finally, Lennette consented to the removal. At the status hearing on January 23, 2015, Lennette waived his right for a speedy hearing on the merits of the allegations at that time and agreed to abide by the juvenile court's order until it held an evidentiary trial on the allegations. App. 118.

And even if Lennette could satisfy the elements of the claim,

Lennette concedes that the Restatement (Second) recognizes a privilege to rescue from physical violence for "[a]ny person authorized by law to remove a child from an improper home . . . when acting within the scope of his [or her] authority." Restatement (Second) of Torts, § 700, cmt. e; Lennette Final Brief at 57. On appeal, Lennette's sole argument on this issue is that, at some point, the State's privilege to rescue ended. Lennette, however, fails to identify a single material fact showing when such a privilege ended or when the State acted outside the scope of its legal authority.

Here, the State is clearly authorized under Iowa Code § 232.71C(1) to file an affidavit requesting the removal of a child from her parent for a belief the child is in danger. After Siver did just that, the juvenile court ordered Lennette removed from the family home for the safety and well-being of his children, as authorized under Iowa Code § 238.78. Once the CINA was initiated, the juvenile court had exclusive jurisdiction over the case, including the separation of Lennette from his children. The State no longer had any legal authority to either prolong or end the separation. That power existed with the juvenile court. To the extent this claim is applicable to the State, the State acted only under privileged legal authority.

Even without examining whether the State was privileged under the Restatement (Second), the case law shows that a claim for tortious interference with custody is wholly inapplicable to the State and its child protection workers. Claims for tortious interference with custody are intended for kidnapping or child abduction. *See Wolf*, 690 N.W.2d 887 at 891-92 (citing the *Wood* court's reasoning for recognizing a tortious interference with custody claim, one that would serve to prevent child-snatching, as well as recognizing that a similar cause of action has been codified under Iowa Code § 710.9, in the chapter for Kidnapping and Related Offenses.). The State is aware of only three tortious interference with custody cases that have reached the Iowa Supreme Court: all involved an allegation that one parent abducted or induced a child to leave the custody of another parent with superior legal rights to that child. *See Wood*, 338 N.W.2d 123; *Wolf*, 690 N.W.2d; *Lansky v. Lansky*, 449 N.W.2d 367 (Iowa 1989). No Iowa case has allowed a cause of action for tortious interference with custody against DHS for carrying out its duties under Iowa Code Chapter 232.

A claim of tortious interference with custody is clearly meant to apply to individuals who go outside the law to interfere with a parent's

right of custody, it is not meant to apply to child protection workers working within the legal system. Allowing this claim to proceed would lead to absurd results. It would mean that any time the State initiates a CINA requesting removal of a victim from his/her abusive parent, the parent would have a cause of action for tortious interference with custody—regardless of whether the abuse occurred.

B. Intentional Infliction of Emotional Distress

The district court correctly granted summary judgment because Lennette did not submit any evidence of outrageous conduct.

To successfully state a claim for IIED, a plaintiff must demonstrate (1) outrageous conduct by the defendant; (2) the defendant intentionally caused, or recklessly disregarded the probability of causing, emotional distress; (3) plaintiff suffered severe or extreme emotional distress; and (4) the defendant's outrageous conduct was the actual and proximate cause of the emotional distress. *Smith*, 851 N.W.2d at 26 (citing *Barreca v. Nickolas*, 683 N.W.2d 111, 123-24 (Iowa 2004)). "The outrageousness element requires *substantial evidence* of extreme conduct." *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984) (emphasis added). "It has not been enough that the defendant has acted with an intent which is

tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d).

"[I]t is for the court to determine in the first instance, as a matter of law, whether the conduct complained of may reasonably be regarded as outrageous." *Smith*, 851 N.W.2d at 26 (quoting *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 183 (Iowa 1991)). For conduct to be considered outrageous, it must be so "extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156-57 (Iowa 1996) (citing Restatement (Second) of Torts § 46, cmt. d (1965)) (abrogated on other grounds).

In an attempt to find a case allowing an IIED claim against child protection workers investigating child sex abuse, Lennette cites *J.C. v. County of Los Angeles*, Case No. CV 18-3045-DMG, 2019 WL4228373 (C.D. Cal. May 13, 2019). Not only is *J.C.* not controlling, as it comes from another jurisdiction, it is also irrelevant because it is a ruling on

a motion to dismiss.[9] Under Iowa's notice pleading standard, the district court allowed Lennette's IIED claim to survive the State's motion to dismiss. Ruling on Motion to Dismiss App. 9-23. At the summary judgment stage, however, Lennette must produce evidence showing that the State engaged in outrageous conduct as a matter of law. Lennette cannot.

Lennette argues that when analyzing the issue of outrageous conduct, the context the claim arises in is relevant. Lennette Final Brief at 52. The State agrees: in the context of allegations of child sex abuse, the State's conduct is not outrageous as a matter of law. Here, the State received a report of child sex abuse. App. 69-70. Siver observed a forensic interview of the alleged victim, S.L. App. 77. In graphic detail, S.L. described Lennette committing acts of sexual abuse against her. App. 73-76. Based on the interview, Siver believed S.L.'s allegations were credible and submitted an affidavit to the juvenile court requesting the temporary removal of Lennette for the health and safety of his children. App. 77-78. The juvenile court, upon review of Siver's

[9] Further weakening Lennette's argument, at the summary judgment stage, the plaintiffs in that case conceded that they did not have a viable claim for IIED, and it was dismissed. *J.C. v. County of Los Angeles*, Case No. CV 18- 3045-DMG, 2020 WL 854199 (C.D. Cal. Jan. 2, 2020) at *8-9.

affidavit and finding probable cause, entered an ex parte order for the temporary removal of Lennette from the family home. App. 79-80. Any other evidence Lennette allegedly presented to the State was also presented to the juvenile court to aid its final determination.

Simply put, Lennette contends that Siver, Howell, and Lovaglia's conduct in doing their jobs and taking seriously a report of child sex abuse was outrageous. The State's actions were not outrageous—they were reasonable. The Iowa Supreme Court has rejected claims of IIED on more extreme facts than this. *See e.g. Engstrom v. State*, 461 N.W.2d 309, 312 (Iowa 1990). Again, Lennette is attempting to transform a negligence claim into an IIED claim. Even if the State's conduct was negligent, it doesn't rise to the level of, and there is no evidence of, recklessness or intentionality required for an IIED claim. *See Smith*, 851 N.W.2d at 26. While Lennette may disagree with the State's conduct because it alleged he abused his children and he was temporarily separated from them, that is a result that is tolerable in a society that has laws in place governing state responses to allegations of child abuse. *See Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984) (noting "the relationship between the parties" is relevant to whether conduct was outrageous). The State's conduct is

not outrageous as a matter of law.

V. The District Court Correctly Granted Summary Judgment on the Merits of Lennette's Iowa Constitutional Claims.

Preservation of Error

The State agrees that Lennette preserved on this ground.

Standard of Review

The State agrees with Lennette that the Court reviews for errors at law.

Merits

At the outset, Lennette argues that if he has no common law or statutory remedy for the State's alleged tortious conduct, then he must necessarily have a constitutional remedy. Lennette Final Brief at 58-59. The Iowa Constitution does not provide a cause of action for any alleged harm in the absence of a common law or statutory remedy. The Iowa Constitution is self-executing such that it gives rise to a direct tort action **for tortious violations of the Iowa Constitution** when the legislature has not provided a remedy for violations **of the Iowa Constitution**. *See generally Godfrey v. State*, 898 N.W.2d 844, 880 (Iowa 2017) (Cady, C.J., concurring) (recognizing "a tort claim **under the Iowa Constitution** when the legislature has not provided an

adequate remedy" (emphasis added)). That is, just because Lennette does not have a common law remedy for the State's allegedly negligent actions does not mean Lennette has a Constitutional remedy in the absence of some underlying Constitutional violation. To be a cognizable claim under *Godfrey*, two separate things must be true: (1) the part of the constitution alleged to have been violated must be self-executing; and (2) there is no adequate state remedy addressing the *constitutional* violation. The unavailability of a negligence cause of action is unrelated to either of those questions. The district court correctly granted summary judgment on the merits of Lennette's constitutional tort claims under Article I, § 1, Article I, § 8, and Article I, § 9.

A. Article I, § 1

The State is unaware of any Iowa authority finding that Article I, § 1 of the Iowa Constitution is self-executing such that it gives rise to tort liability. Lennette has cited no such cases. Lennette has cited no authority from any jurisdiction finding that such jurisdiction's inalienable rights provision is self-executing. In the absence of authority to the contrary, and given the significant tension between *Godfrey* and Iowa's longstanding sovereign immunity precedent, *see*

Wagner, 2020 WL 7775949, at *8-9, the district court properly declined to extend *Godfrey* and held that Article I, § 1 is not self-executing.[10]

Not only does Lennette not cite any authority for his novel argument, but a recent decision found that Article I, § 1 is **not** self-executing under *Godfrey*. The Southern District of Iowa reasoned:

> Some states have interpreted their state constitution's equivalent to Iowa's Inalienable Rights Clause to not be self-executing so as to permit an independent action for money damages. . . . This Court's review has not revealed a state that has interpreted the inalienable rights clause of its own constitution to be self-executing.
>
> **Implying an independent claim for money damages is not consistent with the way Iowa law has employed article I, § 1 in the past. A review of Iowa case law involving the Inalienable Rights Clause reflects a negative power to invalidate legislative action that unduly infringes on the common-law rights of Iowa citizens, as opposed to a positive right to civil damages. . . .** The parties have not cited to any case where damages were made available as a result of a violation of rights independently contained article I, § 1 of the Iowa Constitution, and this Court's review has been unable to locate any where that is the case.

Meyer v. Herndon, 419 F. Supp. 3d 1109, 1132 (S.D. Iowa 2019)

[10] Lennette's argument here is also undermined by the fact that he alleges the case should be routed to the court of appeals because it only involves the application of existing legal principles. There is no existing legal principle that Article I, § 1 is self-executing.

(emphasis added). At most, Article I, § 1 may be invoked to challenge *legislation*. *See, e.g.*, *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004) (applying Article I, § 1 to determine whether legislation was a reasonable exercise of the State's police power). Moreover, there already exists a body of law addressing an alleged constitutional violation for depriving parents custody of their children—the due process clause. The attempt to invoke Article I, § 1 in this case is nothing more than a continued attempt to transform a negligence cause of action into a constitutional tort. *See DeShaney v. Winnebago Cnty. Dept. of Social Services*, 489 U.S. 189, 202 (1989) (stating that the "Due Process Clause of the Fourteenth Amendment, . . . as we have said many times, does not transform every tort committed by a state actor into a constitutional violation").

B. Article I, § 8

Similar to the Article I, § 1 claim, the Iowa Supreme Court has not found that Section 8 is self-executing such that it gives rise to a constitutional tort action. Lennette cites no cases in support of his position that it is self-executing. For that reason alone, the district court correctly declined to extend *Godfrey* and entered summary judgment in favor of Defendants.

But even if it were self-executing, such a claim does not apply here. Lennette spends several pages explaining why Section 8 is self-executing and analogizes the juvenile proceedings using a *Franks* standard. *See* Lennette Final Brief at 63-68 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). But Lennette still has not alleged or identified any search or seizure to implicate Section 8.[11] Article I, § 8 of the Iowa Constitution prohibits "unreasonable seizures and searches." Iowa Const. Art. I, § 8. "In order for the Fourth Amendment to apply . . . there must first be a 'seizure.'" *State v. Wilkes*, 756 N.W.2d 838, 842 (Iowa 2008).

Lennette was not "seized" under Article I, § 8—indeed he does not even allege he was seized. *See, e.g.*, *State v. White*, 887 N.W.2d 172, 176 (Iowa 2016) ("A seizure occurs when an officer by means of physical force or show of authority in some way restrains the liberty of a citizen." (internal quotation and citation omitted)). Lennette is correct that Iowa Courts reserve the right to analyze Article I, § 8 of the

[11] Lennette makes a passing reference to *Santi v. Santi*, 633 N.W.2d 312 (Iowa 2001) in a different section of his brief to claim that a parental custody case implicates Article I, § 8 of the Iowa Constitution. *See* Lennette Final Brief at 70-71. Even the most cursory reading of *Santi* shows that the Court analyzed the constitutionality of the challenged statute under the due process clause. *See id.* at 317-321.

Iowa Constitution differently than the United States Supreme Court analyzes the Fourth Amendment to the United States Constitution. What such difference has to do with this case remains a mystery. Absent any search or seizure, Article I, § 8 does not apply.[12]

Instead, Lennette again is merely attempting to transform a negligence cause of action into a constitutional tort: Lennette's complaint boils down to his belief that Siver did not do a thorough enough investigation before asking the court for a removal order. *See* Lennette Final Brief at 67. *See also DeShaney*, 489 U.S. at 202 (stating that the "Due Process Clause of the Fourteenth Amendment, . . . as we have said many times, does not transform every tort committed by a state actor into a constitutional violation"). The district court correctly entered summary judgment on this claim.

C. Article I, § 9

Lennette claims the district court erred when it found there was

[12] And, even if Lennette were "seized" by virtue of the juvenile court's ex parte order, such order was based on probable cause and thus would not violate the Iowa Constitution. *See* App. 79 ("[T]he Court finds there is probable cause to believe that sexual abuse of the child(ren) has occurred and that substantial evidence exists to believe that the continued presence of the perpetrator of that abuse, Andrew Lennette, presents a danger to the physical, emotional and mental health of the child(ren)").

no genuine issue of material fact that the State did not violate either procedural or substantive due process. Iowa analyzes due process claims under the Iowa Constitution using standards applied by federal courts to due process claims under the United States Constitution. *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 554, 566 (Iowa 2019). The district court correctly granted summary judgment in favor of the State on both claims.[13]

1. Procedural Due Process

"A party claiming a violation of procedural due process must first show an impairment of an interest in life, liberty, or property by government action." *Id.* at 566. If such a violation is established, "the next question is what procedural minima must be provided before the government may deprive the complaining party of the protected interest." *Id.* Procedural due process requires "notice and an opportunity to be heard on the issue." *Behm*, 922 N.W.2d at 566. To

[13] Because Lennette fails to raise any issue of material fact, it is unnecessary to decide whether *Godfrey* wrongly concluded that a damages claim for a due process violation can be brought at all. But if the Court concludes the district court erred on this ground, summary judgment is also appropriate because the State has not waived its sovereign immunity for constitutional claims. *Godfrey*'s holding to the contrary conflicts with Iowa's long-standing sovereign immunity precedent and should be overruled. *See Wagner*, 2020 WL 7775949, at *8-9.

determine what process is due, courts look to the three-factor test articulated in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976). *See also Behm*, 922 N.W.2d at 567 (applying the *Mathews* test to a procedural due process claim in Iowa).

Lennette has not even attempted to identify what procedure he believes he was due, despite ample opportunity. *See* App. 130. Lennette certainly had notice of the State's actions—indeed, he does not allege otherwise. App. 81. Rather, Lennette's procedural due process argument appears to be that courts should "include a requirement that any procedural due process that provides for pre-hearing or post-hearing deprivation include a requirement that the State not interfere in the exercise of those procedural protections by failure to timely and appropriately complete its investigations as mandated by existing statutes, rules, or industry standards." Lennette Final Brief at 71-72. In short, Lennette argues that an alleged negligent investigation may form the basis for a procedural due process

challenge. Lennette cites no authority for this entirely novel proposition because there is no legal basis for this claim. The alleged negligent investigation simply has nothing to do with whether Lennette was afforded procedural due process. This argument is nothing more than an attempt to transform alleged negligence into a constitutional tort. *See DeShaney*, 489 U.S. at 202 (stating that the "Due Process Clause of the Fourteenth Amendment, . . . as we have said many times, does not transform every tort committed by a state actor into a constitutional violation").

Lennette in fact was offered and used extensive procedures—he had an opportunity to be heard, used that opportunity, and obtained the relief he sought. The juvenile court set a hearing to review the order for January 23, 2015. On January 23, Lennette agreed to stay out of the family home and that he needed more time to present the case. Lennette engaged in extensive discovery, filed many motions, and presented several days' worth of evidence at a contested hearing which, along with the State's evidence, amounted to more than 1300 pages of testimony. Lennette used the process available to him and ultimately prevailed when the juvenile court found in his favor on December 23, 2015. Because Lennette received notice of DHS's action and had an

opportunity to be heard on the issue, the district court correctly determined the State is entitled to summary judgment on Lennette's procedural due process claim.

2. Substantive Due Process

On appeal, Lennette argues that: (1) standards other than "shocks the conscience" should apply to a substantive due process tort; and (2) summary judgment should not have been granted even under a "shocks the conscience" standard. The district court correctly found, under a "shocks the conscience" standard, that the State is entitled to summary judgment.

a. Legal Standard

There are two ways to show a substantive due process violation. First, if dealing with governmental legislation involving a non-fundamental interest "that involves a life, liberty, or property interest, there must be a reasonable fit between the government purpose and the means chosen to advance that purpose." *Behm*, 922 N.W.2d at 550. Here, Lennette is not challenging government legislation.

The second strand of substantive due process "may arise from government action that 'shocks the conscience.'" *Id.* This test "has become extremely difficult to meet . . . [and] is reserved for 'the rarest and most outrageous circumstances.'" *Id.* at 553-54 (quoting *United*

States v. Duvall, 846 F.2d 966, 973 (5th Cir. 1988)). To satisfy this test, the government conduct must be "offensive to human dignity." *Id.* at 554. *See also Hughes v. City of Cedar Rapids*, 112 F. Supp.3d 817, 839-40 (N.D. Iowa 2015), *aff'd in part, rev'd in part on other grounds*, 840 F.3d 987 (8th Cir. 2016). As the district court in *Hughes* stated:

> To shock the conscience, the alleged violation must be "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to brutal and inhumane abuse of official power literally shocking to the conscience." . . . A plaintiff "must allege that a government action was sufficiently outrageous or truly irrational, that is, something more than . . . arbitrary, capricious, or in violation of state law" to state a substantive due process claim.

Id. See also Blumenthal Inv. Trusts v. City of West Des Moines, 636 N.W.2d 255, 265 (Iowa 2001) ("[S]ubstantive due process doctrine does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity. With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily

"shocked."" (internal quotation and citation omitted)). "[N]egligence is insufficient to show conscience shocking behavior . . . ." *Hutson v. Walker*, 688 F.3d 477, 484 (8th Cir. 2012). "Only in the rare situation when the state action is 'truly egregious and extraordinary' will a substantive due process claim arise." *Strutton v. Meade*, 668 F.3d 549, 557 (8th Cir. 2012).

"[P]arents have an important but limited substantive due process right in the care and custody of their children." *Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005). However, "[t]he right is limited because the state has a potentially conflicting, compelling interest in the safety and welfare of the children." *Id.* As long as "the officials' actions [are] based on a reasonable suspicion of child abuse and [are] not . . . disproportionate under the circumstances," a constitutional violation has not occurred. *Id.* "The need to weigh a parent's right to familial integrity against the state's interest in protecting the child makes it difficult to overcome a qualified immunity defense in the context of a child abuse investigation." *Dornheim*, 430 F.3d at 926.

On appeal, Lennette argues that "[b]ecause they have been deemed constitutional tort claims, the foundation for the 'shocks the

conscience' test does not exist in the State of Iowa." Lennette Final Brief at 73. Lennette has cited no authority in support of his argument.[14] Indeed, even after *Godfrey* was decided, the Iowa Supreme Court continues to apply the "shock the conscience" test for substantive due process claims brought pursuant to Article I, § 9 of the Iowa Constitution. *See Behm*, 922 N.W.2d at 554 (stating that an automated traffic enforcement system "does not shock the conscience for purposes of substantive due process under the due process clause of article I, section 9 of the Iowa Constitution").

Lennette then contends that because the State did not have to make a split-second decision, the standard for showing a due process violation is somehow lower. *See* Lennette Final Brief at 73. Lennette appears to argue that the substantive due process standard is "deliberate indifference." In the context of violations of the Eighth

[14] Lennette again appears to be conflating the *Baldwin* "all due care" qualified immunity with whether there was an underlying constitutional violation. *See* Lennette Final Brief at 73 (urging the Court to abandon the current substantive due process test because "[c]oncepts applicable to tort claims can be utilized in assessing Iowa constitutional violations"). Nothing in *Godfrey* or *Baldwin* purported to alter the standard used to analyze a substantive due process claim. *Godfrey* merely made available a direct tort remedy *for an underlying constitutional violation*, while *Baldwin* set out a qualified immunity standard of "all due care" *for an underlying constitutional violation*.

Amendment to the United States Constitution, the Supreme Court analyzes such alleged violations under a "deliberate indifference to a serious medical need" standard. *See generally Estelle v. Gamble*, 429 U.S. 97, 103-106 (1976). Lennette is not making such a claim here. The United States Supreme Court explicitly rejected a rigid "deliberate indifference" standard to analyze substantive due process claims. *County of Sacramento v. Lewis*, 523 U.S. 833, 855-56 (1998) (Rehnquist, C.J., concurring).

b. Application

In support of his claim that the State's conduct shocks the conscience, Lennette relies generally on his Statement of Disputed Facts. Lennette Final Brief at 75. In turn, the Statement of Disputed Facts cross-references the Statement of Disputed Facts from the district court. Lennette Final Brief at 17 n.1. Lennette does not identify where in this more-than-fifty pages of material is evidence showing a substantive due process claim, nor does he point out where in the more than 900 pages of appendix which facts amount to conscience-shocking conduct.[15] *See In re Interest of C.M.*, 2020 WL 1550685 at *3

[15] In the substantive due process section and several other places in his brief, Lennette relies on his expert's opinion. Whether there is a substantive due process violation is a question of law. Whether the

(Iowa Ct. App., April 1, 2020) (Table) ("As the State correctly notes, it is not the State's responsibility to formulate the [opposing party's] argument in order to respond to it. It is also not our responsibility. *See Venckus v. City of Iowa City*, 930 N.W.2d 792, 806 (Iowa 2019) ("Judges are not like pigs, hunting for [meritorious] truffles buried in [the record]")").

The record here is clear and undisputed: DHS received the report of abuse on Friday, arranged and attended a CPC-conducted interview of S.L. on Saturday, arranged and attended a CPC-conducted interview of S.L.'s siblings on Monday, and sought court intervention on that same Monday based on Siver's reasonable belief that S.L. truthfully stated to the CPC interviewer that Lennette sexually abused her. *See* App. 72-78, 104, 120, 139. Not only are these actions not "conscience-

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expert believes DHS's conduct is unconstitutional is irrelevant and, in any event, is impermissible, inadmissible expert testimony. *See* Iowa R. Civ. P. 1.981(5) (requiring documents submitted in summary judgment proceedings to be admissible in evidence); *see also Employers Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 29 (Iowa 2012). Similarly, whether the State complied with Iowa statutes and regulations is a legal question for the Court: the expert's opinion about the application of Iowa law is irrelevant. And neither opinion constitutes a "fact" to be considered by the Court. If this were a negligence case—which Lennette throughout his briefing appears to desire, but which the district court has already ruled is unavailable and not before this Court—then an expert setting forth the standard of care might be appropriate and admissible.

shocking," they actually evince a carefully considered decision to seek temporary removal of Plaintiff from the family home to protect S.L. from continued abuse. Such actions were entirely consistent with DHS's purpose to protect children from abuse. *See* Iowa Code § 232.67 ("Children in this state are in urgent need of protection from abuse. It is the purpose and policy of this part 2 of division III to provide the greatest possible protection to victims or potential victims of abuse . . . ."). Moreover, the State sought and the court ordered only a temporary removal, which was proportionate under the circumstances.

Extensive litigation proceeded through the juvenile court. At the end of the judicial process, the juvenile court ordered the founded report expunged. App. 126. *Cf. Whisman Through Whisman v. Rinehart*, 119 F.3d 1303, 1310 (8th Cir. 1997) (finding, at the motion to dismiss stage, that the plaintiff adequately stated a substantive due process violation based on: (1) social workers removing child from mother's custody with no evidence of physical neglect, no indication of any immediate threat to the child's welfare, and no indication of criminal activity by the mother; (2) refusing to give the child to the grandmother; and (3) doing all this without a court order for 13 days).

Because the State's actions were based on a reasonable suspicion of child abuse and were not disproportionate under the circumstances, the district court correctly concluded the State is entitled to summary judgment on the Substantive Due Process claim.

CONCLUSION

While the Court could affirm the district court on all grounds, it need not affirm on all grounds to dispose of the case. Affirming the district court on **any one** of the following immunity grounds would be dispositive: the judicial process immunity, the discretionary function immunity, section 669.14(4) immunity, and section 232.73 immunity. And even if none of the immunities applied, the Court should affirm on the merits of Lennette's intentional and constitutional tort claims. Whichever of the many paths this Court takes, it should not open the door to permit Lennette and future plaintiffs to transform ordinary negligence claims into intentional and constitutional torts. The Court should affirm the district court's grant of summary judgment in favor of the State and against Lennette.

REQUEST FOR ORAL SUBMISSION

The State requests oral argument.

COST CERTIFICATE

We certify that the cost of printing the Appellee's Brief and Argument was the sum of $ 0.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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