ORAL ARGUMENT REQUESTED

No. 20-3099

In the United States Court of Appeals for the Tenth Circuit

Raymond R. Schwab, and Amelia D. Schwab

Appellants,

v.

KIM YOXELL, ANGIE SUTHER, PHYLLIS GILMORE,THERESA FREED, KENDRA BAKER, LORA INGLES , BARRY WILKERSON, BETHANY FIELDS ,CARLA SWARTZ ,JULIA GOGGINS, KVC , PATHWAYS FAMILY SERVICES LLC, PAWNEE MENTAL HEALTH SERVICE, ST FRANCIS COMMUNITY SERVICES , KATHY BOYD ,KAYLEE POSSEN , ANTHONY ALLISON, MICHELLE ALLISON, DOES 1-10 Inclusive,

Appellees.

On Appeal from the United States District Court for the District of Kansas, No. 18-CV-02488 Judge Daniel Crabtree, Presiding

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BRIEF OF APPELLANTS

Filed In Propria Persona

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II. Adjudication Hearing Carla Swartz Testimony

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 42 U.S.C. Code 1983. Furthermore the Court had primary Subject Matter Jurisdiction under U.S.C. 1332, Diversity Jurisdiction for all claims whereas all the Plaintiffs are citizens of Colorado, while all the plaintiffs are citizens of the State of Kansas. The district court dismissed all Federal 1983 Claims in Sept 25, 2019 on some defendants, and then denied

Diversity Jurisdiction declining to hear what the Court labeled as "Supplemental State Claims" on April 28 2020. The Plaintiff's filed their Notice of Appeal May 22, 2020.

This Appeals Court has jurisdiction under 28 U.S.C. § 2107.

STATEMENT OF THE ISSUES

(1). Did the District Court err in Denying Plaintiff's Amended complaint?

(2). Did the District Court Err in Denying Subject Matter Jurisdiction over State Tort Claims.

(3). Did The Court err in Dismissing defendants Carla Swartz and Julia Goggins?

(4). Did the Court Err in Dismissing Federal Claims against KVC, St. Francis; Kathy Boyd; Laura Price; and Kaylee Posson?

(5). Did the Court err in omitting facts and viewing facts in a light most favorable to the defendants as the foundation for their ruling?

(6). Did the Court Err in offering 11th Amendment immunity to Lora Ingles?

(7). Did the Court Err in Denying personal service to DCF defendants?

STATEMENT OF THE CASE

This appeal arises from the September 25, 2020 and April 28, 2020's dismissal of the Plaintiff's Raymond and Amelia Schwab's Complaint, filed August 2018 (18-cv-02488) , against a number of defendant's who were involved in initiating, or perpetuating through denial of due process and fraud, the unlawful removal of 5 of the Plaintiff's children without warrant or exigent circumstances April 28th 2015 through May of 2018.

INTRODUCTION

As the United States Supreme Court has explained, "Choices about marriage, family life, and the upbringing of children are . . . ranked as 'of basic importance in our society,'" and are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

These rights, though fundamental, are not absolute. Neither Kansas nor the United States Constitution shields those who perpetrate abuse on children. The State of Kansas, through its Department of Children and Family Services , is charged with identifying children who are in imminent danger and initiating proceedings to ensure that children are protected from harm.

The 9th Circuit ruled in Hardwick v. County of Orange [U.S. Court of Appeals for the Ninth Circuit] Preslie Hardwick v. Marcia Vreeken (2017 Full ruling contained in Appendix I),

> Like the interests of criminal defendants, the fundamental liberty interests of parents and their children in their familial relationship has long been clearly established. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (explaining that the Fourteenth Amendment protects the liberty to " establish a home and bring up children"); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (recognizing the right of parents "to direct the upbringing and education of children under their control"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (acknowledging that "the custody, care and nurture of the child reside first in the parents"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (observing that a parent has a protected interest in the "companionship, care, custody, and management of his or her children").

Because the law recognizes the parents' paramount right to raise their children

without unjustified intrusion by the State, the State bears the statutory burden of demonstrating that the removal of a child from his or her parents is necessary to prevent imminent harm to the child. Court's have repeatedly proclaimed on multiple occasions that "[a]ctions which break the ties between a parent and child 'can never' be justified without the most solid and substantial reasons." Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976) (quoting State v. Deaton, 54 S.W. 901 (Tex. 1900)).

In April of 2015 Raymond and Amelia Schwab's marriage was in crisis, and they were separating. Amelia was moving to Colorado. Raymond, who worked for the Department of Veteran Affairs, was waiting on a job transfer whereas he would follow his wife as they worked on the difficulties in their marriage.

Amelia had already been separated and living with her mother for a month prior to the children's removal and her mother, Cindy Baer, was assisting in watching the children while the Schwab's packed up their house. Raymond was moving to a home for Veterans until his job transfer was complete. Their split had been very tumultuous as marriages in crisis often are. When Cindy Baer learned that Amelia was moving back to Colorado, where the Schwab's had lived the majority of their marriage since 2002, which was also many of their children's place of birth, she refused to return the children to the parents.

The Schwab's contacted the Topeka Police Dept, in the town of their residence, who refused to intervene, citing a civil matter, unless the Schwab's pressed charges. The Schwab's then Contacted the Dickenson County Sheriff office, where the children were

being held at Cindy's house. A Deputy Ferris went to Cindy's house and instructed Cindy to return the children or Mr. Schwab would be pressing charges. Mrs. Schwab asked her husband not to have her mom arrested and to give her time to resolve the issue. Mr. Schwab informed Amelia he would give Cindy through the weekend to return the children. Mr Schwab gave the grandmother until Monday April 28th.

In response to the demand to return the children Cindy Baer fled with the Schwab's children from Dickenson to Riley County Kansas and developed, in collaboration with Anthony and Michelle Allison, Amanda Allison-Ballard and Detective Julia Goggins and Carla Swartz a fictitious story of the children being abandoned while the Schwab's were on a drug binge. The Allisons made false claims about the children residing in their home, and collaborated with RCPD to unlawfully and unconstitutionally deprive the Schwab's of their lawful parental custody through fraud upon the Court and a deprivation of the Schwab's right to due process.

Again the 9th Circuit in Hardwick v. County of Orange responding to the claim that lying to remove children was not an established right;

In Greene, we said that "we held in the context of a child abuse proceeding that 'the constitutional right to be free from the knowing presentation of false or perjured evidence' is clearly established." 588 F.3d at 1035 (citing and quoting Devereaux, 218 F.3d at 1055–56). We also said that "[e]ven earlier [than Devereaux] we stated emphatically that 'if an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth, . . . he cannot be said to have acted in an objectively reasonable manner, and the shield of qualified immunity is lost.'" Id. (describing and quoting Hervey v. Estes, 65 F.3d 784, 788 (9th Cir. 1995)).

The Schwab children were unlawfully seized (The Detective made an

appointment to seize them), without exigent circumstances (Such as imminent Danger of Harm which is what the Courts and Kansas Statutorily requires K.S.A. 22 38-2231) any investigation, or a warrant. The Police detective, Carla Swartz, testified in the 2015 adjudication hearing that minimal to no investigation was done to substantiate any allegation against the Schwab's. She did not contact local law enforcement in the Schwab's area for a welfare check, investigate the Schwab's home, contact the children's doctors or dentist, and even failed to contact the schools the children were attending. (testimony included in Appendix II). The Statue States the imminent danger must be in the place where the children are found, not a unfounded fear of harm based on hearsay evidence of hostile family members, who had unlawfully fled with the children and hid them from the Schwab's.

The subsequent State of Kansas Department of Children and Family Services investigation returned a conclusion that the charges of Neglect and Abuse against the Schwab's were unsubstantiated (Finding in Appendix III) and yet the State refused, for over 3 years, to return the children while they parents fought from their home state of Colorado. The defendants consistently denied due process by refusing to honor the Court Ordered reintegration, while presenting the Schwab's consistently in a false light to the public, therapists, attorney's, and journalist in retaliation for publicly protesting the injustices their family was suffering. One such event is their consistent false claim that Mr. Schwab failed a drug test. There is no such drug test. The only evidence ever submitted was a scribbled on piece of paper alleging Mr. Schwab tested positive and never has there been any lab report substantiating this fraud.. The Schwab's contend

there is no lab report of Mr. Schwab ever failing a drug test for any unlawful substance, and yet this narrative was pushed so hard it was even picked up in foreign media in Europe.

The Children were then kept in State Custody while State agencies and actors refused to reintegrate for almost three years, committed perjury in every single hearing the Schwab's were present , sabotaged court ordered reintegration, hid documents, used secret reports against the parents, and denied the Schwab's due process through fraud upon the Court. The Schwab's have extensive documentation and witnesses to prove these assertions. One such example was the perjury Laura Price committed inn an April 2017 hearing. She consistently lied on the stand that Mr. And Mrs. Schwab were refusing to communicate with her and were not complying with the Court Ordered reintegration. Mr. Schwab (Who was representing himself) presented evidence of her perjury, filed a motion for Show cause to hold her in contempt that the Court refused to hear. Nevertheless this perjury led to St Francis hiring a third party contractor, remove all the workers from the case, and reintegration actually began to happen for the first time in years (Pg 52 of complaint). This level of perjury and misinformation occurred in every single hearing the Schwab's had with these defendant's for three years.

Another example is Lora Ingles. As the Court actually began to force the defendant's to comply with its orders to reintegrate the children, Ingles with defendant's Anthony and Michelle Allison, St Francis, Price, and the DCF defendant's began to spread that one of the Children had confessed to them Mr. Schwab threw them down the

stairs in a fit of rage. This was never an allegation for the entire case and was alleged after Ingles began to push it two and a half years later. Ingles and others refused to have the children called as witnesses, as Mr. Schwab was requesting citing it would be "Too traumatic" for the children. Ingles refused to allow Mr. Schwab's attorney to interview the children about the allegation even though he flew clear from Florida to do so. Then the defendant's fought Mr. Schwab from participating in family counseling so he couldn't address the allegations with a third party. When Mr. Schwab finally was able to go to family counseling he brought up the allegation of violently thrown a child down the stairs. All of the children reacted with surprise, and in front of the Counselor exclaimed Ingles and others were fabricating they ever said such a thing. This is the level of fraud, manipulation of the legal process, presentation in a false light, slander and abuse of legal process the Schwab's endured for 3 years. (Pg 52 of complaint).

Hardwick V Vreeken the 9th circuit stated;

"The Court of Appeal also acknowledged the defendants' collective admission on appeal that the evidence was sufficient "to demonstrate the social workers committed egregious acts of misconduct in the dependency case." (pg 5)

What was the allegation of misconduct that was committed by these social workers?

"(1) telling the dependency court on February 17, 2000, that Deanna had caused her daughters to skip a mandatory visit with their father, when in fact the problem was caused by a visitation monitor, Hector Delgadillo; (2) advising the court that Deanna was responsible for turning her children against the monitor; and (3) telling the court that Deanna had told her children that their father was trying to take them away from her when in reality it was defendant Vreeken who had made inappropriate comments to the children, including the threat that if they did not visit their father, they would be put "in a home." (pg 7).

If this constituted a violation of the mothers civil rights to the 9th circuit, how

much more inventing completely false narratives of egregious abuse by the father that was then leaked to the press, repeated in secret emails to the Schwab's therapist who were favorable to the Schwab's, and exclaimed to attorneys to bias them against Mr. Schwab that he was a monster they were advocating for, all while denying any legal attempt to counter the false accusation. This and many more such events occurred as the Schwab's outlined in their complaint, yet the district Court claims these are not constitutional violations? The District Court is claiming using false and perjured testimony to keep children away from their parents is not a violation of the Schwab's right to their children and due process?

During these event's the Schwab's went on a public crusade and conducted protests that generated widespread local and national media focus. The State and their agencies retaliated by sabotaging reintegration, lying in Court, manipulating the legal process, restricting the children from testifying to address fraudulent accusations that the children were alleging per defendant's such as the Children's counselors in Pawnee Mental Health. Defendant's consistently threatened the Schwab's that because of their protesting they would never see their children again and they would terminate the Schwab's parental rights, which they tried unsuccessfully to do three times.

These are part of the facts that the Schwab's presented, and though the District Court seemed to recognize only the State Narrative from the State District Court Records, the Schwab's continue to assert that those facts from the State are fruit of the poisonous tree, based on fraud upon the Court, denial of due process, and Perjury, and

manufactured evidence.

Eventually, three competent attorneys entered the Schwab's case Pro Bono and successfully fought for the return of the children. The Children were returned to their parents January of 2018, the case was terminated in May of 2018, and Mr. and Mrs. Schwab filed a lawsuit a new lawsuit with multiple claims against the people and agencies responsible to hold them accountable for their actions and harm through the chain of events they initiated and caused against the Schwab family.

As this Court has previously acknowledged, the denial of rights "for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976) , how much damage could have occurred during a three year unlawful separation of the Schwab's and their children?

FACTUAL BACKGROUND

The material facts are based on the previous 2016 Verified Amended Complaint, 2018 Verified Complaint, Docket Report, and Court Orders and the Appellant's believe these facts to be undisputed. The court dismissed the complaint based on conclusions of law alone.

I. The First Lawsuit April of 2016

Plaintiff's include the events surrounding this complaint because it was used as justification in dismissing some defendant's and some claims. In the Oct 2020 Order, the District Court stated about the complaint filed in Oct of 2018,

"Their Compliant is 84-pages long, containing factual and legal conclusions virtually identical to those asserted in an earlier 2016 lawsuit filed in this court."

Indeed, the Schwab's filed a complaint April of 2016, but it was nothing like the 2018 complaint. The defendants were different in the 2016 complaint though some carried over to 2018, it only covered a one year timeframe, the relief requested concerned returning the children and a focus on the belief that the children were taken because the parents had publicly stated they were moving to Colorado to be in the medical marijuana industry. This 17-page complaint was filed with the assistance of an attorney. The subsequent amendments became closer to the 2018 complaint, however almost a year and a half passed after the Schwab's submitted their final amended complaint and new defendant's entered in and even more violations of the Schwab's rights, and right to due process, such as the events explained in the introduction.

Over the life of the complaint, there were changes and amendments as the Schwab's added any injury or injustice into the record as the time stretched on. The jurisdictional distinctions bled over into the State Child In Need of Care Case to the level the Plaintiff's had defendant's (Ingles, Fields, Price and BOYD) using the child custody case to try and identify a witness who was mentioned in an 10th circuit interlocutory appeal brief by threatening to hold back visits from the children if the name wasn't given to the defendants. The lawsuit initiated a shift in defendants, with two more years of steady slander, deprivation of due process, sabotaging of the reintegration process, restriction of access to the children, by the defendants.

The lawsuit was dismissed in 2017. The main reasons for the dismissal were

Failure to State a claim of which relief could be granted, as well as abstentions from taking jurisdiction under the Rucker-Feldman doctrine and Younger Abstention. The Schwab's understood that many of their claims would not be heard because they had an ongoing State litigation on the issues presented and the Court would not hear them until the State proceedings were finished. The problem is Judge Crabtree, who also presided over the 2016 case, never specified which claims fell under the abstention. The dismissal was just a general dismissal with an understanding that once the State case was over the Schwab's could then pursue their claims.

The Schwab's filed an appeal to the 10th circuit. Near the time the appeal brief was due, Mr Schwab was sent to Puerto Rico to repair the telecommunications after Hurricane Maria and had no access to any form of communication because the Island had no power and was completely devastated. It would be a month, Nov 2017, before Mr. Schwab had access to communications and realized that they had missed their appeal brief deadline, and the case had been dismissed. Rather than seek a reconsideration, since Mr Schwab would remain in Puerto Rico until February of 2018 and could not assist Mrs. Schwab with the legal paperwork, the Schwab's decided to wait until the state case ended, and then refile a complaint based on the entirety on injustices perpetuated upon their family, add the correct defendant's, and pursue their claims.

In January of 2018 the Schwab children returned to their parents in Colorado. In May of 2018 the State proceedings were terminated. In October of 2018 the Schwab's

filed the current complaint with a number of new claims, defendants, an extended timeline of events, and an ever more egregious timeline of outrageous behavior and actions perpetuated upon the Schwab's and their children by the defendant's.

Procedural History of the Complaint of 2018

With the State Proceedings completed the Schwab's filed a new complaint in their home state of Colorado on October of 2018. After recognizing jurisdictional issues, they requested the case be transferred which was granted in September. Through December the Plaintiff's had a private individual serve the defendants. Two issues of note the Appellant's wish to point out to the Court.

A. When the Schwab's had the DCF Defendant's (Kendra Baker, Theresa Freed, Phyllis Gilmore, Kansas Department of Children and Families, Angie Suther, Kim Yoxell) served the clerks placed on the record that their counsel was representing them in Personal and Professional Capacity. This was the only notice the Schwab's saw. They did not realize that the clerk corrected the entry d that the DCF defendant's counsel was only representing them professionally. The Schwab's did not realize another service was needed until the Court ordered them to enact proper service for personal capacity. This delayed service for these defendants. The Plaintiffs were unable to get valid addresses for these defendants since most of them were executive level State employees, and their private information is not easily accessible.

The Plaintiff's requested from the Court for an alternate form of service, or for the Court to compel the DCF attorney to give the Plaintiffs the correct addresses to serve the

defendants who were already engaged in the lawsuit due to the Plaintiffs inability to get access to the defendants or get their addresses. The Court Denied the request.

B. The Schwab's had defendant's Anthony and Michelle served VIA registered mail on 1/11/2020. Both complaints were signed for by Michelle Allison. During this time, most of the other defendants already had attorneys place notice of appearances, filed motions to dismiss, and the Schwab's were replying to those motions. On February 13, 2020 the Allison's counsel made an entry of appearance and filed a motion to quash service the same day. The Schwab's responded on 2/21/2020 and argued that the Allison's had been served correctly according to the Federal Rules of Civil Procedure. During these months the Plaintiffs were addressing the other defendant's motions to dismiss, motions on discovery, and requesting the removal of defendants.

The Court did not rule on any motions or responses pending. Five months later, on July 11th the Schwab's filed a motion asking the Court to rule on pending motions. The Court then denied the Allison's motion to quash and directed the Schwab's to serve the Allison's within 30 days despite them being served properly many months prior. The Court also denied the Schwab's motion to compel council for DCF providing the Plaintiff's with accurate addresses to serve the DCF defendants. Without addresses the Schwab's were unable to serve these defendant's in personal capacity.

On 9/25/2020 the District Court dismissed a number of defendants. At that time the Schwab's did not believe they had a right to appeal without the Courts leave. On 9/26 the Schwab's served the Allison's for the second time. On 10/22/2020 the Allisons

filed a 12(b) motion to dismiss, in response the Schwab's filed an amended complaint.

Again, almost a span of 6 moths transpired before the Court dismissed the rest of the defendant's. The Court denied the Schwab's Amended Complaint in response to the 12b motion to dismiss for timeliness, and then stated it declined to hear the "Supplemental State Claims" though there were not supplemental state claims as primary subject matter jurisdiction belonged in the Court due to complete Diversity.

LEGAL STANDARDS

I. STANDARD OF REVIEW:

This Court Reviews denial of Diversity and Subject matter jurisdiction. Some claims the District Court determined were "State Matters" and "Declined Supplemental Jurisdiction". Questions of subject matter jurisdiction are reviewed de novo. Pillow v. Bechtel Const., Inc., 201 F.3d 1348, 1351 (11th Cir. 2000). Appellants also seek review of the denial Motion for leave to amend complaint. Reviewed on abuse of discretion standard. Technical Resource Servs. v. Dornier Medical Sys., 134 F.3d 1458, 1464 (11th Cir. 2000).. In general, "a party must be given at least one opportunity to amend before the district court dismisses the complaint." Corsello v. Lincare, Inc., 428 F.3d 1008, 1014 (11th Cir. 2005).

Appellant's also seek review of the dismissal of Federal claims against KVC; Pathways; St. Francis; Kathy Boyd; Laura Price; and Kaylee Posson; Dismissal of Claims against DCF Defendant's in personal capacity. In Using claim preclusion for defendant's Barry Wilkerson, Bethany Fields, and Carla Swartz. In using Qualified

Immunity for Swartz and Goggins.

SUMMARY OF ARGUMENT

The district court made fundamental legal errors in denying Appellant's Amended Complaint, and granting motions to dismiss on 9/25/2020 and 4/28/2020

ARGUMENTS

A. Did the District Court err in Denying Amended complaint?

In general, "a party must be given at least one opportunity to amend before the district court dismisses the complaint." Corsello v. Lincare, Inc., 428 F.3d 1008, 1014 (11th Cir. 2005). Although the rule is typically applied after a court grants a Rule 12(b)(6) motion to dismiss when a plaintiff fails "to state a claim upon which relief can be granted," FED. R. CIV. P. 12(b)(6), courts also apply the rule in the context of a 12(c) motion for judgment on the pleadings. See, e.g., Spitsyn v. Morgan, 160 Fed. Appx. 593, 594 (9th Cir. 2005) ("Before entering judgment based on an inadequate pro se complaint, a district court should briefly explain the deficiencies of the complaint to the pro se litigant and provide leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment."); Canty v. Wackenhut Corr. Corp., 255 F. Supp. 2d 113,117-18 (E.D.N.Y. 2003) (dismissing certain claims "without prejudice" pursuant to a Rule 12(c) motion and allowing pro se plaintiff leave to amend); United States ex rel. Bledsoe v. Cmty. Health Sys., 342 F.3d 634, 644-45 (6th Cir. 2003) (district court abused its discretion when it did not allow plaintiff leave to amend complaint after court granted Rule 12(c) motion); United States ex rel.

Goldstein v. Fabricare Draperies, Inc., 84 Fed. Appx. 341, 343 (4th Cir. 2004) (district court granted leave to amend complaint in an order granting Rule 12(c) motion).

Under Rule 15(a)(1)(B), a plaintiff's may amend their complaint as a matter of course within 21 days after a Rule 12(b) motion is filed. The district Court Stated in its denial "Plaintiffs filed their Motion to Amend more than 14 months after their initial Complaint.". As the Appellants stated above 11 of those 14 months were the result of the Court not ruling on pending motions and requiring the Schwab's to re-serve the Allison's after they had already been properly served once. It took 14 months for the Allison's to file their motion to dismiss, whereas the Schwab's responded with an Amended Complaint and Leave to Amend under Rule 15a the Court admitted that the Schwab's filed within the 21 day period after the 12(b) motion to dismiss was filed (Pg 7 of April 28th Order).

The Schwab's also corrected deficiencies that were pointed out in the 9/25/2020 ruling mainly the aggregation of damages and an expansion on information about why St Francis and KVC were State Actors. The reason for the amended complaint was the motion to dismiss, not the deficiencies pointed out in the previous order, but with the opportunity to amend based on the recently filed motion to dismiss the plaintiffs decided to cure some other deficiencies. They had not amended the complaint in response to any of the other defendants 12b motions but answered them The Appellants did not feel the need to modify their complaint based on arguments of Statue of Limitations against these defendants because the arguments could be made in a response to their motion.

The Appellants felt there needed to be more clarification on the Allison's involvement. Therefore, this was the first time a motion to amend was entered and it was denied, and the case dismissed.

B. Did the District Court Err in Denying Subject Matter Jurisdiction over State Tort Claims.

In the 4/28/2020 ruling The District Court Stated "Instead, exercising its discretion, the court declines to exercise supplemental jurisdiction over plaintiffs' state law claims because they are the only remaining claims in this lawsuit now that the court has dismissed all of plaintiffs' federal claims." (Pg. 19). The ruling did not address any of the claims but simply dismissed them. Diversity jurisdiction under 28 U.S.C. § 1332 exists when two conditions are met. First, the amount in controversy must exceed $75,000. Second, all plaintiffs must be of different citizenship than all defendants. Both conditions are met with the Plaintiff's Raymond and Amelia Schwab being from Colorado, while all the defendants are citizens of the state of Kansas, or other States. Prior to denying the Leave to Amend Complaint in the 9/25/2019 ruling Judge Crabtree observed that the Plaintiff's had aggregated their damages and stated "But plaintiffs do not allege facts establishing that all defendants are jointly liable for aggregate damages to support the court's diversity jurisdiction under § 1332. (pg. 28). When the Plaintiff's had an opportunity to amend their complaint, they remedied this area. The Court rejected the Amended complaint, however they could have allowed the defendants to remedy the defect, as was stated above in the previous argument.

C. Did The Court err in Dismissing defendants Carla Swartz and Julia Goggins?

Carla Swartz and Julia Goggins were the Riley County Police Detectives who made an appointment to seize the Schwab's children without Warrant, Statutory Authority, Imminent danger of harm to the children, contacting the parents, or even minimal investigation besides the patently false and manufactured testimony of the maternal family of the children.

1. Issue Preclusion: In dismissing defendants Julia Goggins and Carla Swartz the Court determined;

"As explained above, to the extent plaintiffs' claims here arise from "the same transaction, or series of connected transactions as [the 2016 suit]," they are barred. *Yapp*, 186 F.3d at 1227. The court previously dismissed plaintiffs' claims against Mr. Wilkerson, Ms. Fields, Ms. Swartz, RCPD, and Pathways because plaintiffs failed to state plausible claims against these defendants under §§ 1983 and 1985. Dismissal for failure to state a claim under Rule 12(b)(6) is a "judgment on the merits" to which res judicata applies. *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1298 (10th Cir. 2014) (citing *Stewart v. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002)). Thus, claim preclusion bars plaintiffs' §§ 1983 and 1985 claims against Mr. Wilkerson, Ms. Fields, Ms. Swartz, RCPD, and Pathways."

If this Court would take judicial notice of the 2018 ruling, which has been included in the Appendix (Appendix IV), it would see that the District Court has never ruled on the actual claims made against these two defendants. Julia Goggins was not added in the first lawsuit because the Schwab's were unaware of her involvement until they received a copy of the police report. They believed that the District Court abstaining due to ongoing State proceedings meant they could not pursue claims against her until the State CINC case was dismissed.

As for Swartz, In the 2017 Order of Dismissal the Court dismissed claims against Swartz based on 11th Amendment immunity stating;

"Riley County Detective Carla Swartz enjoys witness immunity against claims based on her testimony during the CINC proceedings. Detective Swartz testified in the CINC case about her investigation into the complaint that the Schwabs were not caring properly for their children. She also testified about the State's removal of the children from the Schwabs' care based on the investigation's results. "A witness is absolutely immune from civil liability based on any testimony the witness provides during a judicial proceeding 'even if the witness knew the statements were false and made them with malice.'

That was the only judgment concerning this witness in that ruling and did not even address the actual claims the Schwab's had against Swartz. The Schwab's never claimed that Officer Swartz testimony caused harm. The claim plainly written in the previous lawsuit begins on pg 49 of Document 85 Revised Second Amended Complaint and clearly states the claim is for Fourteenth Amendment Familial Association,Warrantless Seizure of Children which was not addressed in 2017, and the Schwab's gave a detailed account of what transpired.. Therefore, the Schwab's believed this claim lay under the Courts Younger Abstention and they were not even eligible to pursue this claim until the State proceedings were completed. Once they were completed, and the Appellant's had the opportunity they added Julia Goggins based on the new information they had received through the disclosure during the previous litigation. Therefor Appellant's believe the Court Erred in using issue preclusion as a reason to dismiss these defendants.

2.Qualified Immunity: The 9/25 Order stated;

"Riley County Detectives Carla Swartz and Julia Goggins are entitled to qualified

immunity. "Qualified immunity exists to protect public officials from the broad-ranging discovery that can be peculiarly disruptive of effective government." *Robbins v. Oklahoma*, 519 F.3d 1242, 1248–49 (10th Cir. 2008) (internal quotations omitted). To avoid the qualified immunity defense on a motion to dismiss, the Tenth Circuit requires plaintiffs to "allege facts sufficient to show (assuming they are true) that defendants plausibly violated their constitutional rights, and that those rights were clearly established at the time." (Pg 22)

The question becomes is the warrantless removal of children without exigent circumstances or the immediate threat of harm a violation of clearly established constitutional rights? The Appellant's claim is that it was, and these officers knew or should have known that their actions were a violation of the Schwab's Constitutional rights. Even the Kansas Statue limits the reasons by which an officer can enact an emergency removal of a child.

K.S.A. 22 38-2231 (b)(1). Child under 18, when law enforcement officers or court services officers may take into custody; sheltering a runaway. (a) A law enforcement officer or court services officer shall take a child under 18 years of age into custody when

"(1) The law enforcement officer reasonably believes the child will be harmed if not immediately removed from the place or residence where the child has been found; or

Julia Goggins and Carla Swartz notated in their April 2015 Police report that the Schwab's Children were "Safe" at the Allison's and scheduled an appointment to seize the children the following day. They did not state the Children were in imminent danger of harm with the Allison's and their maternal grandmother, Cindy Baer, which was also evidenced by the children being returned to these parties after the Officers initiated the removal unlawfully and unconstitutionally.

When asked, During the July 2015 Adjudication (Transcript of this portion of testimony has been provided in Appendix) hearing why the RCPD took the children in

custody, Swartz replied,

"Because I felt they were children in need of care. The Parent's had made numerous statements to both the uncle, the aunt, and the grandmother that they were going to come and pick the children up"

(Pg 30 Adjudication hearing July 2015 Transcript)

So the RCPD became the judge, jury and executioner. Therefore, the entire case, for three years rest entirely on hearsay testimony from this officer who admitted they had no statutory authority to remove the children but determined they were Children In Need of Care, without the appropriate or Constitutionally required due process and seized the children. They did no investigation and their action were a causation for the entirety of events which occurred over the next three years. If they would have done their Constitutional duty to the public and required evidence and exigent circumstances, the children would have been returned and the Schwab's would have continued their move to Colorado with their children, which was their right.

Furthermore, Swartz admitted they (Swartz and Goggins) did not even do any investigation. When asked on the stand about the level of investigation the officers conducted she admitted they did not. When asked if she contacted the Schools, the children's doctors, the children's dentist, went to the parents' house, or verified any of the allegations she replied no.

As the ninth circuit has stated;

"Two provisions of the Constitution protect the parent- child relationship from

unwanted interference by the state: the Fourth and the Fourteenth Amendments.2 First, parents "have a well- elaborated constitutional right to live" with their children that "is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency." Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 1999); accord Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1107 (9th Cir.2001); Ram v. Rubin, 118 F.3d 1306, 1310 (9th Cir. 1997). Second, the Fourth Amendment safeguards children's "right . . . to be secure in their persons . . . against unreasonable . . . seizures" without a warrant, U.S. Const. amend. IV, although we similarly recognize an exception to the warrant requirement where the exigencies of the situation are so compelling that a warrantless seizure is objectively reasonable under the Fourth Amendment, see Rogers v. County of San Joaquin, 487 F.3d 1288, 1294 (9th Cir. 2007). Therefore, we have said that the tests under the Fourth and Fourteenth Amendment for when an official may remove a child from parental custody without a warrant are equivalent. Wallis, 202 F.3d at 1137 n.8... In Rogers v. County of San Joaquin, we clarified that seizing a child without a warrant is excusable only when officials "have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant." 487 F.3d at 1295 (citing Mabe, 237 F.3d at 1108) (emphasis added). "

D. Did the Court Err in Dismissing Federal Claims against KVC, St. Francis; Kathy Boyd; Laura Price; and Kaylee Posson

The Court determined that "Several defendants argue that plaintiffs' Complaint fails to allege state action sufficient to subject them, as private parties, to liability under § 1983." (Pg 24 Sept 25th order) and then continues to argue that the Plaintiff's did not establish they were State actors under "the nexus test, the symbiotic relationship test, the joint action test, and the public function test.". These Defendant's and agencies are solely tasked and contracted for providing foster care placement, investigation, and adoption service in place of and in symbiotic relationship with Kansas DCF. This arrangement is in part due to a lawsuit filed against Kansas DCF, by the ACLU, for negligence and harm they were causing foster children. Kansas privatized its Foster care system as a

remedy. Pgs 62-67 in the initial complaint outline liability for the private contractors, as working in place of DCF to provide core foster care services. This is also explained on pgs 11-15 and none of these facts are challenged, that these agencies and Defendant's provide a core function of services in place of the State Agency DCF and are liable as State Actors in the respective areas where they are located.

If the Court truly "accepts facts asserted by the Complaint as true and views them in the light most favorable to plaintiffs. *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013) (citing *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009))", then the identification of St Francis, KVC and their workers as Monell defendant's who provided a core State function which subjected them to liability would have been accepted as true (Pgs 62-66 of complaint).These assertions were unchallenged by the defendant's.

The Appellant's also modified this information in their Amended complaint in order, once it was accepted by the Court to file a motion for relief of judgment on this dismissal. In that amended complaint Appellant's included documentation from Kansas DCF and Kansas Legislative Research Department, which have been included in the appendix of this brief (Appendix V and VI), which demonstrate these agencies provide State functions in place of State agencies due to litigation against those agencies for negligence and harm to foster children.

D. Did the Court err in omitting facts and viewing facts in a light most favorable to the defendants as the foundation for their rulings.?

Throughout both rulings, Sept 25 and April 28th , the Court ignored the Plaintiff's statement of facts and ruled based on partial information, or promoted the challenged narrative of the State. The Court recognized "When considering a motion to dismiss, the court accepts facts asserted by the Complaint as true and views them in the light most favorable to plaintiffs. *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013) (citing *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (Pg 8 Sept 25th 2019 order)" but then proceeded to view facts in the light most favorable to the defendant's and even ignored statements of facts by the Plaintiff's. Let's look at some of these.

1. The Court states on pg 9 of the Sept 25th order;

"Without the Schwab's knowing it, the maternal grandmother and a maternal uncle contacted the Riley County Police Department—RCPD—to express their concerns about how Mr. and Mrs. Schwab were caring for their children. The RCPD removed the children from the Schwab's custody and the State of Kansas initiated proceedings"

However, the actual facts presented by the Schwab's were that they had let the Maternal Grandmother watch the children while they were packing to move. When she found out the Schwab's were moving to Colorado she hid the children, relocated them to Riley County after being contacted by a Dickenson County Sheriff who demanded she return the children, created a fictional narrative with the Allison's and Amanda Allison-Ballard that the children had been abandoned by their parents and had been living in Riley county for some time (Which was a complete lie), and the children were removed from the maternal families custody without warrant, or exigent circumstances, or any

investigation after the officers made an appointment to seize them. The agencies and DA placed a petition in to the Court with countless factual inaccuracies, and even outright lies, that everything possible had been done to keep the children in the home, those attempts had failed and then dependency proceedings were initiated without even the Schwab's knowledge with no steps to keep children in the home. This is all contained in pages 16-18 of the initial complaint and Counts 1 and 2 of the complaint (Pgs 58-62).

2. On page 16 of the April 28th ruling the Court asserted;

"The crux of plaintiffs' claim is that the Allisons provided information to the RCPD and, because of that information, RCPD removed plaintiffs' children from their home. But "mere furnishing of information to police officers does not constitute joint action under color of state law which renders a private citizen liable under § 1983 . . . ." *Benavidez v. Gunnell*, 722 F.2d 615, 618 (10th Cir. 1983)."

This again is not an accurate representation of the Schwab's claims, and presents the facts in a light more favorable to the Defendant's and the State's false narrative rather than the plaintiffs. The Allison's have never in the Schwab's entire marriage been part of the Schwab's lives or their children's. The claim against the Allison's concerning the removal of the children was that Anthony and Michelle Allison conspired with Amanda Allison-Ballard, Cindy Baer and the Riley County Police dept to deprive the Schwab's of the lawful control and care of their children through feloniously interfering with parental custody.

Cindy Baer was hiding the Schwab's children. The other defendants orchestrated splitting the children up in various jurisdictions after a Dickenson County Sheriff, where

the children were supposed to be, demanded the children be returned to the Schwab's. They worked with Defendants Goggin's and Swartz to create a false narrative that the children had been living with the Allison's and they could not locate the Schwab's. The Allison's, with the police convinced Deven Backman, who is now an adult and living again with the Schwab's, to write a letter detailing false accusations which the police drove all the way to Dickenson County to pick up, according to Deven. The Appellant's believe this is why no investigation was done, all the parties knew their narrative was false and worked cooperatively to entangle the Schwab's in dependency proceedings, so Amelia could not leave the state with her children. These parties conspired to deprive the Schwab's of their children through creating a false narrative of facts, and false accusations of homelessness and neglect in order in initiate dependency proceedings under these false pretenses.

These are the crux of the Schwab's arguments not the abbreviated version the Court is basing their rulings on. The process of viewing the facts and evidence in light most favorable to the defendant's is why the Court made rulings against the Schwab's in error. This seems to be a consistent standard the Court utilized through the duration of these, and the previous proceedings.

E. Did the Court Err in offering 11th Amendment immunity to Lora Ingles

The Court, in its Sept 25th ruling, stated;

"Plaintiffs' Complaint—much like their 2016 claims against Ms. Ingels—asserts claims against Ms. Ingles only for acts she performed in her capacity as a court-appointed guardian ad litem and in furtherance of the judicial process."

This is another Statement by the Court which is incorrect in its presentation of

facts. In the State of Kansas the role and responsibility of an Attorney Ad Litem is outlined in Kansas Statues 38-2205 and Kansas Supreme Court Rule 110a which clearly states that a Guardian Ad Litem must conduct an independent investigation and submit that report to the Court, which Mrs Ingles never did for almost three years, and that their role and responsibility is not to be a fact finder for the Court, but just gather the appropriate information to represent the best interest of the children. The Schwab's asserted throughout their complaint that Ingles not only refused to do an investigation, but she conspired with other defendants to promote a narrative she knew, or should have known was completely false. Ingles also worked outside of her statutory scope and did everything within her power to hinder the reintegration of the Schwab children by;

1. Contacting service providers of the Schwab's and attempting to Bias them through sharing false, biased, or intentionally deceptive information about the Schwab's to these providers in order to get them to file negative reports or abandon support of the Schwab's. This behavior grew so aggressive that two service providers had to retain attorney's to protect them from her threats and attempts to circumvent HIPPA by demanding confidential information about the Schwab's and then threatening the providers with subpoenas and her promise she would discredit any favorable report they wrote. (pg 50 and 52 of complaint)

2. Working in conjunction with the DA, ST Francis, Pawnee Mental Health and other defendant's to defame and present the Schwab's in a false light to their counselors even after agreeing to stop seeking conversations with this providers without the

Schwab's attorneys being part of the conversation. This behavior was so alarming to one family Counselor, Loretta Jasper, she turned the email streams over to the Schwab's and informed the parties she was very concerned about their attempts to bias her and not have the Schwab's attorneys present during these attempts to sabotage the reintegration process. (Pg 51, 52 of complaint and Amended Complaint)

3. Threatening the Schwab's that she would make sure they never see their children again due to the Schwab's exercising their constitutional right to petition their government for a redress of grievances through public protesting and retaliating against them through presenting biased and false facts to the Court. (Pg 66 and 67 of complaint)

4. Near the end of the case completely abandoning her duties as Ad Litem to continue to fact find against the Schwab's and be the POC between the Court and the Schwab's as a type of mediator while leaving the Schwab children without any type of representation and continuing her pattern of lies, harassment, threats and fraud upon the Court through reporting bias and incorrect facts in an attempt to keep the CINC case going. (Pg 53 of Amended Complaint)

All of these activities were far outside the scope of her duties as Ad Litem, and the Schwab's even included an email stream as an exhibit where Ingles was attempting to spread misinformation about Mr. Schwab to his Family Therapist who was writing favorable reports to the Court. (Appendix VII)

In R.J.L. v. Mayer, 34 N.E. 3d 780 (Mass. App. Ct. July 24, 2015) (Vuono, Milkey, & Blake, JJ.), the court upheld the trial court's determination that a lawyer who

served as guardian ad litem did not en-joy blanket quasi-judicial immunity, and could be held liable for certain actions taken outside the scope of the appointment. Therefore, while the Schwab's understand that as Guardian Ad Litem Lora Ingles has immunity for her acts and services conducted within the scope of Ad Litem, their claims revolve around the deprivation of the Schwab's rights when she abandoned her role, and engaged in a pattern of slander, threats, intimidation and sabotage against the Schwab's and their service providers outside of her role as Ad Litem.

The Appellant's believe the Court recognized this in not dismissing the State charges against her, though the Court declined to hear those claims, yet the Appellant's believe the conduct rose to the level of depriving the Schwab's of Constitutional and Civil rights and the Federal claims should not have been dismissed against her.

F. Did the Court Err in Denying personal service to DCF defendants.

As Stated above, the Appellant's believed they had served the DCF defendant's, as originally the clerk placed that their attorneys entry of appearance was in professional and personal capacity, as was the case in the previous litigation. All of these Defendants; Gilmore, Suthers, Youxell, Freed, and Baker all were executive level State positions whose personal information is protected by law. The Schwab's were unable to re-serve them at their residence. The Plaintiff's requested of the Court if they could compel the Attorney for Kansas DCF, who was already representing these defendants and had put in an entry opf appearance, to provide addresses so that service could be perfected or waive

service. DCF denied to waive service and the Court denied the motion to compel.

Generally, courts have considered the due process requirements to have been reasonably met if the plaintiff at least substantially complies with the statutory provisions. McCall v. Gates, 354 Pa. 158, 47 A.2d 211 (Sup. Ct. 1946). Legislative rules as to service of process are in derogation of the common law and must be strictly construed. *Id.* at 161, 47 A.2d at 213.

In such cases, service will be upheld whether or not the defendant has received actual notice. Miedreich v. Lauenstein, 232 U.S. 236 (1914); *see* Walker v. Hutchison, 352 U.S. 112, 114-16 (1956) (Court holds that actual notice is to be given if feasible, noting there may be cases where it is not possible to give actual notice).

In contrast, in some relatively recent cases, courts have held service to be effective even with- out substantial compliance with statutory requirements, if the attempted method of service results in actual notice. construction theory is explained in *Karlssonv. Rabinowitz;*

> [W]here actual notice of the commencement of the action and the duty to defend has been received **by** the one served, the provisions . . . should be liberally construed to effectuate service and uphold the jurisdiction of the court, thus insuring the opportunity for a trial on the merits.

Karlsson v. Rabinowitz, 318 F.2d 666 (4th Cir. 1963); Rovinski v. Rowe, 131 F.2d 687 (6th Cir. 1942).

Instead of just denying the request the Court knew, or should have known that instead of providing the addresses the Court could have determined notice given, required the defendant's assign a legal agent, like their attorney who was representing them in professional capacity, where another copy of the litigation they had already been

served could be delivered. Instead the Court dismissed the defendant's claims in personal capacity while granting immunity for their professional roles played as State actors in the deprivation of the Schwab's civl rights.

CONCLUSION

"Government officials are required to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes 'reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.'" Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1106 (9th Cir. 2001) (quoting Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir.

The state's decision to take custody of a child implicates the constitutional rights of the parent and the child under the Fourteenth and Fourth Amendments, respectively. "Parents and children have a well-elaborated constitutional right to live together without governmental interference. That right is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency." Wallis, 202 F.3d at 1136 (internal citations omitted). "The claims of the parents in this regard should properly be assessed under the Fourteenth Amendment standard for interference with the right to family association."

All of these Defendant's conspired against the Schwab's to take their children, and then used fraud upon the Court, Deprivation of the right of due process, threats, manipulation of the legal process, slander, perjury and refusal to reintegrate the children as they were Court ordered as means to perpetuate the deprivation for three years.

At this stage the Schwab's do not need to prove their entire case and even the District Court claimed "When considering a motion to dismiss, the court accepts facts asserted by the Complaint as true and views them in the light most favorable to plaintiffs. ***Bu**rnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013) (citing *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009))."**.** However it appears to the Appellant's that the District court interpreted facts in the light most favorable to the defendant's, made rulings based on those facts, failed to accept the Plaintiff's amended pleadings though they were timely, and declined jurisdiction which was appropriately in its Court.

For the said reasons above we ask The Court should reverse the district court's decision and remand with instructions to accept the amended pleadings, and to move forward on the Plaintiff's claims against the appropriate defendant's.

/S/ _____ 6-27-2020

RAYMOND SCHWAB
In propria persona

/ S/ Amelia Schwab 6.27.2020

AMELIA SCHWAB
In propria persona

CERTIFICATES OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **10,035** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using **Microsoft Office Word** in **Times New Roman 14-point font**.

6-27-2020

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Certification of Service

The Plaintiff's hereby assert that service was made to the following individuals on June 27th 2020 via email. Not all defendant's have a notice of appearance on the Appeal Docket. Therefore we served via email all defendant's with the last known attorney, if there is no entry of appearance on Docket.

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