Case No. 20-5422

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WENDY HANCOCK, personally and as next friend for B.B.

Plaintiff – Appellant

v.

DEANDREA MILLER, ANGELA BROWN, TRACY HETZEL, MICHAEL COLLINS, JAMES CORNELIUS, MATTHEW HOLMES, RICHARD WILLIAMS, FANETHA SNEED, WENDOLYN MILLER, EASTER WILLIAMS, CHRISTA WILSON, CITY OF SMITHVILLE, and KEYS GROUP HOLDINGS, LLC

Defendants – Appellees

CORRECTED BRIEF OF THE APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The plaintiff, Wendy Hancock, is an individual person and not a corporation, nor does she have any affiliation with any corporation, therefore, no other disclosure is required.

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NATURE OF THE PROCEEDINGS

This case arises out of the Middle District Court of Tennessee on an action brought by the Plaintiffs for violations of constitutional rights under the Fourth and Fourteenth Amendments under 42 U.S.C. § 1983. The Plaintiff Wendy Hancock is the biological and legal parent of minor child B.B. She sued the listed state actors in her personal capacity and as "next friend" for the minor child asserting her rights in this case.

The Plaintiffs are (1) WENDY HANCOCK – Mother and (2) B.B. – minor child.

The Defendants are (1) DEANDREA MILLER - DCS investigator, (2) ANGELA BROWN - DCS case worker, (3) TRACY HETZEL - DCS attorney, (4) MICHAEL COLLINS - juvenile court judge, (5) JAMES CORNELIUS - detective, (6) MATTHEW HOLMES - detective, (7) RICHARD WILLIAMS - foster care review board, (8) FANETHA SNEED - foster parent, (9) WENDOLYN MILLER - foster home supervisor, (10) EASTER WILLIAMS - foster parent, (11) CHRISTA WILSON - foster parents, (12) CITY OF SMITHVILLE - employer of Defendants Cornelius and Holmes, and (13) KEYS GROUP HOLDINGS, LLC - foster care contractor for Sneed, W. Miller, and E. Williams.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The relationship between parent and child is constitutionally protected. *Troxel v. Granville,* 530 U.S. 57, 60 (2000). And yet, the district courts are seeing an increased number of cases brought under 42 U.S.C.§ 1983 for violations of those rights both on the procedural and substantive grounds.

As the cases have been published and relied on, the rights of families have been fractured. This case illustrates government overreach and infringements against those basic procedural due process right that should protect families from pre-hearing deprivation of rights.

It appears that the federal courts minimize the impact of family separation by referring on the "equally compelling interest" of the government to protect children from their parents set forth in *Kottmyer v. Maas,* 436 F.3d 684 (6th Cir. 2006) The result is a system in which "fairness" and even "due process" are muffled by the ever increasing arbitrary actions of child protective services, juvenile court systems, and law enforcement. And protections against lies and fabrications of evidence from state actors has far behind protection provided to criminals.

This case speaks to the need for this Court to recognize that the rights of family integrity are truly protected under the Fourth and Fourteenth Amendments.

Two legal issues echo in family rights litigation and this case. (1) the misapplication of the Rooker-Feldman doctrine in family rights cases and in light of

and (2) the wrongful limitations put on family rights cases under immunity and the mixed holdings of Sixth Circuit and various other circuits.

The issue of qualified immunity has lit the skies of civil rights litigation. Currently eight cases are on application to the United States Supreme Court on this court-made doctrine that truncates plaintiff's rights found under 42 U.S.C. § 1983. It was not long after its passage in 1964 that this Court started carving out immunities that have all but halted any victory in a civil rights claim. The "clearly established" limitation that gives the state actor a "pass" was not intended in this legislation and is not consistent with U.S. legal history.

In 2018, the United States Supreme Court narrowed a citizen's constitutional rights as it relates to police conduct, stating, "In the context of qualified immunity under 42 U.S.C. § 1983, the clearly established standard requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted. This requires a high degree of specificity. Courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. A rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that the rule was firmly established. In the context of a warrantless arrest,

the rule must obviously resolve whether the circumstances with which the particular officer was confronted constituted probable cause." *District of Columbia v. Wesby,* 138 S. Ct. 577, 580, 199 L.Ed.2d 453, 453 (2018)

In this case, the Plaintiffs would show that the qualified immunity conclusion was an error of the Court and that well-established principles of the Fourth and Fourteenth Amendment in the context of child welfare prevent a social worker state actor removing B.B. from her Mother's care.

The District Court made this statement, "*Indeed, if social workers could be held liable for violations of fundamental rights every time DCS took temporary custody of a child, the child welfare system would be turned upside down*." Order, RE. 122, PageID # 1004.

STATEMENT OF JURISDICTION

This appeal is made under FRAP 3 - Appeal by Right from a dismissal on a Rule 12 motion to dismiss all claims against all defendants. A Memorandum Order was entered by the District Court on March 27, 2020. Order, RE 122, PageID # 1001-1046. Appellant filed a timely appeal under the applicable appellate rules.

STATEMENT OF ISSUES

1. District court erred in denying the Motion to Exclude the interim order from the Juvenile Court, records in the Juvenile Court file, and the "Standing Order" of the Tennessee Supreme Court. RE 122, PageID # 1002 – 1003.

2. District Court erred in ruling dismissing "all claims" that arose out of the Ex Parte Order as precluded under the *Rooker-Feldman* doctrine. RE 122, PageID # 1019 – 1022.

3. District Court erred in dismissing Wendy Hancock' procedural and substantive due process claims for violations of her constitutional right of family integrity against Judge Michael Collins, and DCS investigator Deandrea Miller. RE 122, PageID # 1022, 1037 – 1044.

4. District Court erred in dismissing B.B.'s Fourth and Fourteenth Amendment rights for procedural due process violations and wrongful

seizure against Defendants M. Collins and D. Miller. RE 122, PageID # 1022, 1037 – 1044.

5. District Court erred in dismissing Wendy Hancock's Fourth Amendment and Fifth Amendment claims against Defendants Cornelius and Holmes. RE 122, PageID # 1012 – 1013; 1027 – 1032.

STATEMENT OF THE CASE

The Amended Complaint (FAC) was filed August 27, 2019 (RE 34, PageID # 204-256). Defendants Hetzel, Brown, D. Miller, and Wilson filed a Rule 12 Motion to Dismiss on September 24, 2019. RE. 50 & 51. Defendants Cornelius, Holmes, and City of Smithville filed on September 30, 2019. RE 61 & 62. Defendants Collins, Smith County, and R. Williams filed on October 3, 2019. RE 74 & 75.

In the D. Miller's Rule 12 Motion (RE 50 & 51), the Defendant filed four juvenile court documents. See RE 51, fn 9. These documents are referred to in the Amended Complaint. However, as admitted by these Defendants, the documents are not referenced to assert the truth of the allegations stated therein. RE 51, PageID # 339, fn. 5.

Defendants Collins, Cornelius, and Holmes also filed documents outside of the pleadings which Plaintiff sought to exclude and are the subject of Argument one below.

Defendant Deandrea Miller is a child protective services (CPS) investigator and employee of DCS. Defendant Michael Collins is the General Sessions / Juvenile court judge in Smith County. Defendants James Cornelius and Matthew Holmes are employed by the City of Smithville (Dekalb County) in law enforcement. FAC, RE 34, PageID # 205, 206, 210.

On August 6, 2018, Defendant Miller responded to the DCS referral of abuse as a child protective services investigator responsible for implementing and enforcing the policies of the department, including APP 14.12 and 14.7. RE 34, PageID # 215. Miller had been involved with Plaintiff Hancock in the 2017 and knew that Hancock was represented by counsel. Hancock's attorney had instructed Miller not to speak to Hancock outside of counsel's presence. RE 34, PageID # 218-19.

Miller's duty's in her investigative and administrative role, included conducting an interview with the alleged perpetrator (Plaintiff Hancock), conducting a home visit, requesting medical and psychological examinations. Under APP 14.12, the DCS investigators are required to "document thorough reasonable efforts to secure culturally sensitive, appropriate and available services to meet the needs of

the family and child/youth in order to prevent removal"….including "holding a child and Family Team Meeting (CFTM); or arrange for services to increase safety/reduce risk." Under Federal law, the state agency is required to make reasonable efforts to avoid removal of a child from a home. See CAPTA, 42 U.S.C. Sec. 671(a)(15). It was the duty of Defendant Miller and the right of Plaintiff Hancock to have these policies and administrative items addressed prior to the advancement of a petition unless there is an imminent risk of harm or an objective indication that the parent will flee with the child. APP 14.12. RE 34, PageID # 215.

On August 8, 2018, Plaintiff Mother went to the Smithville[1] Police Department to make a missing person's report on her son, not knowing that Defendants CW Miller[2] and Cornelius were secreting him away from her. Cornelius and Miller met Plaintiff in the lobby and quizzed her about her son. Cornelius then took Plaintiff Hancock upstairs and made her sign a Miranda warning. Cornelius never informed Plaintiff that she had been accused of any criminal activity. This was not a custodial interrogation. RE 34, PageID # 220.

On August 9, 2018, Plaintiff's attorney telephoned Miller and left her a message that Miller was not to speak to Hancock without her attorney present, but a

[1] Smithville is located in Dekalb County, Tennessee.
[2] There were two defendants with the last name of Miller. Deandrea Miller is the DCS investigator who is referred to herein as Miller. Wendolyn Miller is the Keys Holding Group, LLC supervisor. The dismissal of the claims against Wendolyn Miller are not being appealed.

meeting could be set up to address any safety issues. Miller never called back. RE 34, PageID # 220. When Miller acquired information from Plaintiff's son on August 9th, she did not seek immediate protection for her son, but waited four more days (until August 13th), secreting her son from Plaintiff without a court order. She exercised control over Plaintiff's son and kept him from returning home. RE 34, PageID # 228-229.

On Friday August 10, 2018, Cornelius called Plaintiff and told her that he had some information about her son, but that she had to come to the police department to get that information. After this phone call, Plaintiff contacted her attorney about the interview and call. Plaintiff's attorney called Cornelius and he refused to disclose the information he had about Plaintiff's son to her attorney. Plaintiff's attorney told Cornelius not to talk to Plaintiff again without her attorney present and asked him if there was any emergent information that Hancock needed to know about. Cornelius said 'no'. Plaintiff and her attorney offered to cooperate with the investigation. Over the weekend, August 11 and 12, neither Miller nor Cornelius made any efforts to contact Plaintiff or her attorney. RE 34, PageID # 220-221. Cornelius was acting in concert with CW Miller to trap Hancock with a warrant so her children could be taken from her. RE 34, PageID # 226.

On Monday, August 13, 2018, before the ex parte order was entered by Judge Collins, Miller received another voice message from Hancock's attorney asking for

a return call. Miller did nothing and made no attempts to contact Hancock's attorney. Hancock's attorney made multiple phone calls to the Dekalb County Juvenile Court clerk on August 13, 2018 to see if anything had been filed against her client and was told no until the last call at about 4 pm, when she was told that a petition was filed. No notice was provided to Plaintiff Mother or her attorney that an ex parte order had been entered. Her attorney asked that this be faxed to her office and the clerk refused to do so. Miller intentionally ignored the calls from her attorney and secreted the petition to Judge Collins in a neighboring county (Smith County) to secure an ex parte order of protective custody and body attachment, prior to even filing the petition with the Court in Dekalb County. RE 34, PageID # 221-222.

On Monday August 13, 2018, Plaintiff's attorney again called Cornelius and left a message to call her back and he did not call back. RE 34, PageID # 222.

The August 13, 2018 DCS Petition[3], sworn under oath by Defendant Miller and executed by Defendant Hetzel, stated that on August 9, 2018 Plaintiff's son contacted DCS and stated he was safe. C.B. was brought to the DCS office by his estranged Father who tested positive for meth. RE 34, PageID # 220. The petition, based solely on hearsay, alleged that Mother/Plaintiff Hancock was a drug dealer, a

[3] These Defendants filed under seal the DCS petition which Plaintiff now references. Plaintiff does not admit to the truth of the allegations. RE 53, Sealed.

drug addict, and physically abusive to her children. RE 34, PageID # 220. There are no allegations of physical or emotional abuse of B.B. Nor does the petition allege that B.B. is at immediate risk of harm. RE 34, PageID # 220.

Miller failed to disclosure in her sworn affidavit/petition that Mother's attorney had made several attempts to contact her and therefore deceived the Court when she sought the ex parte body attachment of B.B. The ex parte order, which says that the hearing will be held in Smithville, (Dekalb County) Tennessee, was never served on Plaintiff Hancock. RE 34, PageID # 223.

The DCS petition executed by Miller and Hetzel is dated August 13, 2018. The ex parte order and body attachment were entered on August 13, at 2:04 p.m. And the petition and orders were filed with the Court at 3:43 pm. Because of the failure to secure a proper transfer by designation order, Judge Collins never acquired jurisdiction, and therefore, the events of August 13 are NOT integral to the judicial process. And the orders entered by Defendant Collins are void. RE 34, RE 34, PageID # 222-223.

On August 13, 2018, Defendants Hetzel and Miller secreted a petition for ex parte relief to Defendant Judge Michael Collins for the purpose of concealing from Plaintiff that they intended to take her children into custody, even after Plaintiff Hancock had offered to cooperate with the investigation through her attorney. RE 34, PageID # 221-222. Instead of filing the petition in Dekalb County which had

proper jurisdiction over any action involving Plaintiff's children, Miller and Hetzel secretly took the unfiled petition to the neighboring county of Smith, where Judge Collins entered the ex parte order. It was only after getting the ex parte order entered that Miller and Hetzel filed the petition with the Dekalb County juvenile court clerk. RE 34, PageID # 222-223.

Judge Collins did not have an order of transfer, nor had the Dekalb County judge recused himself. RE 34, PageID # 224. Collins thereafter recused himself and was no longer involved in the case.

Miller, Hetzel, and Collins, then, participated in a preliminary hearing on Tuesday, August 14, 2019, with no notice to Plaintiff Mother or her counsel. The order was not in the court file on August 15, 2018. RE 34, PageID # 225.

Instead of returning a phone call to Plaintiff's counsel, Defendant Cornelius unlawfully pinged Plaintiff's cell phone and August 16, 2018 and caused the images of B.B. and Plaintiff to be publicly broadcast. Plaintiff alleges that Miller and Cornelius caused the images to be published. Cornelius has admitted under oath that he contacted T.B.I. to publish the endangered child alert. There was no evidence that B.B. was in immediate danger and Cornelius also admitted under oath that he had no set of facts which would substantiate that B.B. was endangered. RE 34, PageID # 226-228.

Plaintiff was arrested on August 16, in Middle Tennessee and Plaintiff B.B. was placed in state's custody and transported nearly 200 miles away from home. She was transported to Dekalb County and arrested on two misdemeanor warrants issued by Cornelius. These warrants were issued on August 10 even though Cornelius had informed Plaintiff's attorney that there were no emergent circumstances. RE 34, PageID # 227-229. Back in Smithville, Cornelius and Holmes did not give Plaintiff Hancock her Miranda warnings and she did not execute a waiver. Cornelius and Holmes interrogated Plaintiff after she was booked and charged with assault and contributing to delinquency of a minor. Even after Cornelius had been specifically instructed not to talk to Plaintiff without an attorney. Those statements of Plaintiff were used to prosecute her in Juvenile court and are now being used against her in criminal court. RE 34, PageID # 228.

The State of Tennessee dismissed the charge of assault against Plaintiff. RE 34, PageID # 237. The State of Tennessee Department of Children's Services dismissed the petition against the Mother and returned her child in June 2019. RE 34, PageID # 246.

Plaintiff alleges that Defendants Collins and Miller acted in concert to violate Plaintiff Mother's Fourteenth Amendment rights of substantive and procedural due process for the wrongful removal and retention of B.B. And that said acts also

violated the Fourth and Fourteenth Amendment rights of B.B. RE 34, PageID # 221-222.

Defendant Cornelius and Holmes violated the constitutional rights of Plaintiff Mother: (1) Fourth Amendment violation of pinging Plaintiff's phone without a search warrant and (2) Fifth Amendment violation of causing Plaintiff to give self-incriminating statement, custodial interrogation. Defendant Holmes participated with (acted in concert) with Cornelius in violating Plaintiff's Fifth Amendment rights.

The District Court dismissed these claims on the grounds of (1) the Rooker-Feldman doctrine for all claims that arose after the entry of the ex parte order, RE 122, PageID # 1019-1022, 1037; (2) granted Rule 12 dismissal on Plaintiff Hancock's Fifth Amendment claims stating that it does not apply to civil cases, RE 122, PageID # 1012-1013; (3) granted qualified immunity to W. Miller and Keys Group, RE 122, PageID # 1023-1027; (4) granted qualified immunity to Defendant Cornelius for the alleged Fourth Amendment violation of pinging her cell phone location, RE 122, PageID # 1027-1030; (5) granting absolute immunity to Hetzel, Miller, and Collins RE 122, PageID # 1037-1041, 1022 fn8.

SUMMARY OF THE ARGUMENT

Plaintiffs Hancock and B.B. are not appealing the dismissal of claims against Defendants Angela Brown, Tracy Hetzel, Sarah Cripps, Richard Williams, Fanetha

Sneed, Wendolyn Miller, Easter Williams, Christa Wilson, City of Smithville, and Keys Group Holdings, LLC.

Plaintiffs seek a reversal of the District Court on the claims brought against Deandrea Miller, Michael Collins, James, Cornelius, and Matthew Holmes for the Fourteenth Amendment substantive and procedural due process violations against Wendy Hancock, the Fourth Amendment unreasonable seizure violation and Fourteenth Amendment procedural due process violation against B.B., and the Fourth and Fifth Amendment violations against Wendy Hancock.

Plaintiff also seeks to reverse the District Court's denial of the Motion to Exclude documents filed by Defendants Collins, Cornelius, and Holmes of which the Court relied to establish "exigent circumstances" and delegated authority to Defendant Judge Michael Collins.

ARGUMENT

The standard of review for a Rule 12 motion is de novo. All well-pleaded material allegations of the plaintiff must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Id.* The Court construes the complaint in a light most favorable to the plaintiff, accepts all factual allegations as true, and determines whether the complaint states a plausible claim for relief. *Albrecht v. Treon*, 617 F.3d 890, 893

(6th Cir. 2010), (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *LULAC v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007)).

Applying the pleading requirements outlined in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007), and *Iqbal* to Rule 12 motions, plaintiffs must "plead ... factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." When considering a Rule 12 motion, the Court need not accept as true legal conclusions or unwarranted factual inferences. However, "[i]f it is at all plausible (beyond a wing and a prayer) that a plaintiff would succeed if he proved everything in his complaint, the case proceeds." *Brooks v. Spiegel,* No. 1:18-CV-12, 2018 U.S. Dist. LEXIS 190252, at *5-6 (E.D. Tenn. Nov. 7, 2018) (internal cites omitted).

1. District court erred in denying the Motion to Exclude the interim order from the Juvenile Court, records in the Juvenile Court file, and the "Standing Order" of the Tennessee Supreme Court. RE 122, PageID # 1002 – 1003.

Defendants Cornelius, Holmes, and City of Smithville filed a Rule 12 Motion and Memorandum to Dismiss. RE 61, Page ID # 431,436; RE 70, Sealed. Plaintiff filed a Motion to Exclude documents that Defendants Cornelius, Holmes, and City of Smithville included with their motion to dismiss. RE 84, PageID # 595-602. Plaintiff sought to exclude Exhibit 3 a "permanency plan" prepared by the Department of Children's Services; Exhibit 4, a juvenile court order of March 20, 2019; and Exhibit 7, a "standing order" captioned, "In the Supreme Court of

Tennessee, In Re: Standing Order for the Designation of Substitute Judge/Dekalb General Sessions Court/13th Judicial District." Plaintiff also filed the public policy of the Administrative Office of the Courts #4.02, regarding the designation of substitute judges. RE 90, PageID # 656-692.

Defendant Collins filed a Rule 12 Motion and Memorandum to Dismiss wherein he attached a copy of a "standing order" from the Tennessee Supreme Court regarding Judge Bratton Cook. RE 75, PageID # 532-558.

The DCS Defendants (including D. Miller and Hetzel) filed under seal four documents directly related to the claim and referenced in the Complaint, i.e., (1) the underlying petition, (2) the ex parte order, (3) the preliminary hearing order, and (4) the order of recusal of Judge Michael Collins. RE 53, 54, 55, & 56. These documents were relevant to the Amendment Complaint, however none of these documents contained judicially noticed facts under Fed. R. Evid. 201.

A. DISTRICT COURT RULING

The District denied the Motion to Exclude finding that they were "public records" and took judicial notice under Fed. R. Evid. 201. RE 122, PageID # 1002. The District Court claimed that Plaintiff offered no authority or reasoned argument that the Juvenile Court order presented by the Defendant was not a "final order" and therefore could not be adopted as adjudicated facts. Id. Plaintiff argued that

documents filed by the Defendants were "confidential" and therefore were not "public records" and that the interim juvenile court order was not a final order subject to judicial notice. The Court disagreed and claimed that because the state Circuit Court permitted use of these records[4] that Defendants were permitted to file and rely in the records in their Rule 12 motion. Id. The District Court relied on *Barany-Snyder v. Weiner,* 539 F.3d 327, 4332 (6th Cir. 2008) (matters of public record may be considered in a motion to dismiss), and *Wyser-Pratt Mgmt. Co., Inc., v. Telson Corp.*, 413 F.3d 553, 560 (6th Cir. 2005) (the court may consider other material integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice.)

The District Court erred by allowing and relying on these exhibits which Defendants admitted in its Motion to Seal that the records were confidential pursuant to "Tenn. Code Ann. §§ 37-5-107, 37-2-408, and other applicable laws and regulations." RE 62, PageID # 444.

B. LEGAL STANDARD

Fed. Civ. P. 12(d) provides that when a motion filed under Rule 12(b)(6) or 12(c) that the submission of documents and materials outside the pleadings would

[4] This matter is on appeal in the Tennessee Court of Appeals, Case No. M2019-02139-COA-R3-JV, Middle District. The rule in Tennessee is that a judgment is not final and *res judicata* where an appeal is pending. *Creech v. Addington,* 281 S.W.3d 363, 377 (Tenn. 2009)

convert the motion to a Rule 56 summary judgment. However, this Rule is not absolute, and it will not be converted if the attached materials are: (i) referred to in the plaintiff's complaint and are central to the claims or (ii) matters of public record." *Kassem v. Ocwen Loan Serv., LLC*, 704 F. App'x 429, 432 (6th Cir. 2017).

However, prudence and precision are warranted when a party submits extra-pleading evidence in connection with a Rule 12(c) motion because "the mere presentation of evidence outside of the pleadings, absent the district court's rejection of such evidence, is sufficient to trigger the conversion of a Rule 12(c) motion to a motion for summary judgment." *Max Arnold & Sons, LLC v. W.L. Hailey & Co., Inc.*, 452 F.3d 494, 503 (6th Cir. 2006).

C. JUVENILE COURT RECORDS ARE NOT PUBLIC RECORDS AND NOT APPROPRIATE FOR JUDICIAL NOTICE

This matter arises out of the Juvenile Court of Dekalb County, Tennessee. The records and files in Juvenile Court proceedings are not public records and are controlled by Tenn. Code Ann. § 37-1-153 which states that "all files and records of the court in a proceeding under this part are open to inspection only by…" Those permitted to have access to the records are the judge, officers, and professional staff of the court; the parties to the proceeding and their counsel; an agency providing supervision or having custody of the child under court order; court and probation officers; and with permission of the court any other person or agency with a legitimate interest in the proceeding. Section (d) states that a violation of this section

shall be punished as criminal contempt. There is no dispute that the Defendants named in this Motion were NOT parties to the underlying juvenile court proceedings.

Exhibit 3 – Family Permanency Plan. This document is not a public record or central to the Plaintiff's claims. Further, this document is a DCS record which is not a public record. RE 65, Sealed. The records of DCS, including the permanency plans, are confidential under Tenn. Code. Ann. § 37-5-107. This is NOT an adjudication of the facts and is not appropriate for judicial notice upon which these Defendants can rely in a Rule 12(d) motion. Fed. R. Evid. 201(b) cannot be applied.

Exhibit 4 – Adjudicative Order dated March 20, 2019. This document is not a public record nor central to the Plaintiff's claims. Under Tennessee law, this order is of no force or effect and cannot be considered by the Court as adjudicative facts under Fed. R. Evid. 201(b), nor can it be used for any preclusive effect, collateral estoppel or otherwise since this order was negated by the de novo appeal. RE 66, Sealed.

Tenn. Code. Ann. § 37-1-159(a) provides that an adjudication from the juvenile Court may be appealed de novo to the Circuit Court. Although, this appeal does not stay the application of the disposition in Juvenile Court, the findings and conclusions are NOT final and subject to dismissal in the Circuit Court. In this case, the Plaintiff appealed this adjudication and, as evidenced by the Defendant's Exhibit

5, the case was dismissed, and Plaintiff's children were returned to the Mother. RE 67, Sealed.

In *Green v. Green*, M2007-01263-COA-R3-CV, pgs. 24-25 (Tenn. Ct. App. Feb. 11, 2009) the Court defined the status of the proceedings when a de novo appeal has been perfected. A Circuit Court's trial de novo of a case originally initiated in juvenile court, under Tenn. Code Ann. § 37-1-159(a) is analogous to a circuit court trial in an appeal of a case originally initiated in general sessions court, which also requires a de novo trial. There is essentially "no difference in the effect of an appeal from general sessions court for a trial de novo and the effect of an appeal from juvenile court for a trial de novo. The matter is tried in circuit court as if no other trial had occurred. The final order was dismissal of the action in Circuit Court.

RE 66, Sealed Exhibit 4 is NOT a final order. The defendants also attached to their motion, the Circuit Court Order which dismissed the petition filed by DCS in June 7, 2019 as a result of Plaintiff's de novo appeal pursuant to Tenn. Code Ann. § 37-1-159. The final order of dismissal supersedes the adjudication of March 20, 2019 rendering it moot and without force or effect. RE 67, Sealed Exhibit.

In *Starlink Logistics, Inc. v. ACC, LCC,* 1:18-cv-00029, (M.D. Tenn. June 3, 2019), the Court discussed the use of court documents from other proceedings in a Rule 12 motion. The Court states that the Court may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial

court's territorial jurisdiction, or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b)(2). The party requesting judicial notice bears the burden of persuading the court that a particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source whose accuracy cannot reasonably be questioned. In *Starlink*, the Court said that the two court orders (from other litigation) were not final orders and therefore, they were not appropriate for stipulation. While a court may take judicial notice of the existence of court documents and the proceedings in which those documents were generated, federal court do not generally take judicial notice of the truth of any statement of fact contained within those documents. (quoting *Derrico v. Moore,* 1:17CV866 (N.D. Ohio Apr. 25, 2019) A court may take judicial notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation. (quoting *Zurich Am. Ins. Co. v. Southern-Owners Ins. Co.* 314 F. Supp. 3d 1284 (M.D. Fla. 2018)) A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings. Judicial noticing documents in the court's file does not include noticing the truth of the facts asserted in each document.

D. THE ASSUMPTION THAT THE STANDING ORDER PROVIDED JUDICIAL AUTHORITY FOR COLLINS IS OUTSIDE THE PLEADINGS AND SUBJECT TO REASONABLE DISPUTE

The District Court ruled that the "standing order" is a public record and provided Smith County Defendant Collins with sufficient authority over a Dekalb County Juvenile Court case. RE 122, PageID # 1003, 1005

RE 69, Sealed Exhibit 7 – Standing Order dated September 30, 2016[5]. This document is not a public record, and although it may have relevance, it is not conclusive for the purposes of Fed. R. Evid. 201(b).

These defendants relied on a "Standing Order" which is captioned "IN THE SUPREME COURT OF TENNESSEE / IN RE: Standing Order for the Designation of Substitute Judge / Dekalb County General Sessions Court / 13th Judicial District."

This order is stamp-filed by the Circuit Court Clerk September 30, 2016. RE 86, Exhibit 1. No evidence was presented that it was received or applied to the underlying case in juvenile court for which the relevant period is as alleged in the Amended Complaint, i.e., August 13, 2018 through August 20, 2018. FAC RE 34, PageID # 222-227.

[5] To the extent this "Standing Order" has been relied on by any other defendants, it should also be excluded. RE 74 & 75 (Rule 12(d) Motion filed by Defendants Collins, Smith County, R. Williams); RE 50 & 51 (Rule 12(d) Motion to Dismiss filed by Defendants Hetzel, D. Miller, A. Brown, C. Wilson).

The Plaintiff has not referenced this Standing Order in the Amended Complaint and does not adopt its relevance. The Plaintiff alleged that Smith County Defendant Judge Michael Collins acted in clear absence of jurisdiction when he signed an ex parte order for a Dekalb County case. FAC RE 34, PageID # 207. Even if this Court finds that the standing order was valid, the defendant must demonstrate that Dekalb County Judge Cook was "unavailable or recuses himself". Plaintiff also filed the policy of the Administrative Office of the Courts. 4.02 which required an order of designation when a judge is not available, this never occurred. Plaintiff discusses in Argument 3, Section A below that Judge Collins actions were taken in clear absence of jurisdiction and therefore, he is not entitled to assert judicial immunity. Until Collins can demonstrate that Judge Cook was not available on August 13, 2018, the "Standing Order" has no application. The District Court adopted the "Standing Order" as a public record and allowed Collins to escape liability.

E. THE EXCLUSION OF THE DOCUMENTS NEGATES THE COURT'S CONCLUSION EXIGENT CIRCUMSTANCES EXCUSES PINGING PLAINTIFF HANCOCK'S PHONE

The District Court granted qualified immunity to Defendants Cornelius and Holmes for pinging Plaintiff Hancock's phone to secure her location stating that the Defendants were pursuing Hancock and her daughter pursuant to the ex parte order and that Cornelius was "arguably" pursuing Hancock pursuant to outstanding

criminal warrants. RE 122, PageID # 1027. The Court granted Cornelius qualified immunity claiming that Judge Collins' ex parte order "found a threat" to B.B.'s safety, and identified "valid concerns" that B.B. may be taken out of the jurisdiction. RE 122, PageID # 1029. These conclusions were drawn from the inadmissible Juvenile Court adjudicatory order which must be stricken from the Rule 12, i.e., RE 66 Sealed, Exh 4.

Def. Cornelius and Holmes argued for dismissal of the Fourth Amendment violation because exigent circumstances existed on August 16, 2018. Defendants quotes the adjudicatory order finding that that child was an "endangered child." Reliance on the statement in this document is in error and should be stricken this removes any "exigent circumstances" on the Fourth Amendment claims. RE, Def. Mo. (Sealed) pgs. 14-18.

The District Court stated, "Federal Rule of Evidence 201, which governs judicial notice contains none of the restrictions Hancock suggest." RE 122, PageID # 1002. However, Rule 201 only covers "facts not subject to reasonable dispute" that can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Id.

Courts may take judicial notice of public records. A court that is ruling on a Fed. R. Civ. P. 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of

judicial notice. This includes judicial opinions and court filings in other cases. The ability to take judicial notice is not unlimited. A high degree of indisputability is the essential prerequisite for taking judicial notice. As Fed. R. Evid. 201(b) states, the facts must be susceptible to accurate and ready determination from sources whose accuracy cannot reasonably be questioned. … Additionally, this exception does not permit courts to accept the truth of the facts noticed, but only to establish their existence. *Geiling v. Wirt Fin. Servs.,* No. 14-11027, 2014 U.S. Dist. LEXIS 183237, at *1 (E.D. Mich. Dec. 31, 2014)

F. STATE COURT'S PERMISSION TO USE THE JUVENILE COURT RECORD

The State Court (Circuit) said the juvenile records were relevant and permitted the defendants to use the documents. This ruling is contrary to Tennessee law and is on appeal. See *State v. Harris*, 30 S.W.3d 345 (Tenn. Crim. App. 1999).

Notwithstanding, the Circuit Court ruling[6], the documents still cannot be permitted in this Court as stipulated facts and must be excluded from consideration of Defendants' Rule 12 Motion.

Defendants have not established, under any theory, how RE, 65, Sealed Exhibit 3 (permanency plan) or RE 69, Sealed Exhibit 7 (standing order) are either adjudicated facts or public records, therefore, they must be excluded by this Court.

[6] Which is subject to appeal under Tenn. R. App. Proc. 3.

This Court must conclude that it was an abuse of discretion to permit the Defendants from relying on (1) the March 20, 2019 adjudicative order which was not a final order from which the Court could take Fed. R Evid. 201 judicial notice; (2) that the permanency plan is not a public record nor is it a document which is competent to established adjudicated facts; and (3) the standing order upon which they rely to give Defendant Judge Michael Collins jurisdiction to enter an ex parte order. Or in the alternative, this Court should find that allowing the Defendant to include references to these documents, that the Rule 12 motion was converted to a Rule 56 and further discovery should have been allowed. The removal of these documents removes (1) any defense of exigent circumstances upon which the Defendant may rely; and (2) any jurisdiction the Smith County Judge Collins could exercise in the execution of the ex parte order.

2. District Court erred in ruling dismissing "all claims" that arose out of the Ex Parte Order as precluded under the *Rooker-Feldman* doctrine. RE 122, PageID # 1019 – 1022.

The District Court erred in dismissing the (1) Fourth Amendment claim for seizure of children under the Ex Parte Order, (2) Fourteenth Amendment procedural due process claims concerning the removal of the child and participating in hearings without notice pursuant to the Ex Parte Order; (3) Fourteenth Amendment substantive due process claims concerning removal of the child pursuant to the Ex Parte Order, including the claim based on the HPV vaccine given to B.B. finding

that these claims all challenged the "substance and authority" of the Ex Parte Order and were precluded by the Rooker-Feldman doctrine. RE 122, PageID # 1019 – 1022. Simply put, the Rooker-Feldman doctrine prevents the District Court from acting as an appellate court over the final state court decision[7]. That is not the case in *Hancock*.

RE 122, PageID # 1022 – The District Court dismissed all claims against Collins. See fn 8.

RE 122, PageID # 1027 – The District Court stated that "it is likely" that Plaintiff's claim of a Fourth Amendment violation for pinging her phone was precluded by the Rooker-Feldman doctrine because Cornelius was pursuing Hancock and her daughter pursuant to the Ex Parte Order at the time this occurred.

RE 122, PageID # 1037 – The District Court stated that the investigation and petition for the ex parte order are subject to Rooker-Feldman doctrine and any claims based on the conduct of Hetzel and Miller thereto are barred. However, the events

[7] The District Court held that the events that occurred "prior" to the entry of the ex parte order were not precluded by the Rooker Feldman doctrine, i.e. (1) making false and misleading claims, (2) taking the petition to Judge Collins (rather than Judge Cook) in bad faith; (3) failing to respond to Mother's counsel during the investigation; (4) initiating the removal proceedings in retaliation against Hancock, (5) withholding exculpatory evidence; and (6) improperly controlling Hancock's son. RE 122, PageID # 1037. Plaintiff includes a claim that the ex parte order was was a procedural and substantive due process violation. This claim should not be barred by the Rooker Feldman doctrine.

that occurred prior to it being entered by Judge Collins, are not precluded by the Rooker-Feldman doctrine. Order RE 122, PageID # 1037 – 1043.

The District Court directly erred in is direct reference to two unpublished cases. Both *Reguli v. Guffee,* 371 Fed. Appx. 590 (6th Cir. Mar. 31, 2010) (Not recommended for full-text publication) and *Cunningham v. Davenport,* No. 3:19-cv-00501, (M.D.Tenn. Jan. 23, 2020) (a matter on appeal to the Sixth Circuit, Case No. 20-5216) were these cases substantially different. This misdirected the Court's attention from this Court recent decision of *Vanderkodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397 (6th Cir. Feb 26, 2020). The Sixth Circuit stated that the Rooker-Feldman doctrine barred lower federal courts from conducting appellate review of the final state court judgments and it prevents a party from re-litigating a matter previously litigated in state court. *Vanderkodde*, 951 F. 3d, at 402. In *Vanderkodde*, the concurring opinion explained that the "inextricably intertwined" language of Feldman was limited by the Supreme Court decision of *Exxon*, where Justice Ginsburg emphasized the "narrow ground" the two decisions (Rooker & Feldman) occupy. In *Exxon*, the Court determined that Rooker-Feldman applies ONLY to litigants who side-step 28 U.S.C. § 1257 (giving only the US supreme court juris over state court final decision) by trying to vacate or reverse final state court decisions in federal district court: namely, only to cases brought by state court losers complaining of injuries cause by state court judgements rendered before the district

court proceedings commenced and inviting district court review and rejection of those judgments. The key words are review and judgments. The doctrine does not apply to federal lawsuits presenting similar issues to those decided in a state court case or even to cases that present exactly the same, and thus the most inextricably intertwined issues.

The plaintiffs are not seeking relief (or damages) from a final state court decision. *See Rooker v. Fidelity Trust Co.* 263 U.S. 413 (1923); *Marshall v. Bowles,* 92 F.App'x 283 (6th Cir. 2004). Plaintiff's allegations involved the procurement of an ex parte order causing the removal of her children from her constitutional right to the care and control of her children and the conduct of the state actors, before and after the procurement of the ex parte order, before a final ruling was even rendered. In fact, the ultimate decision in the state court proceeding was a dismissal of the action and the return of her children. The plaintiff needs no relief from the final state court decision. FAC RE 34, PageID # 220-231; 246.

The application of the *Rooker-Feldman* doctrine is subject to limitations. In *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., the Supreme Court recognized that the *Rooker-Feldman* doctrine is a narrow jurisdictional bar to litigation where the losing party "repairs to federal court to undo the [state court] judgment in its favor." The Supreme Court cautioned that "*Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow

federal courts to stay or dismiss proceedings in deference to state-court actions." The Supreme Court noted that, "[i]f a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion[8]." An important factor in *Exxon Mobil* is that the plaintiff was not seeking to overturn the state court. See also *Feiger v. Ferry,* 471 F.3d 637, (6th Cir. 2007)

Even before the *Exxon Mobile* decision (2005), the Sixth Circuit had found that where the federal plaintiff asserted that his procedural due process rights were violated during the course of his divorce proceedings that his civil rights action was not barred by the *Rooker-Feldman* doctrine. *Catz v. Chalker,* 142 F.3d 279 (6th Cir. 1998). Then in 2015, the Sixth Circuit found that the plaintiff's alleged constitutional injury did not come from the state court judgment but instead from the conduct of the individuals who happened to participate in that decision and the civil rights action was not barred by the *Rooker-Feldman* doctrine. *Alexander v. Rosen,* 804 F.3d 1203 (6th Cir. 2015)

[8] Tennessee case law would NOT preclude Hancock from bringing this claim against the Defendants under the preclusion doctrine. Claim preclusion, bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit. *Creech v. Addington,* 281 S.W.3d 363, 376 (Tenn. 2009)

In 2010, the Sixth Circuit reversed the District Court's dismissal on the Rooker Feldman doctrine under similar circumstances. *Kovacic v. Cuyahoga County Dep't of Children & Family Servs.,* 606 F.3d 301, 308-311 (6th Cir. 2010) The Sixth Circuit rejected the Defendant's "source of injury" and "inextricably intertwined" arguments where the Plaintiffs brought civil rights claims against social workers' actions that "lead up to the juvenile court's decision to award temporary custody to the County." The Court also looked to *Brokaw v. Weaver*, 305 F.3d 660 (7th Cir. 2002) which also denied dismissal on the Rooker Feldman doctrine where the defendants conspired to cause false child neglect proceedings to be filed. As in Kovacic, Plaintiffs Hancock and B.B. do not seek a reversal of the decision of the juvenile court order, but focus on the actions of the defendants and seek compensatory damages for the unconstitutional conduct, relief not available to her in the juvenile court proceedings.

Of course, there is an assumption that due process has been well-served in the Rooker Feldman doctrine. If indeed a litigant that been able to full litigate an action taken against them, being given the basic rights of notice and opportunity to be heard; and full access to the trial and appellate process, then slipping into Federal Court to attempt to get a "second bite of the apple" should indeed be halted. However, an "ex parte" and "interlocutory" order lacks both. This process which more resembles the issuing of a warrant than litigation, strips persons of rights,

including unlawful seizure as to the child, and interruption of the family unit without process. The ultimate result of the legal process in Hancock was a complete dismissal, Plaintiff is not seeking relief on the dismissal of her case.

A dismissal of this action under the Rooker Feldman doctrine would deny Plaintiff Hancock of her right to litigate her civil rights claims against the state actors.

3. District Court erred in dismissing Wendy Hancock' procedural and substantive due process claims for violations of her constitutional right of family integrity against Judge Michael Collins, and DCS investigator Deandrea Miller. RE 122, PageID # 1022, 1037 – 1044.

The District Court erred in the dismissal of Hancock's claims for procedural and substantive due process. The dismissal based on reliance on the Rooker-Feldman doctrine is discussed above. Plaintiff Hancock appeals the dismissal of these claims as follows:

A. THE DISTRICT COURT ERRED IN GRANTING ABSOLUTE PROSECUTORIAL IMMUNITY TO DCS INVESTIGATOR D. MILLER AND JUDGE MICHAEL COLLINS.

The District Court found that Judge Michael Collins was entitled to absolute judicial immunity in that his action, at most, were in "excess of jurisdiction" and not "in all absence of jurisdiction." RE 122, PageID # 122, fn. 8.

The District Court found that D. Miller and T. Hetzel were entitled to absolute prosecutorial immunity because they were engaged in legal advocacy when she investigated, prepared, presented, and offered evidence in support of the DCS

removal petition that resulted in the Ex Parte Order, regardless of whether they made false statements, material omissions, withheld exculpatory evidence, or acted outside of their jurisdiction by taking the petition to Judge Collins[9]. RE 122, PageID # 1040-41.

The District Court granted this blanket dismissal based on absolute immunity on the (1) Fourteenth Amendment procedural and substantive due process claims of Plaintiff Hancock, and (2) the Fourth and Fourteenth Amendment claims of Plaintiff B.B. RE 122, PageID # 1040.

a. Judge Michael Collins is not entitled to absolute judicial immunity.

The Plaintiff argued that the ex parte order entered by Judge Michael Collins was done in the clear absence of jurisdiction and was therefore void, and that Defendant Miller had intentionally secreted herself to the neighboring Smith County, even prior to filing her petition with the Dekalb County Juvenile Court clerk to conceal her actions. RE 34, PageID # 222.

(1) Juvenile Court is a Court of special and limited jurisdiction.

The Tennessee Constitution Art. VI, Sec. 1 vests the power in the Tenn. General Assembly to ordain and establish inferior courts and (Sec. 8) to establish the

[9] *Brent v. Wayne Cnty. Human Servs.,* 901 F3d 656 (6th Cir. 2018); *Bauch v. Richland Cty. Children Servs.,* 733 F. App'x 292, 297 (6th Cir. 2018); *Pittman v. Cuyahoga Co. Dep't of Children & Family Servs.*, 640 F.3d 716,724 (6th Cir. 2011); *Barber v. Miller,* 809 F.3d 840, 843 (6th Cir. 2015).

jurisdiction of inferior courts, "until changed by the legislature." The Tennessee Juvenile courts are courts of limited and special jurisdiction[10]. These juvenile courts are creations of the Tennessee legislature and were not known in common law. They may exercise only such jurisdiction and powers as have been conferred on them by statute. *Green v. Green,* M2007-01263-COA-R3-CV, pg. 11. (Tenn. Ct. App. 2009). The juvenile courts are limited in their jurisdiction to (1) its geographic boundaries of their county; and (2) matters that can be brought before it as outlined in Title 37. The establishment of juvenile courts is found in Tenn. Code. Ann. Sec. 37-1-201 et seq in which juvenile court jurisdiction may be placed with the general sessions judge or by special district juvenile courts. The jurisdiction of General Sessions is limited to that set out by statute. *Wells Fargo Bank, N.A. v. Dorris,* 556 S.W.3d 745 (Tenn. Ct. App. 2017)

The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States and is inflexible without exception. *United States v. Yeager,* 303 F.3d 661 (6th Cir. 2002)

(2) Jurisdiction under a dependent and neglect action.

[10] This Court is required to take judicial notice of the statute and case law of each of the states." *Schultz v. Tecumseh Prods.*, 310 F.2d 426, 433 (6th Cir. 1962) (citations omitted); *see also Lamar v. Micou*, 114 U.S. 218, 223 (1885) ("The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.").

The General Assembly has established that juvenile courts have exclusive and original jurisdiction over all cases seeking a finding of dependent and neglect of a minor child. Tenn. Code. Ann. § 37-1-103(a). Venue is established in the (1) county where the child resides, or (2) the county where the child is located when the action is commenced. Tenn. Code Ann. § 37-1-111. Tennessee courts have long held that where venue is localized in a particular county, venue and subject matter jurisdiction are synonymous. *Inter-Southern Life Ins. Co. v. Pierce,* 31 S.W.2d 692 (Tenn. 1930); *Curtis v. Garrison*, 364 S.W.2d 933 (Tenn. 1963); *Norton v. Everhart*, 895 S.W.2d 317 (Tenn. 1995).

DCS asserted in their verified dependent and neglect petition executed by Defendants Hetzel and Miller, that the minor child, B.B., resided in Dekalb County. Therefore, the Dekalb County Juvenile Court judge (Judge Cook) was the ONLY juvenile court with authority and jurisdiction in the underlying proceeding.

(3) Tennessee courts recognize the limitations of juvenile court jurisdiction.

The Tennessee Courts have examined the limitations of jurisdiction in proceedings that arise out of juvenile courts many times, stating:

- The lack of subject matter jurisdiction is so fundamental that it requires dismissal whenever it is raised and demonstrated. Juvenile courts have special and limited jurisdiction. *In re Brody S.,* M2015-01586-COA-R3-JV, (Tenn. Ct. App. 2016)

- The jurisdiction of juvenile courts is derived entirely from the statute creating it. The jurisdiction of the subject matter is conferred by the constitution and statutes. Subject matter jurisdiction cannot be

conferred by the parties or be waived. A court cannot confer subject matter jurisdiction on another court. Tenn. Const. art. 6, § 1 grants the legislature the power to determine how many and what kinds of courts are required for the administration of justice and the power to fix the limits of each court's jurisdiction. *In re H.N.K.*, M2005-02577-COA-R3-PT (Tenn. Ct. App. 2006)

- Juvenile court are courts of record with special and limited jurisdiction. *In re McCloud,* 01-A-01-9212-CV-00504, (Tenn. Ct. App. 1993)

- Subject matter jurisdiction cannot be conferred or enlarged by agreement and its lack may be raised at any stage of the proceeding. *In re Z.M.B.,* E2004-00380-COA-R3-JV (Tenn. Ct. App. 2005), referring to juvenile court jurisdiction.

Defendant Judge Michael Collins executed an ex parte order violating the familial rights of Plaintiffs Hancock and B.B. On August 13, 2018, he did not have nor did her every acquire prior to the execution of that order the power and authority to do so. Therefore, he acted in clear absence of jurisdiction.

(4) Defendant Judge Michael Collins acted in clear absence of all jurisdiction in his execution of the ex parte removal order and body attachment on August 13, 2018.

In *Stump v. Sparkman*, the Court held that the judge was immune for his actions taken under his "broad, general jurisdiction" when he ordered the sterilization of a young disabled woman, stating that there was no law specifically denying him the ability to order this relief. *Stump v. Sparkman*, 435 U.S. 349, 360 (1978)

In the case at bar, the power and jurisdiction of Defendant Collins is neither "*broad*" nor "*general*." Where in *Stump*, the Court held that the absence of law (on involuntary sterilization) allowed the judge to avoid liability, here, the law is in place which provides for the limitations on jurisdiction.

In *King v. Love,* 766 F. 2d 962, (6th Cir. 1985) the Court stated that "We acknowledge that a plaintiff will often find it easier to prove that a judge of a court of limited jurisdiction acted in the clear absence of all jurisdiction than a judge of a court of general jurisdiction because the subject matter jurisdiction of a court of limited jurisdiction often is unambiguously defined by statute." The Sixth Circuit found that the Memphis City Court had concurrent jurisdiction with criminal courts and general sessions courts over misdemeanor cases and that the city court judge had the power of contempt over his court. Therefore, the Defendant Judge in *Love* had *exceeded his jurisdiction*, but had not acted in clear absence of jurisdiction (or without jurisdiction over the subject matter).

A judge acts in clear absence of all jurisdiction if the matter upon which he acts is clearly outside the subject matter jurisdiction of the court over which he presides. *Stump v. Sparkman,* 435 U.S. 349, 357 (1978); *Bradley v. Fisher,* 80 U.S. 335, 351 (1871). A judge of general jurisdiction as well as a judge of limited jurisdiction enjoy absolute immunity from an action for damages if he exceeds his

authority in resolving a matter over which his court has subject matter jurisdiction. *King v. Love,* supra.

Plaintiff asserts that Defendant Judge Michael Collins lacked subject matter jurisdiction at the time he entered the ex parte order on August 13, 2018 on two independent grounds. First, the petition was presented to him before it was even filed with the Court and therefore lacked legal effect. Under Tennessee juvenile law, the action is commenced with the filing of the petition. Tenn. Code Ann. § 37-1-108 and Tenn. Juv. Proc. Rule 103. Second, Defendant Collins had not acquired jurisdiction by interchange, recusal, or transfer from the Dekalb County juvenile court. Therefore, on August 13, 2018 at 2:04 pm when he entered the ex parte order and protective custody order, he was acting in clear absence of jurisdiction.

Plaintiff would show that Defendant Miller's failure to "file" the petition with the Court Clerk prior to obtaining the ex parte order from Defendant Collins rendered this to a "non-judicial" act or in the alternative this Court may find that his actions to be in clear absence of jurisdiction. And absolute immunity should be denied.

As stated above, both Tennessee law and Juvenile Court rules describe the "commencement" of a case as the filing of the petition with the clerk. Plaintiff would argue that without the requisite filing of the petition with the court clerk, the documents presented to Collins were without legal effect. Plaintiff has alleged that

this was done intentionally so that Defendants Hetzel and Miller could secret the ex parte order from the Plaintiff Mother and her counsel until it was secured.

There is ample legal authority regarding the "filing" of a complaint or petition as the commencement of the legal status of the action:

- In a proceeding in rem, exclusive jurisdiction attaches when the bill is **filed,** and process has been issued. *Sharp v. Bonham,* 213 F. 660, 661 (M.D.Tenn. Aug. 9, 1913)
- Jurisdiction is tested by the facts as they exist **when an action is brought**. *J.P. v. Taft,* 2:04-cv-692, 2005 U.S. Dist LEXIS 21708 (E.D.Ohio Sept. 29, 2005)
- The timely **filing** of a notice of appeal in General Sessions establishes jurisdiction in the Circuit Court. *Wells Fargo Bank, N.A. v. Dorris,* 556 S.W.3d 745 (Tenn. Ct. App. 2017)
- The "first-to-file" rule considers the proper jurisdiction when two separate, but identical issues are **filed** in different courts. *In re DPL, Inc. Sec. Litig,* 285 F. Supp. 2d 1053 (S.D. Ohio Aug. 4, 2003)
- The statute of limitations is also governed by the timing of the **filing** of a complaint in relation to when the injury occurred. *Hunley v. Glencore, Ltd.*, 3:10-cv-455, 2012 U.S. Dist. LEXIS 43754 (E.D.Tenn. Mar. 29, 2012)

Even Black's Law Dictionary, states that to "**file**" is to commence a lawsuit and delivery to the court clerk. Black's Law Dictionary, Ninth Ed., pg. 704.

In this case, the action against Plaintiff Hancock did not commence until the petition was filed nearly two hours after Defendant Collins executed the ex parte order and attachment.

In *Ratte v. Corrigan*, 989 F. Supp. 2d 550, (E.D. Mich. Nov. 26, 2013) the District Court found that where a judge had signed blank "form" removal orders prior to the filing of any complaint or petition with the Court, that the Judge was not performing a judicial act. This was found to be an administrative act for which the judge could not enjoy immunity.

Plaintiff alleges that this was a non-judicial act, not unlike the signing of blank form orders.

Second, even if this Court finds that the execution of the order prior to the filing of the petition was a judicial act, the Court must find that Defendant Collins lacked subject matter jurisdiction when he entered the ex parte order and attachment on August 13, 2018.

As described above, this matter was in the jurisdiction of the Dekalb County Juvenile Court. Even the style of the case reflects that it was always intended as a Dekalb County case. Defendant Michael Collins, a Smith County General Sessions judge, did not have subject matter jurisdiction, unless and until he could obtain

jurisdiction by some other means such as designation, transfer, recusal, or assignment. See. Tenn. Sup. Ct. Rule 10B and 11. The Amended Complaint alleges that Defendant Collins lacked subject matter jurisdiction and had not obtained it by any of these means and therefore the ex parte order and body attachment are void. RE 34, PageID # 223.

Defendant Collins does not assert that Judge Cook (Dekalb County) recused himself, or was otherwise unavailable, but asserts that the Standing Order entered by Justice Bivins and attached as RE 69, Sealed Exhibit A "explicitly endowed" Defendant Judge Collins with the authority to exercise jurisdiction in DeKalb County. RE 75, PageID # 541. Defendant Collins does not dispute that jurisdiction lied in Dekalb County and not Smith County.

(5) Defendants reliance on the "standing order" for interchange from 2016 must be denied in this Rule 12 motion

In the Defendants' Motion, they attach and rely on a "standing order" of the Tennessee Sup. Court entered September 30, 2016. RE 74-1, Exhibit A. Defendants claim that Justice Bivins entry of this order which permits interchange between Dekalb County Judge Cook with other county General Sessions Judges forgives any error on the part of Defendant Judge Collins and assigns jurisdiction to him without the need for any other order of recusal, transfer, or interchange.

Notably this order was first filed lacking any entry by the Clerk. The Defendant then submitted a copy of the order stamp-filed in September 2016 (two

years prior to this action), still with no indicia that Defendant Collins acted pursuant to this order[11]. Even if Defendant Collins could rely on the standing order without complaint of Policy 4.02 or with the prerequisites stated in *State v. Frazier,* 558 S.W.3d 145, 155 (Tenn. 2018) the "standing order" also requires at least one of two requisite actions by Judge Cook, that he either recuse himself OR that he is unavailable. There is no record of either occurring.

Without waiving this objection, the order is insufficient as Judges must comply with AOC Policies and Procedures Index #: 4.02

This order presumably relies on Tenn. Code Ann. § 17-2-201, 202, and 208 and Tenn. Sup. Ct. Rule 11. Tenn. Code Ann. § 17-2-201 is the stated purpose of the statutes related to interchange. Tenn. Code Ann. § 17-2-202 is the duty to interchange for state court judges. Tenn. Code Ann. § 17-2-208 provides for interchange of general sessions and juvenile court judges. Plaintiff would show that Tennessee Supreme Court Policies and Procedures has required a designation order by the chief justice since 2001. This requires the judge to contact the Administrative

[11] Tenn. R. Civ. Proc. 58 states that the entry of an order is effective when the clerk marks on its face that it is "filed for entry." The purpose of the rule is to ensure that a party is aware of the existence of a final appealable order. In the case at bar, the order has never been entered in the underlying action, nor is there in general authority offered by the Defendant that could confer jurisdiction that is contrary to the statute and therefore, contrary to Art. VI of the Tennessee Constitutional which gives the legislature the sole power to set the jurisdiction and powers of the lower courts.

Office of the Courts to process the designation order. This policy has never been amended, modified, or retracted and remains posted on the public AOC website. RE 90, PageID # 688-660, Exhibit 1. Tenn. Sup. Ct. Administrative Policies and Procedures, Index #: 4.01 / 4.02. See 4.02, Section IV. Procedures.

The Plaintiff would show that a specific designation order[12] as described in Policy 4.02 was a required step to grant Judge Michael Collins jurisdiction over the Dekalb County Juvenile Court case.

In *Cooper v. Parrish,* 203 F. 3d 937, 951 (6th Cir. 2000) the Court did not grant immunity to a private person who acted as a prosecutor without having the proper appointment from the governor. Although Defendant Collins is not a private person, the limits of his jurisdiction are clearly defined by the legislature and until and unless he obtains a designation order.

Defendant Collins also claims that, even if he did not have jurisdiction, that he did not know that he did not have jurisdiction, citing *Mills v. Killebrew*, 765 F.2d 69 (6th Cir. 1985). Plaintiff would show that *Mills* is not instructive in this case, because it dealt with mediators. RE 75, PageID # 542. In this case, Defendant Collins knew that the petition had not been filed and knew that there was no order of interchange, designation, or transfer. Therefore, this argument must fail.

[12] There is nothing in the underlying action that shows that the Dekalb County Juvenile Court Judge recused himself or was unavailable.

There is no provision in the above cited Tennessee code or the Supreme Court Rule which provides for the wholesale expansion of jurisdiction of the county General Sessions judge.

Further, there is no evidence that this "standing order" ever appeared in the case file in the Juvenile Court case. The "standing order" has no case number and has no other indicia that it was filed in the Plaintiff's juvenile court case to transfer jurisdiction. The Amended Complaint states that Plaintiff's counsel specifically asked the Clerk on August 15, 2019, if there was an order of recusal or transfer and Plaintiff's counsel was told no. RE 34, PageID # 224.

(6) Notwithstanding the "standing order" Defendant Collins could only obtain jurisdiction by an order of interchange, transfer, or designation.

In *State v. Frazier,* 558 S.W.3d 145, 155 (Tenn. 2018), the Tennessee Supreme Court held that in the absence of interchange, designation, appointment, or some other lawful means of obtaining expanded geographical jurisdiction, a circuit court lacks authority to issue search warrants for property located outside the judge's statutorily assigned judicial district. The Court reviewed the statutory provisions for obtaining a search warrant. When the geographical limitations provided in the statute were ignored, the warrant was held to be invalid.

We have the same defect in the case before this Court. Smith County Juvenile Court Judge Collins did not have subject matter jurisdiction and therefore, the Defendant cannot enjoy absolute judicial immunity.

(7) Defendant Michael Collins cannot enjoy immunity on the argument that he merely "exceeded" his jurisdiction. Def. Memo. RE 75 PageID # 543.

In reliance on *Brookings v. Clunk*, 269 F. 3d 614, 623 (6th Cir. 2004), Defendant Collins argues that "even if the Plaintiffs are correct that Judge Collins did not have authority to issue the order, at most, Judge Collins would have exceeded his jurisdiction rather than acted in clear absence of jurisdiction. Def. Memo. RE 74, PageID # 543. Plaintiff would show that *Brookings* is not dispositive as to the issues in this case.

In *Brookings*, the Court found that Judge Clunk had jurisdiction over the matter brought before him (the application for a marriage licenses) but exceeded his authority when he brought criminal charges against a party whom he believed perpetrated a fraud in the application. The Court found that the judge enjoyed absolute immunity because he had jurisdiction over the subject matter before him and because he had an obligation to report potentially obstructive conduct to the proper authority if he felt such conduct had occurred in a case before him. Id.

In this case, the Plaintiff argues that Defendant Collins lacked subject matter jurisdiction and lost abolute immunity.

(8) The ex parte removal order is void.

A void judgment is one that is invalid on its face because the issuing court either lacked subject matter or personal jurisdiction over the proceedings, or the judgment was outside of the pleadings. A collateral attack on a prior judgment may

be successful if the judgment is void because the court rendering the judgment acted in a manner inconsistent with due process of law. *Hood v. Jenkins,* 432 S.W. 3d 814 (Tenn. 2013) In this case, even if this Court finds that Judge Collins did not act in clear absence of all subject matter jurisdiction, this Court can still find that Judge Collins did not have jurisdiction at the time he entered the order making his order invalid.

A judgment may be void only if the court issuing the order lacked jurisdiction or if it acted inconsistently with the due process of law. *Magnavox Co. of Tenn. v. Boles & Hite Const. Co.*, 583 S.W.2d 611, 613 (Tenn. Ct. App. 1979) (citing 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2862 (1 ed. 1973)). "In order to adjudicate a claim, a court must possess both subject matter and personal jurisdiction." *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994).

Defendant Judge Michael Collins was without jurisdiction over the subject matter or the person (Plaintiffs) when he entered the ex parte order. Therefore, any actions taken as a result of this order are unlawful.

b. DCS investigator D. Miller is not entitled to absolute immunity.

The District court relied on *Bauch* and *Barber*, both unreported cases, which are both distinguishable from the case at bar. In *Barber,* 809 Fed. 3d, at 844 (2015) a social worker acted as a legal advocate and was granted prosecutorial immunity

when initiating court proceedings, failing child-abuse complaint, and testifying under oath. In *Bauch*, 733 Fed. Appx, at 844 (2018) a social worker's submission of an affidavit that triggered a judicial child-removal proceeding was an act of legal advocacy. The Sixth Circuit made is clear in *Brent* (2018), in reliance on *Kovacic* (2013) that the social worker is not entitled to absolute immunity for her role in executing a removal order. *Brent,* 901 F. 3d, at 685. The *Brent* Court agreed that when removing children from a home, social workers are acting in a police capacity rather than as legal advocates.

The Sixth Circuit has previously discussed that actions of the social worker while acting in the capacity of an investigator were only subject to qualified immunity. *Kottmyer v. Maas*, 436 F.3d 684, (6th Cir. 2006)

In this case, DCS investigator Miller is not entitled to absolute immunity for her actions leading up to and causing the removal order and is liable for the constitutional violations identified below.

c. Defendants Miller and Collins acted in concert to violate the rights of Hancock and B.B.

Plaintiffs alleged that Defendants Miller and Collins acted in concert to secret the actions of executing an ex parte order, by intentionally carrying the petition to neighboring Smith county before the petition was even filed and given a case number as a calculated, devious, and secretive action intended to violate the Plaintiffs' procedural and substantive due process rights. RE 34, PageID # 225. That

Defendant Collins acted without jurisdiction and Miller's bad faith investigation tainted her request for removal with false statements.

A civil conspiracy under 42 U.S.C.S. § 1983 is an agreement between two or more persons to injure another by unlawful action. The elements of this claim are as follows: To prevail on a civil conspiracy claim, a plaintiff must show that (1) a single plan existed, (2) the defendant shared in the general conspiratorial objective to deprive the plaintiff of his constitutional (or federal statutory) rights, and (3) an overt act was committed in furtherance of the conspiracy that caused the injury to the plaintiff. An express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. *Crowley v. Anderson Cty.,* 783 F. App'x 556, 557 (6th Cir. 2019)

In this case, Defendant Collins knew that the petition had not been filed; that he did not have jurisdiction; and knew the following morning when a hearing was held that Plaintiff Hancock had not been served with process. Defendant Miller intentionally secreted herself to neighboring Smith County to secret her actions while Hancock's attorney made multiple calls to Miller and to the clerk's office to see if an action had been commenced. RE 34, PageID # 222-224.

B. THE DISTRICT COURT MUST BE REVERSED ON THE PROCEDURAL DUE PROCESS CLAIMS OF PLAINTIFF HANCOCK.

Hancock alleged that her constitutional procedural due process right to a pre-deprivation hearing, notice and opportunity to be heard, were violated by DCS investigator Deandrea Miller and Judge Michael Collins. RE 34, 223, 252. Miller and Collins acted in concert in the entry of the ex parte order entered (1) where NO exigent circumstances existed, and (2) which was void for lack of jurisdiction. Plaintiff alleged sufficient facts to show that Miller acted with gross negligence and deliberately indifference to Plaintiff's due process rights. Plaintiff also alleged that Miller engaged Judge Collins (Smith County) who did not have jurisdiction over this Dekalb County matter, for the purposes of secreting an ex parte order and secret hearing the morning after the entry of the order without notice to Plaintiff Hancock.

Defendant Miller moved the Court to dismiss the procedural due process claims. RE 51, PageID # 351-352. Miller admits that the investigation commenced on August 8, 2018 and that the request for emergency removal did not occur until August 13, 2018 (five days later). RE 51, PageID # 333. But failed to acknowledge that Plaintiff's attorney had reached out to her and left messages on August 9 and August 13 to set up a meeting and address her concerns. FAC, RE 34, PageID # 220, 222. Miller claims that the clerk informed Mother's attorney of the ex parte order on the day it was filed. RE 51, PageID # 352. This is not a "fact" in the Amended Complaint which states that on August 13, Plaintiff's attorney called the

clerk who said a petition was filed and who agreed to fax the petition to counsel without mention of the ex parte order; on August 14, Plaintiff's attorney contacted the clerk and asked why they had not faxed her any documents and they refused to fax them. Neither the Clerk, nor Miller, nor Hetzel attempted to contact Plaintiff's attorney and inform her that a hearing was set for August 14, and DCS made no attempts to serve the Mother with process. RE 34, PageID # 223-24. DCS Miller claims that because a hearing was set on August 14 (without notice to Mother), the morning after the ex parte order was signed, and then it was continued to August 20[13], so "the parents could be served and present for proceedings" that the Mother's procedural due process rights were not violated. RE 51, PageID # 353.

Exigent circumstances arise when an emergency situation demands immediate police action that excuses the need for a warrant, including the need to assist persons who are seriously injured or threatened with such injury. Preventing imminent or ongoing physical abuse within a home qualifies as an exigent circumstance. *Kovacic v. Cuyahoga County Dep't Children & Family Servs.,* 724 F.3d 687, 695 (6th Cir. 2013)

It is elementary that the right to be heard is a fundamental requirement of due process of law and that this right has little value unless a person has the concomitant right to be informed that a matter is pending and the right to choose for himself

[13] Defendant Miller's assertion is contradicted by her Exhibit – Preliminary hearing order of August 14 which shows that the Court did not set a court date until August 28, 2018. RE 55, SEALED.

whether to appear, or default, acquiesce or contest. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

It is possible for both a procedural and substantive due process claim to arise from the same conduct. The Due Process Clause of the Fourteenth Amendment prohibits the government from interfering in familial relationships unless the government adheres to the requisites of procedural and substantive due process. *O'Donnell v. Brown,* 335 F. Supp. 2d 787, 797 (W.D. Mich. 2004)

In this case, the District Court's dismissal focused on the substantive due process claims finding that Defendant Miller would have qualified immunity for making false statements in her ex parte process in obtaining the removal order for Hancock's children relying on the 2018 opinion of *Brent,* 901 F. 3d, at 685. RE 122, PageID # 1038-1041.

The District Court must be reversed on the dismissal of Plaintiff Hancock's procedural due process claims.

Procedural due process applies to the deprivation of a constitutionally protected liberty interest and must amount to gross negligence, deliberately indifferent, or intentional denial of the due process protections provided under the Fourteenth Amendment. The right of family integrity is a fundamental liberty interest. Once the liberty interest is identified, the second step requires a determination of whether the defendants provided plaintiff a constitutionally

adequate process before depriving them of their right to familial integrity. *O'Donnell*, 335 F. Supp. 2d, 797. Three factors determine what process is due: (1) the private interest that will be affected by the official action, (2) the risk of erroneous deprivation of such interest through the procedures used, and (3) the probable value, if any, of additional or substitute procedural safeguards. The Court also considers that government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Id.

The Supreme Court has held that post-deprivation remedies that fully compensate a plaintiff for loss of property can satisfy the requirements of due process, however, post deprivation remedies will be adequate only when pre-deprivation remedies were impossible, for example, because of an emergency situation. Id.

Courts have found that removal of children pursuant to a removal order can satisfy the procedural due process issue if a prompt hearing is held. *O'Donnell*, 335 F. Supp. 2d, at 813. However, this conclusion assumes three factors that are not present in this case. One, that the case is properly investigated prior to the removal order; two, that such an emergent circumstances existed that a pre-deprivation hearing posed a risk of immediate harm to the child; and three, that a prompt hearing was held. Id.

Since 2004, the Sixth Circuit relied on the *O'Donnell* opinion in considering the procedural due process rights in child welfare removals. The Court granted summary judgment for the Plaintiff children, finding that their procedural due process rights had been violated where no exigent circumstances existed at the time of removal and no hearing was held prior to removal. They found that this procedural due process right was clearly established in 2002. *Kovacic v. Cuyahoga County Dep't of Children & Family Servs.*, 724 F.3d 687, 700 (6th Cir. 2013) (*affirming that procedural due process rights belong to children as well*). In *Doe v. Staples,* 706 F.2d 985, 990 (6th Cir. 1983) the court held that "in addition to providing an exception to the warrant requirement under the Fourth Amendment, exigent circumstances may alter the notice and hearing requirements typically required under the Fourteenth Amendment in child-removal cases."

It belies the facts of the petition that an exigent circumstances arose on August 13, after Mother's counsel had twice contacted Miller to meet with her regarding the August 9 investigation and Miller refused to even return a phone call. RE 34, PageID # 220-224.

Defendants Miller and Collins violated Hancock's procedural due process rights in the removal of B.B. by seeking and obtaining a ex parte order where there were no exigent circumstances. The District Court must be reversed on the dismissal of this claim.

C. THE DISTRICT COURT MUST BE REVERSED ON THE SUBSTANTIVE DUE PROCESS CLAIMS OF PLAINTIFF HANCOCK.

Hancock alleged that her substantive due process constitutional right to family integrity (and right to make medical decisions) were violated by DCS investigator Deandrea Miller and Judge Michael Collins by Miller's bad faith investigation and making false statements for the purposes of obtaining a removal order. RE 34, PageID # 221-223.

The District Court granted qualified immunity to Miller (and absolute immunity to Collins) dismissing the substantive due process claim relying on the analysis in *Brent v. Wayne County Dep't of Human Servs.*, 901 F.3d 656, 685 (6th Cir. Aug. 23, 2018) In *Brent*, the parent alleged that the state worker had made material false statements in order to obtain a removal order. Id. The court found that the worker would be granted absolute immunity for actions taken as a legal advocate, such as filing a petition for removal because the petition triggers a subsequent hearing in court. Id. However, the defendant was only entitled to qualified immunity when removing children from a home because, in such circumstances, social workers are acting in a police capacity rather than as legal advocates. Id. Plaintiff Brent argued that his substantive due process right against intentional falsehoods used to obtain a removal order was clearly established in reliance on the well established Fourth Amendment principle that an officer cannot rely on a judicial determination of probable cause to justify executing a warrant if that officer

knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant. Citing *Vakilian v. Shaw*, 335 F. 3d 509, 517 (6th Cir. 2003). The Sixth Circuit referred to *Barber v. Miller*[14], 809 F. 3d 840, 843-44 (6th Cir. 2015) stating that "as recently as 2015" generally assertions that the Fourth Amendment was violated as to the child when he was seized pursuant to an order that he claims was based on false statements and otherwise lacked probable cause invoke no clearly established right. *Brent,* 901 F. 3d, at 685. The Sixth Circuit also stated that it now holds directly that a social worker, like a police officer, cannot execute a removal order that would not have been issued but for known falsities that the social worker provided to the court to secure the removal order. Id.

Plaintiff Hancock would show that it was clearly established prior to the *Brent* decision that a child could not be removed based on falsities and bad faith investigation and the grant of qualified immunity should be reversed.

In 2018, the United States Supreme Court stated that police officers are entitled to qualified immunity under 42 U.S.C.S. § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would

[14] Not Recommended for full-text publication.

understand that what he is doing is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct beyond debate. This demanding standard protects all but the plainly incompetent or those who knowingly violate the law. In the context of qualified immunity under 42 U.S.C.S. § 1983, to be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that every reasonable official would know. *District of Columbia v. Wesby,* 138 S. Ct. 577, 580, 199 L.Ed.2d 453, 453 (2018)

However, in 2019, the Court stated as to social workers that it does not require "a prior, precise situation or finding that the very action in question has previously been held unlawful to conclude that official had fair warning that their conduct was unconstitutional" and "that a right may be clearly established from the general reasoning that a court employs." *Schulkers v. Kammer*, 367 F. Supp. 3d 626, 641-42 (E.D.Ky Feb. 8, 2019) citing *Guertin v. Michigan,* 912 F.3d 907 (6th Cir. Jan. 4, 2019)

In 2013, the Sixth Circuit said this, "Social workers are entitled only to qualified immunity when removing children from a home because, in such circumstances, the social workers are acting in a police capacity rather than as legal advocates." *Kovacic v. Cuyhoga Cty. Dep't of Children & Family Servs*., 724 F.3d 687, 694 (6th Cir. 2013) Since that date, social workers have been on notice that their conduct, that is their investigation and subsequent actions, are subject to the substantive due process protections provided to private citizens against unlawful (unconstitutional) conduct which violates the liberty interest of family integrity.

In 2016, the Sixth Circuit found in *Heithcock v. Tenn. Dep't of Children's Servs*[15]*., No.* 15-6236, (6th Cir. 2016) that a bad-faith child investigation that caused a child's removal based on false information was a substantive due process violation. Although *Heithcock* was not a published decision, its analysis relies on the published decision of *Kottmyer v. Maas,* 436 F. 3d 684, 690 (6th Cir. 2006) (which held that a government child abuse investigation did not trigger a substantive due process violation of family integrity, but qualified that principle by stating, "this may be different if there is evidence that the investigation was undertaken in bad faith or with malicious motive or if tactics used to investigate would shock the conscience."). The *Heithcock* Court also stated, the notion that bad-faith child-services investigation can violate that constitutional right seems at odds with another

[15] Not Recommended for full-text publication.

principle, that, because the juvenile court has the ultimate decision making power with respect to custody, it alone could deprive a parent of his fundamental right (citing *Pittman v. Cuyahoga Cnty. Dep't. of Children & Families*, 640 F. 3d 716, 720 (6th Cir. 2011) and stated "while it is generally true that only the court that ordered a child removed from custody can deprive a parent of the right to familial association, there is an exception for when the court order is based on a bad-faith child-services investigation. *Heithcock*, pg. 11.

In 2009, the So. District of Ohio, also relied on *Kottmyer* and denied qualified immunity where the defendant social worker had fabricated evidence against them in a child abuse and neglect investigation. The Court stated, "A reasonable case worker would have known that she was putting the familial rights of [Plaintiff] and her children at risk when she invented evidence against a mother during an abuse investigation." *Abdulsalaam v. Franklin Cnty. Bd. of Comm'rs,* 637 F. Supp. 2d 561, 583 (S.D.Oh. July 23 ,2009)

The acts of Miller are similar to police officers in obtaining a warrant for arrest where qualified immunity would be inappropriate, because it is clearly established that "[p]olice officers cannot, in good faith, rely on a judicial determination of probable cause when that determination was premised on an officer's own material misrepresentations to the court." *Wesley v. Campbell,* 779 F.3d 421, 433 (6th Cir. 2015)

Plaintiff Hancock would show that her substantive due process right of family integrity arises from the bad faith investigation which resulted in false statements in order to obtain a removal order. This Court must find that by 2018, it was clearly established that this bad faith investigation principle applied to social workers and reverse the Court's grant of qualified immunity to Miller as to Plaintiff Hancock's claim for substantive due process violations.

4. District Court erred in dismissing B.B.'s Fourth and Fourteenth Amendment rights for procedural due process violations and wrongful seizure against Defendants M. Collins and D. Miller. RE 122, PageID # 1022, 1037 – 1044.

The District Court erred in the dismissal of B.B.' claims. The dismissal based on Rooker-Feldman and absolute immunity is addressed above. Plaintiff B.B. appeals the dismissal of these claims, incorporating the arguments above and as follows:

A. THE DISTRICT COURT MUST BE REVERSED ON THE PROCEDURAL DUE PROCESS CLAIMS OF PLAINTIFF B.B.

B.B. alleged that her constitutional procedural due process right to notice and opportunity to be heard prior to removal was violated by DCS investigator Deandrea Miller and Judge Michael Collins. RE 34, PageID # 251. B.B. incorporates the arguments above emphasizing that NO exigent circumstances existed when Miller fabricated evidence, secreted her conduct, traveled to a neighboring county (Smith) for Judge Collins to execute the ex parte removal order without jurisdiction. Miller

could not have accomplished her goal without the complicit conduct of Collins who knew that he lacked jurisdiction over a Dekalb County Juvenile Court case.

Kovacic (2013) relied on *Tennebaum v. Williams*, 193 F.3d 581, 605 (2d Cir. 1999) and held that a seizure without consent or a warrant is a 'reasonable' seizure if it is justified by 'exigent circumstances.' The Court stated that the absence of pre-2002 case law (the date of the events) was insufficient to upset the presumption that all government searches and seizures are subject to the strictures of the Fourth Amendment. *Kovacic v. Cuyahoga County Dep't of Children & Family Servs.*, 724 F.3d 687, 699 (6th Cir. 2013)

Where there is a seizure alleged under the Fourth Amendment, B.B.'s procedural due process rights are implicated.

B. THE DISTRICT COURT MUST BE REVERSED ON THE FOURTH AMENDMENT CLAIMS OF PLAINTIFF B.B.

B.B. alleged that her Fourth Amendment rights against unreasonable seizure and her Fourteenth Amendment rights of family integrity were violated by DCS investigator Deandrea Miller and Judge Michael Collins when Miller obtained the removal order on false information and caused B.B. to receive an HPV vaccine under the unlawful order without the consent of her Mother (Plaintiff Hancock). RE 34, PageID # 251.

The District Court granted Miller qualified immunity focusing on the *Brent* opinion, which was published August 23, 2018, just ten days after the allegations in

this complaint. However, Plaintiff B.B. would show that the purpose of *Brent* was to extend the prohibition against false statements made to obtain removal orders providing further protection for the Fourteenth Amendment substantive due process family integrity rights. However, the Fourth Amendment rights of Plaintiff B.B. were clearly established where the seizure was made (1) where no exigent circumstances existed, (2) where the removal order was obtained with false statements and would not have otherwise been granted; and (3) where her procedural due process rights were violated.

There is a well established Fourth Amendment principal that an officer cannot rely on a judicial determination of probable cause to justify executing a warrant if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant. *Vakilan v. Shaw,* 335 F.3d 509, 517 (6th Cir. 2003)

The strictures of the Fourth Amendment are clearly established, and the Sixth Circuit has held that the Fourth Amendment applies to social workers. *Andrews v. Hickman Cnty.*, 700 F.3d 845, 859 (6th Cir. 2012)

The allegations of the Amended Complaint are sufficient to establish a plausible claim that Plaintiff B.B. was wrongfully seized based on the false information B.B. provided to obtain an ex parte order. And if this Court finds that the ex parte order was invalid, B.B.'s seizure under the authority of this document

also created a Fourth Amendment violation. Incorporating the arguments made herein, the ex parte order was invalid for lack of jurisdiction in that Judge Collins did not obtain jurisdiction through designation. *State v. Frazier,* 558 S.W.3d 155. Defendant Miller cannot claim a "good faith exception" because she knew that (and she caused) the ex parte order to be executed by Defendant Collins. She also knew that she presented false and deceptive information upon which Defendant Collins would rely. *United States v. Neal,* 577 F. Appx. 434 (6th Cir. 2014).

The District Court should be reversed on the dismissal of Fourth Amendment unreasonable seizure claims of Plaintiff B.B.

4. District Court erred in dismissing Wendy Hancock's Fourth Amendment and Fifth Amendment claims against Defendants Cornelius and Holmes. RE 122, PageID # 1012 – 1013; 1027 – 1032.

Plaintiff Hancock alleged that her Fourth Amendment rights were violated by Defendant Cornelius when he pinged her phone to gain her location and her Fifth Amendment rights were violated when Defendants Cornelius and Holmes conducted a custodial interrogation without a Miranda waiver and that said interrogation was used against her in a criminal prosecution. RE 34, PageID # 228.

The District Court dismissed the Fourth Amendment claims granting Cornelius qualified immunity reasoning the exigent circumstances, i.e., the ex parte order at issue in this complaint and that Cornelius was "arguably" pursuing Hancock for an outstanding warrant. RE 122, PageID # 1027. The District Court dismissed

Hancock's Fifth Amendment claims stating that the Fifth Amendment privilege may not be invoked to resist compliance with regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws. *Baltimore city Department of Social Services v. Bouknight,* 493 U.S. 549, 556 (1990). RE 122, PageID # 1013.

A. UNLAWFUL PINGING OF PLAINTIFF HANCOCK'S CELL PHONE

The District Court acknowledged that *Carpenter v. United States,* 138 S.Ct. 2206 (2018) is the leading case in cell-site location information (CSLI), and that the Supreme Court held that the government will "generally" need a warrant to access CSLI, but that case-specific exception may support a warrantless search of an individual's cell-site records under certain circumstances. A well-recognized exception is exigent circumstances. Pursuing a fleeing suspect, protecting individuals who are threatened with imminent harm, preventing the imminent destruction of evidence, or in face of an urgent situation, fact-specific threats will justify a warrantless collection of CSLI. Id. RE 122, PageID # 1029.

Exigent circumstances is a factual inquiry and under the Rule 12 standard of review. The FAC tells that Cornelius talked to Plaintiff Hancock on August 8, 2018; that Hancock's attorney contacted Cornelius on Friday, August 10, 2018 to make an inquiry about any emergent situation that Plaintiff Hancock needed to know about

and he said no[16]. Defendant Cornelius was also informed on that day that he should not talk to Hancock without her attorney present. RE 34, PageID # 221. On Monday, August 13, 2018, Hancock's attorney contacted Cornelius again and left a message. Cornelius did not call back. RE 34, PageID # 222. By August 15, 2018, Cornelius had still made no effort to return a call to Hancock's attorney; he concealed information related to Hancock's son; that Mother had offered to cooperate with Cornelius with her attorney present; and that Cornelius merely trapped Hancock with a warrant for the purposes of taking her children (working alongside Defendant D. Miller.) RE 34, PageID # 226.

Whether exigent circumstances existed is a question of fact for the jury unless the underlying facts are essentially undisputed and a finder of fact could reach but one conclusion. *Crabbs v. Pitts,* No. 19-4057, 2020 U.S. App. LEXIS 20761, at *1 (6th Cir. June 30, 2020)

Whether exigent circumstances justified a warrantless search of person's home is a question for a jury, provided that, given the evidence on the matter, there is room for a difference of opinion. *Carpenter v. Laxton,* No. 95-6486, 1996 U.S. App. LEXIS 28245, at *1 (6th Cir. Oct. 25, 1996)

[16] Hancock's attorney also contacted Def. D. Miller on two occasions prior to August 15, 2018. RE 34, PageID # 219, 222.

There are sufficient allegations in the FAC to defeat a Rule 12 motion showing that Defendant Cornelius was NOT faced with an urgent situation nor were there exigent circumstances.

The District Court should be reversed on the dismissal of the Fourth Amendment violation against Cornelius.

B. FIFTH AMENDMENT VIOLATION

Plaintiff Hancock alleged Defendants Cornelius and Holmes conducted a custodial interrogation on August 16, 2018 that the statements she made in her interrogation "are now being used against his in criminal court." RE 34, PageID # 228. And that Hancock was arrested on July 19, 2019 for custodial interference on the ex parte order of Defendant Judge Collins. RE 34, PageID # 246.

The Fifth Amendment provides bedrock protections against government overreach. It states that no individual shall be compelled in any criminal case to be a witness against himself. U.S. Const. amend. V. As interpreted by *Miranda v. Arizona,* the Fifth Amendment requires that an individual subject to custodial interrogation be informed clearly and unequivocally: (1) that he has the right to remain silent; (2) that "anything said can and will be used against the individual in court; and (3) that he has the right to consult with a lawyer and to have the lawyer with him during interrogation; and (4) that if he is indigent, a lawyer will be appointed to represent him. These warnings form an absolute prerequisite to

interrogation. Although an individual may waive some or all of these rights, the government must show that such a waiver was done knowingly and intelligently. *United States v. Pacheco-Alvarez,* 227 F. Supp. 3d 863, 869, 2016 U.S. Dist. LEXIS 179783, *1, 2016 WL 7475652, quoting *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

The Fifth Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *Slone-Stiver v. Kossoff* (In re *Tower Metal Alloy Co.*), 188 B.R. 954, 955, 1995 Bankr. LEXIS 1366, *1, 27 Bankr. Ct. Dec. 1113 (S.D. Ohio Aug. 29, 1995) The Fifth Amendment privilege adheres basically to the person, not to information that may incriminate him. Id.

Defendants do not claim that (1) the August 16, 2018 was not a custodial interrogation; or (2) that Plaintiff was properly given her Miranda warnings prior to questioning.

The District Court erred when it dismissed this claim.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore, Plaintiffs Hancock and B.B. asks this Court to reverse the District Court and find that (1) that the Motion to Exclude should be granted; (2) that the Rooker Feldman doctrine does not preclude the Plaintiffs' civil right action; (3) that Plaintiff Hancock has stated a claim that survives a Rule 12 motion to dismiss for Fourteenth Amendment substantive and procedural due process violations and neither Defendants Miller nor Collins are entitled the privilege of absolute immunity or qualified immunity; (4) that Plaintiff B.B. has stated a claim that survives a Rule 12 motion to dismiss for Fourth Amendment unreasonable seizure and Fourteenth Amendment procedural due process and the Defendants are not entitled to absolute or qualified immunity; and (5) that Plaintiff Hancock's claims for Fifth Amendment violations against self-incrimination and Fourth Amendment violations against unlawful search survive Rule 12 dismissal and Defendants Cornelius and Holmes are not entitled to qualified immunity on these claims.

This is the 22 day of July 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief does comply with the court-ordered permission to expand word count limit. FRAP 32(a). The brief contains less than 16,000 (being 15,493) words. See Fed. R. App. P. 32 and Sixth Cir. R. 32.

The brief complies with the typeface, type style, and spacing requirements of Fed. R. App. R. 32. The typeface is Times New Roman, proportionally spaced, and 14-point. The margins are one inch, pages are serially paginated, double-spaced, and footnotes appearing in the same size text.

This is the 22 day of July 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Connie Reguli, do hereby certify that a true and exact copy of: APPELLANT'S BRIEF has been served on the defendants with counsel via CM/ECF and mailed first class to defendants who have not entered an appearance on this 22 day of July 2020:

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Connie Reguli

DESIGNATION OF THE RECORD

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86	10/30/2019	COLLINS, SMITH COUNTY WILLIAMS MOTION to Allow Substitution of Stamp-Filed Copy Into the Record Attachments: #1 – Justice Bivins' Standing Order for the Designation of Substitute Judges file date stamped 09/30/2016	606-608 609-610
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