

1 Appeal from the May 20, 2008 judgment of the United States
2 District Court for the Eastern District of New York (Brian M.
3 Cogan, Judge), granting summary judgment to defendants, in an
4 action involving wrongful child removal, on the grounds of
5 absolute immunity and qualified immunity under federal and state
6 law. Although we disagree with the district court's conclusion
7 that the caseworker defendants are entitled to absolute immunity
8 under federal law, we agree that they are entitled to qualified
9 immunity and that the rest of the district court's determinations
10 are correct.

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12 AFFIRMED.

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24 RAKOFF, District Judge.

25 For centuries, Anglo-American law has protected public
26 officials against claims for damages arising from actions taken
27 in the course of duty. Harlow v. Fitzgerald, 457 U.S. 800, 806
28 (1982). "As recognized at common law, public officers require
29 this protection to shield them from undue interference with their
30 duties and from potentially disabling threats of liability." Id.
31 In the case of legislators, judges, and certain executive
32 officials such as prosecutors, the protection usually takes the
33 form of absolute immunity from liability for damages. Id. at
34 807. In the case of most executive employees, however, the
35 protection takes the form of "qualified immunity," i.e., immunity

1 from liability if the employee was acting in subjective and
2 objective good faith. Id. at 807, 815. The instant case chiefly
3 concerns what kind of immunity attaches to actions taken by two
4 categories of New York employees -- caseworkers and lawyers --
5 involved in the inherently difficult determination of whether to
6 seek removal of a child from the custody of the child's parents
7 on the ground of child abuse.

8 **BACKGROUND**

9 Plaintiff-appellant Sally Cornejo commenced these
10 consolidated actions on behalf of herself and her infant child,
11 Kevin Salas, alleging violations of federal and state law arising
12 from actions taken by the employees of the New York City
13 Administration for Children's Services ("ACS") in connection with
14 the investigation into the death of Cornejo's other infant son,
15 Kenny, and the resulting Family Court proceedings. The
16 defendants-appellees, in addition to the City of New York (named
17 only derivatively), are current or former ACS caseworkers and
18 supervisors (collectively, the "caseworker defendants"), namely,
19 caseworkers Kathleen Cerrito and Eugene Weixel, their supervisors
20 Janice Hogg and Ramon Vargas, Hogg's manager Joyce De Nicholson,
21 De Nicholson's director Maureen Fleming, and the then-acting ACS
22 Commissioner William Bell; and current or former lawyers in ACS's
23 Division of Legal Services (collectively, the "lawyer
24 defendants"), namely, attorneys Dawn Schwartz and Susan Schenkel

1 Savitt, and their supervisors Fredda Monn and Jodi Kaplan.

2 The pertinent facts, largely undisputed and, where disputed,
3 taken most favorably to the plaintiff, are as follows:

4 On October 30, 2002, plaintiff Cornejo returned from work to
5 find her fiancé, Rothman Salas, holding their five-month-old son
6 Kenny, who was not breathing. Kenny was subsequently brought to
7 Schneider Children's Hospital ("Hospital") at 11:30 PM. On the
8 afternoon of October 31, 2002, a nonphysician Hospital employee
9 reported (via telephone call) to the New York State Central
10 Registry of Child Abuse and Maltreatment (the "SCR") that Kenny
11 had suffered a broken rib, diffuse cerebral edema, and a heart
12 attack as a result of being violently shaken by his father. The
13 Oral Report Transmittal ("ORT") documenting the call stated that
14 Cornejo was not present during the shaking incident. A second
15 ORT made at approximately 5:30 PM stated that the rib fracture
16 was several weeks old but that the parents had "failed to provide
17 a plausible explanation" for how Kenny's rib was fractured.

18 Upon receiving the two ORTs from SCR, ACS assigned
19 caseworker Cerrito to investigate. Cerrito spoke by telephone
20 with Dr. Debra Esernio-Jenssen, a pediatric specialist in charge
21 of the Hospital's Child Protection Consulting Team, who reported
22 that Kenny's immediate brain and heart injuries were most likely
23 caused by Shaken Baby Syndrome. She also expressed her belief
24 that Cornejo had "no part" in the immediate injuries, which

1 "would happen immediately after violent shaking." Dr. Esernio-
2 Jenssen further opined, however, that the broken rib could have
3 been the result of a prior shaking incident. Cerrito reported
4 this back to Hogg, who concluded that not only Kenny but also
5 Kevin, the couple's other, eighteen-month-old son, would have to
6 be removed from the home pending further proceedings.

7 Cornejo was then informed that both her children would be
8 removed from her custody until the ACS investigation was
9 completed. Cerrito arranged for Kevin to be brought to the
10 Hospital, where he was examined and then placed in temporary
11 kinship foster care on an ex parte emergency basis. The medical
12 examination of Kevin showed him to be healthy, with no signs of
13 abuse. Kenny remained at the Hospital, where he died on November
14 7.

15 Meanwhile, on November 1, ACS instructed its attorneys to
16 file petitions in Family Court accusing both parents of child
17 abuse of both children. Kaplan filed the petitions, which were
18 signed by Cerrito, that day. The petitions notably failed to
19 differentiate between the two parents, Cornejo and Salas, stating
20 that both parents had either "inflict[ed] or allow[ed] to be
21 inflicted . . . physical injury" or "create[d] or allow[ed] to be
22 created a substantial risk of physical injury" to the children.
23 The petitions included the Hospital diagnosis of Shaken Baby
24 Syndrome as the cause of Kenny's heart and brain injuries; as to

1 the fractured rib, the petition alleged that the parents "failed
2 to provide an explanation consistent with a non-abusive or non-
3 intentional trauma." The Family Court remanded the children to
4 ACS, and, as noted, Kenny died on November 7.

5 Despite an intervening attempt by Cornejo to regain custody
6 of Kevin, this was where matters stood until, on November 14, a
7 city medical examiner informed ACS attorney Schwartz of her
8 preliminary findings: that she "could not say" that Kenny was a
9 victim of Shaken Baby Syndrome and that the "fractured rib" was
10 actually a congenital rib malformation. As a result, the very
11 next day, ACS itself sought, by Order To Show Cause, to parole
12 Kevin to his mother. Nevertheless, the Family Court judge, after
13 hearing testimony from Dr. Esernio-Jenssen in which she
14 maintained her conclusion that Kenny had been shaken, declined to
15 return Kevin to his mother's care. The judge also denied
16 subsequent applications for parole or withdrawal of the petition
17 against Cornejo, citing ongoing disparities in the medical
18 evidence as to the cause of Kenny's death.

19 In January 2003, the medical examiner issued a final autopsy
20 report that concluded that the actual cause of Kenny's death was
21 a "rare and natural heart defect" and that reaffirmed the medical
22 examiner's previous finding that there was no rib fracture but

1 only a congenital abnormality. The Hospital staff, however,
2 maintained its view that Kenny had been shaken.¹

3 On February 4, ACS sought withdrawal of the petition against
4 Cornejo, but the Family Court judge denied the request, making
5 clear that she would not allow withdrawal of that petition unless
6 ACS was also willing to withdraw the petition against Salas.
7 Nevertheless, the judge did this time allow Kevin to be paroled
8 to Cornejo's custody. On May 20, Cornejo moved for summary
9 judgment and dismissal of the petition against her. At a court
10 appearance on June 10, Schwartz stated that "ACS has no basis to
11 dispute the [medical examiner's] findings," and the Family Court
12 judge allowed both petitions to be withdrawn.

13 Thereafter, on January 28, 2004, Cornejo commenced, on
14 behalf of herself and her son Kevin, the first of the two civil
15 rights proceedings now consolidated in this case, which, as now
16 consolidated, allege due process and search and seizure
17 violations under 42 U.S.C. § 1983, as well as state and federal
18 claims for malicious prosecution (the latter again under § 1983)
19 and a state law claim for breach of the duty of reasonable care.

20 On May 19, 2008, the district court granted summary judgment
21 to the defendants. See Cornejo v. Bell, No. CV-04-0341, 2008 WL

¹ Kenny's heart was subsequently sent to two pediatric cardiologists for further evaluation. Neither specialist ultimately found a definitive cause for the heart attack, but they concluded that it was more likely that Kenny's death resulted from a congenital defect than from shaking.

1 5743934 (E.D.N.Y. May 19, 2008). In addition to concluding that
2 none of the plaintiff's rights was violated, the district court
3 alternatively held that both sets of defendants were entitled to
4 absolute immunity from all the § 1983 claims, and that, even
5 failing this, they were entitled to qualified immunity. As to
6 the malicious prosecution and breach of duty of reasonable care
7 claims under New York state law, the district court concluded
8 that the lawyer defendants were entitled to absolute immunity on
9 both claims and that the caseworker defendants were entitled to
10 absolute immunity as to the malicious prosecution claim and
11 qualified immunity as to the unreasonable care claim.

12 **DISCUSSION**

13 We review de novo a district court's decision granting
14 summary judgment. See, e.g., Warren v. Keane, 196 F.3d 330, 332
15 (2d Cir. 1999). Since we conclude that some form of immunity
16 attaches to each of the challenged actions of each of the
17 defendants sufficient to preclude liability, we do not reach the
18 district court's determination on the merits.

19 **I. Federal Claims**

20 The federal claims are all claims for damages brought under
21 42 U.S.C. § 1983, which provides "a method for vindicating
22 federal rights elsewhere conferred," including under the
23 Constitution. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).
24 The conduct at issue "must have been committed by a person acting

1 under color of state law" and "must have deprived a person of
2 rights, privileges, or immunities secured by the Constitution or
3 laws of the United States." Pitchell v. Callan, 13 F.3d 545, 547
4 (2d Cir. 1994). There is no dispute here that the defendants
5 were acting under the color of state law.

6 **A. Absolute Immunity for Lawyer Defendants**

7 As noted, the district court held, inter alia, that both the
8 caseworker defendants and the lawyer defendants were entitled to
9 absolute immunity precluding liability under § 1983. This was
10 despite well-established precedent that "qualified rather than
11 absolute immunity is sufficient to protect government officials
12 in the exercise of their duties." DiBlasio v. Novello, 344 F.3d
13 292, 296 (2d Cir. 2003) (quoting Burns v. Reed, 500 U.S. 478,
14 486-87 (1991)) (internal quotation mark omitted). However, there
15 are certain instances where executive employees, such as
16 prosecutors, are entitled to absolute immunity. Imbler v.
17 Pachtman, 424 U.S. 409, 427 (1976). The real distinction between
18 whether an executive employee is entitled to absolute or
19 qualified immunity turns on the kind of function the employee is
20 fulfilling in performing the acts complained of. This is what
21 the Supreme Court has called a "functional" analysis. Briscoe v.
22 LaHue, 460 U.S. 325, 342 (1983). Prosecutors are entitled to
23 absolute immunity, for example, because their prosecutorial
24 activities are "intimately associated with the judicial phase of

1 the criminal process, and thus [are] functions to which the
2 reasons for absolute immunity apply with full force." Imbler,
3 424 U.S. at 430.

4 Mutatis mutandis, absolute immunity also extends to non-
5 prosecutor officials when they are performing "functions
6 analogous to those of a prosecutor." Butz v. Economou, 438 U.S.
7 478, 515 (1978). While any analogy between two kinds of
8 executive employees is never perfect, such reasoning by analogy
9 is at the heart of judicial thinking: things that are essentially
10 alike should be treated essentially the same. Thus, the Butz
11 Court held that an agency official who decides to institute an
12 administrative proceeding is entitled in such circumstances to
13 absolute immunity, since that decision is "very much like the
14 prosecutor's decision to initiate or move forward with a criminal
15 prosecution." Id. at 515.

16 This Court has previously extended absolute immunity to
17 state and federal officials initiating noncriminal proceedings
18 such as administrative proceedings and civil litigation. See
19 Barrett v. United States, 798 F.2d 565, 572 (2d Cir. 1986)
20 (citing Butz, 438 U.S. at 512-17). Of particular relevance here,
21 we have held that an attorney for a county Department of Social
22 Services who "initiates and prosecutes child protective orders
23 and represents the interests of the Department and the County in
24 Family Court" is entitled to absolute immunity. Walden v.

1 Wishengrad, 745 F.2d 149, 152 (2d Cir. 1984). The Wishengrad
2 Court concluded that given "the importance of the Department's
3 [child protection] activities, the need to pursue protective
4 child litigation vigorously and the potential for subsequent
5 colorable claims," the attorney must be accorded absolute
6 immunity from § 1983 claims arising out of the performance of her
7 duties. Id. We conclude that the lawyer defendants in the
8 instant case were fulfilling similar functions, and that the
9 district court thus properly extended to those defendants
10 absolute immunity from the § 1983 claims.

11 **B. Qualified Immunity for Caseworker Defendants**

12 However, the district court was incorrect in its conclusion
13 that the caseworker defendants were also entitled to absolute
14 immunity.² Although they undoubtedly played a substantial role
15 in providing the information that helped initiate many of the
16 actions here complained of, the caseworker defendants essentially
17 functioned much more like investigators than prosecutors. Even
18 when they made the initial decision to remove Kevin from his
19 mother's custody, their actions were the functional equivalent of
20 police officers' making arrests in criminal cases, which are a

² The district court appears to have relied for its conclusion that the caseworker defendants were entitled to absolute immunity on a district court decision, Levine v. County of Westchester, 828 F. Supp. 238, 243-44 (S.D.N.Y. 1993), that was affirmed without opinion by this Court. Such an affirmation has no precedential weight.

1 classic example of actions entitled to qualified, rather than
2 absolute immunity. See, e.g., Malley v. Briggs, 475 U.S. 335,
3 340-44 (1986). The caseworker defendants here were performing
4 what was "fundamentally a police function," Robison v. Via, 821
5 F.2d 913, 918 (2d Cir. 1987), and as such were entitled only to
6 qualified immunity, id. at 920.

7 Even qualified immunity, however, is sufficient to shield
8 executive employees from civil liability under § 1983 if either
9 "(1) their conduct 'did not violate clearly established rights of
10 which a reasonable person would have known,' or (2) 'it was
11 objectively reasonable to believe that [their] acts did not
12 violate these clearly established rights.'" Young v. County of
13 Fulton, 160 F.3d 899, 903 (2d Cir. 1998) (quoting Soares v.
14 Connecticut, 8 F.3d 917, 920 (2d Cir. 1993) (alteration in
15 original) (internal quotation marks omitted)); see also Harlow,
16 457 U.S. at 818. Of relevance here, we have previously noted
17 that the second Young prong provides "substantial protection for
18 caseworkers," Tenenbaum v. Williams, 193 F.3d 581, 596 (2d Cir.
19 1999), which is necessary because "[p]rotective services
20 caseworkers [must] choose between difficult alternatives," id.
21 (second alteration in original) (quoting van Emrik v. Chemung
22 County Dep't of Soc. Servs., 911 F.2d 863, 866 (2d Cir. 1990)).
23 The Tenenbaum Court concluded that summary judgment should thus

1 be "readily available to these caseworkers in proper cases under
2 the qualified immunity doctrine." Id. at 597.

3 Here, the gist of plaintiff's § 1983 claims against the
4 caseworker defendants for denial of due process and unlawful
5 seizure in the immediate removal of Kevin from Cornejo's custody
6 is that defendants had no reason to doubt her assertion that she
7 was not at home when Kenny became ill on October 30, nor to infer
8 that prior abuse had occurred, and so had no basis, even by
9 inference, to remove Kevin and pursue Family Court actions
10 against her. But undisputed facts establish that this is not a
11 reasonable way to characterize the situation that confronted the
12 caseworkers when they took their actions. Specifically, it is
13 undisputed that at the time of Kevin's removal on October 31, ACS
14 had received two ORTs reporting a medical opinion that Kenny had
15 suffered violent shaking and a fractured rib. Although Salas,
16 not Cornejo, was suspected of having shaken Kenny, the rib
17 fracture was diagnosed as several weeks old. There was thus
18 evidence of at least two instances of apparent abuse -- one
19 occurring at an unknown time when Cornejo may have been present
20 -- for which neither parent had an apparent explanation.
21 Moreover, a caseworker had confirmed the substance of the ORTs
22 with Dr. Esernio-Jenssen, and the injuries to Kenny were
23 extremely serious. Under these circumstances, it was objectively
24 reasonable for the caseworker defendants to believe that

1 immediate temporary removal of both children without prior
2 judicial authorization was proper. See id. at 593. The
3 caseworker defendants are thus entitled to qualified immunity on
4 the due process and unlawful seizure claims arising from their
5 initial removal of Kevin.

6 As for the subsequent actions taken in Family Court, these
7 actions were chiefly taken by the lawyer defendants, who, as
8 already determined, were entitled to absolute immunity. While
9 certain of the caseworker defendants provided information to the
10 Family Court, the heart of the complaint against them in this
11 regard is that they failed to adequately apprise the Family Court
12 of exculpatory information. But this Court has found no
13 constitutional violation where caseworkers allegedly committed
14 "sins of commission and omission in what they told and failed to
15 tell . . . the Family Court Judge." van Emrik, 911 F.2d at 866.
16 Indeed, it would take a much more extreme misstatement than any
17 alleged here to override the necessary freedom of action that
18 qualified immunity accords caseworker defendants dealing with the
19 extreme situation when one child suffers fatal injuries while at
20 home and another child is still at home. The caseworker
21 defendants are thus entitled to qualified immunity on the due
22 process claims related to the Family Court actions.

23 **II. State-Law Claims**

1 Plaintiff also pursues malicious prosecution claims both
2 under New York State law and, indirectly, under § 1983. Under
3 New York law, a malicious prosecution claim requires: "(1) the
4 initiation of an action by the defendant against the plaintiff,
5 (2) begun with malice, (3) without probable cause to believe it
6 can succeed, (4) that ends in failure or, in other words,
7 terminates in favor of the plaintiff." O'Brien v. Alexander, 101
8 F.3d 1479, 1484 (2d Cir. 1996) (citing Broughton v. State, 335
9 N.E.2d 310, 314 (N.Y. 1975)). And § 1983, in recognizing a
10 malicious prosecution claim when the prosecution depends on a
11 violation of federal rights, adopts the law of the forum state so
12 far as the elements of the claim for malicious prosecution are
13 concerned. See, e.g., Fulton v. Robinson, 289 F.3d 188, 195 (2d
14 Cir. 2002) ("In order to prevail on a § 1983 claim against a
15 state actor for malicious prosecution, a plaintiff must show a
16 violation of his rights under the Fourth Amendment and establish
17 the elements of a malicious prosecution claim under state law."
18 (internal citations omitted)).

19 The issue of immunity, however, differs as between the state
20 and federal law claims. As to the claim for malicious
21 prosecution under § 1983, federal law of immunity applies, see,
22 e.g., Gross v. Rell, 585 F.3d 72, 80 (2d Cir. 2009), and thus,
23 since the malicious prosecution claim is grounded on the same
24 allegations as underlay the due process claims, the lawyer

1 defendants are entitled to absolute immunity and the caseworker
2 defendants to qualified immunity, either of which are sufficient
3 to defeat the claim for the reasons already described in the
4 preceding section.

5 As to the state law claim of malicious prosecution, however,
6 the highest New York court to consider the issue has previously
7 determined that in a situation comparable to the instant case,
8 both the caseworkers and the lawyers are entitled to absolute
9 immunity. See Carossia v. City of N.Y., 835 N.Y.S.2d 102 (App.
10 Div. 1st Dep't 2007). Because we are bound "to apply the law as
11 interpreted by New York's intermediate appellate
12 courts . . . unless we find persuasive evidence that the New York
13 Court of Appeals . . . would reach a different conclusion," we
14 affirm the district court's ruling that all defendants here are
15 entitled to absolute immunity on the state law claim of malicious
16 prosecution. Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 134
17 (2d Cir. 1999).

18 Finally, as regards the breach of duty claim, New York law
19 accords the lawyer defendants absolute immunity on such a claim,
20 because their actions with regard to that claim "involve[d] the
21 conscious exercise of discretion of a judicial or quasi-judicial
22 nature." Arteaga v. State, 527 N.E.2d 1194, 1196 (N.Y. 1988).
23 Caseworker defendants, by contrast, may be entitled only to
24 qualified immunity on this claim. But qualified immunity is

1 available under New York law if these defendants were "acting in
2 discharge of their duties and within the scope of their
3 employment, and . . . such liability did not result from the
4 willful misconduct or gross negligence." N.Y. Soc. Serv. Law
5 § 419; see also Yuan v. Rivera, 48 F. Supp. 2d 335, 358 (S.D.N.Y.
6 1999). For the reasons previously discussed, the underlying
7 facts establish that the caseworker defendants meet these
8 requirements.

9 CONCLUSION

10 For the reasons stated, therefore, while we disagree with
11 the district court's conclusion that the caseworker defendants
12 were entitled to absolute immunity on plaintiff's claims under 42
13 U.S.C. § 1983, we find that they were nonetheless entitled to
14 qualified immunity on those claims and that the rest of the
15 district court's conclusions were correct.

16 In summary:

- 17 (1) The lawyer defendants are entitled to absolute immunity on
18 plaintiff's § 1983 claims because they were performing
19 functions analogous to those of a prosecutor. See
20 Wishengrad, 745 F.2d at 152.
- 21 (2) The caseworker defendants are not entitled to absolute
22 immunity on plaintiff's § 1983 claims because their actions
23 were the functional equivalent of arresting officers in
24 criminal cases.

1 (3) The caseworker defendants are entitled to qualified immunity
2 on plaintiff's § 1983 claims because their actions were
3 objectively reasonable under the circumstances. See
4 Tenenbaum, 193 F.3d at 595-96.

5 (4) For plaintiff's state-law malicious prosecution claims, all
6 defendants are entitled to absolute immunity under New York
7 law. See Carossia, 835 N.Y.S.2d at 104.

8 (5) For plaintiff's state-law breach of duty claims, the lawyer
9 defendants are entitled to absolute immunity under New York
10 law because their actions involved the conscious exercise of
11 discretion of a judicial or quasi-judicial nature. See
12 Arteaga, 527 N.E.2d at 1196. The caseworker defendants are
13 entitled to qualified immunity under New York law because
14 they did not commit willful misconduct or gross negligence.
15 See N.Y. Soc. Serv. Law § 419.

16 Accordingly, the judgment of the district court dismissing
17 the case in its entirety is hereby AFFIRMED.