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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHARLES TOMBERLIN, II,	)	
	)	
Plaintiff;	)	
	)	
vs.	)	2:13-cv-01111-LSC
	)	
MARNIE CLARK, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF OPINION

Defendants Leah Waller and Wellspring Christian Clinic, Inc. (Doc. 93), Michael Fetter and Child & Adolescent Psychological Services of Inverness (Doc. 101), Julie O'Connor (Doc. 103), Alisha Ruffin (Doc. 104), and Marnie Clark (Doc. 106) have filed motions for summary judgment. These motions have been fully briefed and are ripe for review. Defendants Leah Waller (Doc. 125) and Julie O'Connor (Doc. 130) have also filed motions to strike portions of the materials submitted by Plaintiff Charles Tomberlin ("Tomberlin") in response to their respective motions for summary judgment. For the reasons stated below, the motions for summary judgment are due to be granted, while the motions to strike are due to be denied as moot.

I. Background[1]

Plaintiff Charles Tomberlin ("Tomberlin") and Defendant Marnie Clark ("Clark") were married on June 21, 2003. Over the course of their marriage, the couple had one child together, referred to for purposes of this litigation as "ABT." Tomberlin and Clark separated on October 3, 2008, and ultimately received a final judgment of divorce on December 16, 2010.

On October 3, 2008, Clark filed a petition for a Protection from Abuse Order ("PFA"). Pursuant to the PFA Order, Mr. Tomberlin was limited to a two hour supervised visit with ABT every weekend. On October 6, 2008, Clark filed divorce proceedings, which were ultimately consolidated with the PFA proceedings.

Beginning in January 2009, Clark and Tomberlin mutually agreed to increase the length and frequency of these visits, to unsupervised visitation every other weekend and every Wednesday night. In that same month, Clark began to see Leah Waller ("Waller"), a licensed social worker, in an attempt to help ABT out with her parents divorce.

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[1] The facts set out in this opinion are gleaned from the parties' submissions of facts claimed to be undisputed, their respective responses to those submissions, and the Court's own examination of the evidentiary record. All reasonable doubts about the facts have been resolved in favor of the nonmoving party. *See Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224 (11th Cir. 2002). These are the "facts" for summary judgment purposes only. They may not be the actual facts.

In August of 2009, Clark's mother informed Clark that she had witnessed ABT, who was two years old at the time, masturbating. On August 26, 2009, Clark reported this to Waller. (Doc. 108-4 at 11.) Waller informed her that the behavior was normal and not a cause for concern unless it continued. (Doc. 108-4 at 11-12.) Clark herself witnessed ABT masturbating a few days later. On August 31, 2009, Clark and ABT met with Waller. After stepping out of the room to speak with Clark alone, Waller returned and saw ABT simulating one doll changing the diaper of another doll. While playing with the dolls, ABT reportedly said "Stop da-da, that hurts." (Doc. 108-4 at 14.) Waller is a mandatory reporter, and as such is required to report suspected abuse of a child to the Shelby County Department of Human Resources ("DHR"). Based on her observations and Clark's reports of masturbation, Waller decided to report her concerns to DHR. After Waller made her report, Clark stopped allowing Tomberlin to have unsupervised visitation with ABT. Though Waller played no formal role in the resulting DHR investigation, Waller continued counseling ABT through December 2009, during which time Waller continued to see ABT making statements about her father doing things to her. Waller was questioned by DHR concerning her sessions with ABT and provided DHR with some of her session notes in December of 2009, and submitted an affidavit on December 4, 2009, recommending that ABT's visitation with Tomberlin be stopped until the completion of the DHR proceedings. Waller

stopped counseling ABT, and had no further involvement with the sexual abuse investigation, after she was informed in December of 2009 that DHR would be submitting ABT for examination by other mental health professionals as part of their investigation.

In September of 2009, Janee Dickinson ("Dickinson"), a DHR employee who investigated child abuse, attempted to conduct two forensic interviews of ABT in response to this report. Dickinson could not complete one of the interviews because ABT would not separate from her mother, and could not complete another because ABT had a severe reaction to Ms. Dickinson coughing.

ABT's case was eventually transferred to the family preservation unit, where it was handled by DHR social worker Alisha Ruffin ("Ruffin"). In or around February of 2010, Ruffin and DHR contracted with Julie O'Connor ("O'Connor"), a social worker in private practice, to perform a forensic evaluation of ABT. On February 8, 2010, O'Connor met with Clark, but not ABT, in order to learn background information on ABT. On February 15, 2010, O'Connor met with ABT and Clark, but was unable to separate ABT from Clark. O'Connor attempted to separate ABT from Clark on nine other occasions, but was unsuccessful. (Doc. 108-11 at 9.) These sessions were used to build rapport between O'Connor and ABT, to allow O'Connor to eventually separate ABT from Clark in order to question ABT alone. (Doc. 108-11 at

8.)

In May of 2010, DHR hired Dr. Michael Fetter ("Dr. Fetter") to perform an emotional-functioning evaluation of ABT for DHR's dependency case. Around the time of the evaluation, Dr. Fetter was informed by a DHR caseworker and Clark that Tomberlin was being investigated for possible abuse of ABT. (Doc. 108-10 at 11.) Based on that information and his observations during the evaluation, Dr. Fetter wrote a recommendation that ABT's visitations with Tomberlin be stopped, because the investigation made him "concerned about her safety" and he wanted to "rule out that possibility as a possible stressor." (Doc.108-10 at 15.) On May 17, 2010, DHR and Ruffin filed a dependency petition relating to Tomberlin and ABT. As a result, Tomberlin's visitation was suspended. On June 8, 2010, Tomberlin agreed to voluntarily suspend all contact with ABT until the forensic evaluation into the possible sexual abuse was completed.

Also on May 17, 2010, O'Connor was able to successfully separate ABT from Clark, and begin interviewing ABT. (Doc. 108-11 at 18.) O'Connor conducted a total of six such interview sessions with ABT, with the last session occurring on June 21, 2010. During the interviews, ABT told O'Connor that her father made her sad by "coughing and putting his tongue on [her.]" (Doc. 108-20 at 98.) O'Connor did not make video recordings of these sessions. She testified during her deposition that she

did not ask ABT leading or suggestive questions during the sessions. (Doc. 108-11 at 15.)

After finishing her evaluation, O'Connor prepared a report of her findings for DHR. She concluded in the report that ABT "did disclose inappropriate behavior by" Tomberlin. (Doc. 108-20 at 99.) However, the report did not make a conclusion as to whether sexual abuse had occurred.

On August 10, 2010, the dependency action was dismissed at the request of DHR, and Tomberlin resumed his supervised visits with ABT. Also in August of 2010, at Clark's request, Dr. Fetter began to provide therapy to ABT. That same month, based on information provided to him by Clark, Dr. Fetter made a recommendation to the court that ABT's supervised visitation with Tomberlin be stopped. Based on that recommendation, Tomberlin's visits with ABT were suspended from September 2 to September 26, 2010.

On September 22, 2010, O'Connor testified at a hearing regarding visitation and other issues associated with ABT. O'Connor testified at the hearing that she could not make a determination as to whether any sexual abuse had occurred. Dr. Fetter also testified regarding ABT at this hearing. At the conclusion of the hearing, the court ordered that Tomberlin's visitation resume under supervision. O'Connor had no further involvement in this case after this hearing. Dr. Fetter continued to provide

counseling to ABT until April of 2013, and also provided deposition testimony as part of the ongoing custody dispute in April of 2012.

On October 4, 2010, DHR sent Tomberlin a letter stating that, based on its initial assessment, sexual abuse was "indicated." Tomberlin requested an administrative review of this decision. On December 2, 2010, DHR notified Tomberlin that it had completed an administrative review and affirmed the finding that sexual abuse was indicated. As a result of this finding, Tomberlin was placed on the DHR Central Registry on Child Abuse and Neglect ("CAN registry"). On December 16, 2010, Tomberlin and Clark's divorce became final, and Clark was awarded custody of ABT.

On December 16, 2011, DHR informed Tomberlin that his name had been removed from the DHR Central Registry on Child Abuse and Neglect. Tomberlin eventually filed the instant action in the United States District Court for the Middle District of Alabama on November 30, 2012. The action stated claims against many of the individuals involved in investigating the abuse allegations. On June 12, 2013, the case was transferred to this Court. On February 14, 2014, this Court dismissed many of Tomberlin's claims against several of the Defendants. On March 23, 2015, Defendants Waller and Wellspring Christian Clinic, Inc. ("Wellspring") moved for summary judgment. On March 30, 2015, all other remaining Defendants moved for

summary judgment.

II. Standard of Review

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is a "genuine dispute" as to a material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The trial judge should not weigh the evidence but must simply determine whether there are any genuine issues that should be resolved at trial. *Id.* at 249.

In considering a motion for summary judgment, trial courts must give deference to the non-moving party by "considering all of the evidence and the inferences it may yield in the light most favorable to the nonmoving party." *McGee v. Sentinel Offender Services, LLC*, 719 F.3d 1236, 1242 (11th Cir. 2013) (citing *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005)). In making a motion for summary judgment, "the moving party has the burden of either negating an essential element of the nonmoving party's case or showing that there is no evidence to prove a fact necessary to the nonmoving party's case." *Id.* Although the trial courts must use caution when granting motions for summary judgment, "[s]ummary judgment procedure is properly regarded not as

a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986).

"In opposing a motion for summary judgment, 'a party may not rely on his pleadings to avoid judgment against him.'" *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 592 (1995) (quoting *Ryan v. Int'l Union of Operating Eng'rs, Local 675,* 794 F.2d 641, 643 (11th Cir. 1986)). As a result, the burden is not placed upon the Court to distill all the potential arguments based upon the materials before it on summary judgment. *Id.* at 599. "Rather, the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned." *Id.*

III. Discussion

A. Clark

Tomberlin brings state law claims against Clark for defamation, abuse of process, malicious prosecution, and intentional infliction of emotional distress or outrage. These claims will be discussed in turn.

1. Defamation

To make out a case of defamation under Alabama law, "the plaintiff must show that the defendant was at least negligent, in publishing a false and defamatory statement to another concerning the plaintiff, which is either actionable without

having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod)." *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1091 (Ala. 1998) (internal citations omitted). "Spoken words that impute to the person of whom they are spoken the commission of an indictable criminal offense involving infamy or moral turpitude constitute slander actionable per se." *Id.* (citing *Ceravolo v. Brown*, 364 So. 2d 1155 (Ala. 1978)).

Clark argues, among other things, that this claim is time barred. In Alabama, defamation claims are subject to a two year statute of limitations. Ala. Code § 6-2-38(k). The cause of action accrues on the date of publication of the allegedly defamatory statement. *Poff v. Hayes*, 763 So.2d 234, 242 (Ala. 2000). As Tomberlin filed his claim on November 30, 2012, the statute of limitations would bar this claim if it accrued before November 30, 2010.

In support of this claim, Tomberlin argues that, prior to and during the DHR investigation and related proceedings, Clark made defamatory statements to third parties that he had sexually abused ABT. The dependency action was commenced on May 17, 2010, and was dismissed on August 10, 2010. DHR concluded its abuse investigation on October 4, 2010, when it notified Tomberlin that it had found that abuse was indicated. Therefore, any statements that Clark may have made during the investigation or dependency hearing process would be time barred. Tomberlin's only

argument against that is the fact that his name was not listed on the CAN registry until December 2, 2010. However, Clark did not list his name on the registry, and therefore that has no bearing on Tomberlin's claim against her, and Tomberlin points to no defamatory statements made by Clark between November 30, 2010 and his name being listed on the CAN registry.

The only additional argument Tomberlin makes is that "according to the Motion for Summary Judgment, Clark maintains to this day that [Tomberlin] sexually abused ABT." (Doc. 119 at 13.) However, in defamation claims, communications made in the course of judicial proceedings are absolutely privileged, and therefore this cannot provide evidence of Tomberlin's defamation claim. *O'Barr v. Feist*, 296 So.2d 152, 156 (Ala. 1974). As Tomberlin has failed to point to any evidence that Clark has made any allegedly defamatory statements that are not barred by the statute of limitations, summary judgment is due to be granted on Tomberlin's defamation claim.

2. Abuse of Process

To establish a claim for abuse of process, Tomberlin must offer evidence showing "(1) the existence of an ulterior purpose; 2) a wrongful use of process, and 3) malice." *Willis v. Parker*, 814 So.2d 847, 865 (Ala. 2001) (quoting *C.C. & J., Inc. v. Hagood*, 711 So.2d 947, 950 (Ala. 1998)). Abuse of process claims concern "the wrongful *use* of process *after it has been issued*," unlike malicious prosecution claims

which center around the wrongful issuance of process. *C.C. & J., Inc.*, 711 So.2d at 950. As a result, even if a complaint was filed with an improper ulterior motive, Clark "cannot be liable for an abuse of process claim unless [she] somehow acted outside the boundaries of legitimate procedure after the [complaint] had been filed." *Id.* at 951.

In support of the abuse of process claim, Tomberlin has pointed to no evidence, and has simply argued that "Clark had motive, method, opportunity, and knowledge to leverage false child sex abuse allegations into becoming a formal DHR investigation and further DHR proceedings." (Doc. 119 at 16.) Tomberlin also argued that the "DHR investigation, itself, harmed the father-daughter relationship." (*Id.*) At best, this constitutes an argument that Clark had an improper motive in any of the judicial proceedings against Tomberlin. Tomberlin has pointed to absolutely no evidence that she "acted outside the boundaries of legitimate procedure" after these judicial proceedings were commenced. *C.C. & J., Inc.*, 711 So.2d at 951. As a result, summary judgment is due to be granted as to this claim.

3. Malicious Prosecution

To establish a claim of malicious prosecution, Tomberlin must provide evidence "(1) that a prior judicial proceeding was instituted by the present defendant, (2) that in the prior proceeding the present defendant acted without probable cause and with malice, (3) that the prior proceeding ended in favor of the present plaintiff, and (4) that

the present plaintiff was damaged as a result of the prior proceeding." *Delchamps, Inc. v. Bryant*, 738 So.2d 824, 831-32. (Ala. 1999) (citing *Fina Oil & Chem. Co. v. Hood*, 621 So.2d 253 (Ala. 1993)).

In support of this claim, Tomberlin has provided no argument beyond citing the elements of a malicious prosecution claim and the definition of probable cause. (Doc. 119 at 17.) He has made no effort to point the Court towards any evidence, or even apply the facts of this case to the legal framework he has provided.

Indeed, Tomberlin has pointed to no evidence and made no argument showing that Clark ever even instituted a relevant judicial proceeding against him, as the DHR abuse investigation and dependency proceedings were instituted by DHR in response to a report of suspected abuse made by Leah Waller. The court cannot find that, in this circumstance, the tenuous chain of Clark reporting what she considered odd behavior by ABT to Waller, followed by Waller making a report to DHR after witnessing further behavior she considered suspicious, and ultimately resulting in an investigation by DHR, constitutes Clark instituting a judicial proceeding. Additionally, while Clark contemplated filing a civil suit against Tomberlin, she never did so, and the filing of the PFA petition clearly falls outside the relevant statute of limitations. As Tomberlin has failed to provide any evidence to make out a prima facie case of malicious prosecution, summary judgment is due to be granted as to this claim.

4. Outrage

In Alabama, intentional infliction of emotional distress is generally referred to as the tort of outrage. *See Ex Parte Crawford & Co.*, 693 So.2d 458, 460 (Ala. 1997). Therefore, the Court will refer to the tort at issue as the tort of outrage, even though Tomberlin's complaint styles this claim as one for intentional infliction of emotional distress.

To succeed on an action based on outrage, Tomberlin must prove: "(1) that the defendant's conduct was intentional or reckless; (2) that it was extreme and outrageous; and (3) that it caused emotional distress so severe that no reasonable person could be expected to endure it." *Id.* Outrage is a limited tort, and the Alabama Supreme Court has recognized it in only three situations: "(1) wrongful conduct in the family-burial context; (2) barbaric methods employed to coerce an insurance settlement; and (3) egregious sexual harassment." *Little v. Robinson*, 72 So.3d 1168, 1172 (Ala. 2011) (internal citations omitted). While the Alabama Supreme Court has made it clear that the tort of outrage may be viable in other situations, it is clear that the conduct must be "'so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.'" *Id.* at 1172-73 (quoting *Horne v. TGM Assocs., L.P.*, 56 So.3d 615, 631 (Ala. 2010)).

In support of this claim, Tomberlin points to his deposition testimony that Clark had filed her PFA petition to "gain temporary custody of [ABT] and to embarrass and humiliate me in front of my family and friends" (Doc. 122-5 at 23), statements that an allegation of sexual abuse is "arguably the worst allegation that can be made against a parent," and that Tomberlin suffered severe distress as a result. (Doc. 119 at 18.) While a deliberately false or reckless accusation of sexual abuse may meet this standard of being "atrocious and utterly intolerable in a civilized society," it is certain that a merely mistaken accusation of abuse would not qualify as "atrocious and utterly intolerable in a civilized society," especially in light of the mandatory reporter laws society has put in place in order to encourage reporting of potential sexual abuse. *Id.* at 1173. While Tomberlin has provided evidence that Clark may have filed her PFA petition in order to cause emotional harm to him, he has provided no evidence that the PFA petition caused him "emotional distress so severe that no reasonable person could be expected to endure it." *Ex Parte Crawford*, 693 So.2d at 460. And it would be impermissible speculation to determine that, because Clark may have made an earlier claim in an effort to gain custody of ABT and embarrass Tomberlin, that she deliberately or intentionally did so with her later allegations of abuse.

Additionally, the statute of limitations bars this action. The statute of limitations for the tort of outrage in Alabama is two years, and therefore the claim would be barred

if it accrued before November 30, 2010. Ala. Code § 6-2-38(l). Tomberlin's only arguments concerning this claim relate to Clark's PFA petition, which occurred in 2008, and her intention to have Tomberlin "prosecuted for sexually abusing his daughter." (Doc. 119 at 17.) Considering Tomberlin was never actually prosecuted for abuse, this can only refer to the investigation launched by DHR. This investigation concluded on October 4, 2010, and any action by Clark in instituting the investigation therefore must also have occurred before November 30, 2010. As Tomberlin has failed to provide any evidence that Clark intentionally or recklessly made a false accusation of sexual abuse against him, and further since his claim is barred by the statute of limitations, summary judgment is due to be granted as to this claim.

B. Ruffin

The only remaining claim Tomberlin asserts against Ruffin is a state law negligence claim. Ruffin argues, among other reasons, that the claim should be dismissed as it is barred by the statute of limitations. Negligence claims are subject to a two year statute of limitations in Alabama. Ala. Code § 6-2-38(l). "A cause of action accrues as soon as the claimant is entitled to maintain an action, regardless of whether the full amount of the damage is apparent at the time of the first legal injury." *Gilmore v. M&B Realty Co.*, 895 So.2d 200, 208 (Ala. 2004). The rule has been further explained in this way:

> If the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage [then apparent] however slight, and *the statute will operate to bar a recovery not only for the present damages but for damages developing subsequently and not actionable at the time of the wrong done; for in such a case the subsequent increase in the damages resulting gives no new cause of action.*

Chandiwala v. Pate Const. Co., 889 So.2d 540, 543 (Ala. 2004)(quoting *Kelly v. Shropshire*, 75 So. 291, 292 (Ala. 1917))(emphasis in original). This claim would therefore be barred if it accrued before November 30, 2010.

Ruffin testified in her deposition that she had no involvement with the Tomberlin family after October 31, 2010. (Doc. 108-8 at 15.) Tomberlin has not pointed to any evidence that Ruffin took any action in this case after that date. Tomberlin states that Ruffin's negligence was in breaching her duty to properly "monitor the extended forensic interview process," yet all the forensic interviews for the investigation had been completed before October 31, 2010. Similarly, it is undisputed that before that date Tomberlin was aware of Ruffin's involvement with the case, and that Tomberlin had been damaged through, for example, the suspension of his visitation with ABT which occurred at least in part due to the events of the forensic interview process.

Instead of contesting any of these facts, Tomberlin states that Ruffin's

"negligence continued until December 2, 2010" when DHR concluded its administrative review of its initial decision that abuse had occurred and placed Tomberlin on the CAN registry. However, it is undisputed that Ruffin had no further involvement with the case after October 31, 2010, and that Tomberlin had already been damaged to some degree at that point. While Tomberlin may not have realized the full extent of the damages he would suffer until his name was placed on the CAN registry, it is clear under Alabama law that this is not enough to prevent the claim from being barred by the statute of limitations. As Tomberlin's claim accrued before November 30, 2010, the statute of limitations bars this action from proceeding, and Ruffin's motion for summary judgment is due to be granted.

C. O'Connor

Tomberlin's two remaining claims against O'Connor are a state law negligence claim, and a claim for violation of civil rights under 42 U.S.C. § 1983. These claims will be addressed in turn.

1. Negligence

"The elements of a negligence claim are a duty, a breach of that duty, causation, and damage." *Prill v. Marrone*, 23 So.3d 1, 6 (Ala. 2009) (quoting *Armstrong Bus. Servs., Inc. v. AmSouth Bank*, 817 So.2d 665, 679 (Ala. 2001)). O'Connor argues that this claim is due to be dismissed because O'Connor did not owe a duty to Tomberlin,

and Tomberlin has failed to prove that she breached any duty that she may have owed him.

In Alabama it is the "well-established rule that 'every person owes every other person a duty imposed by law to be careful not to hurt him.'" *Taylor v Smith*, 892 So. 2d 887, 893 (Ala. 2004) (quoting *Se. Greyhound Lines v. Callahan*, 244 Ala. 449, 453 (1943)). Therefore, the Alabama Supreme Court has "recognized a duty to foreseeable third parties, based on a general 'obligation imposed in tort to act reasonably.'" *Id.* (quoting *Berkel & Co. Contractors, Inc. v. Providence Hosp.*, 454 So. 2d 496, 502 (Ala. 1984)). In this case, O'Connor was hired by DHR to perform a forensic evaluation of ABT due to possible abuse by Tomberlin. Therefore, Tomberlin was a "foreseeable third party" that could have been harmed if O'Connor negligently performed her duties in connection with that evaluation.

However, Tomberlin has failed to provide any evidence that O'Connor breached that duty. Tomberlin alleges that O'Connor breached her duty by conducting "sixteen forensic interviews" of ABT; failing to look to alternate explanations for ABT's behavior and statements, as forensic interview best practices require; and failing to videotape her interview sessions. (Doc. 118 at 12-13.)

As an initial matter, the evidence shows that O'Connor only conducted six forensic interviews with ABT; during the first ten sessions, she was unable to separate

ABT from Clark, and as a result only used those sessions for rapport building. Therefore, O'Connor only actually conducted six forensic interviews. However, Tomberlin has failed to provide evidence that even conducting 16 interviews would violate the standard of care. While Tomberlin has provided evidence that general "best practices" for forensic interviews may generally call for fewer interviews, his own expert testified in her deposition that the best practice protocols did not "mandate a maximum number" of interviews. (Doc. 108-15 at 30.) The mere fact that best practice protocols may generally recommend a lower number of interviews is not sufficient to find that O'Connor was negligent merely because she conducted six or even sixteen forensic interviews with ABT.

Second, Tomberlin argues that "O'Connor never entertained the possibility that ABT was never abused either at all or especially by [Tomberlin]." (Doc. 118 at 12.) However, Tomberlin has produced no evidence that O'Connor did not entertain hypotheses other than abuse by Tomberlin, other than his expert's opinion that there was no evidence of such an alternate hypothesis. (Doc. 108-15 at 64.) However, Tomberlin's expert also explained that this was simply because there was not enough information available as to what went on for her to determine whether or not O'Connor did or did not comply with the general practices required for good forensic interviews. (Doc. 108-15 at 65.) Therefore, Tomberlin has failed to provide any

evidence that O'Connor breached her duty by failing to entertain alternate hypotheses or otherwise follow proper forensic interview technique.

Finally, Tomberlin contends O'Connor breached her duty by failing to record her interviews with ABT. The only evidence Tomberlin has presented concerning this alleged breach is that current best practice manuals may call for videotaping forensic interviews, although Tomberlin has failed to identify a specific best practice manual from the time of O'Connor's interviews which called for such interviews to be videotaped. However, even if failing to record the sessions was a breach of the standard of care, it did not injure Tomberlin; it simply prevented him from determining whether or not O'Connor followed proper interview methodology in conducting her evaluation of ABT. Tomberlin has failed to provide evidence that O'Connor breached the duty that she owed him, or that any such breach caused him harm, and therefore a reasonable jury would be unable to determine that she was liable for negligence.

Additionally, O'Connor argues that any negligence claim against her is barred by the statute of limitations. The law on the statute of limitations as discussed in Sec. III.B, above, requires that Tomberlin's negligence claim against O'Connor must have accrued after November 30, 2010 for this action not to be barred. Tomberlin has not argued that O'Connor took any actions in relation to this case after her September 22,

2010 testimony, or that he had not already suffered damages such as loss of visitation with ABT before November 30, 2010 as a result of her allegedly negligent conduct. Instead, he simply argues that DHR did not complete its administrative review of the case and place him on the CAN registry until December 2, 2010. This demonstrates only that Tomberlin may not have been aware of the full extent of the damages caused by O'Connor's alleged negligence until December 2, which is not enough to prevent his negligence claim from accruing. Because the statute of limitations bars Tomberlin's claim for negligence, and a reasonable jury could not find O'Connor liable for negligence in any event, summary judgment is due to be granted as to this claim.

2. § 1983

To sustain a § 1983 claim for a violation of constitutional rights, the state actor must act with a degree of culpability beyond mere negligence. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("...liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."). As discussed above in Sec. III.C.1, Tomberlin has failed to provide sufficient evidence to show that O'Connor was negligent, and he has failed to provide any additional proof in arguing his § 1983 claim. Therefore, Tomberlin has failed to provide sufficient evidence to allow a reasonable jury to determine that O'Connor was more than negligent, as is

required to sustain this claim.

It also appears that Tomberlin's § 1983 claim would be time barred. "All constitutional claims brought under § 1983 are tort actions, subject to the statute of limitations governing personal injury actions in the state where the § 1983 action has been brought." *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008). The applicable limitations period in Alabama is two years. Ala. Code § 6-2-38(l). While the length of the limitations period is governed by state law, the time at which the action accrues is a question of federal law. *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987). Under federal law, a § 1983 claim does not accrue "until the plaintiff knows or has reason to know that he has been injured," and "until the plaintiff is aware or should have been aware who has inflicted the injury." *Id.* The same statute of limitations analysis performed above in Sec. III.C.1 above would thus also apply to this claim: Tomberlin has not provided any evidence or even alleged that he was not aware that he had been injured by O'Connor before November 30, 2010. Instead, he has simply stated that DHR did not complete its administrative review and place him on the CAN registry until December 2, 2010. This does not mean that he did not suffer damages, such as loss of visitation with ABT, as a result of O'Connors actions before that time, and does not mean he was not aware that it was O'Connor who had damaged him. As a result, Tomberlin's § 1983 claim is also time barred. Because this claim is both

barred by the statute of limitations, and Tomberlin has also failed to present evidence that would allow a reasonable jury to determine that O'Connor was more than negligent in allegedly depriving him of his constitutional rights, summary judgment is due to be granted as to this claim.

D. Waller & Wellspring

Tomberlin asserts claims against Waller and Wellspring Christian Clinic, Inc ("Wellspring"), Waller's employer, for violations of procedural and substantive due process under 42 U.S.C. § 1983, a due process claim under the Alabama state constitution, and state law claims for negligence and malicious prosecution. These claims will be addressed in turn.

1. State constitutional claim

Tomberlin has alleged violations by Waller and Wellspring of the Alabama Constitution. As discussed by this Court in its previous Memorandum of Opinion dated February 19, 2014, (Doc. 36), these claims fail as a matter of law because the Alabama constitution does not create a private right of action to sue for monetary damages. *Matthews v. Ala. Agric. & Mech. Univ.*, 787 So.2d 691, 698 (Ala. 2000). Tomberlin seeks only monetary damages against Waller and Wellspring, and therefore summary judgment is due to be granted as to this claim.

2. § 1983 claims

In order for Waller and Wellspring to be liable for claims under § 1983, they must be state actors. *See Rayburn ex rel. Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001). It is undisputed that Waller and Wellspring were not employed by the State of Alabama and had no contract with the State of Alabama. "Only in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." *Harvey v. Harvey*, 949 F.2d 1127, 1131 (11th Cir. 1992). The Eleventh Circuit has summed up the limited circumstances supporting such a finding of state action by a private party in this way:

> Indeed, to hold that private parties . . . are State actors, this court must conclude that one of the following three conditions is met: (1) the State has coerced or at least significantly encouraged the action alleged to violate the Constitution ("State compulsion test"); (2) the private parties performed a public function that was traditionally the exclusive prerogative of the State ("public function test"); or (3) 'the State had so far insinuated itself into a position of interdependence with the [private parties] that it was a joint participant in the enterprise' ('nexus/joint action test').

Rayburn, 241 F.3d at 1347 (quoting *NBC, Inc. v. Commc'n Workers of America*, 860 F.2d 1022, 1026-27 (11th Cir. 1988)). Tomberlin argues that Waller and Wellspring were state actors because they participated in joint action with DHR, and therefore this Court will focus on the joint action test. To satisfy that test, "the governmental body and private party must be intertwined in a 'symbiotic relationship.'" *NBC, Inc.*, 860

F.2d 1022, 1027 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974)).

In this case, Tomberlin has failed to provide sufficient evidence that the State and Waller and Wellspring were in such a "symbiotic relationship." Waller conducted private counseling sessions with ABT, and reported her concerns to DHR concerning possible sexual abuse. She provided some additional information to DHR, both voluntarily and at DHR's request, asked DHR about the status of the investigation, and eventually submitted an affidavit recommending that ABT's visitation with Tomberlin be suspended until the DHR investigation was complete. Waller's counseling sessions were not performed at the request of DHR, who seperately contracted with O'Connor and Dr. Fetter to perform assessments of ABT for the investigation. Waller additionally ceased counseling ABT after she learned that they had contracted with O'Connor and Dr. Fetter. The mere fact that Waller's report lead to the DHR investigation and Waller provided information that was ultimately used, along with the information obtained during DHR's investigation, in DHR's conclusion that abuse had occurred, does not convert the independent actions taken by Waller into acts of the State. Tomberlin has failed to provide evidence that DHR had "so far insinuated itself into a position of interdependence" with Waller and Wellspring that they could be considered joint participants carrying out a single enterprise. *Rayburn*, 241 F.3d at 1347.

This claim is also time barred. The statute of limitations, as detailed in Sec. III.C.2 above, bars this action as Tomberlin has provided no evidence that he was not aware that he had been harmed by the alleged constitutional violation before November 30, 2010. Tomberlin has also made no argument that Waller took any action that harmed him after November 30, 2010. Therefore, summary judgment is due to be granted as to Tomberlin's claim under § 1983, both because this claim is time barred and because Waller is not a state actor.

3. Negligence

Waller and Wellspring argue that Tomberlin's negligence claim is barred by the relevant statute of limitations. The law pertaining to the statute of limitations was laid out in Sec. III.c above; in short, if Tomberlin's negligence claim accrued before November 30, 2010, then the claim is barred by the statute of limitations.

Tomberlin does not provide evidence demonstrating that Waller and Wellspring took any actions that harmed him after December of 2009, and also does not argue that he was not aware of these Defendants actions before November 30, 2010, as Waller testified about her report to DHR in September of 2010 as part of the divorce proceedings. Rather, Tomberlin argues that he "availed himself of the administrative process and believed that he would be exonerated," and therefore the statute of limitations did not accrue until December 2, 2010, when DHR placed his name on the

CAN registry. Tomberlin provides no legal support for the proposition that his decision to pursue an administrative remedy tolled the statute of limitations for his negligence action against Waller and Wellspring, and the Court is unable to find any. While it is true that Tomberlin may have been unable to fully assess the damages caused by any negligence on Waller's part until that point, Alabama law makes it clear that the full extent of damages need not be apparent for the cause of action to accrue. *Id.* Tomberlin's negligence action would therefore have accrued before November 30, 2010, and summary judgment is due to be granted as to this claim.

4. Malicious Prosecution

As an initial matter, Waller has asserted that she is entitled to statutory immunity for reporting sexual abuse under Ala. Code § 26-14-9. Tomberlin argues that Waller did not have reasonable cause to make her report, and therefore did not act in good faith and is not entitled to immunity under that statute. However, as Tomberlin has failed to make out a prima facie case of malicious prosecution, it is not necessary for this Court to examine the immunity issue.

The elements of a malicious prosecution claim are set forth in Sec. III.D.3 above. Waller and Wellspring argue that this claim should be dismissed as they did not "institute" a judicial proceeding. Tomberlin alleges that Waller's call to the abuse hotline was what lead to DHR's investigation, and that she therefore instituted

proceedings against him.

In *Lee v. Minute Stop, Inc.*, 874 So. 2d 505, 512 (Ala. 2003), the Alabama Supreme Court examined a malicious prosecution claim brought against a store clerk who placed a 911 call reporting a robbery. The defendant clerk identified the plaintiff as being present in the store, and answered questions about the incident. *Id.* The Court determined that merely providing information to the police, such as reporting a crime, does not qualify as instigating a prosecution for malicious prosecution purposes, unless the information was a purposeful misrepresentation of facts in order to induce action. *Id.* at 513-514. Waller's situation seems similar to that of the store clerk, as she merely reported information relating to suspected abuse to DHR, who then independently made the decision to launch an investigation. Tomberlin can point to no evidence showing that Waller made a purposeful misrepresentation to DHR in order to spark an investigation.

In support of his argument, Tomberlin points to the case of *Marks v. Tenbrunsel*, where the Supreme Court of Alabama determined that an initial report of suspected child abuse qualifies as participation in an investigation under Ala. Code § 26-14-9, a statute which provides immunity from liability for good faith participation in an investigation of child abuse. 910 So.2d 1255, 1259-60 (Ala. 2005). However, the court reached this conclusion not because it believed the initial report instituted the

investigation, but because it determined that to hold otherwise would "drastically frustrat[e] the legislative purpose" by depriving individuals of the incentive to make an initial report of child abuse. *Id.* at 1260. This case does not stand for the proposition that an initial report of possible sexual abuse to a government body constitutes instituting the resulting investigation, but merely that individuals who report sexual abuse before an investigation is launched are shielded by statutory immunity as well as those who report abuse after an investigation has begun.

In addition, this claim is time barred. The statute of limitations for a claim of malicious prosecution in Alabama is two years. Ala. Code § 6-2-38(h). As discussed above in Secs. III.D.2-3, Tomberlin does not provide evidence of any actions taken by Waller that injured him after November 30, 2010, and provides no proof that he was unaware that Waller had injured him until after that date. Therefore, this claim is barred by the statute of limitations. As Waller did not have the power to institute a sexual abuse investigation and the malicious prosecution claim is time barred, Waller and Wellspring's motion for summary judgment is due to be granted.

E. Dr. Fetter and CAPSI

Tomberlin's two remaining claims against Dr. Fetter are a state law negligence claim and a claim for violation of civil rights under 42 U.S.C. § 1983. The only remaining claim against Child and Adolescent Psychological Services of Inverness

("CAPSI"), Dr. Fetter's wholly owned professional corporation, is for negligence. These claims will be addressed in turn.

1. Negligence

The elements of a negligence action have been explained above in Sec. III.C.1. Dr. Fetter contends that summary judgment is due to be granted because Tomberlin has not provided sufficient proof that he has breached any duty.

In support of the negligence action, Tomberlin argues that Dr. Fetter was not an expert in child sex abuse cases and typically worked with children older than ABT, and that evaluating ABT and providing counseling to her violated the American Psychological Association Code of Ethics. Additionally, Tomberlin argues that Dr. Fetter should have considered that she had already been counseled and interviewed a number of times before his evaluation, and that he should have conducted "Source Monitoring" yet never did so, which Tomberlin asserts is also a violation of the American Psychological Association Code of Ethics.

However, Tomberlin has failed to provide evidence that Dr. Fetter did, in fact, violate the ethical code of his profession. Rule 3.05, which Tomberlin argues Dr. Fetter "clearly violated" when he both performed an emotional evaluation of ABT and provided counseling to her, specifically states that dual relationships "that would not reasonably be expected to cause impairment or risk exploitation or harm are not

unethical." (Doc. 122-31 at 7.) Tomberlin has not provided any evidence that the dual role relationship between Dr. Fetter was an unethical one; while Dr. Fetter has provided expert testimony stating that his dual relationship was ethical. (Doc. 108-25 at 21.) Similarly, Tomberlin has failed to provide evidence that Dr. Fetter's failure to engage in "source monitoring" violated Rule 2.01 of the American Psychological Association Code of Ethics. That rule requires that psychologists provide services only within the bounds of their competence, and have an obligation to make themselves competent before providing services that they are not already competent in. (Doc. 122-31 at 6.) If this rule has any relation to "source monitoring," Tomberlin has not made the connection evident, and in any event the only evidence Tomberlin has produced to show that Tomberlin was not competent to provide services to ABT was that his practice typically dealt with adolescents rather than very young children. The fact that Dr. Fetter typically dealt with older children is simply not enough to establish that he was not competent to provide services to ABT, and to show that Dr. Fetter either violated a rule of professional conduct or breached any duty to Tomberlin. As Tomberlin has failed to provide sufficient evidence that Dr. Fetter breached any duty, summary judgment is due to be granted as to this claim.

2. § 1983

As discussed above in Sec. III.D.2, to be liable under § 1983 Dr. Fetter must

have been a state actor. Like with Waller, Tomberlin argues that Dr. Fetter is a state actor because he participated in "joint action" with the State.

Like Waller, Dr. Fetter was not a state employee, but unlike Waller the state did contract with Dr. Fetter in order to have him evaluate ABT. The only additional argument provided by Tomberlin is that, as a mandatory reporter, Dr. Fetter was required under DHR regulations to receive a notification of the final abuse determination.

The mere existence of a contract with the state does not mean that the state and a private party are engaged in joint action. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school that treated students with drug and alcohol problems not a state actor despite operating under a contract with the state and receiving 90% state funding). Similarly, the fact that Dr. Fetter's work was potentially used by the State in making its decisions also does not transform him into a state actor. *See Langston v. ACT*, 890 F.2d 380, 385 (11th Cir. 1989) (State's reliance on defendants test to make university admission decisions did not transform defendant testing company into state actor where the state did not "exert[] influence" over the defendants decisions). While DHR contracted with Dr. Fetter and provided him with notification of the final sexual abuse determination, there is no evidence that DHR had any influence over the way Dr. Fetter performed any of his work or had in any way "intertwined itself with

[Dr. Fetter] to such an extent that the state was a joint participant in the enterprise." *Id.* As Dr. Fetter was not a state actor, summary judgment is due to be granted on this § 1983 claim.

F. Motions to Strike

Defendants Waller and Wellspring (Doc. 125) and O'Connor (Doc. 130) have also filed motions to strike portions of the materials submitted by Tomberlin in response to their respective motions for summary judgment. As summary judgment for these Defendants was proper even considering the challenged materials, these motions are due to be DENIED as moot.

IV. Conclusion

For the foregoing reasons, Defendants' motions for summary judgment (Doc. 93, 101, 103, 104, 106) are due to be GRANTED.

A separate order will be entered.

Done this 12th day of August 2015.

L. SCOTT COOGLER
UNITED STATES DISTRICT JUDGE
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