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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Montiah Chatman, individually and on behalf
10 of her two minor children, J.L.C. and
E.V.T.P.,

11 Plaintiffs,

12 v.

13 Marci D Ferrell, et al.,

14 Defendants.
15

No. CV-17-03826-PHX-DLR

ORDER

16
17 On February 13, 2020, the Court granted summary judgment to Plaintiffs on count
18 one of their complaint brought pursuant to 42 U.S.C. § 1983. (Doc. 129.) Specifically, the
19 Court found that, by removing J.L.C. and E.V.T.P. (the “Boys”) from Montiah Chatman’s
20 custody without judicial authorization and in the absence of exigent circumstances,
21 Defendants violated the Fourth and Fourteenth Amendments. (*Id.*) The parties
22 subsequently prepared to proceed to trial, but logistical challenges and safety concerns
23 stemming from the COVID-19 pandemic caused the matter to be continued for at least six
24 months. (Doc. 137.) Facing delayed resolution of the matter, Plaintiffs moved for leave
25 to file a second motion for summary judgment addressing their false imprisonment and
26 negligence claims. (Doc. 138.) The Court granted the motion, reasoning that a second
27 round of dispositive motion practice would not prejudice Defendants and could be
28 productive by narrowing the issues prior to trial. Plaintiffs’ second motion for summary

1 judgment is now ripe. (Docs. 147-49.) The Court held oral argument on December 9, 2020
2 and thereafter took the matter under advisement. (Doc. 152.) Plaintiff’s motion is granted
3 in part and denied in part as described below.¹

4 **I. False Imprisonment**

5 Under Arizona law, a defendant who confines another person without that person’s
6 consent and without lawful authority is liable for false imprisonment. *Spears v. Ariz. Bd.*
7 *of Regents*, 37 F. Supp. 3d 893, 922 (D. Ariz. 2019) (citing *Slade v. City of Phoenix*, 541
8 P.2d 550, 552 (Ariz. 1975)). To be found liable, each defendant need not have physically
9 confined the other person, themselves. Rather, a defendant is subject to liability for false
10 imprisonment if (1) the defendant acted with the intent to confine another person within
11 boundaries fixed by the defendant; (2) the defendant’s act resulted in such confinement;
12 and, (3) the other person was conscious of the confinement or was harmed by it. *Gau v.*
13 *Smitty's Super Valu, Inc.*, 901 P.2d 455, 458 (Ariz. App. 1995).

14 At oral argument, Defendants conceded that they each intentionally caused the Boys
15 to be taken into custody without consent, and that the Boys were conscious of the
16 confinement or harmed by it. (Doc. 152.) Nevertheless, Defendants argued that they are
17 not liable for false imprisonment because A.R.S. § 8-821 provided them with lawful
18 authority to remove the boys. However, as the Court explained in its prior order, child-
19 removals in the absence of exigent circumstances² or judicial authorization, such as what
20 occurred here, violate the Fourth and Fourteenth Amendments. The Constitution is the
21 supreme law of the land, and conduct that violates the supreme law of the land, by
22 definition, lacks lawful authority. *See Worcester v. Ga.*, 31 U.S. 515, 571-72 (1832)
23 (M’Lean, J., concurring) (“No one can deny that the constitution of the United States is the

24 ¹ The Court incorporates by reference the background section from its prior
25 summary judgment order. (Doc. 129 at 1-4.)

26 ² As explained in the Court’s February 13, 2020 decision, exigent circumstances in
27 the child-removal context exist only when government officials have reasonable cause to
28 believe that: (1) at the time of seizure, the children are in imminent danger of suffering
serious physical injury; (2) the scope and degree of the intrusion is reasonably necessary
to avert that specific injury; and (3) there is insufficient time to obtain a warrant to prevent
such injury. *Birair v. Kolycheck*, No. CV-15-01807-PHX-DJH, 2018 WL 4220759, at *9
(D. Ariz. Sept. 5, 2018) (quoting *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784, 790 (9th
Cir. 2016)).

1 supreme law of the land; and consequently, no act of any state legislature or of congress,
2 which is repugnant to it, can be of any validity.”). In sum, because they violated the Fourth
3 and Fourteenth Amendments by removing and confining the boys, Defendants could not
4 have simultaneously acted with lawful authority. Plaintiffs have therefore established, as
5 a matter of law, that each defendant confined the Boys without their consent and without
6 lawful authority. The Court will grant summary judgment to Plaintiffs on their false
7 imprisonment claim.

8 **II. Negligence**

9 “To establish a claim for negligence, a plaintiff must prove four elements: (1) a duty
10 requiring the defendant to conform to a certain standard of care; (2) a breach by the
11 defendant of the standard; (3) a causal connection between the defendant’s conduct and the
12 resulting injury; and (4) actual damages.” *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007)
13 (citation omitted). Here, Plaintiffs proffer four negligence per se theories in support of
14 their negligence claim against Marci Ferrell and Cindy Chrisman. Specifically, they allege
15 that A.R.S. §§ 8-821(B) and (F), 8-822(C) and 8-823 imposed duties on Ms. Ferrell and/or
16 Ms. Chrisman, which they violated, causing Plaintiffs psychological trauma. The Court
17 will address the parties’ arguments by considering each statutory provision, in turn.

18 **A. A.R.S. § 8-821(B)**

19 Section 8-821(B) states, in relevant part,

20 B. A child may be taken into temporary custody by a peace
21 officer, a child welfare investigator or a child safety worker if
22 temporary custody is clearly necessary to protect the child
because probable cause exists to believe that the child is either:

23 1. A victim or will imminently become a victim of abuse or
neglect.

24 Plaintiffs argue that, because the Court earlier determined that the Boys’ removal violated
25 the Fourth and Fourteenth Amendments, Ms. Ferrell and Ms. Chrisman similarly violated
26 § 8-821(B). However, the question, here, is not whether Defendants’ behavior was
27 constitutional, but whether it violated § 8-821(B) for negligence purposes. While it is true
28 that, to comply with constitutional due-process, child removals require a greater showing

1 than probable cause, the probable cause analysis is relevant because § 8-821(B) makes it
2 so. *Birair*, 2018 WL 4220759, at *9.

3 Here, a dispute of material fact exists as to whether Defendants had probable cause
4 to believe that J.L.C. and E.V.T.P. were victims of abuse or neglect. Specifically, evidence
5 such as J.L.C.’s sexualized behavior and the Boys’ former cohabitation with a registered
6 sex offender suggest that Defendants had probable cause to believe that the Boys were
7 victims of abuse or neglect. (Doc. 148 at 4.) Therefore, Plaintiffs cannot establish, as a
8 matter of law, that Ms. Ferrell and Ms. Chrisman breached their duties under § 8-821(B).
9 The Court will consequently deny summary judgment to Plaintiffs on their negligence
10 claim stemming from § 8-821(B).

11 **B. A.R.S. § 8-821(F)**

12 Section 8-821(F)³ states that a “child shall not remain in temporary custody for more
13 than seventy-two hours excluding Saturdays, Sundays and holidays unless a dependency
14 petition is filed.” Here, Defendants do not dispute breach, causation or damages. Instead,
15 they assert that § 8-821(F) did not impose a duty on Ms. Ferrell or Ms. Chrisman because
16 the harm alleged—psychological trauma to Plaintiffs—was not the harm the subsection
17 sought to prevent. *See Quiroz v. ALCOA Inc.*, 416 P.3d 824, 829 (Ariz. 2018) (quoting
18 *Gipson*, 150 P.3d at 233) (“A duty may arise from a statute when the plaintiff “is within
19 the class of persons to be protected by the statute and the harm that occurred . . . is the risk
20 that the statute sought to protect against.”).

21 To ascertain whether the harm alleged was the harm § 8-821(F) sought to prevent,
22 the Court must interpret the section’s intent by giving the “words their ordinary meaning
23 unless the context suggests a different one.” *State ex. Rel. Brnovich v. City of Phoenix*,
24 468 P.3d 1200, 1205 (Ariz. 2020). Looking to the section’s plain meaning, the Court
25 concludes that it was not designed to prevent psychological harm to separated families.
26 Section § 8-821 does not include language suggesting that its application aims towards
27 emotional harm reduction. Rather, in addition to providing a dependency-petition-filing

28 ³ A.R.S. § 8-821(F) was effective from July 3, 2015 until June 30, 2018. Identical requirements are now included in § 8-821(H).

1 exception to the seventy-two-hour return deadline, the section includes an exception for
2 “Saturdays, Sundays, and holidays,” suggesting that the section’s purpose is
3 administrative. Namely, § 8-821(F) creates a three-business-day processing timetable to
4 ensure expeditious resolution of cases. If the section had been designed, instead, to reduce
5 emotional harm caused by family separation, it seems unlikely that it would permit longer
6 separations during weekends and holidays, a policy that probably exacerbates trauma.
7 Because § 8-821(F) was not designed to prevent the harm that Plaintiffs allege, Plaintiffs
8 have not met the duty prong as a matter of law. Summary judgment is therefore
9 inappropriate on Plaintiffs’ negligence claim stemming from § 8-821(F).

10 **C. A.R.S. § 8-822(C)**

11 Section 8-822(C) states, in relevant part,

12 C. [T]he department may not remove a child from the custody
13 of the child’s parents, guardian or custodian unless both of the
following occur before the removal:

14 1. The child safety worker who is recommending the removal
15 submits the reasons for removal and supporting information to
the worker’s supervisor.

16 2. The worker’s supervisor reviews the reasons and supporting
17 information and approves the removal.

18 In their motion, Plaintiffs contend, without elaboration, that Ms. Chrisman violated § 8-
19 822(C) by “approving the removal.” (Doc. 147 at 6.) The Court sought clarification,
20 because it had been its understanding that Ms. Ferrell was the relevant “child safety
21 worker” and that Ms. Chrisman, the “supervisor,” had reviewed Ms. Ferrell’s reports and
22 approved the removal by directing Ms. Ferrell to remove the Boys. At oral argument,
23 however, Counsel raised, for the first time, the argument that Ms. Chrisman violated § 8-
24 822(C) by failing to submit her removal recommendation to “someone else” for approval.
25 (Doc. 152.) Counsel did not name the individual or group to whom Ms. Chrisman was
26 required to submit her recommendation⁴ or otherwise support Plaintiffs’ reading of the

27 ⁴Plaintiffs, in their first motion for summary judgment, suggested that the
28 department customarily “staffed” removal decisions and expressed concern that the
absence of staffing records addressing the Boys’ removal indicates that the decision was
not staffed. (Doc. 110-4 at 10.) Perhaps Counsel’s reference at oral argument to “someone

1 statute, which appears to require an extra approval step. Without more, Plaintiffs have not
2 met their burden to show that Ms. Chrisman breached her duty under § 8-822(C) as a matter
3 of law. The Court will deny summary judgment to Plaintiffs on their negligence claim
4 arising from this section.

5 **D. A.R.S. § 8-823**

6 The relevant portion of § 8-823 reads,

7 A. If a child is taken into temporary custody, [the] child safety
8 worker taking the child into custody shall provide written
9 notice within six hours to the parent or guardian of the child . .

10 B. The written notice shall contain []:

11 1. Specific reasons as to why the child is being removed. The
12 notice shall list the specific factors that caused the
13 determination of imminent danger.

14 Here, Defendants do not dispute that Ms. Ferrell tendered a temporary custody
15 notice (“TCN”) to Ms. Chatman that lacked an explanation of the specific reasons for the
16 Boys’ removal. (Doc. 110-2 at 11.) Instead, they assert that they are not liable for a
17 violation of the section, because the duty element has not been met. Specifically, they
18 argue that the harm alleged—psychological trauma suffered by Ms. Chatman—was not the
19 harm § 8-823 sought to prevent. The Court agrees. Section 8-823, titled “Notice of taking
20 into temporary custody,” is unequivocally a notice statute. The foreseeable harm arising
21 from the violation of such a provision is lack of notice, not emotional distress. Because §
22 8-821(F) was not designed to prevent the harm that Plaintiffs allege, the duty prong has not
23 been met. Summary judgment is therefore inappropriate on Plaintiffs’ negligence claim
24 stemming from § 8-823.

25 Because Plaintiffs have not shown they are entitled to relief as a matter of law on
26 any of their negligence theories, the Court will deny summary judgment to Plaintiffs on
27 their negligence claim. Further, the Court will grant summary judgment to Defendants on

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else” as the final approver was intended to point to the staff group. However, even if
staffing was an ordinary department practice and the Boys’ removal decision was not
staffed, § 8-822(C) does not appear to include a staffing requirement.

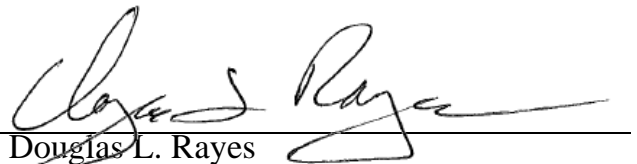
1 Plaintiffs' negligence claim insofar as it rests on alleged violations of A.R.S. §§ 8-821(F)
2 and 8-823. As a matter of law, these provisions were not designed to prevent the harm
3 alleged by Plaintiffs. Consequently, Plaintiffs cannot meet the duty element. An award of
4 summary judgment to Defendants is appropriate here, even though they did not move for
5 summary judgment, because Plaintiffs had a full and fair opportunity to brief their duty
6 arguments. *See Whitmire v. Wal-Mart Stores, Inc.*, 359 F. Supp. 761, 792 (D. Ariz. 2019)
7 (quoting *In re Harris Pine Mills*, 44 F.3d 1431, 1439 (9th Cir. 1995) (the Court may grant
8 summary judgment for a nonmovant without notice where "the losing party has had a full
9 and fair opportunity to ventilate the issues involved in the motion.")). For these reasons,

10 **IT IS ORDERED** that Plaintiffs' motion for summary judgment (Doc. 147) is
11 **GRANTED IN PART AND DENIED IN PART** as detailed above.

12 **IT IS FURTHER ORDERED** that summary judgment is granted to Defendants on
13 Plaintiffs' negligence claim insofar as it rests on alleged violations of A.R.S. §§ 8-821(F)
14 and 8-823.

15 Dated this 23rd day of December, 2020.

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Douglas L. Rayes
United States District Judge