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28E-filed on: 3/15/2011

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

TRACY WATSON, RENEE STALKER, PAM
STALKER as Guardian *Ad Litem* for OLIVIA
STALKER, SHAFER WATSON and RILEY
WATSON, minors,

Plaintiffs,

v.

COUNTY OF SANTA CLARA, *et al.*,

Defendants.

No. C-06-04029 RMW
PRETRIAL ORDER NO. 2

The court hereby issues the following orders on matters discussed at the pretrial conference on March 10, 2011.

1. Statement of Case for Jury: The parties are to submit a joint proposed statement for the jury by March 17, 2011 setting forth the nature of the case, and, if they cannot agree on a statement, their respective proposals. The statement should include mention that the case will be phased.

2. Exclusion of Witnesses: Witnesses, except parties, are excluded.

3. Exhibits: Exhibits will be premarked and numbered consecutively without regard to which party offers the exhibit.

4. Jury: There will be 8 jurors and each side is entitled to 3 peremptory challenges. The court will initially examine 20 prospective jurors and then allow counsel for each side up to 10

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1 minutes for follow-up questions. After the parties exercise any challenges for cause, the courtroom
2 deputy will hand the parties a list with the prospective jurors numbered 1 through the number of
3 prospective jurors who remain after challenges for cause. The parties will then pass the list between
4 themselves exercising their peremptory challenges. A pass counts as a challenge. After the parties
5 exercise their peremptory challenges, the examined jurors will be asked to return to the public seats
6 in the courtroom and the 8 who will serve as the jury will be called back to the jury box by the
7 courtroom deputy. The jurors will be the first 8 unchallenged prospective jurors on the list provided
8 to counsel

9 **5. Length of Trial:** Each side will have up to 12 hours, not including jury selection and
10 closing arguments, to present its case.

11 **6. Defendants' Objections to Testimony of Plaintiffs' Attorneys**

12 Defendants object to testimony by plaintiffs' attorneys, Patrick Clancy and Dennis Ruel, as
13 to the legal advice they provided to their clients, the interview with O.W. at Mr. Clancy's office, and
14 any opinion about the innocence or other legal condition of Tracy Watson or the other plaintiffs.
15 Defendants object on two grounds: (1) what the attorneys told their clients is not relevant; and (2)
16 plaintiffs asserted the attorney/client privilege during discovery when asked about Mr. Clancy's
17 advice, and, therefore, should not be allowed to now waive the privilege and offer evidence
18 defendants were precluded from discovering. Defendants' objection has merit at least with respect
19 to the liability phase.

20 The essential liability question as to the claims of both the children and their parents is
21 whether the warrantless seizures of the children were justified by exigent circumstances, i.e. did the
22 information possessed by the officers at the time of the seizures provide reasonable cause for the
23 officers to believe that the children were in imminent danger of serious bodily injury or abuse and
24 was the removal action reasonably necessary to avert such injury? *See Wallis v. Spencer*,
25 202 F.3d 1126, 1137-38 (9th Cir. 2000). What the plaintiffs may have been advised by their
26 attorneys was not information available to the officers and, therefore, is not relevant to the exigent
27 circumstances question. Defendants' motion does not seek to exclude information the officers may
28

1 have been told by counsel prior to the removal of the children and evidence of such information
2 would be admissible if relevant to whether exigent circumstances existed.

3 Evidence of the advice given to plaintiffs by their counsel around the time of the removal
4 may have some relevance to damages. However, the court defers resolving that question until it
5 arises, if it does. The court understands that plaintiffs do not intend to offer such evidence in their
6 case-in-chief and, if it is offered, it most likely will be in rebuttal to something offered by
7 defendants. Counsel is to advise the court before any evidence of attorney advice, observations or
8 opinions are offered.

9 **7. Defendants' Objections to the Testimony of Plaintiffs' Treating Physicians**

10 Defendants object to testimony from Carol Marks, MFT, Margaret Cochran, Ph.D and
11 Valerie Fox, Ed.D concerning the emotional distress suffered by plaintiffs. Defendants claim that
12 the juvenile court later determined there were proper grounds for removal and, therefore, plaintiffs
13 are not entitled to compensation for the distress suffered by them as a result of the removal.
14 Defendants further assert that any attempt by the experts to parse out what emotional distress was
15 suffered during the first five to six days of the separation from that suffered during the entire ordeal
16 would be based on speculation.

17 The court overrules defendants' objection. The fact that the juvenile court later ordered that
18 the children remain in protective custody pending further court hearing does not mean that damages
19 did not result from the removals if they were wrongfully made. Defendants have also not persuaded
20 the court that the witnesses could not parse out the emotional distress suffered. However, as
21 discussed below, difficult issues may arise as to the scope of cross-examination of the witnesses
22 called to support plaintiffs' damage claims.

23 **8. Defendants' Objections to the Testimony of Plaintiffs' Police Practices Expert
24 Michael Lyman**

25 Defendants object on a number of grounds to the testimony of Michael Lyman, a police
26 practices expert retained by plaintiffs. Primarily, they complain that Mr. Lyman's opinions are
27 inconsistent with that of the juvenile court, that he speculates as to what would have resulted from
28 further investigation, and that he expresses opinions on subjects properly left to the jury.

1 The court finds that most of Mr. Lyman's testimony would not assist the trier of fact to
2 understand the evidence or determine a fact in issue. *See* F.R.E. 702. The court, however, does
3 believe that Mr. Lyman's opinion on one narrow subject could be helpful, specifically what
4 alternative avenues, if any, were available to the officers before they entered the residence and
5 seized S.W. and R.W. or removed O.W. when she was later brought to the police station. In *Wallis*,
6 the court specifically held that the police cannot seize children suspected of being abused or
7 neglected unless reasonable avenues of investigation are first pursued. 202 F.3d at 1138. There may
8 not be, however, a reasonable avenue of investigation depending on the time element and the nature
9 of the allegations. *Id.* Circumstances cannot be considered exigent if there is a reasonable avenue of
10 investigation that has not been taken, even if, in hind sight, it is learned that such investigation
11 would not have negated any risk of immediate injury. Mr. Lyman's testimony may assist the jury in
12 evaluating whether any reasonable alternatives of investigation existed under circumstances as
13 presented to the officers here.

14 **9. Instruction on the Scope of Damages**

15 At the pretrial conference on March 10, 2011 the parties discussed with the court issues with
16 respect to the scope of damages that could be claimed upon a finding of liability. Both sides had
17 some quarrel with the proposed instruction that the court suggested in Pretrial Order No. 1. The
18 court has made minor modifications to the instruction which it intends to give if there is a damages
19 phase:

20 You may award as compensatory damages the amount of money that you
21 determine will reasonably and fairly compensate plaintiffs for any injury you find
22 was caused by the defendant officers' unconstitutional acts that occurred during the
23 period from June 29, 2005, the date on which S.W. and R.W. were removed, through
24 July 5, 2005, the date that the juvenile court found that return to the parents' home
25 was contrary to the children's welfare and ordered that the children remain in
26 protective custody pending further court hearing. The juvenile court order was based
27 upon evidence that was presented by County of Santa Clara social workers and the
28 continued protective custody was not based upon any conduct for which the police
29 officers can be held responsible. The propriety of the action taken by the county
30 social workers is not a matter before you in this proceeding.

31 You should consider the mental and emotional pain and suffering experienced
32 during the June 29 through July 5, 2005 period and any experienced thereafter which
33 was caused by the police officer's unconstitutional acts occurring during that period.
34 However, you must not include in your award compensation for mental and
35 emotional pain and suffering resulting from the detention of the children or any other
36 events occurring after July 5, 2005.

1 Your award must be based upon evidence and not upon speculation,
2 guesswork or conjecture.

3 **10. Scope of Cross-Examination on Damages**

4 The parties disagree about the permissible scope of cross-examination of plaintiffs and their
5 treating medical professionals regarding the emotional distress plaintiffs allegedly suffered during
6 the June 29, 2005 through July 5, 2005 time period. The court explained the difficulty of making
7 any definitive rulings without hearing the testimony (or a proffer of the questions to be asked and the
8 anticipated answers). The only written motion to exclude that has been made is defendants' motion
9 to exclude altogether testimony from plaintiffs' treating physicians which the court has denied. *See*
10 *above*.

11 If plaintiffs offer testimony as to the emotional distress they suffered, defendants are entitled
12 to cross-examine to test the credibility of that testimony and to question the nature and extent of the
13 distress suffered as a result of the officers' unlawful conduct. This could include examination about
14 other sources of stress existing during the June 29 through July 5 time period and whether the nature
15 and extent of the emotional distress resulting from the officers' conduct can be distinguished from
16 the stress resulting from the total period of separation and other events. Any specific direct or cross-
17 examination, of course, would be subject to objection under F.R.E. 403, if the objection is brought
18 timely to the court's attention.

19 Defendants argue that if they are found liable because exigent circumstances did not exist,
20 damages can be awarded against them only for the constitutional violation and not for the resulting
21 separation of the children from their parents. Defendants assert that the juvenile court determined
22 that the separation was based on proper grounds. Defendants rely primarily on *Mabe v. San*
23 *Bernardino County*, 237 F.3d 1101 (9th Cir. 2001). In *Mabe*, the court held that although summary
24 judgment was precluded on plaintiff's claim that her daughter was improperly removed without a
25 warrant, summary judgment was proper in favor of defendants on plaintiffs' claim that defendants
26 were liable for placement of the daughter in foster care. The court reasoned that because the
27 juvenile court found two days after the removal that a *prima facie* showing had been made that the
28 lack of pre-placement preventive efforts was reasonable and that continuation in the parental home

1 would be contrary to the welfare of the minor, there was no basis for liability for the four-year
2 placement in foster care. The *Mabe* court clearly held that the juvenile court's finding cut off any
3 liability for damages or suffering incurred as a result of the foster care placement. *Id.* at 1110. It is
4 not clear, however, that Mabe raised the specific claim that she was entitled to damages for the
5 separation from her daughter for the two day period prior to the detention hearing as opposed to a
6 claim that the placement should never have been made. Therefore, it does not appear that *Mabe*
7 supports defendants' assertion that damages are not recoverable for the emotional distress suffered
8 by plaintiffs because the children were removed without a warrant and separated from their parents
9 before a detention hearing. *Mabe* does, however, support the fact that the juvenile court's *prima*
10 *facie* finding cuts off defendants' responsibility for the continued detention of the children.

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DATED: 3/15/2011


RONALD M. WHYTE
United States District Judge