UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

S.V.

Plaintiff,

-vs- Case No. 10-cv-919

KENNETH KRATZ

Defendant.

UNPUBLISHED COURT DECISIONS CITED IN PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Slip Copy, 2011 WL 781582 (N.D.Ind.)
(Cite as: 2011 WL 781582 (N.D.Ind.))

H

Only the Westlaw citation is currently available.

United States District Court,
N.D. Indiana,
South Bend Division.
Roman FINNEGAN, et al., Plaintiffs,
v.
Laurel MYERS, et al., Defendants.

No. 3:08-CV-503.
March 1, 2011.

Heather M. Kirkwood PHV, Peterson Russell Kelly PLLC, Seattle, WA, Jana K. Strain, Ronald J. Waicukauski, Price Waicukauski & Riley LLC, Indianapolis, IN, Kevin C. Tankersley, Tankersley Law Office, Winamac, IN, for Plaintiffs.

Laura L. Bowker, Indiana Attorney General's Office, Kelly J. Pitcher, Delk McNally LLP, Indianapolis, IN, for Defendants.

OPINION AND ORDER

RUDY LOZANO, District Judge.

***1** This matter is before the Court on the: (1) Defendant Antoinette Laskey's Motion for Judgment on the Pleadings, filed by Defendant, Antoinette Laskey, on April 14, 2010 (DE # 44); (2) Defendant Antoinette Laskey's Motion to Strike Exhibits Attached to Plaintiffs' Response to Motion for Judgment on the Pleadings, filed by Defendant, Antoinette Laskey, on May 13, 2010 (DE # 48); and (3) Motion to Supplement Response to Defendant's Motion for Judgment on the Pleadings, filed by Plaintiffs on June 1, 2010 (DE # 53). For the reasons set forth below, the motion for judgment on the pleadings (DE # 44) is **DENIED;** the motion to strike exhibits (DE # 48) is **DENIED;** and the motion to supplement response (DE # 53) is also **DENIED.**

BACKGROUND

Plaintiffs have sued several defendants in this case, including Dr. Antoinette Laskey, a licensed physician hired by the Department of Children Services ("DCS") to give a medical opinion as to whether the death of Plaintiffs' 14-year old daughter, Jessica Salyer, was due to accident or parental abuse. Defendant Laskey filed the current Motion for Judgment on the Pleadings, arguing she is not a proper party to the action because she did not act under "color of law," she did not violate Plaintiffs' civil rights, and she is entitled to absolute immunity. Plaintiffs, Roman Finnegan (Jessica's stepfather), and Lynnette Finnegan (Jessica's mother), controvert each of these claims.

Dr. Laskey has also moved to strike certain exhibits attached to Plaintiffs' response to the motion for judgment on the pleadings. Specifically, Dr. Laskey requests that the Court strike Exhibit 1, labeled "Coroner's Verdict and Pless report," Exhibit 2, the 2006 opinion letter written by Dr. Laskey, and Exhibit 3, labeled "cover letter on joint letterhead of Dr. Laskey and Governor Daniels." Dr. Laskey contends that because she has not offered any materials outside of the pleadings, to preserve her motion as one made pursuant to Rule 12(c), the Court should strike the documents attached as exhibits to Plaintiffs' response. In response, Plaintiffs claim that all three exhibits are proper, arguing Dr. Laskey's opinion letter is central to Plaintiffs' claims, and the other two exhibits are public documents which the Court may take judicial notice.

Finally, Plaintiffs move for leave to supplement their response to the motion for judgment on the pleadings with a final state court decision rendered by Judge Blankenship of the Pulaski County Superior Court, which was filed on January 28, 2010. Dr. Laskey disagrees, arguing that it is improper for the Court to consider that opinion when ruling on the instant motion for judgment on the pleadings.

All three motions are fully briefed and are

therefore ripe for adjudication.

DISCUSSION

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) "is reviewed under the same standard as a motion to dismiss under 12(b) ...." *Flenner v. Sheahan,* 107 F.3d 459, 461 (7th Cir.1997); *see also R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Eng'rs, Local Union 150,* 335 F.3d 643, 647 (7th Cir.2003). Where the plaintiff moves for judgment on the pleadings, "the motion should not be granted unless it appears beyond doubt that the non-moving party cannot prove facts sufficient to support his position." *Housing Auth. Risk Retention Group, Inc. v. Chicago Housing Auth.,* 378 F.3d 596, 600 (7th Cir.2004) (quotation omitted). In other words, "[a] court will grant a Rule 12(c) motion only when it appears beyond a doubt that the plaintiff cannot prove any facts to support a claim for relief and the moving party demonstrates that there are no material issues of fact to be resolved." *Brunt v. Serv. Employees Int'l Union,* 284 F.3d 715, 718-19 (7th Cir.2002). In ruling on a motion for judgment on the pleadings, the court must accept as true "all well-pleaded allegations" and view them in the light most favorable to the non-moving party, as well as accept as true all reasonable inferences to be drawn from the allegations. *R.J. Corman,* 335 F.3d at 647; *see also Forseth v. Village of Sussex,* 199 F.3d 363, 368 (7th Cir.2000). A court may rule on a judgment on the pleadings under Rule 12(c) based upon a review of the pleadings alone, which include the complaint, the answer, and any written instruments attached as exhibits. *See Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend,* 163 F.3d 449, 452-53 (7th Cir.1998); *see also* Fed.R.Civ.P. 10(c) (providing that written instruments attached as exhibits to a pleading are part of the pleading for all purposes).

Motion to Strike Exhibits

***2** Dr. Laskey requests that the Court strike: Exhibit 1 to Plaintiffs' response, labeled "Coroner's Verdict and Pless report," which is the Jasper County Coroner's Verdict, results from the Coroner's Inquest, letters and a declaration from Plaintiffs' medical experts, and what appears to be notes from a meeting with one of the experts; Exhibit 2, an opinion letter written by Dr. Laskey; and Exhibit 3, labeled "cover letter on joint letterhead of Dr. Laskey and Governor Daniels." (DE # 46, p. 9; Exs. 1-3.)

In *Menominee Indian Tribe of Wisconsin v. Thompson,* 161 F.3d 449, 456 (7th Cir.1998), the Seventh Circuit held that "documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." In that case, because the Plaintiffs had referred to treaties in the complaint, and the treaties were central to the Plaintiffs' claims, the Court found the materials were not outside the pleadings, and considered them for purposes of the Rule 12(c) motion to dismiss. *Id.* Additionally, the Court took judicial notice of historical documents without converting the motion to dismiss into a motion for summary judgment. *Id.* "Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper." *Id.* (citations omitted).

The Coroner's Verdict, including the reports of Dr. Pless and Dr. Leestma (Ex. 1), are public documents that should not be stricken. *See, e.g., Harris v. Quinn,* No. 10-CV-02477, 2010 WL 4736500, at *4 (N.D.Ill. Nov.12, 2010) (taking judicial notice of ten documents submitted in support of motion to dismiss because they were matters of public record and central to plaintiffs' claims, including executive orders, collective bargaining agreements, and a judicial order); *Opoka v. I.N.S.,* 94 F.3d 392, 394 (7th Cir.1996) ("it is a well-settled principle that the decision of another court or agency ... is a proper subject of judicial notice"). The two reports are incorporated by reference in the Coroner's Verdict, and included in the 98-page Verdict filed in the Jasper County Circuit Court in July 2007. (*See* DE # 46-1, including the file stamp.) The Verdict and the re-

ports are pertinent to Plaintiffs' claims as they state opinions that (contrary to Dr. Laskey's opinion), it is not possible to have a fatal beating without exhibiting external evidence of trauma in a patient taking Warafin, and that the skull fractures that Dr. Laskey attributed to Jessica's mother and stepfather were instead created post-mortem, possibly at the first autopsy.

The Court will also take judicial notice of Dr. Laskey's October 28, 2006, opinion letter, in which she states "it is my expert medical opinion that this child sustained a fatal beating on the day that she died and that this beating was the direct cause of her death." (DE # 46-2.) Oftentimes, Courts analyze what documents may be attached to a motion to dismiss. *See, e. g., Menominee,* 161 F.3d at 456 ("documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim."). However, the facts are slightly different in this case, where the Plaintiffs (not the Defendant) have attached the additional documents to their response in objection to the motion for judgment on the pleadings. Such action is also proper on behalf of the Plaintiffs opposing the motion:

> ***3** A party moving for judgment on the pleadings must limit the basis of the motion to the pleadings and to documents attached to or referred to in the pleadings and certain matters of public record. A party opposing such motion, however, is free to oppose the motion by suggesting in a brief the existence of facts that are not inconsistent with the party's allegations in the pleadings. There is no reason why the opposing party cannot add rhetorical support for such suggestions with some supporting documents-indicating that there is a substantial basis for the assertions-though the opponent risks possible conversion of the motion into a summary judgment motion.

Marwil v. Farah, No. 1:03-cv-0482-DFH, 2003 WL 23095657, at *2 (S.D.Ind. Dec.11, 2003) (citations omitted). However, like in *Marwil,* the Court here finds that Plaintiffs have not converted the motion to one for summary judgment. In her memorandum in support of the motion for judgment on the pleadings, Dr. Laskey argues that the Plaintiffs would be "unable to prove under any set of circumstances that Dr. Laskey's allegedly improper conduct was related to her position as an employee of Indiana University." (DE # 45, p. 8.) In response, Plaintiffs have pointed out that Dr. Laskey's opinion letter was written on Indiana University letterhead, and signed by her as an Assistant Professor of Pediatrics. (*See* DE # 46-2.) Dr. Laskey's opinion letter dated October 28, 2006, is referenced numerous times in the complaint, and clearly central to Plaintiffs' claim. (Compl.¶¶ 57-63, 150-51.) The letter assists Plaintiffs in supporting their argument that Dr. Laskey is indeed a proper defendant in this case who acted under color of state law, it is central to their case, and it was referred to in the complaint. Therefore, the Court will not strike it.

Similarly, the Court will consider Dr. Laskey's letter written as Chair of the State Child Fatality Review Team on January 8, 2007 (DE # 46-3). In her motion, Dr. Laskey argues that her opinion letter regarding the cause of Jessica's death was unrelated to her position as Chair of the State Fatality Review Team, which she described as mainly administrative. (DE # 45, p. 8.) The letter attached to Exhibit 3 is used by Plaintiffs to rebut this argument. In this letter, Dr. Laskey states that the State Fatality Review Team's task is "to review the sudden, unexplained, and unexpected deaths in children," and that they have "broadened [their] scope and redoubled [their] efforts to understand how Hoosier children are dying." (DE # 46-3.) Dr. Laskey's position as the Chair of the State Fatality Review Team was referred to in the Complaint (¶¶ 11, 150), and the instant letter which introduced the annual report of the State Fatality Review Team for the period that Jessica's death was under investigation, is a public record which the Court may also take judicial notice.

As such, the Court finds that all three docu-

ments attached to Plaintiffs' response are documents to which the Court may properly take judicial notice. The motion to strike is therefore **DENIED.**

Motion to Supplement Response to Defendant's Motion for Summary Judgment on the Pleadings

***4** Plaintiffs also move for leave to supplement their response with a final state court decision of Judge Blankenship of the Pulaski County Superior Court, dated January 28, 2010, in which he orders DCS to unsubstantiate all claims of abuse or neglect against the Finnegans and to remove the Finnegans from the child protection index. Although this is also a public document subject to judicial notice, the Court declines to allow Plaintiffs to supplement their response with this decision simply because Plaintiffs have not established that this document is necessary for resolution of their motion. *See Harris v. Quinn*, No. 10-cv-02477, 2010 WL 4736500, at *4 (N.D.Ill. Nov.12, 2010) (declining to take judicial notice of documents where defendants did not establish that they were necessary for resolution of the motion). Unlike the previous three exhibits discussed which go towards establishing whether Dr. Laskey acted under color of law, or whether she is entitled to absolute immunity, the present written decision is not relevant to the issues in the instant Motion for Judgment on the Pleadings. Consequently, the motion to supplement their response is **DENIED.**

Motion for Judgment on the Pleadings

Facts

This case arises from the death of 14-year old Jessica Salyer, who lived with her mother and stepfather, Roman and Lynette Finnegan, in Pulaski County, Indiana. (Compl., ¶¶ 3, 4.) Jessica was born with a congenital heart condition that required multiple surgeries, concluding in a 1996 surgery (the Fontan procedure), which left her with a two-chambered, rather than a four-chambered, heart. (*Id.* ¶ 18.) Even with good care, the mortality rate for Fontan patients is high, with ten year survival rates in the 70-75% range. *Id.* Jessica also had a fourth generation seizure disorder, for which she took 3 medications: Warfarin, Digoxin and Phenytoin (brand name Dilantin). (*Id.* ¶¶ 19, 20.) Warfarin in particular is a high risk drug as it can result in bleeding, bruising, and is linked to a risk of brain hemorrhage. (*Id.* ¶¶ 21, 22.)

Shortly after Jessica started the 8th grade at West Central Middle School, the school nurse filed a complaint with the Pulaski County Department of Child Services (“DCS”), stating the school needed a medical safety plan for Jessica, but that Lynnette was not cooperating, that Jessica probably needed to have surgery again, and that Lynnette told them Jessica had no insurance. (Compl.¶ 31.) All of this information was incorrect, as verified by the school records. *Id.* Nevertheless, the following month, the principal of West Central Middle School filed another complaint with DCS based upon Jessica's alleged complaints of neglect-stating that Roman and Lynnette were locking up the food and not allowing her to eat. (*Id.* ¶ 38.) On December 5, 2005, DCS substantiated medical neglect, stating that Lynnette and Roman would not have obtained appropriate medical care for Jessica without DCS intervention. (*Id.* ¶ 42.) In reaching its conclusion, DCS notified the school of the substantiation, but did not notify Roman, Lynnette, or Jessica's doctors, and did not mention the 14 years of medical care that Lynnette had previously provided without DCS intervention. (*Id.* ¶ 42.) Plaintiffs claim that had DCS provided a copy of the substantiation to the Finnegans, or notified Jessica's doctors that monthly blood tests were needed but not being taken, proper testing could have been implemented, and the prescription errors (which were eventually uncovered in this case) could have been caught before Jessica's death. (*Id.* ¶ 45.)

***5** On December 20, 2005, just 15 days after DCS substantiated the school's claims of medical neglect, Lynnette found Jessica lying face down by the side of her bed, not breathing, and with a small amount of blood by her mouth or nose. (Compl.¶

48.) Lynnette and Roman called 911, and performed CPR until the paramedics arrived. *Id.* The CPR was unsuccessful, and Jessica died. At DCS's direction, law enforcement officials from Pulaski County and the Indiana State Police, along with the Jasper County Coroner, investigated Jessica's death. (*Id.* ¶¶ 49-50.) They did not find any signs of abuse or neglect. *Id.* Additionally, Dr. Kenneth Ahler (the emergency room physician and former Coroner for Jasper County), examined Jessica's body, interviewed her parents, and consulted with Dr. Hurwitz, Jessica's pediatric cardiologist. (*Id.* ¶ 51.) Dr. Hurwitz told him that there were only about 200 surviving patients in the country with Jessica's condition, and that 2/3 of the deaths were sudden, like in this case. *Id.* Dr. Ahler concluded that Jessica's death was due to congenital heart disease and sudden death syndrome. (Compl. and Laskey Answ. ¶ 51.) An autopsy conducted the day after her death found no signs of abuse or neglect, "and the preliminary autopsy report attributed Jessica's death to blunt force injury of the head consistent with a fall, with coagulopathy (Coumadin) as a contributing factor." (Compl.¶ 55.) DCS then conducted interviews with Jessica's siblings, her parents, and conducted a home investigation. (*Id.* ¶¶ 52-54.) No indication of abuse or neglect was found, so the Sheriff's office, Indiana State Police, and prosecutor closed their investigations. (*Id.* ¶ 56.)

In an effort to investigate the circumstances surrounding Jessica's death further, ten months after her death, DCS enlisted the help of Dr. Antoinette Laskey. (Co-Defs.' Answ. ¶ 56.) Dr. Laskey was on staff at the Indiana University School of Medicine, where she was employed to teach and research pediatrics. (Compl. ¶ 11; Laskey Answ. ¶ 11.) Dr. Laskey also served as Chair of Indiana's State Child Fatality Review Team ("Fatality Review Team"), an organization charged with reviewing deaths of children that are sudden, unexpected, or unexplained. (Ans. ¶ 11; Ind.Code § 31-33-24-6(a).)

On October 28, 2006, Dr. Laskey authored a report stating that Jessica "sustained a fatal beating on the day that she died and that this beating was the direct cause of her death." (Laskey Answ. ¶ 15; DE # 46-2.) Dr. Laskey's report listed that Jessica's autopsy revealed:

> multiple blunt force traumas to the head (abraded contusion of the left frontal region, bilateral hemorrhages at the temples, a subdural hemorrhage [bleeding around the brain], subarachnoid hemorrhage [bleeding immediately adjacent to the brain], right ventral cerebral contusion [bruise on the brain near the top], right anterior basilar skull fracture [fracture at the base of the skull, near where the spinal column attaches, on the right front side], an epidural hemorrhage [bleeding outside of the dura, underneath the skull], bleeding in the nose and throat with aspiration of the blood and cerebral edema [swelling of the brain]).

***6** (Laskey Answ. ¶ 58.) Dr. Laskey claimed she based her opinion on her "consultation with pediatric cardiologists at Riley Hospital for Children" and "extensive discussions with multiple pediatric cardiologists familiar with tricuspid atresia and Fontan procedures." (DE # 46-2.) [FN1] Dr. Laskey also wrote in her opinion letter that she had "grave concerns about the safety of other children in the care of the caregivers at the time of these injuries." (DE # 46-2; Laskey Answ. ¶ 58.) Plaintiffs insist that Dr. Laskey misstated the medical literature on the risks of the Fontan procedure and Warfarin, confused small hemorrhages typical of Warfarin with blunt force trauma caused by beating, and failed to recognize that her theory was medically impossible given the lack of bruising on Jessica's body. (Compl.¶¶ 59-63.)

> FN1. However, at her deposition, on advice of counsel, Dr. Laskey refused to identify the pediatric cardiologists with whom she consulted. (Compl. and Laskey Answ. ¶¶ 63, 89.)

After Dr. Laskey's opinion letter was issued, DCS responded saying "[t]hank heaven someone

other than the local Director [Ms. Myers] and FCM [Ms. McAninch] agree this child died from physical abuse." (Compl.¶ 57.) Based upon Dr. Laskey's letter, DCS Defendants McAninch and Myers placed Jessica's siblings, Tabitha (nearly 17), and Katelynn (10), in out-of county foster care for more than 9 months. (*Id.* ¶¶ 64-66.)

The judicial proceedings stemming from this allegation of physical abuse went on until Judge Blankenship's decision in January 2010. In July 2007, the Coroner finally ruled that Jessica died from the prescription errors and pre-existing medical conditions, and that the skull fracture attributed by Dr. Laskey to Jessica's parents was created post-mortem, at the first autopsy. (DE # 46-1.) Plaintiffs now claim that Dr. Laskey's report was biased, incomplete, reckless, unsupported by the evidence, and was directly responsible for the seizure of their children. (Compl.¶¶ 57-64, 150.)

In the present motion for judgment on the pleadings, filed on April 14, 2010, Dr. Laskey argues: (1) she is not a proper defendant because she did not act under "color of law"; (2) Dr. Laskey's conduct did not deprive Plaintiffs of any Constitutional rights, privileges, or immunities; and (3) Dr. Laskey is entitled to absolute immunity. (DE # 45.) Plaintiffs' response, filed on May 3, 2010, takes issue with each of these arguments. (DE # 46.) Finally, Defendant Laskey filed a reply on May 13, 2010. (DE # 47.)

Material Issues of Fact Exist as to Whether Dr. Laskey Acted Under Color of State Law

Dr. Laskey admits that Plaintiffs correctly identified that she is a pediatrician employed by the Indiana University School of Medicine ("Indiana University"), and that she currently serves as Chair of the Fatality Review Team. (Def.'s Mem., DE # 45, p. 6.) However, Dr. Laskey claims that just because she was employed by the State of Indiana in some capacities, does not establish that she acted under "color of law" when rendering her opinion in this case.

In order to establish a claim under § 1983, Plaintiffs must establish that Dr. Laskey acted "under color of state law" when depriving them of rights, privileges, or immunities guaranteed by the Constitution or the laws of the United States. 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535-36, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). A public employee only functions under color of state law while acting in her official capacity or while exercising her responsibilities pursuant to state law. *Gibson v. Chicago*, 910 F.2d 1510, 1516-17 (7th Cir.1990) (finding police officer who had been placed on medical roll and declared unfit for duty did not act under color of state law, and affirming dismissal of claim against him). In *Gibson*, the Seventh Circuit found that the "essential inquiry" was whether the plaintiff had "created a triable issue of fact concerning whether [Defendant police officer's] actions related in some way to the performance of a police duty." *Id.* at 1517. "In distinguishing private action from state action, the general inquiry is whether 'a state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or ... is such that the actor could not have behaved in that way but for the authority of his office.' " *Zambrana-Marrero v. Suarez-Cruz*, 172 F.3d 122, 125 (1st Cir.1999) (denying summary judgment for off-duty policeman) (quoting *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir.1995)).

***7** The Supreme Court has held that "[i]f an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law." *Griffin v. Maryland*, 378 U.S. 130, 135, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964). Thus, the fact that Dr. Laskey could have made a report on her opinion about Jessica's death without being cloaked in any state authority is not controlling. The controlling issue is whether Dr. Laskey possessed state authority and whether she purported to act under that authority.

Of course, the motion at hand in this case is a motion for judgment on the pleadings pursuant to Rule 12(c), made after the parties have filed a complaint and answer, which can be granted "only when it appears beyond a doubt that the plaintiff cannot prove any facts to support a claim for relief and the moving party demonstrates that there are no material issues of fact to be resolved." *Supreme Laundry Serv., LLC v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 746 (7th Cir.2008). In this case, there are material issues of fact raised by Plaintiffs as to whether Dr. Laskey acted under color of law when she issued her opinion letter.

First, Dr. Laskey wrote her opinion letter on Indiana University letterhead, and under her signature, included her title of "Assistant Professor of Pediatrics Indiana University School of Medicine." (DE # 46-2.) [FN2] This alone supports the conclusion that she acted under color of state law. *See, e.g., Corbitt v. Anderson*, 778 F.2d 1471, 1475 (10th Cir.1985) (affirming jury verdict on issue of "color of state law" where director of publicly funded counseling service made disparaging statements about the plaintiff on political subdivisions' letterhead and signed statement in his capacity as the director). Neither party disputes that "[a] state university without question is a state actor." *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988). Nor does Dr. Laskey argue that she had a private medical practice. However, Dr. Laskey does argue that she was employed by Indiana University for the purposes of teaching and researching, not for rendering expert opinions to DCS. (Laskey Ans. ¶ 11; DE # 45, p. 7-8.) Even if this is true, it does not preclude her opinion as being deemed one under color of law-as Plaintiffs argue, "scope of employment" is relevant only if the plaintiff seeks to hold the employer responsible for the plaintiff's damages under a respondeat superior theory, which is not at play in this case. *Coleman v. Smith*, 814 F.2d 1142, 1147-48 (7th Cir.1987); *see also Coles v. City of Chicago*, 361 F.Supp.2d 740, 746 (N.D.Ill.2005) ("under color of law" and "scope of employment" inquiries "should not be confused"). As Plaintiffs contend, it is possible for a fact finder to conclude that Dr. Laskey's opinion was in fact sought out by Defendants McAninch and Myers (who admittedly retained the services of Dr. Laskey), because of her pedigree and affiliation with Indiana University. (DCS Defs.' Answ. ¶ 56.)

> FN2. In their memorandum in opposition, Plaintiffs claim Dr. Laskey charged $300/hour for her opinion letter, which was to be paid to Indiana University. (DE # 46, p. 10.) However, since these facts are not in the pleadings, the Court will not consider them at this time.

***8** Second, Dr. Laskey is Chair of the Fatality Review Team, which is an "organization charged with the task or reviewing deaths of children that are unexpected, unexplained, and/or sudden." (Laskey Answ. ¶ 11; DE # 46-3.) The State Child Fatality Review Committee is created by statute, its members are appointed by the Governor, and its Chair-Dr. Laskey-is selected by the Governor. I.C. §§ 31-33-25-8, 9. DCS has a close knit relationship with the State Child Fatality Review Committee-DCS trains Committee members, collects and disseminates data on individual child deaths reviewed by the Committee, and pays Committee expenses from funds appropriated to DCS. I.C. §§ 31-33-25-12, 13, 15. Additionally, the Coroner is ordered to immediately notify the local DCS office and the local or statewide fatality review committee of apparently unexpected or suspicious deaths. I.C. § 36-2-14-6.3. On written request, the Coroner is required to provide the autopsy report to DCS and the Committee. I.C. § 36-2-14-18. Because of her position on the Committee, and as the Chair of the Indiana State Child Fatality Review Team, there is definitely a factual dispute that precludes summary adjudication as to whether Dr. Laskey acted under color of state law.

In this case, Plaintiffs have plausibly alleged that Dr. Laskey deprived them of a federal constitutional right while acting under color of state law.

Kramer v. Village of North Fond du Lac, 384 F.3d 856, 861 (7th Cir.2004). There is an issue of fact as to whether Laskey possessed state authority and purported to act under that authority. *Griffin*, 378 U.S. at 135. As noted previously, Dr. Laskey could have possessed state authority under at least three possible routes: (1) as an employee of Indiana University; (2) as Chair of the State Child Fatality Review Committee; and (3) because she works with or through the Department of Child Services.[FN3]

> FN3. As such, at this stage of the proceedings, the Court does not reach the issue of whether the allegation that Dr. Laskey conspired with state actors is sufficient to permit a finding that she acted under color of law.

Plaintiffs Have Sufficiently Alleged That Dr. Laskey's Conduct Violated A Constitutional Right

Dr. Laskey argues that she did not violate a constitution right, and if any deprivations did occur, she is immune from personal liability. First she contends Plaintiffs have no Constitutional right to "proper investigation." (DE # 45, p. 12.) Then, she argues that Dr. Laskey had no duty to reveal exculpatory information and that she had no duty to agree with other medical experts. (DE # 45, pp. 14-15.) As Plaintiffs point out, these arguments miss the mark of whether Plaintiffs have stated a sufficient claim that Dr. Laskey violated their 4th and 14th Amendment rights.

It is now well established that due process encompasses a parent's liberty interest in familial relations. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (collecting cases); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *Brokaw v. Mercer County*, 235 F.3d 1000, 1018 (7th Cir.2000) (reiterating "[t]he Supreme Court has long recognized as a component of substantive due process the right to family relations."). Children have a "corresponding familial right to be raised and nurtured by their parents." *Berman v. Young*, 291 F.3d 976, 983 (7th Cir.2002). However, the right to familial relations is not without limits. It is bounded by the Government's compelling interest in protecting children. *Brokaw*, 235 F.3d at 1019; Doe, 327 F.2d at 520 ("[t]he right to familial relations is not, however, absolute."). The Court must balance "the fundamental right to the family unit and the state's interest in protecting children from abuse, especially in cases where children are removed from their homes." *Brokaw*, 235 F.3d at 1019 (citation omitted).

***9** In *Brokaw*, which Plaintiffs' rely upon heavily, the Seventh Circuit found that a person "causes a constitutional violation if he sets in motion a series of events that defendant knew or should have known would cause others to deprive the plaintiff of constitutional rights." *Brokaw*, 235 F.3d at 1012. In that case, the plaintiff alleged that relatives and a deputy sheriff conspired to end his parents' marriage by filing "baseless and scurrilous" claims of child neglect with DCFS that they believed "would cause [plaintiff] and his sister to be removed from their parents' home, and in turn prompt [the father] to divorce his wife and leave his family." *Id.* at 1007. Subsequently, without explanation, two police officers walked into the plaintiff's home and grabbed him and his three-year-old sister, carrying them crying out of the house. *Id.* The children remained in foster care for almost four months before being returned home. *Id.* at 1008. Plaintiff's complaint alleged violation of the Fourth Amendment and his substantive due process right to familial relations. *Id.* at 1009-10, 1017-18. Although the district court dismissed the claims for failure to state a claim or, alternatively, on the basis of immunity, the Seventh Circuit reversed. The Seventh Circuit found that a DCFS caseworker who was not present for the actual seizure, but "the allegations read in the light most favorable to [plaintiff] indicate that she directed those who removed the children to do so," could be liable under section 1983 for the 4th Amendment violation. *Id.* at 1014. *See also Morris v. Dearborne*, 181 F.3d 657, 672 (5th Cir.1999) (holding defendant, child's teacher, who was moving force behind the removal of children was re-

sponsible for causing allegedly unconstitutional removal). The Court did note:

> Before closing the Fourth Amendment discussion, it is important to reiterate two points. First, our holding should not be read as creating a constitutional claim any time a child is removed from his home and a later investigation proves no abuse occurred. The alleged facts here go much beyond that scenario, and our holding is limited to the unique circumstances of this case. Second, it is important to remember that this case is here on 12(b)(6) dismissal. Further proceedings and discovery may well narrow this case substantially, but at this point the question is solely whether [plaintiff] can succeed under any set of facts.

Brokaw, 235 F.3d at 1017.

This Court believes this case is one of those rare instances, like *Brokaw*, which at this stage of the proceedings, has successfully alleged a deprivation of Constitutional rights based upon Plaintiffs' children being removed from the home. *Brokaw* teaches that a defendant is personally responsible if she "acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge or consent." *Id.* at 1012 (quoting *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir.1985)). Plaintiff's allege that Dr. Laskey's opinion letter stating "it is my expert medical opinion that this child sustained a fatal beating on the day that she died and that this beating was the direct cause of her death.... I have grave concerns about the safety of other children in the care of the caregivers at the time of these injuries," did just that-recklessly set into motion a series of events that she should have known would culminate in the seizure of Tabitha and Katelynn. (DE # 46-2.) The *Brokaw* Court noted that "to the extent the defendants knew the allegations of child neglect were false, or withheld material information, and nonetheless caused, or conspired to cause [the child's] removal from his home, they violated the Fourth Amendment." *Brokaw*, 235 F.3d at 1012 (citation omitted). The allegations in this case-that Dr. Laskey wrote her letter without consulting the Coroner or any other investigators, that she admitted during her deposition that she was not qualified to determine the cause or manner of death, that she was unfamiliar with Jessica's medical conditions, that her letter contains highly misleading and/or erroneous statements about Jessica's medical conditions and medications, that she knowingly and/or recklessly misrepresented the medical literature on Jessica's medical condition and medications, that she falsely claimed to base her opinions on extensive discussions with multiple pediatric cardiologists, and that she abused her position as Chair of the State Fatality Review Team and assistant professor at Indiana University School of Medicine, together, satisfy the burden of alleging a violation of Plaintiffs' 4th Amendment rights. (Compl. ¶¶ 57-63, 89-90, 150.)

***10** Similarly, Plaintiffs have also sufficiently alleged a violation of their 14th Amendment substantive and procedural due process rights. A parent's interest in the care and custody of her children, and the children's right to care and nurturing by their parents, is protected by the 14th Amendment. *Troxel*, 530 U.S. at 65; *see* Compl. ¶¶ 162-64. Although the Government has an interest in protecting children from abuse, the State does not have an interest in protecting children from their parents "unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Brokaw*, 235 F.3d 1019 (citation omitted). Here, because Tabitha and Katelynn were removed from the house and subjected to questioning for nine months, long after Plaintiffs allege there was no evidence of abuse, neglect, or danger, Plaintiffs have stated a sufficient claim of violation of their substantive due process rights.

Finally, Plaintiffs have also sufficiently stated a claim for violation of procedural due process under the 14th Amendment. "[N]o matter how much

process is required, at a minimum, it requires the government officials not misrepresent the facts in order to obtain the removal of a child from his parents." *Brokaw*, 235 F.3d at 1020 (citing *Malik v. Arapahoe County Dep't of Soc. Servs.*, 191 F.3d 1306, 1315 (10th Cir.1999)). Because Plaintiffs have alleged that Dr. Laskey's opinion letter contributed to the children's removal, and that Dr. Laskey conspired with the DCS defendants, who allegedly denied Tabitha access to the CHINS court and Coroner's Inquest, and engaged in ex parte communications with the CHINS court to deny or limit Plaintiffs' constitutional rights, these allegations are sufficient at this stage of the proceedings to state a claim for violation of procedural due process. (Compl.¶¶ 115, 123, 128.)

Dr. Laskey Is Not Entitled To Absolute Immunity

Lastly, Dr. Laskey argues that even if she was found to be a state actor, she should be held immune from prosecution under § 1983. Specifically, she argues she is entitled to: (1) absolute witness immunity; (2) absolute immunity for providing information to DCS; and (3) absolute prosecutorial immunity. (DE # 45, pp. 16-22.)

Providing immunity to a state official "spare[s] a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). Therefore, the "quick and early" resolution of immunity issues furthers the purpose of immunity by protecting government officials from the costs of trial and burdens of discovery. *See Blessing v. Kulak*, No. 86-C-10227, 1987 WL 7614, at *2 (N.D.Ill. June 19, 1987). As "[a]llowing defendants discovery would only assist them in a challenge to the factual basis for allegations in the complaint," it is not warranted before the court can make the determination of immunity. *Id.* Thus, it is appropriate for the Court to decide the issue of Dr. Laskey's potential entitlement to immunity based upon the motion for judgment on the pleadings in this case.

***11** Because it is a complete defense to liability, "[a]bsolute immunity from civil liability for damages is of a rare and exceptional character," *Auriemma v. Montgomery*, 860 F.2d 273, 275 (7th Cir.1988) (quotation omitted), and there is a presumption against granting it to government officials. *Houston v. Partee*, 978 F.2d 362, 365 (7th Cir.1992). The burden of establishing absolute immunity rests on its proponent, who must show that overriding considerations of public policy require that the defendant be exempt from personal liability for unlawful conduct. *Auriemma*, 860 F.2d at 275; *Walrath v. United States*, 35 F.3d 277, 281 (7th Cir.1994).

Witness Immunity

It is true that witnesses are given absolute immunity under § 1983 for in-court testimony, in order to permit them to testify truthfully without fear of litigation or potential liability. *See Briscoe v. LaHue*, 460 U.S. 325, 334-35, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) (absolute immunity for trial testimony); *Kincaid v. Eberle*, 712 F.2d 1023, 1023-24 (7th Cir.1983) (extending *Briscoe* to grand jury testimony). However, it is undisputed that Dr. Laskey never testified as a witness in any court relating to this litigation (including the CHINS cases), or the criminal cases, or the Coroner's Inquest. Yet Dr. Laskey contends that this immunity should extend to her deposition testimony in this case. Even assuming, *arguendo*, that her deposition testimony was protected (and the Court makes no such finding at this point in time), this does not save Dr. Laskey from prosecution under Section 1983. Plaintiffs' allegations about Dr. Laskey stem from her October 2006 opinion letter, which was not signed under oath.

Although Defendants contend that Dr. Laskey is entitled to witness immunity under *Briscoe*, and *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir.1984), these cases are readily distinguishable. In *Briscoe*, the Supreme Court recognized that immunity applied to police officers allegedly giving perjured testimony at a criminal trial. 460 U.S. at 341. Dr.

Laskey is neither a police officer, nor did she actually testify at any proceedings in this case.

Kurzawa, a case from the Sixth Circuit, which is not controlling on this circuit, found that defendants who were social services employees, and a guardian ad litem, were entitled to absolute immunity because they were "state employees who [were] responsible for the prosecution of child neglect and delinquency petitions in the Michigan courts." *Kurzawa*, 732 F.2d at 1458. Additionally, the psychologist and two psychiatrists (whom Dr. Laskey likens herself to), had a successful statute of limitations defense. *Id.* However, the Court noted in dicta that the psychologist and psychiatrists "would have also been entitled to immunity.... [t]heir findings [were] used by the Department of Social Services and the Michigan courts to determine what environment best serves the interests of the child. This function of providing information is analogous to that of a witness and under *Briscoe* would have also entitled them to immunity." *Id.* Reading the facts in *Kurzawa*, it is difficult to discern whether the defendant psychologist and psychiatrists were appointed by the State. In referring to the lower court's decision, it becomes evident that defendant Wallenbrock, the psychologist, was indeed appointed by the Probate Court to conduct a psychiatric examination of the child, and she testified at the termination hearing. *Kurzawa v. Mueller*, 545 F.Supp. 1254, 1258 n. 4 (E.D.Mich.1982). As to the two psychiatrists, Dr. Onate was a resident from Children's Psychiatric Hospital (CPH) in Ann Arbor, and Dr. Tooley was Onate's supervisor. *Id.* at 1257. It is unclear whether Onate and Tooley were court-appointed, but it is certainly possible, since the Court had previously ordered the child to be placed at CPH. *Id.* at 1257. The complaint suggests that defendant Onate may have testified at one hearing. *Id.* at 1257 n. 3. Additionally, the guardian ad litem in *Kurzawa* presented the testimony from Onate and Tooley at a hearing before a probate judge. *Id.* at 1257. This Court chooses to follow the Seventh Circuit's take on *Kurzawa*, which is that "[g]uardians ad litem and court-appointed experts, including psychiatrists, are absolutely immune from liability for damages when they act at the court's direction." *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir.2009). The *Cooney* Court goes on to explain that:

> ***12** Experts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations without the worry of intimidation and harassment from dissatisfied parents.

Id. (quotation omitted.) In this case, because Dr. Laskey was not a court-appointed expert, and she did not present testimony at any hearing, she is not protected by absolute witness immunity.

"Reporting" Immunity

Dr. Laskey also argues that she is entitled to "witness immunity," relying solely on *Kurzawa*. As discussed in detail in the previous section, the dicta of that Sixth Circuit case is not applicable here, where Dr. Laskey did not act at the Court's direction, was not a treating doctor of Jessica's, and did not testify in Court.

Prosecutorial Immunity

Finally, Dr. Laskey argues that she is entitled to prosecutorial immunity. Prosecutors are absolutely immune, both individually and in their official capacities, from liability under section 1983 for evaluating evidence, initiating a prosecution, and presenting the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). A civil claim against a prosecutor is absolutely barred if the prosecutor was performing functions "intimately associated with the judicial phase of the criminal process." *Id.* at 430. In determining whether a person is entitled to judicial immunity, the court should look at the nature of the functions performed, not the identity of the actor who performed them. *H.B. v. State of Indiana*, 713 N.E.2d 300, 302 (Ind.Ct.App.1999) (citing *Forrester v. White*, 484 U.S. 219, 224, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)).

This immunity is absolute and shields a prosecutor "even if he initiates charges maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence." *Henry v. Farmer City State Bank,* 808 F.2d 1228, 1238 (7th Cir.1986). The immunity applies to a prosecutor's deliberate suppression of exculpatory evidence at trial. *Houston v. Partee,* 978 F.2d 362, 365 (7th Cir.1992); *see also Spiegel v. Rabinovitz,* 121 F.3d 251, 257 (7th Cir.1997) (finding absolute immunity shields prosecutor who willfully submitted incomplete and inadequate assessment of case that provided basis for decision to prosecute). The immunity also applies to a prosecutor's evaluation of evidence in determining whether to prosecute. *Davis v. Zirkelbach,* 149 F.3d 614, 617 (7th Cir.1998); *Spiegel,* 121 F.3d at 257. However, this immunity does not apply "when a prosecutor gives advice to police during a criminal investigation ... or acts as a complaining witness in support of a warrant application." *Van de Kamp v. Goldstein,* --- U.S. ----, ----, 129 S.Ct. 855, 861, 172 L.Ed.2d 706 (2009). Therefore, absolute immunity did not protect a prosecutor who certified the factual basis for a warrant of probable cause as she was functioning as a witness, not a prosecutor. *Kalina v. Fletcher,* 522 U.S. 118, 130-31, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997).

***13** As the person seeking absolute immunity, Dr. Laskey bears the burden of showing immunity is justified. *Burns v. Reed,* 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). The main case cited by Dr. Laskey in her initial memorandum is *Wolf v. Napier,* 742 F.Supp. 1014 (N.D.Ind.1990). In that case, the Court found immune defendant, Napier, who was a Deputy Sheriff employed by Tippecanoe County, Indiana, and also a member of the Arson Task Force, which was an arson investigation team drawn from local law enforcement and fire fighting agencies, and appointed by the prosecuting attorney for Tippecanoe County. *Id.* at 1017. In contrast to the defendant in *Wolf,* Dr. Laskey was not on a team appointed by the prosecuting attorney. Rather, she was hired by DCS, and Plaintiffs allege she was unqualified to interpret Jessica's medical conditions, to review autopsies, or to determine the cause or manner of death. (Compl. and Laskey Answ. ¶¶ 18-25, 58-63). Additionally, in *Wolf,* after conducting his investigation of the fire, the defendant submitted his final report directly to the office of the prosecuting attorney for Tippecanoe County, Indiana, and the prosecuting official prepared an Affidavit of Probable Cause which the defendant signed. *Wolf,* 742 F.Supp. at 1017-18. In contrast, Dr. Laskey never created an affidavit, and never testified on behalf of DCS. Rather, she provided what Plaintiffs allege was an ad hoc opinion letter that misrepresented the facts. She was not intimately associated with the judicial phase of this case. As such, Dr. Laskey is not entitled to prosecutorial immunity.

CONCLUSION

For the aforementioned reasons, the motion for judgment on the pleadings (DE # 44) is **DENIED;** the motion to strike exhibits (DE # 48) is **DENIED;** and the motion to supplement response (DE # 53) is **DENIED.**

N.D.Ind.,2011.
Finnegan v. Myers
Slip Copy, 2011 WL 781582 (N.D.Ind.)

END OF DOCUMENT

Slip Copy, 2011 WL 839530 (E.D.Wis.)
(Cite as: 2011 WL 839530 (E.D.Wis.))

Only the Westlaw citation is currently available.

United States District Court,
E.D. Wisconsin.
Tyrone L. GRAFFREE, Plaintiff,
v.
Angela SHELTON, Jan Cummings, and John Doe, at Attorney General's Office, Defendant.

No. 09-cv-167.
March 7, 2011.

Tyrone L. Graffree, Prairie Du Chien, WI, pro se.

Karla Z. Keckhaver, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI, for Defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. # 33) AND DISMISSING THIS ACTION

C.N. CLEVERT, JR., Chief Judge.

***1** Plaintiff is proceeding on a due process claim that he spent four months incarcerated as a result of defendants' actions in pursuing revocation of his probation. For the reasons set forth below, the defendants' motion for summary judgment will be granted and this case will be dismissed.

I. STANDARD OF REVIEW

"The court shall grant summary judgment 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); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665, 668 (7th Cir.2011). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *See Anderson*, 477 U.S. at 248. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c)(1). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed.R.Civ.P. 56(c)(4).

II. FACTS

Plaintiff was convicted on April 20, 2001, on fourteen counts of medical assistance fraud/benefit application in Milwaukee County Case Number 00CF006010. On May 29, 2001, he was sentenced to three years and six months in prison on counts 2 and 3. As to the remaining counts, 1 and 4 through 14, the sentence was withheld and plaintiff was placed on probation for a period of ten years consecutive to his prison term. Plaintiff commenced mandatory release parole supervision on September 24, 2003, with a parole discharge date of November 24, 2004. His case was transferred to the State of Mississippi under interstate compact on December 8, 2003.

Plaintiff's Mississippi chronological supervision records show that an apprehension request was issued on October 25, 2004, because he violated supervision by absconding, testing positive for THC and committed an additional infraction of a confidential nature. (Antilla Aff. ¶ 4, Exs. 1002-1003.)

However, a violation warrant was not issued

"stopping time" prior to plaintiff's November 24, 2004, discharge date.[FN1] As a result, plaintiff was issued a Discharge Certificate signed by Secretary Matt Frank on December 15, 2004. (Antilla Aff. ¶ 5, Ex. 1004.) On November 24, 2004, plaintiff's case status changed to probation and a new face sheet for the consecutive probation case was issued. (Antilla Aff. ¶ 6, Exs. 1005-1006.) On July 30, 2005, plaintiff was arrested in Mississippi on the apprehension request that was issued while he remained on parole. The violation underlying the apprehension request continued after plaintiff was discharged from parole on November 24, 2004. The extradition warrants ordering plaintiff's return to Wisconsin all note his case status as probation. (Antilla Aff. ¶ 7, Ex. 1007.)

FN1. It appears that the Department had contemplated issuing a warrant for the violation of parole on January 14, 2005, but this was not processed as the parole had been allowed to discharge. (Antilla Aff. ¶ 8, Ex. 1008.)

A request for a violation warrant (stop time request) was completed on February 17, 2005 for the probation case. (Antilla Aff. ¶ 9, Ex. 1009.) It does not appear, however, that this was ever processed through Central Records as there is no case status change for absconding noted in the Offender Automated Tracking System ("OATS").

***2** After plaintiff was apprehended on July 30, 2005, he was extradited to Wisconsin where the DOC placed him on a hold to investigate the violations of supervision. At all times relevant, defendant Angela Shelton was employed by the DOC as a Probation and Parole Agent-Senior. In August 2005, Shelton transferred from one unit to another, where she inherited plaintiff's case from his former agent, Alicia Smith.

Agent Shelton handled the revocation preparation after plaintiff was arrested in Mississippi and returned to Wisconsin. The case was staffed with Shelton's supervisor Glenda Meeks in consultation with Assistant Regional Chief Mary Jane Antilla. Shelton, Meeks, and Antilla decided to revoke plaintiff's probation because he had absconded, failed to pay restitution, and drove on a suspended license. These violations continued after plaintiff's discharge from parole.

On August 15, 2005, defendant Agent Shelton completed a Violation Investigation Report, which recommended revocation of probation and included plaintiff's signed statement admitting to the violations. (Antilla Aff. ¶ 11, Ex. 1010.) Plaintiff was served with two DOC-414's (Notice of Violation, Recommended Action and Statement of Hearing Rights). The first DOC-414 was served on August 18, 2005, but included dates for violations that occurred during the parole period. (Antilla Aff. ¶ 12, Ex. 1011.) Plaintiff was re-served with a second DOC-414 on August 23, 2005, which included the three violations that were addressed in the hearing. Violation number one occurred following his discharge from parole on November 24, 2004, and violations 2 and 3 began during the parole and continued following discharge from parole into probation supervision. (Antilla Aff. ¶ 13, Ex. 1012.)

Plaintiff remained in custody without a preliminary hearing because he provided a signed statement admitting the violations. (Antilla Aff. ¶ 14, Ex. 1010.) On September 18, 2005, Shelton submitted a Revocation Summary. (Antilla Aff. ¶ 14, Ex. 1013.) A revocation hearing followed on September 29, 2005, before an administrative law judge within the State of Wisconsin Division of Hearings and Appeals. At the time of the hearing, Shelton was unable to locate a DOC Discharge Certificate, showing that plaintiff's parole discharged on November 24, 2004. Consequently, she printed a Face Sheet form and filled it in with information from the Offender Automated Tracking System ("OATS"), indicating that plaintiff's parole discharged on November 24, 2004. On October 20, 2005, the judge issued his decision. (Antilla Aff. ¶

17, Ex. 1017.)

In pertinent part, that decision reads as follows:

> The sentence structure in this case is not complicated. The client was sentenced to a prison term of three years and six months. Upon discharge of that prison term, the client would begin serving ten years on probation supervision. As noted above, the client was released from prison to parole supervision on September 23, 2003. His projected discharge date was November 24, 2004. The client allegedly violated his supervision on April 21, 2004. The Department issued an order stopping his time effective April 21, 2004 and issued an apprehension request on October 25, 2004 (Exhibit # 5). The client remained in absconder status until his arrest in Mississippi on July 29, 2005. At the time of the hearing on September 29, 2005, there was no documentation in the Department's file that the Department had reinstated the client's parole. Nor has evidence been submitted subsequent to the September 29, 2005, hearing that the client's parole had been reinstated by the Department before the client's arrest on July 29, 2005. In fact, the client was arrested on a Department warrant which had issued on October 25, 2004, clearly during the term of his parole supervision.
>
> ***3** It is clear from the record that the client was on parole supervision at the time of his arrest on July 29, 2005 in the State of Mississippi. The record suggests the Department has taken action since that time, apparently since the hearing on September 29, 2005, to allow the client's parole supervision to discharge. That does not alter his status at the time of the alleged violations here. The Department has not requested revocation of the client's parole supervision. Absent such request, the examiner is without authority to order revocation of the client's parole supervision. The only violations that have been alleged here occurred while the client was on parole supervision. Since there was no violation during the client's probation supervision, the examiner must order the client's probation not be revoked.
>
> An argument can be made that the Department inadvertently requested revocation of the wrong status. That would not be supported by the record here. All of the documentation in the Department's file indicated that the client was on parole supervision. Agent Shelton was unable to locate a Department Face Sheet (DOC 3) which reflected the client's probation status. As a result, Agent Shelton created that document (Exhibit # 1, page 3). The information in that document is clearly and patently incorrect. Agent Shelton testified she was acting on directions from the Regional Chief and that the Regional Chief was responding to pressure from the Attorney General's Office. No effort was made to determine if there was an error in the records in the Department's file and whether the probation supervision had begun. Rather, the documentation in the Department's file was disregarded and the Department acted with clear and intentional disregard of the client's status. The Department did not inadvertently check the wrong box in this request for revocation (Exhibit # 1, page 1).
>
> Since the examiner has determined that none of the alleged violations occurred during the client's probation supervision, the examiner must order the client's probation not be revoked. Finding a violation during the current term of supervision is an essential prerequisite to ordering revocation. "Implicit in the system's concern with the parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole." *Morrisey v. Brewer*, 33 L.Ed. 484 (1972) at 493[sic]. In addition, since the Department has not requested revocation of the client's parole supervision, the examiner cannot order revocation of that status.

(Antilla Aff. ¶ 17, Ex. 1014; Complaint, Exhib-

it.) Consequently, plaintiff's probation was not revoked.

At all times relevant, defendant Janice Cummings was employed by the DOC as a Correctional Services Manager. In that capacity, Cummings recommended statewide policies and procedures and had administrative responsibility for the management of the regional staff and resources necessary to implement the Department and Division of Community Corrections' mission, goals, and objectives within one of eight regions. She was not involved in revocation decisions, except under unusual circumstances. In 2004, Cummings had approximately 14,000 persons on supervision in Milwaukee, and there were about 400 probation/parole agents. Most, if not all, case supervision decisions, including custody and revocation matters, were handled by the probation agent, the probation agent's supervisor, and the Assistant Regional Chief. On occasion, Cummings reviewed revocation decisions and/or processed revocation packets in the absence of an Assistant Regional Chief or because of an Assistant Regional Chief's heavy workload. However, Cummings has no recollection of plaintiff's revocation proceedings, and does not believe she was involved in the decision to seek revocation.

ANALYSIS

***4** The defendants contend that (1) Agent Shelton is entitled to absolute immunity for her actions relating to the decision to pursue revocation of plaintiff's probation; (2) Chief Cummings should be dismissed from this lawsuit inasmuch as she had no personal involvement in the decision to revoke plaintiff's probation; and (3) plaintiff cannot establish that defendants violated his due process rights by placing him on a hold and pursuing revocation of his probation.

Absolute immunity is a complete defense to liability for monetary damages. However, "absolute immunity from civil liability for damages is of a rare and exceptional character.' " *Auriemma v. Montgomery*, 860 F.2d 273, 275 (7th Cir.1988) (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985)), and there is a presumption against granting government officials absolute immunity, *Houston v.. Partee*, 978 F.2d 362, 368 (7th Cir.1992). To determine whether a public official is absolutely immune from suit, the Supreme Court has adopted an approach that focuses on "the nature of the function performed, not the identity of the actor who performed it[.]" *Forrester v. White*, 484 U.S. 219, 229 (1988).

Parole agents are entitled to absolute immunity when they perform activities that are analogous to those performed by judges or prosecutors. *Dawson v. Newman*, 419 F.3d 656, 662 (7th Cir.2005). Such activities include the final decision to grant, revoke or deny parole, and the signing of an arrest warrant. *Id.* Absolute immunity is extended even to a parole agent's routine activities if those activities, such as scheduling (or failing to schedule) a hearing, are sufficiently adjudicative in nature. *Walrath v. United States*, 35 F.3d 277, 283 (7th Cir.1994); *Thompson v. Duke*, 882 F.2d 1180, 1184-85 (7th Cir.1989). However, absolute immunity does not extend to duties of a parole agent that are analogous to those performed by police officers. *Wilson v. Kelkhoff*, 86 F.3d 1438, 1446 (7th Cir.1996). Duties that are analogous to those performed by police officers include investigating potential charges, initiating revocation proceedings, and issuing notices of charges. *Id.* at 1445-46.

Examining plaintiff's allegations in light of the above case law, Agent Shelton is not immune from suit for damages arising from her initiation of revocation proceedings and recommendation that plaintiff's probation be revoked. *See id.; see also Dawson*, 419 F.3d at 662 (holding that parole officers were not absolutely immune from charges that they ignored plaintiff's statements that the conviction upon which his parole was based had been reversed and "refused to investigate his claim of entitlement to release"). Moreover, in printing and completing a Face Sheet form for plaintiff with information from OATS, Shelton's actions were akin to those of a police officer and not judicial in

nature. Consequently, Agent Shelton's is not entitled to absolute immunity from plaintiff's claims in this action.

***5** As to whether the claim against Chief Cummings should be dismissed, the court notes that liability under 42 U.S.C. § 1983 arises only when a defendant is personally responsible for the deprivation of which the plaintiff complains. *See e.g., Johnson v.. Snyder*, 444 F.3d 579, 583 (7th Cir.2006); *Vance v. Peters*, 97 F.3d 987, 991 (7th Cir.1996); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir.1995). To establish personal liability for a subordinate's acts, a supervising official "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye." *Johnson*, 444 F.3d at 583-84 (quoting *Gentry*, 65 F.3d at 561).

The evidence submitted in support of summary judgement establishes that Chief Cummings was not personally involved in the events underlying plaintiff's claims. Cummings had no knowledge of plaintiff or his case, and submitted an affidavit attesting to her lack of knowledge respecting the decision to seek revocation of plaintiff's probation. On the other hand, the plaintiff points to the administrative law judge's decision citing Shelton's testimony that she was acting on directions from Chief Cummings, who was responding to pressure from the Attorney General's Office. This disagreement regarding Cummings involvement creates a genuine issue of material fact which precludes granting summary judgment on defendants' claim that Cummings lacked personal involvement in plaintiff's revocation proceedings.

Finally, defendants contend that plaintiff cannot establish a due process violation based on pursuit of revocation of his probation.[FN2] An individual on parole or probation has a protectible liberty interest associated with his status as a parolee or probationer. *See Morrissey v. Brewster*, 408 U.S. 471, 482 (1972) (parole); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (probation). A probationer or parolee is entitled to a preliminary and a final revocation hearing that must meet certain procedural due process standards. *Morrissey*, 408 U.S. at 485-88; *Gagnon*, 411 U.S. at 782.

FN2. In his response brief, plaintiff asserts a Fourth Amendment false arrest claim. However, he is not proceeding on such a claim. *See* Court's Screening Order, June 24, 2009.

With respect to the preliminary hearing, the Supreme Court has stated that the minimum requirements of due process entitled a probationer or parolee to the following: "notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged." *Morrissey*, 408 U.S. at 486-87; *Gagnon*, 411 U.S. at 782. The due process requirements for a final revocation include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

***6** *Morrissey*, 408 U.S. at 488-89; *Gagnon*, 411 U.S. at 782.

The DOC may incarcerate a probationer for up to five business days while considering whether to commence revocation proceedings, Wis. Admin. Code § DOC 328.22(2)(b), and, if the violation has been admitted in writing (as it was in the statement signed by plaintiff), continue to detain the probationer pending a final revocation hearing. Wis. Stat. § 973.10(2) Wis. Admin. Code §§ DOC 328.22(4),

331.04(1), 2(b),(5); *see Faheem-el v. Klincar*, 841 F.2d 712, 724 (7th Cir.1988); *see also Johnson v. Sondalle*, 112 Fed. Appx. 524, 527-28 (7th Cir.2004) (unpublished) (Wisconsin DOC did not unlawfully jail probationer on motion to revoke probation after he signed consent to enter drug treatment as alternative to revocation, inasmuch as state regulations provided for his continued detention when proposed program was not available, given his admission of violation in writing under Wis. Admin. Code §§ DOC 331 .04(1), (2)(b), (5)). Moreover, plaintiff received a final revocation hearing within a reasonable amount of time. *See Morrissey*, 408 U.S. at 488 (due process requires a final revocation hearing "within a reasonable time" after the probationer is taken into custody and a lapse of two months is not unreasonable).

The record establishes that plaintiff was on probation at the time of his violation and, although Shelton was unable to locate his Discharge Certificate, she provided other evidence confirming his probation status. That plaintiff's probation was not revoked after the DOC failed to satisfy its burden of proof, does not render any actions by any defendant respecting the revocation proceedings in question unconstitutional. At most Agent Shelton's failure to produce sufficient evidence for revocation was negligence, but not a constitutional violation. *See County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Daniels v. Williams*, 474 U.S. 327, 329-31 (1986). In short, although the administrative law judge declined to revoke plaintiff's probation, there is no evidence of a constitutional violation that entitles the plaintiff to any relief. Therefore,

IT IS ORDERED that defendants' motion for summary judgment (Docket # 33) is **GRANTED.**

IT IS FURTHER ORDERED that this case is **DISMISSED.**

E.D.Wis.,2011.
Graffree v. Shelton
Slip Copy, 2011 WL 839530 (E.D.Wis.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2002 WL 31906466 (N.D.Ill.)
(Cite as: 2002 WL 31906466 (N.D.Ill.))

H

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.
Tawana NAJIEB, Plaintiff,
v.
William CHRYSLER-PLYMOUTH, Defendant.

No. 01 C 8295.
Dec. 31, 2002.

MEMORANDUM OPINION AND ORDER

ASPEN, J.

***1** Plaintiff, Tawana Najieb filed a five-count complaint against Defendant William Chrysler-Plymouth ("William Chrysler" or "Dealership") alleging violations of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691(d) (Count I), the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681m (Count II), the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* (Count III), the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/2 and 815 ILCS 505/2C 2C, (Count IV), and trespass to chattel (Count V). William Chrysler filed a motion for summary judgment on all five counts. Najieb filed motions to deem her submitted facts admitted and to strike William Chrysler's motion for summary judgment for failure to comply with Local Rule 56.1. Najieb also filed a cross motion for summary judgment on Counts I, III, IV, and V. For the reasons set forth below, this Court denies Najieb's motions to deem her submitted facts admitted and to strike William Chrysler's motion for summary judgment. With regard to William Chrysler's motion for summary judgment, we grant its motion on Counts II and III, deny its motion on Counts I and V, and grant in part and deny in part its motion on Count IV. We deny Najieb's motion for summary judgment on Counts I, III, IV, and V.

BACKGROUND

I. RULE 56.1

This Court, in review of the parties' Local Rule 56.1 Statements, is frustrated, in large part, because of William Chrysler's disregard for its obligations under the Rule.[FN1] The Northern District promulgated Local Rule 56.1 "to assist the court in quickly and effectively identifying the disputed and undisputed material facts. It is designed to conserve judicial time and resources." Sunil R. Harjani, *Local Rule 56.1: Common Pitfalls in Preparing a Summary Judgment Statement of Facts,* CBA Record, Oct. 2002, at 42 (citing *Bordelon v. Chicago Sch. Reform Bd. of Trustees,* 233 F.3d 524, 527 (7th Cir.2000)).[FN2] The Seventh Circuit has "consistently and repeatedly upheld a district court's discretion to require strict compliance with its local rules governing summary judgment." *Bordelon,* 233 F.3d at 527 (quoting *Markham v. White,* 172 F.3d 486, 490 (7th Cir.1990)).

FN1. Najieb was similarly frustrated, as evidenced by her motions to deem her submitted facts admitted and to strike William Chrysler's motion for summary judgment for failure to comply with Rule 56.1. We deny Najieb's motion to deem her submitted facts admitted. This Court thoroughly reviewed the Rule 56.1 statements filed by both parties. A substantial portion of William Chrysler's Rule 56.1 pleadings fall short of the Rule's standards. However, William Chrysler does properly plead certain facts. In the Background section of this Opinion, we discuss in detail which facts are stricken, which facts are admitted, and which facts are contested under Rule 56.1. *See infra* p. 2-6. We discuss Najieb's motion to strike William Chrysler's motion for summary judgment in the Analysis section of this Opinion. *See infra* p. 8, n. 11.

Najieb has also asked that this Court impose sanctions against William Chrysler under 28 U.S.C. § 1927 for its abuse of Rule 56.1. *See* Pl. Rule 56.2[sic] State-

ment. This Court will address Najieb's request outside of this opinion, in due course. At that time, this Court will also consider entering an order to show cause why sanctions should not be imposed.

FN2. We urge both parties, but counsel for William Chrysler in particular, to review Harjani's article as well as the instructive comments on Rule 56.1 in *Malec v. Sanford*, 191 F.R.D. 581, 582-87 (N.D.Ill.2000).

Local Rule 56.1(a)(3) requires the movant to file a statement of undisputed material facts that "shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting material relied upon to support the facts set forth in that paragraph." William Chrysler, in its twenty-two paragraph Statement of Facts, repeatedly fails to refer to affidavits, the record, or other material to support the facts it sets forth. In place of making the required citations, William Chrysler refers to Najieb's complaint as well as its response to the complaint. *See* Def. Statement of Material Facts at ¶¶ 5, 7-10, 16-22. However, it is improper to cite to a complaint or a response to the complaint as support for a statement of fact. *See* L.R. 56.1(a)(3); *see also Burton v. Nelson*, 1998 WL 46900 at *1 n. 1 (N.D.Ill. Feb. 3, 1998) (disregarding statement of fact that cited only to an amended complaint). As such, this Court strikes those portions of William Chrysler's Statement of Facts which refer to Najieb's complaint or William Chrysler's response. Najieb's responses to the affected statements of fact are deemed admitted to the extent that they are uncontested by the properly pled portions of William Chrysler's Rule 56.1 filings.

***2** Local Rule 56.1(b)(3)(A) requires that the nonmovant file a similarly structured, concise response to the movant's statement. The nonmovant must also submit a statement "of any additional facts that require the denial of summary judgment." L.R. 56.1(b)(3)(B). In this case, Najieb's response adheres to the provisions of Rule 56 .1(b)(3).[FN3] William Chrysler's reply is not similarly compliant. Like all other statements filed under Rule 56.1, the movant's response must be concise. *See* L.R. 56.1(a)(3) (last unnumbered paragraph). Nearly all of William Chrysler's responses, however, contain narrative sections and recitations of the standards governing summary judgment motions and other law. *See* Def. Reply to Pl. Statement of Material Facts at ¶¶ 5, 7-22. This Court therefore strikes the above cited portions of William Chrysler's responses. *See Malec v. Sanford*, 191 F.R.D. 581, 585 (N.D.Ill.2000) (noting that a Rule 56.1 statement "is not intended as a forum for factual or legal argument.").

FN3. Najieb incorrectly titled her pleading "Plaintiff's Rule 56.2 Statement," hereinafter referred to as Plaintiff's Statement of Facts. Local Rule 56.2 provides notice to pro se litigants opposing summary judgment. Local Rule 56.1(b)(3) governs Najieb's statement as a nonmovant responding to the William Chrysler's statement of facts and her statement of additional facts.

William Chrysler's response to Najieb's submission of additional facts is similarly deficient. Local Rule 56.1(a)(3) requires that any response by the movant to the nonmovant's submission "satisfy the same requirements as the nonmovant's response." *Malec*, 191 F.R.D. at 584. Thus, "in the case of disagreement," the movant must include "specific references to the affidavits, parts of the record, and other materials relied upon." L.R. 56.1(b)(3)(A). A general denial is insufficient to rebut a nonmovant's statement of additional facts. *See Malec*, 191 F.R.D. at 584. Yet the only response William Chrysler provides to each of Najieb's sixty-six additional facts is "Denied." Def. Amend. Reply to Pl. Statement of Material Facts at ¶¶ 23-79. Thus, this Court strikes William Chrysler's response to Najieb's additional facts and deems

those facts admitted to the extent that they are uncontested by properly pled portions of William Chrysler's Rule 56.1 filings.

II. FACTS

The following facts are culled from the properly pled portions of the parties' Local Rule 56.1 Statements of Material Facts and accompanying exhibits. On January 27, 2001, Najieb went to William Chrysler to purchase a vehicle for her daughter. Najieb selected a 1998 Chrysler Cirrus ("Cirrus"). William Werthman, an employee of William Chrysler, pulled Najieb's credit report while Najieb was at the Dealership.[FN4] William Chrysler tendered a Vehicle Sales Order ("Order") to Najieb for the Cirrus which stated a total sales price of $13,995.00. As part of the transaction, Najieb made a $1,000 down payment.

FN4. In his deposition, Werthman explains that the purpose of pulling a prospective customer's credit report is "to know who you are doing business with." Werthman Dep. at 17. Werthman adds that William Chrysler reviews a prospective customer's credit report in order to decide whether to enter into a Retail Installment Contract ("RIC") with the individual and thus seek financing on the individual's behalf. *See id.* at 22-23.

Najieb also entered into a Retail Installment Contract ("RIC") with William Chrysler for the unpaid balance and additional fees.[FN5] The RIC set forth that the total amount would be financed at a 15.0% annual percentage rate ("APR")-a figure Werthman calculated based on his "best opinion." Werthman Dep. at 14-15. Werthman congratulated Najieb on her purchase and announced over the Dealership's loudspeaker that a sale had been made. Najieb drove the Cirrus home, purportedly without realizing that her purchase and the terms governing it were conditioned on William Chrysler obtaining financing from an outside source on her behalf. The condition was made explicit in the Vehicle Sales Order, which stated, in relevant part, "THIS ORDER SHALL NOT BECOME BINDING UNTIL ACCEPTED BY DEALER OR HIS AUTHORIZED REPRESENTATIVE AND IN THE EVENT OF A TIME SALE DEALER SHALL NOT BE OBLIGATED TO SELL UNTIL APPROVAL OF THE TERMS HEREOF IS GIVEN BY A BANK OR FINANCE COMPANY WILLING TO PURCHASE A RETAIL INSTALLMENT CONTRACT BETWEEN THE PARTIES."[FN6]

FN5. One of the fees listed in the RIC was a $420.00 charge for GAP Guardian insurance. GAP Guardian insurance provides a lender with the remaining balance due on a vehicle if an owner suffers the total loss of the vehicle due to theft or accident. *See* Werthman Dep. at 27. The fee for the insurance coverage was included in the amount financed, but excluded from the finance charge under the RIC.

FN6. Don Cranley of William Chrysler states that the Dealership itself could extend credit to customers that enter into RICs. *See* Cranley Dep. at 94, 96. He explains, however, that William Chrysler's practice is to seek financing on behalf of its customers from outside sources. *See* Cranley Dep. at 93. William Chrysler successfully structures financing in this manner for over two hundred customers annually. *See* Werthman Dep. at 25.

***3** After January 27, 2001, the Dealership contacted the following seven financial institutions in an attempt to obtain financing on Najieb's behalf: Harris Bank, Firstar Bank, Wells Fargo Financial, Fifth Third Bank, Arcadia Financial, Bank One, and National City. Each institution declined to extend credit to Najieb based on her insufficient credit history.[FN7] While William Chrysler received notice of each institution's decision, Najieb only received such notice from Bank One and National City.[FN8]

FN7. William Chrysler attached the affidavits of William Chrysler employee Don

Cranley, Firstar Bank employee Brian Gille, and Bank One employee Mark Haugen, as Exhibits 3, 4, and 17, respectively, to its Motion for Summary Judgment. The Dealership cites to these affidavits in support of its assertion that William Chrysler neither evaluated Najieb's credit history nor decided whether Najieb would receive financing for her purchase. *See* Def. Statement of Facts, ¶¶ 11-15. Najieb protests that Cranley's Affidavit is not based on personal knowledge and is conclusory in violation of Federal Rule of Civil Procedure 56(e). *See* Pl. Motion to Strike at ¶ 11. We agree. In his Affidavit, Cranley fails to set forth his personal knowledge of the matter before this Court. We therefore strike Cranley's Affidavit.

Najieb argues that this Court should also strike the Affidavits of Brian Gille and Mark Haugen because the individuals were not identified as witnesses in William Chrysler's Federal Rule of Civil Procedure 26(a) disclosures. *See* Pl. Motion to Strike ¶ 7. This Court has broad discretion to determine whether to issue discovery sanctions. *See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). We decline to strike the Affidavits of Gille and Haugen. Najieb further asserts that the Affidavits are not based on personal knowledge, and are conclusory in violation of Rule 56(e). *See* Pl. Motion to Strike ¶¶ 8-10. We disagree. According to their Affidavits, Gille and Haugen were involved in evaluating Najieb's credit history for Firstar and Bank One, respectively, without any input from William Chrysler. *See* Def. Memo., Ex. 4, 17. Gille and Haugen thus describe their personal knowledge of the matter without setting forth any ultimate fact or conclusion of law.

FN8. Neither party provided this Court with the information Najieb received from Bank One and National City. Najieb points out that William Chrysler did not include the written notice each financial institution provided to the Dealership in its Rule 26(a) discovery disclosures. *See* Pl. Statement of Facts at ¶ 15. This Court has broad discretion to determine whether to issue discovery sanctions. *See Nat'l Hockey League*, 427 U.S. at 642. We decline to strike Paragraph 15 of William Chrysler's Statement of Material Facts which relies on these documents.

A William Chrysler employee contacted Najieb by telephone the week of February 11, 2001 and informed her, without further explanation, that it was unable to obtain financing for her purchase .[FN9] Consequently, the Dealership asked Najieb to return the Cirrus. On February 14, 2001, Najieb returned the Cirrus to William Chrysler. William Chrysler did not return to Najieb the $1,000 down payment she had made on the vehicle. The Dealership suggested that she “try out” a Ford Escort (“Escort”) while it searched for financing on her behalf. William Chrysler prepared a RIC and other documents which set forth Najieb's purchase of the Escort. Najieb's signature appears on those documents. She drove to William Chrysler on February 15, 2001 to return the Escort, but was told to keep the vehicle for another day. On that date, the Dealership informed her that it was unable to find financing for a vehicle similar to the Cirrus. William Chrysler obtained financing from Harris Bank on February 17, 2001 for the Escort on Najieb's behalf.[FN10]

FN9. In her deposition, Najieb states that William Chrysler also sent her a letter “saying they [sic] was [sic] sorry” that it was unable to obtain financing on her behalf. Najieb Dep. at 85. Neither party provided the letter, or the date of the correspondence to this Court.

FN10. Najieb asks this Court to strike the Harris Bank document, on which this fact is based, for William Chrysler's failure to include the document in its Rule 26(a) discovery disclosure. *See* Pl. Statement of Facts at ¶ 7. This Court has broad discretion to determine whether to issue discovery sanctions. *See Nat'l Hockey Society*, 427 U.S. at 642. We elect to not sanction William Chrysler for its failure to disclose the document before filing its motion for summary judgment.

While Najieb had the Escort, Najieb called William Chevrolet to inquire about purchasing a vehicle from that Dealership. On February 16, 2001, Najieb purchased a Chevrolet Cavalier ("Cavalier") from William Chevrolet. Najieb left the Escort with Lawrence Phillips, an employee of William Chevrolet, believing that Phillips would return the vehicle to William Chrysler on her behalf. William Werthman of William Chrysler telephoned Najieb on February 17, 2001, informing her that she had purchased two vehicles, the Escort and the Cavalier. Najieb insisted that she had only purchased the Cavalier. That evening, representatives from William Chrysler drove the Escort to Najieb's home, leaving the keys with Najieb's husband. Soon thereafter, Najieb returned the Escort to William Chrysler. On February 20, 2001, William Chrysler tendered a check in the amount of $1,000 to Najieb and rescinded the RIC governing Najieb's purchase of the Ford.

Najieb subsequently filed this action alleging violations of the ECOA, 15 U.S.C. § 1691(d) (Count I), the FCRA, 15 U.S.C. § 1681m (Count II), the TILA, 15 U.S.C. § 1601 *et seq.* (Count III), the ICFA, 815 ILCS 505/2 & 2C. (Count IV), and trespass to chattel under Illinois law (Count V). William Chrysler moved for summary judgment on all counts. Najieb moved to deem her submitted facts as admitted and to strike Najieb's motion for summary judgment. She also filed a cross motion for summary judgment on Counts I, III, IV, and V.

ANALYSIS

I. STANDARD OF REVIEW

***4** Summary judgment is proper only when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56(c). A genuine issue for trial exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This standard places the initial burden on the moving party to identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citations omitted). Once the moving party has met this burden of production, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(c). In deciding whether summary judgment is appropriate, we must accept the nonmoving party's evidence as true, and draw all inferences in that party's favor. *See Anderson*, 477 U.S. at 255.

In moving for summary judgment, a party should ensure that its legal memoranda contain two integral parts: a fact section and an analysis section. William Chrysler failed to include a statement of facts in its memoranda of law. *See* Def. Memo.; *see also* Def. Reply Memo. In place of such a statement, the Dealership asked this Court to rely on its woefully inadequate Local Rule 56.1 filings, to which it did not even cite in its legal memoranda. FN11 *See* Def. Reply to Pl. Motion to Strike at 1-5. Rule 56.1 statements, however, "are not intended to be substitutes for a statement of facts section of a memorandum of law." *Cleveland v. Prairie State College*, 208 F.Supp.2d 967, 972-73 (N.D.Ill.2002) (quoting *Duchossois Indus., Inc. v. Crawford & Co.*, 2001 WL 59031, at *1 (N.D.Ill. Jan. 19, 2001)); *see also Malec*, 191 F.R.D. 581, 585-86 (N.D.Ill.2000). This Court could deny William Chrysler's motion for summary judgment on account of the Dealership's faulty briefing. The in-

terests of judicial economy and justice, however, compel us to evaluate the merits of the parties' motions for summary judgment.

> FN11. Najieb filed a motion to strike William Chrysler's motion for summary judgment based on William Chrysler's failure to cite to its Rule 56.1 statement of facts in its legal memoranda. *See* Pl. Motion to Strike at 2. At a minimum, a party, in its legal memoranda, should cite only to portions of the record that it included in its Rule 56.1 statement of facts. *See Malec*, 191 F.R .D. 581, 586 (N.D.Ill.2000). A party can cite directly to those portions of the record rather than to the paragraphs of its Rule 56.1 statement of facts that contain the same citations. William Chrysler's citations meet the citation requirement set forth above. We therefore deny Najieb's motion to strike William Chrysler's motion for summary judgment.

I. ECOA

In Count I, Najieb claims that William Chrysler violated the ECOA, 15 U.S.C. § 1691, by failing to satisfy the Act's notice requirements. Under the ECOA, "[e]ach applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor." 15 U.S.C. § 1691(d)(2). The Act defines "adverse action" as the "denial or revocation of credit." 15 U.S.C. § 1691(d)(6). William Chrysler, however, asserts that it had no obligation to provide such notice to Najieb because it is not a creditor under the Act. We disagree.

The ECOA defines "creditor" to include "any person who regularly arranges for the extension, renewal, or continuation of credit." 15 U.S.C. § 1691a(e). This jurisdiction has found the above definition to encompass car dealerships that arrange for the extension of credit on behalf of customers by submitting those customers' credit applications to financial institutions. *See Mungia v. Tony Rizza Oldsmobile*, 2002 WL 554504, at *1-2 (N.D.Ill. April 15, 2002); *see also Burns v. Elmhurst Auto Mall*, 2001 WL 521840, at *2 (N.D.Ill. May 16, 2001); *Williams v. Thomas Pontiac-GMC-Nissan-Hyundai*, 1999 WL 787488, at *3 (N.D.Ill. Sept. 24, 1999). William Chrysler is such a dealership. It concedes that it "accommodates its customers by having them fill out the applicable finance forms and then tender such forms to various lenders." Def. Memo. at 4. Indeed, in this case, William Chrysler submitted Najieb's finance forms to the following seven lenders in an effort to obtain financing on her behalf: Harris Bank, Firstar Bank, Wells Fargo Financial, Fifth Third Bank, Arcadia Financial, Bank One, and National City. *See* Def. Memo., Ex. 7, 9-14. William Chrysler is therefore a creditor under the ECOA.[FN12]

> FN12. We reject Najieb's suggestion that William Chrysler may also be a creditor under the ECOA because it "*regularly* extends, renews, or continues credit." *See* Compl. at ¶ 14 (emphasis added) (quoting 15 U.S.C. § 1691a(e)). Don Cranley of William Chrysler states that the Dealership *could* itself extend credit to its customers. *See* Cranley Dep. at 94, 96. Najieb does not provide any evidence that the Dealership *does* itself extend credit to customers on a regular basis or otherwise. Indeed, Cranley explains that William Chrysler's practice is to seek financing on behalf of its customers from outside sources. *See* Cranley Dep. at 93.

***5** William Chrysler further asserts, however, that even if it is a creditor under the ECOA, it was not obligated to provide notice to Najieb of the adverse action. According to William Chrysler, the seven financial institutions that declined to extend credit to Najieb were solely responsible for providing such notice. We disagree. The ECOA provides that where a third party asks a creditor to extend credit to an individual, "the notification and statement of reasons required by this subsection may be made directly by such creditor, *or* indirectly

through the third party." 15 U.S.C. § 1691(d)(4) (emphasis added). In this case, William Chrysler acted as a third party in asking the seven financial institutions to extend credit to Najieb. Najieb avers that she did not receive written notification from five of the seven financial institutions. *See* Najieb Aff. at ¶ 20. Because neither party produced the letters from Bank One and National City, we do not know if either letter complied with the requirements of the ECOA. In her deposition, Najieb stated that she received a letter from William Chrysler "saying they [sic] was [sic] sorry" that it was unable to obtain financing on her behalf. Najieb Dep. at 85. Because neither party produced this letter, we do not know if it complied with the requirements of the ECOA. Consequently, this Court denies both parties' motions for summary judgment on Count I.

II. FCRA

In Count II, Najieb alleges that William Chrysler violated the FCRA, 15 U.S.C. § 1681m, by failing to provide proper notice of an adverse action. The Act requires an entity to provide electronic, written, or verbal notice of "any adverse action [taken] with respect to any consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m. Under the FCRA, an "adverse action" is any "action taken or determination that is adverse to the interests of a consumer." 15 U .S.C. § 1681a(k)(B)(iv)(II). William Chrysler contends that Najieb does not offer any material fact to suggest that it took adverse action against her based in whole or in part on information contained in her credit report. We agree.

William Chrysler employee William Werthman pulled Najieb's credit report while she was at the Dealership on January 27, 2001. *See* Werthman Dep. at 17-18. Werthman explains that the purpose of pulling a prospective customer's credit report is "to know who you are doing business with." *Id* at 17. He adds that William Chrysler reviews a prospective customer's credit report in order to decide whether to enter into a Retail Installment Contract ("RIC") with that individual and thus seek financing on his or her behalf. *See id.* at 22-23. After reviewing Najieb's credit report, the Dealership entered into a RIC with Najieb for her purchase of the Cirrus, the terms of which were governed by the Vehicle Sales Order. *See* Def. Memo, Ex. 6. In doing so, Najieb asserts, William Chrysler itself extended credit to her. *See* Pl. Response Memo. at 14. In support of her claim, Najieb refers to William Chrysler employee Don Cranley's admission that the Dealership itself could have extended credit to Najieb. See Cranley Dep. at 94, 96. Significantly, however, Najieb ignores Cranley's statement that the Dealership did not extend credit to Najieb. *See id.* at 96. Cranley explains that William Chrysler's practice is to seek financing on behalf of its customers from outside sources, not from itself. *See* Cranley Dep. at 93. Because William Chrysler did not extend credit to Najieb, it could not possibly have revoked credit from Najieb.

***6** Indeed, the terms governing Najieb's purchase of the Cirrus indicate that William Chrysler did not extend credit to her. The Vehicle Sales Order stated, in pertinent part, "IN THE EVENT OF A TIME SALE [FN13] DEALER SHALL NOT BE OBLIGATED TO SELL UNTIL APPROVAL OF THE TERMS HEREOF IS GIVEN BY A BANK OR FINANCE COMPANY WILLING TO PURCHASE A RETAIL INSTALLMENT CONTRACT BETWEEN THE PARTIES." Def. Memo, Ex. 6. Najieb's purchase was therefore conditioned on William Chrysler obtaining financing from an outside source, *not* from itself, on her behalf. The condition in the Vehicle Sales Order was not met when all seven financial institutions William Chrysler contacted on Najieb's behalf declined to extend credit to her.[FN14]

FN13. In the context of automobile financing, "time sale" refers to the conditional sale of a vehicle that is governed by a RIC or "time sale" contract. *See* Mark D. Lonergan, *Auto Finance and Lease Litigation*, 1301 Practising Law Institute/Corporate Law 349, 351 (2002).

FN14. It is possible that William Chrysler submitted Najieb's credit report to each financial institution. Such a submission, however, does not constitute an adverse action under the FCRA. *See* 15 U.S .C. § 1681a(k)(B)(iv)(II) (definition of adverse action); *see also Treadway v. Gateway Chevrolet, Oldsmobile*, 2002 WL 554513 at *1 (N .D.Ill. April 12, 2002) ("the supplying of [credit] information does not make a defendant a user of credit reports."). There is no evidence that the Dealership was further involved in any financial institution's decision to decline to extend credit to Najieb. Najieb concedes that she has "no knowledge of any negotiations between Defendant and these finance companies." Najieb Aff. at ¶ 20. Firstar employee Brian Gille and Bank One employee Mark Haugen do have such knowledge. *See* Def. Memo, Ex. 4, 17. Both men aver their respective institutions evaluated Najieb's credit history without any input from William Chrysler. *See id.*

William Chrysler's statements to Najieb further demonstrate that William Chrysler did not extend credit to her. A William Chrysler employee contacted Najieb by telephone the week of February 11, 2001 and asked her to return the Cirrus to the dealership. *See* Najieb Aff. at ¶ 2. Najieb admits that the only verbal statement William Chrysler made to her regarding the matter was that it "couldn't find anyone to finance me." *See* Najieb Dep. at 85-86. The depositions of William Chrysler employees Don Cranley and William Werthman fail to provide any further explanation. We therefore grant William Chrysler's motion for summary judgment on Count II.

III. TILA

In Count III, Najieb asserts that William Chrysler violated the TILA, U.S.C. § 1601 *et seq.*, by failing to provide her with the proper disclosures as required by the Act and Regulation Z, 12 C.F.R. § 226. As an initial matter, William Chrysler contends that it was not required to provide such disclosures to Najieb because it is not a creditor under the Act. We disagree. Congress enacted the TILA "to assure meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). In doing so, Congress "delegated expansive authority to the Federal Reserve Board ["FRB"] to elaborate and expand the legal framework governing commerce in credit." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60 (1980). The FRB promulgated Regulation Z, 12 U.S.C. § 226, to implement the Act's provisions. *See id.* Regulation Z defines a "creditor" as an entity "(A) wh[ich] regularly extends consumer credit ..., and (B) to wh[ich] the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract." 12 C.F.R. § 226.2(a)(17)(i).

In *Riviere v. Banner Chevrolet*, the Fifth Circuit noted that Regulation Z includes an official FRB staff explanation of the term creditor. *See* 184 F.3d 457, 461 (5th Cir.1999). The explanation provides that "[i]f an obligation is initially payable to one person, that person is the creditor *even if the obligation by its terms is simultaneously assigned to another person." Id.* (quoting 12 C.F.R. pt. 226, supp. I, subpt. A, cmt. 2(a)(17)(i)(2) (emphasis added)). The Supreme Court mandates that "[u]nless demonstrably irrational," FRB staff interpretations of the TILA and Regulation Z "should be dispositive." *Milhollin*, 444 U.S. at 565. The Dealership entered into a RIC with Najieb for the Cirrus, the terms of which, according to the Order, would become final only after the RIC was purchased by a bank or financial institution. *See* Def. Memo., Ex. 6. William Chrysler successfully structures such transactions for over two hundred customers a year. *See* Werthman Dep. at 25. If a financial institution had elected to extend credit to Najieb, her obligation on the RIC, although initially payable on its face to William Chrysler, would have been simultaneously assigned to the financial institution. *See*

id. Accordingly, William Chrysler is a creditor under the TILA. FN15

FN15. It does not appear that the Seventh Circuit or the courts of the Northern District of Illinois have explicitly addressed the issue before us. The dispositions they have reached, however, in claims brought against automobile dealers under the TILA were only possible by treating the dealerships as creditors under the statute. *See Lifanda v. Elmhurst Dodge*, 237 F.3d 803 (7th Cir.2001) (dealer that entered into RIC with customer subject to the TILA disclosure requirements); *see also Janikowski v. Lynch Ford*, 210 F.3d 765 (7th Cir.2000) (dealer that entered into RIC with customer complied with the TILA disclosure requirements); *Leguillou v. Lynch* Ford, 2000 WL 198796, at *3 (N.D.Ill. Feb. 14, 2000) (same); *Jasper v. New Rogers Pontiac*, 1999 WL 1024522 (N.D.Ill. Nov. 5, 1999) (same).

***7** A creditor under the TILA must disclose certain terms governing credit transactions, including the annual percentage rate ("APR") and the finance charge, to consumers. *See* 12 C.F.R. § 226.18(a), (d). Regulation Z requires that such disclosures be made "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 226.17(a)(1). If the creditor does not know the "information necessary for an accurate disclosure ... the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, shall state clearly that the disclosure is an estimate." 12 C.F.R. § 226.17(c)(2)(i). All disclosures must be made "*before* consummation of the transaction." 12 C.F.R. § 226.17(b) (emphasis added). "Consummation" of a transaction occurs at "the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(13).

Najieb alleges that William Chrysler violated the TILA by failing to disclose that the 15.0% APR set forth in the RIC was an estimate. We disagree. Even after entering into the RIC, Najieb was not contractually obligated to purchase the Cirrus. Indeed, Najieb's purchase of the Cirrus and the terms governing it were conditioned on William Chrysler obtaining financing from an outside source on her behalf. The condition was made explicit in the Vehicle Sales Order, which stated, in relevant part, "THIS ORDER SHALL NOT BECOME BINDING UNTIL ACCEPTED BY DEALER OR HIS AUTHORIZED REPRESENTATIVE AND IN THE EVENT OF A TIME SALE FN16 DEALER SHALL NOT BE OBLIGATED TO SELL UNTIL APPROVAL OF THE TERMS HEREOF IS GIVEN BY A BANK OR FINANCE COMPANY WILLING TO PURCHASE A RETAIL INSTALLMENT CONTRACT BETWEEN THE PARTIES." Def. Memo., Ex. 6. Because the purchase by a bank or finance company of the RIC was a condition precedent to Najieb's purchase of the Cirrus, a binding obligation was never formed. FN17 Consequently, William Chrysler did not violate the TILA by failing to disclose that the 15.0% APR set forth in the RIC was an estimate.

FN16. *See supra* note 13 for an explanation of the term "time sale."

FN17. A condition precedent is "an event which must occur or an act which must be performed by one party to an existing contract before the other party is required to perform." *Vuagniaux v. Korte*, 652 N.E.2d 840, 842 (Ill.App.Ct.1995).

Najieb also claims that William Chrysler violated the TILA by including the charge for GAP Guardian insurance in the amount financed rather than including the fee as part of the finance charge. Regulation Z defines "finance charge" as the sum of all charges "payable directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 C.F.R. § 226.4(a). The finance charge involves those "charges or premiums paid for debt cancellation coverage." 12 C.F.R. § 226.4(b)(10). Because the condition precedent nev-

er occurred, William Chrysler would not have violated the TILA even if it had failed to disclose the finance charge. Accordingly, the Dealership's failure to include the GAP Guardian insurance fee in the finance charge is not actionable under the TILA. We therefore grant William Chrysler's motion for summary judgment on Count III.

IV. ICFA

***8** In Count IV, Najieb contends that William Chrysler committed several violations of the ICFA, 815 ILCS 505/2 & 2C. Under Illinois law, "[a] complaint alleging a violation of consumer fraud must be pled with the same particularity and specificity as that required under common law fraud." *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill.1996) (citing *People ex rel. Harrigan v. E & E Hauling, Inc.*, 607 N.E.2d 165, 174 (Ill.1992)). Federal Rule of Civil Procedure 9 similarly requires that "all averments of fraud or mistake ... be stated with particularity." As a federal court applying state law, we must attempt to resolve Najieb's claims under the ICFA as would the Illinois Supreme Court. *See Stephan v. Rocky Mountain Chocolate Factory, Inc.*, 129 F.3d 414, 416-17 (7th Cir.1997).

A. Section 2 Claims

Section 2 of the ICFA prohibits "unfair or deceptive acts or practices ... in the conduct of any trade or commerce." 815 ILCS 505/2 (emphasis added). To prove that an act or practice was deceptive, Najieb must show the following: (1) William Chrysler engaged in a deceptive act or practice; (2) William Chrysler intended that Najieb rely on that deception; (3) William Chrysler's deception occurred in the course of conduct involving trade or commerce; and (4) William Chrysler's deception caused Najieb's damages. *See Priebe v. Autobarn*, 240 F.3d 584, 588-89 (7th Cir.2001) (citing *Siegel v. Levy Org. Dev. Co.*, 607 N.E.2d 194, 198 (Ill.1992)).[FN18]

FN18. Najieb summarily contends that William Chrysler also violated Section 2 of the ICFA by engaging in unfair conduct. *See* Pl. Response Memo. at 7-8. In determining whether an act or practice is unfair, this Court must examine: "(1) whether the [act or] practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers." *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 961 (Ill.2002) (citing *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972)). Najieb failed to plead this contention with particularity as required by state law and Federal Rule of Civil Procedure 9. *See supra* pp. 15-16.

> In her response to William Chrysler's motion for summary judgment, Najieb fails to set forth any facts in support of her contention. *See* Pl. Response Memo. at 7-8. Instead, Najieb states her belief that "there exist triable issues regarding whether Defendant's conduct was unfair under the [above] factors. To the extent this involves judgment calls regarding 'ethics' and 'morality' it is a quintessential jury question." *Id.* at 8. Najieb does not identify those "triable issues" for this Court. Accordingly, we grant William Chrysler's motion for summary judgment as to Najieb's claim pertaining to unfair conduct in Count IV.

1. *Cirrus-Related Claim*

Najieb contends that William Chrysler violated Section 2 of the Act by failing to inform her that her purchase of the Cirrus and the terms governing it were conditioned on the Dealership obtaining financing on her behalf. We disagree. The ICFA provides that "[n]othing in this Act shall apply to ... [a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1). The Illinois Supreme Court explained that "[u]nder this provision, conduct which is authorized by Federal stat-

utes and regulations, such as those administered by the Federal Reserve Board, is exempt from liability under the [Illinois] Consumer Fraud Act." *Lanier v. Associates Finance, Inc .*, 499 N.E.2d 440, 447 (Ill.1986). William Chrysler's disclosures to Najieb complied with Federal Regulation Z, and thereby adhere to the TILA. *See supra* pp. 14-15. Because the Federal Reserve Board administers the TILA, we find that, under Section 10b(1) of the ICFA, William Chrysler's compliance with the TILA's disclosure requirements is a complete defense to liability under the ICFA in this case. *See Lanier*, 499 N.E.2d at 447; *see also Hoffman v. Grossinger Motor Corp.*, 218 F.3d 680, 684 (7th Cir.2000); *Franks v. Rockenbach Chevrolet Sales*, 1998 WL 919714, *3-4 (N.D.Ill.Dec. 30, 1998). Accordingly, this Court grants William Chrysler's motion for summary judgment on the Section 2 claim pertaining to the Cirrus under Count IV.

2. *Escort-Related Claim*

***9** Najieb also argues that William Chrysler's conduct surrounding Najieb's use of the Escort violated Section 2 of the ICFA. Najieb claims that after returning the Cirrus to William Chrysler on February 14, 2001, the Dealership used its possession of her down payment of the Cirrus "as leverage to induce Plaintiff into purchasing a different vehicle, a Ford Escort," on February 14, 2001. Compl. at ¶ 33. Yet Najieb does not provide any material facts that William Chrysler's refusal to return her down payment led her to purchase the Escort. To the contrary, in her Affidavit and Deposition, Najieb states that she never purchased the Escort. *See* Najieb Aff. at ¶¶ 3, 13, 16, 21, 23-24; *see also* Najieb Dep. at 52-53. She asserts that all documents governing the sale of the Escort, which bear her signature, were forged by William Chrysler. *See* Najieb Aff. at ¶¶ 3, 13, 15, 21, 23-24; *see also* Najieb Dep. at 37, 68-69, 72-73.[FN19] Najieb's Complaint, however, did not set forth a claim of forgery, let alone plead it with particularity as required by state law and the Federal Rules of Civil Procedure. This Court therefore wholly rejects Najieb's allegation that William Chrysler forged the documents detailing Najieb's purchase of the Escort.

FN19. William Chrysler attached the documents in question to its Memorandum for Summary Judgment as Exhibit 15.

Najieb further claims that on February 14, 2001, William Chrysler "misrepresented to her that the Escort was the only vehicle on the lot for which they could provide her with financing." Compl. at ¶ 35. Najieb fails to set forth any material facts in support of this portion of her Complaint. She instead provides an account of William Chrysler's conduct that rebuts her claim. In her Affidavit, Najieb avers that William Chrysler told her on February 14, 2001 that it would "try to find financing on a car similar to the Cirrus while I tried out the Escort." Najieb Aff. at ¶ 27. It was only after Najieb had the Escort that William Chrysler informed her that it was unable to locate financing on a vehicle similar to the Cirrus. *See id.* The only financing William Chrysler was able to obtain on Najieb's behalf was that for the Escort. *See* Def. Memo., Ex. 8.

The parties have, however, demonstrated that there is a genuine issue of material fact regarding Najieb's claim that William Chrysler misrepresented that her purchase of the Escort was conditioned on her trying out and liking the vehicle. *See* Compl. at ¶ 35; *see* also Najieb Dep. at 52, 54; Najieb Aff. at ¶ 27. William Chrysler insists that Najieb's purchase of the Escort was governed only by the RIC and other pertinent documents. *See* Def. Memo, Ex. 15. There also remains a genuine issue of material fact as to whether Najieb repudiated her purchase of the Escort so that William Chrysler delivered the Escort to Najieb's home on February 17, 2001 under false pretenses. Najieb implies that she repudiated the contract on February 16, 2001 by purchasing a Cavalier from William Chevrolet and arranging for the return of the Escort to William Chrysler. *See* Najieb Aff. at 16; *see also* Def. Ex. 16. William Chrysler counters that under the terms governing Najieb's purchase of the Escort, she became bound to the contract when the Dealership

successfully obtained financing on her behalf on February 17, 2001. We therefore deny both parties' motions for summary judgment on Najieb's Section 2 claim pertaining to the Escort under Count IV.

B. Section 2C Claim

***10** Najieb alleges that William Chrysler violated Section 2C of the ICFA by failing to return her down payment of $1,000 after William Chrysler was unable to obtain financing on her behalf for the Cirrus. Section 2C states that "[I]f the furnishing of merchandise ... is conditioned on the consumer's providing credit references or having a credit rating acceptable to the seller and the seller rejects the credit application of that consumer, the seller must return to the consumer any down payment. The retention by the seller of part or all of the down payment ... is an unlawful practice within the meaning of this Act." 815 ILCS 505/2C.

Najieb made a $1,000 down payment on the Cirrus on January 27, 2001. Def. Memo., Ex. 6. Najieb returned the Cirrus to William Chrysler on February 14, 2001, after learning that the Dealership failed to obtain financing on her behalf. *See* Najieb Dep. at 52-53. At that point, William Chrysler was required under Section 2C to return Najieb's down payment. *See Roche v. Fireside Chrysler-Plymouth, Mazda*, 600 N.E.2d 1218, 1226 (Ill.App.Ct.1992) (the seller is required to return the consumer's down payment upon rejection of the consumer's application for credit). The Dealership instead applied Najieb's down payment on the Cirrus as a down payment on the Escort. *See* Def. Reply Memo. at 5 (citing Def. Memo., Ex. 15). In doing so, the Dealership retained Najieb's down payment in violation of Section 2C of the ICFA.

The ICFA, however, requires that a person also suffer actual damage in order to succeed in a bringing a claim under the Act. *See* 815 ILCS 505/10a. A genuine issue of material fact remains as to whether Najieb suffered actual damage as a result of William Chrysler's retention of her down payment. William Chrysler argues that Najieb has failed to plead with specificity any actual damages she suffered as a result of the Dealership's application of her down payment on her purchase of the Escort. *See* Def. Reply Memo. at 4-5. Furthermore, William Chrysler asserts that it returned her down payment in full on February 20, 2001, by tendering a check to her in the amount of $1,000. *See* Def. Ex. 5. Najieb considered William Chrysler's check to be a settlement offer made in response to a settlement demand advanced by Najieb's attorney. FN20 *See* Najieb Dep. at 26-27. Najieb rejected the offer and believes that William Chrysler has yet to return her $1,000 down payment. *See id* . Consequently, this Court denies both parties motions for summary judgment as to the Section 2C claim under Count IV.

> FN20. Najieb protests that evidence of settlement demands and offers are inadmissible under Federal Rule of Evidence 408. *See* Pl. Statement of Facts at ¶ 21. It has not yet been established, however, that William Chrysler was making a settlement offer in tendering the check to Najieb.

V. TRESPASS TO CHATTEL

In Count five, Najieb contends that William Chrysler committed the tort of trespass to chattel when it failed to return her $1,000 down payment after it was unable to obtain financing on her behalf for the Cirrus. To prove that William Chrysler committed trespass to chattel, Najieb must show that the Dealership intentionally dispossessed her of the $1,000, and that the dispossession resulted in damages. Restatement (Second) of Torts §§ 217-218, 221-222.

***11** William Chrysler first argues that it did not dispossess Najieb of the $1,000. We disagree. Under the Restatement (Second) of Torts, a dispossession "may be committed by intentionally barring the possessor's access to a chattel." *Id.* at § 221(c). Najieb returned the Cirrus to William Chrysler on February 14, 2001, after learning that the Dealership failed to obtain financing on her behalf. *See* Najieb Dep. at 52-53. The Dealership concedes that instead of returning Najieb's down payment to her,

it applied the $1,000 to her purchase of the Escort. *See* Def. Reply Memo. at 5 (citing Def. Memo., Ex. 15). In doing so, William Chrysler intentionally barred Najieb's access to her down payment on the Cirrus.

William Chrysler, however, insists that it had the right to retain and apply Najieb's down payment on the Cirrus in such a manner. *See* Def. Reply Memo. at 18. To the contrary, state law required William Chrysler to return Najieb's down payment once it failed to obtain financing on her behalf for the Cirrus. *See* 815 ILCS 505/2C; *see also supra* Count IV, Part B, pp. 19-20. William Chrysler is not relieved of liability even if a mistake of law or fact led it to reasonably believe that it could dispossess Najieb of her down payment. *See* Restatement (Second) Torts § 244.

There remains, however, a genuine issue of material fact as to whether Najieb suffered damages as a result of William Chrysler's dispossession of her down payment. According to the Restatement, "dispossession is always a trespass to the chattel, and subjects the actor to liability for at least nominal damages for the interference with the possession." *Id.* at § 222. William Chrysler asserts that Najieb suffered no damages because it returned her down payment in full on February 20, 2001, by tendering a check to her in the amount of $1,000. *See* Def. Ex. 5. Najieb considered William Chrysler's check to be a settlement offer made in response to a settlement demand advanced by Najieb's attorney. FN21 *See* Najieb Dep. at 26-27. Najieb rejected the offer and believes that William Chrysler has yet to return her $1,000 down payment. *See id.* Accordingly, this Court denies both parties motion for summary judgment on Count V.

FN21. Najieb protests that evidence of settlement demands and offers are inadmissible under Federal Rule of Evidence 408. *See* Pl. Statement of Facts at ¶ 21. It has not yet been established, however, that William Chrysler was making a settlement offer in tendering the check to Najieb.

CONCLUSION

For the foregoing reasons, this Court denies Najieb's motions to deem her submitted facts admitted and to strike William Chrysler's motion for summary judgment. With regard to William Chrysler's motion for summary judgment, we grant its motion on Counts II and III, deny its motion on Counts I and V, and grant in part and deny in part its motion on Count IV. We deny Najieb's motion for summary judgment on Counts I, III, IV, and V. It is so ordered.

N.D.Ill.,2002.
Najieb v. Chrysler-Plymouth
Not Reported in F.Supp.2d, 2002 WL 31906466 (N.D.Ill.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2006 WL 757816 (E.D.Wis.)
(Cite as: 2006 WL 757816 (E.D.Wis.))

United States District Court,
E.D. Wisconsin.

R.S., by his next friend Ryan SIMS, Sr., Ryan Sims, Sr., Amola Sims, T.J., by his next friend Terrence Johnson; Terrence Johnson, Catherine Johnson, D.B. by his next friend Clarence Brown, Clarence Brown, Theresa Brown, T.G. by his next friend Nicole Garcia, Nicole Garcia, A.L. by his next friend Stacey Osley, Stacey Osley, A.L. # 2, by his next friend Alex Flynn, Timothy Winston Owens, B.L., by his next friend Lisa Brendt, Lisa Brendt, I.W. by his next friend Valerie Williams, Valerie Williams, Plaintiffs,

v.

BOARD OF SCHOOL DIRECTORS OF THE PUBLIC SCHOOLS OF THE CITY OF MILWAUKEE, Peter Lawrence Adams, individually and in his official capacity as a Milwaukee Public Schools teacher, Compcare Health Services Insurance Corp., a domestic corporation that may have provided benefits on behalf of plaintiff T.J., Humana Insurance Co., a domestic corporation that may have provided benefits on behalf of plaintiff T.J., Humana Insurance Co., a domestic corporation that may have provided benefits on behalf of plaintiff A.L., Wisconsin Health Fund, a domestic corporation that may have provided benefits on behalf of plaintiff D.B., State of Wisconsin, Department of Justice Crime Victim Compensation Program, a public corporation that may have provided benefits on behalf of plaintiff T.G., Defendants.

No. 02-C-0555.
March 22, 2006.

Alexander Flynn, Alex Flynn & Associates, Lawrence G. Albrecht, First Blondis Albrecht Bangert & Novotnak, Milwaukee, WI, for Plaintiffs.

Jan A. Smokowicz, Milwaukee City Attorney's Office, Robert E. Neville, Piper & Schmidt, Michael D. Riegert, Previant Goldberg Uelmen Gratz Miller & Brueggeman, Milwaukee, WI, James E. Snodgrass, Snodgrass & Dieringer, Brookfield, WI, for Defendants.

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT BOARD OF SCHOOL DIRECTORS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING CLAIM OF TIMOTHY OWENS

CLEVERT, J.

***1** For the reasons stated below, this court is granting in part and denying in part the summary judgment motion of the Board of School Directors of the Public Schools of the City of Milwaukee.

Findings of Fact

Peter Adams, a teacher in elementary schools operated by the Board of Directors of the Public Schools of the City of Milwaukee (MPS), sexually molested a number of his students.

I. Incident Involving Timothy Owens

Plaintiff Timothy Owens, born in 1980, was a student in Adams' 4th or 5th grade at Victory School. When Owens was 11 or 12 years old (i.e., in 1991 or 1992) Adams showed sexual interest in him. On two occasions, Adams spoke to Owens in a sexual manner and looked at him inappropriately; on a third occasion, Adams touched Owens inappropriately. (Smokowicz Affidavit pp. 000246-47). Owens reported the touching incident to his mother the day it occurred, and she called the police. Owens then spoke with the police about what had occurred. When the police sought to put a monitor on Owens, his mother would not give them permission to do so. She took Owens out of school the following day and he remained out of school for the rest of the year.

II. Incidents at Congress Elementary School (Congress)

Adams taught at Congress until the 1998-1999 school year. During that time, plaintiff T.G. was a student in Adams's 3rd or 4th grade class. Adams touched T.G. in a sexual manner approximately once every day for the entire school year until T.G. moved out of state in the last month of the year.

In 1999, Adams molested plaintiffs A.L. # 2 and I.W. He had sexual contact with I.W. on three occasions. I.W. told his brother about these incidents at the time, but he did not report them to an adult.

About two or three times a day, starting approximately a month after school began, Adams engaged in sexual misconduct with plaintiff D.B. These incidents occurred in Adams' classroom behind a “tall thing where ... no one could see.” (Smokowicz Affidavit, p. 000226).

Sean Goldner, a teacher at Congress Elementary School, reported to Congress' Principal Minkley that Adams had students on his lap during school hours. (Goldner's dep., p. 16). The principal at Congress also knew that Adams' students had not been coming to gym or art. However, she did not initiate any disciplinary action against Adams during his tenure at Congress.

During Adams' last semester at Congress, the furniture in his classroom obstructed the view of the classroom and of his desk. However, the principal did not confront him about the layout of the room. On some of Minkley's visits to Adams' classroom, the door was locked; however, other teachers locked their classrooms occasionally too. Even so, Minkley had the ability to enter a locked classroom by using her master key.

III. Incidents at Dr. Benjamin Carson Academy (Carson)

During the 1999-2000 school year, Adams was teaching at the Dr. Benjamin Carson Academy, another elementary school operated by MPS.

***2** At that time, plaintiff T.J. was a student in Adams' 4th grade class. Starting in October 1999, Adams engaged in misconduct with T.J.

Plaintiff A.L. was a student in Adams' 5th grade class at Carson. Adams had inappropriate sexual contact with A.L. at the school on one occasion, but A.L. cannot recall the exact date.

An incident involving T.C. occurred in January 2000 and was handled internally at the school. T.C. complained that Adams touched her posterior as she was entering the classroom. T.C.'s mother reported the incident to Principal Deborah Thompson and requested a meeting with Thompson. Thompson met with the mother, T.C., Adams, and Yvonne Hopgood-a Leadership Specialist in charge of principals.

At the meeting, T.C. recounted the incident. Thompson asked T.C. if anyone witnessed the incident and whether Adams touched anyone else. T.C. replied that Adams always asked people for hugs. Adams denied misconduct with T.C.

After the meeting with T.C., Hopgood and Thompson agreed that further hearings were unwarranted, because, without corroboration, it would be T.C.'s word against Adams'. Hopgood felt that the contact between Adams and T.C. may have been accidental and did not amount to child abuse.

Neither Hopgood nor Thompson reported the incident to the police or Child Protective Services. T.C.'s mother removed T.C. from the school shortly after the meeting.

Plaintiff B.L. was a student in Adams' 4th grade class. Adams was involved in a sexual incident with B.L. on one occasion around January 2001.

R.S. was a student in Adams' 4th grade class. In January 2001, R.S. told his mother that Adams “fondled his penis” on three different occasions. R.S. had told only his mother and classmate D.C. of the incident. On January 29, 2001, the mother called Thompson to report R.S.' complaint. Thompson invited the mother to come to school the

next day to fill out a parent complaint form and said that she (Thompson) needed a statement from R.S. R.S. was removed from Adams' class after the mother complained to Thompson.

IV. School and Police Investigations in Response R.S.' Complaint

In response to R.S.' complaint, Thompson called the police on January 31, 2001, to report Adams' behavior. Detective William Herold and Officer Christian-officers assigned to the case-spoke to Thompson, who said that the school would conduct an internal investigation into R.S.' allegations.

Herold then interviewed R.S. in the school office outside Thompson's presence. R.S. told Herold that he (R.S.) did not like Adams because Adams touched his private part. Next, Herold interviewed Adams outside Thompson's presence. Adams stated that he might have hugged R.S., and that he has hugged other students for various reasons, but denied improper sexual contact with any of the children. Herold also interviewed R.S.'s mother, after which his involvement with the investigation ended.

The police uncovered no witnesses to the incident between R.S. and Adams. R.S. told the police that he had spoken to D.C. about the incident and that Adams also molested D.C. However, D.C. denied it to Officer Christian.

***3** Because of the seriousness of R.S.' allegations, Thompson initiated an emergency misconduct proceeding against Adams. She contacted her supervisor, Leadership Specialist Dorothy St. Charles, on January 30, 2001. St. Charles told Thompson (1) to interview students, and (2) to hand-deliver a letter to Adams. Thompson did so on January 31, 2001. The letter directed Adams (1) to absent himself from his duties effective February 1, 2001, and (2) to appear at a School Board hearing on February 5, 2001.

Leadership Specialist Therese Campos conducted Adams' emergency misconduct hearing. Thompson, Adams and a teacher's union representative were present. The evidence presented to Campos consisted of: (1) one student complaining that Adams touched him inappropriately; (2) other students stating that Adams tickled them; (3) one or more students talking about sitting on Adams' lap.

At the hearing, Adams' union representative asked him whether the allegations were true. Adams only admitted to tickling students. The union representative added that the district attorney had already declined to charge Adams.

On February 5, 2001, Campos sent Adams a letter stating that the evidence at the hearing may support a finding of serious misconduct on his part. The supporting evidence came from students' statements presented at the hearing. Adams returned to work on February 6, while the misconduct process continued.

After the hearing concluded, St. Charles held another (second level) hearing on February 16, 2001. Although she deemed tickling and lap-sitting inappropriate, there were no corroborations of sexual touching. A warning letter placed in Adams' file ordered him to stop tickling students and placing them on his lap. That concluded the hearing process.

V. School and Police Investigations in Response to D.C.'s Complaint

Thompson first learned of D.C.'s allegations of assault from talking to R.S.' mother. Thompson's Assistant Principal, Dawn Rice, interviewed D.C. at Thompson's request and prepared a report detailing the interview. At that time, D.C. only stated that Adams tickled his stomach and that he sat on Adams's lap. D.C.'s allegations against Adams resurfaced a month after R.S.' complaint. D.C.'s foster mother reported that Adams committed sexual acts against her son, such as pulling his (D.C.'s) pants down in the bathroom.

Upon hearing D.C.'s complaint, Thompson

called Child Protective Services, the police, and her supervisor St. Charles. After receiving Thompson's call, St. Charles initiated another emergency misconduct process; she ordered Adams to absent himself from school and scheduled a hearing for March 8, 2001.

On March 2, 2001, the police assigned Detective Greg Jackson and Officer Christian to investigate D.C.'s complaint. Jackson and Christian first spoke to Thompson, who familiarized them with the situation. Christian, who interviewed D.C. previously, understood that he changed his story. Thompson said that she believed D.C. She added that a parent complained about Adams having fourth-graders sit on his lap, and that she told Adams this was inappropriate. Jackson next took a statement from Adams, who denied inappropriate conduct.

***4** After interviewing Adams, Jackson began talking to students. Having obtained T.C.'s name from Thompson, Jackson and Christian spoke to T.C. about her complaint that Adams pinched her posterior. Christian interviewed T.C. at her residence outside her parents' presence. Jackson spoke to T.C.'s mother who informed him that she had complained about the incident to Thompson.

Jackson next spoke to T.W., a non-plaintiff, who complained about incidents that occurred in 1999. T.W. was afraid to complain earlier, because Adams made a threatening gesture toward him in class. T.W. gave Jackson the name of plaintiff A.L. # 2, to whom the police spoke next. A.L. # 2, who transferred to Carson from Congress, told Jackson that Adams molested him at Congress in September 1999.

Jackson spoke to plaintiff I.W., who maintained that Adams had molested him in the “think tank”-a secluded area of the classroom where students were supposed to come up with ideas. The “think tank” was out of the view of other students and surrounded by tall cabinets. The only other person I.W. told about the abuse was his brother.

Jackson next interviewed non-plaintiff J.G., Adams' student from Congress. J.G., who lived with his mother and Adams, claimed that Adams spanked him on his bare buttocks with a ruler. In addition, Jackson contacted the Bureau of Child Welfare to get J.G. out of the house. J.G.'s interview led to Adams' arrest on April 18, 2001.

Jackson interviewed plaintiff D.B., who, until then, had only told his cousin and a classmate of Adams' inappropriate actions toward him. The cousin advised D.B. to tell his parents, but D.B. had not done so. Jackson was the first adult to learn of D.B.'s allegations.

Non-plaintiff R.S. told Christian that while he (R.S.) was a student at Carson, Adams asked to let him observe R.S. urinate, then reached down into R.S.' underwear and squeezed his penis and testicles.

Christian spoke with plaintiff B.L. also, and was told that Adams touched him inappropriately at Carson. B.L. reported these incidents to his mother for the first time in spring of 2001 after Adams' arrest.

Plaintiff A.L. told Christian that Adams had him stay after class while the rest of the students went to music class; Adams then sat A.L. on his lap and rubbed A.L.'s penis over his clothing. A.L. told his pastor about it after Adams was arrested. However, he did not mention anything to any adults before the arrest.

On April 23, 2001, plaintiff T.J. told Jackson that in October 1999, Adams followed him to the bathroom, told him to pull down his pants and underwear and held his penis while he urinated. T.J. spoke of the incident for the first time to his father in April of 2001 after learning of Adams' arrest.

In the last interview, plaintiff T.G. told Christian that on ten or more occasions at Congress, Adams exposed his penis to T.G. and asked him to rub it up and down. Adams also had T.G. expose

his (T.G.'s) penis and rubbed it up and down. This occurred in class, while the students had their heads down, and in the "think tank." Until the interview with Christian, T.G. had not told any adults about the abuse, but he had told a classmate.

VI. Pertinent Board Policies and Instructions

***5** In 1982, MPS promulgated a written policy prohibiting sexual harassment of its employees and students. As of 1995, that policy stated that "[t]he Milwaukee Public Schools does not tolerate sexual harassment in any form and will take all necessary and appropriate action to eliminate it up to and including termination and expulsion of offenders." As of 1995, the policy defined "sexual harassment" as consisting of "unwelcome sexual advance, requests for sexual favors, sexually motivated physical conduct or other verbal or physical conduct of a sexual nature that would be offensive to a reasonable person."

At all times pertinent to the lawsuit, another policy prohibited student sexual harassment, prohibiting "any student, teacher, administrator, or other school personnel of the district [from] harass[ing] a student, teacher, administrator, or other school personnel through conduct or communication of a sexual nature as defined by this policy."

VII. Adams' Response to the Lawsuit

Adams was served with a summons and complaint in this lawsuit, but did not contact the school or his criminal defense attorney about representation in the civil lawsuit. Moreover, he declined to send the City Attorney's Office any correspondence asking for representation in this lawsuit.

DISCUSSION

Plaintiffs brought this action against MPS, claiming that defendant (1) violated their constitutional rights under the Due Process and Equal Protection provisions of the U.S. Constitution; (2) discriminated against plaintiffs in violation of Title IX; and (3) breached its duty to plaintiffs under Wisconsin law. Further, plaintiffs claim that MPS must indemnify Adams for the judgment obtained against him by plaintiffs.

I. Standard for Summary Judgment

Under Rule 56(c), Fed.R.Civ.P., summary judgment is proper when the pleadings and other submissions in the case show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). After adequate time for discovery, summary judgment is appropriate against a party who fails to establish an essential element of that party's case on which that party bears the burden of proof at trial. *Celotex*, 477 U.S. at 322. A factual dispute between the parties will not defeat a properly supported summary judgment motion unless it might affect the outcome or resolution of issues before the court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists only where a reasonable finder of fact could decide for the nonmoving party. *Anderson*, 477 U.S. at 248 (1986); *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir.1990). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine need for trial and summary judgment is proper. *Matshushita Elec. Indus. Co., Lt. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

***6** The moving party has the initial burden of demonstrating entitlement to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Once this burden is met, the nonmoving party must designate specific facts supporting or defending each element of the action, showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 322-23. When the nonmovant has the burden of proof at trial, that party must produce evidence which would support a reasonable jury verdict. *Anderson*, 477 U.S. at 267; see also, *Celotex*, 477 U.S. at 324 ("proper" summary judgment motion may be "opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves ..."); Fed.R.Civ.P.

56(e) ("When a summary judgment motion is made and supported as provided in [Rule 56(c)], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavit or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial"). " Rule 56(c) mandates the entry of summary judgment, ... upon motion, against a party who fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322 (emphasis added). A party opposing a properly supported summary judgment motion "may not rest upon mere allegations or denials," but rather must introduce affidavits or other evidence to "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also, Celotex,* 477 U.S. at 322-23; *Becker v. Tenenbaum-Hill Associates, Inc.,* 914 F.2d 107, 110 (7th Cir.1990).

To defeat summary judgment, the nonmoving party must engage in more than a mere swearing match. *Matter of Wade,* 969 F.2d 241, 245 (7th Cir.1992). While the resolution of factual disputes, the sufficiency of evidence and the relative credibility of the parties are matters generally left to a jury or fact-finder at trial, summary judgment is nonetheless appropriate where the evidence is so one-sided that one party must prevail as a matter of law. *Anderson,* 477 U.S. at 251-252. Unsupported allegations do not suffice where the evidence presented by the plaintiff to support his claim is merely colorable. If a party's allegations are based on mere conjecture, and are merely colorable or conclusory, and not significantly probative of material facts, denial of a motion for summary judgment is justified. *Id.,* at 249-50.

In evaluating a motion for summary judgment, the court must draw all inferences in a light most favorable to the nonmoving party. *Johnson v. Pelker,* 891 F.2d 136, 138 (7th Cir.1989). "However, we are not required to draw every conceivable inference from the record-only those inferences that are reasonable." *Bank Leumi Le-Israel, B.M. v. Lee,* 928 F.2d 232, 236 (7th Cir.1991) (citation omitted).

II. Equal Protection Claim

***7** The Equal Protection clause of the Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

Plaintiffs have not alleged an Equal Protection violation based on gender or race. One of the victims, T.C., is female; the rest are male. Indeed, the plaintiffs do not identify any students' race. It is unclear whether they belong to one or more races. Nor do plaintiffs point to any facts in the record indicating that MPS assigned students to Adams' class based on race or gender. Further, plaintiffs do not state on what grounds MPS discriminated against them when it assigned them to Adams' class. For those reasons, no heightened standard of scrutiny applies in this case. Therefore, to prevail on Equal Protection grounds, plaintiffs must establish that the discriminatory intent of MPS in assigning the plaintiff students rather than other students similarly situated was not rationally related to a legitimate state interest. *Schroeder v. Hamilton Sch. Dist.,* 282 F.3d 946, 951 (7th Cir.2002). However, plaintiffs do not state how MPS assigned students to classes nor have they set forth any facts indicating that MPS' class assignment methods are not rationally related to a legitimate state interest-education of students in Milwaukee. It follows that the defendants are entitled to summary judgment dismissing the plaintiffs' Equal Protection claim.

III. Substantive Due Process Claim

The Due Process clause of the Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV § 1. The Due Process clause "is not 'a guarantee of certain minimal levels of safety and security." ' *J.O. v. Alton Comm. Unit Sch. Dist. 11,* 909 F.2d 267, 272 (7th Cir.1990) (quoting *DeShaney v. Winnebago County*

Dep't of Soc. Servs., 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)). The protection arises where "the state has exercised its power so as to render an individual unable to care for himself or herself ..." *Id.*

To prove a Due Process violation, plaintiffs must show that (1) execution of MPS' policies placed students in danger of molestation by a sexual predator, *Monell v. Dep't. of Soc. Servs. of N.Y.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); or (2) MPS knew of the danger and did nothing to rectify it, thus fulfilling *Alton's* requirement of exercising state power to "render students unable to care for themselves." 909 F.2d at 272.

MPS asserts, and plaintiffs do not dispute, that MPS enacted policies prohibiting sexual harassment and punishment for persons for violating that policy. Hence, it is impossible for the plaintiffs to establish that MPS violated plaintiffs' substantive Due Process rights under the first prong. On the other hand, MPS has failed to show that the plaintiffs are unable to prevail under the second prong. MPS does not state what its board of directors knew and did not know. Moreover, school principals Minkley and Thompson certainly were aware of complaints of student abuse from Owens and T.C. long before misconduct hearings began. However, MPS does not state whether Minkley and/or Thompson reported those allegations to the board and how the board responded. Further, under *Alton*, plaintiffs can prevail if they prove that MPS knew of the allegations of abuse, but did nothing to address them. Therefore, a genuine issue of material fact exists as to whether MPS was in the dark or knew of pupil abuse and willfully or recklessly ignored the allegations. For those reasons, summary judgment on plaintiffs' Due Process claim must be denied.

IV. *Title IX Claim*

***8** Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The Supreme Court has held that Title IX's prohibition against discrimination includes sexual harassment. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). The Court based its holding on a Title VII case, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). *Franklin*, 503 U.S. at 75. Since then, federal courts have applied Title VII analysis to claims of discrimination under Title IX. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir.2002) (same-sex harassment); *Doe v. Univ. of Illinois*, 138 F.3d 653, 665 (7th Cir.1998), vacated, 526 U.S. 1142, 119 S.Ct. 2016, 143 L.Ed.2d 1028 (1999) (hostile environment); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-249 (2nd Cir.1995) (sexual harassment by teacher); *Preston v. Virginia ex rel. New River Community Coll.*, 31 F.3d 203, 206 (4th Cir.1994) (employment discrimination).

Thus, the court applies Title VII sexual harassment analysis to the plaintiffs' Title IX claim. In *Holman v. Indiana*, the Seventh Circuit rejected a sexual harassment claim by a husband and wife, both of whom were harassed by the same supervisor. 211 F.3d 399 (2000). In so doing, the court stated that "Title VII does not cover the 'equal opportunity' or 'bisexual' harasser ... because such a person is not discriminating on the basis of sex." *Id.* at 403. In this case, plaintiffs and defendant agree that at least one of the victims, T.C., was female. This fact renders Title IX inapplicable, because Adams was a bisexual child abuser who did not harass solely male students or solely female students or discriminate on the basis of a student's sex. Consequently, defendant's motion for summary judgment on plaintiffs' Title IX claim is granted.

V. *State Law Claims*

Next, the court turns to plaintiffs' state law claim that MPS supervised Adams negligently. Generally, Wisconsin law grants immunity to public officers for acts performed within the scope of

their duties. Wis. Stat. 893.80; *see also Sheridan v. Janesville,* 164 Wis.2d 420, 425, 474 N.W.2d 799 (1991). However, there are two exceptions to the immunity rule: (1) immunity is not available to public officers who are negligent in performing a ministerial duty; and (2) public officers are liable for willful, malicious, or intentional conduct. *Id.* (citing *Lister v. Bd. of Regents,* 72 Wis.2d 282, 299, 240 N.W.2d 610 (1976)). Additionally, government actions are not immune to legal attack if "the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act." *Sheridan,* 164 Wis.2d at 426, 474 N.W.2d 799 (quoting *C.L. v. Olson,* 143 Wis.2d 701, 706, 422 N.W.2d 614 (1988)).

1. *"Ministerial Duty" Exception*

***9** A duty is ministerial only if "it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Id.* In the case at bar, plaintiffs argue that MPS had a ministerial duty to report Adams to authorities for sexual abuse. However, before reporting the abuse, MPS officials must investigate the complaints and exercise their judgment and discretion in determining whether there was any substance to charges brought to the attention of responsible officials. *Compare Kimps v. Hill,* 200 Wis.2d 1, 12, 546 N.W.2d 151 (1996) (" '[T]ime, mode and occasion' for performing an investigation of [an] accident and determination of the appropriate corrective action ... remained totally within [defendant's] judgment and discretion."), *with Bicknese v. Sutula,* 260 Wis.2d 713, 735, 660 N.W.2d 289 (2003) ("[I]n making the job offer to [plaintiff], [defendant] was under a ministerial duty to correctly set the terms of the offer.")

To prevail under the "ministerial duty" exception, plaintiffs must show that defendant had no substantive determinations to make. *See Snyder v. Nolen,* 380 F.3d 279, 288 (7th Cir.2004) ("duty ... to maintain the official record was purely ministerial; [defendant] had no authority ... to make substantive determinations on the worth or merits of a filing"). What plaintiffs are really saying is that MPS "botched" the Owens investigation, thereby endangering other students. However, "[i]mmunity presupposes negligence and has no reason for existence without it." *Kierstyn v. Racine Unified Sch. Dist.,* 228 Wis.2d 81, 95, 596 N.W.2d 417 (1999). Thus, the "ministerial duty" exception is inapplicable in this case to the extent that plaintiffs claim that MPS was negligent in performing its discretionary task of investigating charges against a classroom teacher.

For those reasons, the "ministerial duty" exception does not apply.

2. *"Known Danger" Exception*

Plaintiffs' alternative contention is that MPS failed to act in the face of known danger. To prevail under the "known danger" exception, plaintiffs must demonstrate "a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion." *C.L. v. Olson,* 143 Wis.2d 701, 717, 422 N.W.2d 614 (1988). For the "known danger" exception to apply, the danger must be so certain as to leave state officials without discretion. *Compare Linville v. City of Janesville,* 174 Wis.2d 571, 497 N.W.2d 465 (Ct.App.1993) (known danger existed where occupants were trapped in a submerged van), *and Domino v. Walworth County,* 118 Wis.2d 488, 347 N.W.2d 917 (Ct.App.1984) (known danger existed where a tree fell across the road at night), *with Lodl v. Progressive N. Ins. Co.,* 253 Wis.2d 323, 646 N.W.2d 314 (2002) (a failed traffic light did not constitute known danger requiring a specific response from a police officer), *and Kierstyn v. Racine Unified Sch. Dist.,* 228 Wis.2d 81, 596 N.W.2d 417 (1999) (reduction of benefits resulting from an erroneous advice of a school official does not amount to known danger).

***10** The lack of discretion is the common thread between the "ministerial duty" and the

"known danger" exceptions. *Lodl v. Progressive N. Ins. Co.*, 253 Wis.2d 323, 344, 646 N.W.2d 314 (2002) ("[B]oth exceptions derive from the principle that only discretionary acts are immunized"). As noted above, MPS had to investigate any misconduct allegations brought to its attention before taking action against Adams. Moreover, nothing in the record establishes that MPS had strict guidelines or rules dictating the decisions to be made with respect to such matters. Hence, the "known danger" exception does not apply, and summary judgment must be granted for MPS regarding plaintiffs' state law claims.

VI. *Indemnification of Adams by MPS*

MPS maintains that as a matter of law, it has no duty to indemnify Adams respecting the plaintiffs' claims in this case. It submits that Adams acknowledged during a deposition taken by the plaintiffs that he received the summons and complaint yet neglected to contact MPS or the Milwaukee City Attorney to request representation. Also, according to MPS, Adams' inaction was effectively a refusal to cooperate in the defense of this case. Further, MPS offers that Adams was acting outside the scope of his employment when he molested his pupils.

On the scope of duty and cooperation in defenses Wisconsin law provides as follows:

> If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee.

Wis. Stat. 895.46(1)(a). Examination of all case law leads this court to conclude that it does not support the ruling urged by MPS. Section 895.46(1)(a) requires a government unit to indemnify an employee for damages flowing from intentional actions taken during the scope of employment. *Graham v. Sauk Prairie Police Com'n*, 915 F.2d 1085, 1090 (7th Cir.1990). Moreover, whether the employee was acting within the scope of his employment must be resolved by the trier of fact at trial, rather than by the court on a motion for summary judgment. *Id. See also Olson v. Connelly*, 156 Wis.2d 488, 457 N.W.2d 479 (1990) ("[I]n scope of employment cases, consideration must be given to whether the employee was actuated, at least in part, by a purpose to serve the employer."). Determination of the employee's motivation, however, is not for the court on a motion for summary judgment; instead, it is a question of fact within the jury's province. *See, e.g., Carney v. White*, 843 F.Supp. 462, 479-80 (E.D.Wis.1994) ("Whether an employee was acting within the scope of his employment is a material issue of fact to be determined by the trier of fact."); *Doe v. ABC Ins. Co.*, 863 F.Supp. 884, 892 (E.D.Wis.1994) ("[Q]uestions about whether or not [defendant], if guilty of wrongdoing, was acting within the scope of his employment is an issue of fact for trial.") Therefore, Adams' failure to advise MPS or the Milwaukee City Attorney directly that he was sued by plaintiff would not preclude plaintiffs from recovering damages from MPS; rather, it would merely relieve MPS of responsibility for attorney fees and costs Adams may have incurred in defending this action on his own.

VII. *Equitable Tolling of Timothy Owens' Claims*

***11** Next, defendant claims, and plaintiffs concede, that Owens' claims are barred by the statute of limitations. However, plaintiffs argue that the court should toll the statute of limitations based on equity. (Pl. Br. at 31-32). Plaintiffs assert that, as an 11-year-old boy, Owens "could not have been aware [that] the legal principles that place liability for Mr. Adams' actions also [apply to] MPS." (Pl. Br., at 33).

In *Doe v. ABC Ins. Co.*, 863 F.Supp. 884, 886 (E.D.Wis.1994) the court tolled the statute of limitations under similar circumstances. There, the 26-year-old plaintiff filed a claim against her former teacher and the school board regarding an assault which took place when she was age 12 and in sixth grade. *Id.* The case turned on "when the clock starts to run." *Id.* at 889. The court tolled the statute of limitations, reasoning that plaintiff may argue that "she didn't really know of her injury and damage until [much later]." *Id.* at 891.

Although this case bears a resemblance to *Doe*-Owens was young when Adams abused him and claims ignorance of the injury at the time-there is one major difference between Owens and the plaintiff in *Doe*. On the day Adams touched Owens, Owens related the incident to his mother, who called the police promptly. These actions by Owens and his mother establish that Owens and his mother were aware of the existence and timing of any injury by Adams or MPS. Therefore, Owens may not assert now that he was unaware of the injury and the damage until years later.

Now therefore,

IT IS ORDERED that the defendants' motion for summary judgment is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that plaintiffs' equal protection Title IX and state law negligent supervision claims are dismissed.

IT IS FURTHER ORDERED that all claims of Timothy Owens are DISMISSED.

E.D.Wis.,2006.
R.S. ex rel. Sims v. Board of School Directors of Public Schools of City of Milwaukee
Not Reported in F.Supp.2d, 2006 WL 757816 (E.D.Wis.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2007 WL 5325714 (W.D.Wis.)
(Cite as: 2007 WL 5325714 (W.D.Wis.))

H

Only the Westlaw citation is currently available.

United States District Court,
W.D. Wisconsin.
Dennis STRONG, Plaintiff,
v.
State of WISCONSIN, Michael Vitaccio, Fred Siggelkow, Greg Van Rybroek, David Pollock, Jan Gray, Brad Smith, Clair Krueger, John Feeney, Kelly Vitense, Patricia Dorn, Cheryl Marshall, Lori Klemer, Cheryl Hoffman, Defendants.

No. 07-C-86-C.
Dec. 20, 2007.

Amy F. Scarr, Amy F. Scarr, S.C., Madison, WI, for Plaintiff.

Jennifer Sloan Lattis, Monica Burkert-Brist, Wisconsin Department of Justice, Madison, WI, for Defendants.

Kelly A. Vitense, Madison, WI, pro se.

OPINION AND ORDER

BARBARA B. CRABB, District Judge.

***1** In this civil action for monetary relief, plaintiff Dennis Strong alleges that defendants engaged in a litany of unlawful conduct against him while he was a patient at the Mendota Mental Health Institute in Madison, Wisconsin, including retaliating against him for speaking out on matters of public concern, sexually harassing him and failing to properly treat his mental illness. Included in plaintiff's complaint are state law claims for medical malpractice, sexual battery and violations of plaintiff's rights under Wisconsin's patients' rights law, Wis. Stat. § 51.61. Plaintiff has named defendant State of Wisconsin on these claims because of its "oversight" of the institute and because the other defendants are "employees/agents" of the state. Cpt., dkt # 2, exh. 1, ¶ 2.

Now before the court is the state's motion for partial summary judgment on the ground that it is entitled to sovereign immunity on plaintiff's medical malpractice and sexual battery claims. (The state concedes that it has waived its sovereign immunity to plaintiff's claim under Wis. Stat. § 51.61.) In addition, the state seeks a declaration that it is not required to indemnify defendant Kelly Vitense under Wis. Stat. § 895.46(1)(a) for any damages she is required to pay plaintiff as a result of this lawsuit. (Defendant Vitense was an employee at the institute who plaintiff alleges committed a sexual battery against him. The state says it has no duty to indemnify Vitense because any battery she committed did not occur while she was "acting within the scope of employment." Wis. Stat. § 895.46(1)(a).)

The first issue raised by the state is easily resolved. Plaintiff concedes in his response brief that he cannot maintain his claims for sexual battery and medical malpractice against the state. *Fiala v. Voight*, 93 Wis.2d 337, 342, 286 N.W.2d 824, 827 (1980) (state cannot be sued under state law without authorization of state legislature); *Brown v. State*, 230 Wis.2d 355, 363, 602 N.W.2d 79, 84 (Ct.App.1999) (legislature has not waived sovereign immunity with respect to tort claims generally).

The second issue cannot be resolved at all because it is not ripe. Any opinion regarding the state's duty to indemnify Vitense would be advisory because it has not yet been determined whether Vitense is liable to plaintiff for damages. Obviously, if Vitense is not found liable to plaintiff, the state will not have to indemnify her, regardless of the scope of § 895.46. Because federal courts "possess no ... authority to issue advisory opinions," *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 927 (7th Cir.2000), a determination of the indemnification question will have to wait until the question of Vitense's liability is resolved.

This conclusion is consistent with Wisconsin law, which requires a court to resolve questions of liability before determining questions of indemnification of any party for such liability. *General Casualty Co. v. Hills*, 209 Wis.2d 167, 176 n. 11, 561 N .W.2d 718, 722 n. 11 (1997) (citing *Newhouse v. Citizens Security Mutual Insurance Co.*, 176 Wis.2d 824, 834-36, 501 N.W.2d 1 (1993)). In fact, in each of the cases the state cites in support of its indemnification argument, the court determined the application of Wis. Stat. § 895.46 after the court or the jury determined liability. *Olson v. Connerly*, 156 Wis.2d 488, 457 N .W.2d 479 (1990); *School Board of Pardeeville Area School District v. Bomber*, 214 Wis.2d 397, 571 N.W.2d 189 (Ct.App.1997); *Block v. Gomez*, 201 Wis.2d 795, 549 N.W.2d 783 (Ct.App.1996). In some cases, the indemnification issue was determined in a separate lawsuit. *Horace Mann Insurance Co. v. Wauwatosa Board of Education*, 88 Wis.2d 385, 276 N.W.2d 761 (1979); *Thuermer v. Village of Mishicot*, 86 Wis.2d 374, 272 N.W.2d 409 (Ct.App.1978).

***2** The state briefly mentions that it is seeking a ruling that it is "not responsible for [Vitense's] legal defense in this action," dft.'s br., dkt # 50, at 2, but that is a nonissue. Section 895.46 does not impose a duty to defend on the state under *any* circumstances. The statute says only that the state must pay the employee reasonable attorney fees after "the results of the litigation" if the court or jury determines that the employee is acting within the scope of employment. Thus, this will be a question that needs resolution only if defendant Vitense seeks reimbursement for any attorney fees she incurs at the close of this case.

ORDER

IT IS ORDERED that defendant State of Wisconsin's motion for partial summary judgment is GRANTED with respect to plaintiff Dennis Strong's claims for medical malpractice and sexual battery. The complaint is DISMISSED with respect to those claims against defendant State of Wisconsin on the ground of sovereign immunity. The state's motion is DENIED as unripe with respect to the question whether the state must indemnify defendant Kelly Vitense.

W.D.Wis.,2007.
Strong v. Wisconsin
Not Reported in F.Supp.2d, 2007 WL 5325714 (W.D.Wis.)

END OF DOCUMENT

C
Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Indianapolis Division.
Toni **TWYMAN**, Plaintiff,
v.
Brian **BURTON** and Ryan Mears, Defendants.

Case No. 1:10-cv-0601-TWP-TAB.
Dec. 2, 2010.

Background: Female confidential drug informant with police department filed § 1983 action against department's undercover detective alleging that by subjecting her to inappropriate sexual acts and harassment he violated her rights under Fourth and Fourteenth Amendments. Detective moved to dismiss.

Holdings: The District Court, Tanya Walton Pratt, J., held that:
(1) informant stated a Fourth Amendment claim against undercover detective for unlawful entry into her home;
(2) sexually harassing actions of male undercover detective, while deplorable, were not sufficiently severe to give rise to a substantive due process claim under the Fourteenth Amendment; and
(3) informant stated an equal protection claim under the Fourteenth Amendment against detective.

Motion granted in part and denied in part.

West Headnotes

[1] Arrest 35 ⚿68(10)

35 Arrest
35II On Criminal Charges
35k68 Mode of Making Arrest
35k68(6) Intrusion or Entry
35k68(10) k. Entry Without Warrant Impermissible. Most Cited Cases

Searches and Seizures 349 ⚿42.1

349 Searches and Seizures
349I In General
349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1 k. In General. Most Cited Cases
Generally, in the absence of permission or exigent circumstances, police need a warrant to enter an individual's home, and entry without a warrant implicates the Fourth Amendment. U.S.C.A. Const.Amend. 4.

[2] Arrest 35 ⚿68(10)

35 Arrest
35II On Criminal Charges
35k68 Mode of Making Arrest
35k68(6) Intrusion or Entry
35k68(10) k. Entry Without Warrant Impermissible. Most Cited Cases

Searches and Seizures 349 ⚿42.1

349 Searches and Seizures
349I In General
349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
349k42.1 k. In General. Most Cited Cases
Female confidential drug informant with police department stated a Fourth Amendment claim against department's undercover detective by alleging that detective entered her home to photograph her sex toy and that photograph had been taken at a time when she "was not present in her home and had not given permission" for him to be in her residence; even though informant did not specifically allege that detective's entry into her home was warrantless and not impelled by exigent circumstances, and although informant only cited to Fourteenth Amendment, pleading was sufficient for court to draw reasonable inferences. U.S.C.A. Const.Amends. 4, 14.

[3] Federal Civil Procedure 170A ⚿674

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(B) Complaint
170AVII(B)1 In General
170Ak674 k. Theory of Claim. Most Cited Cases

Pleading the wrong legal theory is not necessarily fatal to a plaintiff's case, assuming the facts alleged give rise to a plausible claim.

[4] Constitutional Law 92 3893

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3893 k. In General. Most Cited Cases

Constitutional Law 92 4037

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4037 k. Personal and Bodily Rights in General. Most Cited Cases

The Fourteenth Amendment affords substantive due process, which encompasses a liberty interest in bodily integrity. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 3896

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3896 k. Egregiousness; "Shock the Conscience" Test. Most Cited Cases

The key standard for determining a substantive due process claim under the Fourteenth Amendment is whether the action would shock the conscience of federal judges. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 4037

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4037 k. Personal and Bodily Rights in General. Most Cited Cases

In the context of battery, for purposes of substantive due process claim under the Fourteenth Amendment, the right to bodily integrity is infringed only by a serious battery, not a battery that is nominal or trivial. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 3893

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3893 k. In General. Most Cited Cases

Constitutional Law 92 4042

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4042 k. Threats, Harassment, and Use of Force. Most Cited Cases

In determining whether conduct gives rise to a substantive due process claim under the Fourteenth Amendment, court ascribes weight to specific factors, including the duration of the offensive behavior and whether force was used. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 4522

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)3 Law Enforcement
92k4521 Conduct of Police and Prosecutors in General
92k4522 k. In General. Most Cited Cases

Municipal Corporations 268 747(3)

268 Municipal Corporations
268XII Torts
268XII(B) Acts or Omissions of Officers or Agents
268k747 Particular Officers and Official Acts
268k747(3) k. Police and Fire. Most Cited Cases

Actions of male undercover detective with police department against female confidential drug informant with department, which included taking a photograph of female informant's sex toy by entering her home without permission, and then placing the toy on female informant's car seat so that she would unwittingly sit on it, while deplorable, were not sufficiently severe to give rise to a substantive due process claim under the Fourteenth Amendment for violating her bodily integrity; the duration of undercover detective's harassment was not protracted, he did not use force, he never directly touched female informant, and to the extent he committed an indirect battery by sex toy, the battery was not sufficiently severe. U.S.C.A. Const.Amend. 14.

[9] Civil Rights 78 1358

78 Civil Rights
78III Federal Remedies in General
78k1353 Liability of Public Officials
78k1358 k. Criminal Law Enforcement; Prisons. Most Cited Cases

Constitutional Law 92 3784

92 Constitutional Law
92XXVI Equal Protection
92XXVI(F) Criminal Law
92k3783 Police Action or Inaction
92k3784 k. In General. Most Cited Cases

Female confidential drug informant with police department, who had been subjected to allegedly harassing behaviors of undercover detective with police force when he entered her home without her permission while she was away, photographed her sex toy, and then later placed the toy on the seat of her car where she would unwittingly sit on it, stated an equal protection claim under the Fourteenth Amendment against undercover detective with police force by alleging in her § 1983 action that because of detective's behavior she had been intentionally treated differently from others similarly situated, and that there was no rational basis for the difference in treatment; even though detective was not informant's employer, she could bring § 1983 action against him, since claim involved individual person's actions. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Jaunae M. Hanger, Richard A. Waples, Waples & Hanger, Indianapolis, IN, for Plaintiff.

James S. Stephenson, Ronald J. Semler, Wayne E. Uhl, Stephenson Morow & Semler, Indianapolis, IN, for Defendants.

ENTRY ON DEFENDANT RYAN MEARS' MOTION TO DISMISS

TANYA WALTON PRATT, District Judge.

This § 1983 matter is before the Court on Defendant Ryan Mears' (“*Mears* ”) 12(b)(6) Motion to Dismiss [Dkt. 25]. Plaintiff Toni Twyman (“*Twyman* ”) brought the present action pursuant to 42 U.S.C. § 1983, alleging that Mears and Brian Burton (“*Burton* ”) (collectively, “*Defendants* ”), undercover detectives with the Franklin Police Department (“ *FPD* ”), violated her constitutional rights by subjecting her to inappropriate sexual acts and harassment while she worked for them as a

confidential drug informant. For the reasons set forth below, Mears' Motion to Dismiss [Dkt. 25] is **GRANTED** in part and **DENIED** in part.

I. LEGAL STANDARD

Defendant Ryan Mears, has moved to dismiss under Fed.R.Civ.P. 12(b)(6). Pursuant to Rule 12(b)(6), the Court must take the facts alleged in the complaint as true and draw all reasonable inferences in favor of the Plaintiff. *Mosley v. Klincar,* 947 F.2d 1338, 1339 (7th Cir.1991). The complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed.R.Civ.P. 8(a)(2), and there is no need for detailed factual allegations. *Pisciotta v. Old Nat'l Bancorp,* 499 F.3d 629, 633 (7th Cir.2007) (citation omitted). Nevertheless, the statement must "give the defendant fair notice of what the claim is and the grounds upon which it rests" and the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* (citations and internal quotations omitted). Finally, although heightened fact pleading is not required, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

II. BACKGROUND

Twyman's Complaint alleges a litany of police misconduct, running the gamut from silly and immature to deplorable and dangerous. This unfortunate string of events began in 2007, when Twyman moved to Franklin, Indiana with her three children. (Complaint ¶ 9-10). Twyman was living a sober lifestyle by the time she moved however, in the past she had encountered a number of alcohol-fueled problems, including a DUI arrest and the initiation of a CHINS proceeding jeopardizing her custodial status. (*Id.* at 12-13).

Soon after moving, Twyman began serving as a confidential drug informant for the FPD. (*Id.* at 14-21). Twyman's initial contact with the FPD was Burton, who promised Twyman that if she assisted him in drug investigations, he would, among other things, "get rid of" her DUI and "take care" of the CHINS action. (*Id.* at 22). Enticed by this quid pro quo proposition, Twyman assisted Burton with a meth investigation, agreeing to wear a concealed audio wire and camera while making controlled drug buys. (*Id.* at 23, 24, 26). According to Twyman, the relationship eventually veered into unprofessional and unseemly territory. On February 23, 2009, Burton fondled Twyman's breasts when fitting her with a concealed wire prior to a controlled drug buy. (*Id.* at 25). Months later, Burton's inappropriate behavior intensified: "[O]n or about May 29, 2009, while Detective Burton and Ms. Twyman were waiting for a person to deliver drugs to be purchased, Detective Burton exposed his penis to Ms. Twyman." (*Id.* at 27).

Twyman only implicates Mears in *some* of her allegations. Specifically, Twyman alleges that on May 29, 2009-the same day that Burton exposed himself-Mears showed her a picture from his cell phone of Burton holding Twyman's sex toy. (*Id.* at 28-29). According to the Complaint, "The photo had been taken at a time when Ms. Twyman was not present in her home and had not given permission to either Detective Burton or Detective Mears to be in her residence." (*Id.* at 30). The ridiculous antics did not end there. On July 15, 2009, Burton and Mears allegedly placed the same sex toy in Twyman's automobile, laughing when she unwittingly sat on it. (*Id.* at 31).

III. DISCUSSION

For purposes of Mears' Motion to Dismiss, it is important to partition off the more egregious allegations leveled against Burton from the allegations leveled against Mears. Based on the allegations of the Complaint, Mears never fondled or exposed himself to Twyman. Instead, a fair reading of the Complaint establishes that Mears engaged in the following behavior: (1) entering Twyman's home and taking a photo of a sex toy without permission when Twyman was not present; (2) showing Twyman the picture he took; and (3) placing the sex toy in the seat of Twyman's car and watching her reac-

tion when she unwittingly sat on it.

To state a claim upon which relief can be granted under § 1983, Twyman's Complaint must allege that Mears caused her to suffer a *constitutional injury* while acting under color of state law. 42 U.S.C. § 1983; *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (§ 1983 "is not itself a source of substantive rights," but instead provides, "a method for vindicating federal rights elsewhere conferred."). Thus, the first step in analyzing a § 1983 claim is to identify the specific constitutional right allegedly infringed. *Id.* (citations omitted). Here, Twyman's Complaint, in some form, contemplates three distinct constitutional claims: (1) Fourth Amendment illegal search and seizure; (2) Fourteenth Amendment substantive due process; and (3) Fourteenth Amendment equal protection. Each claim is analyzed separately below.

A. 4th Amendment Claim

[1][2] Generally, in the absence of permission or exigent circumstances, police need a warrant to enter an individual's home, and entry without a warrant implicates the Fourth Amendment. *United States v. Hughes*, 993 F.2d 1313, 1315 (7th Cir.1993) ("Warrantless searches are per se unreasonable under the Fourth Amendment subject to a few well-delineated exceptions."); *see also Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). Mears argues that Twyman's allegations fail to state a viable Fourth Amendment claim relating to Mears' alleged impermissible entry into her home. Indeed, on this point, Twyman's allegations are relatively scant, limited to the statement: "The photo had been taken [by Detective Mears] at a time when Ms. Twyman was not present in her home and *had not given permission* to either Detective Burton or Detective Mears to be in her residence." (Complaint ¶ 30) (emphasis added).

Mears makes two basic arguments in support of his argument that any Fourth Amendment claims against him should be dismissed. First, Mears argues that Twyman's Fourth Amendment claim is fatally deficient because she did not specifically allege that Mears' entry into her home was warrantless and not impelled by exigent circumstances. Instead, Twyman only alleges that the entry was *without permission*, which is far from synonymous with *warrantless under non-exigent circumstances.* Perhaps this is a close call, but the Court respectfully disagrees with Mears' argument. Without engaging in inappropriate speculation, the Court can draw a reasonable inference that Mears-by entering a home without permission and snapping a photo of a sex toy-is liable for a violation of Twyman's Fourth Amendment rights. *See Ashcroft v. Iqbal*, ---U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inferences that the defendant is liable for the misconduct alleged."). Mears' argument is an invitation for the Court to elevate form over substance. At this early stage, the Court will not do so where, as here, the complaint contains the requisite factual content.

[3] Second, Mears argues that Twyman's Fourth Amendment claim fails because Twyman's Complaint fails to mention the Fourth Amendment, but instead focuses solely on the Fourteenth Amendment. The Court is not persuaded, finding this argument more semantic than substantive. Fed.R.Civ.P. 8(a) prescribes a notice pleading standard, only requiring a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." This standard applies to § 1983 claims. *Leatherman v. Tarrant County Narcotics & Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Moreover, pleading the wrong legal theory is not necessarily fatal to a plaintiff's case, assuming the facts alleged give rise to a plausible claim. *See generally, Shah v. Inter-Continental Hotel Chicago Operating Corp.*, 314 F.3d 278, 282 (7th Cir.2002) (plaintiff is not required to plead legal theories in complaint, but instead must only "describe his claim briefly and simply."). Here,

despite omitting reference to the Fourth Amendment, Twyman pleaded facts giving rise to a plausible Fourth Amendment claim. *See United States v. Etchin*, 614 F.3d 726, 733 (7th Cir.2010) ("It is therefore a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.") (quoting *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)); *see also Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir.2004) (stating that, in the absence of consent or compelling circumstances, a warrant is required for entry into the home). Accordingly, Mears' Motion to Dismiss Twyman's Fourth Amendment claim is **DENIED.**

B. 14th Amendment Substantive Due Process Claim

[4][5][6] The Fourteenth Amendment affords substantive due process, which encompasses a liberty interest in bodily integrity. *Albright*, 510 U.S. at 272, 114 S.Ct. 807; *Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir.1997) (finding a "liberty claim of a right to bodily integrity is ... within substantive due process."). Here, Twyman alleges that her substantive due process rights were violated by Mears when he showed her the sex toy picture and "battered her with the object by placing it in her seat knowing that she would sit upon it." [Dkt. 31 at 1]. Such behavior is unquestionably puerile and repulsive. The harder question, however, is whether such behavior amounts to a constitutional deprivation. After all, "every official abuse of power, even if unreasonable, unjustified, or outrageous, does not rise to the level of a federal constitutional deprivation. Some such conduct may simply violate state tort law or indeed may be perfectly legal, though unseemly and reprehensible." *McCoy v. Harrison*, 341 F.3d 600, 605 (7th Cir.2003) (citation and internal quotations omitted). The key standard for determining a substantive due process claim is whether the action would "shock the conscience of federal judges." *Decker v. Tinnel*, 2005 WL 3501705, at *7 (N.D.Ind. Dec. 20, 2005) (citations and internal quotations omitted). More on-point, the Seventh Circuit has indicated that, in the context of battery, the right to bodily integrity is infringed only by a serious battery-not a battery that is nominal or trivial. *Alexander v. DeAngelo*, 329 F.3d 912, 916 (7th Cir.2003) ("Because any offensive touching ... is a battery ... most batteries are too trivial to amount to deprivations of liberty.").

[7] So what kind of battery does amount to a constitutional deprivation? Not surprisingly, given the unique allegations at issue, the Court failed to find case law directly on-point. Nonetheless, the case law in this area does offer useful guidance, establishing that "serious" sexual assault implicates the substantive due process liberty interest in bodily integrity. *See, e.g., Wudtke*, 128 F.3d at 1063 (allegation of coercion to perform oral sex stated substantive due process claim); *Alexander*, 329 F.3d at 916 ("rape committed under color of state law is [ ] actionable under 42 U.S.C. § 1983" as a due process violation). Conversely, less odious conduct does not state a substantive due process claim. *See, e.g., Decker v. Tinnel*, 2005 WL 3501705 (N.D.Ind. Dec. 20, 2005) (no substantive due process claim where male officer, during voluntary ride-along with 18-year-old female, asked her to strip, repeatedly tried to kiss her, forced his hand between her thighs, and groped her breasts); *Nagle v. McKernan*, 2007 WL 2903179 (N.D.Ill.2007) (no substantive due process violation where fire marshal wrote love note and intimately pressed his face against plaintiff and breathed on her neck). In determining whether the conduct at issue gives rise to a substantive due process claim, courts have ascribed weight to specific factors, including the duration of the offensive behavior and whether force was used. *Decker*, 2005 WL 3501705, at *9.

[8] Based on the sweep of the case law and these factors, this Court is persuaded that Mears' reprehensible conduct does not support a claim under § 1983 for a violation of substantive due process. The duration of Mears' harassment was not protracted; Mears did not use force; Mears never directly touched Twyman; and to the extent Mears

committed *indirect battery by sex toy*, this battery is not sufficiently severe to give rise to a substantive due process claim. The line of demarcation separating a viable substantive due process claims from one that fails is somewhat nebulous. Regardless, the Court is convinced that Mears' behavior-taking a photo of a sex toy and placing the toy on Twyman's car seat so that she would unwittingly sit on it-falls well below the threshold line of egregiousness. Accordingly, Mears' Motion to Dismiss Twyman's substantive due process claim is **GRANTED.**

C. 14th Amendment Equal Protection Claim

[9] In relevant part, Twyman's Complaint states, "Detective Ryan Mears' actions toward Ms. Twyman constitute a violation of her ... right to be free of gender based harassment ... in contravention of the fourteenth amendment to the U.S. Constitution." (Complaint ¶ 36). Mears largely ignored this claim in his briefing. As an initial matter, the Supreme Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that [she] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir.2001) (citations and internal quotations omitted). Further, "[t]he Supreme Court and [the Seventh Circuit] have held that the equal protection clause contains a federal constitutional right to be free from gender discrimination," and "[a]ll district courts ... that have interpreted this language as it applies to sexual harassment by a state employer have determined that such harassment constitutes sex discrimination in violation of the equal protection clause and is actionable under § 1983." *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir.1986) (citations and internal quotations omitted).

Indeed, § 1983 claims grounded in the equal protection clause typically arise in the employment context, which is not the case here, at least in the conventional sense of the word "employment." However, guidance from case law suggests that this fact is not fatal to Twyman's cause of action. *See Lytle v. Bd. of Lake County Commissioners*, 2007 WL 433539, *2-3 (N.D.Ind. Feb.6, 2007) (ruling that plaintiff stated a claim under equal protection clause, even though defendant was not an employer for purposes of Title VII); *See also Decker*, 2005 WL 3501705, at *6 (tacitly acknowledging fact that although plaintiff failed to do so, she *could have* stated an equal protection clause claim against individual officer, even though she was not an employee); Cheryl L. Anderson, *Nothing Personal: Individual Liability Under 42 U.S.C. § 1983 For Sexual Harassment as an Equal Protection Claim*, 19 BERKELEY J. EMP. & LAB. L. 60, 67 (1998) ("Unlike Title VII, which rests liability on 'employers,' § 1983 applies to 'persons.' "). Twyman has sufficiently described her harassment claim against Mears. In light of the case law-coupled with Mears' failure to address the operative issue-Mears' Motion to Dismiss Twyman's equal protection claim is **DENIED.**

CONCLUSION

For the reasons set forth above, Mears' Motion to Dismiss [Dkt. 25] is **GRANTED** in part and **DENIED** in part. Specifically, the Court **GRANTS** the Motion to Dismiss as to Plaintiff's Fourteenth Amendment substantive due process claim; therefore, this claim is **DISMISSED** with prejudice. However, the Court **DENIES** the Motion to Dismiss as to Plaintiff's Fourth Amendment and Fourteenth Amendment equal protection clause claims.

SO ORDERED.

S.D.Ind.,2010.
Twyman v. Burton
757 F.Supp.2d 804

END OF DOCUMENT