SJC-13015

C.M. vs. COMMISSIONER OF THE DEPARTMENT OF CHILDREN AND FAMILIES & others.[1]

Suffolk. February 5, 2021. - June 11, 2021.

Present: Budd, C.J., Gaziano, Lowy, Kafker, & Georges, JJ.

Department of Children & Families. Minor, Care and protection. Parent and Child, Care and protection of minor. Social Worker. Immunity from Suit. Civil Rights, Immunity of public official. Federal Civil Rights Act. Practice, Civil, Care and protection proceeding, Affidavit, Civil rights.

Civil action commenced in the Superior Court Department on September 16, 2014.

The case was heard by Rosemary Connolly, J., on a motion for judgment on the pleadings, and entry of separate and final judgment was ordered by Paul D. Wilson, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Eric Tennen for the plaintiff.

Jesse M. Boodoo, Assistant Attorney General, for the defendants.

Andrew Cohen & Amy Karp, Committee for Public Counsel Services, & Melanie L. Todman, Kate J. Bergeron, Jennifer G.

[1] Candice Gemski and Marcie Plouffe.

Roma, & Kelly C. Hogan, for Committee for Public Counsel Services, amicus curiae, submitted a brief.

GEORGES, J. At issue in this case is the scope of immunity afforded to social workers in the Department of Children and Families (department) who attest to facts in sworn affidavits as part of care and protection proceedings commenced by the department in the Juvenile Court pursuant to G. L. c. 119, § 24 (§ 24). The plaintiff, C.M., brought an action under 42 U.S.C. § 1983 (§ 1983) in the Superior Court against the defendant Marcie Plouffe, a department social worker, alleging that she intentionally misrepresented facts in a sworn affidavit filed in the Juvenile Court in support of a care and protection petition (petition). C.M.'s complaint further alleged that Plouffe's area supervisor, the defendant Candice Gemski, also was liable because she had approved Plouffe's actions.

Plouffe and Gemski (collectively, defendants) sought judgment on the pleadings pursuant to Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). They argued that Plouffe's conduct was protected by absolute immunity, and that the immunity afforded to Plouffe also extended to Gemski as Plouffe's superior. In opposing the defendants' motion, C.M. maintained that social workers are not afforded such immunity at common law, because the act of misrepresenting facts to a court is "never afforded absolute immunity." After a hearing, a Superior Court judge

allowed the defendants' motion, and C.M. appealed from the judgment to the Appeals Court. The Appeals Court reversed, in part, concluding that the defendants were not absolutely immune from liability under § 1983 for the averments in Plouffe's affidavit. C.M. v. Commissioner of the Dep't of Children & Families, 97 Mass. App. Ct. 343, 355 (2020).

We granted the defendants' application for further appellate review, limited to the question of the scope of immunity afforded to department social workers, and their approving supervisors, for the averments contained in affidavits accompanying, and filed with, petitions under § 24.[2] For the reasons that follow, we conclude that department social workers, and their approving supervisors, are entitled to absolute immunity in these circumstances. Accordingly, we affirm the judgment entered in the Superior Court.[3]

[2] In her brief filed in this court, C.M. also raises a number of substantive issues related to the allowance by the Superior Court judge of a separate motion for summary judgment filed by the commissioner of the department (commissioner), who also was named as a defendant in the underlying 42 U.S.C. § 1983 action. Because those issues fall outside the scope of our limited further appellate review, the decision of the Appeals Court affirming the order granting summary judgment in favor of the commissioner stands. C.M. v. Commissioner of the Dep't of Children & Families, 97 Mass. App. Ct. 343, 355-356 (2020).

[3] We acknowledge the amicus brief submitted by the Committee for Public Counsel Services.

Background. We first provide a brief overview of how § 24 petitions are initiated. We then summarize the relevant and undisputed facts, reserving the development of certain facts for later discussion.

1. Section 24 proceedings. "The purpose of G. L. c. 119 is to protect children 'against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes.'" Care & Protection of Lillian, 445 Mass. 333, 335 (2005), quoting G. L. c. 119, § 1. Care and protection proceedings under § 24 are initiated in the Juvenile Court upon the filing of a petition, which must establish that a child's well-being requires his or her removal from the household due to at least one of the four concerns enumerated in the statute. Specifically, the petitioner must allege "under oath" that a child "(a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care, discipline or attention." G. L. c. 119, § 24.

While the statute provides that any "person" may file a petition, see G. L. c. 119, § 24, in practice, petitions "are

usually filed by [the department] or by another health or welfare agency involved with children." See 1 S.M. Limon, Massachusetts Juvenile Court Bench Book § 15.2.1(a), at 15-2 (Mass. Cont. Legal Educ. 3d ed. 2011 & Supp. 2014). To comply with the requirements of § 24, petitioners customarily file "an affidavit or other report under oath outlining the alleged factual basis for the petition." See id. at 15-3. See Care & Protection of Lillian, 445 Mass. at 337 (petition sufficiently pleaded "if it alleges specific facts, based on personal knowledge or on information and belief, that, if true, fall within at least one of those four enumerated concerns [in § 24]"). Taken together, § 24 petitions are customarily (although not exclusively) filed by department social workers, and the petition -- including the factual bases for the petition -- statutorily must be filed under oath.

After the petition is filed, and both parents receive a summons and notice, a Juvenile Court judge holds an initial hearing, which may be held ex parte, in order to determine whether there is "reasonable cause" for a Juvenile Court judge to order the temporary removal of the child from his or her parents. See G. L. c. 119, § 24. If the judge makes such a finding and authorizes temporary removal of the child from the household, then "[§ 24] mandates a temporary custody hearing within seventy-two hours to determine whether temporary custody

shall continue until a hearing on the merits of the petition for care and protection."[4] Care & Protection of Zita, 455 Mass. 272, 276 (2009), citing G. L. c. 119, § 24.[5]

2. Care and protection of the child.[6] On three occasions between 2004 and 2011, the department received reports indicating that C.M. had left the child alone with the child's father, a registered level three sex offender. On the first two occasions, in 2004 and 2009, the department investigated the reports and imposed safety plans to mitigate possible risks to the child going forward. The safety plans included prohibiting unsupervised contact between the child and the father.

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[4] The relevant portion of § 24 provides:

> "Upon entry of the order [granting the department temporary custody of the child at the ex parte hearing], notice to appear before the court shall be given to either parents, both parents, a guardian with care and custody or another custodian. At that time, the court shall determine whether temporary custody shall continue beyond [seventy-two] hours until a hearing on the merits of the petition for care and protection is concluded before the court."

[5] We acknowledge that similar proceedings may be commenced in the Probate and Family Court, pursuant to G. L. c. 119, § 23 (a) (3), which may also result in the court granting the department emergency custody of a child, followed by a seventy-two hour hearing, see Custody of Lori, 444 Mass. 316, 322 (2005). However, because those proceedings may be initiated sua sponte by a judge of the Probate and Family Court, see id., we confine our analysis to petitions and corresponding affidavits filed pursuant to § 24.

[6] The Appeals Court's opinion in this case sets out a more detailed summary of the factual background. See C.M., 97 Mass. App. Ct. at 345-348.

Following a third report of unsupervised contact in 2011, Plouffe became involved with the family for the first time.

Between August and September 2011, Plouffe met with and interviewed C.M., the child, and the father several times. During these meetings, she discussed the importance of the father's discontinuing unsupervised contact with the child. In October of 2011, Plouffe proposed a safety plan providing that the father would not have unsupervised contact with the child in any circumstances, and that the family would engage in department services. C.M. refused to agree to the proposed safety plan; she maintained that the father posed no risk to the child's physical well-being.

Based on their conclusion that C.M. either did not understand, or was unwilling to take, the necessary steps to obviate the risk that the father posed to the child, the defendants then determined that the child was at risk. In response, the defendants decided to petition the Juvenile Court to remove the child from the home. When Plouffe informed C.M. of the department's intention to file a petition under § 24, Plouffe believed, based on C.M.'s behavior during their interaction, which was markedly different from the tone of all

of their earlier interactions, that C.M. intended to flee with the child, or to harm herself or the child.[7]

To initiate the proceedings, Plouffe submitted to the Juvenile Court, inter alia, a report containing a five-page affidavit detailing the factual bases for the petition, and the department's request for emergency custody.[8] On the same day that the petition was filed, a Juvenile Court judge held an ex parte hearing in which Plouffe testified under oath. At the conclusion of the hearing, the judge ordered that the department receive temporary custody of the child. The matter then was scheduled for a "seventy-two hour hearing," as required under § 24, in which C.M., through her attorney, initially participated, but she then waived her rights to prior to its completion.[9]

In December of 2011, after an independent physician certified that C.M. understood the risks posed by the father,

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[7] Among other things, Plouffe noted that C.M. was being "eerily quiet and appeared extremely relaxed," as opposed to what Plouffe characterized as her usual "angry and defensive" demeanor.

[8] The five-page affidavit contained in Plouffe's report came to be referred to over the course of this litigation simply as "the affidavit." See C.M., 97 Mass. App. Ct. at 351. For brevity and consistency, we also employ this designation.

[9] The record is unclear as to the extent of C.M.'s initial involvement in the seventy-two hour hearing. C.M.'s eventual waiver of her rights to a seventy-two hour hearing, however, was stipulated to by the defendants.

the judge ordered that physical custody of the child be returned to C.M., but that legal custody of the child remain with the department pending final disposition of the matter. In April 2012, an investigator appointed by the Juvenile Court submitted a report recommending that the custody proceedings against C.M. be dismissed, provided that the family agreed to a new safety plan addressing safe contact between the father and the child. C.M. agreed to the new safety plan that was based on the investigator's recommendation, and the judge dismissed the case in May 2012.

3. Procedural history. Over two years later, in September of 2014, C.M. commenced the present action in the Superior Court against Plouffe, Gemski, the department itself, and other department personnel. As is relevant to our analysis, the first count of the amended complaint alleged, pursuant to § 1983,[10] that the defendants had violated C.M.'s substantive due process rights under the Fourteenth Amendment to the United States

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[10] Title 42 U.S.C. § 1983 provides, in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Constitution by "unjustifiably removing [the child] from her care, custody and control." Specifically, C.M. asserted that Plouffe, with Gemski's approval, had wrongly initiated the care and protection proceedings, and that Plouffe had made false statements in her affidavit initiating the same.

The defendants then filed a motion for judgment on the pleadings, which C.M. opposed.[11] Subsequently, a judge in the Superior Court issued an order allowing the defendants' motion. The judge concluded that the defendants were absolutely immune from liability under the § 1983 claim because Plouffe's act of swearing to the facts in her affidavit had been necessary to initiate the care and protection proceedings. Relying on decisions from a number of Federal Courts of Appeals, the judge determined that the defendants had been "engaged in conduct in their capacity as legal advocates for the Commonwealth [in] initiating and prosecuting a child custody proceeding in the Juvenile Court," and accordingly were shielded by absolute immunity for this "quasi prosecutorial" conduct. The judge also concluded that when Plouffe testified at the Juvenile Court ex parte hearing on the petition, she was entitled to absolute

[11] The commissioner separately moved for summary judgment as to the counts that pertained to her; the judge allowed the commissioner's motion, and the Appeals Court affirmed that order. See C.M., 97 Mass. App. Ct. 343, 355-356.

immunity as a witness in a judicial proceeding. C.M. timely appealed.

The Appeals Court affirmed the judgment in part and vacated it in part. See C.M., 97 Mass. App. Ct. at 344. To the extent that C.M. challenged the defendants' "filing" of the petition, the Appeals Court held that Plouffe and Gemski were entitled to absolute immunity because the function of their actions was "analogous to that of a prosecutor" in initiating a criminal proceeding. See id. at 351-352, quoting Minor v. State, 819 N.W.2d 383, 398 (Iowa), cert. denied, 568 U.S. 980 (2012). Likewise, the Appeals Court agreed with the Superior Court judge that the defendants were entitled to absolute witness immunity with respect to Plouffe's in-court testimony at the initial ex parte hearing in the Juvenile Court. See C.M., supra at 354-355.

With respect to C.M.'s claim that Plouffe, with Gemski's approval, had made false statements in her affidavit as part of the initiation of care and protection proceedings, however, the Appeals Court held that Plouffe was not entitled to absolute immunity because she was acting as a "complaining witness." See id. at 352. The Appeals Court reasoned that the appropriate equivalent of Plouffe's conduct in making particular averments was that of a prosecutor attesting to facts in support of an arrest warrant, which the United States Supreme Court has held

is conduct that is not protected by absolute immunity. See id. at 351-352, citing Kalina v. Fletcher, 522 U.S. 118, 130-131 (1997). Accordingly, the Appeals Court concluded that Plouffe was entitled only to qualified immunity with respect to the averments in her affidavit, not absolute immunity. See C.M., supra at 355. With respect to its immunity analysis, the Appeals Court generally concluded that "Gemski's immunity for approving Plouffe's actions is the same as Plouffe's immunity." See id. at 352 n.9. The Appeals Court vacated the Superior Court judge's order "to the extent that [C.M.] alleged violations of § 1983 based on Plouffe's conduct of allegedly making false factual assertions in support of the care and protection petition and Gemski's alleged approval of that conduct." Id. at 356-357.

We granted the defendants' application for further appellate review, limited to the issue of "the scope of a social worker's immunity in attesting to facts contained in an affidavit accompanying and filed with a care and protection petition, and her supervisor's immunity for approving those acts." C.M. v. Commissioner of the Dep't of Children & Families, 485 Mass. 1107 (2020).

Discussion. 1. Standard of review. "We review the allowance of a motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c) . . . de novo." Marchese v. Boston Redev.

Auth., 483 Mass. 149, 156 (2019), citing Perullo v. Advisory Comm. on Personnel Standards, 476 Mass. 829, 834 (2017).

In addition, "[t]he question of the availability of § 1983 immunity is one of Federal law." Jordan v. Sinsheimer, 403 Mass. 586, 588 (1988). "[A]lthough we give respectful consideration to such lower Federal court decisions as seem persuasive," Commonwealth v. Pon, 469 Mass. 296, 308 (2014), quoting Commonwealth v. Hill, 377 Mass. 59, 61 (1979), "we are not bound by decisions of Federal courts except the decisions of the United States Supreme Court on questions of Federal law," Commonwealth v. Montanez, 388 Mass. 603, 604 (1983). The United States Supreme Court has yet to address the question whether social workers are entitled to absolute immunity in child removal proceedings. See Hoffman v. Harris, 511 U.S. 1060, 1061 (1994) (Thomas, J., dissenting from denial of certiorari). Therefore, there is no binding Federal case law on the specific issues before us.

2. Absolute immunity. Section 1983 provides a civil cause of action against any person who, acting under color of State law, deprives another of constitutional rights, privileges, or immunities. See 42 U.S.C. § 1983. Although the language of § 1983 does not expressly provide for any immunities, the Supreme Court has recognized that "some officials perform 'special functions' which, because of their similarity to

functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability." Buckley v. Fitzsimmons, 509 U.S. 259, 268–269 (1993), quoting Butz v. Economou, 438 U.S. 478, 508 (1978). "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." Buckley, supra at 269, quoting Burns v. Reed, 500 U.S. 478, 486 (1991).

In determining whether the actions of a governmental official fit within the common-law tradition of absolute immunity, the Supreme Court "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" Buckley, 509 U.S. at 269, quoting Forrester v. White, 484 U.S. 219, 229 (1988). This "functional approach" ensures that "those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation" are shielded from civil liability, so that those functions "are performed with independence and without fear of consequences" (quotation and citation omitted). Rehberg v. Paulk, 566 U.S. 356, 363 (2012).

Under this framework, the United States Supreme Court has held that prosecutors are entitled to absolute immunity from civil liability under § 1983 when "initiating a prosecution" and "presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 431 (1976). This absolute prosecutorial immunity is

premised on the concern that "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Id. at 423.

In the same vein, the United States Supreme Court also has recognized absolute immunity for State agency officials who perform certain functions analogous to those of prosecutors initiating criminal proceedings on behalf of the State. Butz, 438 U.S. at 515. The Court has explained that "[t]he decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." Id. Nonetheless, the Court has "been quite sparing in [its] recognition of absolute immunity" and has "refused to extend it any further than its justification would warrant" (quotations and citations omitted). Burns, 500 U.S. at 487. The general presumption is that "qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." Id. at 486-487.

Thus, the Supreme Court has distinguished between conduct that is within the prosecutor's role as an advocate, which is entitled to absolute immunity under Imbler, 424 U.S. at 431, and conduct that is investigative or administrative in nature, which

is not entitled to absolute immunity, see Buckley, 509 U.S. at 274-275 (prosecutor not absolutely immune for fabricating evidence during preliminary investigation); id. at 276-278 (prosecutor not absolutely immune for statements made at press conference announcing indictment); Burns, 500 U.S. at 494-496 (prosecutor not absolutely immune for providing legal advice to police). Similarly, the Court has held that a prosecutor who attests to facts in an affidavit in support of an arrest warrant acts as a "complaining witness" rather than as an advocate initiating judicial proceedings, and therefore is not entitled to absolute immunity for such conduct. Kalina, 522 U.S. at 130-131. On this lattermost point, the Court has reasoned that "the only function that [a prosecutor] performs in giving sworn testimony is that of a witness," and such actions do not involve "the exercise of the judgment of the advocate." Id.

In sum, the touchstone for absolute immunity for prosecutorial functions is conduct that is "intimately associated with the judicial phase of the criminal process." Imbler, 424 U.S. at 430. Prosecutors, and similarly situated State actors who initiate judicial proceedings, are afforded absolute immunity "not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." Malley v.

Briggs, 475 U.S. 335, 342 (1986), citing Briscoe v. LaHue, 460 U.S. 325, 334-335 (1983). With these principles as a guide, we turn to the parties' arguments.

3. Whether Plouffe had absolute immunity. C.M. argues that Plouffe is not entitled to absolute immunity because, historically, "social workers" were not afforded such immunities under the common law when § 1983 was enacted. That argument, however, misconstrues the jurisprudence regarding absolute immunity in this context. A State official who performs a quasi prosecutorial function may be entitled to absolute immunity. See Buckley, 509 U.S. at 273 ("We have not retreated, however, from the principle that acts undertaken . . . in the course of [one's] role as an advocate for the State . . . are entitled to the protections of absolute immunity"). This is so because absolute immunity protects specific actions rather than broad titles or offices. See id. Accordingly, the dispositive question is whether Plouffe's actions in swearing to the facts within her affidavit can be separated from her act of initiating the care and protection proceeding under § 24. We conclude that they cannot be separated, and thus Plouffe is entitled to absolute immunity for this "quasi prosecutorial" conduct.

On this point, we are persuaded by guidance from the United States Court of Appeals for the Sixth Circuit. In Barber v. Miller, 809 F.3d 840, 844 (6th Cir. 2015), the court held that a

social worker was entitled to absolute immunity against allegations that he "included false and misleading statements of fact in [a] protective-custody petition." As could be said of Plouffe, the court concluded that the social worker "offered his factual assessment in his capacity as a legal advocate initiating a child-custody proceeding in family court." Id. Three years later, in Brent v. Wayne County Dep't of Human Servs., 901 F.3d 656, 685 (6th Cir. 2018), cert. denied, 139 S. Ct. 1551 (2019), the Sixth Circuit extended this absolute immunity analysis to the context of temporary child removal petitions. Noting that the filing of a petition to remove a child from the home under an analogous Michigan court rule triggers a subsequent judicial hearing,[12] the court concluded

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[12] Rule 3.963(B)(1) of the Michigan Court Rules states, in pertinent part,

> "The court may issue a written order . . . authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, after presentment of a petition or affidavit of facts to the court, the court has reasonable cause to believe that all the following conditions exist, together with specific findings of fact:
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> ". . .
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> "(b) The circumstances warrant issuing an order pending a hearing in accordance with:
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> "(i) [Michigan Court Rule 3.965 (Preliminary Hearing)] for a child who is not yet under the jurisdiction of the court . . . ."

that the conduct of a social worker vouching for the truth of facts asserted in a removal petition is "more analogous to a prosecutor's decision to prosecute than a police officer's testifying by affidavit in support of probable cause." Id., quoting Bauch v. Richland County Children Servs., 733 Fed. Appx. 292, 297 (6th Cir.), cert. denied, 139 S. Ct. 594 (2018). Accordingly, the court concluded that the social worker was entitled to absolute immunity. Brent, supra at 683-684. See Bauch, supra (social worker's affidavit in support of removal petition "undeniable part of the judicial process because the [affidavit] initiated the [removal] action and subsequent hearing" [quotations and citation omitted]).

Most Federal Courts of Appeals that have considered this issue agree that social workers are entitled to absolute immunity with respect to conduct that initiates judicial child custody, removal, or dependency proceedings. See Pittman v. Cuyahoga County Dep't of Children & Family Servs., 640 F.3d 716, 724 (6th Cir. 2011) (social worker who filed complaint and affidavit in support of motion for permanent custody acted "in her capacity as a legal advocate, and she is therefore entitled to absolute immunity with regard to these actions"); Ernst v. Child & Youth Servs. of Chester County, 108 F.3d 486, 495 (3d Cir.), cert. denied, 522 U.S. 850 (1997) (child welfare case workers "entitled to absolute immunity for their actions on

behalf of the state in preparing for, initiating, and prosecuting dependency proceedings"); Vosburg v. Department of Social Servs., 884 F.2d 133, 137 (4th Cir. 1989) ("Under Virginia law, the filing of a removal petition is, in essence, the start of judicial proceedings against the parent or guardian of a minor child, and the duties of the social worker at that point are those of an advocate in that process").[13]

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[13] To the extent that certain Federal Courts of Appeals have reached a different conclusion, in our view, those cases are either unpersuasive or inapposite. For instance, in Beltran v. Santa Clara County, 514 F.3d 906, 908-909 (9th Cir. 2008), the United States Court of Appeals for the Ninth Circuit held that a social worker was not entitled to absolute immunity for allegedly fabricating statements in a sworn child dependency petition. In reaching its decision, however, the Ninth Circuit conflated the social worker's sworn child dependency petition with her preliminary investigations that already had occurred. See id. ("[A]s prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, a fortiori, social workers conducting investigations have no such immunity"). Here, however, Plouffe's act of swearing to the facts in her affidavit was not an instance of nondiscretionary "investigatory conduct," but, rather, was a statutorily required act within her function as an advocate initiating care and protection proceedings in the Juvenile Court. See Miller v. Gammie, 335 F.3d 889, 896 (9th Cir. 2003) ("[T]he initiation and pursuit of child-dependency proceedings [are] prosecutorial in nature and [warrant] absolute immunity," where social worker's activities "[are] performed as an advocate within the judicial decision-making process").

Similarly, in Austin v. Borel, 830 F.2d 1356, 1363 (5th Cir. 1987), the United States Court of Appeals for the Fifth Circuit held that child protection workers were not entitled to absolute immunity for allegedly filing a false verified complaint seeking the removal of two children from their household. The Fifth Circuit noted, however that there was a distinction under Louisiana law between a "verified complaint" and a separate petition for adjudication of the child's custody.

At oral argument, C.M. maintained that, to the extent that Plouffe's conduct has a historical analog at common law, the comparison is to that of a "complaining witness" testifying in support of probable cause for an arrest warrant, who the Supreme Court has held is not entitled to absolute immunity. In Kalina, 522 U.S. at 120-122, the Court considered immunity in the context of a motion for an arrest warrant that was accompanied by an affidavit, both of which were executed by a prosecutor. Employing its "functional approach" analysis, the Court held that the prosecutor was entitled to absolute immunity with respect to preparing and filing the motion and affidavit, but was not entitled to absolute immunity for swearing to the facts contained within the affidavit itself. Id. at 122, 129-131. Critically, the Court based its holding on the fact that, although the affidavit was required to be sworn under oath, neither Federal nor State law required that the prosecutor be the individual personally to certify the affidavit. Id. at 129-130. Otherwise put, there was no need for the prosecutor to

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Id. at 1360-1361. Specifically, it is the petition, and not a verified complaint, that initiates adjudicatory proceedings in Louisiana courts, and the petition may be filed only by a prosecutor. Id. Unlike Louisiana's statute, G. L. c. 119, § 24, does not make any such distinction. Plouffe was empowered to file the care and protection petition and corresponding affidavit herself, and, as discussed, she was required to do so in order to initiate the care and protection proceedings pursuant to § 24.

certify the specific affidavit at issue in order to function as an advocate for the State. Therefore, when she did so, the prosecutor ceased performing her advocacy functions and began "giving sworn testimony [as] that of a witness." Id. at 131.

Kalina is distinguishable for several reasons. First, the prosecutor in Kalina made averments in support of a finding of probable cause, which is a precursor to potentially commencing criminal proceedings. It was not assured that the prosecutor's averments would have any connection to future judicial proceedings, because the proceedings were contingent not on the prosecutor's averments, but on the trial court judge's finding that there was probable cause to issue the arrest warrant. Here, however, Plouffe's averments were essential to her initiation of the care and protection proceeding in the Juvenile Court, which commenced upon her filing the petition and supporting affidavit.

Second, and more importantly, the language of § 24 makes clear that, unlike the prosecutor in Kalina, Plouffe was required to attest to the facts contained within her affidavit in order to initiate the care and protection proceedings. Given that the petition must be filed "under oath" and must sufficiently allege that the child meets one of the four enumerated statutory concerns, see G. L. c. 119, § 24, Plouffe could not act as an advocate in initiating the care and

protection proceedings without also acting as an affiant with respect to the underlying factual basis for the petition. Taken together, we are persuaded that Plouffe was not acting as a "complaining witness" providing testimony as contemplated by Kalina, but rather was exercising her quasi prosecutorial function of initiating care and protection proceedings in the Juvenile Court.[14]

Last, C.M. argues that the defendants are not entitled to absolute immunity because the act of misrepresenting facts to a court is "never afforded absolute immunity." We disagree, because this argument misconstrues how absolute immunity operates as applied to prosecutorial and quasi prosecutorial functions. As the Supreme Court has explained, absolute immunity for prosecutors has operated at common law to mean that they are absolutely immune "from damages liability . . . for making false or defamatory statements in judicial proceedings (at least so long as the statements [are] related to the proceeding)." See Burns, 500 U.S. at 489-490. Absolute immunity represents a "balance between . . . evils," meaning

[14] The defendants request that we address language in the Appeals Court's decision regarding the scope of immunity that department social workers are entitled to "in investigations they conduct." C.M., 97 Mass. App. Ct. at 355. The defendants acknowledge, however, that this issue falls outside the scope of our limited further appellate review. Accordingly, we decline to address it.

that "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Imbler, 424 U.S. at 428, quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

The same public policy concerns that undergird absolute immunity for prosecutors apply with equal force in the context of child removal proceedings. Without absolute immunity, "we would expect suits in retaliation for the initiation of dependency proceedings to occur with even greater frequency than suits against prosecutors," as "[p]arents involved in seemingly unjustified dependency proceedings are likely to be even more resentful of state interference in the usually sacrosanct parent-child relationship than are defendants of criminal prosecution." Ernst, 108 F.3d at 496-497.

As noted by the judge, social workers "walk a tightrope" in trying to do what is in a child's best interests. When those interests are in direct conflict with a parent's desire to retain custody of his or her child, the circumstances are bound to be emotionally fraught. Were we to hold otherwise, there is a risk that social workers would act "so overly cautious[ly], out of fear of personal liability, that they fail to intervene in situations in which children are in danger." Ernst, 108 F.3d at 496. For these reasons, it is vital that social workers are

afforded absolute immunity for conduct that initiates care and protection proceedings under § 24, which, as the provision is written, necessarily includes swearing to facts contained in an affidavit in support of a petition.

We emphasize that our recognition of absolute immunity here only removes the possibility of civil tort liability under § 1983 for the initiation of care and protection proceedings by State-employed social workers; it does not foreclose other means by which the public is protected against the kind of misconduct that C.M. alleges in her complaint. First, the decision to grant the department emergency, temporary custody of a child in response to the filing of a § 24 petition rests solely with the Juvenile Court. See G. L. c. 119, § 29C.[15] Thus, the court has the authority to decline to order temporary custody to the department if a motion judge perceives that the social worker has failed to adequately substantiate, or even has

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[15] General Laws c. 119, § 29C, states in relevant part:

> "If a court of competent jurisdiction commits, grants custody or transfers responsibility for a child to the department or its agent, the court shall certify that the continuation of the child in his home is contrary to his best interests and shall determine whether the department or its agent, as appropriate, has made reasonable efforts prior to the placement of a child with the department to prevent or eliminate the need for removal from the home . . . ."

misrepresented, his or her statements in the affidavit or at the initial hearing.

Furthermore, to guard against the risk that a child's temporary removal from the home may have been ordered erroneously, § 24 mandates that a subsequent hearing be held within seventy-two hours to determine whether the emergency, temporary custody of the child will continue pending a resolution of the case. "A 'primary function' of the seventy-two hour hearing is 'to discover and correct any errors that may have occurred during the initial hearing, which, in the interest of expediency, most likely cannot be exhaustive.'" Care & Protection of Zita, 455 Mass. at 276, quoting Custody of Lori, 444 Mass. 316, 321 (2005).[16]

Additionally, apart from the process prescribed by § 24, the Juvenile Court may address misrepresentations in sworn

[16] Indeed, C.M.'s most immediate opportunity to challenge the statements in Plouffe's affidavit was at the seventy-two hour hearing, but she voluntarily waived the hearing prior to its completion. See Note to Rule 9 of the Juvenile Court Rules for the Care and Protection of Children (2018) ("By waiving the temporary custody hearing, the parent, guardian, custodian or child is relinquishing his/her right to be heard, to object to the court's orders and to appeal the orders"). C.M. then waited two years after the child had been released from department custody before initiating this § 1983 action. These facts underscore our conclusion that absolute immunity is necessary to protect social workers against the threat of civil liability hanging over their heads, which risks interfering with the full and independent exercise of their duties on behalf of at-risk children in the Commonwealth.

affidavits or in-court testimony through other mechanisms both internal and external to the judiciary, including through the imposition of sanctions or contempt, Rule 17 of the Juvenile Court Rules for the Care and Protection of Children (2018); seeking perjury charges, G. L. c. 268, § 4; or filing a professional complaint with the Board of Registration of Social Workers, 258 Code Mass. Regs. § 30.01 (2004). In short, a variety of mechanisms remain in place to protect the public from the risk that a social worker may intentionally misrepresent facts to the court or otherwise improperly initiate care and protection proceedings under § 24.[17]

4. Whether Gemski had absolute immunity. The parties do not dispute that because Gemski acted as Plouffe's supervisor in approving her conduct, any immunities afforded to Plouffe also apply to Gemski. See Van de Kamp v. Goldstein, 555 U.S. 335, 345 (2009) (supervisory prosecutor entitled to absolute immunity for approving advocacy conduct of trial prosecutor). We agree. Because we conclude that Plouffe was entitled to absolute immunity for attesting to the facts in her affidavit, we also

[17] We emphasize that our immunity analysis is limited to care and protection proceedings initiated pursuant to § 24, and does not apply to other authorities, such as G. L. c. 119, § 51B, that permit the ex parte removal of a child prior to the initiation of judicial proceedings. The absence of judicial imprimatur in the removal of a child from the home would present a substantially different set of circumstances that, in turn, would require a different analysis.

conclude that Gemski, as her superior at the department, similarly was entitled to absolute immunity for approving Plouffe's conduct.

Judgment affirmed.