

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

MAR 17 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

RUFUS ROBINSON; GRETCHEN M.  
ROBINSON,

Plaintiffs - Appellants,

v.

TRIPLER ARMY MEDICAL CENTER;  
DEPARTMENT OF HUMAN SERVICES  
BRANCH OF CHILDREN'S  
PROTECTIVE SERVICES, MAUI;  
CHILD PROTECTIVE SERVICES, State  
of Hawaii; PATRICIA SYNDER  
Administer Social Service Division;  
DAVID KAM; ELLIOT PLOURDE;  
HONOLULU POLICE DEPARTMENT;  
K. HONOLULU POLICE LILLIAN  
RAMIREZ-UY, Judge,

Defendants - Appellees.

No. 05-17011

D.C. No. CV-04-00672-DAE

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Hawaii  
David A. Ezra, District Judge, Presiding

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Submitted February 13, 2009\*\*  
Honolulu, Hawaii

Before: REINHARDT, BRUNETTI and THOMAS, Circuit Judges.

Melanie Rapez gave birth to Kewai K. Robinson at Tripler Army Medical Center (“Tripler”) on November 18, 2002. A few days later, Melanie’s biological mother, Gretchen M. Robinson, and step-father, Rufus R. Robinson III, the plaintiffs in this action, sought to adopt the baby so that he could continue to receive care at Tripler as Rufus’s military dependent. They applied for and received a pendente lite order of adoption awarding them custody. Upon learning of the pending adoption, however, Elliot Plourde, a social worker with the State of Hawaii’s Department of Human Services (“DHS”), intervened with Honolulu Police Department (“HPD”) police officers and placed Kewai in state custody, reasoning that such action was needed because Melanie had been removed from the Robinsons’ care and placed in foster custody in 2000 pursuant to a family court order finding that Rufus had sexually abused her. Kewai died eight days after his birth, still under care at Tripler.

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\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiffs brought this action against the following defendants: Tripler; Tripler's Director of the Neonatal Intensive Care Unit; DHS; State of Hawaii's Child Protective Services ("CPS"); Patricia Snyder, the Social Services Division Administrator; David K.Y. Kam, CPS Supervisor; Elliott Plourde; Judge Lillian Ramirez-Uy, the judge in Melanie's custody proceedings and later in Kewai's adoption proceedings; HPD; and HPD police officer K. Kanaa. Plaintiffs' primary contentions in this action are that the defendants' conduct deprived the plaintiffs of their right to custody of Kewai and eventually led to his death.

Plaintiffs appeal from a number of district court orders granting a motion to dismiss or a motion for summary judgment in favor of the defendants. Although the plaintiffs appealed some of the orders prematurely, we now have jurisdiction to review them under 28 U.S.C. § 1291 because the district court subsequently dismissed all defendants and terminated the action. *See Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980). We review *de novo* the dismissal for failure to state a claim, *see Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008), and the dismissal for lack of subject-matter jurisdiction, *see Scholastic Entm't, Inc. v. Fox Entm't Group, Inc.*, 336 F.3d 982, 985 (9th Cir. 2003). A district court order granting summary judgment is also

reviewed de novo. *See Simo v. Union of Needletrades*, 322 F.3d 602, 609 (9th Cir. 2003), *cert. denied*, 540 U.S. 873 (2003).

1. To the extent that the plaintiffs appeal the district court order dismissing their claims against Judge Ramirez-Uy, we affirm on the basis of judicial immunity. Judge Ramirez-Uy enjoys immunity from suit for the actions taken in her judicial capacity, unless she has acted “in the clear absence of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (internal quotation marks omitted). The allegations in the complaint regarding her conduct fall within the scope of this immunity.

2. We affirm the district court order dismissing plaintiffs’ 42 U.S.C. §1983 and 42 U.S.C. §1985 claims against DHS and CPS. State agencies like DHS and CPS are not “persons” that can be sued under §1983 and §1985, and the Eleventh Amendment bars suits against them. *See Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 429-31 (1997); *Sykes v. California*, 497 F.2d 197, 201-02 (9th Cir. 1974).

3. We affirm the district court order dismissing the claims against HPD as time-barred. In §1983 and §1985 actions, the court applies the forum state’s statute of limitations for personal injury actions. *See McDougal v. County of Imperial*, 942 F.2d 668, 672-74 (9th Cir. 1991). The plaintiffs added HPD as a

defendant after the two-year statute of limitations under Haw. Rev. Stat. § 657-7 (2002) had already expired. The amendment does not relate back to the original complaint because there was no mistake about the identity of the defendant. *See* Fed. R. Civ. P. 15(c).

4. The district court correctly dismissed plaintiffs' *Bivens* claims against Tripler and Tripler's Director of Neonatal Intensive Care Unit. A *Bivens* cause of action is not available against federal agencies or federal agents sued in their official capacities. *See Ibrahim v. DHS*, 538 F.3d 1250, 1257 (9th Cir. 2008).

5. The district court also correctly dismissed plaintiffs' claim under the Federal Tort Claims Act, because they did not file an administrative claim within two years of the time that the claim accrued. *See Winter v. United States*, 244 F.3d 1088, 1090 (9th Cir. 2001); 28 U.S.C. § 2401(b).

6. The district court correctly held that plaintiffs failed to state a claim under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1 to d-8, against any defendant. HIPAA directs the Secretary of the Department of Health and Human Services to promulgate regulations setting privacy standards for medical records. *Id.* Even if HIPAA created a private right of action to sue for breach of the regulations issued under it, compliance with the

regulations was not required yet at the time of the events in question. *See* 45 C.F.R. §164.534 (2002).

7. The district court also properly dismissed the plaintiffs' §1985 claims against all defendants. The plaintiffs have failed to allege any specific facts to support the existence of the claimed conspiracy under § 1985, *see Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988), or to allege that they are "member[s] of a class that requires special federal assistance in protecting its civil rights," *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1992) (internal quotation marks omitted). Although a pro se civil rights plaintiff should be given an opportunity to amend his complaint, *see Karim-Panahi*, 839 F.2d at 623-24, the plaintiffs did in fact amend the complaint prior to the termination of the action without fixing the deficiencies in the complaint. We conclude that we are not required to remand the §1985 claims for further opportunities to amend as the deficiencies in the complaint appear to be incurable.<sup>1</sup>

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<sup>1</sup> In addition, plaintiffs cannot sustain their §1985 claims to the extent that they are predicated on the same set of allegations for which we hold that plaintiffs have not shown a deprivation of constitutional rights under §1983. *See Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005).

8. Plaintiffs' claims against Snyder, Kam, and Plourde in their official capacities were properly dismissed for sovereign immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

9. The district court properly granted summary judgment to Snyder in her personal capacity. Snyder was the Social Services Division Administrator for DHS at the time. Because there is no vicarious liability under §1983, a supervisor may be held liable only if there exists personal involvement in the constitutional deprivation or sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *See Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001). Plaintiffs have not presented evidence as to either, nor have they identified what additional evidence they hope to acquire from further discovery. *See Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984). Snyder is therefore entitled to summary judgment.

10. The district court properly granted summary judgment in favor of Plourde on the § 1983 and wrongful death claims alleging that Plourde's unavailability to make necessary medical decisions for Kewai led to his death. Specifically, plaintiffs allege that Plourde was unavailable to give consent for surgery on November 24. Plaintiffs have failed to present any evidence, however, that Tripler staff sought to obtain consent from Plourde or that they could not reach

him or another CPS social worker to obtain any needed consent. In fact, evidence submitted by plaintiffs shows that Tripler staff successfully obtained consent from CPS social workers for necessary procedures on November 24, and that there were “[n]o indications for surgical intervention” at that time. There is no genuine issue of material fact left for trial, and summary judgment was proper given that plaintiffs have not indicated what other evidence they hope to acquire from further discovery. *See Taylor*, 729 F.2d at 656.

**11.** We reverse the district court’s decision holding that Plourde and Kam are entitled to absolute immunity for a letter that Plourde wrote and Kam signed in the adoption proceedings after Kewai’s death. In connection with the letter, plaintiffs allege that “without investigating and without proper knowledge and without proper authority, improper, hateful, and hurtful statements were made.” The district court granted Plourde and Kam absolute immunity under *Doe v. Lebbos*, 348 F.3d 820 (9th Cir. 2003), but the case was overturned last year by *Beltran v. Santa Clara County*, 514 F.3d 906, 909 (9th Cir. 2008) (en banc). Under *Beltran*, social workers are “not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury . . . .” *Id.* at 908. We therefore reverse and remand this claim so that the district court may

consider what claims plaintiffs raise with regard to the letter, and whether absolute immunity still applies to those claims in light of *Beltran*.

**12.** We also reverse the district court on its decision granting Plourde qualified immunity for the §1983 claim alleging that he unconstitutionally removed Kewai from plaintiffs' custody and care. Parents have a constitutionally protected right to care for their children and to make medical decisions for them, and that right cannot be extinguished without notice and a hearing unless the children are in immediate danger. *See Wallis v. Spencer*, 202 F.3d 1126, 1138, 1141 (9th Cir. 2000); *Ram v. Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997). Plourde has not argued that the plaintiffs' interest in continued custody of Kewai was entitled to any less protection because of their status as grandparents or prospective adoptive parents at the time that Plourde intervened.

In a qualified immunity inquiry, we ask first whether the facts that plaintiffs have shown make out a violation of a constitutional right, and second, if so, whether that right was "clearly established" at the time of defendant's alleged misconduct. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *modified by Pearson v. Callahan*, 555 U.S. \_\_\_ (2009). Taking the facts in the light most favorable to the non-moving party, as we are required to do on summary judgment, we conclude that the plaintiffs have established a genuine issue of fact as to a constitutional

violation. The state must have “specific, articulable evidence that provides reasonable cause to believe that a child is in imminent danger of abuse” before taking custody of a child. *See Wallis*, 202 F.3d at 1138. Although we have stated that “[a]n indictment or serious allegations of abuse which are investigated and corroborated usually gives rise to the reasonable inference of imminent danger sufficient to justify taking children into temporary custody,” *Ram*, 118 F.3d at 1311, that is not always the case, especially when the allegations of abuse are not specific to the child who is allegedly in danger. *See, e.g., Wallis*, 202 F.3d at 1139 n.10. In this case there were two factors mitigating any immediate danger: first, there was no cause to believe that Kewai would be in imminent danger of sexual abuse from Rufus, and second, Kewai was being cared for at a hospital.

Plourde’s action, if proven, constituted a violation of clearly established rights. In order to be “clearly established,” the contours of the asserted right must be “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). We have held that “specific, articulable evidence” of “imminent danger” is required to remove a child from parental custody without a court order. *Wallis*, 202 F.3d at 1138. We hold that, viewing the evidence in light most favorable to the plaintiffs, as we must do on summary judgment, *see Simo*, 322 F.3d at 609, there was no such

indication of imminent danger and a reasonable official would have understood that he could not revoke plaintiffs' right to custody of Kewai without a prior court order.

**13.** We review the order granting the motion to set aside the entry of default for abuse of discretion and affirm. *See O'Connor v. State of Nev.*, 27 F.3d 357, 364 (9th Cir. 1994). Where it is the entry of default rather than a default judgment that is being set aside, the district court's discretion is especially broad and we will reverse only if the court was clearly wrong in its determination of good cause. *See id.* We conclude that the district court was not clearly wrong in finding that defendants timely sought relief from the default, that they did not act willfully or with any culpable intent, that they may have meritorious defenses, and that plaintiffs would not be prejudiced. *See id.*

**14.** The district court did not err by denying plaintiffs' summary judgment motion. Genuine issues of material fact remain with respect to the claims that we remand to the district court. The district court also did not err by not allowing plaintiffs to file a concise statement of facts in the motion for reconsideration after their summary judgment motion was denied. *See Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

For the above reasons, we affirm the district court's dismissal of Judge Ramirez-Uy, Tripler, Tripler's Director of the Neonatal Intensive Care Unit, DHS, CPS, HPD, and Snyder as defendants in this action. We affirm the district court's dismissal of all claims against Kam in his official and personal capacities, except for any §1983 claims against him in his personal capacity arising from the filing of the letter in Kewai's adoption proceedings. We affirm the district court's dismissal of all claims against Plourde in his official and personal capacities, except for any §1983 claims against him in his personal capacity arising from the filing of the letter in Kewai's adoption proceedings, and the §1983 claim against him in his personal capacity alleging that he unconstitutionally interfered with plaintiffs' right to custody of Kewai.

**AFFIRMED IN PART; REVERSED AND REMANDED IN PART.**