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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL N. JONES, an individual; JILL JONES, an individual; G.J., an individual, Plaintiffs-Appellees, v. COUNTY OF LOS ANGELES, Defendant, and DR. CLAUDIA WANG, an individual, Defendant-Appellant.	No. 12-55995 D.C. No. 2:11-cv-02851-SJO-VBK MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted April 11, 2014
Pasadena, California

Before: N.R. SMITH and MURGUIA, Circuit Judges, and MCNAMEE,** Senior District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen M. McNamee, Senior United States District Judge for the District of Arizona, sitting by designation.

Michael and Jill Jones, and their son, G.J. (collectively, the "Joneses") alleged that Appellant Dr. Claudia Wang ("Dr. Wang") violated their Fourth and Fourteenth Amendment rights and committed various torts during her investigation into whether G.J. had been abused. Dr. Wang appeals the district court's denial of summary judgment based on her qualified immunity defense. We have jurisdiction under 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We review de novo the district court's denial of qualified immunity, *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). We affirm in part, reverse in part, and remand.

I.

On February 24, 2010, Mrs. Jones contends that while she was carrying her infant son G.J. in her arms, she slipped and dropped G.J., who tumbled down the stairs. The Joneses brought G.J. to the Emergency Department at the Santa Monica UCLA Medical Center, where he was diagnosed with a severe head injury and remained in the hospital for two days. Subsequently, G.J.'s injury was investigated for child abuse. Dr. Wang, UCLA's Suspected Child Abuse and Negligence ("SCAN") team medical director, asked the Joneses to bring G.J. to the UCLA Westwood campus medical facilities on March 5, 2010 for further testing. The testing did not reveal any additional head injuries; it did, however, reveal the presence of bilateral rib fractures. Dr. Wang concluded that G.J.'s ribs had been fractured after the accident and believed G.J's injuries to be compatible with non-

accidental trauma. The Commissioner of the Los Angeles County Department of Children and Family Services ("DCFS") would later disagree with Dr. Wang's conclusion.

It was then that Dr. Wang recommended that the Joneses admit G.J. to the UCLA Medical Center in Santa Monica for further testing, even though the additional tests could have been performed as outpatient procedures. While the Joneses asked to take G.J. home, a DCFS social worker persuaded them to agree to admit G.J. to the hospital for the weekend. The following Monday, Dr. Wang asked the DCFS social worker to place a hospital hold on G.J., and a hold was issued. The Joneses lost physical custody of G.J. for months pending the resolution of the DCFS investigation and subsequent dependency proceedings. Ultimately, the Commissioner presiding over the proceedings determined that G.J. had not been abused and that there was no risk that G.J. would be abused in the future.

II.

The Joneses brought claims against Dr. Wang alleging that her conduct violated two provisions of the Constitution that protect the parent-child relationship from unwanted interference by the state: the Fourth and the Fourteenth Amendments. Under the Fourteenth Amendment right to familial association, an official who removes a child from parental custody without a warrant "must have reasonable cause to believe that the child is likely to experience serious bodily

harm in the time that would be required to obtain a warrant." *Rogers v. Cty. of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007). The child subjected to seizure is also protected by the Fourth Amendment's prohibition against unreasonable searches and seizures. *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784, 789 (9th Cir. 2016) (en banc). While the constitutional source of the parent's and the child's rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. *Wallis v. Spencer*, 202 F.3d 1126, 1137 n.8 (9th Cir. 2000). The Constitution requires an official separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in "imminent danger of serious bodily injury." *Id.* at 1138.

In analyzing qualified immunity, we employ a two-prong analysis; we determine whether the facts show the government actor's "conduct violated a constitutional right," and "whether the right was clearly established" at the time of the alleged unlawful action. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. 223 (2009). "To determine whether a right is clearly established, the reviewing court must consider whether a reasonable [official] would recognize that his or her conduct violate[d] that right under the circumstances faced, and in light of the law that existed at that time." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065 (9th Cir. 2006). In this case,

we exercise our "sound discretion," and decide the qualified immunity issue on the second prong of the analysis, whether the right was clearly established. *See Pearson*, 555 U.S. at 236. Therefore, we decline to determine whether Dr. Wang seized G.J. without a warrant and in the absence of exigent circumstances. Instead, we hold that Dr. Wang is entitled to qualified immunity because in March 2010 there was no clearly established case law that would have provided Dr. Wang with "fair warning" that her actions would violate federal constitutional law. *See Kennedy*, 439 F.3d at 1065.

At the time of Dr. Wang's purported seizure of G.J., it was well-settled that a child could not be removed from his or her parents without prior judicial authorization, absent evidence that the child was in imminent danger of serious bodily injury. *See Rogers*, 487 F.3d at 1297. At the same time, however, it was not beyond debate that the totality of the circumstances surrounding Dr. Wang's purported seizure of G.J. would not support a finding of exigency or that this purported seizure was otherwise unreasonable. *See Ashcroft v. al–Kidd*, 563 U.S. 731, 742 (2011) (noting that the Supreme Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" (citation omitted)). Sitting en banc in a similar case, we very recently noted that there were no Ninth Circuit cases that "explain when removing an infant from a parent's custody at a hospital to prevent neglect, without a

warrant, crosses the line of reasonableness and violates the Fourth Amendment." *Kirkpatrick*, 843 F.3d at 793 (distinguishing *Rogers*, 487 F.3d at 1291–93; *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1108 (9th Cir. 2001); and *Wallis*, 202 F.3d at 1138, none of which involved infants or a seizure that occurred in a hospital). Similarly, there is no Ninth Circuit or Supreme Court case law that could have provided Dr. Wang with sufficiently fair notice that her purported seizure of G.J. in order to investigate plausible child abuse, under the circumstances in this case, would violate federal constitutional law. Without such fair notice, we hold that Dr. Wang is entitled to qualified immunity.

III.

The Joneses also alleged various state law claims against Dr. Wang.[1] Dr. Wang asserted state statutory immunities in response to these claims. Dr. Wang is entitled to immunity regarding all of the Joneses' state law claims except the claim of false imprisonment.

A. Immunity under California Government Code section 820.2 applies to the discretionary act of a public employee if three requirements are met. First, the employee must be vested with the authority to exercise discretion. Cal. Gov't Code

[1] Although we conclude that Dr. Wang is entitled to qualified immunity with respect to the Joneses' 42 U.S.C. § 1983 claims based on alleged violations of federal constitutional law, "the doctrine of qualified immunity does not shield defendants from state law claims." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013).

§ 820.2. Second, the discretionary act in question must be a basic policy decision rather than ministerial. *Caldwell v. Montoya*, 897 P.2d 1320, 1326 (Cal. 1995). Third, the exercise of discretion must involve "a conscious balancing of risks and benefits," but need not be a "careful, thorough, formal, or correct evaluation." *Id*. at 1327 (emphasis omitted). These three requirements are met in this case.

Dr. Wang was vested with broad discretion to make recommendations in the interest of G.J.'s safety. As the SCAN team medical director, Dr. Wang was authorized to act as a child abuse pediatrician, which according to both parties "requires recommendations for the safety of the child above all other considerations." Then, Dr. Wang exercised the broad discretion vested in her as a child abuse pediatrician when she recommended to the Joneses that G.J. receive further testing in the hospital even though the testing did not require hospitalization. This decision was not ministerial, because it was based on Dr. Wang's "preliminary determination[] of the potential risk to [G.J.] and the necessity of intervention." *B.H. v. Cty. of San Bernardino*, 361 P.3d 319, 336 (Cal. 2015). In addition, Dr. Wang consciously balanced the risks and advantages of her decision. Therefore, she would ordinarily be entitled to discretionary immunity under section 820.2 for the act of recommending that G.J. be admitted to the hospital for further medical testing.

However, our case law explicitly states that immunity under section 820.2

does not apply to claims of false imprisonment. *Wallis*, 202 F.3d at 1145. Thus, section 820.2 provides Dr. Wang immunity from the Joneses' state law claims that arise from Dr. Wang's recommendation that G.J. receive further testing in the hospital except the Joneses' claim of false imprisonment.

B. Dr. Wang further argues that she is entitled to immunity under section 11172(a) of the California Penal Code. That section provides absolute immunity to a mandatory reporter, which includes physicians, of child abuse and neglect against civil and criminal liability for a mandatory report of child abuse. *See* Cal. Penal Code §§ 11165.9, 11165.7(a)(21) (requiring reporting and including physicians among mandatory reporters). Immunity under section 11172(a) extends to "conduct committed in furtherance of diagnosing whether abuse occurred," *Arce v. Cty. of L.A.*, 150 Cal. Rptr. 3d 735, 765 (Cal. Ct. App. 2012), as well as "subsequent communications between the reporter and the public authorities responsible for investigating or prosecuting abuse," *Robbins v. Hamburger Home for Girls*, 38 Cal. Rptr. 2d 534, 538 (Cal. Ct. App. 1995). However, this reporter immunity does not extend to conduct by a mandatory reporter that usurps the role of the DCFS. *See id.* at 539; *James W. v. Superior Court*, 21 Cal. Rptr. 2d 169, 254–57 (Cal. Ct. App. 1993) (holding that the immunity does not extend to unreasonable post-report investigation). Thus, a mandatory reporter is not entitled to immunity under section 11172(a) for attempting to take a child into temporary

custody in exigent circumstances, because that is the role of the DCFS.

The Joneses assert that, when Dr. Wang recommended admitting G.J. to the hospital, it was not in furtherance of diagnosing whether abuse occurred. Dr. Wang concedes that the testing could have been performed in an outpatient setting and that she recommended hospitalization to protect G.J. rather than to make a diagnosis. Thus, viewing the facts in the light most favorable to the Joneses, Dr. Wang sought to take G.J. into temporary custody in exigent circumstances. That is the role of the DCFS, not the role of a mandatory reporter. Consequently, Dr. Wang is not entitled to immunity under section 11172(a) for recommending the hospitalization of G.J.[2]

Because the Joneses' claim of false imprisonment survives summary judgment, we remand to the district court. None of the Joneses' federal law claims remain. Thus, in its discretion, the district court must decide on remand whether or not to exercise supplemental jurisdiction over the Joneses' state law claim of false imprisonment. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 940 (9th Cir. 2012) (en

[2] Dr. Wang is certainly entitled to immunity under section 11172(a) for acts that were in furtherance of diagnosing child abuse. Inasmuch as the Joneses base their claims on those acts, Dr. Wang is immune under section 11172(a). Nevertheless, Dr. Wang is not immune under section 11172(a) for recommending that G.J. be hospitalized, because that act was not in furtherance of diagnosing child abuse (even if the actual testing performed at the hospital was in furtherance of diagnosing child abuse).

banc).

AFFIRMED in part, REVERSED in part, and REMANDED.

The parties shall bear their own costs on appeal.

McNAMEE, Senior Judge, concurring dubitante in Section III, Part B:

Section 11172(a) immunity is defined by the California Legislature, governed by California law, and interpreted by California courts and this Court. As read, existing law does not provide a specific answer to the issue presented in this case: whether a treating physician's post-report statements to the parents of a suspected child-abuse victim are protected by section 11172(a).

The concept of expanded immunity as applied by California courts calls into question the conclusion that Dr. Wang's conduct is not within the ambit of section 11172(a) immunity. *See Arce*, 150 Cal. Rptr. 3d at 766-67 (finding that immunity extends not only to the act of reporting child abuse but also to the activities engaged in leading up to the report); *Thomas v. Chadwick*, 274 Cal. Rptr. 128, 134-35 (Cal. Ct. App. 1990) (finding that immunity extends beyond the initial report of child abuse), *abrogated on other grounds as recognized in Dwight R. v. Christy B.*, 151 Cal. Rptr. 3d 406, 420 (Cal. Ct. App. 2013); *Krikorian v. Barry*, 242 Cal. Rptr. 312, 312 (Cal. Ct. App. 1987) (finding that immunity extends to reports of child abuse made in good and bad faith).

As further evidence that existing law does not account for the unique circumstances of this case, I cite the fact that our conclusion is in clear conflict with Dr. Wang's professional responsibility as a child abuse pediatrician.

The parties do not dispute that as the SCAN team medical director, Dr. Wang's role as a child abuse pediatrician requires her to make recommendations for the safety of the child above all other considerations.[1] It is also undisputed that Dr. Wang recommended hospitalization to protect G.J. from potential further abuse.[2] Yet we find that Dr. Wang is not entitled to immunity under section 11172(a) because she recommended hospitalization to protect G.J. from potential further abuse.[3] In so finding, we reprimand Dr. Wang for executing the very professional obligation to which the parties recognize she is bound.

Had Dr. Wang not recommended hospitalization for G.J. – a three month old, non-verbal infant with injuries consisting of rib fractures, a possible skull fracture, and a periosteal reaction on the leg bones – she would have failed to carry out her professional responsibility as a pediatrician trained in child abuse and neglect. To be certain, she would have gone against her professional opinion that G.J.'s injuries were highly specific for child abuse, and ignored her extensive experience as a member of the UCLA SCAN Team which told her that G.J. was at substantial risk of additional serious harm, irreversible damage, and even death, if he went home. In

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[1] The majority recognizes this professional responsibility in Section III, Part A.

[2] The gravamen at issue is the extent of Dr. Wang's statements and conduct in making that recommendation, which is in much dispute.

[3] Pursuant to legal standards we are bound to apply, we view the facts in the light most favorable to the Joneses in reaching our conclusion. It is important to note that these facts are yet to be determined at trial.

other words, had Dr. Wang not recommended hospitalization for G.J., she would have failed to make recommendations for the safety of G.J. above all other considerations. Clearly, existing law does not account for Dr. Wang's professional responsibility and thus does not go far enough as to protect Dr. Wang's actions under the circumstances.

Finally, Dr. Wang was acting in the best interest of G.J. and took the *least* controversial course of action in recommending hospitalization for him. She certainly could have taken more drastic measures. To subject Dr. Wang to a claim of false imprisonment for acting in G.J.'s best interest and taking the least controversial course of action is not only an unjust result, but an illogical one.

Should this case be remanded to the California courts, the issue of whether Dr. Wang's post-report statements to the Joneses are entitled to section 11172(a) immunity can be placed squarely before those courts.

Jones v. Wang, No. 12-55995

MURGUIA, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion in part III, section A, that Dr. Wang is entitled to discretionary immunity under section 820.2 of the California Government Code.[1]

Section 820.2 of the California Government Code grants public employees immunity from liability for the employee's acts or omissions during the employee's exercise of discretion invested in her. *See Hampton v. County of San Diego*, 362 P.3d 417, 425 (Cal. 2015). Accordingly, to be entitled to immunity under section 820.2, the employee must be vested with the authority to exercise discretion. *See* Cal. Gov't Code § 820.2; *see also Newton v. County of Napa*, 266 Cal. Rptr. 682, 687 (Cal. Ct. App. 1990).

Here, Dr. Wang has not identified any authoritative source indicating that, in California, physicians, as opposed to social workers, have the authority to decide whether to place a hospital hold on a child or otherwise detain a child in order to investigate suspected abuse. Because the decision to detain G.J. at the hospital

[1] I agree with the majority's conclusion that under *Wallis*, 202 F.3d at 1145, section 820.2 does not shield Dr. Wang from liability on the Joneses' claim for false imprisonment. Therefore, I do not believe that Dr. Wang is entitled to state statutory immunity on any of the Joneses' state law claims.

rested within the authority and discretion of DCFS, I cannot conclude that Dr. Wang acted within her authority in misleading G.J.'s parents that his hospitalization was required. Accordingly, I would affirm the district court's decision that Dr. Wang is not entitled to discretionary immunity under section 820.2.