COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

WORCESTER, SS. NO. SJC-13666

JAKLIN SUZETH GOTAY & OTHERS,
Plaintiffs-Appellees,

v.

JULIANN CREEN, ROXANNA JOHNSON-CRUZ, BREANNE PETERSON AND CATHERINE VARIAN,
Defendants-Appellants.

ON INTERLOCUTORY APPEAL FROM AN ORDER OF THE SUPERIOR COURT FOR WORCESTER COUNTY

BRIEF OF THE DEFENDANTS-APPELLANTS (CORRECTED)

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1. Whether qualified immunity bars the substantive due process claims brought on behalf of two minor children against four current or former social workers for grievous injuries that occurred in the children's former foster home, where the social workers' conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

2. Whether qualified immunity also bars the substantive due process claims because plaintiffs did not adduce evidence that any of the four social workers deprived the minor children of substantive due process through actions that shock the conscience.

STATEMENT OF THE CASE

This is an interlocutory appeal from an order of the Worcester County Superior Court (Yarashus, J.) denying the motion for summary judgment on the basis of qualified immunity filed by Juliann Creen, Roxanna Johnson-Cruz, Breanne Peterson and Catherine Varian (collectively, "Social Workers").[1]

The claims arise from tragic events on August 15, 2015, when two young foster children were found unresponsive in a bedroom of the foster home of Kimberly Malpass ("Malpass"). Evidence taken from the scene and analyzed by

[1] The doctrine of present execution allows interlocutory appeal of the denial of a motion for summary judgment predicated on qualified immunity. *See, e.g.*, *Earielo v. Carlo*, 98 Mass. App. Ct. 110, 110 & n.2 (2020).

the Massachusetts State Police Crime Laboratory suggested that one of the children had been able to reach the bedroom's thermostat from her crib, and during the night had turned it to a very high setting, which resulted in the room becoming badly overheated and the two children sleeping there suffering very serious injuries. One of the foster children, not represented in this action, was later pronounced dead. The other foster child, who is represented in this action, was permanently impaired.

The Complaint was filed in July 2018 by three plaintiffs: Matthew Moran, guardian ad litem of minors Samara Gotay (then Samara Sepulveda) ("Samara") and Alessa Sepulveda ("Alessa"); Juan Sepulveda, Samara and Alessa's biological father; and Kerri Flanagan Sepulveda, Samara and Alessa's biological mother. RA.I/29-57. Moran asserted 42 U.S.C. § 1983 claims against the four Social Workers for violations of Samara's and Alessa's rights to substantive due process (Counts IX and X). RA.I/45-46. The remaining counts were asserted against the Department of Children and Families ("DCF") and Malpass. RA.I/35-45, 47-51.[2]

On December 21, 2018, DCF and the four Social Workers filed a motion to dismiss under Rule 12. RA.I/58-60. On April 22, 2019, the Superior Court

[2] Dispositions of those other counts are not presently before this Court.

granted in part and denied in part the motion as to DCF, and denied the motion as to the four Social Workers. RA.I/106-16.[3]

On January 23, 2020, the Social Workers filed a motion for judgment on the pleadings on the grounds of qualified immunity. RA.I/117-20. On July 13, 2020, the Superior Court denied the motion, stating that until discovery was completed, it could not be determined what the Social Workers knew about Malpass and her home. RA.I/157.

On July 21, 2020, the Superior Court entered a protective order governing the disclosure and protection of confidential information produced by DCF in the litigation. RA.I/21-28.

On September 22, 2022, plaintiffs filed the operative First Amended Complaint to replace Moran with Jaklin Suzeth Gotay ("Gotay") on behalf of Samara, based on Gotay's legal adoption of Samara in 2021. RA.I/158-88.

On December 9, 2022, DCF and the Social Workers filed separate motions for summary judgment, and a joint motion to strike certain exhibits. RA.I/210-14; RA.IV/3-5, 6-16, 120-21. The Superior Court heard argument on April 20, 2023. RA.IV/122-47. On August 18, 2023, the Superior Court granted in part and denied in part DCF's motion for summary judgment, and denied the Social Workers'

[3] The only claims dismissed by the Superior Court in its order on the motion to dismiss were against DCF, not a party to this appeal. RA.I/116.

motion for summary judgment. Add. 1-27, RA.IV/157-83. The Superior Court denied DCF's and the Social Workers' motion to strike. RA.IV/185.

On October 13, 2023, the Social Workers filed a notice of appeal of the order denying their motion for summary judgment. RA.IV/186-88.

STATEMENT OF FACTS

I. Malpass's Licensing

Malpass's application: Malpass applied to be a foster parent with DCF in August 2013. RA.I/270.[4] She was a single mother of three children, one of whom was adopted. RA.I/271. Juliann Creen was the DCF family resource worker assigned to perform the license study, which assesses the suitability of a home for foster care. RA.I/275.

Contacts with Malpass and her children: Creen conducted two home visits with Malpass (on September 16 and October 31, 2013), one phone interview of Malpass (on March 4, 2014), and had approximately ten additional interactions with Malpass during Malpass's 2013 foster parent training. RA.I/277, 278. DCF's Family Resource Policy provided that during the license study, the family resource worker was to interview each household member as appropriate to age and verbal

[4] The material facts are not in dispute. In opposing the motions for summary judgment, plaintiffs did not properly dispute any of the paragraphs in DCF and the Social Workers' Consolidated Statement of Material Facts. RA.I/266; RA.I/270-305.

capacity. During the Malpass license study, Creen noted the ages of Malpass's children (13, 9 and 7), but did not interview them. RA.I/280, 281; RA.II/22.

Contacts with collateral sources: During the license study, Creen communicated with, among others, Malpass, Malpass's mother, medical providers for Malpass and her children, and educators of Malpass's children. RA.I/276; RA.II/23-26. The study also noted that Malpass received Social Security Income because of her lupus condition, which her doctor reported as stable. RA.II/24, 25. The educators of Malpass's children reported no issues (*e.g.*, one principal reported that "parent teacher communication is very good," while the teachers stated that they had no issues or concerns with the parent-student relationship). RA.II/26. The director of a youth program in Auburn stated that Malpass is an "awesome mother with a heart of gold" and can "handle stress." RA.II/26. Creen received some cautionary feedback about Malpass as well: one child's doctor stated that "I feel mother is very stressed with caring for [her son's specialized] needs. This would certainly affect her ability to care for additional children." RA.II/25.

Size of the bedrooms: DCF's Family Resource Policy required foster home bedrooms to have 50 square feet per child. RA.I/281. During the license study, Creen observed the bedrooms visually and concluded that they satisfied this requirement, but did not take measurements. RA.I/281, 282.

Private adoption agency's home study: The Family Resource Policy did not require or recommend inquiries into whether another agency had completed a home study on the applicant's home. RA.I/276, 277; RA.II/47-51. DCF did not have a practice of requesting copies of home studies conducted by third-party agencies. RA.I/276. Malpass had adopted her daughter in 2007 through a private adoption agency, but Creen did not know whether the agency had completed a home study and, not inconsistent with DCF policy and practice at the time, did not request a copy. RA.I/276.

Police contacts: The Family Resource Policy did not require or recommend inquiries into the local police department's contacts with the applicant's home, RA.I/277, and Creen did not ask the Auburn Police Department about its number of contacts with the home, RA.I/277.

Malpass's prior DCF history: Prior to Malpass's application, two reports were filed with DCF regarding Malpass under G.L. c. 119, § 51A, alleging neglect of her children (known as "51A reports"). Neither report was supported or resulted in a finding of neglect.[5] RA.I/271, 272. First, in 2008 a 51A report alleged that

[5] G.L. c. 119, § 51A applies to a report filed with DCF that alleges abuse or neglect of a child, called a "51A report." Reports are "screened out" if they do not meet the criteria for a reportable concern, the perpetrator is a non-caretaker of the child, or the allegation is not credible. All other reports are "screened in" for investigation or an initial assessment. *See* G.L. c. 119, §§ 51A, 51B.

Malpass was not feeding her children properly, kept the home in poor condition, and had taken out credit cards in the children's names. RA.I/271. This report was based largely on allegations made by the father of Malpass's two sons. RA.I/271. The report was "screened in" for further investigation, and the investigator found the allegations unsupported: Malpass admitted to putting bills in the children's names, but the home was clean and the children were not undernourished. RA.I/271, 272; RA.II/121-27. Second, in June 2012 a neighbor filed a 51A report alleging abuse of Malpass's daughter by Malpass's boyfriend at the time, and neglect of Malpass's sons. RA.I/272; RA.II/129-34. The worker assigned to perform the initial assessment of the June 2012 report found it retaliatory by the neighbor against Malpass, and "screened out" the report as not credible. RA.I/272, 273.

Creen submitted a waiver of Malpass's prior DCF contacts, known as "FYI" DCF history. RA.I/279; RA.II/29-34. DCF's Background Record Check Policy defined "FYI" DCF history as "previous Department history information that is not disqualifying but should be reviewed," such as a screened-out 51A report or a referral for services. RA.II/144. Under those circumstances, the Director of Areas (or designee) must review and determine next steps. RA.II/144. In the waiver request, Creen identified the unsupported 2008 51A report, but not the screened-out 2012 51A report. RA.I/279.

Creen's supervisor at the time, Roxanna Johnson-Cruz, as well as the Area Program Manager (Johnson-Cruz's supervisor, not a defendant in this action), both recommended waiver of Malpass's "FYI" DCF history. RA.I/179. The Director of Areas for the Worcester area (not a defendant in this action) then approved it on the condition that DCF verify Malpass's prescribed medications and that all utilities were in an adult name. RA.I/279; RA.II/31, 34. After the approval, Creen did not verify Malpass's prescribed medications or the names in which utilities were held. RA.I/280.

Malpass's probationary status: In March 2014, Creen recommended Malpass's approval as a foster parent based on the license study. RA.I/282; RA.II/27. The Area Program Manager approved Malpass's license in March 2014 for a six-month probationary period. RA.I/282; RA.II/27.

The Family Resource Policy suggested monthly visits during the probationary period but did not require them. RA.I/283 (family resource worker "*normally* contacts the family at least monthly," which "will *normally* be home visits") (emphasis added). During Malpass's probationary status, Creen recorded six contacts with Malpass: three home visits on March 4, April 28 and June 12; and three phone calls on August 5, 6 and 18. RA.II/14, 15. Other social workers, including Peterson, also recorded multiple contacts with Malpass during the probationary period. RA.II/209, 211-13.

Malpass's license renewal: In January 2015, Malpass began the reassessment process, an annual requirement for maintaining a license as a DCF foster parent, by which DCF reviews whether the foster parent is providing suitable care. RA.I/286, 287. Three social workers were asked about Malpass, only one of whom is a defendant in this action (Peterson). RA.I/287; RA.II/172. All three social workers gave Malpass positive reviews in February 2015, and none expressed concerns about the care that Malpass provided to the foster children placed in the home. RA.I/287. The Area Program Manager approved Malpass's license renewal. RA.I/286, 287; RA.II/173.

II. Samara's and Alessa's Placement (March 2014 to August 2015)

Samara's and Alessa's placement: Samara and Alessa are minors, RA.I/285, 288, and the biological children of Juan Sepulveda and Kerri Flanagan Sepulveda, RA.I/287. Samara was placed in DCF custody and the Malpass home in June 2014 at six months old, and Alessa was placed in DCF custody and the Malpass home in February 2015 soon after her birth. RA.I/285, 288, 289. While Samara and Alessa were in the foster home, Peterson was their ongoing clinical social worker, and Varian was Peterson's supervisor. RA.I/286, 289.

March 2015 investigation: In March 2015, Amy Villanueva, a DCF social worker for another child placed in the home at the time ("J.E."), filed a 51A report against Malpass. RA.I/291; RA.II/178-88. The 51A report alleged neglect of J.E.

by Malpass and another individual, Anthony Mallett ("Mallett"), based on information obtained from J.E.'s mother. RA.I/290, 291. J.E.'s mother alleged that Mallett was Malpass's boyfriend, was a drug addict living in the foster home, had been charged with armed robbery, and had hit J.E. on the head. RA.I/291. The Family Resource Policy and Background Records Check Policy required DCF to check all "frequent visitors" in DCF-licensed foster homes for criminal offender record information ("CORI"), which might result in the foster parent's disqualification. RA.I/291, 292.

On March 5, 2015, ten social workers, supervisors, and managers, including the Director of Areas, attended a conference to discuss the 51A report of J.E.'s mother's allegations. RA.I/293; RA.II/18, 186. The group discussed the conflicting information obtained to date, including: J.E.'s mother's allegations; a Facebook post suggesting that Malpass and Mallett were romantically involved; Malpass's admission that she had posted bail for Mallett; Malpass's report of a history of threatening behavior by J.E.'s mother towards Malpass; and Malpass obtaining a safety plan with the Auburn Police Department regarding J.E.'s mother's behavior. RA.II/18. The consensus was that J.E. would move to the home of J.E.'s grandfather, who had already applied to serve as a placement for J.E. but whose fingerprints DCF had been awaiting. RA.II/18, 186. The consensus

was that the other children would remain in the home pending the outcome of the investigation into the 51A report. RA.II/18, 186.

After the conference, a manager in DCF's Special Investigations Unit contacted the Director of Areas to inquire why one child, J.E., was "removed" from the home while the other children remained in the home. RA.II/187. The Director of Areas responded to clarify that J.E. was not "removed": "To be clear, we did not remove the child, the foster mother did agree to the child moving out and she was placed with my approval with her grandfather. The Area Office had been awaiting his finger print [sic] results and they arrived simultaneous to this report." RA.II/187. One DCF employee stated that at around this time, Creen said that she had told Malpass to take her Facebook posts down, which Creen denies saying. RA.II/318; RA.III/175.

The investigator (not a defendant in this action) concluded in his 51B report that the March 2015 allegations were unsupported. RA.II/190-206. He interviewed seventeen individuals, including: the four DCF social workers for the children in the home (Peterson and three others); Creen, the social worker for the home itself; the children's daycare providers; Malpass; Malpass's three children; Mallett; J.E.; and J.E.'s mother. RA.I/294; RA.II/190-204. Malpass told the investigator that Mallett came to the home "maybe 2-3 times a month," and that she was aware she would need to notify DCF if someone new moved into her

home or "was coming over on a frequent basis." RA.II/197. Malpass's children said that Mallett had been to the house but "is not over a lot." RA.II/198. The investigator obtained Mallett's CORI, which included restraining orders, a charge of armed robbery in 2015, and charges of assault and battery in prior years. RA.II/200. The investigator then interviewed Mallett, who acknowledged his lengthy criminal background and admitted he had been to Malpass's home. RA.II/203. Mallett told the investigator that no children were at the Malpass home when he was there, and that no foster children were present when he visited with Malpass and her children outside of the home. RA.II/203.

At the end of the investigation, the investigator found no indication that the foster children had been neglected or abused, or were otherwise at risk:

> Investigator does feel that Mr. Anthony Mallett was in the home more often than was reported, but again does not feel that this is indicative of Neglect. Ms. Malpass is fully aware of what is expected and was told to contact to her FRW [family resource worker] with any questions about who needs to be approved. She was told that she cannot have anyone around the foster children on a frequent basis, who has not been approved by DCF.

RA.I/295; RA.II/206. The investigator noted that if Malpass had Facebook posts about Mallett, that would not be "inappropriate" as foster parents are allowed to have lives outside of their roles as foster parents. RA.II/198.

After the March 2015 51B report found the allegations unsupported, the Director of Areas approved Johnson-Cruz's recommendation for waiver of the

"FYI" DCF history for Malpass. RA.I/297; RA.III/91-101. Johnson-Cruz had recommended approval on the condition that "[c]ontinual conversations will be had with Kim [Malpass] regarding visitors and the need to keep the Department informed as well as the need for CORI/BRC checks for frequent visitors to the home." RA.I/297; RA.III/97. The Director of Areas stated: "The [family resource worker] will continue to ensure that Ms. Malpass is communicating any questions and concerns to DCF. 51b extensively investigated the allegations and ultimately unsupported." RA.III/101.

After the 51B report, Creen told Malpass that Mallett was not supposed to be in the foster home, but Malpass and Mallett actively hid Mallett's presence in the home from DCF. RA.I/297. On August 12, 2015, Creen conducted a visit to the foster home and did not identify any conditions of concern. RA.II/19.

Number of children placed in the home: The Family Resource Policy provided that unless a waiver was in place, only six children could be cared for in a single home at one time; and of these, up to two could be 24 months old or younger. RA.I/283, 284. In February 2015, after Alessa's birth, the Regional Director (a high-level DCF manager supervising Worcester and other areas) approved Alessa's placement in the Malpass home with her sister Samara (resulting in three children placed in the home under age two) and approved waiver of the requirement that only two children under age two be placed in a home.

RA.I/289. At the time of the incident on August 14 and 15, 2015, the Malpass home did not exceed DCF limits and no waiver was required: in the home were Malpass's three children (then 15, 11, 9); foster child Avalena Conway, 2; Samara, 22 months; and Alessa, 6 months. RA.I/289, 290; RA.II/252.

III. The August 2015 Incident

On the night of August 14, 2015, Malpass went out with friends, while Mallett was at the home with the three foster children (Samara, Avalena and Alessa). RA.I/298. Malpass returned home intoxicated, to the point of vomiting. RA.I/298; RA.II/270. Samara and Avalena were sleeping in their shared bedroom, which did not have air conditioning. RA.I/298. Alessa slept in Malpass's bedroom, which had air conditioning. RA.I/299.

On August 15, at around 12:20 pm, Malpass found Samara and Avalena unresponsive and called 911. RA.I/299; RA.II/260. Samara and Avalena were transported to UMass Memorial Medical Center by ambulance. RA.I/299. Avalena was pronounced dead, and Samara was critically ill, with respiratory failure, seizures, and extremely high temperature. RA.I/300. Medical staff evaluated Alessa but found no physical injury. RA.I/300.

During DCF's investigation of the August 2015 incident, Mallett admitted to the investigator (unlike in March 2015) that he had been living in the Malpass

home for a year and a half, which Malpass had concealed from DCF. RA.I/301.[6]

Samara, now 10 years old, continues to suffer from her injuries, with limited mobility and verbal communication. RA.I/285, 303. Nothing indicates physical injury to Alessa, now 9 years old. RA.I/285, 300; RA.III/208-10. Although Alessa experiences mood swings, sleep issues and eating issues, nothing in the record identifies their causes. RA.III/208-10.

IV. Inquest and Criminal Proceedings Against Kimberly Malpass

In 2019, the Worcester District Court conducted an inquest into Avalena's death. RA.I/303.[7] The Commonwealth introduced evidence that a thermostat for an electric heater was located on the bedroom wall, within arm's reach of Samara's crib. RA.I/303. The Massachusetts State Police Crime Laboratory analyzed DNA material taken from the thermostat and concluded that it contained Samara's DNA,

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[6] DCF conducted post-incident internal reviews of the supervision of the Malpass foster home, which plaintiffs included as exhibits in opposing summary judgment. *See* RA.III/185-95, 212-13. DCF and the Social Workers moved to strike those exhibits as inadmissible, which the Superior Court denied. RA.IV/185. In any event, according to those reviews, the only defendant evaluated for potential employment action was Johnson-Cruz, who was demoted to a non-managerial position. RA.III/185-95. The review panel found that Johnson-Cruz "has not mastered the skills and abilities required to be an optimally effective supervisor," but "is deeply respected, has an unwavering work ethic, is highly motivated, and cares deeply about the agency and the Worcester East Area Office." RA.III/191-92.

[7] Although some inquest evidence may be admissible, the decision is not. *Kennedy v. Just. of Dist. Ct. of Dukes Cnty.*, 356 Mass. 367, 374 (1969), *abrogated on other grounds*, *In re Globe Newspaper Co.*, 461 Mass. 113 (2011).

suggesting she had touched the thermostat. RA.I/304. State Police investigators performed a heat study in the bedroom: after turning the thermostat to the highest setting, the temperature rose to 109 degrees within four hours. RA.I/304-05. Malpass told her brother that when she found the girls, the room was very hot and the thermostat was on high. RA.I/305.

On June 2, 2020, Malpass was indicted on counts of criminal neglect and obstruction of justice. Her criminal case has not yet been scheduled for trial. *See Commonwealth v. Malpass*, No. 2085CR00095 (Worcester Super. Ct.).

SUMMARY OF THE ARGUMENT

The Superior Court's denial of the Social Workers' motion for summary judgment should be reversed because plaintiffs' claims do not satisfy either of the two inquiries required to overcome qualified immunity: whether the right was clearly established at the time of the purported violations, and whether the facts shown by the plaintiffs make out a violation of the constitutional right.

Plaintiffs cannot satisfy the first prong of overcoming qualified immunity. Assuming that in 2015 the law clearly established that children in foster care are in a special relationship with the state, liability on a substantive due process theory arising out of that special relationship requires deliberate indifference to a *known* risk of harm. Plaintiffs' claim, however, is based on a theory that the Social Workers violated Samara's and Alessa's right to safety in the foster home because

the Social Workers could have detected an *unknown* risk of harm and thereby prevented the August 15, 2015 events, had they taken different actions. No controlling authority or consensus of persuasive authority would have put a reasonable person on notice that this conduct rose to the level of a substantive due process violation. On the contrary, based on *J.R. v. Gloria*, 593 F.3d 73 (1st Cir. 2010)—which found on similar facts that the social workers' conduct did not violate substantive due process and that the social workers were protected by qualified immunity—a reasonable person would have concluded that this conduct did not rise to the level of a constitutional deprivation. The Superior Court, in rejecting the qualified immunity defense, failed to address whether the right was clearly established or the application of the right to the conduct of this case. *See infra* at 25-41.

Plaintiffs cannot satisfy the second prong of qualified immunity because the undisputed actions of the Social Workers, when reviewed on a defendant-by-defendant basis as required, did not rise to the level of a constitutional deprivation. None of the Social Workers engaged in conduct that shocks the conscience in their interactions with the Malpass foster home, while the two supervisors among the Social Workers did not encourage, condone or acquiesce to a constitutional violation. In addition, Alessa experienced no constitutional deprivation because

she was not injured or otherwise deprived of a fundamental right in the home. *See infra* at 41-53.

ARGUMENT

The facts of this case, as tragic and heart-wrenching as they are, do not support the imposition of potentially ruinous personal liability on the Social Workers, none of whom is alleged to have intended any harm to the children in this case, known that the children were in any danger, or had any direct involvement in the terrible incident that injured them. For plaintiffs to prove their claim that Social Workers violated substantive due process, they would have to demonstrate conduct that "shocks the conscience"—an extremely high bar that the allegations here do not approach. Accordingly, the Social Workers should have been granted qualified immunity, which bars § 1983 claims against officials whose conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation and quotations omitted).

The qualified immunity analysis has two prongs: one prong asks whether the right was "clearly established" at the time of the alleged violation, while the other prong asks "whether the facts ... shown by the plaintiff make out a violation of a constitutional right." *Penate v. Sullivan*, 73 F.4th 10, 17 (1st Cir. 2023) (citations omitted). A plaintiff must satisfy both prongs to overcome a qualified

immunity defense. *Raiche v. Pietroski*, 623 F.3d 30, 35 (1st Cir. 2010); *see also Penate v. Hanchett*, 944 F.3d 358, 366 (1st Cir. 2019); *Eldredge v. Town of Falmouth*, 662 F.3d 100, 105-07 (1st Cir. 2011). Because the claims here do not meet the high bar for a substantive due process violation, to say nothing of one that was clearly established in 2015, the Social Workers' motion for summary judgment should have been allowed.[8]

I. The Social Worker Defendants Are Entitled to Qualified Immunity Because the Law Did Not Clearly Establish That a Social Worker Could Be Liable Under Substantive Due Process for Not Detecting an Otherwise Unknown Risk of Harm.

The Social Workers are entitled to qualified immunity from liability because the law did not clearly establish that social workers could be liable for substantive due process violations for the actions challenged here. The allegations against the Social Workers are limited to purported omissions in information-gathering and subjective assessments of the foster parent's credibility. There is no allegation that the Social Workers had any knowledge of the conditions or circumstances that led to the tragic injuries suffered by the children. And there is no clearly established law holding that social workers may be held liable in those circumstances for injuries suffered by foster children under a substantive due process theory.

[8] This Court "review[s] an order granting or denying summary judgment de novo…." *Lynch v. Crawford*, 483 Mass. 631, 641 (2019).

A lawsuit may overcome a qualified immunity defense only if "existing precedent ... place[s] the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citations and quotations omitted). "[A] plaintiff has the burden to identify controlling authority or a robust consensus of persuasive authority such that any reasonable official in the defendant's position would have known that the challenged conduct is illegal in the particular circumstances that he or she faced." *Penate v. Sullivan*, 73 F.4th at 18 (citations and quotations omitted).

The question whether the right was "clearly established" has two aspects. "One aspect ... focuses on the clarity of the law" at the time of the conduct, while the other focuses "on the facts of the particular case and whether a reasonable defendant would have understood that his conduct violated the plaintiffs' constitutional rights." *Id.* (citation and quotations omitted). The "salient question" is "whether the state of the law *at the time* of the violation gave the defendant fair warning that his particular conduct was unconstitutional." *Drumgold v. Callahan*, 707 F.3d 28, 42 (1st Cir. 2013) (emphasis added).

A. Even Assuming that the "Special Relationship" Theory of Substantive Due Process Liability Applies to Children in Foster Care, the Law Did Not Clearly Establish That the Theory Extends to Unknown Risks of Harm.

The Supreme Court has recognized that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with

respect to particular individuals" who are unable to care for themselves "by reason of the deprivation of [their] liberty." *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 198-99 (1989) (citation and quotations omitted). Following *DeShaney*, the First Circuit has noted that a failure to protect an individual may amount to a substantive due process violation "in situations where a state creates a 'special relationship' because of 'the limitation which [the state] has imposed on [an individual's] freedom to act on his own behalf.'" *J.R.*, 593 F.3d at 79 (citations omitted). *DeShaney* "express[ed] no view" on the question whether such a "special relationship" might extend to children in foster care, while noting that "several Courts of Appeals" had already held that it did. *DeShaney*, 489 U.S. at 201 n.9.

There appears to be no controlling authority from Massachusetts state or federal appellate courts expressly adopting the "special relationship" theory for children in foster care.[9] However, sufficient persuasive authority from other jurisdictions exists that the Social Workers assume, *arguendo*, that it was clearly established in 2015 that the "special relationship" theory does apply to children in

[9] *See, e.g.*, *Sheila S. v. Commonwealth*, 57 Mass. App. Ct. 423, 431 & n.14 (2003) (holding that the theory was not clearly established as to social workers as of 1982, and "express[ing] no opinion" as to "whether such rights would exist today," *i.e.*, in 2003); *J.R. v. Gloria*, 593 F.3d 73, 80 (1st Cir. 2010) ("assum[ing] arguendo," without deciding, that the special relationship theory applies to social workers); *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53 (1st Cir. 2014) (same).

foster care. *See, e.g.*, *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010) (collecting cases from six other federal courts of appeals).

What was *not* clearly established in 2015 was that the "special relationship" theory could result in liability for social workers if a foster child is injured due to a risk that was unknown to them. To the contrary, cases holding that the special relationship theory applies to foster children have adopted a "deliberate indifference" standard, and have expressly concluded that subjective awareness of a risk is required. The Ninth Circuit, for example, held that "the deliberate indifference standard, as applied to foster children, requires a showing of an objectively substantial risk of harm *and* a showing that the officials were *subjectively aware* of facts from which an inference could be drawn that a substantial risk of serious harm existed and that either the official actually drew that inference or that a reasonable official would have been compelled to draw that inference." *Id.* at 845 (emphasis added).[10] Likewise, the Fourth Circuit has held that "[a] claim of deliberate indifference … implies at a minimum that defendants were *plainly placed on notice* of a danger and *chose* to ignore the danger

[10] The court added that "the subjective component may be inferred from the fact that the risk of harm is obvious." *Tamas*, 630 F.3d at 845 (citation and quotations omitted). That circumstance does not apply to this case, as there is no allegation that the possibility of a catastrophically overheated room was an "obvious" risk of harm.

notwithstanding the notice." *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010) (emphasis added; citation and quotations omitted) (also noting that adoption of "special relationship" theory "does not mean that social workers will be duty-bound to protect the child from unknown harm or dangers").

Other courts have adopted similar formulations. *See, e.g.*, *Cox v. Dep't of Soc. & Health Servs.*, 913 F.3d 831, 837 (9th Cir. 2019) (conscience-shocking conduct requires "deliberate indifference to a *known* or so obvious as to *imply knowledge* of, danger") (emphasis added); *Hubbard v. Oklahoma ex rel. Oklahoma Dep't of Hum. Servs.*, 759 F. App'x 693, 707 (10th Cir. 2018) (liability for social workers under special relationship theory requires that "state official *knew* of the asserted danger to [a foster child]") (brackets in original) (emphasis added); *Hernandez ex rel. Hernandez v. Texas Dep't of Protective & Regul. Servs.*, 380 F.3d 872, 881 (5th Cir. 2004) (deliberate indifference is demonstrated if "social workers exhibited a *conscious disregard* for *known* severe physical abuses in a state-licensed foster home") (emphasis added); *Ray v. Foltz*, 370 F.3d 1079, 1085 (11th Cir. 2004) (plaintiffs must allege "that the defendants had actual knowledge that [the foster child] was being abused (or at substantial risk of being abused)"); *Nicini v. Morra*, 212 F.3d 798, 811 & n.10 (3d Cir. 2000) (declining to decide whether an objective "should have known" test can satisfy the "deliberate

indifference" standard in foster care case, but noting that "the courts of appeals have shown a tendency to apply a purely subjective deliberate indifference standard outside the Eighth Amendment context"); *Yvonne L., by & through Lewis v. New Mexico Dep't of Hum. Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (finding clearly established law that "if the persons responsible place children in a foster home or institution that they *know or suspect to be dangerous* to the children they incur liability if the harm occurs") (emphasis added); *K.H. through Murphy v. Morgan*, 914 F.2d 846, 854 (7th Cir. 1990) (Posner, J.) (social worker liability for harm that occurs in foster homes requires placing the child "in hands they know to be dangerous"); *Gonzalez v. New Jersey*, Nos. 21-2395, 21-2439, 2023 WL 3884114, at *3 & n.17 (3d Cir. June 8, 2023) (unpublished) (noting that "a robust consensus of cases of persuasive authority in the Courts of Appeals establishes the right of a child in foster care to be protected from a *known substantial risk* of serious harm") (emphasis added; citations, quotations and footnote omitted).

Thus, there is no consensus of persuasive authority that a social worker may be held liable for a substantive due process violation where an *unknown* risk of harm results in injury to a foster child. To the contrary, as the First Circuit has recognized, the persuasive authority cited above uniformly requires that "state officials must have been at least aware of known or likely injuries or abuse and have chosen to ignore the danger to the child." *J.R.*, 593 F.3d at 80 (describing

"other circuits['] … formulations of when 'deliberate indifference' rises to conscience-shocking conduct in the foster care context"). Where, as here, a foster child is injured due to risks unknown to the social workers involved in the case, the social workers are entitled to qualified immunity from a substantive due process claim.

The Superior Court's decision denying qualified immunity failed in multiple respects to grapple with the contours of the "clearly established" inquiry, and thus arrived at the wrong result. First, the Superior Court repeatedly acknowledged that no controlling authority exists in Massachusetts holding that the "special relationship" theory applies to children in foster care, *see* Add. 24-26 & nn.23-24, RA.IV/181-83, and nowhere analyzed persuasive authority from other jurisdictions. Instead, the court simply "assume[d] without deciding that a special relationship exists between foster children and the Commonwealth, and that a foster child had a clearly established right to a safe foster home, through the substantive Due Process clause." Add. 24 n.23, RA.IV/181. But "[a]n *arguendo* assumption … is not 'existing law,'" *United States v. Potts*, 644 F.3d 233, 237 (5th Cir. 2011), and thus cannot serve as the basis for a conclusion that the law is clearly established. And, having not even determined what actually was "clearly established" and what was not, the Superior Court was in no position to conclude that plaintiffs had adequately alleged or adduced evidence of a violation of clearly

established law. The Superior Court also failed to appreciate the significance of its recognition that controlling federal authorities "have addressed—without explicitly deciding—the standard [for a substantive due process violation] in the context of foster care." Add. 25, RA.IV/182 (quoting the discussion in *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 53-54 (1st Cir. 2014), of the possible "tension ... between the *Youngberg* standard and the *Lewis* shocks-the-conscience test"); *see County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). That fact alone should have been enough to conclude that the law in this area is not clearly established.

Second, assuming that placing a child in foster care does create a special relationship between the child and the state (as the Social Workers do for purposes of this case, *see supra* at 27-28), the Superior Court failed to appreciate the importance of distinguishing what the Social Workers actually knew from what they did not. As explained above, there is no clearly established authority that social workers can be liable on a substantive due process theory for harm resulting from an unknown risk. *See supra* at 28-31. To the contrary, as the First Circuit has recognized, the circuits uniformly require "aware[ness] of known or likely injuries or abuse." *J.R.*, 593 F.3d at 80. In denying qualified immunity, the Superior Court simply ignored this critical part of the inquiry, never even mentioning the Social Workers' knowledge.

Third, the Superior Court held that the record "create[s] a genuine issue of material fact" as to whether the Social Workers "acted with … deliberate indifference." Add. 26, RA.IV/183. But the evidence upon which the court relied for that conclusion—the opinion of a licensed social worker, Paula Wisnewski—contains no allegation that the Social Workers were deliberately indifferent *to a known risk to the children*. RA.III/197-201. Instead, Wisnewski's affidavit states that the Social Workers "appeared to be deliberately indifferent *to following their own policies*." RA.III/200 (emphasis added). But, as the First Circuit has squarely held, a failure to follow state law "does not amount to inherently egregious conduct." *J.R.*, 593 F.3d at 81; *see also Connor B.*, 774 F.3d at 53 (holding that "harm caused by officials' negligence categorically cannot be a Due Process violation"). Thus, although the First Circuit has no law clearly establishing what *does* constitute a substantive due process violation in the foster care context, it has law clearly establishing what *does not* constitute such a violation. The Superior Court's conclusion that an opinion regarding compliance with state law and/or department policy could create a fact issue regarding "deliberate indifference" thus failed to align the record in the case with the requirements of clearly established law.

In short, the Superior Court's finding that facts were in dispute regarding whether the Social Workers violated clearly established substantive due process

law is incorrect. At most, some persuasive authorities have suggested that social workers who are deliberately indifferent to a known risk of harm may be liable for a substantive due process violation. But nothing in the record shows that the Social Workers might have committed such a violation. They should have been granted qualified immunity.

B. A Reasonable Person in the Social Workers' Place Would Not Have Understood Their Conduct as Violating Samara's and Alessa's Constitutional Rights.

Plaintiffs also fail to satisfy the second aspect of the "clearly established" prong in the qualified immunity analysis because a reasonable person would not have understood that the conduct of the Social Workers in monitoring the Malpass home (or, in Johnson-Cruz's and Varian's case, supervising subordinate social workers) violated a constitutional right. The Superior Court failed to address this "salient question." *Drumgold*, 707 F.3d at 42. Indeed, based on controlling authority in Massachusetts and the First Circuit and persuasive authority from other jurisdictions, no reasonable person would have concluded that these actions violated substantive due process.

To overcome qualified immunity, plaintiffs must demonstrate not only the clarity of the legal right, but also the "clarity of the law *as applied to the case*—in other words, whether a reasonable person in the defendant's shoes would have understood that his conduct violated the Plaintiff['s] constitutional rights." *Raiche*,

623 F.3d at 36 (emphasis added; citation and quotations omitted). The Supreme Court has underscored that courts cannot "define clearly established law at a high level of generality." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (citation and quotations omitted). To find the constitutional right clearly established, courts must "identify a case where an [official] acting under similar circumstances as [the defendant] was held to have violated" the relevant constitutional right before treating law as clearly established. *White v. Pauly*, 580 U.S. 73, 79 (2017). All of this requires determining "whether the state of the law at the time of the violation gave the defendant fair warning that his particular conduct was unconstitutional." *Drumgold*, 707 F.3d at 42. This task is imperative in the context of substantive due process. "The conscience-shocking standard is not a monolith," and "its rigorousness varies from context to context." *Coyne v. Cronin*, 386 F.3d 280, 288 (1st Cir. 2004).

Neither controlling authority nor a consensus in persuasive authority would have demonstrated to a reasonable person that the conduct here ran afoul of substantive due process.

1. A Reasonable Person in the Social Workers' Place Would Not Have Understood Their Interactions with the Malpass Foster Home as Violating Substantive Due Process.

Applying the law of substantive due process to the particular facts here would not have put a reasonable person on notice that the Social Workers' conduct

in monitoring the Malpass home ran afoul of substantive due process. On the contrary, based on *J.R.* alone, a reasonable person would have concluded that the conduct here falls well short of whatever standard for substantive due process applies to social workers.

The material facts in this case are undisputed. Creen, the family resource worker for the home, did not perform certain tasks in monitoring the foster home, *e.g.*, during the licensing process, she did not interview Malpass's children and did not provide her supervisor with a copy of a 51A report on Malpass that had been screened out because DCF's investigations unit had found the allegations to be not credible. *See supra* at 10-14. In March 2015, after a 51B report found that a foster child's mother's allegations of abuse and neglect in the home were unsupported, neither Creen nor Peterson—nor their supervisors, Johnson-Cruz and Varian, nor Johnson-Cruz's or Varian's supervisors, nor the Worcester office's Director or other upper-level managers—advocated that Malpass's license be suspended or that the foster children in the home be removed. *See supra* at 15-19. The record does not include any evidence that Creen or Peterson observed any physical harm to the children or observed any conditions in the home that placed the children at risk of physical harm. *See supra* at 10-20. Plaintiffs' theory seems to be that Creen could have gathered more information during the licensing and monitoring process, that Creen and Peterson should have done more to investigate the

conditions in the home, and that Creen and Peterson (and by proxy, their supervisors, Johnson-Cruz and Varian) should have disbelieved Malpass's representations that she did not have a boyfriend living in the home.

J.R. would have told a reasonable person in the Social Workers' place that this conduct did not run afoul of substantive due process. In *J.R.*, the plaintiff boys were abused in a Rhode Island foster home by an individual living in the home who was not the licensed foster care parent, but who acted as a de facto caregiver. 593 F.3d at 76-79. The plaintiffs claimed that social workers showed deliberate indifference to the safety of the children by acting inconsistently with agency regulations: they failed to conduct a background investigation on the individual, to report his residence in the house to the agency's licensing division, or to maintain regular, direct contact with the children. *Id*. at 79. The plaintiffs claimed that the individual defendants *knew* the individual was living in the home and that *multiple* concerns and reports of physical abuse of the children had been raised to the agency before the children were removed. *Id.* at 76-77.

Nevertheless, the First Circuit found that the claims in *J.R.* were barred by qualified immunity because the conduct did not run afoul of substantive due process. Like here, the evidence did not show that the social workers "actively directed or assisted [the] private actors in causing harm." *Id.* at 79. While the allegations evidenced "troubling lapses" in supervision, they did not "meet the

legal definition of conscience-shocking conduct." *Id.* at 80. The First Circuit made clear that even "deliberately indifferent behavior does not per se shock the conscience," and that individual social worker liability would require egregious misconduct. *See id.* at 80-81. Thus, even if the defendants in *J.R.* knew this unauthorized adult was living in the home, they had no reason to know the children were at risk of harm, and certainly did not engage in conscience-shocking conduct. *Id.* at 80.

Here, although Mallett's criminal history was recorded in the March 2015 investigation report, the Social Workers had no reason to know the children were at risk of harm. Indeed, Mallett's criminal history has no apparent relation to overheating of the bedroom on August 15, 2015. In any event, the March 2015 51B report, which reported Mallett's criminal history, also reported seventeen interviews over a two-week investigation, yet did not conclude that Mallett was living in the home, and concluded that the children in the home had not been subject to abuse or neglect. RA.I/191-207.

No consensus in persuasive authority would have informed a reasonable person that the Social Workers' conduct—according to plaintiffs, a failure to obtain additional information about the home, or a failure to reach a subjective assessment that the foster parent was not credible or competent—violated substantive due process. On the contrary, the consensus is that failures to comply

with agency policies and failures to detect an unknown risk of harm do not violate substantive due process. Courts have found liability not supported where a social worker: mishandled investigatory interviews, *Miller v. City of Philadelphia*, 174 F.3d 368, 376-77 (3d Cir. 1999); made "inept, erroneous, ineffective, or negligent" decisions, *Hernandez*, 380 F.3d at 883; relied on wrong information, *Mitchell v. Dakota Cnty. Soc. Servs*., 959 F.3d 887, 898 (8th Cir. 2020); made judgments about risk that proved incorrect, *Cox*, 913 F.3d at 838; and failed to ensure that recommended services were provided, *Hubbard*, 759 Fed. App'x at 711-12. The common touchstone is whether the defendants had actual knowledge that the home was dangerous. *See Ray*, 370 F.3d at 1084 (liability could not derive from failure to take various actions that, if taken, would have led to the discovery of adverse information); *K.H.*, 914 F.2d at 854 (liability requires placing "the child in hands they know to be dangerous"); *cf. Gonzalez*, 2023 WL 3884114, at *3 (finding dispute of fact as to whether defendants knew or should have known of three previous reports of physical injury to the children, but where those injuries had been documented). Here, there is not even an allegation, to say nothing of record evidence, to the effect that the Social Workers actually knew of any danger to the children.

Nothing in this line of cases, applied to these facts—in which the Social Workers indisputably did not know of a danger to Samara or Alessa—would

suggest violation of a constitutional right of which a reasonable person would have known.

2. A Reasonable Person in Johnson-Cruz's and Varian's Place Would Not Have Understood Their Conduct in Supervising Their Subordinates as Violating Substantive Due Process.

The qualified immunity barrier to liability is even greater where, as here, a plaintiff seeks to hold supervisors Johnson-Cruz and Varian liable for the purported constitutional violations of their subordinates. A plaintiff can overcome qualified immunity from supervisory liability claims when "(1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context." *Camilo-Robles v. Hoyos*, 151 F.3d 1, 6 (1st Cir. 1998). Applying this standard, the supervisor defendants (Johnson-Cruz and Varian) were not on notice that their supervision of Creen and Peterson violated a constitutional right.

Johnson-Cruz requested various clinical tasks in monitoring of the Malpass foster home, whether or not she subsequently confirmed their completion; Varian conducted supervision meetings with Peterson and had no direct contact with Malpass or the home; and both were at a ten-person meeting in March 2015 at which the group collectively decided to keep foster children placed in the home pending the investigation. *See supra* at 16-17. No controlling authority has found

liability on similar facts for a supervisor of a social worker, who in turn supervises a foster parent. *See supra* at 28-31 (citing cases). And the Superior Court's decision contained no analysis of the standard for qualified immunity from supervisory liability. *See* Add. 24-26, RA.IV/181-83.

In sum, all four Social Workers are entitled to qualified immunity because their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

II. The Social Workers Are Entitled to Qualified Immunity Because Plaintiffs Cannot Make Out a Constitutional Violation.

The Social Workers are also entitled to qualified immunity because, under the second prong of the analysis, plaintiffs cannot "make out a violation of a constitutional right." *Penate v. Sullivan*, 73 F.4th at 17.

A. The Social Workers' Conduct in Monitoring the Foster Home Did Not Shock the Conscience.

Even if the contours of the constitutional rights here were clearly established in 2015, the Social Workers are entitled to qualified immunity because their conduct does not satisfy the requirement for violations of substantive due process—that the conduct shocks the conscience.

1. A Substantive Due Process Claim Would Require Failure to Provide Basic Human Needs Through Actions That Shock the Conscience.

Where a special relationship gives rise to substantive due process rights, the plaintiff must first show that a defendant "fail[ed] to provide for [their] basic

human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety." *DeShaney*, 489 U.S. at 200 (citing *Youngberg*, 457 U.S. at 315-16). The plaintiff must also show that this deprivation occurred through actions that rose to the level of conscience-shocking. *J.R.*, 593 F.3d at 79.

The burden for the "conscience-shocking" behavior prong is "extremely high." *Id.* at 80. A plaintiff must show egregious and extreme behavior by an individual defendant, with "*stunning* evidence of arbitrariness and caprice." *Id.* (emphasis added; citation and quotations omitted); *see also Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 881 (1st Cir. 2010) (the test requires "violations of personal rights ... so severe ... so disproportionate ... and ... so inspired by malice or sadism ... that it amounted to a brutal and inhumane abuse of official power") (citation and quotations omitted); *Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir. 1999) (requiring "conduct that is truly outrageous, uncivilized, and intolerable"). A state official's negligence, without more, cannot meet this standard. *J.R.*, 593 F.3d at 80. Even a possible violation of state law, without more, does not amount to "inherently egregious conduct." *Id*. at 81. The conduct is typically "*intended* to injure" in some way that is "unjustifiable by any government interest.'" *Id.* at 79 (quoting *Chavez v. Martinez*, 538 U.S. 760, 775 (2003)) (emphasis added). Conscience-shocking behavior would require that a social worker was "at least

aware of known or likely injuries or abuse and ... chose[] to ignore the danger to the child." *Id.* at 80.

And, indeed, the *J.R.* court concluded that the claims there failed to rise to the level of conscience-shocking behavior, even where there were "troubling lapses" in the social workers' supervision of the foster home. *Id.* at 79-81; *see supra* at 37-38 (discussing facts and conclusions in *J.R.*) & 28-30 (citing cases in which courts have similarly found that liability cannot be supported where a social worker failed to take actions that might have resulted in detecting a risk of harm).

To establish a claim for supervisory liability under § 1983, a plaintiff must show that (1) the subordinate's behavior resulted in a constitutional violation, and (2) the supervisor's action or omission "could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference." *Pineda v. Toomey*, 533 F.3d 50, 54 (1st Cir. 2008) (citation and quotations omitted); *see also Baptiste v. Exec. Office of Health & Human Servs.*, 97 Mass. App. Ct. 110, 115 (2020). Under § 1983, a supervisor "may be found liable only on the basis of her *own* acts or omissions." *Figueroa v. Aponte-Roque*, 864 F.2d 947, 953 (1st Cir. 1989) (emphasis added). The supervisor's acts or omissions must be a "reckless or callous indifference to the constitutional rights of others." *Guadalupe-Báez v. Pesquera*, 819 F.3d 509, 515 (1st Cir. 2016) (citation and quotations omitted); *see also Penate v. Hanchett*, 944

F.3d at 367 (citing cases). A plaintiff must prove "that the supervisor's conduct led inexorably to the constitutional violation." *Guadalupe-Báez*, 819 F.3d at 515 (citation and quotation marks omitted).

2. The Qualified Immunity Analysis Requires an Individualized Review as to Each Defendant.

Plaintiffs' purported bases for overcoming qualified immunity must be reviewed on an individual basis as to each defendant. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988); *see also Walton v. Dawson*, 752 F.3d 1109, 1125 (8th Cir. 2014). In particular, the "clearly established" standard requires "that the legal principle clearly prohibit [the defendant's] conduct in the particular circumstances before him." *Dist. of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). This requires "a high degree of specificity" in order to reach "the crucial question whether the official acted reasonably in the particular circumstances." *Id.* (citations and quotations omitted). This Court must consider each of the Social Workers as discrete from each other and determine—on a strictly defendant-by-defendant basis—whether the plaintiff has adduced evidence in support of a claim against *each* defendant. *See Foster v. Comm'r of Corr.*, 484 Mass. 1059, 1061 (2020) (requiring allegations of "direct, affirmative involvement"); *Lipsett*, 864 F.2d at 902 (requiring causal connection between the specific defendant and the federal rights deprivation); *Hubbard*, 759 Fed. App'x at 706 (claims "must stand or

fall based on the conduct of each defendant," without "aggregat[ing]" their conduct).

The Superior Court erred in declining to perform an individualized analysis of each defendant, instead finding (incorrectly, as explained above, *supra* at 31-34) that the record contained a "genuine issue of material fact that the Department Employees acted with reckless disregard and/or deliberate indifference to the rights of the minor children in their duties with respect to Malpass's home." Add. 26, RA.IV/183. Not only did the court misstate the standard of substantive due process, if it applied to social workers, by failing to identify the "shocks the conscience" requirement, but it did not apply the standard to the individual actions of Creen, Johnson-Cruz, Peterson and Varian, and did not address the standard for supervisory liability.

3. An Individual Review as to Each Defendant Shows No Conduct That Shocks the Conscience.

The substantive due process claims must be dismissed because the undisputed material facts are that the Social Workers did not engage in conduct that shocks the conscience. As in *J.R.*, 593 F.3d 73, the gravamen of the claim is that more rigorous oversight of the foster home (and a differing set of credibility determinations in the face of competing allegations and statements) could have resulted in removal of the children before the incident occurred.

This is precisely the type of claim that courts in this and other jurisdictions have found do not rise to the level of a constitutional rights violation. *See Sheila S. v. Commonwealth*, 57 Mass. App. Ct. 423, 432 (2003) ("failure to detect signs of sexual abuse" may have been sufficient to state a claim of negligence but were not "deliberately indifferent"); *J.R.*, 593 F.3d at 80-81 ("lapses in ... supervision of the [plaintiffs'] foster care environment" fell short of legal and regulatory requirements, but did not shock the conscience); *Hubbard*, 759 Fed. App'x at 711 (failure to ensure children attended therapy sessions showed lack of attention but did not "shock the conscience"). No reasonable person could conclude that the Social Workers, when considered individually, "chose[] to ignore" "known or likely injuries or abuse" of Samara or Alessa, *J.R.*, 593 F.3d at 80, and engaged in conduct that shocks the conscience.

a. The March 2015 Report (All Social Workers)

Although each Social Worker should be considered individually, all four individuals attended the March 5, 2015 conference regarding the allegations in the March 2015 51A report, and the facts concerning the events of that month can be considered as to all of them. These facts are not in dispute. The clinical team, at a meeting attended by the Director of Areas, collectively decided not to remove the children while the investigation was pending, and the investigator then found the allegations of abuse and neglect unsupported. *See supra* at 15-18.

Undisputedly, the March 2015 allegations ultimately came down to a credibility determination, and different social workers, investigators and managers differed in those discretionary assessments. One social worker and her supervisor believed J.E.'s mother's allegations, while the DCF investigator found the statements not credible. After the DCF investigator found the allegations unsupported, neither Creen nor Peterson, nor their various supervisors and upper-level managers, advocated for the removal of the foster children from the home. *See supra* at 18-19. The March 2015 51A report, which DCF's investigator found unsupported, was the only allegation of abuse or neglect in the Malpass home while foster children were placed there, prior to the August 2015 incident. In February 2015, the social workers involved with the home provided universally positive feedback on Malpass's abilities and performance as a foster parent. *See supra* at 15. Thus, these events contain nothing that remotely approaches conscience-shocking behavior.

b. Juliann Creen

The evidence involving Creen specifically is likewise undisputed.

During the licensing process, more than a year and a half before the August 2015 incident, Creen did not take certain actions: (1) she did not record interviews of Malpass's three children; (2) she did not obtain information not required under DCF protocol (*e.g.*, physical measurement of the bedrooms, a copy of a home

study performed by a private adoption agency); (3) in requesting a waiver of Malpass's "FYI" DCF history, Creen did not identify the June 2012 51A report that was screened out as not credible; and (4) after the "FYI" DCF history was approved as not being disqualifying, Creen did not verify Malpass's medications or ensure that Malpass's utilities were in an adult's name. RA.I/276-82.

Likewise, the actions that Creed *did* taking during the licensing process are undisputed: she conducted two home visits and one phone interview with Malpass; she contacted at least eight different individuals regarding Malpass, including three doctors, three educators, and two references; and she conducted Malpass's foster parent training. Information gained about Malpass during the licensing process was generally positive: the teachers and principal at her children's school provided positive feedback; the director of a youth program spoke highly of Malpass's parenting skills; two doctors expressed no concerns about Malpass; and one doctor cautioned that she felt Malpass was "very stressed" caring for the special needs of one of her children, which would affect Malpass's ability to care for additional children. RA.I/276, 278; RA.II/25-27.

After the March 2015 51B report, which found allegations of abuse and neglect unsupported, Creen told Malpass that Mallett was not supposed to be in the foster home; but Malpass continued to actively hide Mallett's presence in the home from DCF. On August 12, 2015, just three days before the children were found

unresponsive, Creen conducted a home visit to the Malpass foster home and did not identify any conditions of concern. RA.I/297; RA.II/19.

Plaintiffs maintained below that there is a dispute of fact as to whether Creen made a statement to Malpass in or around March 2015 about Malpass's Facebook account. One DCF employee stated that Creen said that she had told Malpass to take her Facebook posts down, which Creen denies. RA.I/319, 510. Whether or not Creen made such a statement demonstrates nothing about Creen's knowledge that the children were in danger. Indeed, DCF's investigator acknowledged the Facebook posts, noting that he did not find them or a foster parent having a private life outside the home as "inappropriate," and acknowledged that Mallett had been in the home more frequently than originally reported—but nevertheless found no evidence of abuse or neglect. RA.I/295, 319, 510; RA.II/198.

Based on these undisputed facts about Creen's involvement, along with the general information known to the social workers involved in the Malpass foster home, as a matter of law Creen did not engage in conduct that shocks the conscience and cannot be found to have violated Samara's and Alessa's rights to substantive due process. The claim that Creen could have been more diligent during the licensing process, could have visited the foster home more frequently, or could have directed more skepticism at Malpass and her presentation of competence as a foster parent in March 2015 after the 51A report was found to be

unsupported, simply cannot support a claim of individual liability. None of such actions would reflect indifference to any known risk or anything more than, at most, a failure to comply with certain department policies and practices. *See supra* at 28-31 (citing cases).

c. Breanne Peterson

The evidence involving Peterson is likewise undisputed. Peterson was a clinical social worker assigned to individual children, not assigned to supervise Malpass or foster parents. RA.I/285, 286. Peterson had no involvement in reviewing or approving Malpass's application to become a foster parent or her license status. RA.I/281, 282; RA.II/26. These facts alone show that Peterson cannot have committed conscience-shocking actions with respect to the condition of Malpass's home.

The evidence is also undisputed as to her involvement and knowledge after the March 2015 allegations of abuse or neglect were asserted. Peterson attended (with nine others) the March 5, 2015 case conference at which the 51A allegations were discussed. RA.I/293. After the investigation, when Peterson came to the Malpass home to work with or transport Samara or Alessa, she looked for but did not see any evidence of Mallett's presence in the home. RA.I/298.

Based on these undisputed facts, as a matter of law Peterson did not engage in conduct that shocks the conscience and cannot be found to have violated rights

to substantive due process. The claim is premised on a theory that Peterson should be held liable for not having more skepticism about the individual serving as a foster parent for two children for whom Peterson provided social worker services. Such a theory cannot form the basis of a substantive due process claim under *J.R.* and other controlling authority.

d. Roxanna Johnson-Cruz

The evidence involving Johnson-Cruz, Creen's supervisor, is undisputed, and fails to satisfy the high standard for supervisory liability claims under § 1983.

During the licensing process, Johnson-Cruz was one of the managers who recommended approval of Creen's request for waiver of Malpass's "FYI" DCF history, and one of the managers who recommended approval of Malpass's foster parent application. RA.I/279; RA.II/27. She attended (with nine others) the March 5, 2015 conference at which the 51A allegations were discussed. RA.I/293. After the 51B report found the allegations unsupported, Johnson-Cruz recommended approval to waive this "FYI" DCF history for Malpass. RA.I/297. Johnson-Cruz also recorded that "[c]ontinual conversations will be had with Kim regarding visitors and the need to keep the Department informed as well as the need for CORI/BRC checks for frequent visitors to the home." RA.I/297; RA.III/97.

As a matter of law, Johnson-Cruz did not engage in conduct that might satisfy the standard for supervisory liability claims under § 1983. The undisputed

facts provide no basis for an assertion that Johnson-Cruz encouraged, condoned or acquiesced to a constitutional violation. Nor do the facts indicate that Johnson-Cruz's supervision of Creen on one hand "led inexorably" to Malpass's actions in August 2015 on the other. *See Guadalupe-Báez*, 819 F.3d at 515. Plaintiffs suggest that Johnson-Cruz, in supervising Creen, should have done more to ensure that Creen had in fact performed each task involved in supervising the home, and could have been more skeptical of Malpass, but the purported failure to detect omissions in a subordinate's foster care work or in discerning Malpass's defects cannot support a claim of individual § 1983 liability. Even if such failure were proven, it would amount to nothing more than, at most, "mere negligence," which as a matter of law is not enough to establish supervisory liability. *Penate v. Hanchett*, 944 F.3d at 367.

e. Catherine Varian

The allegations and evidence against Varian are the sparsest of all. It is undisputed that her involvement in the Malpass foster home was limited to her supervision of Peterson, and her attendance (with nine others) at the March 5, 2015 conference at which the 51A allegations were discussed. RA.I/286, 293.

As a matter of law, the evidence involving Varian provides no basis for an assertion that Varian encouraged, condoned or acquiesced to a constitutional violation, or that her conduct "led inexorably to the constitutional violation."

Guadalupe-Báez, 819 F.3d at 515. The substantive due process claim against Varian fails as a matter of law under *J.R.* and the controlling and persuasive authority on supervisory liability.

B. Plaintiffs Adduced No Evidence That Alessa Experienced a Constitutional Deprivation.

The Superior Court also erred in not dismissing the substantive due process claim on behalf of Alessa (Count X), because Alessa did not suffer a deprivation of life, liberty, or property by a state actor. *DeShaney*, 489 U.S. at 194-95, 200. Alessa was not physically harmed in the August 15, 2015 incident in the Malpass foster home. Alessa, an infant at the time, slept in a bedroom with air conditioning, rather than in the bedroom that reached excessive temperatures. *See supra* at 20. Without a deprivation, there can be no due process violation. *DeShaney*, 489 U.S. at 195, 200. The Superior Court failed to address this defect in the constitutional claim brought on Alessa's behalf. *See* Add. 24-26, RA.IV/181-83.

CONCLUSION

For the foregoing reasons, the order denying the Social Workers' motion for summary judgment should be reversed, and the claims against them dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Katherine B. Dirks, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,968 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word (version: Word 2016).

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CERTIFICATE OF SERVICE

I, Katherine B. Dirks, hereby certify that on November 25, 2024, I filed with the Supreme Judicial Court and served the attached Brief of Defendants-Appellants (Corrected) in *Gotay et al. v. Department of Children and Families et al.*, No. 2023-P-1340, through the electronic means provided by the clerk on the following registered users:

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ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 18-01114

JAKLIN SUZETH GOTAY[1] & others[2]

vs.

KIMBERLY MALPASS & others[3]

MEMORANDUM OF DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF THE MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES AND JULIE ANN CREEN, ROXANNA JOHNSON-CRUZ,[4] BREANNE PETERSON, AND CATHERINE VARIAN

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This action arises out of a tragic incident on August 15, 2015, involving two children, Samara Gotay (f/k/a Samara Sepulveda) ("Samara") and Alessa Sepulveda ("Alessa") (collectively, "children"), in the care of their foster parent, defendant Kimberly Malpass ("Malpass"). In July 2018, Matthew Moran ("Moran"), as Guardian Ad Litem of the children, and Juan and Kerri Sepulveda ("the Sepulvedas"), the children's biological parents, brought this action contending that Malpass; the Massachusetts Department of Children and Families ("DCF") and its former or current employees Julie Ann Creen ("Creen");[5] Roxanna Johnson ("Johnson-Cruz");[6] Breanne Peterson ("Peterson");[7] and Kathy Varian ("Varian")[8] (collectively, "Department Employees"); and DCF Commissioner Linda Spears ("Spears")[9] are responsible for the children's

[1] Parent and next friend of Samara Kristine Gotay f/k/a/ Samara Sepulveda
[2] Matthew P. Moran, Guardian Ad Litem of Alessa Sepulveda; Kerry Flanagan Sepulveda; and Juan Sepulveda
[3] Massachusetts Department of Children and Families; Linda Spears, as Commissioner of DCF; Juliann Creen; Roxanna Johnson-Cruz; Breanne Peterson; and Catherine Varian
[4] Pled as Roxanna Johnson
[5] Family Resource Worker assigned to the children's case.
[6] Creen's supervisor, later promoted to Area Program Manager.
[7] Samara's ongoing clinical social worker as of July 2014.
[8] Peterson's supervisor until at least August 2015.
[9] The amended complaint lacks any allegations of specific actions by Commissioner Spears. Therefore, the court assumes that Commissioner Spears has been named as a defendant only in her official capacity. See *Harihar* v. *United States Bank Nat'l Assoc.*, 2017 WL 1227924 at *14 (D. Mass. 2017). A claim against Commissioner Spears in her official capacity is functionally identical to a claim against DCF. See *Will* v. *Michigan Dep't of State Police,* 491 U.S.

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injuries. The amended complaint[10] asserts claims against DCF for vicarious liability for Malpass's negligence (Counts I and II), negligent hiring (Counts III and IV), negligent supervision/oversight (Counts V and VI), and violation of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670, *et seq.* (Counts XI and XII). It also asserts claims for violations of 42 U.S.C. § 1983 against Malpass (Counts VII and VIII) and the Department Employees (Counts IX and X). In addition, the Sepulvedas assert claims for loss of consortium (Counts XIII, XIV, XV, and XVI) against DCF.

On April 22, 2019, the court (Sullivan, W.) dismissed the negligent hiring claims against DCF (Counts III and IV) and the claims for violation of the Adoption Assistance and Child Welfare Act (Counts XI and XII). The case is now before the court on DCF's motion for summary judgment on Counts I and II alleging vicarious liability for Malpass's negligence; Counts V and VI asserting negligent supervision/oversight of DCF employees; Counts II and VI, brought on Alessa's behalf, for negligence; and Counts XIII through XVI alleging loss of consortium by the Sepulvedas. The Department Employees also move for summary judgment on Counts IX and X of the amended complaint for violation of 42 U.S.C. § 1983 (substantive due process). For the reasons set forth below, DCF's motion is **ALLOWED** in part and **DENIED** in part. The Department Employees' motion is **DENIED**.

58, 71 (1989) ("A suit against a state official in their official capacity "is not a suit against the official but rather is a suit against the official's office"). Accordingly, the court's analysis of DCF's claims will apply to the claims against Commissioner Spears.

[10] The complaint was amended as of September 22, 2022, to substitute Samara's adoptive mother, Jaklin Suzeth Gotay, in place of Moran.

BACKGROUND

The following facts are taken from the summary judgment record and are viewed in the light most favorable to the plaintiffs as the non-moving party. See *Bulwer* v. *Mount Auburn Hosp.*, 473 Mass. 672, 680 (2016).[11]

Samara and Alessa, biological sisters, were minors under DCF's care and custody. Samara was removed from the Sepulvedas' custody and placed in DCF custody on or about June 26, 2014. She was placed in foster care with Malpass from June 26, 2014 to August 15, 2015. Alessa was removed from the Sepulvedas' custody on February 17, 2015, and placed in foster care with Malpass on February 20, 2015. She stayed in Malpass's care until August 15, 2015.

Malpass was a single mother with three children at the time of the incident. In 2008, a report was filed against her pursuant to G. L. c. 115, § 51A ("51A report") alleging that her children were "malnourished and very skinny," that the "condition of the home was deplorable," and that she was taking out credit cards, cell phones, and books in the children's names.[12] DCF screened in the report for further investigation and determined that the allegations were unsupported. Another 51A report was filed against Malpass in June of 2012 by her neighbor alleging abuse and neglect of Malpass's children, but the investigator assigned to the case screened out the report, finding that the neighbor was fighting with Malpass and that the report was retaliatory.

Malpass applied to be a foster parent with DCF in April of 2013. Creen was the family resource worker assigned to perform the license study of Malpass's home to assess the suitability of the home for foster care.[13] DCF's Policy #2006-01 ("Family Resource Policy"), revised in 2008, stated that the license study was performed in order "[t]o assure quality of care, children

[11] The plaintiffs did not properly respond to the defendants' Statement of Material Facts, and therefore the facts summarized below were either admitted or are deemed to be admitted for their failure to respond properly.
[12] The report was partially based on the statements made by the father of Malpass's two sons.
[13] Although Creen had been a social worker for thirty-five years at that time, she did not have a social worker license.

who are in Department care or custody are to be placed only in fully assessed, prepared and licensed homes." It further provided that the license study process should include "[a]t least 3 interviews, at least 2 of which are home visits," and "[a]t least 1 interview with each household member as appropriate to her/his age and verbal capacity, including an individual interview with each applicant."

Past 51A/B activity was not addressed in the Family Resource Assessment, as required by CMR 5.09(4)(c)(4) and DCF Standards 10 CMR 7.103 Services (3)(i). Johnson-Cruz, supervisor of the family resource unit, admitted in her deposition that it was an "oversight" not to have reviewed all of the prior 51A reports filed on the Malpass home. These past 51A/B reports included the fact that Malpass's children had poor school attendance and that that the family was known for having "intergenerational" neglect. According to Malpass's medical doctor, she was not in compliance with her medical regimen. Malpass had multiple medical issues, including Lupus, high blood pressure, and kidney failure, which could impact her capacity to serve as a foster caregiver. Indeed, Malpass was receiving social security income and the foster home assessment failed to explore the reason for that governmental assistance. The family resource worker did not follow up on a concern raised by a physician of one of the children, who reported that Malpass was overwhelmed by managing her own children's medical needs. Multiple regulations were violated in failing to address incomplete areas of the application.

Under the Family Resource Policy, "[a]fter the family has been licensed, the [Family Resource Worker] normally contacts the family at least monthly. During the probationary period [the first six months after a child has been placed in the home], the monthly contacts will normally be home visits . . . . After the probationary period ends, the [Family Resource Worker] visits the foster family at least once every other month."

As part of the study, Creen gathered information about Malpass and her home and family. In September 2013, Creen communicated with Malpass, her family members, and the medical providers and educators of her children. Creen conducted two home visits and one phone interview and had approximately ten additional interactions with Malpass during Malpass's foster care training in 2013. Creen did not record any interviews with Malpass's children as part of the study. During Malpass's six-month probationary period, Creen recorded three visits to her home.

Malpass was approved as a licensed foster parent in March 2014 for a six-month probationary period. The plaintiff's expert, Paula Wisnewski ("Wisnewski"), MSW, LICSW, concludes, "[w]hile each one of the above events in and of themselves could be understood as a mistake, in looking at the breadth and depth of the concerns and oversights, it is clear that ... Creen and ... Johnson-Cruz and their supervisors at the [DCF] were reckless in their work and appeared to be deliberately indifferent to following their own policies."

March 2015 51A report

In March of 2015, a social worker for one of the children in the foster home, J.E., filed a 51A report against Malpass. The March 2015 51A report alleged that Anthony Mallett ("Mallett") was a drug addict living in the foster home, was charged with either armed or unarmed robbery, and had hit J.E. on the head.[14] The Family Resource Policy stated: "The [foster/pre-adoptive] home must not have any household member, alternative caretaker or frequent visitor who would, in the judgment of the Department, pose a threat of abuse or neglect to children placed in the home, or would impede or prevent the provision of adequate foster/pre-adoptive care in the home." The Background Records Check Policy defined "Frequent Visitor" as follows:

> Any individual who does not live in but spends substantial time in the home, regardless of the reason or purpose of their visitation. Such visitors may include, but are not limited to:

[14] The allegations were made by J.E.'s biological mother who had contact with Malpass and allegedly had harassed her.

non-custodial parent(s); relatives; significant others; baby-sitters; caregivers; and other individuals who perform a caregiving role for any child in that home.

The Background Records Check Policy stated that a background records check is part of the licensing process for foster homes to determine "whether the applicant and the members of her/his household age 15 years and older (and those younger household members about whom concerns exist) and other frequent visitors to the home meet Department BRC standards for being a Department licensed foster/pre-adoptive home." The Background Records Check Policy identifies the categories of criminal offender registry information ("CORI") that result in various types of presumptive or discretionary disqualifications from being a foster parent.

On March 5, 2015, after J.E.'s social worker filed the March 2015 51A report, a case conference on the foster home was conducted with the following social workers and supervisors: Amy Villanueva, Kelly Prendergast, Natasha Webster-Lester, Donna Pearce, Heather Kerr, Tori Ginetti, Philip Ekeson, Johnson-Cruz, Peterson and Creen [and perhaps Varian]. At the March 5, 2015 case conference on the Malpass home, a decision was made to "screen in" the 51A report for further investigation by the Special Investigations Unit. J.E. was moved from the Malpass foster home to her grandparents' home, but the other children were left in the foster home.

Wisnewski summarized the following evidence related to the defendants' involvement. Creen colluded with the foster mother Malpass by advising her to take down information about her boyfriend Mallett on Facebook because it was incriminating. Creen admitted this to her supervisor. The 51B investigation found that Mallett was in the home more than Malpass admitted and that, in effect, he was a "frequent visitor" under DCF regulations. A CORI-BRC report should have been run at the time, and it was the responsibility of the social worker and supervisor at DCF to do so. Ultimately, the 51B investigator ran a CORI report on Mallett and found six abuse prevention (209A) orders, open armed or unarmed robbery charges, convictions

for assault and battery, assault and battery of a police officer, larceny and resisting arrest. Creen admitted at deposition that she had not even read the 51A report or 51B investigation report, although she agreed it would have been important to do so. Johnson-Cruz admitted to reading the report but failing to take any action as a result of it. Neither Peterson nor Varian recalled reading the 51B investigation.

An investigator from the Special Investigations Unit was assigned to investigate the March 2015 51A report. As part of the investigation, the investigator communicated with social workers, Malpass, Mallett, J.E.'s mother, J.E., daycare providers, and educators regarding the allegations. The investigator for the March 2015 51A report wrote the following in partial summary of a March 12, 2015 interview with Malpass:

> Ms. Malpass stated that she is fully aware that she would need to notify DCF if someone new moved into her home or if there was someone that was coming over on a frequent basis. She explained that she knew Anthony from years ago. They dated about 15 years ago. She stated that they reconnected over a year and a half ago. She stated that they would get together, now and then. She stated that he might have been at the home "maybe 2-3 times a month." She stated that he never slept over and was never left alone with any foster children, or her own children. She stated that they have gone away together with her kids, but never with foster children. She expressed that she did not realize that he would need to have a DCF background check based on the little time she did spend with him. She stated that [redacted] had met him, and [redacted] last saw him at a birthday party she had for [redacted] at her mother's home.

The investigator for the March 2015 51A report recorded statements from J.E. that described "AJ," i.e., Mallett, as both an adult who lived in the Malpass home and as a child who lived near her father. The investigator for the March 2015 51A report stated that Malpass had received subtle threats from J.E.'s mother and had concerns for her safety. The investigator for the March 2015 51A report completed his 51B investigation report on March 18, 2015, and

concluded that the allegations were unsupported. The investigator for the March 2015 51A report stated in his conclusions:

> Investigator does feel that Mr. Anthony Mallett was in the home more often than was reported, but again does not feel that this is indicative of Neglect. Ms. Malpass is fully aware of what is expected and was told to contact her FRW with any questions about who needs to be approved. She was told that she cannot have anyone around the foster children on a frequent basis, who has not been approved by DCF.

The supervisor of the investigator for the 51A report agreed with the investigator's decision that the allegations were unsupported.

A conference took place as a result of this report. The Department Employees were present at this meeting. At the meeting, the social worker, Amy Villanueva, reported that a male, Mallett, was living in the home and was acting as a primary caretaker for the children in the residence. He had a criminal history as outlined above. It was reported that he had possibly struck J.E. in the home. At the meeting, the group also discussed the fact that on March 3, 2015, Malpass had posted bail for Mallett, who had been charged with an unarmed robbery. The decision was made to remove J.E. from the home but to leave the rest of the children with Malpass.

After the March 2015 51A report was filed, Creen had a conversation with Malpass in which Creen told Malpass that Mallett was not supposed to be in the foster home. In April 2015, Creen completed a Background Record Check Approval Request for the March 2015 51A report that was found unsupported, in which she wrote: "Worker has been able to meet with Kim and discuss the allegations. It appears that Kim has a new understanding of who she can and cannot associate with while she has foster children in the home and is very much aware of the responsibilities of caring for foster children." After the March 2015 51A report was filed,

Peterson looked in the Malpass home for evidence that Mallett was present and reported that she found no such evidence.[15]

Johnson-Cruz approved the April 2015 Background Record Check Approval Request, in which she wrote: "Continual conversations will be had with Kim regarding visitors and the need to keep the Department informed as well as the need for CORI/BRC checks for frequent visitors to the home."

According to Wisnewski, none of the Department Employees did what was required in light of this new information, which was to deem Mallett to be a frequent visitor to the home, run a background check on him, and reconsider the safety of the home in light of the new information. Despite the 51A report and 51B investigation, there was no increased oversight of the home and the plan to have weekly visits by social workers was never monitored. Instead of weekly visits, there were only three home visits between March and August 2015.

Incident of August 14-15, 2015

On the evening of August 14, 2015, Malpass left her home to meet friends while Mallett was at home and left to care for the foster children. Mallett told a DCF investigator that "he got [Avalena Conway ("Avalena")] and Samara ready for bed. He (sic) fed them waffles and bananas, changed them and put them to bed." Mallett told a DCF investigator that "there was no air conditioning in the babies room." On the night of August 14, 2015, Alessa slept in Malpass's bedroom, which had a window air conditioning unit.[16] Malpass returned home that evening intoxicated.

[15] The plaintiffs also fault the defendants for granting a waiver of Malpass's DCF history under the condition that a social worker verify the medications prescribed to the family members and make sure that all utilities were in an appropriate adult name as a part of the home study process. Creen never performed the required verifications.
[16] According to the Family Resource Policy, "[n]o foster/pre-adoptive child over age one shall share a bedroom with an adult."

During DCF's investigation into the events of August 15, 2015, Mallett stated that he had provided childcare in the Malpass foster home, including on the evening of August 14, 2015. One or both of the allegedly overheating and distressed children apparently cried from their rooms/cribs, with no response from Malpass (by inference, due to her intoxication or indifference to the children's needs) or Mallett (by inference, due to his indifference to the children's needs). Mallett further told the investigator that he woke on August 15, 2015, to Malpass screaming about Samara and Alessa not breathing.

On August 15, 2015, Malpass called 911 to report that Avalena[17] and Samara were unresponsive. After Malpass called 911, Samara and Avalena were transported to UMass Memorial Medical Center at approximately 12:30 p.m. At the hospital, Avalena was pronounced dead. Doctors found Samara critically ill and her conditions included respiratory failure and seizure disorder, and she was hyperthermic (high temperature) and hypotensive.

During DCF's investigation into the events of August 15, 2015, the investigator summarized Mallett's statements to him regarding his presence in the Malpass home as follows:

> Mr. Mallett reported that he has been living in Ms. Malpass home for a year and a half. He told Inv[estigator] that he was living there back in March when Inv[estigator] met with him before. He told Inv[estigator] that Kim lied and she had her children lie to Investigator about that. He stated that they were just a normal family doing normal things. He stated that he helped Kim with all the children.

On or around September 24, 2015, Malpass's license to be a foster parent with DCF was revoked.

In 2019, the Worcester District Court conducted an inquest into the death of Avalena, which included evidence regarding the injuries to Samara. *Worcester Cnty. Dist. Attorney v. Avalena Conway-Coxen*, No. 1862IN000001 (Worcester Dist. Ct.). A thermostat for an electric

[17] Avalena is not a party to this action.

heater was located on the wall of Avalena and Samara's bedroom. After the August 15, 2015 incident, police forensic scientists from the Massachusetts State Police collected a swab of material from the dial on an "electric thermostat in that upstairs bedroom," which was processed for latent fingerprints. A DNA analyst from the Massachusetts State Police Crime Laboratory analyzed the material collected from the thermostat in Samara and Avalena's bedroom and concluded that "the DNA profile of S.S. [Samara] is consistent with the major profile from the swab of the thermostat."

On August 18, 2015, investigators with the Massachusetts State Police and Auburn Police Department performed a heat study in Samara and Avalena's bedroom. During that heat study, the baseline temperature at 8:01 p.m. was 88 degrees Fahrenheit, and that the final temperature was 109 degrees Fahrenheit at midnight. Malpass's brother, Andrew Malpass, testified at the inquest that Malpass told him that "[s]he walked into the bedroom and that the room was really hot and she noticed that the heat was on."

Samara and Alessa's care and custody

Samara has been legally adopted and lives in Rhode Island, and her care and petition proceeding in the Juvenile Court has been closed. Samara continues to suffer from her injuries from August 2015, with limitations on her mobility and ability to communicate verbally.

On March 5, 2022, Alessa began to reside with her father, Juan Sepulveda. Alessa's care and petition proceeding remains pending in the Juvenile Court and DCF currently has legal custody over her.

Affidavits

The plaintiffs included in the summary judgment materials affidavits from Wisnewski and Juan Sepulveda. Wisnewski is a licensed independent social worker and has over twenty-six

years of experience working within child placement and family resource development, with most of those years within the DCF system. Upon review of the Sepulveda matter, and all the litigation documents associated therewith, Wisnewski concluded that Creen and Johnson-Cruz failed to take various steps in approving Malpass's home for approval of a foster home, including, but not limited to, failing to (1) assess Malpass's adopted child in the home study; (2) review all prior 51A reports concerning Malpass's home, including one where she placed bills and credit cards in the names of her children; (3) assess Malpass's medical needs and whether she complied with her medical regimen; and (4) include enough interview/home visits. Wisnewski also determined that Creen, Johnson-Cruz, Peterson, and Varian failed to follow DCF regulations and policies, amongst others, that led to Samara's injuries, in particular with respect to investigating Mallett's relationship with Malpass and whether Mallett lived at the premises. In conclusion, Wisnewski opined that "DCF, its servants, agents and employees . . . demonstrated reckless disregard with respect to the Malpass home."

Juan Sepulveda's affidavit alleges that on August 15, 2015, Samara suffered "nonaccidental trauma with subsequent hypoxic ischemic insult to the brain resulting in cortical visual impairment, epilepsy, right-sided hemi-paresis and global development delays." While Juan Sepulveda has visitation with Samara, he ultimately agreed to release her for adoption given the severity of her needs after the August 15, 2015 incident. Juan Sepulveda has had continued visitation with Alessa from the date of the incident through February2022, when he received physical custody of Alessa. He is still awaiting legal custody of her. Since the incident, Alessa had had mood swings, nightmares, eating issues, and behavioral issues in school. Alessa verbalizes missing Samara on a weekly basis, and when they go to visit Samara, Alessa does not

understand why Samara does not go with them. Alessa requires continued counseling for the trauma she sustained while living in foster care, among other reasons.

DISCUSSION

I. Legal Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). "The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue." *Scholz* v. *Delp*, 473 Mass. 242, 249 (2015). "The party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if the moving party demonstrates that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case" (brackets, ellipsis, quotation, and citation omitted). *Id.*

"When a motion for summary judgment is made and supported . . . , an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56(e). See also *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991) (when moving party makes necessary showing, opposing party must respond with evidence of specific facts establishing existence of genuine dispute); *LaLondè* v. *Eissner*, 405 Mass. 207, 209 (1989) ("the opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment"). A court does not assess credibility or weigh evidence at the summary judgment stage. *Bulwer*, 473 Mass. at 689 ("The question of whose interpretation of the evidence is more believable, raised by the [parties'] conflicting

evidence as to the defendant[s'] motive, is not for a court to decide on the basis of [briefs and transcripts], but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of witnesses.").

II. DCF's Motion for Summary Judgment

a. *Vicarious Liability for Negligence of Kimberly Malpass pursuant to G.L. c. 258 (Counts I and II)*

DCF argues that it is not vicariously liable for Malpass's negligent actions because they were not performed in her scope as a public employee under G. L. c. 258, § 1. Under the Massachusetts Tort Claims Act ("MTCA"), "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances . . . ." G. L. c. 258, § 2. The MTCA's definition of "public employee" includes foster caregivers, provided their tortious conduct "was not intentional, or wanton and willful, or grossly negligent." G. L. c. 258, § 1. Generally, "[w]hether an individual is a public employee is a question of fact." *Williams* v. *Hartman*, 413 Mass. 398, 400 (1992). Here, however, the Legislature has defined a "public employee" to explicitly include "an approved or licensed foster caregiver" G.L. c. 258, § 1. The full section for this portion of the statute is as follows:

> For purposes of this chapter, the term "public employee" shall include an approved or licensed foster caregiver with respect to claims against such caregiver by a child in the temporary custody and care of such caregiver or an adult in the care of such caregiver for injury or death caused by the conduct of such caregiver; provided, however, that such conduct was not intentional, or wanton and willful, or grossly negligent.

G.L. c. 258, § 1.

The plaintiffs have submitted sufficient evidence in the summary judgment record that the minor plaintiffs were in the "temporary custody and care of such caregiver" and that their injuries were "caused by the conduct of such caregiver," within the scope of Malpass's employment as a foster caregiver. See G. L. c. 258, §§ 1, 2.

DCF also argues that Malpass's conduct constituted gross negligence and, therefore, she was not acting as a public employee within the meaning of the MTCA. "[G]ross negligence is substantially and appreciably higher in magnitude than ordinary negligence . . . . It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care . . . . It is a heedless and palpable violation of legal duty respecting the rights of others[.] Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence." *Parson* v. *Ameri*, 97 Mass. App. Ct. 96, 106 (2020), quoting *Altman* v. *Aronson*, 231 Mass. 588, 591-592 (1919). "[S]ome of the more common indicia of gross negligence are set forth as 'deliberate inattention,' 'voluntary incurring of obvious risk,' 'impatience of reasonable restraint,' or 'persistence in a palpably negligent course of conduct over an appreciable period of time.'" *Rosario* v. *Vasconcellos*, 330 Mass. 170, 172 (1953). "[W]hether factual allegations fall within the scope of conduct that can be deemed grossly negligent is typically a question of fact." *O'Flynn* v. *Pingree School, Inc.*, 2022 WL 1694104 (2022). See *Borella* v. *Renfro*, 96 Mass. App. Ct. 617, 622 (2019).

Because there are genuine issues of material fact as to whether Malpass's conduct was within the scope of her employment as a foster caregiver as a "public employee" and whether her conduct rose to the level of gross negligence (or other exemptions set forth in the definition

sections of G. L. c. 258), summary judgment is not appropriate on Counts I and II of the amended complaint.

b. Negligent Supervision/Oversight Claims based upon G.L. c. 258, § 2 as to DCF (based upon conduct of Peterson, Varian, Creen and Johnson-Cruz) (Counts V and VI)

DCF argues that it is immune from liability for the tort claims alleged under the MTCA due to the application of G. L. c. 258, § 10(b), known as the discretionary function rule, and § 10(j), which provides immunity for failure to prevent harm by a third party except in cases where the harm was originally caused by the public employee(s). See *Brum* v. *Town of Dartmouth*, 428 Mass. 684, 690-691 (1999). With respect to § 10(b), DCF asserts that it cannot be liable in negligence for discretionary functions in evaluating the suitability of the foster home and investigating allegations of neglect. Further, with respect to § 10(j), DCF asserts that the alleged negligent supervision of Malpass's home was not the original cause of the children's injuries as required by the statute.

Section 10(b) of the MTCA sets out one of several exceptions to liability, excluding "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused." G. L. c. 258, § 10(b).[18]

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[18] The Supreme Judicial Court has found that the "discretionary function" exception to governmental tort liability does not apply in a wide variety of cases that did not involve policy making or planning:

> See, e.g., *Harry Stoller & Co.* v. *Lowell*, 412 Mass. 139, 145-146 (1992) (no immunity where fire fighters chose not to use buildings' sprinkler systems to fight fire and negligently failed to conform to generally accepted firefighting practices); *Dobos* v. *Driscoll*, 404 Mass. 634, 652-653, cert. denied sub nom. *Kehoe* v. *Dobos*, 493 U.S. 850 (1989) (no immunity where supervisors' conduct in deciding whether and how to discipline State trooper constituted improper implementation of existing police policy); *A.L.* v. *Commonwealth*, *supra* at 245-246 (no immunity where probation officer negligently failed to monitor probationer's compliance with policy decisions made by sentencing judge); *Doherty* v. *Belmont*, 396 Mass. 271, 276 (1985) (no immunity where town failed to maintain municipal parking lot in reasonably safe condition); *Kelley* v. *Rossi*, 395 Mass. 659, 665 & n.6 (1985) (no immunity where city physician's treatment of emergency room patient governed by standard of accepted medical practice); *Irwin* v. *Ware*, 392 Mass. 745, 753 (1984) (no immunity where police officer failed to remove intoxicated motorist from

"The exception distinguishes between discretionary acts, defined as conduct that involves policy making or planning, and functionary acts, that is, those actions that simply implement established policy" (quotation and citation omitted). *Magliacane* v. *City of Gardner*, 483 Mass. 842, 859 (2020).

> Although almost every act involves some degree of discretion, "[t]he discretionary function exception is narrow, 'providing immunity only for discretionary conduct that involves policy making or planning.'" *Greenwood* v. *Easton*, 444 Mass. 467, 470 (2005), quoting *Harry Stoller & Co.*, supra. Discretionary acts do not include those that involve only the "carrying out of previously established policies or plans." *Barnett* v. *Lynn*, 433 Mass. 662, 664 (2001), quoting *Whitney*, 373 Mass. at 218.

Id. at 860.

Determining whether the exception applies requires a "two-step analysis" in which the court must decide: (1) "whether the governmental actor had any discretion at all as to what course of conduct to follow"; and (2) "whether the discretion that the actor had is that kind of discretion

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roadway in accordance with established statutory provisions); *Whitney* v. *Worcester*, *supra* at 223-224 (no immunity for teacher's failure to seek medical attention for injured student where only adoption, not implementation, of plan to integrate handicapped students into public schools was discretionary act). See also *Chiao-Yun Ku* v. *Framingham*, 62 Mass. App. Ct. 271, 277-278 (2004) (no immunity where town's supervision of snow removal constituted ministerial act of maintenance, not discretionary act of policy making or planning); *Alake* v. *City of Boston*, 40 Mass. App. Ct. 610, 612-614 (1996) (city's decision concerning number of chaperons to send on school field trip was discretionary function involving allocation of limited resources, but claim that chaperons were negligent in supervising students was not barred by discretionary function exception because chaperons' conduct did not rise to level of policy making or planning); *Tryon* v. *Lowell*, 29 Mass. App. Ct. 720, 724 (1991) (city's decision to erect fence between school and abutting railroad tracks was discretionary act, but city's inadequate maintenance of such fence did not entail discretionary function warranting immunity under § 10 [b]); *Sanker* v. *Orleans*, 27 Mass. App. Ct. 410, 412-413 (1989) (municipality's decisions concerning location of utility poles and design of public roads were discretionary functions, but municipality's failure to prune tree branch overhanging road was not discretionary act). Contrast *Barnett* v. *City of Lynn*, 433 Mass. 662, 664 (2001) (immunity conferred where city's decision not to erect fence on city property to prevent sledding was based on allocation of limited resources and, as such, was discretionary function); *Pina* v. *Commonwealth*, 400 Mass. 408, 414-415 (1987) (immunity conferred where State employees who evaluated and processed claim for Social Security disability insurance benefits were performing discretionary function); *Patrazza* v. *Commonwealth*, 398 Mass. 464, 469-470 (1986) (immunity conferred where design of highway guardrail and policy implementing its use were encompassed within discretionary function exception of § 10 [b]); *Alter* v. *City of Newton*, 35 Mass. App. Ct. 142, 146 (1993) (immunity conferred where city's decision not to erect fence around school athletic field constituted integral part of governmental policy making or planning); *Wheeler* v. *Boston Housing Authority*, 34 Mass. App. Ct. 36, 40 (1993) (immunity conferred where decision regarding security measures in public housing complex constituted discretionary function).

Greenwood v. *Town of Easton*, 444 Mass. 467, 471 n.6 (2005).

for which § 10(b) provides immunity from liability" (quotation and citation omitted). *Id.* In considering the first step, the court must ask whether there was a statute, regulation or established agency practice prescribing the course of conduct at issue. See *Barnett* v. *City of Lynn*, 433 Mass. 662, 664 (2001). If the Commonwealth had no discretion because a course of action was prescribed by a statute, regulation, or established agency practice, then the discretionary function exception does not apply. *Harry Stoller & Co.*, 412 Mass. at 141; see also *Brum,* 428 Mass. at 691 (discretionary function immunity does not apply in cases in which government official's actions were mandated by statute or regulation).

Here, the plaintiffs allege that DCF failed to follow its own written regulations and policies (including the Family Resource Policy) in multiple ways including a failure to conduct the number of required home visits, which would have uncovered that Malpass's home was not a suitable placement. Rather than discretionary policy decisions, the plaintiffs have put forth sufficient evidence to defeat summary judgment on this ground. Wisnewski's expert report identifies numerous regulations and policies that the Department Employees failed to follow surrounding their investigation into the allegations concerning J.E.

With respect to § 10(j), the Commonwealth's agencies, such as DCF, retain tort immunity for:

> any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer[.]

G. L. c. 258, § 10(j). The purpose of this section is to immunize public employers for harm the public employer failed to prevent, which was caused by a third person. *Brum*, 428 Mass. at 692. Under § 10(j), immunity is only removed "where 'the condition or situation' was 'originally caused by the public employer.'" *Id.,* quoting G. L. c. 258, § 10(j). "Original cause" means "an

affirmative act (not a failure to act) by a public employer that creates the 'condition or situation' that results in harm inflicted by a third party." *Kent* v. *Commonwealth*, 437 Mass. 312, 318 (2002), quoting *Brum*, 428 Mass. at 695. It is not enough for a plaintiff to simply "recast . . . failures as affirmative acts." *Audette* v. *Commonwealth*, 63 Mass. App. Ct. 727, 732-733 (2005). Instead, a plaintiff must show that the public employer's act "materially contributed" to creating the specific "condition or situation" that resulted in the harm. *Kent*, 437 Mass. at 319. In this analysis, courts "must determine . . . whether the [public] employees took an affirmative act that materially contributed to creating a condition or situation that resulted in [the plaintiffs'] injuries." *Cormier* v. *City of Lynn*, 479 Mass. 35, 41 (2018).

Recently, the Appeals Court held that "the actual harmful condition that is alleged is the placement of [the plaintiff's decedent, who was held in protective custody] ... in the cell at the jail with arrestees," so that the MTCA claim was not barred by G. L. c. 258, § 10(j). *Baptista* v. *Bristol Cnty. Sheriff's Dep't*, 100 Mass. App. Ct. 841, 856 (2022). Similarly, the plaintiffs argue that DCF's placement of the child in Malpass's home was the "original cause" of the harm and therefore § 10(j) does not apply. The plaintiffs have submitted extensive evidence through their expert affidavit of Wisnewski (as well as deposition testimony) that DCF repeatedly failed to take actions required by their own regulations and policies, and consequently placed the minor plaintiffs in an unsafe foster home. Wisnewski has identified approximately twenty-three (23) areas of deficiencies where DCF employees failed to follow their own regulations and policies in their decision to approve the Malpass foster home.[19] In addition, Wisnewski identifies approximately eight (8) areas of deficiencies where DCF employees failed to follow their own regulations and

[19] While the plaintiff's expert opines that these departures from the appropriate standards were reckless and constituted deliberate indifference, a jury would be entitled to consider the same underlying facts and conclude that DCF's actions were negligent.

policies in failing to remove the minor plaintiff from the Malpass home following the 51A report in March 2015 and follow-up investigation taken in connection with that.

Therefore, this count survives summary judgment as to DCF, despite the potential availability of immunity under G. L. c. 258, § 10(b) and 10(j), based upon the conduct of its employees in by allegedly failing to follow DCF's own regulations and policies (eliminating immunity under § 10(b) - discretionary function) and allegedly creating the dangerous situation (i.e., being the "original cause" under § 10(j)).[20]

c. Alessa's Negligence Claims (Counts II and VI)

DCF contends that the negligence claims brought on behalf of Alessa – who slept in a bedroom with air conditioning, rather than in the bedroom that reached excessive temperatures – fail because she was not physically harmed on August 15, 2015. However, the plaintiffs have denied the defendant's contention that Alessa was physically unharmed:

> 110. Alessa was not physically injured in the Malpass home on August 14 – 15. 2015. Alessa has not suffered physical injuries as a result of the emotional distress, if any, caused by the incidents of Aug. 14 – 15, 2015. Ex. 25 at 8.

Response of Plaintiffs:

Denied.

The plaintiffs have submitted the affidavit of Juan Sepulveda, Alessa's biological father, to address the harm suffered by Alessa. His affidavit alleges that Alessa has mood swings, eating

[20] The court notes that in in any MTCA matter, the public employer - rather than any individual employee - is liable for its employees' negligent conduct, committed in the scope of their employment to the same extent as a private employer, when the requirements of the MTCA are met. Whether there are four employees who were negligent or one employee who was negligent on behalf of DCF, the single cap of $100,000.00 is in place as to this incident, for each plaintiff who has a claim (whether for negligence or for loss of consortium or any other claim). See *Irwin v. Ware*, 392 Mass. 745, 767-769 (1984). In addition, if the public employer is liable through the MTCA for the conduct of Malpass, the cap of $100,000.00 does not increase because these counts are directed at the social workers and supervisors; rather, they are all still considered public employees who are subject to the single cap of $100,000.00 for the claims to each plaintiff.

issues, sleep issues, nightmares, and behavioral issues, which he attributes to the events of this case. In addition, the plaintiffs have put forth evidence that Alessa was kept in the hospital for several days for evaluation, among other things.

In addition, Mr. Sepulveda's affidavit states:

> Alessa verbalizes that she misses her sister on a weekly basis and most especially after we go visit Samara (every 2 months, 6 visits per year). Alessa asks me on a weekly basis if Samara is coming home or if she will be going back to live with her, will she come over to sleepover, or when will we go to see her. ... When we go to visit Samara, she becomes withdrawn and wonders why she isn't leaving with us and seems very confused and affected ... (par. 9).
>
> [Alessa] requires counseling to deal with the loss of her sister, transition to my home and due to trauma she sustained from moving to numerous different foster home[s]. I also believe she has trauma of the incident because it required her to be removed from the Malpass foster home, into the hospital for several days and then began her being moved between foster homes (par. 10).

Whether Alessa's claims are framed as negligence resulting in physical injury or negligent infliction of emotional distress, pursuant to *Sullivan* v. *Boston Gas Co.*, 414 Mass. 129 (1993), the moving party has not carried its burden to demonstrate that there are no issues of genuine fact. The record at this stage is sufficient to show that Alessa suffered emotional distress which manifests in trouble sleeping and eating, as well as behavioral issues. Whether the child's emotional disturbances manifested themselves in physical harm is a question for the fact finder that is not appropriate for resolution on the present record.

To the extent the injuries were the emotional injuries from being removed abruptly from the Malpass home and/or foreseeably created by the alleged negligence, those claims will survive summary judgment. However, to the extent the plaintiffs claim that Alessa's injuries are essentially loss of consortium of her sibling, those are not cognizable claims under Massachusetts law. Massachusetts recognizes loss of spousal consortium, loss of parental consortium, and loss

of a child's consortium, but there is no claim for loss of a sibling's consortium in a personal injury case.

> We have never recognized the right of a sibling to bring a loss of consortium claim and, in fact, have repeatedly rejected attempts to extend such claims past an actual spouse or parent-child relationship. See, e.g., *Mendoza* v. *B.L.H. Electronics*, 403 Mass. 437, 438 (1988) (stepson); *Feliciano* v. *Rosemar Silver Co.*, 401 Mass. 141, 142 (1987) (de facto spouse). The loss of filial consortium statute, G. L. c. 231, § 85X, inserted by St. 1989, c. 259, § 1, authorizes loss of consortium claims by "parents of a minor child or an adult child who is dependent on his parents for support," and its explicit language does not extend to claims by siblings. See *Leibovich* v. *Antonellis*, 410 Mass. 568, 579 (1991) (loss of filial consortium statute is "narrowly drawn").

Bobick v. *United States Fid. & Guar. Co.*, 439 Mass. 652, 664 (2003) (footnote omitted).

Therefore, the motion for summary judgment is **ALLOWED** to these claims to the extent they seek relief for loss of consortium for loss of a sibling's consortium. The motion is otherwise **DENIED**.[21]

d. Loss of Consortium Claims (Counts XIII, XIV, XV, and XVI)

The Sepulvedas claim that they suffered a loss of consortium as a result of the injuries to the children. DCF argues that, under the loss of consortium statute, G. L. c. 231, § 85X, the parents may not recover for loss of consortium. The statute states that, "[t]he parents of a minor child . . . shall have a cause of action for loss of consortium of the child who has been seriously injured against any person who is legally responsible for causing such injury."

As an initial matter, DCF argues that it is not a "person" under G. L. c. 231, § 85X, and so cannot be held liable for loss of consortium as to any parent's claim for loss of consortium in this case. In *Harrington* v. *Attleboro*, 172 F. Supp. 3d 337, 354-355 (D. Mass. 2016), a federal district court noted that "Massachusetts appellate courts had not yet addressed whether a town is

[21] The court notes that prior to trial, the parties should deal with separating admissible testimony from inadmissible testimony through motions in limine as it relates to testimony regarding how Alessa has been affected by these events by, in essence, missing her sister and other consortium-like claims which are not permitted for siblings under Massachusetts law.

a 'person' under the loss of consortium statute... ." *Id.* (dismissing § 85X because "person" did not include governmental entities). *Doe* v. *Dennis-Yarmouth Reg. Sch. Dist.*, 578 F. Supp. 3d 164, 183 (D. Mass. 2022) similarly concluded that a town is not a person under § 85X.

Significantly, in an unpublished case in 2017, the Appeals Court affirmed the denial of a motion to dismiss as to a spousal loss of consortium claim against the city of Malden and various officials. The Appeals Court analyzed the claim of immunity under G. L. c. 258, § 10(b), and unlike the federal district court, found that the loss of spousal consortium claims could proceed, without any detailed discussion of the precise issue raised in the instant case. *Ryan* v. *City of Malden*, 2017 Mass. App. Unpub. LEXIS 732 (2017). *Doe I* v. *City of Northampton*, 2023 WL 2383775, at * 7-*8 (D. Mass. 2023) disagreed with *Doe* and *Harrington*, concluding that a town can be a "person" under the statute. This court finds the latter two cases to be instructive, and in the absence of Massachusetts appellate courts holding that DCF is not a "person" under the parental loss of consortium statute, these counts may proceed to trial, while awaiting a reported Massachusetts appellate case directly on point.

Next, the defendants argue that Alessa was not "seriously injured" within the meaning of General Laws c. 231, § 85X. This court cannot conclude as a matter of law on this summary judgment record that Alessa's ongoing emotional injuries with physical manifestations are not considered "serious injuries." Rather, this is a genuinely contested issue of material fact. Accordingly, summary judgment is **DENIED** as to Counts XIII, XIV, XV, and XVI.[22]

[22] As noted above, the court's conclusions apply to Commissioner Spears' alleged actions in her official capacity.

III. The Department Employees' Motion for Summary Judgment

a. 42 U.S.C. § 1983 Claims (Counts IX (Samara's claims against the four individual Department Employees) and X (Alessa's claims against the four individual Department Employees))

The Department Employees move for summary judgment on the claims under 42 U.S.C. § 1983 against them for allegedly violating the children's substantive due process rights under the Fourteenth Amendment. The Due Process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the state for the "safety and general well-being" of an individual when the state affirmatively "restrain[s] the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty." *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

> Whether the state deprived an individual of "freedom to act on his own behalf," and so is subject to a correlative constitutional duty, is often described as whether a "special relationship" exists between the state and the individual. *J.R.* v. *Gloria*, 593 F.3d 73, 79 (1st Cir. 2010) (quoting *Rivera* v. *Rhode Island*, 402 F.3d 27, 34 (1st Cir. 2005)) (internal quotation marks omitted). **Though we have never held that such a relationship exists between the state and children in foster care, we have assumed so *arguendo*.** See *Gloria*, 593 F.3d at 80. We do so again here.

Connor B v. *Patrick*, 774 F.3d 45, 53 (1st Cir. 2014) (emphasis added).

Thus, the First Circuit has assumed without deciding, as recently as 2014, that a foster child placed by the state in a foster home has a substantive due process right to a safe living environment due to the special relationship between the Commonwealth and a foster child.[23] Assuming there is such a right, the next step is to determine the standard that applies. Both the

[23] The court is aware of the case of *Sheila* v. *Commonwealth*, 57 Mass. App. Ct. 423, 430-431 (2003), which holds that this right was not "clearly established" at the time of the events at issue in that case, as the right to a safe placement in a foster family was only "clearly established" in the Second Circuit at the time of the events. However, in reviewing the federal case law on § 1983 claims, the court concludes that case law has evolved since 2003 on this subject. At the time of these events in 2015, the court assumes without deciding that a special relationship exists between foster children and the Commonwealth, and that a foster child had a clearly established right to a safe foster home, through the substantive Due Process clause.

federal district court for Massachusetts[24] and the First Circuit have addressed – without explicitly deciding – the standard in the context of foster care:

> The Supreme Court has explained that executive branch actors violate an individual's constitutional rights only if they engage in conduct that "shocks the conscience." [*County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998)]; see *Gloria*, 593 F.3d at 79-80. In particular, *Lewis* makes clear that harm caused by officials' negligence categorically cannot be a Due Process violation. *Lewis*, 523 U.S. at 848-[8]49.
>
> Sixteen years before *Lewis*, in *Youngberg*, the Supreme Court found cognizable certain limited substantive due process claims by an adult involuntarily committed in a state institution for the intellectually disabled. In *Youngberg*, the plaintiff claimed due process rights to "safe conditions of confinement," [among other rights]. 457 U.S. at 309. ...
>
> Even those established liberty interest rights were "not absolute." *Id.* at 320. The issue was "not simply whether a liberty interest has been infringed but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process." *Id.* Importantly, the Court held that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. This is what is referred to as the *Youngberg* standard.
>
> Whatever tension there is between the *Youngberg* standard and the *Lewis* shocks-the-conscience test is of no moment here. The district court found, on the facts, that neither standard was met. It suffices that we agree that the *Youngberg* standard was not met and do not go further.

Connor B., 774 F.3d at 53-54.

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[24] The District Court noted the following regarding the different standards which could apply to § 1983 cases arising out of foster care:

> "[S]ubstantial departure," as articulated in the case law, requires more than mere deviance from professional norms; contrary to intuition, courts have construed this standard to require the most wanton abandonment of caretaking responsibilities. See *Yvonne L.*, 959 F.2d at 894 ("As applied to a foster care setting we doubt there is much difference in the [deliberate-indifference and substantial-departure] standards. "Failure to exercise professional judgment" does not mean mere negligence as we understand *Youngberg*; while it does not require actual knowledge the children will be harmed, it implies abdication of the duty to act professionally in making the placements."); *Connor B.*, 771 F. Supp. 2d at 162 n.4 ("It is far from obvious . . . that the professional judgment standard creates an appreciably lower hurdle for plaintiffs" [than the deliberate indifference standard].).

Connor B. v. *Patrick*, 985 F. Supp. 2d 129, 160 (D. Mass. 2013).

Confirming this analysis regarding the standard to be applied, in 2021, a federal district court within the First Circuit wrote:

> In *Connor B.*, the First Circuit also sidestepped the question of what standard applies to a substantive due process claim in the foster care context. See *id.* at 54. The court explained that two different standards have arisen in evaluating substantive due process violations: the "shocks the conscience" test from *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), and the absence of professional judgment test outlined in *Youngberg* v. *Romeo*, 457 U.S. 307, 323, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). See *id.* at 53–54. The First Circuit recognized that there might be some "tension" between the two tests but decided that it did not need to reconcile these tests because it found that the plaintiffs could not meet the *Youngberg* standard. See *id.* at 54.

Bryan C. v. *Lambrew*, 340 F.R.D. 501, 516 (D. Me. 2021).

The plaintiffs survived a motion to dismiss on the substantive due process claim in order to give them the opportunity to obtain discovery. Now, after discovery has closed, the plaintiffs have provided sufficient facts, taken in the light most favorable to the plaintiffs, to survive summary judgment. Unlike *Connor B* v. *Patrick, supra*, the summary judgment record (including Wisnewski's expert opinion) taken in the light most favorable to the non-moving parties, demonstrates that the actions taken by the Department Employees are sufficient to satisfy both the *Youngberg* standard and the "shocks-the-conscience" standard, and thereby defeat qualified immunity under § 1983. Further, Wisnewski's expert opinion concerning the Department Employees, accompanied by the information alleged in Juan Sepulveda's affidavit, create a genuine issue of material fact that the Department Employees acted with reckless disregard and/or deliberate indifference to the rights of the minor children in their duties with respect to Malpass's home. Thus, the Department Employees motion for summary judgment on these counts fail.

ORDER

For the foregoing reasons, DCF's motion for summary judgment is **ALLOWED** in part and **DENIED** in part. The motion is **ALLOWED** as to any portions of Alessa's claims under Counts II and VI for loss of her sister's consortium but **DENIED** as to the remaining portion of damages for negligence. DCF's motion is otherwise **DENIED**. The Department Employees' motion for summary judgment is **DENIED.**

V. Yarashus, J.
Valerie A. Yarashus
Justice of the Superior Court

Dated: August 17, 2023

2023 WL 3884114
Only the Westlaw citation is currently available.
United States Court of Appeals, Third Circuit.

Zenaida GONZALEZ, Administratrix Ad Prosequendum of the Estate of Alison Chavez, and Zenaida Gonzalez, Individually, Appellant in 21-2439
v.
State of NEW JERSEY (Department of Children and Families; Division of Child Protection and Permanency) f/k/a Division of Youth and Family Services (DYFS), Allison Blake, Andrea Moody; Luisa Cordero, Olga Huynh, Brigid Egwu-Onyema, David Henningsen, Kean University, Child Advocacy Resources Association, (C.A.R.A.S); Victoria Cerda, Monica Avila, Haizel Lazala-Krohn, Lucrecia Vega, John Does 1-20 (fictitious), and ABC Corp 1-20 (fictitious), Defendants
State of New Jersey (Department of Children and Families; Division of Child Protection and Permanency) f/k/a Division of Youth and Family Services (DYFS), Allison Blake, Andrea Moody, Luisa Cordero, Olga Huynh, Brigid Egwu-Onyema, David Henningsen, Third-Party Plaintiffs
Dr. Anita Kishen, M.D., F.A.A.P. and Al & Jeans Children First and Unique Day Care, Inc., Third-Party Defendants
Andrea Moody; Luisa Cordero, Appellants in 21-2395

Nos. 21-2395 and 21-2439
|
Argued March 21, 2023
|
(Opinion Filed: June 8, 2023)

On Appeal from the United States District Court For the District of New Jersey (D.C. No. 2-14-cv-07932), District Judge: Honorable Kevin McNulty

Attorneys and Law Firms

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Before: JORDAN, GREENAWAY, JR., and McKEE, Circuit Judges

OPINION [*]

[*] This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

McKEE, Circuit Judge.

***1** We are asked to review the District Court's denial of a motion for summary judgment in a suit under 42 U.S.C. § 1983 filed by Luisa Cordero, a caseworker with the Department of Children and Families Division of Child Protection and Permanency ("DCF") and her supervisor, Andrea Moody. The court rejected their assertion of qualified immunity from liability for the tragic death of Alison Chavez, a sixteen-month-old child who died due to head trauma while in foster care. The District Court granted the summary judgment motions filed by the other DCF defendants, and defendants associated with the Child Advocacy Resource Association ("CARAS"). Zenaida Gonzalez, Alison's mother, filed a cross-appeal, arguing that the District Court incorrectly granted summary judgment in favor of the remaining DCF and CARAS defendants. For the following reasons, we will affirm the District Court's denial of summary judgment as to Cordero and Moody and dismiss Gonzalez's cross-appeal for lack of jurisdiction.

I. [1]

[1] Under the collateral order doctrine, we have jurisdiction to review a denial of a summary judgment motion based on qualified immunity. See

Mitchell v. Forsyth, 472 U.S. 511, 525–27 (1985); 28 U.S.C. § 1291. We exercise plenary review over the denial of a summary judgment motion. *Acierno v. Cloutier*, 40 F.3d 597, 609 (3d Cir. 1994). "We apply the same test required of the district court and view inferences to be drawn from the underlying facts in the light most favorable to the nonmoving party." *Haybarger v. Lawrence County Adult Prob. & Parole*, 551 F.3d 193, 197 (3d Cir. 2008) (internal quotation marks and citation omitted). We may affirm the District Court on any ground supported by the record. *MRL Dev., LLC v. Whitecap Inv. Corp.*, 823 F.3d 195, 202 (3d Cir. 2016).

The events relevant to Cordero and Moody's liability took place between August 27, 2012—when Cordero placed Alison and her siblings into Haizel Lazala-Krohn and Lucrecia Vega's foster home—and October 10, 2012—when Alison's case was ordered to be reassigned to other caseworkers.

After placing Alison and her siblings in the foster home, Cordero's initial impressions were that Lazala-Krohn was "a little bit overwhelmed" caring for five children ages five and under.[2] Cordero reported this concern to her supervisor Moody, but by the second visit, believed Lazala-Krohn "was more in control."[3]

2 App. 372, 353. Lazala-Krohn had expressed interest in fostering a maximum of four children but agreed to foster five children so that Alison and her siblings could remain together.

3 App. 376.

It is undisputed that Alison was injured in the foster home on September 27, 2012.[4] According to Lazala-Krohn, she left four children downstairs. After hearing a "boom," she went downstairs where she discovered Alison on the floor.[5] The children explained that Alison fell out of a chair and struck her head, which resulted in a bump on Alison's head. Despite that apparent injury, Lazala-Krohn did not take Alison to the hospital or seek medical help.[6] The following day, Friday, September 28, Lazala-Krohn left a message informing Cordero about the incident. When Cordero listened to that message on Monday October 1, she instructed Lazala-Krohn to make Alison an appointment with a pediatrician, and to let her know when that appointment had been scheduled.

4 App. 10.

5 App. 573.

6 Lazala-Krohn did call Lucrecia Vega's sister Maria who has "some medical knowledge." App. 578. Concerned that Alison had a concussion, Maria told Lazala-Krohn to keep Alison awake.

***2** On October 2, Alison's daycare called Cordero to inform her that Alison had a bump on her forehead and black eyes. Cordero immediately told her supervisor Moody, who responded, "let's go and take the baby to the doctor like right away."[7] Although the examining physician suggested that Alison should have been immediately brought to a physician, he concluded that Alison was healthy. Despite Lazala-Krohn's decision to leave Alison alone without supervision, and her failure to take Alison promptly to the pediatrician following this incident, Cordero and Moody did not remove Alison from the foster home.

7 App. 387. Although the District Court made contradictory statements about whether Lazala-Krohn ever scheduled a doctor's appointment for Alison, *compare Gonzalez v. N.J. Dep't of Child. & Fams.*, 545 F. Supp. 3d 178, 195-96 (D.N.J. 2021) with *id.* at 206-07, the record shows that it took additional prodding from Cordero on the morning of October 2 before Lazala-Krohn "finally did make the appointment," *id.*, at 195-96. And it wasn't until Alison's daycare called Cordero later in the day on October 2 that Cordero and Moody took matters into their own hands to get Alison to a doctor.

During the period in which Cordero and Moody served as the caseworker and supervisor responsible for Alison's wellbeing, Alison's daycare documented other concerns. On September 17, the daycare noted two bruises to Alison's forehead. On September 25, 2012, the daycare stated that Alison's sister had come to daycare with a "busted lip" and Alison had a "rash/chaffing [sic] around [her] vagina and buttocks."[8] On October 10, 2012, the daycare documented another bruise on Alison's forehead.

8 App. 410–412.

Cordero testified she did not know about the September 17, September 25, or October 10 occurrences. However,

the Division of Child Protection and Permanency ("DCPP") employees who transported Alison to and from the daycare recalled receiving incident reports from the daycare and testified that it was their practice to provide them to the caseworker who was responsible for putting them in Alison's casefile. [9]

9 During her deposition, Cordero was shown a contact sheet created by Shonda Emanuel, a transportation aide for DCPP, documenting the September 25 incident. She acknowledged that the contact sheet was "in the system. But [she] failed probably to read it." App. 446.

II.

"The doctrine of qualified immunity insulates government officials who are performing discretionary functions 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " [10] To determine whether a government official is entitled to qualified immunity, we ask whether (1) the facts put forward by the plaintiff show a violation of a constitutional right and whether (2) the right was clearly established at the time of the alleged misconduct. [11] Where "issues of fact ... preclude a definitive finding on the question of whether the plaintiff's rights have been violated, the court must nonetheless decide whether the right at issue was clearly established." [12]

10 *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

11 *Peroza-Benitez v. Smith*, 994 F.3d 157, 165 (3d Cir. 2021). Courts can exercise their discretion to decide which of the two prongs of the qualified immunity analysis should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

12 *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 637 n. 4 (3d Cir. 2015).

***3** The District Court correctly held that there exists a clearly established right for a foster child to be protected from a known substantial risk of serious harm. In *Nicini v. Morra*, we held that "when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983." [13] The sufficiently culpable circumstances are those that "shock the conscience." [14]

13 *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000).

14 *Id.* at 811. Relying on our sister courts, we applied a "deliberate indifference standard" to the foster care context. *Id.*

Alone, *Nicini* does not demonstrate a clearly established right because the caseworker's behavior there did "not shock the conscience or demonstrate [ ] deliberate indifference to or reckless disregard of [the child's] constitutional rights." [15] However "a 'robust consensus of cases of persuasive authority in the Courts of Appeals' " [16] establishes the right of a child in foster care to be protected from a known substantial risk of serious harm. [17]

15 *Nicini*, 212 F.3d at 812.

16 *James v. N. J. State Police*, 957 F.3d 165, 170 (3d Cir. 2020) (quoting *Bland v. City of Newark*, 900 F.3d 77, 84 (3d Cir. 2018)).

17 *See, e.g., Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134, 141–42 (2d Cir. 1981) (recognizing that a state foster agency could be liable for deliberate indifference to a foster child's right to adequate agency supervision over the placement of a foster child); *Meador v. Cabinet for Hum. Resources*, 902 F.2d 474, 476 (6th Cir. 1990) (holding that "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes"); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) ("[T]he basic duty of the state to children in state custody [is] clear"); *Norfleet v. Ark. Dep't of Hum. Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) ("[I]t was clearly established in 1991 that the state had an obligation to provide adequate medical care, protection and supervision [to foster children]"); *Yvonne L. v. N. M. Dep't of Hum. Servs.*, 959 F.2d 883, 892–93 (10th Cir. 1992) (foster children have a "clearly established right to protection while in foster care"); *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 847 (9th Cir. 2010) ("[I]t was clearly

established in 1996 that Appellees had a protected liberty interest in safe foster care placement once they became wards of the state"); *Smith v. District of Columbia*, 413 F.3d 86, 95 (D.C. Cir. 2005) (citing approvingly *Doe*, 649 F.3d at 141-42 and *Nicini*, 212 F.3d at 808 for proposition that the state owes children in foster homes a constitutional duty of care); *Taylor v. Ledbetter*, 818 F.2d 791, 795-96 (11th Cir. 1987) (citing approvingly to *Doe* for same proposition); *Hernandez v. Texas Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004) (assuming such a duty).

Although this right is clearly established, here, disputed issues of fact "preclude a definitive finding on the question of whether the plaintiff's rights have been violated." [18] It is undisputed that Cordero and Moody placed five children aged five and under in a foster home even though Lazala-Krohn (quite understandably) appeared overwhelmed. Cordero and Moody then failed to remove Alison from the home after the September 27 head injury. However, the record reflects a dispute as to whether Cordero knew—or should have known—about the September 17, September 25, or October 10 incidents documenting potential abuse. This dispute is material because it bears on whether Cordero and Moody knowingly disregarded a substantial risk of serious harm that "shocks the conscience." [19] Therefore, we will affirm the District Court's denial of defendants Cordero and Moody's motion for summary judgment. [20]

18 *Spady*, 800 F.3d at 637 n. 4.

19 *Nicini*, 212 F.3d at 810–12.

20 Cordero and Moody appealed their denial of qualified immunity on the grounds that the District Court defined the alleged right at too high a level of generality and failed "to identify prior case law that involves factual circumstances that are sufficiently similar to the case under consideration." Cordero and Moody's Br. at 12.
In concluding that the right to be free from "abuse or neglect in a foster home" was clearly established, the District Court paid particular attention to *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d at 145, *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010), *Meador*, 902 F.2d at 475 (6th Cir. 1990). *Gonzalez*, 545 F. Supp. 3d at 211-13. The District Court correctly stated that—in each case—"state foster care workers received information which indicated that circumstance [sic] in a foster household posed a significant threat of abuse ... [,] failed to act on the threat, and the child was thereafter abused by a member of the foster household." *Id.* at 213. To the extent Cordero was informed about the other incidents documented by the daycare, our sister courts have clearly established that a failure to respond to known threats of abuse is a constitutional violation.

III.

***4** We do not have jurisdiction to review Gonzalez's cross-appeal arguing that the District Court improperly granted summary judgment as to other defendants. Our jurisdiction extends only to review of final orders of the District Court. [21] Here, the District Court's order, dated June 25, 2021, was not a final order resolving all issues as to all parties because summary judgment was "granted in part and denied in part." [22]

21 *See Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 460 F.3d 470, 476 (3d Cir. 2006); *Carter v. City of Phila.*, 181 F.3d 339, 343 (3d Cir. 1999) ("an order which terminates fewer than all claims, or claims against fewer than all parties, does not constitute a 'final' order for purposes of appeal under 28 U.S.C. § 1291.").

22 App. 4. Gonzalez asks this Court to exercise its discretion in favor of review under the doctrine of pendent appellate jurisdiction. Plaintiff's Reply Br. at 8. We reject this request as the District Court's decision granting summary judgment in part was not "inextricably intertwined with that court's decision to deny [Cordero and Moody's] qualified immunity motions, [nor is] review of the former decision ... necessary to ensure meaningful review of the latter." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 203 (3d Cir. 2001) (citing *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 50–51 (1995)).

IV.

For the reasons described above, we therefore affirm the District Court's denial of summary judgment as to Cordero and Moody and dismiss Gonzalez's cross-appeal for lack of jurisdiction.

All Citations

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