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**ELECTRONICALLY
FILED**
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

Sep 16 2011

ALAN CARLSON, Clerk of the Court
by E. Veloz

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE**
9 **CIVIL COMPLEX CENTER**

10 **RAELYN STOKES, an individual; MARCUS**
11 **STOKES, an individual; T.S., a minor, by and**
12 **through her guardian ad litem;**

12 **Plaintiffs,**

13 **vs.**

14 **COUNTY OF ORANGE; ORANGE**
15 **COUNTY DEPARTMENT OF CHILDREN**
16 **AND FAMILY SERVICES; SOCIAL**
17 **WORKER SUNDAY PETRIE, in both her**
18 **official capacity and individually; SOCIAL**
19 **WORKER SUPERVISOR JAMES**
20 **WALDRON, in both his official capacity and**
21 **individually; INGRID HARITA, in her official**
22 **capacity as Director of the Orange County**
23 **Social Services Agency; SANDRA MURRAY,**
24 **M.D. in her official capacity as Child Abuse**
25 **Services Team Medical Director and as an**
26 **individual; SOCIAL WORKER SUSAN**
27 **AZADI, in both her official capacity and**
28 **individually; SOCIAL WORKER OSCAR R.**
AGUIRRE, in his official capacity and as an
individual; SOCIAL WORKER JAKE
MICHEL, in his official capacity and as an
individual; SOCIAL WORKER SUSAN
HORN in her official capacity and as an
individual; CHILDREN'S HOSPITAL OF
ORANGE COUNTY; SUSPECTED CHILD
ABUSE AND NEGLECT TEAM; CHILD
ABUSE SERVICE TEAM; DAPHNE WONG,
M.D. in her official capacity and as an
individual; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 30 - 2010 003561398
Judge: Hon. Nancy Wieben Stock
Department: CX 105

**REPLY IN SUPPORT OF
PLAINTIFFS' JUDGMENT ON THE
PLEADINGS TO THE AMENDED
ANSWER FILED BY HOSPITAL
DEFENDANTS**

Date: September 23, 2011
Time: 9:00 a.m.

**REPLY IN SUPPORT OF PLAINTIFFS' JUDGMENT ON THE PLEADINGS TO THE AMENDED
ANSWER FILED BY HOSPITAL DEFENDANTS**

Case No. 30 - 2010 003561398

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I. INTRODUCTION

1
2 Unpublished non-binding decisions carry no precedential value and cannot
3 be relied upon by this Court. The on point – *binding* – United States Supreme
4 Court and Ninth Circuit decisions hold that: State law cannot provide immunity
5 from suit for a federal section 1983 civil rights cause of action. This is true even
6 when the federal claim is asserted in a state court proceeding.

7 Moreover, no federal statutes support Defendants’ position. 42 U.S.C.
8 §5106a does not authorize *absolute* immunity to a federal cause of action.
9 Defendants improperly rely upon legal authority that predates the current rendition
10 of the federal statute. 42 U.S.C §5106a was amended in 1996 to mandate that only
11 “good faith” reports be immunized. Even if Defendants were correct in the law,
12 their authorities have been abrogated by the 1996 amendment.

13 Lastly, Motion for Judgment on the Pleadings properly asserts new legal
14 grounds not previously raised on demurrer.

15 Defendants’ Sixth and Seventh Affirmative Defenses are based on state law
16 immunity and improperly target, in part, the Plaintiffs’ Fourth Cause of Action for
17 violation of federal civil rights.

18 The Court should grant this Motion for Judgment on the Pleadings in its
19 entirety. In the event the Court denies this motion on substantive grounds,
20 Plaintiffs reiterate their request for certification under C.C.P. §166.1.

II. LAW & ARGUMENT

1. Defendants Do Not Address, and Therefore Concede That Federal Law Must Be Applied to Plaintiffs’ Federal Claims

23 Any state law that would produce a different outcome in state court than in
24 federal court must yield to federal law. Federal preemption prevents a state court
25 from applying state law in a federal civil rights cases brought in state court.

26 (*Felder v. Casey* (1988) 487 U.S. 131, 138; *County of L.A. v. Superior Court*
27 (1999) 21 Cal.4th 292, 300.)
28

1 Defendants' opposition is devoid of any controverting legal authority or
2 argument. Therefore, it would appear Defendants concede the point. Federal
3 substantive law is controlling as to Plaintiffs' section 1983 cause of action.

4 **2. This Court Must Apply Governing Ninth Circuit Federal Law**

5 Defendants contend that Plaintiffs' supporting federal authority is
6 inapplicable.¹ They are wrong.

7 Defendants' contention is based on an unpublished Ninth Circuit decision,
8 *Wallis v. Spencer*, 1996 U.S. App. LEXIS 18536 (1996) ("*Wallis I*"). Defendants'
9 reliance on an unpublished Ninth Circuit decision is misplaced and impermissible.

10 Defendants' argue that this Court should not rely upon the published – and
11 hence binding – Ninth Circuit decision in *Wallis ex rel. Wallis v. Spencer* (9th Cir.
12 Cal. 2000) 202 F.3d 1126 ("*Wallis II*"). The sole basis for this being the
13 unpublished *Wallis I* decision. Unpublished federal decisions carry *no*
14 precedential value, except in certain circumstances not present here. (USCS Ct
15 App 9th Cir, *Circuit R.* 36-3(a); See Reply Request for Judicial Notice, Exhibit A.)
16 Unpublished decisions, issued prior to January 1, 2007, cannot be cited.. (USCS
17 Ct App 9th Cir, *Circuit R.* 36-3(c); See Reply Request for Judicial Notice, Exhibit
18 A.)

19 Nonetheless, the United States District Court for the Northern District of
20 California, previously considered an identical argument as posited by Defendants
21 here, in *Watson v. County of Santa Clara* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS
22 66844, 28.² There, the Court expressly held that it was unable to rely on the
23 unpublished *Wallis I* opinion as precedent, and recognized the published *Wallis II*

25 ¹ Specifically, Defendants' contend that *Wallis ex rel. Wallis v. Spencer* (9th Cir. Cal. 2000)
26 202 F.3d 1126, *Buckheit v. Dennis* (N.D. Cal. 2010) 713 F.Supp.2d 910, and *Doe v. Regents of the*
27 *Univ. of Cal.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 65035 were wrongfully decided.

28 ² Citation to the *Watson* decision is permissible. (USCS Ct App 9th Cir, *Circuit R.* 36-3(b).)

1 case barred the application of California Penal Code §11172 to section 1983
2 claims. (*Watson*, 2007 U.S. Dist. LEXIS 66844, 28.)

3 Defendants' argument further fails to address the United States Supreme
4 Court's explicit admonition that California's immunity statutes cannot control
5 §1983 claims – even where the federal cause of action is being asserted in state
6 court. (*Martinez v. California* (1980) 444 U.S. 277, 284. n8.)

7 Defendants' contention that *Wallis II*, *Buckheit*, and by extension, *Martinez*,
8 were wrongly decided, is unsupported by any binding authority. (See Defendant's
9 Opposition, Pg. 4, ln. 25 - Pg. 5, ln. 4). More importantly, this Court lacks
10 jurisdiction to overturn the United States Supreme Court and the Ninth Circuit
11 Court of Appeals on federal issues.

12 This Court must apply the governing federal law as laid out by the United
13 States Supreme Court and the Ninth Circuit.

14 Courts within the Ninth Circuit are bound by the published opinions of the
15 United States Supreme Court and the Ninth Circuit; and in the face of such
16 explicit admonition, cannot dismiss a federal claim based on state law. (*Buckheit v.*
17 *Dennis* (N.D. Cal. 2010) 713 F.Supp.2d 910, 924-925.) Including, California
18 Penal Code section 11172. (*Id.* at 924-925.)

19 **3. 42 U.S.C. 5106a Does Not Authorize Absolute Immunity**

20 Defendants' reliance on 42 U.S.C. §5106a is misplaced. 42 U.S.C. 5106a
21 only authorizes a "good faith" immunity, *not* absolute immunity. (42 U.S.C.
22 §5106a(b)(2)(B)(vii).) Prior 1996, this was not the case. However, in 1996
23 congress amended the statute.

24 *Thomas v. Chadwick* (1990) 224 Cal.App.3d 813 is the only legal authority
25 cited by the Defendants that addresses 42 U.S.C. 5106a. (See Defendants'
26 Opposition, Pg. 5, ln. 18-23). However, in *Thomas*, the Court evaluated 42 U.S.C.
27 5106a, prior to a 1996 amendment that changed the type of immunity permitted.

1 Prior to October 3, 1996, the immunity provision contained in 42 U.S.C.
2 §5106a read: “provisions for immunity from prosecution under State and local
3 laws for persons who report instances of child abuse or neglect for circumstances
4 arising from such reporting.” (42 U.S.C. §5106a(b)(1)(B); see Request for
5 Judicial Notice, Exhibit B, Pg. 9.)

6 However, in 1996 Congress amended this statutory language to read:
7 “provisions for immunity from prosecution under State and local laws and
8 regulations for individuals making *good faith* reports of suspected or known
9 instances of child abuse or neglect.” (42 U.S.C. §5106a(b)(2)(B)(vii); see
10 Request for Judicial Notice, Exhibit B, Pg. 3.)(Italics Added).

11 Under the current statutory language, Congress curtailed the immunity
12 provision to allow for only a “good faith” immunity, not an absolute immunity.
13 (42 U.S.C. §5106a(b)(2)(B)(vii).) Therefore, it cannot be said that the absolute
14 immunity created by California Penal Code section 11172, is authorized by
15 Congress as to any federal cause of action. The analysis applied in *Thomas v.*
16 *Chadwick* was abrogated by Congress’s amendment of the enabling statute.

17 It is also notable, that *Wallis II* and *Buckheit* were decided *after* the 1996
18 amendment, while *Thomas* and *Wallis I* were decided prior to the 1996
19 amendment. It should be assumed that this amended language is, at least in part,
20 the basis for the Ninth Circuit Court’s refusal to apply California Penal Code
21 section 11172 to federal claims.

22 42 U.S.C. 5106a does not authorize absolute immunity against a federal
23 section 1983 claim. Regardless, applicable federal law prevents the application of
24 state law immunities to Plaintiffs’ federal cause of action.

25 **4. Federal Law Prevents the Application of California Civil Code §47(b) to**
26 **a §1983 Cause of Action**

27 Defendants’ fail to provide any authority supporting the application of
28 California Civil Code section 47(b) to a federal section 1983 cause of action. The

1 Supremacy Clause prohibits it. (*Kimes v. Stone* (9th Cir. 1996) 84 F.3d 1121,
2 1126-1127.) Any construction of a federal statute which permits an immunity
3 based in state law to have controlling effect, would transmute a basic guarantee
4 into an illusory promise. (*Martinez v. California* (1980) 444 U.S. 277, 284, n8.)
5 Simply put, California's immunity statutes cannot control §1983 claims, including
6 where the federal causes of action are being asserted in state court. (*Id.* at 284.)

7 Even if this were not the case, any state law that would produce a different
8 outcome if suit were brought in state rather than in federal, court must yield to
9 federal law. (*County of L.A.* (1999) 21 Cal.4th, *supra*, at 300.) Here, federal
10 preemption prevents this Court from applying state law immunities, including
11 mandated reporter immunity, to the federal claims. (*See, Id.* at 300.)

12 Thus, the litigation immunity provided in *California Code of Civil*
13 *Procedure* section 47(b) does not apply to Plaintiffs' section 1983 cause of action.
14 (*Kimes*, 84 F.3d 1121 at 1127.)

15 In addition, Defendants' reliance upon *Silberg v. Anderson* (1990) 786 P.2d
16 365, is misplaced. (See Defendants' Opposition, Pg. 6, ln. 27-28). The Court in
17 *Silberg* did not address the California litigation privilege in the context of a federal
18 cause of action. (*Silberg v. Anderson* (1990) 786 P.2d 365.) It is also notable, that
19 the Court in *Kimes* referenced the *Silberg* opinion, but its ultimate disposition was
20 to preclude California's litigation privilege as to a section 1983 claim.

21 Defendants California Civil Code section 47(b) immunity affirmative
22 defense is inapplicable to Plaintiffs section 1983 cause of action – this motion
23 should be granted.

24 **5. Plaintiffs Judgment on the Pleadings is Based on Different *Legal***
25 **Grounds as the Previous Demurrer and is Therefore Entirely Proper**

26 Defendants incorrectly characterize Plaintiffs Judgment on the Pleadings as
27 identical to Plaintiffs' previous demurrer. (See Defendants' Opposition, Pg. 7, ln.
28 4-10). While Plaintiffs' did previously demurrer to the Defendants' Sixth

1 Affirmative Defense, the demurrer was made on different grounds. In addition,
2 Plaintiffs did not previously demurrer to Defendants' Seventh Affirmative
3 Defense.

4 Where a legal theory was not raised on demurrer, that theory may be raised
5 by Judgment on the Pleadings. (*Thomson v. Canyon* (2011) 198 Cal. App. 4th
6 594, 603.)

7 Plaintiffs demurrer was premised on *factual* grounds, i.e., that Defendant
8 Wong was not a mandated reporter because she had nothing to do with the
9 reporting of suspected abuse. Rather, she merely assisted in the social services'
10 investigation and search for a perpetrator. (See Request for Judicial Notice,
11 Exhibit C, Pg. 3, ln. 23 - Pg. 4, ln. 2).

12 Here, Plaintiffs' Judgment on the Pleadings is predicated on applicable
13 federal legal grounds that prevents state law immunities against federal claims
14 from being asserted in state court, not on any previously raised *factual* grounds..

15 Regardless, any perceived procedural defect is of no moment. There will be
16 no miscarriage of justice in precluding Defendants from asserting an affirmative
17 defense that is preempted by federal law. (*People v. Edward D. Jones & Co.*
18 (2007) 154 Cal. App. 4th 627, 636.)

19 Form should never be elevated over substance.

20 III. CONCLUSION

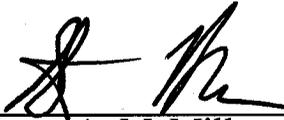
21 The Defendants' affirmative defenses rooted in state law cannot provide
22 immunity from the Plaintiffs' Fourth Cause of Action for violation of federal civil
23 rights pursuant to 42 U.S.C. §1983. This is true even when the federal claim is
24 being asserted in the State Court, as is the case here.

25 This Court should grant Plaintiffs' motion for Judgment on the Pleadings in
26 its entirety, without leave to amend.

27 ///

1 Dated: September 16, 2011

2 THE LAW OFFICES OF SHAWN A. McMILLAN, APC

3 

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5 Stephen D. Daner, Esq.
6 Attorneys for Plaintiffs

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PROOF OF SERVICE - CCP § 1013

Raelyn Stokes, et al., v. County of Orange, et al.,
Superior Court of California, County of Orange – Civil Complex Center
Case Number: 30-2010 00351398

I am employed in the County of San Diego, State of California. I am over 18 years of age and am not a party to the within action. My business address is 4955 Via Lapiz, San Diego, California 92122.

On September 16, 2011, I served the foregoing documents described as:

- **REPLY IN SUPPORT OF PLAINTIFFS' JUDGMENT ON THE PLEADINGS TO THE AMENDED ANSWER FILED BY HOSPITAL DEFENDANTS**
- **REPLY REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' JUDGMENT ON THE PLEADINGS TO THE AMENDED ANSWER FILED BY HOSPITAL DEFENDANTS**

on the interested parties in this action by placing a true copy of the original thereof enclosed in a sealed envelope addressed as follows: **Please see attached service list.**

X **(BY MAIL)**: I placed a true and correct copy of the original thereof in a sealed envelope addressed as indicated above, and I caused such envelope to be deposited in the mail in San Diego, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in the affidavit.

 (BY FACSIMILE): I caused such documents to be transmitted from facsimile number (858) 646-0069 to all interest parties at the facsimile telephone numbers listed. The facsimile machine I used is in compliance with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(I), I caused the transmitting machine to issue a transmission report showing that the transmission was complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 16, 2011, at San Diego, California.



Stephen D. Daner

Service List

Raelyn Stokes, et al., v. County of Orange, et al.,
Superior Court of California, County of Orange – Civil Complex Center
Case Number: 30-2010 00351398

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