.THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Appellate Case No.: 2020-001352

Kaci May and Kaci May as guardian ad litem for A.R.M., J.H.M., J.T.M., C.B.M., J.R.M., and J.W.M.,..... Appellants

v.

Dorchester School District Two,
South Carolina Department of Social Services,
Michael Leach, and Jasmine Flemister ..... Respondents.

FINAL BRIEF OF RESPONDENTS SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, MICHAEL LEACH, AND JASMINE FLEMISTER

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the court below correctly denied injunctive relief to Plaintiff-Appellant, when Plaintiff had not satisfied any of the three required elements for obtaining such relief.

2. Whether the decision of the court below could also be affirmed for any one or more of the following additional sustaining grounds:

    a. Appellant Kaci May lacked standing to bring this action as the GAL for her children, when she was the person alleged to have committed physical neglect.

    b. Even if Appellant could establish standing, there is no present case or controversy between Appellant and these Respondents.

    c. The court below lacked subject matter jurisdiction, because S.C. Code Ann. § 63-7-1610(A) provides that the Family Court has exclusive jurisdiction over claims such as those in the present case.

COUNTERSTATEMENT OF THE CASE

A. Procedural history.

These Respondents adopt by reference the "Procedural Background" paragraphs set forth at pp. 5-6 of the Brief of Respondent Dorchester School District Two.

B. Facts.

Plaintiff Kaci May is the parent of seven children, four of whom are her biological children, and the other three of whom were a sibling group adopted by the Mays in 2015. (Ms. May's husband, Warren May, passed away in April 2020.)

One or more of the adopted children suffered sexual abuse while in their biological family.

It should be noted at the outset that the lengthy factual statement at pp. 4-18 of the Brief of Appellant might, by its sheer length and reference to immaterial details, created an erroneous impression concerning the number and character of the DSS interviews with the May children. In fact, there were relatively few interviews, and they were of short duration, as discussed below.

On March 27, 2017, there was a daylong meeting between Kaci and Warren May and school district personnel regarding four of the May children. At the meeting, according to her affidavit dated December 29, 2017, Plaintiff May became "exasperated," and advised that "·J.H.M. [a female child who was adopted by the Mays] raped my babies." *See* R. 187, 188. Ms. May disclosed in graphic detail that one child in the household had brutally raped other children in the household; that the child had dragged the victim children across the floor to rape them and those children dug their nails into the floor; and that the child used a wood paddle or utensil to rape the other children. R. 187.

These and other statements by Ms. May at that meeting were reported to DSS, which by statute (S.C. Code Ann. § 63-7-920) was required under those circumstances to conduct an investigation into the issue of whether there was abuse or neglect of the children by the parents or others. This in turn led to DSS in-school

interviews with four of the seven May children: one child was interviewed on March 29, 2017, and three others on the following day, March 30, 2017. R. 401.

On March 31, 2017, two county DSS caseworkers went to the May residence to make initial contact with Kaci May and the three other children who had not been interviewed at school. R. 406. One of the case managers read the allegations. Ms. May stated that nothing like that is occurring now. *Id.* She further stated that she has an attorney (Deborah Butcher) and that the case managers needed to speak with her attorney. *Id.* The case managers observed the children, but Ms. May would not allow them to interview the children, nor would Ms. May allow the case managers into her home. *Id.* Ms. May expressed her dislike for DSS and stated "it was [DSS's] fault." *Id.* The case managers observed Ms. May's behaviors to be very erratic. *Id.*

DSS continued to work on the May case in April and early May 2017. On May 12, 2017, DSS interviewed three of the children in a single interview at their school. R. 412. Later that day, DSS issued a Determination Fact Sheet which stated that physical neglect was indicated. R. 499. The Mays, through counsel, filed an administrative appeal of that determination. *See* R. 504-505, 325.

On June 15, 2017 Dorchester County DSS Director John Dunne advised the Mays' attorney that he had conducted an interim review of the case and "concluded that the decision to indicate the case for Neglect is supported by a preponderance

of the evidence." R. 503. The County Director also informed that they would seek intervention in the Family Court. *Id.* The Mays' administrative appeal was stayed, and a Family Court case for non-emergency removal of the children from the home was filed on September 14, 2017. R. 514-528.

During June, July and August 2017, Ms. May resisted all efforts by DSS to contact the children or visit the home, instead referring the caseworkers to Ms. May's attorney. R. 514. At the beginning of the following (2017-2018) school year, Ms. May purported to advise the school district that no further interviews of her children could occur unless either she or her counsel were contacted first. R. 531-532. This total resistance by Ms. May to DSS having contact with the children outside of her presence had the effect of increasing DSS's concerns about the wellbeing of the children, which in turn led DSS to conduct additional interviews in schools in the fall of 2017.

Between the time the administrative proceeding was commenced on May 12, 2017, and the time of the filing of the present Common Pleas case on December 7, 2017, DSS caseworkers saw the May children on several occasions without speaking to them. DSS also interviewed two of the children on May 25, 2017. After that, the only in-school interviews that occurred were one with three of the May children on September 18, 2017, another one with one other child on

September 22, 2017, and one short interview with three of the children all at once on November 20, 2017.[1]

On December 7, 2017, Kaci May filed this action for injunctive relief in the Court of Common Pleas by Kaci May, individually and purporting to act as the guardian ad litem for the four biological children and the three adoptive children.[2] Ms. May, together with her now-deceased husband, was herself the subject of DSS's investigation into possible child abuse within her home. In the present action, she is therefore complaining, purportedly on behalf of the children, about DSS interviewing the children in the course of an investigation into her own behavior.

The Complaint in the present action sought an order "restraining the SCDSS Defendants from interrogating the Plaintiff Children unless there is a Court Order or a new allegation of abuse and/or neglect." R. 27 (Prayer for Relief, ¶ (C)). Consistently with that request, Ms. May has conceded that if new allegations were

[1] The Order of the court below, R. 13-14, describes these events even more succinctly. The pertinent trial testimony regarding the interviews is set forth at pp. 1-4 of the Brief of Respondent Dorchester School District Two, and is incorporated herein by reference.

[2] Although the caption of the case refers to "Kaci May and Kaci May as guardian ad litem" and then lists the children, it appears that Ms. May is in reality the sole plaintiff and appellant. She will therefore be referred to herein in the singular, which is the way she was designated in the Order below.

to arise, it would be appropriate for DSS to interview the children at school. R. 348.

In effect, the only challenge to DSS practices made by Ms. May is to DSS conducting interviews after abuse and neglect is indicated and there is an open pending case against the parents, as was the case here when the interviews of some of the children in late May, September and November occurred.

The concerns of DSS are reflected in the caseworker's notes for September 22, 2017:

> Kaci and Warren May have not allowed the department in their home. No assessments have been made for this family. The May's have not been in direct contact with the department. The family's attorney is not responding to emails to schedule visits. . . . The department is concerned about the allegations and the inability to get in the home. The department is unable to properly assess for the safety and wellbeing of the minor children.

R. 440.

In the meantime, in the Family Court case, Plaintiff May filed a counterclaim seeking, among other things, an order restraining DSS caseworkers from speaking with the Mays about legal issues in this matter. R. 780-788. In addition, and in connection therewith, Plaintiff May filed a motion in that Family Court action seeking, among other things, "[a]n order restraining SCDSS from interrogating Defendants' children at school." Supplemental R. 2. That is the same

relief as is sought in the present case. Apparently, no such order was ever issued by the Family Court.

On June 14, 2018, the Family Court action was dismissed by voluntary stipulation. DSS agreed that "Plaintiff SCDSS's investigation beginning on or about March 28, 2017 resulting in a finding of abuse and/or neglect on or about May 12, 2017 is hereby overturned." R. 533.

It is undisputed that DSS did not interview any of the minor children at any time from November 20, 2017 through the time of the trial in August 2020. DSS closed its case involving the minor children on or about June 21, 2018, shortly after the Family Court case was dismissed.[3]

STANDARD OF REVIEW

With regard to this Court's review of the denial of injunctive relief, these Respondents adopt the standard of review set forth at pp. 6-7 of the Brief of Respondent Dorchester School District Two.

In addition, and as held in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000), with regard to the additional sustaining grounds set forth herein, SCACR. Rule 220(c) provides that "[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the

[3] For further details pertaining to the activities at the school and the trial testimony of the children, these Respondents adopt by reference the "Factual Background" paragraphs set forth at pp. 1-5 of the Brief of Respondent Dorchester School District Two.

Record on Appeal." Every point argued herein was presented to the court below, R. 57-73, 726-740, although that court did not base its ruling on those points.

SUMMARY OF ARGUMENT

Despite the efforts of Appellant Kaci May to make arguments pertaining to alleged general practices of DSS, this case involves only one family, and all of the events that gave rise to this case occurred almost three years before the present case was tried in August 2020.[4] The DSS file was closed in June 2018, more than two years before this case went to trial. There is no indication that counsel for Ms. May ever attempted to have her motion for preliminary injunctive relief heard by either the Family Court or the Court of Common Pleas at any time when the children were still likely to have been interviewed by DSS, i.e., at any time prior to the June 2018 closure of the case. As a result, Plaintiff's claims of irreparable harm and the absence of another remedy were properly rejected by the court below.

The court below also correctly held that Plaintiff's claims lacked substantive legal merit. Although the Brief of Appellant cites many cases which contain broad statements of general legal principles, it cites no case that actually finds a constitutional violation under facts similar to those of the present case. The Brief of Appellant also does not cite those cases which hold that there is no constitutional violation in connection with such facts.

[4] Although the Brief of Appellant (p. 42) cites statistics regarding numbers of child abuse cases, the present case is not a class action.

Finally, although the court below decided the case solely based on Plaintiff's failure to meet the standards for a grant of injunctive relief, its judgment could also be affirmed on one or more of the following grounds: (1) Appellant May lacks standing to bring this case, because as one of the persons being investigated by DSS, her interests conflicted with those of the children, preventing her from serving as their guardian ad litem; (2) the Family Court, and not the Court of Common Pleas, has exclusive jurisdiction over child protection matters, including the claims raised in this case, and (3) there is no longer a live case or controversy between these parties.

ARGUMENT

1. The circuit court correctly denied injunctive relief to Plaintiff, when plaintiff had not satisfied any of the three required elements for obtaining such relief.

In addition to the points set forth at pp. 7-14 of the Brief of Respondent Dorchester School District Two with regard to Plaintiff's failure to satisfy any of the three required elements for obtaining injunctive relief, which are incorporated herein by references, these Respondents add the following contentions in support of those points.

a. Appellant made no showing of irreparable harm.

and

b. Appellant made no showing of inadequate remedy.

As the court below held, "there was no evidence to support that the children suffered or would suffer harm in the absence of injunctive relief," and "Plaintiff made no showing that DSS returning to DD2 to interview the children was anything more than speculation or a hypothetical possibility, which is insufficient to support injunctive relief." R. 15. Likewise, and also as the court below held, there was no showing that Plaintiff lacked an adequate remedy at law. At the time of trial, almost three years had elapsed since DSS conducted the last interview of any of the children.

Under the facts of this case, Plaintiff needed to make a showing that the complained-of conduct was likely to recur. As stated in *Williams v. Cty. of San Diego*, No. 17-CV-815-MMA (JLB), 2021 WL 488361 (S.D. Cal. Feb. 10, 2021), a case cited in the Brief of Appellant for other reasons,

> Plaintiffs were obligated to offer and cite evidence demonstrating that . . . the alleged wrongdoing will occur in the future—i.e., that the County or its social workers are likely to interview Minor Plaintiffs at school in direct contravention of Williams's wishes. They do neither.

2021 WL 488361 at *13. Nor has the Appellant in the present case made such a showing. While it is always possible that future events might lead to another DSS investigation of the May family, it is speculative to assume that such an event might actually take place. Appellant does not discuss this likelihood.

Instead, Appellant claims, under her argument pertaining to the inadequacy of future remedies, that if DSS were to seek to interview the May children in the future, Appellant would not be able, as a practical matter, to do anything about it. Br. of Appellant at 48-49. However, Ms. May expressly agreed that she was "not opposed to DSS interviewing the children that may be subject to a report of abuse and neglect. . . ." R. 348:13-16. Nor did she object to additional interviews if the case was "still in the investigation period," that is, prior to DSS's filing a Family Court action. R. 351:22-352:1.

As a result, Ms. May is only challenging DSS's practice of conducting occasional interviews with the children in situations where DSS's investigation results in a determination that child neglect or abuse is "indicated," that is, there has been "a report of child abuse or neglect supported by facts which warrant a finding by a preponderance of evidence that abuse or neglect is more likely than not to have occurred." S.C. Code Ann. § 63-7-20(13). When that happens, DSS can file a Family Court case or handle the matter administratively. In either event, any "indicated" case goes to Child Protective Services, i.e., family preservation, where DSS is required to take action to protect the child's safety and welfare. S.C. Code Ann. § 63-7-20(8)(a); R. 225:19-23.

From Ms. May's testimony, it has become clear that Appellant's claims of future harm are even more speculative than might have been thought at the time

this case was filed. In order for the complained-of fact situation to recur, there would first have to be another abuse and neglect report involving the May family. Ms. May agrees that DSS can interview the children if that were to occur. In addition, the investigation triggered by that report would need to lead to a decision by DSS that child neglect or abuse were "indicated." Only then, that is, after the conclusion of the investigation resulting in an "indication," would Ms. May have an objection to further interviews. R. 351:19-352:1.

On its merits, this position by Ms. May is essentially an absurdity. In a situation where DSS has made a finding a finding by a preponderance of evidence that abuse or neglect by a parent is more likely than not to have occurred, Ms. May's arguments would require DSS to refrain from conducting further interviews of the children without the consent of the potentially-abusive parent. Ms. May further asks that such consent from her be obtained from the time the matter was "indicated" until the time the matter is ultimately resolved, either in Family Court or otherwise. For DSS to adopt such a position, however, would be for the agency to abdicate its responsibility to protect the children's safety and welfare at the very time when such protection appears to be necessary. Specifically, DSS policy requires that during the time a case for child protective services is open and pending, "Child Protective Services staff will conduct at least one face to face interview once a calendar month with the victim child, siblings and any other

children in the home, and parents, protective adult, and/or other caregiver. . . .” R. 543 (DSS Human Services Policy and Procedure Manual, Policy 701(7)). This policy reflects the prudent practice of requiring DSS to maintain frequent contact with the children during the pendency of an abuse and neglect case, in order to ensure that no additional harm to the children occurs in the meantime.

Aside from the deficiencies of Appellant’s argument on its merits, however, it also lacks merit as a ground for holding that there is no adequate remedy at law (or otherwise) short of the requested injunctive relief. If there were to be another investigation that resulted in an indication of abuse and neglect, Ms. May would have ample opportunity at that time to seek an injunction against further interviews. Her counsel complains that it took some time for Ms. May’s request for preliminary injunctive relief to be heard by the court below. Br. of Appellant at 45. However, there is no indication that her counsel ever sought to have that request heard, either in the Court of Common Pleas or in the Family Court, where a similar request had already been made. R. 787, ¶ (E)(2). If in the future another request for injunctive relief were to made, following an investigation and an indication that abuse and neglect had occurred, there is no reason to think that the court to which the request was made would not hear the request quickly, if Ms. May’s counsel were actually to ask for a speedy hearing.

c. Appellant's claims lack substantive legal merit.

Finally, Plaintiff's substantive legal arguments lack merit, which means that an injunction should not issue even if the other two elements for granting injunctive relief had been satisfied. At this stage of the case, where Plaintiff seeks permanent, rather than preliminary injunctive relief, Plaintiff needs to show actual success on the merits, not merely a likelihood of success. R. 14, citing *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987). Such a showing cannot be made.

1. DSS is expressly authorized by statute to interview children in public schools, and Plaintiff's claims of potential constitutional violations are without support.

The in-school interviews conducted by DSS in this case are specifically authorized by S.C. Code Ann. §63-7-920(C):

> (C) The department or law enforcement, or both, may interview the child alleged to have been abused or neglected and any other child in the household during the investigation. The interviews may be conducted on school premises, at childcare facilities, at the child's home or at other suitable locations and in the discretion of the department or law enforcement, or both, may be conducted outside the presence of the parents. To the extent reasonably possible, the needs and interests of the child must be accommodated in making arrangements for interviews, including time, place, method of obtaining the child's presence, and conduct of the interview. The department or law enforcement, or both, shall provide notification of the interview to the parents as soon as reasonably possible during the investigation if notice will not jeopardize the safety of the child or the course of the

> investigation. All state, law enforcement, and community agencies providing child welfare intervention into a child's life should coordinate their services to minimize the number of interviews of the child to reduce potential emotional trauma to the child.

The language of this subsection would end the question, but for Plaintiff's arguments that (a) the standard for search warrants in another subsection applicable in limited instances § 63-7-920(B)) should also apply to interviews under subsection (C), the interview provision, as well, and (b) such interviews violate the Fourth Amendment. Both arguments are unavailing, for several different reasons set forth below.

With regard to the first claim by Plaintiff, i.e., the claim that the probable cause standard for warrants issued pursuant to § 63-7-920(B) applies to interviews under § 63-7-920(C), the interview provision, as well, that argument is foreclosed by the plain language of the statute itself. Section 63-7-920(C), under which DSS interviewed the children in school, does not contain a warrant requirement. Subsection (B), which does contain a warrant requirement, by its terms applies only when "the investigation cannot be completed without issuance of the warrant." That same subsection also includes a reference, among other things, to authorizing DSS to inspect the premises where the child may be located or may reside. In other words, a warrant is sought only when other means authorized by the statute, such as in-school interviews, are unavailable. In practice, and as

referenced by Plaintiff's counsel at the trial, such warrants are referred to "inspection warrants." R. 245:20-24.

On appeal, Plaintiff offer no suggestion why § 63-7-920(C) should be read as containing a probable cause or warrant requirement for school interviews when that subsection is devoid of any language to that effect. Plaintiff simply offers a cursory conclusion, without explanation, that the warrant requirement of § 63-7-920(B) applies to school interviews despite the absence of language to that effect in § -920(C).

2. The interviews did not violate the Fourth Amendment or any other constitutional provisions.

Plaintiff's arguments of alleged constitutional violations are also unavailing. Indeed, Plaintiff May cannot even assert the Fourth Amendment rights of the children. The Supreme Court of South Carolina follows the general rule that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *State v. Robinson*, 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014), quoting *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978). Plaintiff Kaci May is not the person injured, and she is manifestly barred from serving as GAL for the reasons set forth below.

Secondly, even if Ms. May could overcome the jurisdictional and justiciability issues set forth below, the Fourth Amendment prohibits only "unreasonable searches and seizures. . . ." It should first be noted that the court

below declined to hold that "summoning the children and asking limited, basic questions for a limited amount of time" amounted to a "seizure." R. 17, citing *Camreta v. Greene*, 563 U.S. 692, 713–14 (2011), which declined to hold that a social worker's warrantless in-school interview of a child pursuant to a child abuse investigation violates the Fourth Amendment. As the Respondent school district has pointed out, Br. of Respondent Dorchester School District Two at 7, the children were aware of their rights to terminate the interviews or refuse to speak to the social workers and did so.

Even if "seizures" did occur, which DSS denies, the case does not end there. The duty of DSS to prevent child abuse and neglect prevails over any argument Ms. May has made in asserting that the interviews should not occur. The Fourth Circuit has held that "In determining whether a search and seizure is reasonable, we must balance the government's need to search with the invasion endured by the plaintiff. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)." *Wildauer v. Frederick Cty*., 993 F.2d 369, 372 (4th Cir. 1993). In *Wildauer*, the Fourth Circuit concluded that investigative visits by social workers, even when the home itself is visited, "are not subject to the same scrutiny as searches in the criminal context." *Id.* Continuing, *Wildauer* held that "[W]e cannot say that the Constitution requires that a visual inspection of the body of a child who may have been the victim of child abuse can only be undertaken when the standards of probable cause or a warrant

are met." *Id.* at 373. This holding directly contradicts Appellant's intimation, Br. of Appellant at 28-30, that a showing of probable cause is necessary under the facts of this case. In another case, the Fourth Circuit held that "A state has a legitimate interest in protecting children from neglect and abuse and in investigating situations that may give rise to such neglect and abuse." *Martin v. Saint Mary's Dep't Soc. Servs.*, 346 F.3d 502, 506 (4th Cir. 2003). This case, of course, presents just such a situation.

Tellingly, although the court below cited both *Wildauer and Martin*, Plaintiff's lengthy brief does not mention either of those cases. Nor does Plaintiff include any reference to an Eleventh Circuit case, *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012), which holds that a social worker was "entitled to qualified immunity on the ground that she did not violate any clearly established right protected by the Fourth Amendment when she interrogated [a child at school] as part of an investigation of the child's welfare." And while the Brief of Appellant does cite a recent district court case from California, *Williams v. Cty. of San Diego*, No. 17-CV-815-MMA (JLB), 2021 WL 488361 (S.D. Cal. Feb. 10, 2021), Appellant does not mention that that case declined to find a Fourth Amendment violation:

> [T]he Court has considered if—and the extent to which—the seizures intruded upon Minor Plaintiffs' privacy and concludes that any intrusion was minimal if at all existent. A school official removed Minor Plaintiffs from class and

> brought them to the front office. Although being removed from class might be embarrassing and even disruptive, there is evidence that this type of occurrence was common and not atypical. . . . Therefore, any privacy intrusion was minimal. Further, the County's interest in protecting children from abuse and adequately investigating claims of abuse and neglect greatly outweighs any minor intrusion on Minor Plaintiffs' privacy.

2021 WL 488361 at *9.

The Brief of Appellant cites many cases that contain broad statements of general legal principles, but that brief conspicuously fails to cite any case which has actually held that the kind of interviews conducted by DSS in this case violate children's Fourth Amendment rights, and certainly none in South Carolina or even in the Fourth Circuit. There has only been one federal case that has so held, but that holding was specifically vacated by the Supreme Court. *Greene v. Camreta*, 588 F.3d 1011, 1015, 1017 (9th Cir. 2009), vacated in part, 563 U.S. 692 (2011). This is another case not mentioned in the Brief of Appellant.

The Brief of Appellant cites several other cases from other jurisdictions, but none involve similar facts. The inappositeness of some of those cases has been pointed out at pp. 10-11 of the Brief of Respondent Dorchester School District Two. As noted at p. 10 of that Brief of Respondent, those cases "either involved rigorous and extended questioning at public schools by social services and law enforcement personnel or no articulable suspicion of abuse or neglect to justify an interview at school." Also cited by Appellant, and equally inapposite, is *Mann v.*

Cty. of San Diego, 907 F.3d 1154 (9th Cir. 2018), which involved invasive medical examinations of minor children without warrant or parental consent after removing them from family home under suspicion of child abuse). Appellant's citation to *Doe v. Heck*, 327 F.3d 492, (7th Cir. 2003), also provides no guidance for this case, because in *Doe*, "defendants had no evidence giving rise to a reasonable suspicion that the plaintiff parents were abusing their children." 327 F.3d at 524. Here, on the other hand, the indication of child neglect or abuse supplied the necessary reasonable suspicion to continue interviewing the children after the case had entered the family preservation stage.

Finally, to the extent that the Brief of Appellant seeks to present arguments based on state or federal constitutional provisions other than the Fourth Amendment, Br. of Appellant at 31-37, a point on which the court below did not expressly rule, Appellant makes no suggestion that governmental action that complies with the Fourth Amendment can nevertheless amount to a violation of a right to familial privacy that might arise under some other constitutional provision. Such a claim would fail in any event. *See, e.g., Graham v. Connor,* 490 U.S. 386, 394 (1989) (holding that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against ... physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims").

Moreover, the only actions alleged to be wrongful are the interviews themselves, which are evaluated under the Fourth Amendment. In other words, the familial privacy claim is based only on interviews that were, as the court below held, "reasonable in inception and scope," R. 17. Plaintiff has not claimed that any other action of DSS invaded familial privacy. As a result, such a claim lacks both legal and factual merit.

2. The decision of the court below could also be affirmed for any one or more of the additional sustaining grounds set forth herein.

The following contentions were presented by DSS to the court below. R. 57-73, 726-740. Although that court decided the case based on the three-part test for injunctive relief discussed above, the grounds set forth below provide alternative reasons for reaching the same result.

a. Plaintiff Kaci May has no standing to represent the interests of the children in not being interviewed, and in fact has a conflict which prevents her from asserting those claims on behalf of the children.

It is undisputed that DSS's Family Court case against the Mays, although ultimately dismissed in June 2018, involved allegations of possible abuse or neglect against Plaintiff-Appellant Kaci May herself. R. 519-523 (Family Court Complaint). In both the Family Court case and in filing the present action as the purported GAL for the children, Ms. May was in effect attempting to have those courts enjoin interviews by DSS of the very children she was alleged to have been

subjecting to some form of abuse or neglect. As a result, Ms. May is the last person who should be permitted to maintain this action on behalf of the children. It is unimaginable that a person "indicated" as a person who neglected or abused children should be obtain an injunction which the alleged abuser herself could use in order to prevent questioning of the victim child outside the presence of the abuser. Such an injunction would serve only the interests of the abuser rather than the State's critical interest in protecting the children.

Again, the undisputed facts show that Ms. May in effect self-reported a situation of unsupervised child-on-child sexual assault within her family. Shortly thereafter, she aggressively resisted DSS's effort to investigate. She prohibited DSS from entering her home, and asked DSS to contact her only through her counsel.

Virtually identical facts were present in a relatively recent South Carolina federal case, No. 3:17-0416, *M.M., et al. v. Mitchum, et al.* In that case, District Judge Gergel on his own motion removed a non-natural parent from serving as GAL for the person's custodial children when the GAL had alleged that the custodial children sexually assaulted the natural children. As Judge Gergel held,

> Under the present circumstances, where various custodial children are alleged to have sexually assaulted each other, it would appear that a single GAL for all four children is inappropriate as each probably requires his or her own GAL. Further, it is inconceivable that Ms. Mitchell could serve as the

> GAL for minors she has alleged sexually assaulted her own children.

M.M., supra, Order dated 5/6/2017 (emphasis added). R. 746. The identical conflict is present here. Although the court below chose to base its ruling on other grounds, Ms. May should not have been permitted to bring this action on behalf of "minors she has alleged sexually assaulted her own children." She has no other basis that would give her standing to maintain this action.

This lack of standing existed at the time this action was filed in December 2017. At that time, the Family Court case and DSS's investigation were both still active. The courts of this state have long held that "[t]he rights and liabilities of the parties, that is, their rights to an action for judgment or relief, depend upon the facts as they existed at the time of the commencement of the action, and not at the time of trial." *Am. Agr. Chem. Co. v. Thomas*, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945). *Accord, e.g., Brock v. Bennett*, 313 S.C. 513, 518, 443 S.E.2d 409, 412 (Ct. App. 1994)(plaintiff lacked standing when he conceded he was not a member of a church at the time action seeking control of a church was commenced).

b. The court below lacked subject matter jurisdiction over the issues raised in the Complaint, because the issues raised in this case pertain to child abuse and neglect proceedings which, pursuant to S.C. Code Ann. §63-7-1610(A), are within the exclusive jurisdiction of the Family Court.

S.C. Code Ann. § 63-7-1610(A) provides that "[t]he family court has exclusive jurisdiction over all proceedings held pursuant to this article." It is undisputed that the interviews with the children were conducted in connection with an investigation of child abuse and neglect or in connection with a "proceeding held pursuant to this article," the latter being the Family Court case for non-emergency removal filed pursuant to § 63-7-1660. As a result, the Family Court, and not the Court of Common Pleas, is the only court with subject matter jurisdiction over disputes of the nature of the present dispute, at least at the time when it was a live controversy. In addition, the investigation was also conducted pursuant to the same article of the Code. (Title 63, Chapter 7, Article 3). The General Assembly doubtless intended for matters such as this to be heard by Family Courts because those courts deal with child protective services cases on a regular basis, as reflected by the numerous references to the Family Courts in Title 63, Chapter 7, Article 3. Indeed, Plaintiff May sought various types of restraining orders in her Answer and Counterclaim in the Family Court case, R. 787, several months prior to filing the present Common Pleas case, but apparently never pursued such relief in that appropriate forum.

Finally, there is no question that Fourth Amendment and related challenges can be raised in a Family Court proceeding. Indeed, in *S.C. Dep't of Soc. Servs. v. Wicker*, No. 2014-002734, 2016 WL 3211242, at *2 (Ct. App. June 8, 2016), a Fourth Amendment challenged was rejected on appeal solely because the appellants "never raised a due process or Fourth Amendment argument to the family court."

c. By the time this case came before the court below, it no longer presented a live case or controversy.

When this case came to trial in August 2020, DSS had not sought to interview the children in nearly three years, the last such interviews having been conducted in November 2017. The underlying Family Court action connected with the interviews was dismissed by consent on June 14, 2018, with it being agreed by DSS that any finding by DSS of abuse and neglect was overturned.

In light of these circumstances, there was no longer a live case or controversy that required intervention by the court below, even if, as discussed above, that court had jurisdiction over this matter and Ms. May could serve as the GAL, which she almost certainly cannot. The appellate courts of South Carolina routinely hold that "A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018), quoting *Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460,

477, 596 S.E.2d 51, 60 (2004). The Court in *Jowers, supra,* further held that "a . . . court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all." 423 S.C. at 361, 815 S.E.2d at 455.

Those holdings describe the state of the present case. As already discussed above, Ms. May offers nothing but unfounded speculation that at some future time there might be another allegation of abuse and neglect in the May household that would lead to DSS interviewing the May children in a school setting. She has claimed that this case is "capable of repetition, yet evading review." However, Plaintiff offers only speculation that the facts of this matter might repeat themselves later. Even if another instance of suspected abuse or neglect were to occur, however, Plaintiff cannot show why the Family Court could not enjoin DSS interviews upon a proper showing. In other words, such events are not "the kind that would "evade review" in the future.

The absence of a live claim defeats the ability of Plaintiff to obtain injunctive relief. *See, e.g., O'Shea v. Littleton,* 414 U.S. 488, 495–96 (1974)("[p]ast exposure to [allegedly] illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects"). As our Supreme Court has held, "[a]n injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by

the plaintiff." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014). Where, as here, there is no showing that adverse future events may occur at all, it follows that there has also been no showing of irreparable harm.

CONCLUSION

For the foregoing reasons, these Respondents respectfully submit that the decision of the court below should be affirmed.

Respectfully submitted,

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November 12, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Appellate Case No.: 2020-001352

Kaci May and Kaci May as guardian ad litem for A.R.M., J.H.M., J.T.M., C.B.M., J.R.M., and J.W. M.,..... Appellants

v.

Dorchester School District Two,
South Carolina Department of Social Services,
Michael Leach, and Jasmine Flemister..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondents DSS, et al., certifies that the Final Brief of these Respondents complies with Rule 211(b), SCACR.

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