THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Appellate Case Number 2024-001072

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

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Jul 23 2024

S.C. SUPREME COURT

RETURN TO PETITION FOR CERTIORARI

(RESPONDENTS SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, MICHAEL LEACH, AND JASMINE FLEMISTER)

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Respondents South Carolina Department of Social Services (DSS), Michael Leach, and Jasmine Flemister submit the following Return to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Procedural History.

On December 7, 2017, Plaintiffs filed a Complaint and Motion for a Temporary Restraining Order, seeking temporary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 and the South Carolina Constitution. Appx. 25-35. Plaintiffs sought to restrain Defendant DSS from "interrogating the Plaintiff children" without a court order or new allegation of abuse or neglect and to restrain Dorchester School District Two (DD2) from "facilitating" such interrogations. Appx. 33. In seeking an injunction, Plaintiffs alleged that DD2 and DSS violated their rights to be free from unreasonable seizures and unreasonable invasions of privacy by interviewing and permitting DSS workers to interview the minor children at DD2 schools without a court order, subpoena or exigent circumstances. The last such interviews occurred in November 2017, prior to the filing of this action. Appx. 1035 n.6 (Ct. App. opinion).[1]

[1] At the time when this action was filed, there was already pending a Family Court action brought by DSS against Kaci May and her husband. In that case, the Mays filed a counterclaim seeking relief similar to that sought in the present Common Pleas case. The Mays filed a motion in the Family Court action seeking, among other things, "[a]n order restraining SCDSS from interrogating Defendants' children at

The circuit court heard Plaintiffs' Motion for a TRO on July 29, 2019, more than 18 months after the motion was filed. By form order dated July 30, 2019, the circuit court denied the TRO both for failure to establish irreparable harm and for failure to establish that Plaintiffs lacked an adequate remedy at law. Appx. 7.

On the same day, the circuit court heard the motions to dismiss that had been filed by all Defendants. By form order dated March 17, 2020, the court granted only the motion to dismiss the individually-named DD2 defendants. Appx. 10. The other Defendants' motions to dismiss were denied. *Id.*

The case then proceeded through discovery and an unsuccessful mediation. A bench trial was held on August 11 and 12, 2020, at the conclusion of which the Court granted a directed verdict in favor of the Defendants. A written Order was issued on September 18, 2020. Appx. 18-23.

Plaintiffs then appealed to the court of appeals, which affirmed on March 13, 2024. Appx. 972-981. Petitioners timely sought rehearing, which the court of appeals denied by Order filed on May 29, 2024. The court of appeals also withdrew its original opinion and filed a substituted opinion on May 29, 2024. Appx. 1032-

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school." Appx. 818-819. Apparently, plaintiff Kaci May never sought to have that motion heard by the Family Court.

On June 14, 2018, the Family Court action was dismissed by voluntary stipulation. Appx. 551-552.

1041. The substituted opinion made no substantive changes to the original opinion. The Petition for Certiorari was filed on June 26, 2024.

B. Facts.

At the time of the 2017 filing of this action and the 2020 bench trial, Plaintiff Kaci May was 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. Appx. 1033 (Ct. App. opinion). [2] One or more of the adopted children suffered sexual abuse while in their biological family. *Id.* As discussed below, in March 2023, Ms. May relinquished her parental rights to two of the three adopted children.

This case had its beginnings in March 2017, when Ms. May, at a daylong meeting with DD2 personnel, "alleged in graphic detail that one of the adopted children had brutally raped one or more children in the May home." Appx. 1033 (Ct. App. opinion). DD2 reported this to DSS, which interviewed, or attempted to interview, the May children, either in school or at their home. The last interviews occurred in November 2017. The details of the interviewing process, and Ms. May's resistance to having the interviews occur, are detailed in the opinion of the court of appeals. Appx.133-135. All told, in fact, there were relatively few interviews, and they were of short duration.

[2] Ms. May's husband, Warren May, passed away in April 2020.

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. Nor is there any evidence that any such interviews have occurred at any time after the July 2020 bench trial. In fact, and as previously mentioned, in May and September 2021, two of the three adopted children, known in the present case as J.R.M. and J.H.M., were separately taken into emergency protective custody (EPC) by law enforcement.[3] Appx. 827, 828. (The Petition cites those two events as evidence that another DSS investigation had taken place, Pet. 19, but Petitioner's counsel, who presumably knows what happened, has not suggested that any more in-school interviews occurred after 2017.) From mid-2021 until at least the time of the court of appeals oral argument in June 2023, those

[3] These and other post-trial events, all of which are undisputed, are evidenced in two Family Court Orders issued in 2022 and 2023. Appx. 827-838. The events are summarized in a Rule 208(b)(7) letter from DSS's counsel to the court of appeals, sent several days prior to the oral argument. Appx. 825-826.

Court records are judicially noticeable when the facts set forth in those records are not subject to reasonable dispute. *See* Rule 201(b), SCRE. Plaintiffs' counsel is the source of the 2022 and 2023 Family Court Orders in the Appendix accompanying the Petition, and obviously does not dispute the facts set forth in those Orders. *See, e.g., Freeman v. McBee,* 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984)(court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records); *In re Papatones,* 143 F.3d 623, 624 (1st Cir. 1998)(appellate courts may notice another courts record as an adjudicative fact).

two children thereafter remained in foster care.[4] Eventually, by Order dated June 8, 2023, the Family Court approved Ms. May's relinquishment of parental rights to J.R.M. and J.H.M. Appx. 834. The same Order provided that legal and physical care of those two children would remain with DSS. *Id.*

ARGUMENT

1. The court of appeals correctly held that Petitioners made no showing of irreparable harm.

This Court has held many times that "[a]n injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Denman v. City of Columbia*, 387 S.C. 131, 140–41, 691 S.E.2d 465, 470 (2010)(emphasis added). Both courts below held that Petitioners had not shown irreparable harm to them. Appx. 1036 (court of appeals); Appx. 20-21 (circuit court). The Order of the circuit court summarized the absence of evidence of irreparable harm as follows:

> Plaintiff did not show irreparable harm that would justify an injunction. Two of the children, CBM and ARM, testified that they were not upset about the meetings or interviews with DSS. They were not crying and did not observe any of their siblings to be upset or crying. There was no evidence that any of the children's grades suffered or that any of the children were harmed to any extent that would override the need to meet or talk with them regarding the report of abuse or neglect, which

[4] DSS counsel has no knowledge of what became of those two children following that 2023 Order, but there has been no suggestion that they ever returned to the May home.

> was indisputably justified and reasonable in this case. Although Plaintiff Kaci May testified that the children were upset by the interviews with DSS, there was no evidence to support that the children suffered or would suffer harm in the absence of injunctive relief. . . . Further, 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.

Appx. 20-21.

The court of appeals agreed, holding that

> May has not identified any injury aside from inconvenience or mild upset at the prospect of DSS returning to interview her children. The children testified that they knew they did not have talk to DSS, and some exercised their right not to answer questions. . . . [There is simply no evidence to support a claim that any of the May children have been harmed or would suffer harm in the absence of injunctive relief.

Appx. 1036.

Although the Petition attempts to assert that those holdings were in error, the Petition cites no evidence that would indicate a likelihood of irreparable harm in the absence of a permanent injunction, and especially now that almost seven years have elapsed since the last set of interviews in November 2017. The holdings of the courts below were reached at times when the older two adopted children were still living in the May home. Now that both of those children are no longer part of the May family, the absence of any likelihood of irreparable harm is even more pronounced. Petitioner Kaci May cannot show even the slightest possibility that DSS might again seek to interview the remaining May children at a school. Unsurprisingly, the

Petition contains no suggestion at all as to how, with J.R.M. and J.H.M. no longer part of the family, there can be any likelihood that DSS would ever seek to interview those children. Indeed, the Petition for the most part reads as if those two children were still in the May household, which has not been the case for three years. *See, e.g.*, Pet. at 5, 6.

2. Petitioners also cannot satisfy the other prerequisites for obtaining injunctive relief.

a. Petitioners have not presented a legally-meritorious claim, because there is no federal or state court precedent holding that a constitutional violation occurred under the circumstances of this case.

As frequently stated by this Court, "[t]o obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Denman, supra,* 387 S.C. at 140, 691 S.E.2d at 470 (emphasis added). The use of the term "and" indicates that all three elements must be proven before an injunction can issue.[5] Moreover, and as the circuit court noted, "The standard for granting a permanent injunction is the same as that for preliminary

[5] Federal law is to the same effect. The leading federal case, cited thousands of times, is *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), which holds that "A plaintiff seeking preliminary injunctive relief must demonstrate: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." 555 U.S. at 7. Moreover, "[A]ll four requirements must be satisfied" to obtain the "extraordinary remedy" of a preliminary injunction. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 345–46 (4th Cir.2009), vacated on other grounds, 559 U.S. 1089 (2010)(emphasis added).

relief, except that the court must consider plaintiff's actual success on the merits rather than her likelihood of success. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987)." Appx. 20 (emphases added).

In light of Petitioners' failure to show irreparable harm as a matter of fact, it would normally not be necessary for the Court even to consider Petitioners' constitutional claims. However, Petitioners argue, using an altered quotation, that "[T]he denial of a constitutional right . . . constitutes irreparable harm for purposes of equitable jurisdiction." Pet. at 6-7, citing *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987). This is a misleading use of ellipsis, though, because the Fourth Circuit's actual holding was that "the denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction." *Id*., 818 F.2d 1132, 1135 (4th Cir. 1987)(emphasis added). The court of appeals correctly held that Petitioners cannot establish the denial of a constitutional right, so their failure to prove irreparable harm is without legal foundation as well as lacking a factual basis.

Specifically, the court of appeals agreed with the holding of the circuit court that the United States Supreme Court "has never held that a social worker's warrantless in-school interview of a child pursuant to a child abuse investigation violates the Fourth Amendment." Appx. 1037 (court of appeals), quoting Appx. 1022-1023 (circuit court). Both courts below cited *Camreta v. Greene*, 563 U.S. 692, 710–14 (2011), which examined in-school interviews in the Fourth Amendment

context but ultimately left the issue undecided. The Petition cites no case that holds otherwise.[6]

Further, and as the court of appeals pointed out, citing the circuit court order, "the DSS interviews here were authorized by statute and that May failed to show either DSS or the School District acted unreasonably by interviewing the children or permitting the interviews." Appx. 1037, citing S.C. Code Ann. § 63-7-920(B) and –(C). The latter subsection provides in part that "interviews [by DSS or law enforcement] 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." Appx. 978. The court of appeals therefore unsurprisingly concluded that "the plain language of subsection (C) permits DSS to interview children at school and—in the discretion of DSS or law enforcement—such interviews may be conducted 'outside the presence of the parents.' § 63-7-920(C)." Appx. 1039. To the extent that Petitioner may be attempting to claim that interviews conducted pursuant to § 63-7-920(C) would violate the Fourth Amendment and other constitutional provisions,

[6] The Petition attempts to suggest that Petitioners' position on the constitutional issues is supported by a recent Ninth Circuit case, *Scanlon v. County of Los Angeles*, 92 F.4th 781 (9th Cir. 2024). Pet. 9. However, *Scanlon* expressly declined to address the plaintiff's claim that her daughter's Fourth Amendment rights were violated by a child protective services school interview. *Id.* at 809 ("[W]e decline the invitation to resolve the Fourth Amendment contours of social worker interviews of children at school.")

Pet. 1-2, the court of appeals, as discussed above, correctly pointed out that no case has ever held that such interviews violate constitutional rights.

b. Petitioners have not shown the absence of an adequate remedy at law

The court of appeals rejected Petitioners' claim that there was no adequate remedy at law, holding that: (a) "[w]hile it is always possible that future events could lead to another DSS investigation, it is speculative to assume such will actually take place," Appx. 1041, and (b) "May's decision to forgo a state law damages claim and pursue only injunctive relief does not render the remedy at law inadequate for a case that might merit relief." *Id.*

Regarding this issue, the Petition (1) fails to acknowledge that Ms. May has relinquished custody of the two children accused of sexual assault, *see, e.g.*, Appx. 482, and indeed argues that those children could suffer harm as result of being in the May household when they are no longer there, as mentioned above; (2) rehashes the claims of irreparable harm, already discussed; and (c) confuses the issue by bringing in mootness arguments when the court of appeals declined to dismiss this case as moot. Appx. 1036-1037 n. 7. The Petition does not actually address the tests for whether the remedy at law is adequate. All told, the Petition simply fails to present an argument on this issue at all, much less an argument that would warrant this Court accepting this case.

3. These Respondents have presented several additional sustaining grounds, any of which would support affirmance if this Court were to review this case.

In the court of appeals, these Respondents presented several additional sustaining grounds, any one of which would support affirmance if this Court were to review the case. The court of appeals declined to address those alternative grounds, in light of the findings and conclusions set forth in its opinion. App. 1041 n. 12. At this point in this case, these Respondents would simply enumerate those grounds, with cites to the portions of the court of appeals brief of the DSS Respondents in which those grounds are discussed. These Respondents reserve the right to argue those grounds more fully if this Court accepts this case.

A. Plaintiff Kaci May has no standing to represent the interest 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. Appx. 944-946 (Brief of DSS Respondents 21-23).

B. The circuit court 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. Appx. 947-948 (Brief of DSS Respondents 24-25).

C. By the time this case came before the circuit court below, it no longer presented a live case or controversy. Appx. 948-950 (Brief of DSS Respondents 25-27).[7]

CONCLUSION

For the foregoing reasons, these Respondents respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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[7] These Respondents also incorporate by reference any additional points made in the Return of the DD2 Respondents that are factually applicable the DSS Respondents.