IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MAY GLENN,

Plaintiff,

v.

OFFICER ROBERT W. MEYER and SERGEANT DANIEL NIKOLAY,

Defendants.

OPINION AND ORDER

01-C-458-C

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff May Glenn contends that defendants Meyer and Nikolay, law enforcement officers employed by the Jefferson County, Wisconsin, Sheriff's Department, deprived her of a constitutionally protected liberty interest without due process when they removed her infant son from her custody and gave the child to his father. Jurisdiction is present. 28 U.S.C. § 1331. Presently before the court is defendants' motion for summary judgment. Because I find that defendants are shielded from plaintiff's claims by the doctrine of qualified immunity, defendants' motion will be granted.

For the purpose of deciding the pending motion, I find from the parties' proposed

findings of fact that the following material facts are undisputed.

UNDISPUTED FACTS

Defendants Robert Meyer and Daniel Nikolay are employed by the Jefferson County Sheriff's Department. Defendant Meyer is a deputy and defendant Nikolay is a sergeant. Plaintiff May Glenn and Jamyn Rukavina Sr. are the parents of Jamyn Rukavina, Jr., who was born on June 23, 2000. They have never been married. During the time leading up to the events giving rise to this suit, their child always lived with plaintiff.

On August 2, 2000, Rukavina filed a temporary complaint for custody against plaintiff in Harford County, Maryland, seeking custody of their child. The Harford County clerk of court issued a summons and order to plaintiff to show cause in writing, within 15 days, why the relief requested in the temporary complaint should not be granted. Plaintiff was served with the summons and order on August 3, 2000. Plaintiff never responded to the show cause order.

On November 13, 2000, plaintiff, who was 19 years old, still had legal custody of her child, even though she had never responded to the Maryland court's show cause order. At approximately 5:43 p.m. on that day, Rukavina asked a representative of the Jefferson County Sheriff's Department to accompany him to plaintiff's mother's home in Watertown, Wisconsin, where plaintiff was living, in order to "keep the peace" while he took custody of

his son. Defendant Meyer met Rukavina near plaintiff's home. Rukavina told defendant Meyer that he had been awarded legal custody of his son and showed Meyer the order to show cause, temporary complaint for custody and proof of service from the Maryland court. The temporary complaint alleged that plaintiff had left the state of Maryland with the child without notifying Rukavina. The show cause order indicated that plaintiff had been given 15 days in which to respond to the Maryland court in writing. Rukavina told defendant Meyer that plaintiff had never responded to the court's order. However, Rukavina did not show defendant Meyer a court order awarding him custody of his son, and Meyer did not ask for one. Because Rukavina called the sheriff's department at 5:43 p.m., there was no opportunity to contact the Harford County clerk of court that day to obtain further information about the order, although the clerk could have been contacted the following morning. Defendant Meyer did not verify Rukavina's current address or employment.

When defendant Meyer arrived at the Watertown house, plaintiff was there along with her son, mother and stepfather, grandmother and one or more foster children who were being cared for by plaintiff's mother. Defendant Meyer parked his marked squad car in the driveway and approached the door in uniform. Plaintiff's mother agreed to let defendant Meyer enter her home. Defendant Meyer asked Rukavina to explain to plaintiff's mother why they were there. Rukavina said they were there to take his son because plaintiff had never responded to the Maryland order. Defendant Meyer showed the papers he had been

given by Rukavina to plaintiff's stepfather. Plaintiff admitted to defendant Meyer that she had never responded to the Maryland temporary complaint and order that were served upon her in August. Plaintiff admitted also that she had taken the couple's child out of Maryland and thus away from Rukavina without warning on August 1 or 2, 2000, as alleged in the complaint. (Although plaintiff and Rukavina had reconciled later in August when Rukavina came to Wisconsin, defendants were never told this). Plaintiff's mother and stepfather questioned the paperwork. Plaintiff's mother attempted to contact her attorney without success. Plaintiff's parents asked defendant Meyer to contact someone to insure that the papers could be legally enforced. In response, defendant Meyer called defendant Nikolay and described the details of the situation he was confronting. Defendant Nikolay told defendant Meyer that on the basis of the information available to them, the child should be given to Rukavina because plaintiff never responded to the complaint for custody. Defendant Nikolay told defendant Meyer that a default judgment was likely entered in favor of Rukavina because plaintiff had never responded to the complaint.

After this conversation and despite plaintiff's pleas that her son be allowed to remain with her, defendant Meyer told plaintiff that custody of her son was being transferred to Rukavina because she had never responded to the Maryland complaint. Plaintiff or her parents told defendant Meyer that Rukavina had a drinking problem but Meyer did not talk to Rukavina about these concerns. Nor did defendant Meyer ask Rukavina where he

intended to take his son. Because Rukavina did not have a car seat for his son, defendant Meyer made him go to a department store and buy one before allowing him to leave with his son.

On the morning of November 14, 2000, plaintiff contacted the Harford County circuit court and learned that no order had been issued transferring custody of her child to his father. Rukavina and the child were not located for seven days. During this time, Rukavina had taken his son to Maryland.

OPINION

Defendants' summary judgment motion hinges on one question: are the defendants entitled to qualified immunity? "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). It "is a judicially created doctrine that stems from the conclusion that few individuals will enter public service if such service entails the risk of personal liability for one's official decisions." Donovan v. City of Milwaukee, 17 F.3d 944, 947 (7th Cir. 1994). The doctrine "'gives public officials the benefit of legal doubts.'" Id. at 951 (citation omitted).

A. Constitutional Violation

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." Hope v. Pelzer, No. 01-309, 2002 WL 1378412, at *4 (U.S. June 27, 2002) (citing Saucier, 533 U.S. at 201). Plaintiff alleges that she has a Fourteenth Amendment liberty interest in the custody of her child and that she was deprived of this interest without due process when defendants took her infant son from her and gave the child to his father. In Morrell v. Mock, 270 F.3d 1090, 1100 (7th Cir. 2001), the plaintiff, an Illinois resident, alleged that law enforcement officers gave her child to a man claiming to be the child's father on the basis of an ex parte New Mexico default judgment, without first providing her notice and an opportunity to object to the transfer of custody in Illinois. Finding the New Mexico default order insufficient to authorize a change of custody in the absence of some kind of pre-deprivation hearing in Illinois, the Court of Appeals for the Seventh Circuit held that "absent exigent circumstances, due process requires, at a minimum, pre-enforcement notice and some opportunity to object before law enforcement officials may separate a parent from her child pursuant to an out-of-state default order transferring custody." Id. Accordingly, the court of appeals concluded that the plaintiff had alleged facts sufficient to state a Fourteenth Amendment claim "for deprivation, without due process, of her . . . liberty interest in not being separated" from her child. Id.

Similarly, in this case defendants acted on the basis of (1) a Maryland complaint for

custody; (2) a court order to show cause; and (3) proof of service of the order, along with an admission by plaintiff, who at the time was residing in Wisconsin, that she had never responded to the Maryland show cause order. Taken together, these documents are no more authoritative for purposes of transferring custody of a child than the out-of-state default order in Morrell. Indeed, unlike the defendants in Morrell, defendants in this case did not have an order authorizing a custodial change. Rather, defendants assumed erroneously that a default order had been entered because plaintiff had never responded to the Maryland court's show cause order. Accordingly, viewing the facts in the light most favorable to plaintiff and drawing all inferences in her favor, I find that she has stated a viable Fourteenth Amendment claim that defendants deprived her of her liberty interest in not being separated from her child without affording her due process. For purposes of their motion for summary judgment, defendants do not dispute this conclusion.

B. No Clearly Established Law

Because plaintiff has survived the threshold qualified immunity inquiry, "the next, sequential step is to ask whether the [constitutional] right was clearly established," an inquiry that "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable

officer that his conduct was unlawful in the situation he confronted." Id. at 202 (citing Wilson v. Layne, 526 U.S. 603, 615 (1999)). "To show this, a plaintiff may point to closely analogous cases establishing that the conduct is unlawful, or demonstrate that the violation is so obvious that a reasonable state actor would know that what he is doing violates the Constitution." Morrell, 270 F.3d at 1100. "If the law did not put the officer on notice that his conduct was clearly unlawful, summary judgment based on qualified immunity is appropriate." Saucier, 533 U.S. at 202. This is because qualified immunity shields "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

For purposes of this analysis, the question is not whether it was clearly established that law enforcement officials may not interfere with a mother's liberty interest in her child's custody until she receives notice and an opportunity to be heard. According to the Court of Appeals for the Seventh Circuit, "[t]he statement of the right at this level of generality . . . is of little help in determining the reasonableness of the defendants' conduct." Morrell, 270 F.3d at 1100. Rather, in Morrell, the court of appeals concluded that the appropriate question in that case was "whether it would be clear to reasonable officials in the defendants' position that enforcing the New Mexico court's order without prior notice or an opportunity to be heard in Illinois was unconstitutional." Id. Similarly, in this case the appropriate question is whether it would be clear to reasonable law enforcement officers in defendants'

position that it was unconstitutional to transfer custody of plaintiff's child to his father on the basis of the Maryland court documents and other information of which defendants were aware. See Wilson, 526 U.S. at 615 ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

Plaintiff has identified three cases she believes are closely analogous to this one and that clearly establish that defendants' conduct was unlawful. In examining these cases, I am aware that "officials can still be on notice that their conduct violates established law even in novel factual circumstances" and that "rigid [insistence] on factual similarity" between existing case law and the facts of the case under consideration is inappropriate. Hope, 2002 WL 1378412, at *6-7. I am also aware that "[i]n ascertaining whether a particular right has been 'clearly established,'" the Court of Appeals for the Seventh Circuit has "not required binding precedent from the Supreme Court or the Seventh Circuit." Donovan, 17 F.3d at 952. Rather, the court of appeals seeks "'to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'" Id. (citation omitted).

Plaintiff points first to Wooley v. City of Baton Rouge, 211 F.3d 913 (5th Cir. 2000), a case from Louisiana decided six months before the events giving rise to this suit. Plaintiff characterizes this case as "a very recent cutting-edge pronouncement of the standards [to] which officers may be held [when] assisting with [the] change of custody of children." Plt.'s

Br. in Opp'n to Summ. J., dkt. #17, at 14. As an initial matter, it is questionable whether the characterization of a case as "cutting-edge" helps plaintiff undermine defendants' qualified immunity defense. "Cutting edge" means "the most advanced or innovative position; the avant-garde." Webster's New World College Dictionary 359 (4th ed. 2001). Yet the doctrine of "[q]ualified immunity operates . . . [both] to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful" and "to grant officers immunity for reasonable mistakes as to the legality of their actions." Saucier, 533 U.S. at 206. It is difficult to reconcile the doctrine's notice function with plaintiff's reliance on a case of very recent vintage from Louisiana that is on the "cutting edge" of the law in this area. In any case, Wooley, is easily distinguishable on its facts.

In Wooley, the plaintiffs sued several law enforcement officers who assisted in effecting the transfer of a child from its biological mother and its primary caregiver (two different persons) to the child's maternal grandparents. The officers acted on the basis of a parish court order temporarily transferring custody of the child to the grandparents. They did so in spite of the fact that the child's primary caregiver also had a court order from a different parish awarding her custody of the child, albeit one dated earlier than the grandparent's order. The officers refused to let the child's caregiver call her lawyer or the child's mother before removing the child from its home. Wooley, 211 F.3d at 917-18.

Unlike the plaintiff in Wooley, plaintiff did not present defendants with papers

demonstrating that she was the child's legal custodian. Although Rukavina did not have a court order transferring custody, he had an order directing plaintiff to show cause why custody of their son should not be transferred to him as well as an admission from plaintiff that she never responded to the order. In addition, plaintiff admitted to defendant Meyer that she had fled the state of Maryland with her child without giving Rukavina notice of their departure, as alleged in his complaint for custody. Although plaintiff and Rukavina later reconciled, defendants were not made aware of this fact. In addition, plaintiff's mother was allowed to contact her attorney but was unable to do so. Finally, at plaintiff's parents' request, defendant Meyer contacted his supervisor, defendant Nikolay, to insure that he agreed with Meyer's proposed course of action. Accordingly, the situation confronted by defendants and their conduct in response to it was substantially different from the events described in Wooley.

More important, in rejecting the defendants' qualified immunity defense, the Wooley court noted that "[t]he officers could not reasonably have viewed the order as one granting them authority to effect the transfer of custody of [the plaintiff's child] in light of the Louisiana statute which requires a civil warrant under such circumstances." Id. at 926. The court concluded that "in light of [this] express state law," the defendants' actions were unreasonable. Id. at 927. However, in the instant case plaintiff has pointed to no analogous Wisconsin law requiring officers to obtain "a civil warrant directed to law enforcement

authorities" in addition to a court custodial order before effecting a transfer of custody, and I am aware of none. Id. at 926 (quoting La. R.S. 9:343); see Williams v. Blaisdell, 173 F. Supp. 2d 574, 582 (N.D. Tex. 2001) (distinguishing Wooley because of absence of analogous Texas law). I am not persuaded that Wooley clearly establishes that defendants' conduct was unlawful.

The two other cases cited by plaintiff are equally unpersuasive. In Hurlman v. Rice, 927 F.2d 74 (2d Cir. 1991), the plaintiffs alleged that several law enforcement officers seized a child from her mother and delivered the child to her father in the middle of the night. The child and her mother were living at the mother's parents' home. The officers allegedly entered the home without consent, forcibly seized the child, threatened the mother and her parents with arrest and refused the plaintiffs' demand that they consult a superior officer before taking the child. One of the officers involved in seizing the child was a long-time friend of the child's father. The officers acted on the strength of a family court order directing the child's mother to show cause why she should not be enjoined from residing with her daughter at her parent's home. However, a provision of the order that would have given the child's father temporary custody of the child had been stricken explicitly by the judge. The plaintiffs pointed out to the officers that the order did nothing more than direct the mother to show cause why she should not live at her parent's home with her daughter and did not provide for summary removal of the child from the home, but their protestations

were ignored. Id. at 76.

In Hurlman, the Court of Appeals for the Second Circuit concluded that it lacked appellate jurisdiction to consider the defendants' qualified immunity defense. In the district court, the defendants had moved for summary judgment on the basis of qualified immunity. The district court dismissed the motion without comment and the defendants appealed immediately. The court of appeals noted that a "denial of a motion for summary judgment dismissing a claim on the basis of qualified immunity is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 only to the extent that it turns on an issue of law." Id. at 79. Rather than hinging on a purely legal question, the lower court's decision was based upon a record rife with factual disputes. For instance, the parties contested hotly whether the defendants entered the home with the plaintiffs' consent and whether the defendants threatened to arrest the plaintiffs. Id. By contrast, in the instant case there is no dispute that plaintiff and her parents gave their consent for defendant Meyer to enter their home. Plaintiff alleges that her mother only "let Deputy Meyer in[to] the house because she thought the reason he was there might have to do with her foster children." Plt.'s Br. in Opp'n to Summ. J., dkt. #17, at 4. However, this assertion is immaterial because there is no allegation that defendant Meyer knew this was the reason plaintiff's mother consented to his entry. He knew simply that he was being allowed to enter the home.

In addition, in Hurlman the defendants attempted to justify their actions on the basis

of certain information they allegedly had indicating that the child might be at risk in the plaintiffs' home. However, the court of appeals found that too many factual questions existed as to just what information the defendants possessed at the time they effected the transfer of custody. Id. at 80. Here by contrast, there is no dispute that defendants acted on the basis of a show cause order that plaintiff admitted she never responded to as well as plaintiff's candid admission that she had fled the state of Maryland with her child without giving notice to the child's father. Although plaintiff notes that after she fled, she and the child's father had reconciled in Wisconsin, defendants were never made aware of this fact. In Hurlman, the court of appeals found that there were "plainly factual questions as to what actually occurred, [and] what information the officers had." That is not the situation in this case, where there are few relevant factual disputes. Accordingly, Hurlman does not clearly establish that defendants' conduct was unlawful.

Plaintiff's last case is Bennett v. Town of Riverhead, 940 F. Supp. 481, 489 (E.D.N.Y. 1996), but that court's qualified immunity analysis relies almost entirely on Hurlman and its "remarkably similar" facts. In addition, the court made only a cursory effort to analyze whether the relevant right at issue was clearly established. It noted only that "the Hurlman case in 1991 clearly establishes the liberty interests at issue here." This general formulation of the right in question does little to demonstrate that defendants' conduct in the instant case violated clearly established law. See Morrell, 270 F.3d at 1100; Donovan, 17 F.3d at

951 (noting that "the right allegedly violated must have been 'clearly established' in a 'particularized' sense and '[t]he contours of the right must be sufficiently clear'") (quoting Anderson v. Creighton, 483 U.S. 635, 639-40 (1986)). Finally, I note again that none of the cases cited by plaintiff involve an admission comparable to the one she made to defendants that she had left the state of Maryland with her child and traveled halfway across the country without giving notice to the child's father. In summary, I conclude that none of the cases plaintiff relies on clearly establish that defendants' conduct was unlawful.

This conclusion is reinforced by the Court of Appeals for the Seventh Circuit's recent decision in Morrell, a case decided a year *after* the events giving rise to this case. Therefore, even though it holds that a parent is entitled to pre-enforcement notice and an opportunity to object before state officials may separate her from her child on the basis of an out-of-state default order, because it was issued after the events at issue here, it cannot be used by plaintiff to show that defendants violated a *clearly established* law. Nevertheless, the outcome of that case's qualified immunity analysis is instructive.

In Morrell, 270 F.3d at 1092, the plaintiff turned her child over to Illinois law enforcement authorities on pain of arrest. The authorities gave the child to a man who purported to be the child's father, even though the child's paternity was in dispute. The law enforcement officials acted on the advice of the chief of the state's attorney's civil division, whose reading of the law led him to conclude that an ex parte New Mexico default judgment

granting custody to the putative father should be enforced without giving the mother pre-enforcement notice or an opportunity to object. The state's attorney reached this conclusion even though an Illinois judge had denied the father's request to enforce the New Mexico order. Id. at 1092-94. From these facts, the court of appeals concluded that both the law enforcement officers *and* the state's attorney were entitled to qualified immunity.

By contrast, the facts in this case are less extreme than those in Morrell. In Morrell, the defendants took the child from its mother and gave her to a man whose paternity had yet to be established. Here, there is no dispute that defendants turned the child over to its father. Most notably, in a factual situation similar to the one at issue in this case, the Morrell court granted an experienced state's attorney qualified immunity, even though he knew that a state judge had refused to enforce the New Mexico court's ex parte order. In the instant case, it would be questionable to hold defendants, who are not lawyers, to a higher standard than that to which the court held the experienced state's attorney in Morrell. Plaintiff emphasizes that unlike the defendants in Morrell, the defendants in this case had no court order transferring custody. Nevertheless, defendants had a Maryland order to show cause along with proof that it had been served and plaintiff's admission that she never responded to the order. This admission gave defendants reason to assume that a default judgment had been entered against plaintiff. Although this assumption was ill-advised, I cannot say that it was wholly unreasonable, particularly in light of plaintiff's admission that

she had left Maryland with her child without giving notice to the child's father.

Plaintiff's separation from her child was obviously traumatic and she was understandably dismayed by defendants' actions. Defendants should not have separated her from her child on the mere assumption that a default order had been entered against her in Maryland. Furthermore, in the wake of Morrell, law enforcement officials in this circuit would be well advised to review the procedures they employ when thrust into the unenviable position of mediating child custody disputes. However, given the information defendants had when they effected the transfer of plaintiff's son to his father and the state of the law at that time, I am persuaded that the constitutional violation that presumptively occurred in this case was not clearly established and that no reasonable jury could conclude that the violation was so obvious that a reasonable state actor would have known that his conduct was illegal. Accordingly, I will grant defendants' motion for summary judgment.

ORDER

IT IS ORDERED that the motion for summary judgment of defendants Robert W. Meyer and Daniel Nikolay is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 16th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge