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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEANNA FOGARTY-HARDWICK,	
Plaintiff and Respondent,	G039045
v.	(Super. Ct. No. 01CC02379)
COUNTY OF ORANGE et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Reversed in part and remanded with directions.

Buchalter Nemer, Robert M. Dato and Efrat M. Cogan; Beam, Brobeck, West, Borges & Rosa, Byron J. Beam and Glen A. Stebens, for Defendants and Appellants.

Law Offices of Shawn A. McMillan, Shawn A. McMillan, Sondra Sutherland and Jody Hausman; Law Offices of Donnie R. Cox, Donnie R. Cox and Dennis B. Atchley, for Plaintiff and Respondent.

The County of Orange, along with two of its social workers, Marcie Vreeken and Helen Dwojak (collectively the County), appeals from a substantial monetary judgment in favor of Deanna Fogarty-Hardwick for damages caused by the County's violation of her federal civil rights.[1] Specifically, the County was found liable based upon improper conduct by the social workers, which caused Fogarty-Hardwick to lose custody of her two daughters in a dependency proceeding.[2]

Although the County makes numerous arguments challenging liability in this case, none of them is persuasive. Similarly, we reject the County's challenge to the amount of damages awarded, and to the trial court's use of a "multiplier" in connection with its award of attorney fees to Fogarty-Hardwick.

However, we do conclude the trial court erred by awarding injunctive relief against the County, and remand the case to the trial court with directions to strike that injunctive relief from the judgment. In all other respects, the judgment is affirmed.

FACTS

Fogarty-Hardwick and her former husband separated in 1995, and obtained a status-only judgment of dissolution in early 1998. The couple has two daughters, K. and P. K. is autistic. Initially, Fogarty-Hardwick had primary custody of the girls, with her former husband having custody three weekends per month. However, in late 1999,

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[1] Section 1 of the Civil Rights Act of 1871, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." (42 U.S.C. § 1983, rev. stat. § 1979.)

[2] The County has filed two requests for judicial notice. The first was filed in conjunction with its opening brief on appeal, and asks us to judicially notice portions of the records in the underlying dependency court and family court proceedings. The County contends the documents provide evidentiary support for arguments advanced in the opening brief. The second request was filed in conjunction with the County's reply brief, and asks us to judicially notice a different part of the record in the dependency case, which it contends would refute evidence relied upon by Fogarty-Hardwick in her respondent's brief. None of these portions of the dependency case record was in evidence at trial; nor does the County contend it asked the trial court to take judicial notice of them. We consequently deny both requests for judicial notice.

the husband made a motion in the family court for full custody, claiming he had difficulty coparenting with Fogarty-Hardwick.

In November of 1999, Fogarty-Hardwick brought K. to the therapist who had been engaged to help the girls "adjust[] to their father's recent remarriage." They reported to the therapist that Fogarty-Hardwick's former husband had sexually abused K. The therapist was under a mandatory duty to report such allegations to authorities, and she did so.

As a result of the therapist's report, the Orange County Social Services Agency (SSA) filed a dependency petition alleging the two daughters were at risk of serious physical harm or illness, and sexual abuse. At the initial detention hearing on November 19, 1999, the court ordered the children remain in the custody of Fogarty-Hardwick, with her former husband allowed monitored visitation. Although another social worker was initially assigned to the case, Vreeken succeeded her in fairly short order. Dwojak was Vreeken's supervisor, and also had some direct involvement in the handling of the case.

Unfortunately, there were problems with the former husband's visitation, and disputes arose as to who was responsible for those problems. Among other things, the daughters were uncooperative, and apparently expressed unwillingness to visit with their father. Additionally, K. made allegations of misconduct against one of the monitors, and he was replaced for a period of time.

On February 8, 2000, SSA filed an amended petition, adding allegations that K. had been placed in the middle of her parents' deteriorating relationship; that Fogarty-Hardwick had made derogatory comments to her, causing her to suffer "anxious attachment" to Fogarty-Hardwick; and that Fogarty-Hardwick's "hypervigilant attitude" toward her former husband and his new wife had caused K. to suffer emotional distress.

On February 13, 2000, Fogarty-Hardwick brought her daughters to a monitored visit with their father. The daughters resisted, and although the monitor tried

to coax them, he was unsuccessful, and Fogarty-Hardwick ultimately took them home. Two days later, Fogarty-Hardwick brought the girls for another monitored visit at the SSA office. The visit itself went well, but in its wake, Vreeken spoke with both girls, telling them they were *required* to visit with their father, and "if they didn't visit with their father, the judge was going to put them in a home." This caused both girls to become frightened and start to cry. P. ran to get her mother, leaving K. alone with Vreeken. When Vreeken brought K. to join P. and Fogarty-Hardwick, K.'s face was discolored and her eyes were swollen.

Vreeken informed Fogarty-Hardwick (apparently outside of the children's presence) that she had told the children they would be placed in a home if they didn't visit with their father, which upset Fogarty-Hardwick to such a degree that she vomited. She begged Vreeken for guidance as to what more she could do, because she didn't want to lose her daughters. Vreeken responded with "you'd better call your attorney."

On February 17, 2000, two days after that disastrous meeting, the court held a hearing on the allegations of the amended petition. In connection with the hearing, the court had an off-the-record discussion with counsel, and also a discussion with Vreeken. Vreeken made false allegations against Fogarty-Hardwick, including assertions that she had caused her daughters to skip a mandatory visit with their father, and that she had told the children that their father was trying to take them away from her. In reality, it was Vreeken, and not Fogarty-Hardwick, who had made inappropriate comments to the children, including the threat that if they did not visit with their father, they would be put "in a home." The social workers also alleged Fogarty-Hardwick had been responsible for turning K. against the visitation monitor.

Although Fogarty-Hardwick denied all these things, the court nonetheless concluded, based upon the evidence of Fogarty-Hardwick's conduct as reported by the social workers, that she was "using these children." The court emphasized "[t]here is no question in my mind, based on what I have got right now before me, that that's what's

going on." The court acknowledged that Fogarty-Hardwick denied engaging in the conduct the social workers had accused her of, and noted: "it may well be that you are right and you didn't say these things, but from the evidence I have before me right now, it looks like you [did.] And just as at the detention hearing, I have got to be looking out for the welfare of these children. I have got to do that today, too, based on what I have before me right now. . . . I think I have no other choice but to do that. [¶] So I am going to find that it's of immediate and urgent necessity for the protection of these children that they be removed from your home . . . ." The children were taken into SSA custody that same day.

The social workers then filed a second-amended petition on February 23, 2000, in which they reiterated, as official allegations, the false claims they had made to the court at the February 17 hearing.

After the girls were removed from Fogarty-Hardwick's custody, they were placed in the Orangewood Children's Home, where they remained for more than a month. Fogarty-Hardwick was restricted to supervised visitation. Although the court authorized SSA to return the girls to Fogarty-Hardwick's custody on February 23, 2000, the social workers refused to do so. Instead, on March 21, 2000, the girls were moved to foster care, where they remained until May of 2000.

Meanwhile, on March 1, 2000, after a trial setting conference, Vreeken engaged in a highly charged conversation with Fogarty-Hardwick concerning the false claims made by the social workers about Fogarty-Hardwick's conduct. Vreeken got angry, and threatened that if Fogarty-Hardwick did not "submit" to her will, she would "never see [her] kids again." And while both girls, and especially K., exhibited significant emotional distress in their placement, which was reported to SSA by their therapist, that information was not conveyed to the court by the social workers. Instead, Vreeken falsely claimed, under oath in testimony before the court, that the children were doing well.

Both social workers also demeaned Fogarty-Hardwick to others involved in the case, portraying her as a spoiled beauty queen who was born with all the advantages and was used to getting her way.

In May of 2000, the dependency court ordered an evaluation of the children by a licensed family therapist, in an effort to determine the truth of K.'s assertion that her father had molested her, and the extent to which the parents' conduct was otherwise causing the children to suffer emotional distress. In her report, the therapist concluded that neither parent would knowingly abuse the children, and neither posed any significant risk of physical harm to the children. She believed K.'s accusation of sexual abuse had been "too coincidental" to be credible, and did not appear "spontaneous." The therapist did not conclude that Fogarty-Hardwick had made any conscious effort to encourage K. to make a false claim of sexual abuse, but believed that due to K.'s autism, she was less able to differentiate between her own experiences and what she had been told. Thus, Fogarty-Hardwick's own fears and preoccupation with the issue had unduly influenced K.'s perceptions.

The therapist also found that both parents had inflicted some degree of emotional abuse on the children, by virtue of their difficult relationship, but that the father was more able to differentiate between his own needs and those of his children, and was thus better at shielding the children from his emotional issues.

The therapist concluded that while Fogarty-Hardwick's visits with the children should remain monitored, her former husband should be allowed unrestricted contact.

Ultimately, on May 19, 2000, Fogarty-Hardwick signed a voluntary case plan, which provided the dependency case would be dismissed, and the children released from foster care, upon certain conditions. Specifically, the children would be released into the temporary custody of their father, and Fogarty-Hardwick would be restricted to

monitored visitation, which could be increased, and the terms liberalized, as she complied with the requirements of the plan.

Fogarty-Hardwick believed that her acquiescence in the plan was necessary to get her children out of foster care, and felt that she had no choice but to agree, given the difficulties suffered by the children while in foster care. Once the plan was signed, the dependency case was dismissed, and the custody issue was transferred back to the family court.

Despite Fogarty-Hardwick's complaints, and the concerns expressed by others about the handling of this dependency case, SSA did not investigate the situation or consider assigning different social workers to the matter. Neither of the social workers involved was disciplined. Instead, Vreeken was promoted to supervisor in 2001.

The custody proceedings in family court were protracted, and the court did not enter a final custody order until December of 2001. In that order, it awarded legal and physical custody of the children to Fogarty-Hardwick's former husband. However, as the County acknowledges, while the family court concluded that no sexual abuse had occurred, it "believed Deanna thought the [child abuse] accusation to be true . . . ," and thus made no determination she had acted in bad faith in connection with the dependency proceedings.

Fogarty-Hardwick finally regained shared custody of her daughters in June of 2006. She had filed this lawsuit in February of 2001, alleging tort causes of action based upon state law, as well as causes of action under federal law, which sought damages based upon alleged violations of her constitutional right to familial association. The basis of these causes of action was Fogarty-Hardwick's allegation that the County's social workers had relied upon "intentional[ly] false statements," fabricated evidence, and "perjury" as part of a successful effort to convince the juvenile court to remove her daughters from her custody and place them in foster care.

Fogarty-Hardwick also alleged the social workers deliberately withheld information from the court concerning the emotional detriment suffered by her daughters while in foster placement, and thereby convinced the court to extend the children's placement. Fogarty-Hardwick also asserted the County had a policy of "deliberate indifference" to the rights of parents in her situation, and as a result of that policy, the County failed to supervise, control or direct the conduct of its social workers.

The County challenged several iterations of Fogarty-Hardwick's complaint, and relied upon collateral estoppel and absolute immunity under state law as the bases for its demurrer to her second amended complaint. Although the trial court sustained that demurrer in its entirety without leave to amend, this court determined the ruling was correct only as to the state law tort claims. Rather than relying upon the arguments made by the trial court in sustaining the demurrer, we concluded Fogarty-Hardwick had failed to state a cause of action under state law. However, we also concluded the causes of action based upon the alleged violation of Fogarty-Hardwick's federal civil rights had been properly alleged, and reversed the judgment with directions to overrule the demurrer with respect to those claims. (*Fogarty-Hardwick v. County of Orange* (Mar. 29, 2004, G030302) [nonpub. opn.].)

In that prior opinion, we noted that while the County had relied upon absolute immunity in its original appellate briefs, it had omitted any reference to the defense in a supplemental brief filed in response to this court's invitation for further briefing with respect to the federal civil rights claims. We suggested the omission reflected the County's recognition that a then-recent decision of the Ninth Circuit Court of Appeals, *Miller v. Gammie* (9th Cir. 2002) 335 F. 3d. 889, "holds that social workers have absolute immunity only for the quasi-prosecutorial decision to institute dependency proceedings. Beyond that, the burden is on a social worker defendant to show that other functions he or she performed are similar to conduct accorded absolute prosecutorial immunity at common law." (*Fogarty-Hardwick v. County of Orange, supra,* G030302, p.

14.) We then noted that the claims asserted by Fogarty-Hardwick included conduct occurring after the initiation of the dependency case, and thus that "the demurrer to the federal claims cannot be sustained on this ground." (*Id.* at p. 15.) We specifically left it to the trial court, on remand, "to sort out which of the individual defendants may be protected by absolute (or qualified) immunity, should that issue be raised by the County upon a proper motion." (*Ibid.*)

In its answer to the second amended complaint, the County pleaded the affirmative defense of qualified immunity, but did not plead the defense of absolute immunity. The parties then conducted discovery.

In April of 2006, the County moved for summary judgment, arguing (among other things) that (1) all of the wrongful conduct alleged against the social workers qualified as "quasi-prosecutorial," and was thus protected by absolute immunity; and (2) the alleged conduct fell within the absolute testimonial privilege. Deanna opposed the motion, arguing the defense of absolute immunity had been waived by the County's failure to plead it, and the court denied the motion in October of 2006.

In December of 2006, less than a month before trial was scheduled to commence, the County filed a noticed motion for leave to amend its answer to include the defense of "absolute, judicial, prosecutorial and testimony privilege of federal law." In doing so, the County specifically requested the court to exercise its discretion to allow the late amendment "in the furtherance of justice." Fogarty-Hardwick opposed the attempt, arguing she would be prejudiced by the late addition of an absolute immunity defense. The trial court agreed, and denied the motion.

At the completion of trial, the jury returned special verdicts in favor of Fogarty-Hardwick. The jury found that both Vreeken and Dwojak "intentionally violate[d] the plaintiff's right to familial association or right to privacy"; that they did so "while acting or purporting to act in the performance of their official duties"; and that their conduct was a substantial factor in causing harm to Fogarty-Hardwick. In

connection with the misconduct of Vreeken, the jury answered the question "What are Deanna Fogarty-Hardwick's damages?" with a total of $117,386, including past and future economic loss, and past and future non-economic loss. In connection with the misconduct of Dwojak, the jury answered the same question by concluding Fogarty-Hardwick's "damages" totaled $273,900 including past and future economic loss, and past and future non-economic loss.

In a separate special verdict form the jury concluded that Vreeken and Dwojak's conduct occurred "as a result of the official policy or custom of the County of Orange," and in connection with that verdict, the jury concluded Fogarty-Hardwick's damages were $2,260,785, including past and future economic loss, and past and future non-economic loss.

The jury also concluded that the County was "deliberately indifferent to the need to train and/or supervise its employees adequately," and that failure was both the cause of Fogarty-Hardwick's loss of familial association and a substantial factor in causing harm to her. In connection with that special verdict, the jury concluded Fogarty-Hardwick's damages totaled $2,260,785, including past and future economic loss, and past and future non-economic loss.

With respect to damages specifically, the jury returned a special verdict concluding that "regardless of the award of damages in [the other verdict forms] . . . , the total damages suffered by" Fogarty-Hardwick were $411,456 in past economic losses; $36,400 in future economic losses; $2,810,000 in past non-economic losses; and $1,655,010 in future non-economic losses. These "total damage" numbers add up to $4,912,866 – the same total reached by adding up the separate damage amounts assessed against each defendant (including *both* damage amounts of $2,260,785 assessed against the County.)

Finally, the jury found that both Vreeken and Dwojak acted with "malice, oppression or fraud." The jury assessed punitive damages against Vreeken in the amount of $1,800, and against Dwojak in the amount of $4,200.

The court entered judgment in favor of Fogarty-Hardwick and against: (1) Vreeken in the amount of $119,186; Dwojak in the amount of $278,100; and the County of Orange in the amount of $4,521,570. The court also issued an injunction prohibiting SSA from (1) "including allegations in a juvenile dependency petition under Cal. Welf. & Inst. Code § 300 against any parent or guardian of a child without some reasonable and aticulable [*sic*] evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian*, or is in imminent danger of abuse, neglect or abandonment by that parent"; or (2) requiring a parent or guardian to sign its "'Agency-Parent Temporary Agreement'" or releases of confidential information (e.g., medical, psychological[,] psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent."

After the entry of judgment, the County moved for a judgment notwithstanding the verdict, arguing that defendants were entitled to absolute immunity under federal law. The County acknowledged the court had earlier refused to allow this defense, but asserted the issue had been properly raised and was supported by the evidence adduced at trial. The County also moved for a new trial, arguing the court had abused its discretion in denying its pretrial motion to add the defense of absolute immunity to its answer. The court denied both motions, and, in doing so, reiterated its conclusion the County had waived the defense of absolute immunity.

I

The County first argues Fogarty-Hardwick's claims are barred in their entirety, because this case represented an attempt to "relitigate" the issue of custody, which was already "fully litigated" in both the dependency and family law cases.

We disagree. The County's argument ignores the fact that custody orders are, by their nature, sui generis. A court's analysis of what custody arrangement would be in the best interests of the children is based upon an evaluation of facts and circumstances as they exist *at the time the order is made*, and such orders – even if deemed "permanent" – may be altered and modified based upon a significant change in circumstances affecting the court's evaluation of what custody arrangement is currently in the child's best interests. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256; Fam. Code, §§ 3011, 3020, 3022, 3087.) Thus, a custody order establishes nothing more than what arrangement is in the children's best interests, in light of the circumstances found to exist on the date it issued.

Consequently, the fact a family court ultimately ordered that Fogarty-Hardwick's former husband would retain custody of her two daughters in December of 2001 – a year and a half after he had been given temporary custody (and Fogarty-Hardwick only limited visitation) as a result of the dependency case – *in no way* establishes that the same order would also have been made back in February of 2000, when Fogarty-Hardwick herself still enjoyed primary custody.

Clearly, the dependency case itself was an enormous change in circumstances. Even aside from the change in custody that directly resulted from it, we are certain the court in the family law case would have presumed the dependency case had been handled appropriately; that the juvenile court's decision to remove the girls from Fogarty-Hardwick's custody and place them in foster care had been based upon truthful and sufficient evidence, and that the stipulated termination of that dependency

proceeding reflected both parents' voluntary acquiescence in the conditions imposed upon them.

None of those very significant presumptions would have played any part of a custody determination made by the family court in February of 2000. Consequently, there is simply no basis for assuming the family court would have taken custody away from Fogarty-Hardwick, and awarded it to her husband, had it been asked to rule on the issue at that time.

Likewise, the stipulated termination of the dependency case, which awarded temporary custody of the girls to Fogarty-Hardwick's former husband, is an insufficient basis to support a finding of collateral estoppel. Even more so than the later custody order, the stipulated termination of the dependency case was very much *the product* of the particular circumstances and events leading up to it – and specifically of the social workers' misconduct in that case.

Had the social workers not wrongfully caused the girls to be taken from Fogarty-Hardwick's custody and placed in foster care, there is nothing in the record suggesting she would have voluntarily agreed to relinquish custody. To the contrary, Fogarty-Hardwick testified she did so *only* because she felt coerced by the social workers, and believed she had no other choice if she wanted to free her daughters from foster care. Because the outcome of the dependency case was irretrievably prejudiced by the very misconduct which is at the core of this case, it cannot be cited as evidence of what would have happened in the absence of that misconduct. We cannot engage in the kind of "boot-strapping" that would allow the County to rely upon the outcome of the tainted dependency case as a basis to avoid liability for the very acts which tainted it.

Buesa v. City of Los Angeles (2009) 177 Cal.App.4th 1537, cited by the County in a letter filed after briefing was completed, does not alter our collateral estoppel analysis. According to the County, *Buesa* stands for the proposition that "perjury" can never form the basis of a collateral attack on a judgment. As applied here, the County's

argument seems to be that the specific dispositional order depriving Fogarty-Hardwick of custody in the dependency case is presumed to be "correct," and cannot be collaterally attacked on the basis it was obtained through perjured testimony. *Buesa* is distinguishable.

In *Buesa*, police officers filed an action for damages against the City of Los Angeles, based upon the wrongful termination of their employment. The court dismissed the action, citing collateral estoppel based upon an earlier writ of mandate action in which the officers unsuccessfully sought a court order requiring the city to reinstate them. The "central issue" in the mandate action had been the officers' contention that the disciplinary action which resulted in their terminations was barred by the statute of limitations contained in the Public Safety Officers Procedural Bill of Rights Act, commonly referred to as POBRA. (Gov. Code, § 3300 et seq.) (*Id*. at p. 1548.) However, the City successfully contended that limitations period had been tolled for a sufficient period to render the disciplinary action timely.

In the subsequent damages action, the officers alleged the court's calculation of the tolling period in the mandate action was based upon the perjured testimony of a city witness, and sought damages (rather than reinstatement of their employment) as a result of the City's violation of their rights under POBRA. Thus, in *Buesa*, the officers had simply filed two successive actions – the first seeking equitable relief, and the second seeking damages – based upon the *identical assertion* that the city had previously violated their rights when it initiated disciplinary action in violation of the POBRA statute of limitations. The officers' assertion of perjury in the mandate proceeding was nothing more than a justification for allowing them to *relitigate* the same statute of limitations issue in the damages case, so it amounted to an assertion the prior mandate judgment should be disregarded on the basis of *intrinsic* fraud, which has never been an acceptable basis for attacking a final judgment. (*Pico v. Cohn* (1891) 91 Cal. 129; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1.)

In this case, by contrast, Fogarty-Hardwick did not initiate successive proceedings, each seeking relief against the same party, based upon the same prior acts of misconduct and the same injury. Stated simply, her injuries *arose out of* the proceeding in which the perjury occurred, i.e., the corrupted dependency proceeding, and she had no ability to assert any claim based upon those injuries within *that proceeding*. Collateral estoppel will not be applied unless "the party against whom the earlier decision is asserted had a 'full and fair' opportunity to litigate the issue." (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 90.) And it will not be applied "if injustice would result or if the public interest requires that relitigation not be foreclosed." (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888.)

More fundamentally, the County's attempt to give collateral estoppel effect to the dispositional order in a dependency case ignores the special nature of such proceedings, which may include successive "final" orders which are not really intended to be *final* in the manner of an order issued in other cases.

Dependency cases are, by their nature, fluid, and specifically intended to address the present and future interests and needs of the affected children. As explained in *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, all juvenile court orders made during the pendency of the case, even those deemed "final" and no longer subject to appeal, are considered inherently changeable pursuant to Welfare and Institutions Code section 388, and are thus not entitled to the same res judicata or collateral estoppel effect that attach to other judgments. "In light of the ongoing nature of the proceedings and the express statutory authority permitting modification, principles of res judicata and collateral estoppel do not bar a modification of a [final] dispositional order . . . ." (*Id.* at p. 879.)

Moreover, the fluid nature of dependency proceedings, and the paramount need to protect the well-being of the children, require these proceedings to move very

quickly in response to alleged changes in circumstances, especially with respect to any assertion a child is currently at risk of harm. "Dependency proceedings are part of a comprehensive statutory scheme geared toward expediency, largely to serve the dependent child's best interests. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152.) 'Of the many private and public concerns which collide in a dependency proceeding, time is among the most important.' (*Ibid*.)" (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 635.)

Unfortunately, a rule requiring the rigid application of collateral estoppel to the intentionally fluid interim decision-making of a dependency court, would inevitably encourage parties to litigate more aggressively, and even to launch collateral challenges to those decisions during the pendency of the proceeding. In this case specifically, the County is arguing that Fogarty-Hardwick was bound by the court's February 17, 2000 order, removing her children from her custody, because she never had that ruling overturned. But given the nature of Fogarty-Hardwick's challenge to that ruling – that it was based upon the social workers' falsified evidence – her only avenue for doing so would have been to file a writ of habeas corpus; such a claim would not be cognizable in an ordinary appeal. Thus, what the County is proposing is a rule which requires a parent to engage in collateral attacks on the validity of prior dependency orders (and on the integrity of the social workers), during the dependency case itself, if they wish to preserve any civil claims.

We conclude that such a requirement would be inconsistent with the special nature of dependency proceedings and would interfere with the interests intended to be served in those proceedings. The better policy is to encourage all participants in a dependency action to maintain their focus *on the children*, and to work together as much as possible to quickly address *their* needs on a going-forward basis. To the extent *that focus* requires a parent to directly challenge the actions or motivations of a social worker, then such a challenge would be appropriate. But a requirement that such a challenge be

fully litigated *in the dependency proceeding*, merely to preserve the parent's right to maintain a future damages action, would not be.[3] (See *In re Claudia E., supra,* 163 Cal.App.4th at p. 637 [characterizing the habeas corpus remedy as "a time-consuming process that is inimical to the expedient processing of cases and one which most likely will be impractical in the crowded dependency system."].)

In *People v. Percifull* (1992) 9 Cal.App.4th 1457, the appellate court relied upon the special nature and purposes of a dependency case in denying collateral estoppel effect to a dependency court's judgment exonerating a parent of a charge he had committed an act which also constituted the felony of child cruelty. The court noted that while a conviction of the parent on that felony charge would be "inconsistent" with the judgment of the juvenile court, according collateral estoppel effect to that judgment would be inappropriate considering the extent to which "the two proceedings serve different public interests and purposes . . . ." (*Id.* at p. 1461.)

We conclude a similar analysis is proper here. The goal of the dependency case was to protect the children, and the court's need to act quickly to fulfill that goal would have been undermined by a rule essentially requiring Fogarty-Hardwick to pursue any claim for perjury or falsification of evidence she might wish to bring against the social workers prior to the conclusion of that proceeding.

II

The County also argues the judgment must be reversed because – while it grudgingly admits Fogarty-Hardwick provided the jury with sufficient evidence to demonstrate the social workers committed egregious acts of misconduct in the

[3] And of course, the natural tendency of a parent who wishes to maintain (or regain) custody of the children would be to curry favor with the social workers, not alienate them. In this case, even after the relationship between Fogarty-Hardwick and Vreeken had broken down, Fogarty-Hardwick continued to seek guidance from Vreeken, and to try to satisfy her concerns relating to the underlying issues. That spirit of cooperation – even in a flawed relationship – is to be encouraged, and would be undermined by the initiation of collateral litigation which questioned the social worker's professionalism and integrity.

dependency case,[4] – it also contends the circumstances of this case demonstrate, as a matter of law, that the misconduct did not *cause* Fogarty-Hardwick to lose custody of her children in the dependency case.

The County first contends that events occurring after the children were removed from Fogarty-Hardwick's custody in the dependency case, including the stipulated termination of that dependency case, in which the children were released to the custody of Fogarty-Hardwick's former husband, and the family court's ultimate award of custody to the former husband – demonstrate Fogarty-Hardwick was destined to have lost custody in any event.

We find the contention, which amounts to a restatement of the collateral estoppel argument, unpersuasive. As we have already explained, the outcome of the dependency case, as well as the later award of permanent custody to Fogarty-Hardwick's former husband in 2001, were both profoundly influenced by the dependency court's initial decision to remove the children from Fogarty-Hardwick's custody; and that order was, in turn, caused by the misconduct of the social workers. There is no compelling reason to conclude that, in the absence of the misconduct, those subsequent custody orders would have been the same.[5]

Second, the County relies upon civil rights claims arising out of criminal cases, and argues that a rule developed therein which requires a reversal or vacation of

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[4] As the County concedes, "[Fogarty-Hardwick] demonstrated (if the testimony is to be believed) that in this one instance, social workers lied and fabricated evidence in connection with the dependency proceedings relating to [her] children."

[5] Based upon the same analysis, we also reject the County's related assertion that Fogarty-Hardwick's claim for damages was "cut off" as of the date she signed the voluntary case plan which provided for termination of the dependency case and an award of temporary custody to her former husband. There was substantial evidence supporting the inference Fogarty-Hardwick would never have agreed to such an arrangement in the absence of the social worker's misconduct, and that her acquiescence was anything but "voluntary." Similarly, the family court's subsequent award of permanent custody to the husband did not preclude Fogarty-Hardwick's claim for damages past that time. As we have explained, that order must have been significantly affected by the events and outcome of the dependency case; it would thus be more properly construed as evidence of her *continuing damages*.

the criminal judgment itself to demonstrate the plaintiff was directly harmed by the underlying misconduct, should be applied to dependency proceedings as well.

The contention is based upon *Heck v. Humphrey* (1994) 512 U.S. 477, in which the Supreme Court held "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C. section 1983] plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. [section] 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under [42 U.S.C. section 1983]." (*Id.* at pp. 486-487.)

But as the Supreme Court explained in *Heck*, its conclusion was based upon "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments . . . ." (*Heck v. Humphrey, supra,* 512 U.S. at p. 486.) And of course, that principle is not applicable here, for the obvious reason that a dependency case is not a criminal action. Moreover, the numerous avenues to challenge a criminal conviction listed in *Heck* are not necessarily available in a dependency case – as far as we are aware, there is no procedure for "expungement" of a dependency dispositional order – and even though a writ of habeas corpus might be theoretically available (at least during the time the child actually remains in detention),[6] we have already explained why requiring a parent to resort to such a remedy, merely to preserve a subsequent claim for damages, is inconsistent with the goals of the dependency proceeding. We therefore decline to extend this rule applicable to criminal convictions and sentences to the challenged ruling in the underlying dependency case.

[6] As a general rule, release of the detained individual would render a request for habeas corpus relief moot. (*In re Stinnette* (1979) 94 Cal.App.3d 800, 803.)

Finally, the County argues that the oral statements made by the dependency court, explaining its decision to remove Fogarty-Hardwick's children from her custody in February of 2000, demonstrate the decision was not actually motivated by the social workers' lies, but was instead based upon the court's concern that Fogarty-Hardwick "was using her children and thus interfering with visitation."

There are several problems with this assertion as a basis for challenging the jury's finding of causation, not least of which are (1) that the contention effectively asks us to *interpret* the court's comments in a manner which favors the County, which is inconsistent with our obligation to indulge all inferences in favor of the judgment; and (2) that one of the lies told by the social worker was that Fogarty-Hardwick *had caused her daughters to miss a visit with their father*, which would presumably have provided direct support for the court's conclusion she was "interfering with visitation."

But the most significant problem with the County's contention is that it amounts to an attack on the sufficiency of the evidence to support causation – an attack launched without acknowledging the heavy burden imposed on an appellant who does so.

"An appellate court '"must *presume* that the record contains evidence to support every finding of fact . . . ."' (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887, italics added; see *Brown v. World Church* (1969) 272 Cal.App.2d 684, 690, ['"a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact"'].) It is the appellant's burden, not the court's, to identify and establish deficiencies in the evidence. (*Brown v. World Church, supra*, 272 Cal.App.2d 684, 690.) This burden is a 'daunting' one. (*In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329.) 'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable,* and *show how and why it is insufficient*. [Citation.]' [Citation.] '[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient.

He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.' (*Hickson v. Thielman* (1956) 147 Cal.App.2d 11, 14-15.)" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.)

Moreover, the appellant's burden to provide a fair summary of the evidence "grows with the complexity of the record." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 290.) The record before us is quite substantial (including 14 volumes of reporter's transcript, and 11 volumes of clerk's transcript.) And yet the County supports its attack on the sufficiency of the evidence to support causation with nothing more than a single piece of evidence, which it asks us to *interpret* favorably to it. We find the effort inadequate and the argument unpersuasive.

III

The County next argues its liability to Fogarty-Hardwick is precluded by the defense of absolute immunity. In doing so, however, the County simply addresses the merits of that defense, making the somewhat controversial assertion that it should be applied to all misconduct of a social worker in connection with a dependency court proceeding (but see *Miller v. Gammie, supra,* 335 F.3d. 889 [explaining why qualified immunity is the defense more generally applicable in such cases]; and *Beltran v. Santa Clara County* (9th Cir. 2008) 514 F.3d. 906, 908 [concluding social workers "are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute."])

However, what the County does not do is acknowledge that the trial court deemed the absolute immunity defense to have been *waived* in the proceedings below (See *Collyer v. Darling* (6th Cir. 1996) 98 F.3d 211, 222 ["Given that the defense of absolute immunity was not affirmatively pleaded or argued . . . and in light of the

significant distinctions between qualified and absolute immunity claims, this defense was affirmatively waived . . . ."].) And having failed to acknowledge the waiver determination made below, the County has made no effort to demonstrate the trial court abused its discretion in making it.

In particular, the County does not even *mention* in its opening brief on appeal that it failed to plead absolute immunity as a defense in its answer, or that it moved to add the defense to its answer only shortly before trial. We find it quite remarkable that opening brief does not acknowledge that the court denied that motion as untimely, and that the County did not include that order as part of the record on appeal.[7]

"One of the essential rules of appellate law is that '[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]' (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) It is the duty of the appellant to present an adequate record to the court from which prejudicial error is shown. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1533.)" (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 865.)

Here, we are required to begin with the presumption the court ruled correctly when it denied the County leave to add the absolute immunity defense to its answer prior to trial. The County having failed to even claim, let alone establish, that ruling amounted to error, we must affirm the trial court's determination the defense of absolute immunity was waived.

IV

The County also contends liability was precluded by the defense of qualified immunity, but its argument seems to be predicated on the idea that Fogarty-Hardwick had to satisfy a distinct burden of proving causation in connection with the

[7] The County's motion to amend its answer is included in the record, along with Fogarty-Hardwick's opposition. The County admits, in its reply brief, that the motion was denied.

defense – apparently a different element of causation than the one she satisfied in connection with her prima facie case – and that she purportedly failed to do so.

Specifically, the County relies on *Ramirez v. County of Los Angeles* (2005) 397 F.Supp.2d 1208, which it contends stands for the proposition that in order to "defeat qualified immunity" in a case where governmental actors falsified information to the court and deceived the court, . . . a plaintiff would have to show "that but for the dishonesty, the challenged action would not have occurred." But Ramirez says no such thing. To the contrary, *Ramirez* addresses a police officer's motion for summary judgment based upon the affirmative defense, and thus necessarily involves only *what the officer must prove* in order to justify such relief.

Significantly, what *Ramirez* ultimately concludes is that a police officer who knowingly falsified evidence in support of a search warrant application, in circumstances where he should have known the evidence was otherwise insufficient to support the warrant, was not entitled to rely upon qualified immunity as a defense. In doing so, the court quoted the rule set forth in *Branch v. Tunnell* (1991) 937 F.2d. 1382, 1387: "'If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, ... he cannot be said to have acted in an objectively reasonable manner,' and the shield of qualified immunity is lost."

Thus, the *Ramirez* decision simply reflects an understanding that the essence of the federal defense of qualified immunity is the *reasonableness*, or "good faith," of the defendant's conduct. The defense is applicable in situations where defendants establish that their actions, even if harmful to plaintiff's constitutional rights, were nonetheless carried out in good faith. As explained by the Supreme Court, "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo* (1980) 446 U.S. 635 [fn. omitted]. Decisions of this

Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' *Wood v. Strickland* (1975) 420 U.S. 308, 322. The subjective component refers to 'permissible intentions.' *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . .' *Ibid.* (Emphasis added.)" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 815, fn. omitted.)

In this case, the jury specifically concluded that Vreeken and Dwojak lied, falsified evidence, and suppressed exculpatory evidence – all of which was material to the dependency court's decision to deprive Fogarty-Hardwick of custody – and that they did so with malice. These findings are clearly sufficient to satisfy the Supreme Court's definition of circumstances in which "qualified immunity would *not* be available."

There was no error in the rejection of qualified immunity in this case.

V

The County also claims, in conclusory fashion, that Fogarty-Hardwick failed to demonstrate "that the County had a policy of condoning perjury in reports or testimony." As the County asserts, such a failure of proof would preclude any finding of liability against the County itself, since "[i]n order to hold a public entity liable, a plaintiff must show that a public official or employee acted pursuant to an official policy and custom." (*Monell v. Department of Social Services* (1978) 436 U.S. 658.) This amounts to a contention that the judgment against the County was unsupported by substantial evidence.

However, in asserting this claim, the County has once again failed to make any effort to satisfy its burden to summarize the evidence on the point, favorable and unfavorable, and show how and why it is insufficient. Indeed, the County supports its attack on the substantial evidence with nothing more than a bare assertion that Fogarty-Hardwick "did not prove or submit evidence to show a municipal policy that condoned or encouraged lying or fabricating evidence." The assertion is then followed by an intriguing acknowledgment that Fogarty-Hardwick "may point to defendants' requests for admission that the social workers acted pursuant to municipal policy or custom" in support of the contention that such policies existed, but then suggests that this discovery should be construed favorably to the County, in accordance with its own *assumptions* employed in responding. But there is not a single citation to the record contained within this argument, which (including a discussion of legal authorities) occupies less than one and a half pages of the County's opening brief.

Under these circumstances, we have no choice but to conclude the County waived its claim of insufficiency of the evidence to support the existence of a policy. But even if we were to consider the issue on the merits, we would almost certainly have to reject it in any event. In accordance with the usual procedures on appeal we simply could not, as the County requests, indulge inferences *in its favor* based upon what it contends were its unspoken assumptions in responding to discovery. We are obligated to indulge all inferences in favor of the judgment.

Assuming, as the County states, it represented in discovery that its social workers (whom the jury concluded had lied and fabricated evidence) "acted pursuant to municipal policy and custom," that admission would be sufficient to sustain the challenged finding.

VI

The County next asserts the trial court erred in granting Fogarty-Hardwick's motion in limine to exclude evidence she "coached or influenced" her

children in connection with claims of sexual abuse against their father. The County asserts this motion was based upon the assertion that such evidence was barred by collateral estoppel, and argues the court erred in granting it because the County was neither a party, nor in privity with any party to the prior proceeding relied upon by Fogarty-Hardwick as the basis of the estoppel.

The County correctly states the requirements for application of collateral estoppel. "The doctrine [of collateral estoppel] applies 'only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Moreover, we would agree the County was neither a party to, or in privity with, any party to the prior action, which was the marital dissolution action between Fogarty-Hardwick and her former husband.

However, once again the County has crafted an argument without fully acknowledging what *actually occurred* in the trial court below. This time, what the County fails to acknowledge is that collateral estoppel was *not the only basis* for Fogarty-Hardwick's motion to exclude the evidence. She also relied upon a hearsay objection, as well as Evidence Code section 352.[8]

As previously noted, we are obligated to indulge all presumptions in favor of the court's ruling. As a consequence, where the record does not establish the

[8] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

reasoning employed by the court in reaching its decision, we must presume the court based its ruling on whatever argument asserted best supports it.[9] Hence, in order to persuade us the trial court erred in excluding the evidence, the County was required to demonstrate why none of the arguments relied upon by Fogarty-Hardwick was sufficient to support that decision. Because it made no attempt to do so in its opening brief, we presume the ruling was correct.[10]

VII

The County's last attack on the judgment is based on the assertion the jury's award of damages was excessive, and reflected a disguised award of punitive damages against a governmental entity. In its brief, the County simply pointed to the total compensatory damages assessed against all of the defendants, characterized that total as unusually high and disproportionate to Fogarty-Hardwick's alleged damages,[11] and suggested we infer from the "sheer size" of the award "that the jury acted in a punitive fashion."

However, we found that assertion unpersuasive,[12] and found ourselves more troubled by the significant disparities *among* the damage amounts awarded in the various special verdicts relating to each defendant, and by the fact those special verdicts seem to

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[9] There is nothing in the record before us establishing the court actually relied upon the collateral estoppel theory in its ruling.

[10] The County concedes in its reply brief that Fogarty-Hardwick's motion was grounded on multiple legal arguments. It then argues, for the first time, that (1) the hearsay objection had no merit, and (2) the evidence it sought to rely upon was "not cumulative." The County cannot make these assertions of legal error, for the first time, in a reply brief. But even if we were to consider the points, we would conclude the argument comes up short.

[11] The disproportionate argument concocted by the County is simply untrue and misleading. The County purported to compare a relatively small *portion* of the economic damages claimed by Fogarty-Hardwick (her medical expenses), against the entire award – including the entirety of both economic and non-economic damages – made by the jury. But Fogarty-Hardwick's economic damages also included the significant legal expenses she had incurred during the years-long custody fight she was forced to wage after she was improperly deprived of custody in the dependency case. In fact, the total amount of *economic* damages alleged by Fogarty-Hardwick at trial (including both medical and legal expenses) actually exceeded the amount of *economic* damages awarded to her by the jury. In addition to those economic damages, Fogarty-Hardwick also sought compensation for her significant emotional distress, and it was the jury's award of those *non-economic* damages which accounts for the bulk of the overall liability assessed.

[12] Indeed, at oral argument, the County's attorney expressly conceded that $5 million was *not* an unreasonable amount of damages to compensate for the loss of one's children for a period of several years and the concomitant breakage suffered in those relationships.

hold each defendant *separately liable* for those different damage awards. To reiterate, the damage amounts contained in the special verdicts against each defendant include two *separate* awards of $2,260,785 in damages against the County (as compared to only $117,000 against Vreeken herself, and $274,000 against Dwojak, Vreeken's supervisor), and those awards add up to the "total" amount of damages the jury determined Fogarty-Hardwick had suffered. There is no overlap in the numbers, and no joint liability imposed for any damages. While the overall amount of the judgment was not a concern, these disparities did seem to raise the specter of a "punishment" levied against the County for the actions of its employees.

Consequently, we ordered the parties to provide us with supplemental briefing to address the following issues:

(1) What evidence in this case, or legal authority, supports the jury's conclusion that the damages suffered by Fogarty-Hardwick in this case were divisible, or that a distinct portion of her damages was caused by each defendant and not the others?

(2) What evidence in this case, or legal authority, supports the jury's conclusion that the County of Orange caused Fogarty-Hardwick to suffer a greater amount of damage than did Vreeken and/or Dwojak themselves?

(3) What evidence in this case would support the conclusion that the "official policies and customs" of the County of Orange, and/or its failure to train or supervise its employees, caused harm to Fogarty-Hardwick which was distinct and separate than the harm caused by the misconduct of Vreeken and Dwojak?

(4) What evidence in this case, or legal authority, supports the jury's conclusion that the "official policies and customs" of the County of Orange caused Fogarty-Hardwick to suffer different damages than those caused by its failure to train or supervise its employees?

In response to each of these questions, the County gave new definition to the word "laconic" – merely stating in conclusory fashion that it is unaware of any legal

authority or any evidence which would support the distinct damage awards made by the jury in this case, while making no effort to argue its position or to explain why such distinctions might undermine the validity of the compensatory verdicts.

Fogarty-Hardwick, by contrast, made a significant effort to explain why the damage awards in the special verdicts should be upheld. Among other things, Fogarty-Hardwick suggested she suffered "a series of independently compensable injuries" over the course of the events underlying this case.

Fogarty-Hardwick also asserted that the separate damage awards can be appropriately viewed as an "apportionment of fault" among the defendants, and argued the jury could have reasonably concluded the County – which both promulgated the misguided policies which gave rise to the misconduct alleged in this case and failed to adequately supervise its employees – had substantially more responsibility for the effects of that misconduct than did the social workers themselves. Fogarty-Hardwick asserts "the jury's power to apportion fault is as broad as its duty to resolve conflicts in the evidence and assess credibility," citing *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1234.)

Fogarty-Hardwick concedes that no apportionment of fault was requested in this case, but argues that the damage amounts assessed against each defendant – which add up to the total amount of damages which the jury expressly found had been inflicted on Fogarty-Hardwick – demonstrate that the jury actually engaged in the apportionment on its own initiative. She further contends that because the legally appropriate outcome would have been to hold all defendants liable, jointly and severally, for the *entire* $4,912,866 compensatory award, defendants were not harmed by the apportionment, and we should thus uphold the verdicts as rendered.

We agree. In *Jackson*, the court first noted that "[w]hen a plaintiff has suffered a single or indivisible injury, the general rule is that 'each tortfeasor is jointly and severally liable for the entire amount of damages.' [Citation.]" (*Jackson v. City of*

St. Louis (8th Cir. 2008) 220 F.3d 894, 897.) There is nothing in this case to suggest that a deviation from that general rule would be appropriate. As all parties conceded at oral argument, the County inflicted harm on Fogarty-Hardwick only through the actions of its employees, the social workers. Because those social workers acted pursuant to the policies put in place by the County, it was proper to hold the County directly liable for the damages caused by their actions – but the measure of those damages was *the same* for both employees and employer. And since the jury explicitly found that the overall amount of those damages was $4,912,866, it would have been appropriate to hold all defendants liable, jointly and severally, for that amount.

The fact the jury apportioned Fogarty-Hardwick's damages among the several defendants, rather than holding each liable for the entire amount, might theoretically be harmful to Fogarty-Hardwick (who is not complaining), but we cannot see how it harmed defendants. And indeed, in its response to Fogarty-Hardwick's supplemental brief on the point, the County makes no assertion it was harmed by apportionment. We consequently affirm the damage awards as stated in the judgment.

VIII

And finally, the County attacks the court's award of $1.6 million in attorney fees, arguing the court erroneously double-counted the complexity of the case when it relied upon that factor both as a basis for assigning a lodestar amount, and as a basis for applying a multiplier of 2.5 to that amount. The County contends that as a result of this error, we should remand the case to the trial court, "for a proper determination of attorneys' fees."

The contention is supported by a single case citation, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, in which our Supreme Court is quoted as stating "the difficulty of the question involved [is] *usually* already encompassed by the lodestar." Unfortunately, we cannot locate that quote within *Ketchum*.

And other than that somewhat equivocal (and apparently nonexistent) quotation, the County offers no discussion or analysis of the rule it seeks to invoke, either as applied in *Ketchum* or in any subsequent case; nor does it engage in any meaningful analysis of the court's ruling in this case. Thus, the County has completely failed to demonstrate why this case would necessarily run afoul of *Ketchum*. The issue is waived.

IX

The final issue in this case is one we raised on our own motion, and on which we requested the parties provide supplemental briefing. As part of the judgment, the court granted injunctive relief which "permanently" restrains the County, SSA and their employees from (1) "including allegations in a juvenile dependency petition under [Welfare and Institutions Code section] 300 against any parent or guardian of a child without some reasonable and aticulable [*sic*] evidence giving rise to a reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian*, or is in imminent danger of abuse, neglect or abandonment by that parent"; and (2) "requiring a parent or guardian of a child to sign its 'Agency-Parent Temporary Agreement' or releases of confidential information (e.g., medical, psychological[,] psychiatric, employment) unless the agency has some reasonable and articulable evidence giving rise to a reasonable suspicion that the parent whose records or information are sought has abused, neglected or abandoned the child, or the child is in imminent danger of abuse, neglect or abandonment by that parent."

We requested the parties address the propriety of this injunctive relief, with particular attention to: "(1) whether the injunctive relief imposes obligations on SSA which are actually or potentially inconsistent with those imposed on it by statute; (2) whether and to what extent the trial court in this case has jurisdiction to control the future conduct of SSA in dependency matters filed in the juvenile court; and (3) whether the injunctive relief granted in this case is, as a practical matter, enforceable."

The County responded with a spirited attack on the injunctive relief, arguing it was fatally inconsistent with statutory requirements; the court lacked jurisdiction to impose it; and the order was unenforceable. These assertions are not unexpected; what is surprising is that the County didn't make any of them in its opening brief.

Fogarty-Hardwick defends the injunctive relief as a necessary and appropriate response to the evidence adduced in this case, and argues it represents a proper exercise of the trial court's discretion. We conclude the injunctive relief must be stricken from the judgment.

As Fogarty-Hardwick herself asserts, SSA has only the powers conferred on it by statute, and must comply with the provisions of the Welfare and Institutions Code in its handling of dependency cases. And while a court might properly restrain SSA from acting in a manner which exceeds or is inconsistent with its statutory mandate, it cannot order SSA to do anything which is *different* from that mandate.

In this case, the first injunctive order states SSA is prohibited from including in a dependency petition any "allegations . . . against any parent or guardian of a child without some . . . reasonable suspicion that the child has been abused, neglected or abandoned *by the accused parent or guardian*, or is in imminent danger of abuse, neglect or abandonment by that parent." Although the language is not a model of clarity, we presume it is intended to prohibit SSA from making jurisdictional allegations against parents like Fogarty-Hardwick, who the initial dependency petition alleged had "failed to protect" her child from sexual abuse by Fogarty-Hardwick's former husband, but who was not alleged to have personally "abused, neglected or abandoned" the child.

However, such a blanket prohibition is inconsistent with the statute governing dependency jurisdiction. Welfare and Institutions Code section 300 specifies the circumstances under which a child may be declared a dependent child, and those circumstances include where "[t]he child has suffered, or there is a substantial risk that

the child will suffer, serious physical harm or illness, as a result of the *failure or inability* of his or her parent or guardian to adequately *supervise or protect* the child *or* the *willful or negligent failure* of the child's parent or guardian to *adequately supervise or protect* the child from the conduct of the custodian with whom the child has been left . . . ." (Welf. & Inst. Code, § 300, subd. (b), italics added.)

Under this provision, it is clear that a parent's mere "failure or inability" to "adequately supervise or protect" the child is distinguished from the parent's "willful or negligent" failure to do so, and that the Legislature intended *either* circumstance would be a sufficient basis for imposing dependency jurisdiction. Were we to allow the first injunctive order in this case to stand, it would impermissibly restrict SSA's ability to rely upon the mere "failure or inability" of a parent (absent any negligence) to protect the child from being harmed by others. We cannot do that. To the extent the statutory standard is considered to be overly broad or too insubstantial a basis for imposing dependency jurisdiction, that complaint is properly directed to the Legislature, and is not a proper subject of injunctive relief.

As for the second injunctive order issued in this case – prohibiting SSA from "requiring" a parent or guardian to sign an "Agency-Parent Temporary Agreement" for the release of confidential information absent a "reasonable suspicion" that the parent in question has "abused, neglected or abandoned the child" – the same considerations pertain. As the County points out, Welfare and Institutions Code section 16010, subdivision (f), specifically requires the court, at the initial hearing, to direct "each parent to provide to the child protective agency complete medical, dental, mental health, and educational information, and medical background, of the child *and of the child's mother and the child's biological father if known*." (Italics added.) The statute imposes this requirement without regard to the perceived culpability of the parent in question. Thus, we cannot uphold an injunctive order which prohibits SSA from requiring parents to sign

releases for such mandatory information in cases where it lacks "reasonable suspicion" that the parent has personally "abused, neglected or abandoned the child."

The injunctive orders are also problematic on jurisdictional and enforcement grounds, as well. By their terms, the orders purport to control the conduct of SSA in *future cases* pending before the *dependency* court. As the County points out, once the dependency court establishes jurisdiction over a particular child, "all issues regarding his or her custody shall be heard *by the juvenile court*." (Welf. & Inst. Code, § 304, italics added.) Thus, there are inherent jurisdictional complications presented when an ordinary civil court, exercising its jurisdiction in a tort case, purports to impose blanket restrictions on the manner in which *all future dependency cases* can be handled. Moreover, it appears that enforcement of these orders would be impossible. The future conduct to be enjoined will not, and cannot, be monitored by Fogarty-Hardwick, nor can it otherwise be routinely supervised by the court which issued this order, because juvenile dependency matters are required to be kept confidential. (Welf. & Inst. Code, § 827.)[13]

And while Fogarty-Hardwick seeks to characterize the injunctive relief issued in this case as merely a means of assisting SSA in "promulgat[ing] written policies" and "provid[ing] training" on these issues, that is not what the injunctive orders provide. They explicitly impose restrictions on the conduct of SSA in future dependency court cases. That goes far beyond the mere facilitation of internal policymaking or training. The injunctive relief provisions of the judgment are consequently stricken.

However, our decision to strike the injunctive relief from the judgment should not be viewed by the County as a sign we view it as insignificant. Quite the contrary is true. The fact that a very well respected member of the superior court bench viewed the issuance of injunctive relief as necessary here highlights the egregiousness of

[13] Welfare and Institutions Code section 827, subdivision (a)(1)(L) allows a juvenile case file to be inspected by "A judge, commissioner, or other hearing officer assigned to a family law case with issues concerning custody or visitation, or both, involving the minor," but does not permit any other judicial officer to have access, merely because he purported to issue an injunction which permanently affects all juvenile cases.

defendants' conduct in this case. Stated plainly, the outcome of this case cannot be dismissed as merely the unfortunate product of a runaway jury. The evidence adduced at trial obviously caused both the jury *and the judge* to conclude not only that something seriously wrong was done to Fogarty-Hardwick in this case, but also that the wrongful conduct was *not an isolated incident*. That conclusion is something the County should be taking *very* seriously.

The judgment is reversed and the case is remanded to the trial court with directions to strike the injunctive relief from the judgment. In all other respects, the judgment is affirmed. Fogarty-Hardwick is to recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.