No. D059637

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

JOHNNEISHA KEMPER,

Plaintiff/Appellant,

vs.

COUNTY OF SAN DIEGO, et al.,

Defendants/Respondents.

Appeal from a Judgment of the Superior Court for the
County of San Diego
Hon. Luis R. Vargas, Judge
Case No. 37-2010-00094707-CU-CR-CTL

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH **APPELLATE DISTRICT, DIVISION** ONE	Court of Appeal Case Number: D059637
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APPELLANT/PETITIONER: Johnneisha Kemper RESPONDENT/REAL PARTY IN INTEREST: The County of San Diego, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Johnneisha Kemper

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 11-21-2011

Shawn A. McMillan
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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I. INTRODUCTION.

Police took appellant Johnneisha Kemper's newborn baby from her custody and care without a warrant, in the absence of any exigent circumstances, and when in fact Kemper was providing a safe home for her child. Social workers then lied to the juvenile court, stating that Kemper had abandoned her baby. They knew their statements were false. At all times they knew Kemper's whereabouts and that she wanted her baby back. Relying on the social workers' lies, the juvenile court terminated Kemper's parental rights and allowed her baby to be adopted. Because of the adoption, Kemper cannot have what she wants most – the return of her child. In this action she seeks instead to be compensated for the grievous harms the defendants inflicted upon her by wrongfully taking her child.

Kemper sued under 42 U.S.C. section 1983 (sometimes "section 1983"), alleging the police and social workers and the City and County of San Diego violated her rights to due process of law, familial association, privacy, and to be free from false allegations made by the government, all arising under the United States Constitution's Fourteenth Amendment.

The trial court sustained the defendants' demurrers without leave to amend, finding that *Heck v. Humphrey* (1994) 512 U.S. 477 (*Heck*) bars Kemper's action because the dependency court's order terminating her parental rights remains extant. In *Heck*, the United States Supreme Court held that when recovering damages under section 1983 "necessarily

impl[ies] the invalidity" of a conviction or sentence, the plaintiff must demonstrate that the conviction has been reversed, vacated, or otherwise called into doubt. (*Id.* at p. 487.)

The trial court prejudicially erred in applying *Heck* to bar Kemper's claims. To Kemper's knowledge, *Heck* has never been applied outside of the context of criminal actions, and it applies only to criminals whose section 1983 claims are effectively habeas corpus actions because their success will result in the prisoner's early release from state custody. Criminal defendants and parents whose children are the subject of civil juvenile dependency proceedings are not similarly situated in any way relevant to the determination the trial court made. The trial court's unprecedented ruling greatly and erroneously extending *Heck*'s reach to juvenile dependency proceedings presents a legal issue of first impression to the Court of Appeal. The trial court also ruled that collateral estoppel bars Kemper's claims, but the elements of collateral estoppel could not even be analyzed, let alone applied here, because the trial court did not have the juvenile court's record before it.

The Court of Appeal should reverse the judgment and remand for further proceedings to allow Kemper to prove her claims.

II. STATEMENT OF FACTS AND PROCEDURE.[1]

A. Statement of Facts.

1. The Police Seized Johnneisha Kemper's Baby Daughter Without a Warrant or Exigent Circumstances.

Kemper provided her baby a safe and healthy environment. (CT 4.) The baby was in good health, not in need of any medical care, and was not in immediate danger of any physical abuse. (*Ibid.*) Despite this, San Diego police officers Sergeant Williams, Assistant Sergeant Vasquez, Sergeant Stone, and Officer Macbeth seized Kemper's baby. (CT 3-4.)

When they did so, it would have been apparent to any reasonable officer that Kemper was the baby's mother, that the baby was actually and physically in Kemper's care, and that she possessed the immediate right to the custody and control of her child. (CT 4.) Nor did any evidence suggest that the baby had been abducted or that a crime had been committed. (*Ibid.*) In fact, Kemper and no other person was entitled to the baby's custody. (*Ibid.*)

2. Social Workers Filed a Juvenile Dependency Petition Falsely Alleging That Kemper Abandoned Her Child.

After police seized Kemper's baby, they delivered her to the San Diego County Department of Children and Family Services. (CT 3.) Social workers immediately filed a juvenile dependency petition under

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[1] This brief recites the facts consistent with the rule that the alleged facts are assumed to be true in a demurrer proceeding. (*Adelman v. Associated Internat. Insurance Co.* (2001) 90 Cal.App.4th 352, 359.)

California Welfare and Institutions Code section 300, subdivision (g), which they signed under penalty of perjury.[2] (CT 4.) The petition alleged that Kemper abandoned her daughter, that Kemper's whereabouts were unknown, and that reasonable efforts to locate her were not successful. (*Ibid.*) These allegations were false and the social workers knew this when they signed the petition. (*Ibid.*)

In fact, the social workers had been in contact with Kemper multiple times. (CT 4.) They knew her cellular phone number and had successfully contacted her at that number. (*Ibid.*) They knew where Kemper went to school (*ibid.*), that she had no intention of abandoning her baby, and that she would do whatever was necessary to get her back (CT 3, 5).

3. The Social Workers Repeated Their Lies in Additional Court Filings, and Kemper's Parental Rights Were Terminated as a Result.

The social workers filed multiple court reports, court report addendums, and jurisdictional/disposition reports with the juvenile dependency court. (CT 4.) The reports reiterated the social workers' lies as set forth in the original petition. (CT 4-5.) The social workers intended the juvenile court to accept their reports into evidence and rely upon their contents as true. (CT 4.) In each report, the social workers reiterated the section 300, subdivision (g), allegation that Kemper had abandoned her

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[2] Welfare and Institutions Code sections are sometimes referred to hereafter by section number alone.

daughter and that her whereabouts were unknown (CT 3, 5), and in each report they omitted exculpatory information (CT 4-5, 7).

Kemper's baby remained in detention because of the social workers' false allegations and omissions. (CT 5.) Ultimately, the juvenile dependency court terminated Kemper's parental rights because of them and she permanently lost custody of her baby. (*Ibid.*)[3]

B. Statement of Procedure.

1. Kemper's First Cause of Action Against the Individual Defendants.

Kemper's first amended complaint alleges two claims under section 1983, and seeks damages for violations of her constitutional rights. She alleges one claim against the individual social workers and police officers. (CT 6.) She alleges the other claim against the City and County of San Diego. (CT 8.)

Kemper's first claim, alleged against the individual defendants, is based on the established precept that a parent has a fundamental liberty interest in "the companionship and society of his or her child" and that "the state's interference with that liberty interest without due process of law is remediable under 42 U.S.C. § 1983." (*Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 685.)

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[3] For the court's information, Kemper has sued her counsel in the juvenile dependency proceedings for professional negligence in San Diego Superior Court case number 37-2010-00094975-CU-PN-CTL.

Kemper's claim against the police officer defendants is based on their seizing her baby without a warrant or exigent circumstances. (CT 6-7; *Mabe v. San Bernardino County Dept. of Public Social Services* (9th Cir. 2001) 237 F.3d 1101, 1107 (*Mabe*); *Wallis ex rel. Wallis v. Spencer* (9th Cir. 2000) 202 F.3d 1126, 1136, 1138.) Kemper's claim against the social worker defendants is based on their lies to the juvenile dependency court. (CT 7; *Beltran v. Santa Clara County* (9th Cir. 2008) 514 F.3d 906, 908; *Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1074-1075.)

Kemper's first amended complaint alleges that the individual defendants violated her federally-protected rights while acting under color of state law. (CT 1-2, 3-5, 6-7.) These allegations state a valid cause of action under section 1983. (*Catsouras v. Dept. of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890.)

2. Kemper's Second Cause of Action Against the Municipal Entities.

Kemper's second claim, alleged against the City and County of San Diego, also arises under section 1983. This claim targets the City and County's respective constitutionally-deficient customs and practices. (CT 8:9-10:3; *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 690 (*Monell*).) A *Monell* claim includes two elements: (1) fault, that is, that the municipality's policy or custom is the source of the

constitutional violation, and (2) causation. (*Monell*, at pp. 690-691.) The first amended complaint meets these pleading requirements. (CT 1-10.)

3. The Trial Court Sustained the Defendants' Demurrers Without Leave to Amend.

The City and County of San Diego and the individual defendants demurred to the first amended complaint in November 2010. (CT 11, 27.) They argued Kemper is collaterally estopped from pursuing her section 1983 claims because the juvenile court previously ruled against her when it terminated her parental rights. (*Ibid.*) They also argued that *Heck* prevents Kemper from pursuing her federal claims because she has not overturned the juvenile dependency court's termination order. (CT 19, 32.) Kemper opposed the demurrers. (CT 38, 60.)

The trial court heard the demurrers in February 2011. (RT 1.) The court took judicial notice of the unpublished opinion in *Deanna Fogarty-Hardwick v. County of Orange, et al.* (June 14, 2010, G039045) review den. (Sept. 29, 2010, S184795) [2010 WL 2354383]; CT 59, 81, 116, 119), in which the Court of Appeal held that *Heck* did not bar a mother's section 1983 action arising from juvenile dependency proceedings "for the simple reason that [juvenile dependency proceedings] are not criminal convictions" and that collateral estoppel did not bar the claims for the same

reason. (Exhibit 1, pp. 16-17, 19.)[4] After argument, the court took the demurrers under submission. (RT 31.)

On March 18, 2011, the trial court issued its order sustaining the demurrers without leave to amend. (CT 115-116, 118-119.) The court found that *Heck* is controlling and compels dismissal. (*Ibid.*)

The court certified its decision for immediate writ review under Code of Civil Procedure section 166.1, finding that "[t]here is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." (CT 116, 119.) Since Kemper has the right to appeal from a judgment dismissing her action after the court sustained the demurrers without leave to amend (Code Civ. Proc., section 904.1, subd. (a)(1)), the significance of the trial court's certification lies in the court's view that there are substantial grounds for a difference of opinion on the legal question presented, rather than as support for writ review in the Court of Appeal (which Kemper did not seek because she has an adequate legal remedy by appeal).

On April 28, 2011, Kemper filed a notice of appeal from the order sustaining the demurrers. (CT 121.) On June 2, 2011, the Court of Appeal

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[4] The decision is mentioned here solely as procedural history. It and the Supreme Court's order denying review were exhibits A and B to Kemper's requests for judicial notice, which the superior court omitted from the CT. Kemper will designate the exhibits under California Rules of Court, rule 8.224, at the appropriate time.

issued an order noting that an appeal does not lie from an order sustaining a demurrer without leave to amend and requesting Kemper to obtain an order of dismissal and file it in the Court of Appeal. (See June 2, 2011, docket entry at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=41&doc_id=1978314&doc_no=D059637.) Kemper obtained a final judgment dated June 17, 2011, which she promptly filed in this court. (See *ibid.*, June 22, 2011, docket entry.) The final judgment resolves all issues between the parties. (Cal. Rules of Court, rule 8.204 (a)(2)(B).)

III. *HECK v. HUMPHREY* DOES NOT BAR KEMPER'S ACTION.

A. Standard of Review.

A demurrer raises the legal issue of whether the plaintiff's complaint is sufficient. (*Marina Tenants Assn. v. Deauville Marine Development Co.* (1986) 181 Cal.App.3d 122, 127.) The Court of Appeal reviews a demurrer ruling de novo to determine whether the complaint contains sufficient facts to state a cause of action. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) The reviewing court accepts all properly pleaded material facts and matters as to which judicial notice has been properly taken as true, and it liberally construes all factual allegations "with a view to substantial justice between the parties." (*Marina Tenants Assn.*, at p. 127.)

B. The Trial Court Made Two Fundamental Errors in Applying *Heck* to Bar Kemper's Action.

The trial court ruled that *Heck*, *supra*, 512 U.S. at pages 486-487, required it to dismiss Kemper's claims because the juvenile dependency proceedings did not terminate in Kemper's favor and the juvenile court order terminating her parental rights has not been reversed. (CT 115-116, 118-119.) The trial court's conclusions are erroneous for two reasons, both discussed in detail in section III.C, *post*.

First, to apply *Heck* to bar Kemper's claims, the trial court had to, and did, rule that a juvenile dependency court order terminating parental rights and a criminal conviction should be treated the same for section 1983 purposes. (CT 115-116, 118-119.) This ruling expands *Heck*'s reach beyond the boundaries the Supreme Court expressly defined in *Heck*, which it has clarified and narrowed in later decisions. *Heck* applies only in certain circumstances not present here.

Second, even assuming *Heck* applies to section 1983 actions arising from juvenile dependency proceedings, the trial court still had to determine whether Kemper's action "would necessarily imply the invalidity" of the juvenile court order terminating her parental rights. (*Heck, supra,* 512 U.S. at p. 487.) Despite Kemper's requests, the trial court did not undertake this analysis. (CT 48, 71; RT 7.) Had the court done so, it would have overruled the demurrers, because it would have concluded that Kemper's

claims do not "necessarily imply the invalidity" of a conviction or sentence under *Heck*, *supra*, 512 U.S. at page 487.

C. *Heck* Bars Section 1983 Actions Only When a Criminal Attempts to Circumvent the Federal Habeas Corpus Statute With a Section 1983 Claim.

1. *Heck* Does Not Apply to Kemper's Section 1983 Action Because It Does Not Arise From a Criminal Proceeding and She Had No Federal Habeas Corpus Remedy Available to Her in the Underlying Juvenile Dependency Proceedings.

Section 1983 provides: "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." "[T]here can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." (*Monell, supra,* 436 U.S. at pp. 700-701.)

The circumstances in *Heck* placed it "at the intersection of the two most fertile sources of federal-court prisoner litigation – the Civil Rights Act of 1871, Rev. Stat. §1979, as amended, 42 U.S.C. §1983, and the federal habeas corpus statute, 28 U.S.C. § 2254." (*Heck, supra,* 512 U.S. at p. 480.) Both statutes provide access to federal court for claims of

unconstitutional treatment by state officials, but their scope and operation differ. (*Ibid.*) "In general, exhaustion of state remedies 'is *not* a prerequisite to an action under § 1983,' [citation], even an action by a state prisoner, [citation]. The federal habeas corpus statute, by contrast, requires that state prisoners first seek redress in a state forum." (*Id.* at pp. 480-481.)

The Supreme Court considered the following facts in *Heck*. While Roy Heck's direct appeal from an Indiana conviction for voluntary manslaughter was pending, he sued under section 1983, alleging that the respondents, acting under color of state law, had engaged in an unlawful investigation, destroyed evidence, and used unlawful voice recognition procedures at his trial, which resulted in his conviction. (*Heck, supra*, 512 U.S. at pp. 478-479.) The district court dismissed Heck's action without prejudice, the Indiana Supreme Court upheld his conviction and sentence, and the district court rejected his two petitions for federal habeas relief. (*Ibid.*) The Court of Appeals affirmed the dismissal of Heck's section 1983 complaint, finding that where the plaintiff in a federal civil rights action is challenging the legality of his conviction, so that his victory would require his release even if he had not sought that relief, the suit must be classified as a habeas corpus action and dismissed if the plaintiff failed to exhaust his state law remedies. (*Id.* at pp. 479-480.)

The Supreme Court recognized that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal

judgments" including convictions and sentences. (*Heck, supra*, 512 U.S. at p. 485.) Where a plaintiff's section 1983 action would necessarily "render a [criminal] conviction or sentence invalid," the plaintiff must first 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 [under] 28 U.S.C. § 2254." (*Heck*, at pp. 486-487.) *Heck* therefore bars section 1983 claims that would "necessarily" impugn an underlying criminal conviction or sentence. (*Id.* at p. 487; see also *Wilkinson v. Dotson* (2005) 544 U.S. 74, 81 [*Heck* holds "that a prisoner cannot use section 1983 to obtain damages where success *would necessarily* imply the unlawfulness of a (not previously invalidated) conviction or sentence."]; *Beets v. County of Los Angeles* (Nov. 9, 2011, B227630) __ Cal.App.4th __ [2011 WL 5386349, *1] [stating *Heck*'s holding]; *Wallace v. Kato* (2007) 549 U.S. 384, 392-393 [same].)

By contrast, where the section 1983 action does not necessarily impugn the underlying criminal judgment, the action is not barred. (See *Heck, supra*, 512 U.S. at p. 487.) Kemper's position is that *Heck* does not apply to section 1983 actions that do not arise from criminal proceedings. If the Court of Appeal does not agree with this categorical approach, however, it must determine whether success in Kemper's action would "necessarily imply the invalidity" of the order terminating her parental

rights. (See *id.* at p. 487.) If it would not, then Kemper's action can proceed.

Whether *Heck* bars Kemper's section 1983 claims depends both upon the nature of the underlying juvenile dependency proceedings and the specific challenge her suit raises. As discussed in section III.C.4, *post*, juvenile dependency actions do not ever result in criminal judgments (convictions or sentences) against a parent. Federal habeas relief is unavailable (28 U.S.C. § 2254) and state habeas relief is not readily available to a parent in juvenile dependency proceedings (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 637 [habeas corpus relief is "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."]). *Heck*'s requirement of exhausting state law remedies because the action effectively seeks habeas relief therefore makes no sense in section 1983 actions based upon juvenile dependency proceedings. Thus, neither *Heck*'s holding nor its rationale apply here.

2. The Supreme Court Has Clarified and Narrowed *Heck*.

In *Nelson v. Campbell* (2004) 541 U.S. 637, 647, the Supreme Court emphasized the importance of the term "necessarily" as used in *Heck*: "[W]e were careful in *Heck* to stress the importance of the term 'necessarily.' For instance, we acknowledged that an inmate could bring a

challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not '*necessarily* imply that the plaintiff's conviction was unlawful.' [Citation.] To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination – suits that could otherwise have gone forward had the plaintiff not been convicted."

Nelson v. Campbell, supra, 541 U.S. at page 647, has implications for *Heck*'s application to section 1983 cases arising from juvenile dependency proceedings. The Supreme Court recognized that an inmate could challenge a search warrant's lawfulness under section 1983, even if the search revealed evidence used to convict the inmate at trial (thereby casting doubt on the conviction), because success on the merits would not "necessarily imply that the plaintiff's conviction was unlawful." (*Ibid.*) The Supreme Court cautioned against cutting off "potentially valid damages actions as to which a plaintiff might never obtain favorable termination." (*Ibid.*) Kemper's section 1983 action is like the *Nelson* plaintiff's action insofar as her action does not necessarily imply the invalidity of the juvenile dependency court's determination of the issue it decided (i.e., what placement was in her child's best interests; see § III.C.4, *post*), and Kemper cannot obtain a favorable termination of that decision.

In *Wilkinson v. Dotson, supra*, 544 U.S. at page 84, the Supreme Court reiterated that "prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement." In *Wilkinson*, the court declared that when a prisoner's claim would not "necessarily spell speedier release," that claim does not lie at "'the core of habeas corpus[]' [Citation]" and may be brought under section 1983. (*Id.* at p. 82.) The plaintiffs' section 1983 suit could proceed because it challenged administrative decisions denying them parole eligibility and did not seek an "injunction ordering ... immediate or speedier release into the community." (*Ibid.*) *Heck*'s purpose is thus to prevent a collateral attack on a final judgment when the result of a prisoner's successful section 1983 action would constitute habeas relief by requiring the prisoner to be freed earlier than he or she otherwise would have been.

Most recently, in *Skinner v. Switzer* (2011) __ U.S. __, __ [131 S. Ct. 1298-1299], the Supreme Court reviewed *Heck* and its progeny and again narrowed *Heck*'s application by expanding the type of section 1983 actions that may be brought without being barred. The court held that a state criminal defendant may bring a section 1983 action challenging a state court's post-conviction denial of access to DNA evidence. (*Ibid.*) Skinner's section 1983 action did not "'necessarily imply'" the invalidity of his conviction because its immediate goal was to obtain DNA testing, and

an exculpatory DNA test result was "hardly inevitable; as earlier observed,... results might prove inconclusive or they might further incriminate Skinner." (*Id.* at p. 1298.) After *Skinner*, *Heck* stands for the proposition that a section 1983 action lies even if its success might lead to a conviction's reversal, so long as reversal is not the action's immediate goal and obtaining that goal would not inevitably result in reversal. (*Id.* at pp. 1298-1299.)

Under *Heck*, as clarified by *Nelson*, *Wilkinson*, and *Skinner*, Kemper's section 1983 action may proceed. First, her action does not arise from criminal proceedings. She was never accused, convicted, or sentenced for any crime, so her section 1983 action cannot impugn the validity of a conviction or "invalidate state-imposed confinement." (*Heck, supra,* 512 U.S. at pp. 486-487, *Wilkinson v. Dotson, supra,* 544 U.S. at p. 82.) Kemper's section 1983 action at a definitional level cannot lie in the prohibited zone at "'the core of habeas corpus.' [Citation.]" (*Wilkinson,* at p. 82.)

Second, Kemper's action is not analogous to a *Heck*-barred collateral attack on a criminal judgment because its success cannot result in the reversal of the juvenile dependency court's order terminating her parental rights and freeing her baby for adoption. As addressed more fully in section III.C.4, *post*, the only issue the juvenile court decided was Kemper's baby's best interests, and no such issue arises in her section 1983

action. Her action poses the independent question whether the defendants violated her constitutional rights. Kemper's action does not imply the invalidity of the outcome of the juvenile court case, so it may proceed. (*Heck, supra,* 512 U.S. at p. 487.)

3. The Ninth Circuit's Decision in *Lockett v. Ericson* Supports Kemper's Claim Against the Police Officer Defendants.

In an opinion filed August 31, 2011, five months after the trial court sustained the defendants' demurrers, the Ninth Circuit in *Lockett v. Ericson* (9th Cir. 2011) 656 F.3d 892, 896, reversed the district court's judgment dismissing a criminal's section 1983 complaint based on *Heck.* In *Lockett,* the Ninth Circuit explained that its opinion in *Ove v. Gwinn* (9th Cir. 2001) 264 F.3d 817, 823, was dispositive of Lockett's case and compelled reversal. In *Ove,* the plaintiffs' section 1983 claims arose from blood tests taken from each of them after their arrests for driving under the influence of alcohol. (*Id.* at p. 820.) The plaintiffs filed suppression motions in the criminal proceedings. (*Ibid.*) The court did not rule on one plaintiff's motion because he pled nolo contendre to a California Vehicle Code violation. (*Ibid.*) The court denied another plaintiff's motion and he pled guilty to the same violation. (*Ibid.*) The plaintiffs' convictions were never invalidated as set forth in *Heck, supra,* 512 U.S. at pages 486-487.

The court in *Lockett v. Ericson, supra,* 656 F.3d at page 896, explained that in *Ove v. Gwinn, supra,* 264 F.3d at page 823, *Heck* did not bar the convicted plaintiffs' section 1983 claims because their lawsuit "concern[ed] the way in which their blood was drawn. But blood evidence was not introduced against them. *No* evidence was introduced against them. They pleaded guilty or nolo contendre, respectively. *Their convictions derive from their pleas, not from verdicts obtained with supposedly illegal evidence.* The validity of their convictions does not in any way depend upon the legality of the blood draws." (*Lockett*, at p. 896.) The holding in *Ove* was dispositive of Lockett's claims because he, too, pled nolo contendre after losing his suppression motion, so his conviction derived from his plea and not from a verdict based upon the evidence in the allegedly illegal search of his home. (*Id.* at pp. 896-897.)

Even if the Court of Appeal were to hold that *Heck* applies to section 1983 actions arising from juvenile dependency orders terminating parental rights, under *Lockett v. Ericson, supra,* 656 F.3d at pages 896-897, Kemper's section 1983 claims against the police officers are not barred. The question whether the initial seizure of Kemper's baby was proper has no impact on the validity of the order terminating her parental rights. Seizing Kemper's baby was wrongful regardless of what occurred in the juvenile dependency proceedings. Even if the social workers had not lied and Kemper had received her baby back, seizing the baby still resulted in

an actionable separation of mother and child. (*Beltran v. Santa Clara County, supra,* 514 F.3d at p. 908; *Devereaux v. Abbey, supra,* 263 F.3d at pp. 1074-1075.)

4. Juvenile Court Orders Are Not Like Criminal Convictions.

The Court of Appeal should hold that *Heck* does not apply to section 1983 actions arising from juvenile dependency proceedings because of their vast differences from criminal proceedings. ""[D]ependency proceedings are civil in nature, designed not to prosecute a parent, *but to protect* the child." In these proceedings, "the paramount concern is the child's welfare."' [Citation.]" (*In re April C.* (2005) 131 Cal.App.4th 599, 611.) By statute, juvenile court orders do not constitute criminal convictions for any purpose. (Welf. & Inst. Code, § 203.)

"Criminal defendants and parents are *not* similarly situated." (*In re Sade C.* (1996) 13 Cal.4th 952, 991.) "By definition, criminal defendants face punishment. Parents do not. [Citation.] Criminal defendants, as such, are expressly given protections in the United States Constitution itself. [Citations.] Parents are not. Moreover, at trial, criminal defendants have a general right under the Fourteenth Amendment's due process clause to the assistance of appointed trial counsel if indigent [citation omitted], are entitled to fully confront and cross-examine witnesses under the Sixth Amendment as made applicable to the states through the Fourteenth

Amendment's due process clause [citation omitted], and are favored by the imposition on the state of the burden of proof beyond a reasonable doubt, also through the Fourteenth Amendment's due process clause [citation omitted]; and, in their first appeal as of right, they have a general right to appointed appellate counsel under both the due process and equal protection clauses of the Fourteenth Amendment [citation omitted]. Parents are not so benefitted." (*Id.* at pp. 991-992.) Nor can a parent at a dependency hearing invoke the Fourth Amendment to exclude illegally obtained evidence. (*In re Christopher B.* (1978) 82 Cal.App.3d 608, 614-615.)

In a criminal case the issue is the defendant's guilt, while in a juvenile dependency case the issue is the child's well-being. (*In re April C., supra,* 131 Cal.App.4th at p. 611.) As noted above, a criminal's guilt must be established beyond a reasonable doubt (*In re Sade C., supra*, 13 Cal.4th at p. 992) – the highest burden of proof in our legal system. By contrast, once the juvenile dependency court terminates reunification services, the burden "'falls to the parent to show that the termination of parental rights would be detrimental to the child....' [Citation.]" (*In re C.B.* (2010) 190 Cal.App.4th 102, 122.)

Criminal proceedings also invoke federal and state constitutional and statutory rights to a public trial. (U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 15, 29; Pen. Code, § 686, subd. (1).) Juvenile dependency

proceedings are secret. They are, categorically, a "private affair" closed to the public. (*San Bernardino County Dept. of Public Social Services v. Superior Court* (1991) 232 Cal.App.3d 188, 197-199; Welf. & Inst. Code, § 346.) Dependency proceedings are concerned with what is to be done with the child, not the parent, and the panoply of rights denied to parents and given to criminal defendants flows from that distinction. (*In re Sade C., supra,* 13 Cal.4th at pp. 990-994.)

In short, a juvenile dependency court order terminating parental rights is not a criminal conviction, and is concerned quite literally with none of constitutional protections or ultimate factual or legal questions (guilt versus innocence and punishment) with which criminal proceedings are concerned. As noted above, parents in juvenile dependency proceedings have no federal habeas corpus remedy and their state habeas remedy makes no real legal or practical sense in that forum. (28 U.S.C. § 2254; *In re Claudia E., supra,* 163 Cal.App.4th at p. 637.) Since parents are not convicted of crimes or sentenced in juvenile dependency proceedings and they have no effective habeas remedies, *Heck*'s concern with collateral attacks in the nature of habeas proceedings is not implicated.

The trial court's ruling that *Heck* bars Kemper's action fails to consider the fundamental differences between the two types of proceedings, which compel a different outcome here than in *Heck.* Dispositive juvenile court orders depend far less upon the process due to the parent, and affect

the parent indirectly through the decision made about the child. A criminal section 1983 plaintiff is in a different position. The criminal's section 1983 claims are more likely to depend upon what the state did directly to the criminal, and are thus more likely to imply the invalidity of an underlying criminal judgment.

Finally, as demonstrated above, a parent's successful section 1983 action will not "necessarily imply the invalidity" of a decision made about the child in juvenile dependency proceedings because the issues are inherently independent. (*Heck, supra,* 512 U.S. at p. 487.) A parent's section 1983 action addresses whether the defendants violated the plaintiff's constitutional rights, while the latter is concerned with the child's best interests.

Even when parental rights are terminated by fraudulent conduct (as Kemper alleges here), it remains very possible that it was in the child's best interests to be removed from the parent's custody. The validity of the order terminating parental rights is therefore not "necessarily" impugned by a successful section 1983 action. The child might, for example, be placed in a happy adoptive home, with two parents instead of one, and live in greater material comfort than if the child had remained with the biological parent. Even in this situation, however, the child's parent whose rights were illegally severed still has a section 1983 claim. To hold, as the trial court did, that *Heck* bars parents relief under section 1983 would deprive them of

any remedy for the violation of their constitutional rights and would undermine section 1983's express purpose. (*Monell, supra*, 436 U.S. at pp. 700-701.)

IV. COLLATERAL ESTOPPEL DOES NOT PRECLUDE KEMPER'S CLAIMS.

A. The Trial Court Could Not Make a Collateral Estoppel Determination Because the Juvenile Court Record Was Not Before It.

Collateral estoppel only applies where the issue sought to be precluded from relitigation is: (1) identical to that decided in a former proceeding; (2) actually litigated in the former proceeding; (3) necessarily decided in the former proceeding; (4) the decision in the former proceeding is final and on the merits; and (5) the party against whom preclusion is sought was a party or in privity with a party in the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*).) The party asserting collateral estoppel has the burden of establishing all of the doctrine's elements. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1247-1248.)

The trial court's determination that Kemper's civil rights action collaterally attacked the juvenile court order terminating her parental rights is merely its *Heck* ruling stated differently. The collateral estoppel ruling has no more merit than the *Heck* ruling. As an initial matter, the trial court could not decide this issue because it did not have any part of the record of the juvenile court proceedings before it.

When considering whether the elements of collateral estoppel have been met, courts must "look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) The law is clear that a court cannot rely exclusively on the mere existence of a judgment in the underlying action, yet the trial court did that here. (CT 116, 119.) Rather, the court must carefully scrutinize the record to determine whether the elements of collateral estoppel have been met, including what issues were actually litigated and decided. (*Schaefer/Karpf Productions v. CNA Insurance Companies* (1998) 64 Cal.App.4th 1306, 1314.) Kemper raised this point in her demurrer oppositions and at the hearing but the trial court adopted the defendants' collateral estoppel position nonetheless. (CT 48, 71; RT 7-8.)

Because the trial court is confined to the pleadings and judicially-noticed matters on demurrer (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), determining that collateral estoppel bars an action on demurrer would be a difficult task at best. Here, the task was impossible, because the defendants did not request judicial notice of anything.

The Court of Appeal in *Beets v. County of Los Angeles, supra,* 2011 WL 5386349, at *1, reversed a trial court's demurrer ruling that collateral estoppel and *Heck* barred the plaintiffs' wrongful death action which

alleged that police used unreasonable force when they killed the plaintiffs' son. (*Id.* at **1, 6, 8.) The son's accomplice was convicted of aiding and abetting the son in assaulting a police officer with a deadly weapon, which required the jury to find the officer did not use unreasonable force. (*Id.* at *3.) The Court of Appeal found that the record was inadequate to demonstrate that the son and accomplice were in privity at the accomplice's trial: "First, the entire record of [accomplice] Morales' trial is not before us. We have only a few small fragments the court below judicially noticed. We have no idea what happened at most of Morales' trial. Thus, we have an inadequate basis for concluding that Morales adequately represented the interests of Rose [the son]." (*Id.* at *7.) The *Beets* court noted that without an adequate record from the underlying action, it would have to engage in "'rank speculation'" which is "'the antithesis of the confidence necessary to invoke collateral estoppel.' [Citation.]" (*Id.* at *8.)

With even less information about the juvenile dependency proceedings than the "few small fragments" the trial court had before it in *Beets*, the trial court here similarly engaged in rank speculation that the defendants met the elements of collateral estoppel. It could not properly so find in this evidentiary void. The trial court's collateral estoppel ruling fails for this reason alone.

B. The Elements of Collateral Estoppel Are Not Present.

1. The Issue Adjudicated in the Juvenile Dependency Proceedings Is Not Identical to the Issues in This Litigation.

Although without the record of the juvenile dependency proceedings the trial court could not find the elements of collateral estoppel were met, the Court of Appeal as a matter of law can find that they cannot be met.

As discussed above, Kemper's section 1983 claims seek to recover damages for violations of her constitutional rights, not to recover the custody of her child or to reverse the order terminating her parental rights. (*Carey v. Piphus* (1978) 435 U.S. 247, 254.) Despite this, the trial court concluded that Kemper's section 1983 claims amount to a collateral attack on the juvenile dependency court's order terminating her rights. (CT 115, 118.) This finding was in error. The collateral estoppel effect of a judgment is confined to identical issues that were actually litigated in the prior proceeding. (*Lucido, supra,* 51 Cal.3d at p. 341.)

For example, in *Kilroy v. California* (2004) 119 Cal.App.4th 140, 149, a federal court's determination that a highway patrol officer's search of a business was unconstitutional did not have preclusive effect against the defendant/officer in a later civil rights action, because the issues in the two proceedings were not identical. The issue decided in the federal suppression proceeding (whether evidence had to be suppressed because of the officer's deliberate and material omissions in obtaining the warrant)

was not identical to the issue in the section 1983 action (whether the officer was entitled to qualified immunity because his conduct was objectively reasonable). (*Ibid.*)

This case is similar. Here, the only question before the juvenile dependency court was what placement was in Kemper's child's best interests. (CT 4; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152; Welf. & Inst. Code, § 202, subd. (d).) A section 1983 claim could never be litigated in that forum because it lacks jurisdiction over such claims and cannot provide the plaintiff/parent with the jury trial to which he or she is entitled. (*City of Monterey v. Del Monte Dunes* (1999) 526 U.S. 687, 709 [plaintiffs have the right to a jury trial in section 1983 actions].) Should Kemper successfully litigate her section 1983 claims, the juvenile court order terminating her parental right would be unaffected. The issues in the two proceedings are not identical.

2. The Issue of Whether Exigent Circumstances Justified the Police Officer Defendants' Warrantless Seizure of Kemper's Baby Was Not Litigated in the Juvenile Court Proceedings.

One of Kemper's section 1983 claims is based on the police officers seizing her daughter without a warrant in the absence of any exigent circumstances. (CT 3.) This conduct violated Kemper's constitutional rights. (*Beltran v. Santa Clara County, supra,* 514 F.3d at p. 908.) No facts in the record demonstrate that the juvenile court ever considered this issue, let alone found that exigent circumstances justified taking Kemper's

child, nor does California law require a juvenile court to make any such determination. (See Welf. & Inst. Code, §§ 315, 319; *Anderson-Francois v. County of Sonoma* (9th Cir. 2011) 415 Fed. Appx. 6, 8-9.[5]) Accordingly, Kemper's section 1983 claim based on the seizure is not identical to any issue litigated at the juvenile court's initial detention hearing. (*Ibid.*)

3. The Issue of the Social Workers' Judicial Deception Was Not Litigated in the Juvenile Court Proceedings.

Kemper's claims against the County of San Diego and the individual social services agents is based upon judicial deception. (CT 4-5.) The government violates a citizen's due process rights if it lies about her and the lies deprive her of something to which she is entitled; here, the custody of her child. (*Costanich v. Dept. of Social & Health Services* (9th Cir. 2009) 627 F.3d 1101, 1108.) As a matter of law this issue was not litigated and decided in the juvenile dependency case because, again, the only issue before that court was Kemper's child's best interests. (See § III.C.4, *ante*.)

4. Kemper Was Not a Party or in Privity With a Party in the Juvenile Dependency Proceedings.

Collateral estoppel cannot be applied against a party who was not a party or in privity with a party in the prior proceeding. (*Lucido, supra,* 51 Cal.3d at p. 341.) A parent such as Kemper is not a party in juvenile court

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[5] Unpublished dispositions and Ninth Circuit orders issued on or after January 1, 2007, may be cited pursuant to Federal Rules of Appellate Procedure 32.1 and Circuit Rule 36-3 (b).

proceedings. The petition filed with the juvenile court contains no allegations against a parent. The petition is only required to include a concise statement to show the child falls within the juvenile court's jurisdiction. (Welf. & Inst. Code, § 332, subd. (f).) Juvenile court jurisdiction arises under section 300, and is obtained only over the child named in the petition, not her parents. The fact that Kemper may ultimately have appeared and been represented by counsel in the action does not change this fact. A parent's right to representation in juvenile court stems from his or her entitlement to notice of a hearing, not because he or she is a party. (*Id.* at § 349, subd. (b).)

Nor was Kemper in privity with any 'party' to the juvenile court proceedings. The juvenile court stands in loco parentis to the minor who is the subject of its proceedings. (*In re Hadley B.* (2007) 148 Cal.App.4th 1041, 1048.) A parent's relationship to a child in juvenile dependency proceedings is further altered by the intervention of the social services agency and a minor's independent representation by counsel. (Welf. & Inst. Code, §§ 317, subd. (c), 319, subd. (b).) The child's attorney represents only the child's interests. (*Id.* at § 317, subd. (e).) As the Court of Appeal is aware, the parent and his or her counsel is usually adverse to counsel appointed to represent the child's interests.

Further, in juvenile dependency proceedings a child and parent do not share the same legal interest, because the focus in juvenile court is on

the child's welfare and not the parent's interest in custody. (*In re Meranda P., supra*, 56 Cal.App.4th at p. 1152; see also *In re Hadley B., supra,* 148 Cal.App.4th at p. 1048.) Lacking a common interest in the juvenile proceedings with his or her child, a parent like Kemper cannot be found in privity with her child for collateral estoppel purposes. The defendants did not establish the elements of collateral estoppel.

5. Public Policy Disfavors Applying Collateral Estoppel Under the Circumstances of This Case.

Even where the minimal prerequisites for invoking collateral estoppel are present, it is not an inflexible, universally applicable principle. Policy considerations may limit its use where the doctrine's underpinnings are outweighed by other factors. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829.)

Whether collateral estoppel is fair and consistent with public policy in a particular case depends in part upon the character of the forum that first decided the issue later sought to be foreclosed. (*Vandenberg v. Superior Court, supra,* 21 Cal.4th at p. 829.) In this regard, courts must consider the judicial nature of the prior forum, that is, its legal formality, the scope of its jurisdiction and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings. (*Ibid.*)

Dependency proceedings are part of a comprehensive statutory scheme geared toward expediency to serve the dependent child's best

interests. (*In re R.H.* (2009) 170 Cal.App.4th 678, 697.) By statute, the best interests of the child permeates all aspects of dependency proceedings. (Welf. & Inst. Code, § 202, subd. (d).) Of the many private and public concerns which collide in a dependency proceeding, time is among the most important. (*In re Claudia E., supra,* 163 Cal.App.4th at p. 635.) The fluid nature of dependency proceedings and the paramount need to protect the well-being of children require these proceedings to move very quickly in response to alleged changes in circumstances.

A rule requiring the rigid application of collateral estoppel to the intentionally fluid decision-making of a dependency court would inevitably encourage parents to litigate more aggressively and attempt collateral challenges to even minor decisions while the proceedings are pending. Thus, the trial court's collateral estoppel ruling here would effectively require a parent to engage in collateral attacks on the validity of dependency orders (and on the integrity of the social workers) during the dependency case itself, if they wished to preserve civil claims. Such a requirement would be inconsistent with the special nature of dependency proceedings and would interfere with the interests 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 going forward. 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 to preserve a later tort claim under section 1983 would undermine rather than promote the critical role of such proceedings in protecting the child's best interests.

V. THE TRIAL COURT'S ERRORS WERE PREJUDICIAL.

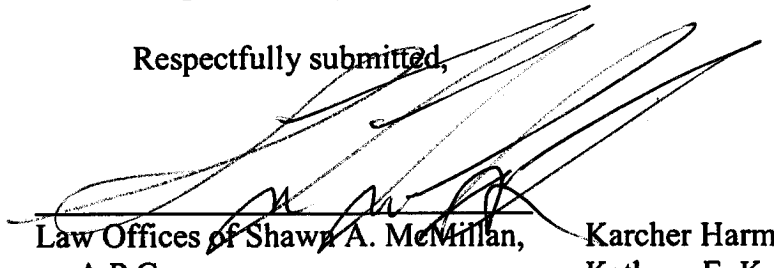
The Court of Appeal must reverse a judgment where judicial error has caused a "miscarriage of justice." (Cal. Const., art VI, § 13; Evid. Code, § 354; Code Civ. Proc., § 475.) A miscarriage of justice should be declared "when the court, 'after an examination of the entire case, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The trial court erred, as demonstrated above. Neither its *Heck* ruling nor its collateral estoppel ruling is correct, leaving the judgment without any support. The errors are prejudicial because, in their absence, the trial court would have overruled the defendants' demurrers and permitted Kemper to litigate her meritorious claims.

VI. CONCLUSION.

The Court of Appeal should reverse the trial court's judgment of dismissal against Kemper and remand this action for further proceedings.

Respectfully submitted,



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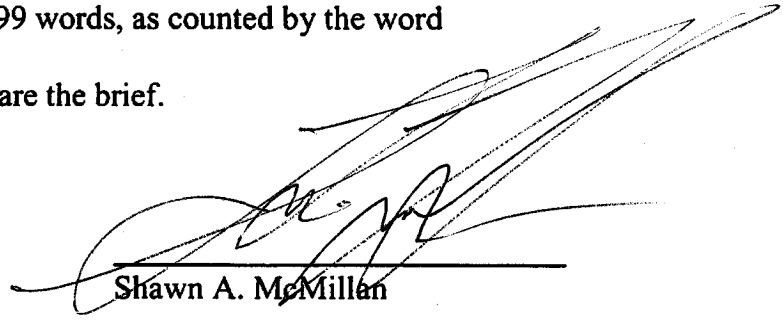

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