IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ERIC MUELLER and CORISSA D. MUELLER, Husband and Wife, Individually, and on behalf of TAIGE L. MUELLER, a Minor, and on behalf of Themselves and Those Similarly Situated, Plaintiffs, v. APRIL K. AUKER; KIMBERLY A. OSADCHUK; JANET A. FLETCHER; BARBARA HARMON; LINDA RODENBAUGH; THE CITY OF BOISE; DALE ROGERS; TED SNYDER; TIM GREEN; RICHARD K. MacDONALD; and ST. LUKE'S REGIONAL MEDICAL CENTER, Defendants.	)	Case No. CV-04-399-S-BLW **MEMORANDUM DECISION AND ORDER**

INTRODUCTION

The Court has before it Defendants' motions to dismiss.[1] The Court heard oral arguments March 9, 2005, and took the motions under advisement. For the

[1] Specifically, the City of Boise and Idaho Department of Health & Welfare employees moved to dismiss under Rule 12(b)(6). St. Luke's and Dr. MacDonald moved for judgment on the pleadings under Rule 12(c). Defendants' motions to dismiss, filed prior to the Amended Complaint (Docket Nos. 19, 21, & 23) are moot and not before the Court.

reasons that follow, the Court will grant St. Luke's motion to dismiss Counts One through Three of the Amended Complaint. The Court will deny all other motions.

BACKGROUND

An emergency room physician administered a spinal tap and antibiotics to minor Taige Mueller without her parents' consent. The Muellers bring this § 1983 action against the physician, the hospital, the City of Boise, Boise police officers, and State social workers. For purposes of Defendants' motions to dismiss, the Court will assume the truth of the Muellers' factual allegations as stated below.

On August 12, 2002, at approximately 10:15 p.m., Corissa Mueller brought her five-week-old daughter, Taige Mueller, to St. Luke's Emergency Room. Taige had a temperature of 100.8 degrees Fahrenheit. The emergency room physician, Dr. MacDonald, informed Corissa that it was hospital protocol to administer antibiotics and a spinal tap to infants six weeks and younger who have a temperature of 100.4 degrees Fahrenheit or above. He told Corissa that there was a five percent risk of meningitis associated with flu-like symptoms.

Corissa did not consent to hospital protocol. Corissa explained that she preferred to wait for the results of the initial lab tests so she could discuss them with her naturopath physician. Corissa explained her concerns, based upon her own

research, with injecting antibiotics into her five-week-old infant and performing a spinal tap. When initial lab tests came back negative, at approximately 1:30 a.m. on August 13, 2002, Corissa asked a nurse to begin the discharge procedure.

Unbeknwonst to Corissa, MacDonald had called the Idaho Department of Health and Welfare (IDHW) for the purpose of enforcing hospital protocol. Detective Rogers of the Boise Police Department then arrived at the hospital. He advised Corissa that she was endangering her child by delaying the antibiotics and spinal tap. Corissa attempted to explain her view regarding the conflicting dangers involved and her reasons for avoiding the procedures.

At approximately 1:40 a.m., MacDonald indicated that he needed to take Taige's temperature. Corissa handed him the child for this purpose. MacDonald subsequently kept the child and refused to return her.

Rogers advised Corissa that the child had been seized pursuant to Idaho Code § 16-1612. This statute provides that a peace officer may remove a child from parental custody where prompt removal is necessary to prevent serious physical or mental injury. Neither Rogers nor any other officer or social worker attempted to use I.C. § 16-1616 which provides for judicial authorization of emergency medical treatment.

Corissa saw MacDonald take the child elsewhere in the hospital to perform

the medical procedures to which Corissa objected. Corissa was dragged protesting down the hall by Officers Green and Snyder of the Boise Police Department. Corissa demanded that Taige be returned to her. She also asked repeatedly to use the hospital telephone to call her husband. City police officers refused her requests and threatened her with handcuffs.

Around 2:30 a.m., April Auker, a social worker from IDHW, approached Corissa with a Department Consent Form. Rogers told Auker to leave. Auker then consulted with a fellow employee, Barbara Harmon, before signing two consent forms in Linda Rodenbaugh's name, also from IDHW. Following these consents, MacDonald performed a spinal tap on Taige, which showed there was no sepsis or meningitis.

Corissa was reunited with Taige at about 4:00 a.m., two hours and twenty minutes after the child was seized. The next day, Kimberly Osadchuk from IDHW attempted to obtain consent from Corissa for the procedures performed the night before. Defendants Linda Rodenbaugh and Janet Fletcher are supervisors within IDHW and authorized the acts of Defendants Auker, Harmon, and Osadchuk.

The Muellers bring § 1983 claims against all Defendants for conspiring to deprive Eric and Corissa Mueller of their constitutionally protected parental rights of custody. The Muellers also bring § 1983 claims against all Defendants for

conspiracy to deprive Corissa and Taige of their Fourth Amendment rights to be free from unreasonable seizures. The Muellers demand an injunction preventing the City and IDHW from removing children from their parents in the absence of imminent harm and without a court order. The Muellers also demand that Idaho Code § 16-1612 be declared unconstitutional on its face and as applied. The Muellers seek to represent a class pursuant to Rule 23 in regard to their claims for prospective relief. The Muellers bring state law tort claims against St. Luke's and MacDonald for battery, improper arrest, and wrongful interference with custodial rights.

DISCUSSION

Standards Governing Motions to Dismiss:

A motion to dismiss should not be granted "unless it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Clegg v. Cult Awareness Network,* 18 F. 3d 752, 754 (9th Cir. 1994). All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the non-moving party. *See Buckey v. County of Los Angeles,* 968 F.2d 791, 794 (9th Cir. 1992). The court need not, however, accord the presumption of truthfulness to any legal conclusions, opinions or deductions, even if they are couched as factual allegations. *United States ex rel. Chunie v. Ringrose,* 788 F.2d 638, 643 n.2 (9th Cir. 1986). The same standards apply to motions to

dismiss made under Rule 12(c) as apply to motions made under Rule 12(b)(6). *Gutierrez v. RWD Techs.*, 279 F.Supp.2d 1223, 1224 (E.D. Cal. 2003).

The Ninth Circuit has held that "in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss &Liehe, Inc. v. N. Cal. Collection Serv., Inc.,* 911 F.2d 242, 247 (9th Cir. 1990). On the other hand, while amendments are liberally permitted under Rule 15(a), the district court may deny leave to amend when there has been an undue delay in bringing the motion, and the opposing party would be unfairly prejudiced by the amendments. *See United States. v. Pend Oreille Pub. Util. Dist. No. 1,* 28 F.3d 1544, 1552-53 (9th Cir. 1994).

§ 1983 CLAIMS

Defendants move this Court to dismiss the Muellers' § 1983 claims on the grounds that (1) the doctrine of *respondeat superior* does not apply to § 1983 claims, (2) St. Luke's and MacDonald are not state actors, (3) the Muellers have failed to allege any facts supporting their constitutional claims, and (4) Defendants are entitled to qualified immunity. The Court will examine each argument in turn.

I. Vicarious Liability – the Doctrine of *Respondeat Superior,* Liability for an Unconstitutional Policy, and Supervisory Liability.

Defendants contend that the Muellers' claims against the City and St. Luke's should be dismissed because the doctrine of *respondeat superior* does not apply to § 1983 claims. The Court agrees that a § 1983 plaintiff cannot recover under the doctrine of *respondeat superior*.

To state a claim under § 1983, a plaintiff must allege four elements: "(1) a violation of rights protected by the Constitution or created by federal statute (2) proximately caused (3) by conduct of a 'person' (4) acting under color of state law." *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).[2] A municipality is a "person" within the meaning of § 1983. However, a municipality may not be held liable under § 1983 for actions of its employees based on a theory of *respondeat superior*. *Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). To establish *Monell* liability under § 1983, a plaintiff must show that the violation of his constitutional rights resulted from municipal policy or custom. *Id.* Where such a showing is made, the city is being held responsible for its own actions in establishing an unconstitutional policy or custom, rather than vicariously for the random acts of

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[2] 42 U.S.C. § 1983, provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, . . . 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. . . .

its employees. However, the Ninth Circuit has seemingly recognized the difficulty inherent in this distinction by cautioning the district court that "it is improper to dismiss on the pleadings alone a section 1983 complaint alleging municipal liability even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice." *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir. 1986).

A. <u>City Policy or Custom</u>

The Muellers state that Boise police officers removed Taige from parental custody in the absence of imminent harm and without judicial authorization. The Muellers allege that it is City policy or custom to assist IDHW in removing children from parental custody under such unconstitutional conditions. The Muellers further contend that although judicial authorization was available under I.C. § 16-1616, Boise police officers chose to ignore it. Muellers allege that this statutory sidestepping was pursuant to the general policy or custom of the City.[3] Therefore, the Muellers meet the Ninth Circuit's "bare allegation" requirement in regard to municipal policy or custom.

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[3] The Amended Complaint does not specifically allege that the police officer's failure to use § 16-1616 was part of the City's general policy or custom. However, the Amended Complaint generally states that all actions of the Boise police officers were pursuant to the City's policy or custom.

B. <u>Hospital Policy</u>

In regard to the Muellers' § 1983 claims against St. Luke's, the *Monell* rule applies to preclude *respondeat superior* liability where the defendants are private entities.[4] Accordingly, the Court must determine whether the constitutional violations alleged by the Muellers' were the result of hospital policy.

St. Luke's argues that the Muellers have failed to allege an official hospital policy to deprive parents of their constitutional rights. St. Luke's admits that the Muellers allege that it is hospital protocol to administer antibiotics and a spinal tap to infants six weeks and younger who have a temperature of 100.4 degrees Fahrenheit or above. However, St. Luke's argues that this allegation makes no mention of official hospital policy to implement the protocol without parental consent, without a court order, and in the absence of imminent harm.

The Muellers, in opposition, note that MacDonald decided to enforce hospital protocol without Corissa's consent. The Muellers argue that under a liberal interpretation of the pleadings, this amounts to an allegation that MacDonald's decision was pursuant to hospital policy.

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[4] *See, e.g., Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982); *Powell v. Shopko Laurel Co.*, 678 F.2d 504, 506 (4th Cir. 1982); *Ibarra v. Las Vegas Metro. Police Dep't*, 572 F.Supp. 562, 563-645 (D.Nev. 1983); *Taylor v. Plousis*, 101 F.Supp.2d 255, 263-64 (D.N.J. 2000); *Whalen v. Correction Medical Service*, 2003 WL 21994752 (D.Del. 2003).

The Court disagrees. The Muellers fail to allege that MacDonald acted pursuant to an official hospital policy to administer antibiotics and a spinal tap without parental consent. The standard referenced in the complaint is a scientific protocol, not a policy which focuses on when a mother or father's consent is required. Moreover, it is difficult to envision any amendment to the complaint which could turn this medical standard of care into a hospital policy that deprives a parent of the right to control their child's medical care. The Court therefore concludes that "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss &Liehe, Inc.* 911 F.2d at 247.

Even if the Muellers had alleged such a hospital policy, St. Luke's would still not be subject to a § 1983 claim. As previously stated, a § 1983 plaintiff must allege that a person acting *under the color of state law* violated rights protected by the Constitution or created by federal statute. *Crumpton,* 947 F.2d at 1420. In addition to alleging that St. Luke's had a policy to implement hospital protocol without parental consent, the Muellers must allege that St. Luke's policy required physicians to act under the color of state law by soliciting assistance from state or local authorities in their enforcement of the protocol. In other words, the Muellers must also allege that St. Luke's policy required physicians to perform tasks traditionally delegated to the state or to conspire with state actors to deprive parents of their

constitutional rights. The Court finds that the lack of state action in Muellers' constitutional claims against St. Luke's cannot be cured by the allegation of other facts. Accordingly, the Court will grant St. Luke's motion to dismiss Counts One through Three of the Amended Complaint.

C. **Supervisory Liability**

The IDHW Defendants (collectively "the Social Workers") maintain that Rodenbach and Fletcher cannot be held individually liable for a § 1983 claim based upon their status as supervisors. The Social Workers argue that although the Muellers allege Rodenbach and Fletcher "are supervisors within CPS," there is no causal connection between their conduct and the alleged constitutional violations. The Muellers note that the Amended Complaint actually alleges Rodenbach and Fletcher are supervisors *and* they "authorized the acts" of other Social Workers.

The Supreme Court has concluded that Congress did not intend to "impose liability vicariously on [employers or supervisors] solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Monell,* 436 U.S. at 692. A § 1983 plaintiff must show a causal connection between the state official's personal conduct and the alleged constitutional violation. *Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1109 (9th Cir. 2001). A supervisor can be liable if the supervisor had knowledge of the acts and tacitly

authorized the offensive practices. No. 02-104, 2004 WL 1246053, at *3 (D. Ore. June 3, 2004). Similarly, supervisory liability is imposed against a supervisory official for his " 'acquiesce[nce] in the constitutional deprivations of which [the] complaint is made,' " *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (quoting *Meade v. Grubbs,* 841 F.2d 1512, 1528 (10th Cir. 1988) (citation omitted)). Authorization of unconstitutional conduct, whether explicit or implicit, is a basis for supervisory liability for a § 1983 claim in the Ninth Circuit.

The Muellers allege that Rodenbach and Fletcher are supervisors within Child Protective Services of IDHW and that they authorized the acts of other Social Workers. The Court finds that this is sufficient to allege supervisory liability for the Muellers' § 1983 claims.

II. Acting Under Color of State Law

MacDonald argues that the Muellers have insufficiently alleged state action. MacDonald contends that his private actions of reporting child abuse or neglect pursuant to state statute and his subsequent medical treatment of Taige do not transform him into a state actor. The Court disagrees and finds that MacDonald's conduct, as alleged in the Amended Complaint, transformed him into a state actor.

If an individual is possessed of state authority and purports to act under that authority, his or her action is state action. *West v. Atkins* 487 U.S. 42, 57 (1988).

An individual is possessed of state authority where the state delegates to the individual a traditional state function, or a function limited by law to state officials. *Id.* at 56.

The Muellers allege that MacDonald assumed the mantle of the state when he determined that Taige needed to be removed from her mother's custody. The Muellers further allege that MacDonald performed a state function when he physically removed Taige from Corissa's custody pursuant to I.C. § 16-1612. That provision provides that "[a] child may be taken into shelter care *by a peace officer or other person appointed by the court*." (emphasis added).[5] Because both the determination that Taige needed to be removed and the subsequent physical removal are functions traditionally delegated to the state, the Court finds that the Muellers have adequately alleged state action.

Alternatively, the Muellers allege that MacDonald acted under color of state law by conspiring with state officials to deprive the Muellers of their constitutional rights. The Supreme Court has held that

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[5] I.C. § 16-1612 (a)(1) provides as follows:

A child may be taken into shelter care by a peace officer or other person appointed by the court without an order issued pursuant to subsection (d) of section 16-1606 or section 16-1608, Idaho Code, only where the child is endangered in his surroundings and prompt removal is necessary to prevent serious physical or mental injury to the child or where the child is an abandoned child pursuant to the provisions of chapter 81, title 39, Idaho Code.

> "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of state law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."

United States v. Price, 383 U.S. 787, 794 (1966). The Muellers allege that MacDonald, by requesting assistance from the Department of Health and Welfare, was jointly engaged with state officials in illegally removing Taige from parental custody in order to perform medical procedures on her. Thus, the Muellers have adequately alleged that MacDonald acted under color of state law by conspiring with state agents.

III. Sufficiency of the Allegations

Defendants maintain that the Muellers have failed to allege facts amounting to constitutional deprivations. The Court finds for the reasons stated below that the Muellers have sufficiently alleged constitutional deprivations of their parental rights of custody and of Corissa and Taige's Fourth Amendment rights.

A. <u>Parental Rights of Custody</u>

Defendants maintain that the Muellers' failure to show a violation of a right guaranteed by law is fatal to their conspiracy claim. However, the Muellers contend that Defendants mislabel Count One as simply a "conspiracy claim" when, in fact, Count One states that "Defendants conspired to deprive, acted in concert to deprive,

and did deprive" Eric and Corissa Mueller of their constitutional rights of parental custody. The Court agrees that the Muellers allege more than a conspiracy claim.

First, the Muellers allege that Defendants made an unreasonable determination of imminent harm. The Muellers allege that Corissa attempted to explain her view on the conflicting dangers involved in a spinal tap and her reasons for avoiding the procedure. The Muellers contend that despite Corissa's efforts, Defendants unreasonably removed Taige from parental custody.

Second, the Muellers allege that Defendants failed to obtain judicial authorization for emergency medical treatment under I.C. § 16-1616.[6] This statute specifically allows for a physician to inform the court that in his professional opinion, the child will suffer serious harm without treatment. Defendants invoked § 16-1612, the Muellers claim, to avoid justifying their actions before a court. The Muellers contend that their allegations of removal in the absence of imminent harm and the procurement of medical procedures without a court order are sufficient to state a claim for constitutional violations of their parental rights. The Court agrees. To

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[6]I.C. § 16-1616(a) provides, in pertinent part, as follows:

> At any time whether or not a child is under the authority of the court, the court may authorize medical or surgical care when:
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> . . .
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> (2) A physician informs the court orally or in writing that in his professional opinion, the life of the child would be greatly endangered without certain treatment and the parent, guardian or other custodian refuses or fails to consent.

state a claim under § 1983, a plaintiff must allege that a person acting under the color of state law violated rights protected by the Constitution or created by federal statute. *Crumpton,* 947 F.2d at 1420. The Muellers have already alleged that Defendants are "persons" acting under the color of state law. The Court will thus turn to whether the Muellers have alleged a constitutionally protected right.

The Supreme Court has long protected, under substantive due process principles, the integrity of the family unit and the right of parents to raise their children. Parents have a fundamental liberty interest in the care, custody, and control of their children. *Troxel v. Granville,* 530 U.S. 57, 65 (2000). This right encompasses "the right of parents to make important medical decisions for their children." *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000).

However, this right is not absolute; "[t]he State has a profound interest in the welfare of the child, particularly his or her being sheltered from abuse." *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999). The Ninth Circuit has recognized that a state may constitutionally remove children threatened with imminent harm from the custody of their parents when it is justified by emergency circumstances. *Mabe,* 237 F.3d at 1106.

The Muellers can state a claim for constitutional violations of their parental rights of custody. The state must provide due process when physically removing

children from parental custody and when making medical decisions for children over their parents' objections. The Amended Complaint states that Defendants unreasonably determined imminent harm prior to Taige's removal in violation of the Muellers' substantive due process rights. Furthermore, the Amended Complaint states that Defendants failed to even attempt to obtain judicial authorization for emergency medical treatment under I.C. § 16-1616. Because the Muellers allege that no exigent circumstance justified Defendants' actions, the Muellers can state a claim for violations of their parental rights of custody.

B. <u>Unreasonable Seizure of Corissa Mueller</u>

Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of due process, must be the guide for analyzing these claims. *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Because the Muellers have alleged an unreasonable seizure, the Fourth Amendment provides the proper analysis for this claim.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A detention or seizure of a person occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *Desyllas v.*

Bernstine, 351 F.3d 934, 940 (9th Cir. 2004).

The Muellers allege that the officers unreasonably restrained the liberty of Corissa by dragging her down the hallway and by not allowing her to use the telephone. The Court finds that the Muellers have sufficiently alleged facts to support a constitutional deprivation under the Fourth Amendment.

Additionally, the Social Workers argue that the Amended Complaint fails to allege their participation in the deprivation of Corissa's Fourth Amendment rights. The Muellers, on the other hand, claim that the Social Workers acted in a conspiracy with other Defendants to deprive the Muellers of their constitutional rights. The Court agrees that the Muellers have sufficiently alleged the Social Workers' participation in the deprivation.

To establish the defendants' liability for a conspiracy, a plaintiff must demonstrate the existence of " 'an agreement' or 'meeting of the minds' to violate constitutional rights. " *United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc) (quoting *Fonda v. Gray,* 707 F.2d 435, 438 (9th Cir. 1983)). Such an agreement need not be overt and may be inferred on the basis of circumstantial evidence such as the actions of the defendants. *See id.* at 856. Furthermore, it is not necessary that each participant in the alleged conspiracy know the exact details of the plan, but each participant must share the common objective

of the conspiracy. *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1301 (9th Cir. 1999).

The Amended Complaint submits that the Social Workers shared in Defendants' overall conspiracy to deprive the Muellers of their parental rights of custody. The Muellers allege that a shared common objective is evidenced by the Social Workers' attempt to obtain consent from Corissa for her child's medical procedures while Corissa was confined by Defendant police officers. The common objective is further evidenced, the Muellers allege, by the Social Workers' unauthorized consent to procedures performed by MacDonald. In sharing the common objective of depriving Eric and Corissa Mueller of their parental rights of custody, the Defendants thus become liable for the acts of other members of the conspiracy. *See Hale v. Townley,* 45 F.3d 914, 920 (5th Cir. 1995). The Muellers can therefore state a claim against the Social Workers for the unreasonable seizure of Corissa.

C. <u>Unreasonable Seizure of Taige Mueller</u>

Defendants argue that there was no violation of Taige's Fourth Amendment rights because she was legally seized pursuant to I.C. § 16-1612. This statute provides that a child who is in danger of "serious physical or mental injury" may be removed from parental custody by a peace officer without a court order. Effectively,

Defendants argue that § 16-1612 provides immunity to city officials who act pursuant to it.

The Muellers contend that the state statute is not a defense to a federal constitutional violation. The Muellers contend that since Defendants did not have reasonable cause to believe that Taige was in imminent danger, then, insofar as the federal constitution is concerned, her seizure was unreasonable.

Again, the proper analysis for this claim falls under the Fourth Amendment, which protects the right of the individual to be free from unreasonable seizures. Government officials are required to obtain prior judicial authorization before seizing a child against the parent's wishes unless they possess information at the time of the seizure that establishes "reasonable cause to believe that the child is in imminent danger of serious bodily injury." *Wallis,* 202 F.3d at 1138.

The Muellers allege that Defendants did not have reasonable cause to believe Taige was in imminent danger. In the face of such allegations, a state law permitting, without judicial authorization, the removal of a child who is in danger of "serious physical or mental injury" cannot provide immunity. The Muellers have alleged a Fourth Amendment violation sufficient to withstand a motion to dismiss.

D. <u>Qualified Immunity</u>

As an alternative basis for dismissing the Amended Complaint, the Social

Workers maintain that the Muellers' claims are barred by the doctrine of qualified immunity. The Social Workers contend that they are entitled to qualified immunity because, based upon the facts alleged in the Amended Complaint, a reasonable social worker would believe her conduct was lawful.

The Social Workers claim they are shielded by qualified immunity "if (1) the law governing the official's conduct was clearly established, and (2) under the law, the official objectively could have believed her conduct was lawful." *Mabe*, 237 F.3d at 1106. The Social Workers maintain that this analysis applies equally to Counts One through Three because the Muellers' Fourth Amendment claims effectively mirror the Muellers' claims of parental rights of custody. As to the first prong, the Social Workers admit that it is clearly established that "parents will not be separated from their children without due process of law except in emergencies." *Id.* at 1107.

As to the second prong of qualified immunity, the Social Workers frame the question as whether, under the law, a reasonable social worker could believe that her conduct was lawful in light of the exigent circumstances existing on the day the child was removed. A government official must obtain prior judicial authorization before intruding upon a parent's right to custody "unless they possess information at the time of seizure that establishes reasonable cause to believe that the child is in

imminent danger of serious bodily injury." *Id.* The Social Workers claim that, based upon the professional medical advice of MacDonald, the Social Workers possessed information at the time of the seizure establishing that Taige was in imminent need of antibiotics and a spinal tap. The professional advice of MacDonald, therefore, established the Social Workers' reasonable cause. Because the Social Workers acted reasonably in light this medical advice, the Social Workers claim entitlement to qualified immunity.

However, to accept the Social Workers' analysis of qualified immunity would be to ignore the facts alleged in the Amended Complaint. The Amended Complaint does not allege that the Social Workers relied upon MacDonald's professional medical advice. If it did, the Social Workers may be entitled to qualified immunity.[7] Yet there remain facts and circumstances within the Social Workers' knowledge that are missing from the Amended Complaint. It is unclear, for instance, whether the Social Workers relied upon MacDonald's professional medical advice in determining imminent harm. As such, a Rule 12(b)(6) dismissal would be inappropriate. *See Act*

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[7] *See Ward v. Murphy*, 330 F.Supp. 2d 83, 92 (D.Conn. 2004) (holding that officials did not act unreasonably in taking custody of a child where the treating physician informed officials that lack of treatment could lead to brain injury and death); *Wilkinson ex rel Wilkinson v. Russell,* 182 F.3d 89, 105-106 (2d Cir. 1999) (concluding that social workers had reasonable cause to believe abuse was occurring when they relied, in part, on doctor's assessment that the child was being abused).

Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993). Therefore, the Court will deny the Social Workers' motion to dismiss on the basis of qualified immunity at this time.

INJUNCTIVE RELIEF

Defendants move to dismiss Count Four of the Amended Complaint, which seeks to enjoin the City and Social Workers, in their official capacities, from taking custody of children away from their parents without a court order and in the absence of imminent harm. The Social Workers contend that the Muellers lack Article III standing to bring this claim. Specifically, the Social Workers argue that the Muellers have failed to allege a credible threat of future injury.

"Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.' " *Diamond v. Charles,* 476 U.S. 54, 61 (1986). A person's past exposure to alleged unlawful conduct is insufficient to establish a present case or controversy entitling him to injunctive relief. *O'Shea v. Littleton,* 414 U.S. 488, 495 (1974). Rather, to establish a present case or controversy, a plaintiff must demonstrate "the likelihood of similar injury in the future." *LaDuke v. Nelson,* 762 F.2d 1318, 1324 (9th Cir. 1985). A plaintiff must show that there is a "credible threat" that she will again be subject to the particular injury against which injunctive

relief is sought. *Kolender v. Lawson,* 461 U.S. 352, 355 n. 3 (1983). A "mere physical or theoretical possibility" that the challenged conduct will again injure the plaintiff is insufficient to establish a present case or controversy. *Murphy v. Hunt,* 455 U.S. 478, 482 (1982).

However, the element of injury need only be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.*

In the instant case, the Muellers allege that they have three children, including a son born very recently. The Muellers use the emergency rooms of hospitals for medical care. The Muellers allege that the City and Social Workers adhere to an unconstitutional policy of removing children from parental custody and making medical decisions for children in the absence of imminent harm and without a court order. The Muellers thus allege that they will likely be exposed to this unconstitutional conduct when they take their children to a hospital emergency room. Under *Lujan*, this allegation is sufficient to embrace the specific facts that are

necessary to support the Muellers' claim of future injury.

Furthermore, the Supreme Court has recognized an exception to the basic standing requirements in cases where a plaintiff's claims are "capable of repetition, yet evading review." *Gerstein v. Pugh*, 420 U.S. 103 (1975). Pretrial detention falls into this category because it is not likely that an individual could have his constitutional claim decided before he is either released or the matter is decided. *Id.* at 110 n. 11. The removal of the Muellers' child has a direct parallel to pretrial detention, since the seizure of the child will typically have ended by the time a legal challenge can be mounted. *See* I.C. § 16-1612 (b) (requiring a shelter care hearing within 48 hours of state's removal of children). *See also Doe v. Kearney*, 329 F.3d 1286, 1293 (11th Cir. 2003) (finding that state removal of children is a form of pretrial detention). Therefore, "any constitutional injury will likely be too fleeting to be redressed and hence qualifies as being capable of repetition, yet evading review." *Kearney*, 329 F.3d at 1293. For the foregoing reasons, the Court finds that the Muellers have standing to bring a claim for injunctive relief.[8]

DECLARATORY JUDGMENT

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[8] The Court does not make any decision regarding Muellers' ability to obtain class certification pursuant to Rule 23.

I. The Facial Challenge to § 16-1612

The Muellers contend that I.C. § 16-1612 is facially unconstitutional because it does not require state officials to seek a court order where time allows. As previously stated, this provision allows for a peace officer to remove a child from parental custody where "prompt removal is necessary to prevent serious physical or mental injury to the child." The statute requires that a shelter care hearing be held within forty-eight hours of the seizure. The Court finds that, for the reasons stated below, the Muellers' facial challenge to this statute must fail.

A facial challenge to the constitutionality of a statute is a question of law. *United States v. Bynum*, 327 F.3d 986, 990 (9th Cir. 2003). The United States Supreme Court has stated that a "facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Solerno*, 481 U.S. 739, 745 (1987).

A state removal statute that does not require judicial authorization where time permits is not facially unconstitutional. *Kearney*, 329 F.3d at 1294.[9] In *Kearney*, the appellants brought a § 1983 suit against a state welfare employee for

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[9] Although not binding authority, the Court finds *Kearney* to be persuasive because of its similarities to the present case and because the Ninth Circuit has not addressed this precise issue.

the emergency removal of appellants' children without a court order. 329 F.3d at 1289. The appellants argued that the state statute governing child removal was unconstitutional on its face where it allowed for removal of children in "imminent danger" without first considering the feasibility of obtaining judicial authorization. *Id.* at 1294. However, the court found that appellants' facial challenge must fail because the face of the statue was silent as to what circumstances may reasonably be considered to constitute "imminent danger." *Id.* Therefore, the statute could be applied in circumstances where "imminent danger" also meant that it was not feasible to obtain judicial authorization. Because it was *possible* to apply the statute in a manner that did not offend due process, the court held that the statute was not facially unconstitutional. *Id.*

Likewise, I.C. § 16-1612 is silent as to what circumstances may reasonably be considered to constitute endangerment to a child. Like the statute in *Kearney*, the Idaho provision may be applied in situations where endangerment to a child also means that it is not feasible to obtain judicial authorization. Thus, from the text of the statute, it is possible to apply § 16-1612 in a manner that does not offend due process. Accordingly, the Muellers' facial challenge to the constitutionality of § 16-1612 will be dismissed.

II. The "As-Applied" Challenge to § 16-1612

In an "as applied" challenge, the court evaluates the constitutionality of a statute by examining how it is applied to the particular circumstances at issue. *Roulette v. City of Seattle*, 97 F.3d 300, 312 (9th. Cir. 1996). Here, the Muellers seek a declaration that § 16-1612, as applied, is unconstitutional because it authorized the removal of Taige where there was sufficient time to obtain a court order. For the reasons that follow, the Court concludes that the Muellers have stated a proper "as-applied" challenge to the constitutionality of § 16-1612.

Due process requires that government officials obtain prior judicial authorization before intruding upon a parent's custody of her child. *Mabe*, 237 F.3d at 1106. An exception to this due process requirement exists where the government official possesses information at the time of the seizure establishing reasonable cause to believe the child is in imminent danger of serious bodily injury. *Id.*

The Ninth Circuit has emphasized that *immediate* danger of future harm is required to qualify for the due process exception. *Id.* at 1109. In *Mabe*, a social worker removed a child from parental custody without a warrant one month after receiving a complaint of child abuse. The court denied qualified immunity because it was unclear whether a reasonable social worker could believe that the child faced "*immediate* threat of serious physical injury" justifying a warrantless

removal. *Id.* Thus, where the danger to the child was not so imminent that there was reasonably sufficient time to obtain a warrant, the social worker was not entitled to summary judgment.

Likewise, the Ninth Circuit recognized "immediate harm" as an element of the due process analysis in *White v. Pierce County*, 797 F.2d 812, 815 (9th Cir. 1986). In that case, a child was removed without a warrant from a potentially abusive and hostile father. The court found that officers acted reasonably for purposes of qualified immunity based on their fear that "the child would be harmed in any time it would take to obtain a warrant." *Id.* The Ninth Circuit considered the feasibility of obtaining a warrant without exacerbating harm to the child in analyzing the parents' due process rights.

Defendants, in opposition, claim that due process is a flexible concept that cannot be tied to the court's schedule. *Kearney*, 329 F.3d at 1297. In *Kearney*, the court held that a social worker acted reasonably in removing children from their parents even though the social worker may have had time to obtain a warrant. The court affirmed the judgment as a matter of law in favor of the defendants, holding that the kind of subtle balancing required by due process cannot be properly accomplished when courts simply ask whether there was time to get a warrant. *Id.* at 1298-99.

Here, however, the court does not simply ask whether there was time to get a warrant. The court considers it as one of several factors in determining "imminent harm." The Ninth Circuit has concluded that this is an appropriate consideration in deciding a parent's due process claim. Because the Muellers allege that state officials removed Taige pursuant to § 16-1612 without considering the feasibility of obtaining a court order, and because this is a valid consideration in determining imminent harm, the Muellers can bring an "as-applied" challenge to § 16-1612.

STATE LAW CLAIMS

The Muellers' Sixth, Seventh, and Eighth causes of action contain state law tort claims against St. Luke's and MacDonald for battery, conspiracy to improperly arrest or imprison Corissa, and wrongful interference with custodial rights. The Court finds for the reasons stated below that the Muellers' state law claims survive the Defendants' motions to dismiss.

I. Battery

St. Luke's and MacDonald argue that a battery was not committed when Taige was given medical treatment without her parents' consent. Specifically, they argue that the claim fails because (1) a hospital cannot be liable for failure to obtain consent, (2) consent to medical treatment was provided by the State, and (3) they are entitled

to immunity.

A. ***Respondeat Superior* Liability**

The Muellers' claim of battery against Taige is predicated upon the fact that MacDonald did not have consent to treat Taige. The tort of battery consists of any intentional, offensive contact upon the person of another without consent. *Pierson v. Brooks*, 115 Idaho 529, 535, 768 P.2d 792, 799 (Idaho Ct. App. 1989). St. Luke's argues that a hospital is not responsible for obtaining consent.

However, the Muellers allege that St. Luke's is liable for the conduct of MacDonald through the doctrine of *respondeat superior*. A "[h]ospital can be negligent for acts or omissions of its agents and employees. *Keyser v. St. Mary's Hosp.*, 662 F.Supp. 191, 193 (D. Idaho 1987).

St. Luke's does not contest the applicability of *respondeat superior* in this context. Accepting as true the Muellers' allegation that MacDonald is an employee of St. Luke's, the Court finds that the Muellers have adequately alleged liability of St. Luke's through the doctrine of *respondeat superior*. Accordingly, the Court will turn to whether the Muellers can state a claim for battery against both MacDonald and St. Luke's.

B. **Consent**

The Muellers allege that Social Worker Auker signed two medical consent

forms: (1) a Department of Health and Welfare “consent for medial surgical treatment, and (2) St. Luke’s hospital “medical center consent.” St. Luke’s and MacDonald contend the consent was valid according to I.C. § 39-4303(a). This statute provides that “[c]onsent for the furnishing of hospital . . . treatment or procedures to any person who is not then capable of giving such consent or who is a minor” may be given by a *legal guardian* of such person. St. Luke’s and MacDonald argue that because Auker obtained legal guardianship pursuant to I.C. § 16-1612, consent was provided and MacDonald did not commit a battery.

However, the Amended Complaint states that MacDonald did not have a reasonable belief that the Muellers’ legal guardianship had been taken away. MacDonald could not reasonably believe the State had taken away the Muellers’ legal guardianship because MacDonald knew or should have known that Taige was not in imminent harm. Thus, St. Luke’s and MacDonald fail to meet the burden of establishing that there are no set of facts which the Mueller’s could allege which would amount to an invalid consent.

MacDonald further contends that I.C. § 39-4303(c) provides consent in this case . This provision allows a treating physician to provide treatment as though consent had been duly given “[w]henever there is no person readily available and willing to give or refuse consent . . . , and in the judgment of the attending physician .

. . the subject person presents a medical emergency or there is substantial likelihood of his or her life or health being seriously endangered by withholding or delay in the rendering of such care. . . ."

However, application of I.C. § 39-4303(c) in this case ignores the Muellers' allegations in the Amended Complaint. The Muellers allege that Corissa was available "to give or refuse consent." The Muellers allege that Taige's life or health was not endangered by the withholding or delay of medical treatment. Thus, viewing all allegations of material fact in the Amended Complaint as true, the Court finds that I.C. § 39-4303(c) does not provide for consent in this case.

C. State Law Immunity

St. Luke's claims immunity because the staff of a hospital room should not be required to investigate the validity of the state's claim of custody before providing emergency medical treatment. St. Luke's cites *Rodrigues v. Furtado*, 950 F.2d 805 (1st Cir. 1991) for the proposition that there is no duty imposed on a physician to second guess the authority to which a state official acts. In *Rodrigues*, the court found that a physician was entitled to qualified immunity because there was no duty to look behind an objectively reasonable and facially valid warrant to determine whether it is based upon probable cause.

The Court finds that *Rodrigues* is not dispositive. That case did not involve a

common-law immunity claim, but rather, a claim of qualified immunity under § 1983. The *Rodriques* court addressed whether the doctor's actions were reasonable in light of clearly established law rather than addressing the plaintiff's ability to state a claim for battery. St. Luke's cites no other authority for the proposition that a physician is entitled to immunity because there is no duty to inquire further into a facially valid consent. Accordingly, the Court finds that St. Luke's is not immune from liability for the Muellers' claim of battery.

MacDonald asserts that he is immune from civil liability for complying with I.C. § 16-1620. As previously stated, this statute provides that any person who has reason to believe a child has been abused, abandoned, or neglected, and acting upon that belief, makes a report under § 16-1619, is immune "from any liability, civil or criminal, that might otherwise by incurred or imposed."

However, the Muellers' allegations extend beyond mere reporting of child abuse or neglect. The Muellers correctly note that a doctor who commits tortious conduct after making a report of abuse or neglect could hardly claim the immunity of § 16-1620 for his subsequent actions. The Court finds that § 16-1620 does not provide MacDonald with immunity from the Muellers' battery claim.

II. Improper Arrest or Imprisonment of Corissa Mueller

St. Luke's and MacDonald contend that Count Seven, conspiracy to

improperly arrest or imprison Corissa, must fail because civil conspiracy is not actionable. The Muellers argue that the claim is not for civil conspiracy, but rather, it asserts "false imprisonment," and seeks liability against defendants who conspired to commit the underlying tort. *See Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 889, 522 P.2d 1102, 1110 (Idaho 1974) ("When a plaintiff alleges and proves that several defendants conspired to commit a tort upon him, all the defendants involved in the conspiracy can be held liable for the overt act which is committed by one of the defendants pursuant to the conspiracy."). The Court agrees that Count Seven is not simply an action for civil conspiracy, but an action for false imprisonment which St. Luke's and MacDonald allegedly conspired to commit.

To state a claim for false imprisonment a plaintiff must allege that he or she was unlawfully restrained of personal liberty. *See Ludwig v. Ellis*, 22 Idaho 475, 126 P. 769 (Idaho 1912). To state a claim for a conspiracy to commit the underlying tort, a plaintiff must allege that there is an agreement between two or more to accomplish an unlawful objective. *Barlow,* 95 Idaho at 889, 522 P.2d at 1110.

Here, the Muellers allege that MacDonald conspired with Boise police officers to unlawfully restrain Corissa's liberty. This conspiracy, the Muellers allege, is evidenced by MacDonald's summoning of state officials and their subsequent actions of dragging Corissa down the hallway while MacDonald took the child elsewhere in

the hospital. The Court finds that the Muellers have sufficiently stated a claim for conspiracy to falsely imprison Corissa.

III. Wrongful Interference with Custodial Rights

St. Luke's and MacDonald move to dismiss Count Eight on the grounds that Idaho does not recognize a cause of action for wrongful interference with custodial rights. There is no Idaho case explicitly recognizing such a cause of action.

In deciding the merits of a claim that involves a novel question of state law, "it is the rule in this circuit that [the Court] must try to predict how the highest state court would decide the issue." *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1171 (9th Cir. 2001). In making this determination, the Court may consider recognized legal sources such as statutes, treatises, restatements, and published decisions. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1548 (9th Cir. 1990). The Court may also look to pertinent decisions from other jurisdictions. *Id.* For the reasons that follow, the Court concludes that the Idaho Supreme Court would recognize the tort of wrongful interference with custodial rights.

A. *Shields* supports recognition of the tort.

The Muellers cite *Shields v. Martin*, 109 Idaho 132, 706 P.2d 21 (Idaho 1985) as recognition of the tort of wrongful interference with custodial rights. In that case, the Idaho Supreme Court held that a noncustodial mother and a police officer who

wrongfully abducted a child from daycare could be joint and severally liable. Although recognition of the tort comes by way of implication, *Shields* provides strong evidence that the Idaho Supreme Court would recognize the tort.

For instance, in order to determine that the mother and police officer could be joint and severally liable for wrongful abduction, the court first had to decide that defendants acted "in a concerted matter in causing the harm of which the plaintiff is complaining." *Id.* at 136, 522 P.2d at 25. In other words, the court had to implicitly recognize "the harm," or the underlying tort, before deciding the defendants acted in concert to commit it.

Ultimately, the *Shields* court decided that the two defendants were joint *tortfeasors*: "It was the combined, *tortious* acts of both that inflicted harm on the plaintiffs. It was Martin and Halsey . . . who together at one time managed the abduction of [the child] from the daycare center." *Id.* at 137, 522 P.2d at 26. (emphasis added). The court also decided that the "*tortious* conduct giving rise to liability was the wrongful abduction of [the child]." *Id.* at 138, 522 P.2d at 27. (emphasis added). The Court finds the above quoted language to be strong indicia that the Idaho Supreme Court recognized the existence of a tort under the facts presented.

Furthermore, the Court finds no meaningful distinction between "wrongful abduction" and "wrongful interference with custodial rights." Indeed, the terms are

referred to interchangeably. *See Stone v. Wall*, 734 S.3d 1038, 1041 (Fla. 1999) ("Most often referred to as "interference with child custody" or "intentional abduction of a child" or by some other version of such terms, this cause of action has been the subject of recent scholarly discussion.") (footnotes omitted)).

Additionally, the Restatement (Second) of Torts § 700 (1977) lists abduction as a subset of wrongful interference rather than as a separate tort:

> One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor, child to leave a parent legally entitled to its custody, or not to return to the parent after it has left him, is subject to liability to the parent.

The comments indicate that, in the case of abduction, it is immaterial whether the child left the parent without the parent's consent. Restatement (Second) of Torts, § 700 cmt. c. Beyond this, the Restatement makes no distinction between wrongful interference and wrongful abduction. Likewise, this Court will not make such a distinction.

Finally, other courts considering the question cite *Shields* in support of recognition of intentional interference with custodial rights.[10] Based upon the foregoing, the Court finds that *Shields* does support recognition of wrongful

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[10] *See Stone v. Wall*, 734 So.2d 1038, 1042-43 (Fla. 1999); *Larson v. Dunn*, 460 N.W.2d 39, 45 (Minn. 1990); *Politte v. Politte*, 727 S.W.2d 198 (Mo. Ct. App. 1987).

interference with custodial rights in Idaho.

B. Other Jurisdiction Support Recognition of the Tort.

The majority of states considering the question have recognized a cause of action for intentional or wrongful interference with custodial rights.[11] St. Luke's and MacDonald argue that this tort mostly applies to children abducted by a noncustodial parent following divorce. However, the Court finds that other jurisdictions have recognized this tort in a variety of circumstances. *Anonymous v. Anonymous*, 672 So.2d 787, 790 (Ala. 1995)(parents suit against their daughter's boyfriend and his parents.); *Murphy v. I.S.K. Con of New England, Inc.*, 571 N.E.2d 340, 342 (Mass. 1991)(minor's and parents' suit against a religious organization); *Bedard v. Notre Dame Hosp.*, 151 A.2d 690 (R.I. 1959)(parent's suit against hospital for retaining her child after the child had already been treated). Thus, it is clear that the tort of wrongful interference with custodial rights is recognized in circumstances stretching beyond a custody dispute. Pertinent decisions from other jurisdictions support the Court's conclusion that the Idaho Supreme Court will recognize such a cause of action.

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[11] *See* Kristen A. Wentzel, Note, *In the Best Interests of the Child? Minnesota's Refusal to Recognize the Tort of Intentional Interference with Custodial Rights*, 14 Hamline L. Rev. 257, 265 n. 83 (1990) (noting that courts in 23 states and the District of Columbia have recognized this tort.)

C. **Public Policy Supports Recognition of the Tort.**

St. Luke's and MacDonald note that courts who refused to recognize the tort did so on the grounds that it is contrary to the best interests of the children. *See Larson v. Dunn*, 460 N.W.2d 39, 45 (Minn. 1990).[12] The Minnesota Supreme Court refused to recognize the tort due to the potential for grave abuses in the custody battle arena wherein the child becomes an object of intra-family controversy. *Id.* at 46. The Minnesota Supreme Court found that creating this tort would place children in the middle of a vigorous lawsuit between their parents. Furthermore, the court found that recognition of the tort was unnecessary where the Minnesota Legislature had already made child abduction a serious crime.

While the Court is sympathetic to the potential for abuse of the tort within the child custody context, this concern does not outweigh the need to protect parental interests from interference. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 124, at 924 (5th ed. 1984) (Tort law has long protected "relational" interests, such as those between family members, from interference). A parent should be able to recover for the loss of society of his child and for his emotional distress resulting from its abduction. Restatement (Second) of Torts § 700 cmt. g.

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[12] *See also Cosner v. Ridinger*, 882 P.2d 1243 (Wyo. 1994); *Politte v. Politte*, 727 S.W.2d 198 (Mo. Ct. App. 1987).

Furthermore, recognizing the tort may very likely serve as a deterrent to wrongful interference with parental rights. In recognizing the tort, the Iowa Supreme Court stated that a tort suit will provide deterrence, encourage a speedy return of the child, and encourage cooperation by potential third-party defendants. *Wood v. Wood*, 338 N.W.2d 123, 127 (Iowa 1983). Recognizing the tort may also serve the function of providing parents with the funds necessary to pay the expenses incurred in regaining custody of the child. H. Clark, The Law of Domestic Relations in the United States § 112, at 386 (2d ed. 1988).

Based upon the strong implications stated in *Shields*, the current trend of state supreme courts to recognize the tort, and the policy concerns of protecting parental rights of custody, the Court finds that the Idaho Supreme Court would recognize the tort of wrongful interference with custodial rights.

D. <u>The Muellers Can State a Claim for Wrongful Interference.</u>

The elements of wrongful interference with custodial rights include that (1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his or her minor child, and (2) a party outside the relationship intentionally abducts, compels or induces a minor child to leave a parent legally entitled to its custody, or otherwise prevents the parent from exercising his or her parental or custodial rights. *See* Restatement (Second) of Torts, § 700; *Kessel v.*

Leavitt, 511 S.E.2d 720, 765-66 (1998); *Anonymous*, 672 So.2d 787, 790 (Ala. 1995).

The Muellers have alleged facts sufficient to state a claim based upon the above factors. The Muellers allege they are the natural parents and custodians of Taige. The Muellers allege that MacDonald intentionally removed Taige from Corissa's custody by asking to take the child's temperature and subsequently refusing to return her. The Muellers allege that MacDonald then performed medical procedures on Taige and that this interfered with the Muellers' parental rights of custody and their right to make medical decisions for their children. Based on the foregoing, the Court finds that the Muellers can state a claim for wrongful interference with custodial rights.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED that the motion to dismiss filed by the City of Boise, Dale Rogers, Ted Snyder, and Tim Green (docket no. 42) is DENIED.

IT IS FURTHER ORDERED that the motion to dismiss filed by April Auker, et al. (docket no. 58) is DENIED.

IT IS FURTHER ORDERED that the motion for judgment on the pleadings filed by St. Luke's (docket no. 31) is GRANTED in regard to Counts One, Two, and

Three, and is DENIED on all other counts.

IT IS FURTHER ORDERED that the motion for judgment on the pleadings filed by Richard MacDonald (docket no. 45) is DENIED.

IT IS FURTHER ORDERED that the motions to dismiss filed before the Amended Complaint (docket nos. 19, 21, and 23) are DISMISSED as they are now moot.

DATED: **April 13, 2005**

B. LYNN WINMILL
Chief Judge
United States District Court