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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CIVIL COMPLEX CENTER

RAELYN STOKES, an individual; MARCUS STOKES, an individual; T.S., a minor, by and through her Guardian ad Litem, Plaintiffs, v. COUNTY OF ORANGE, et al., Defendants.	CASE NO. 30-2010 00351398 OPPOSITION OF DEFENDANTS, CHILDREN'S HOSPITAL OF ORANGE COUNTY AND DAPHNE WONG, M.D., TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THEIR SIXTH AND SEVENTH AFFIRMATIVE DEFENSES CONTAINED WITHIN THEIR AMENDED ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT JUDGE: NANCY WIEBEN STOCK DEPT: CX105 FILED: 02/22/2010 TRIAL: NONE DATE: SEPTEMBER 23, 2011 TIME: 9:00 A.M. DEPT: CX105

COMES NOW defendants, CHILDREN'S HOSPITAL OF ORANGE COUNTY ["CHOC"] and DAPHNE WONG, M.D. ["Dr. Wong"; and sometimes collectively "Hospital Defendants"], and hereby file the following opposition to the motion of Plaintiffs, RAELYN STOKES, an individual; MARCUS STOKES, an individual; and T.S., a minor by and through her Guardian ad Litem ["Plaintiffs"] for judgment on the pleadings, pursuant to *Code of Civil Procedure*, Section 438, targeting Hospital Defendants' sixth (*Cal. Pen. Code*, § 11172) and seventh (*Cal. Civ. Code*, § 47(b)) affirmative defenses as the same pertains to Plaintiffs' fourth cause of action the operative first

amended complaint ["FAC"] for violation of federal civil rights (42 U.S.C. § 1983).

I.

INTRODUCTION

While Plaintiffs may characterize their lawsuit any way they desire, it is manifest, as it relates to the Hospital Defendants, it revolves around the reporting of suspected child abuse and the propriety of professional services rendered. Plaintiffs argument that neither *Penal Code*, Section 11172 nor *Civil Code*, Section 47(b) can immunize Hospital Defendants from alleged violations of federal law, in the context of this case, is wrong. Moreover, Plaintiffs previously demurred to the subject affirmative defenses and the same was overruled. Accordingly, this Court should deny Plaintiffs motion.

II.

LEGAL STANDARD

A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or in matters that can be judicially noticed. (*Nelson v. Superior Court* (2006) 144 Cal.App.4th 689, 691.) As with general demurrers the court gives all material allegations a liberal construction, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-516.)

A restriction on the use of a motion for judgment on the pleadings is where a prior demurrer as to the same cause of action or affirmative defense was overruled the motion will not be permitted unless there has been a material change in the applicable case law or statute since the ruling on the demurrer. (*Cal. Civ. Proc. Code*, § 438(g)(1); see *Yancey v. Superior Court* (1994) 28 Cal. App. 4th 558, 562.)

III.

LEGAL DISCUSSION

A. *PENAL CODE* SECTION 11172 PROVIDES IMMUNITY TO MANDATED REPORTERS

CHOC and its staff physicians, nurses, social workers and staff, including, but not limited to Dr. Wong, were, and are, mandated reporters of child abuse. (*Cal. Pen. Code*, §§ 1165.7 (21-22); *Storch v. Silverman* (1986) 186 Cal.App.3d 671, 681.) As such, they are entitled to absolute immunity from civil

suit. (See, e.g., *Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 679; *Stecks v. Young* (1995) 38 Cal.App.4th 365, 373; *Spitler v. Children's Institute Int'l* (1992) 11 Cal.App.4th 432; *Thomas v. Chadwick* (1990) 224 Cal.App.3d 813, 819-821; *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 96-97; *McMartin v. Children's Institute Int'l* (1989) 212 Cal.App.3d 1393, 1401, cert. denied, 494 U.S. 1057; *Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1222; *Storch, supra*, 186 Cal.App.3d at 681.) *Penal Code*, Section 11172(a) ["Section 11172"] provides, "[n]o mandated reporter shall be civilly or criminally liable for any report required or authorized by this article." Here, the Hospital Defendants are immune from liability for diagnosing and reporting their suspicion of abuse.

But the mandated reporter immunity is not limited to diagnosing and reporting. Rather, the immunity *covers all aspects of the investigation prosecution*, including the investigation leading up to the filing of the report (*Krikorian, supra*, 196 Cal.App.3d 1222; italics added.), and all communications thereafter with law enforcement personnel subsequent to filing the initial report (*Stecks, supra*, 38 Cal.App.4th at 373). *Absolute* immunity applies *regardless of the alleged subjective intent behind* preparing and submitting the mandatory child abuse report. (See, e.g., *Storch, supra*, 1986 Cal.App.3d at 681 [absolute immunity applies even when the intent of the reporter is to "vex, annoy and harass an innocent party"]; *Thomas, supra*, 224 Cal.App.3d at 820 ["the legislature intended to grant absolute immunity to mandated reporters for all required or authorized reports, even though based on a negligent, reckless or false diagnosis"]; *Krikorian, supra*, 196 Cal.App.3d at 1215 [immunity for mandated reporters was intended to be absolute, even for false or reckless reports].)

Plaintiffs' contend that Section 11172(a) does not immunize the Hospital Defendants relative to the various claims asserted against them and in particular the fourth cause of action of the FAC for violation of federal rights under 42 U.S.C. Section 1983. Plaintiffs are wrong. The statute immunizes the Hospital Defendants against any such violation because it is consistent with the purpose and intent of federal law. In 1974, the United States Congress enacted the Child Abuse Prevention and Treatment Act in recognition of the federal government's role "to provide national leadership and to assist states and local communities in developing, expanding, and improving programs to prevent, identify, and treat child abuse and neglect." (100th Cong. Rec. Vol. 134, No. 42 at S3469 (2d Sess. March 30, 1988

[Statement of Sen. Thurmond].) The Act provides the framework by which states may obtain federal grants to establish state "child abuse and neglect prevention treatment programs." (42 U.S.C. § 5106(a).)

In 1988, Congress amended the Act by requiring states provide immunity to mandated reporters of abuse: "to be eligible for these [federal] grants, states ha[ve] to, among other things, implement systems for reporting child abuse and neglect, *establishing laws providing immunity for persons reporting*, and establish systems for investigating such reports." (H.R. 1900,100th Cong. 100-135, at 19 (June 8, 1987 [italics added]; see S. 1663, 100th Cong. 100-210, at 5 (October 16, 1987) [to be eligible for funding states must "provide for the immunity from prosecution for persons so reporting"].) California responded to Congress' declaration by enacting Section 11172(a). By immunizing mandated reporters, such as the Hospital Defendants here, against liability based on good faith reports on suspected child abuse or neglect, Section 11172(a) complies with federal requirements for receiving federal funds, which are designed to assist the state's efforts to treat and prevent child abuse.[1] Section 11172 does not impede federal legislation; it is consistent with Congressional intent.

The Courts have acknowledged the application of Section 11172 to federal claims. In *Thomas v. Chadwick* the Court held: "It is undisputed that Congress called for states to create statutory immunities to bar damage claims against reporters of suspected child abuse." (*Thomas*, *supra*, 224 Cal.App.3d at 824-825.) Because fear of civil liability was the impediment to reporting Congress sought to remove, it would be incongruous to construe the federal act as permitting avoidance of immunity (thus resurrecting the impediment to reporting) merely because the injured party pleads federal rather than state causes of action premised on the same operative conduct.

Plaintiffs have cited *Doe v. Regents of University of California* (E.D. Cal. 2006) U.S. Dist. LEXIS 65035, which disapproves of *Thomas v. Chadwick*, and which was relied upon in *Buckheit v. Dennis* (N.D. Cal. 2010) 713 F.Supp.2d 910, holding *Penal Code* Section 11172 cannot bar Section 1983 claims. (MP at p. 5.) Yet, *Regents* was wrongly decided, and *Buckheit's* reliance upon it was

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[1] *Compare* the Federal Child Abuse Prevention Treatment Act, 42 U.S.C. § 5106(a) *with* California's Child Abuse and Neglect Reporting Act, *Cal. Pen. Code*, §§ 11164, *et seq.*

misplaced, because *Regents* mistakenly relied on *Wallis v. Spencer* (9th Cir. 1999) 202 F.3d 1126 [*Wallis II*], for the proposition that state law immunities – including Section 11172(a) immunity – cannot bar federal claims. This reliance was misplaced because *Wallis II* decision does *not* expressly identify which state law immunities were at issue. Nor did the District Court in *Regents* consider whether Section 11172(a) immunity is consistent with congressional intent. (*Wallis II*, *supra*, 202 F.3d at 1143-1144.) If the *Regents* Court had analyzed the procedural history of the *Wallis* case, including the opinion in the companion case of *Wallis v. Spencer* (9th Cir. 1996) U.S. App. LEXIS 18536 [*Wallis I*] – it would have discovered that the Ninth Circuit Court of Appeals in *Wallis I* granted the physician – defendant there immunity – against a federal Section 1983 claim under the mandated reporter immunity embodied in Section 11172. The *Regents* Court's assumption that *Wallis II* involved Section 11172(a) immunity was incorrect. (See *Wallis II*, 202 F.3d 1126.)

Failure to apply Section 11172 immunity federal causes of action would vitiate the statue and would contravene congressional intent. (*Thomas*, *supra*, 224 Cal.App.3d at 825-826 n.15 ["the protective and encouragement functions served by the congressionally mandated immunity would be largely illusory if reporters were unprotected from a Section 1983 lawsuit alleging governmental intervention caused by an erroneous report."].) To begin with, the Court must avoid interpreting statutory law in a manner that would render the statute superfluous. (*TRW, Inc. v. Andrews* (2001) 534 U.S. 19, 31.) Similarly, "to the extent two statutes appear to conflict, a later enactment which more specifically treats the subject should be construed as superseding the more general provisions of the prior statute covering the same subject." (*Thomas*, *supra*, 224 Cal.App.3d at 826 [citing *Callahan v. The United States* (1932) 285 U.S. 515, 517-518.) Applying these basic cannons of construction here, the more specific enactment of 42 U.S.C. § 516a, requiring immunity for mandated reporters, must be "engrafted" onto the "more generalized remedial statute," Section 1983. (*Id.*) If the Court decides not to apply Section 111729(a) in this case, clever plaintiff lawyers will style all of their future claims as violations of federal law to avoid the immunity statute. This would strip the statute of its teeth, and would consequently increase the volume of federal civil rights litigation.

Failure to apply Section 11172(a) to Hospital Defendants in this case would also conflict with congressional intent. As noted in *Thomas* (224 Cal.App.3d at 826), California enacted mandated child

abuse reporting immunity in direct response to Congress' explicit directive that it do so. Holding a statute inapposite would ignore the integral and important interplay between a congressional call for state action, and the state's obedient response to that call.

B. *CIVIL CODE* SECTION 47(b) BARS PLAINTIFFS' FEDERAL CLAIMS

For similar reasons, the California litigation privilege bars Plaintiffs' federal claims. Assuming hypothetically, these claims survive attack under the mandated reporter statute, the Court still should entertain the Hospital Defendants' affirmative defense within the purview of the litigation privilege. This privilege provides absolute protection to communications: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of litigation; and (4) that has some connection or logical relation to the action. (*Silberg v. Anderson* (1990) 786 P.2d 365, 369.) The litigation privilege is absolute and includes reports by law enforcement of suspected criminal activity that precedes the filing of formal charges. (*Hagberg v. California Federal Bank* (2004) 81 P.3d 244, 249-250 ["the privilege protects communications to or from governmental officials which may precede the initiation of formal proceedings"].) The privilege further extends to include communications that are made *outside of the courtroom* so long as the statements are made to achieve the objects of the litigation. (*Silberg, supra*, 786 P.2d at 369.)

In *Block v. Sacramento Clinical Labs* (1982) 131 Cal.App.3d 386, a toxicologist prepared a report that a District Attorney relied upon in deciding whether to prosecute a murder case. It later became clear that the toxicology report contained significant errors, which prejudiced the defendant. (*Id.* at 388.) The appellate court held that although the toxicology report was inaccurate, the toxicologist enjoyed absolute immunity from suit under the litigation privilege. (*Id.* at 394.) Similarly, here, even if Dr. Wong's opinions are deemed in any respect to be inaccurate she and CHOC still enjoy absolute immunity because this lawsuit is premised upon her statements made in connection with the juvenile proceedings: her reports and communications with social service agency personnel. (See, *id.*; *Hagberg*, 81 P.3d at 249.) Finally, Plaintiffs' unsubstantiated allegations that the Hospital Defendants acted with malice or in bad faith are of no moment because the immunity under Section 47b is absolute, without regard to intent. (*Hagberg, supra*, 81 P.3d at 251-252.) The California litigation privilege thus also bars Plaintiffs' fourth cause of action. (*Silberg, supra*, 76 P.2d at 368-369.) Therefore, the Court

is respectfully urged to deny Plaintiffs' motion for judgment on the pleadings.

VI.

PLAINTIFFS' MOTION IS PROCEDURALLY DEFICIENT

To Hospital Defendants knowledge heretofore Plaintiffs demurred to the exact same causes of action which they now attack by the instant motion for judgment of the pleadings. The demurrer was, in relevant part, overruled. (See Notice of Ruling attached as Ex. "C" to concurrently filed Request for Judicial Notice.) Since there has been no material change in the applicable case law or statute since the ruling on the demurrer the Court should not now reconsider or otherwise readdress the subject affirmative defenses. (*Cal. Civ. Proc. Code*, § 438(g)(1); see *Yancey v. Superior Court* (1994) 28 Cal. App. 4th 558, 562.). Hence, Plaintiffs' motion should be denied on procedural grounds, as well.

V.

CONCLUSION

Based upon the foregoing the Court is respectfully urged to deny Plaintiffs' motion for judgment on the pleadings.

Dated: September 6, 2011

MADORY, ZELL, PLEISS & McGRATH
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By _____
LARRY T. PLEISS
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 17822 17th Street, Tustin, California 92780-2152.

On September 6, 2011, I served the foregoing document described as: OPPOSITION OF DEFENDANTS, CHILDREN'S HOSPITAL OF ORANGE COUNTY AND DAPHNE WONG, M.D., TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AS TO THEIR SIXTH AND SEVENTH AFFIRMATIVE DEFENSES CONTAINED WITHIN THEIR AMENDED ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

☒ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list;

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☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed September 6, 2011 at Tustin, California.

GLADYS MORGAN
Type or Print Name

Signature