2014 IL App (2d) 140095-U
No. 2-14-0095
Order filed December 9, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JASON BARNES, Plaintiff-Appellant, v. TIMOTHY MARTIN, ROBERT C. JONES, KANE COUNTY CHILD ADVOCACY CENTER, UNKNOWN OFFICERS, UNKNOWN INVESTIGATORS, CITY OF AURORA, UNKNOWN DCFS WORKERS, LOYOLA UNIVERSITY MEDICAL CENTER, GREGORY S. THOMAS, BARRY BENNET, and KANE COUNTY, Defendants-Appellees. (David Summer, Joseph McMahon, Laurie Schmidt, Debra Bree, Village of North Aurora, and Angela Scott, Defendants.)	)	Appeal from the Circuit Court of Kane County. No. 11-L-673 Honorable Judith Brawka and James R. Murphy, Judges, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err dismissing the claims against defendants Bennet and Loyola University Medical Center on statute of limitations grounds, and dismissing the claims against defendants Kane County and the Kane County Child Advocacy Center that were based upon vicarious liability for the acts of defendant Martin. Further, although certain counts were properly dismissed, other counts should not have been dismissed.

¶ 2 After the plaintiff, Jason Barnes, was acquitted of charges relating to alleged child abuse, he sued the defendants, asserting various claims under state and federal law. The trial court dismissed his amended complaint in its entirety with prejudice, and Barnes appeals. We affirm in part and reverse in part, finding that the trial court correctly dismissed (1) the claims against defendants Bennet and Loyola University Medical Center, (2) the claims against defendants Kane County and the Kane County Child Advocacy Center that were based upon vicarious liability for the acts of defendant Timothy Martin, as well as (3) certain counts of the amended complaint. However, other counts should not have been dismissed or else should have been dismissed without prejudice.

¶ 3 BACKGROUND

¶ 4 The following recitation of facts is taken largely from the allegations of the amended complaint, which must be taken as true for the purposes of this appeal. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011).

¶ 5 On August 15, 2009, Barnes's 18-month old son N. was taken to the hospital with severe burns over the lower portion of his body. Barnes, who had been home with N. and N.'s three-year old sister J. at the time, stated that the burns had been caused when N., without his knowledge, climbed into the bathroom sink and turned on the hot water. Barnes had responded to N.'s screams and found him in the sink. Unbeknownst to Barnes, the thermostat in the hot water heater had failed, allowing the water temperature to reach 194 degrees. David Summer, the police officer who arrived with the ambulance, interviewed Barnes, J., and a neighbor who had come over to help (Linda Saracco), and made observations of the scene. Summer later interviewed the children's mother, Elaine Brocker, at the hospital. According to the amended complaint, all of the information obtained by Summer was consistent with Barnes's account. Barnes was not arrested at that time.

¶ 6 N. was transferred that same day to the defendant, Loyola University Medical Center (Loyola). While there, Barnes spoke with Angela Scott, an employee of the Department of Children and Family Services (DCFS). Scott did not mention any safety plan involving Barnes or his children, and Barnes alleges that, in fact, no such safety plan was ever created.

¶ 7 On August 17, 2009, Barnes attempted to visit N. at Loyola. When he arrived, he was told by defendant Barry Bennet, a social worker employed by the hospital, that he could not have any contact with N. because of a safety plan. When Barnes insisted on seeing N., Bennet told Barnes that he would be escorted from the hospital by security if he persisted.

¶ 8 Also on August 17, 2009, the defendant Robert Jones, a police officer with the city of Aurora, spoke with N.'s attending doctor, Dr. Gamelli, and asked if N.'s injuries were inflicted intentionally. Dr. Gamelli refused to state that the injuries were intentionally inflicted.

¶ 9 The following day, Jones and the defendant, Timothy Martin, came to Barnes's home. Martin had been appointed as a special investigator by the Kane County State's Attorney and was assigned to the Kane County Child Advocacy Center (another defendant).[1] Jones and Martin interviewed Barnes, who repeated the account he had given to Summer on the day of the incident. Jones and Martin also examined the bathroom vanity and sink, where they observed that the hot water temperature could reach 192 degrees within 30 seconds. They took pictures of

[1] This statement is based in part upon an affidavit submitted by Martin in connection with his motion to dismiss the amended complaint pursuant to section 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-629 (West 2012). The affidavit included an exhibit, a copy of Martin's appointment as special investigator for the Kane County State's Attorney. Although Barnes objected to consideration of the affidavit on the basis that it was conclusory, it was not stricken and remains in the the record on appeal.

the entire home. Jones and Martin falsely told Barnes that, pursuant to a DCFS safety plan, he could not see or have any contact with his children and that if he did so he could be criminally charged. They also interviewed Brocker, N.'s mother. Brocker told them that N. was an active child who climbed easily and got "into things" a lot. She also said that Barnes was a loving father and she did not believe that he had intentionally hurt N.

¶ 10 Barnes alleges that, on August 21, 2009, a DCFS investigator interviewed his parents, with whom J. had been staying since the incident. They told the investigator that, when they asked J. what happened, J. told them that N. climbed into the sink and got into the hot water, and that she had fetched Barnes to help. The summary of the interview was placed into the file on the incident maintained by the Child Advocacy Center, which was available to Jones and Martin.

¶ 11 Also on August 21, unidentified "defendants" conducted a video interview of J., who stated that N. had burned himself and that Barnes had discovered N. in the sink. J. denied that Barnes had burned N. Child Advocacy Center staff also interviewed N.'s half sister, J.R., who stated that she had lived with Barnes for three years when she was six to nine years old, and that Barnes was not abusive.

¶ 12 On August 27, 2009, Martin interviewed Barnes's neighbor, Saracco. Saracco reported that, when she entered the home on the day of the incident, she asked J. what had happened, and J. said that N. "got burned." Saracco went into the bathroom; the floor was wet and the sink felt hot. There was a soaked roll of toilet paper in the sink. When Saracco asked Barnes what happened, he gave the same account as he later gave the police and DCFS.

¶ 13 On September 15, 2009, Jones and Martin returned to Barnes's home and accused Barnes of intentionally burning N., despite the lack of any evidence to support such accusations. When Barnes asked them to leave, they produced a warrant permitting them to remove Barnes's bathroom sink, and did so.

¶ 14 Barnes called Jones and Martin several times requesting information about the purported safety plan that was preventing him from seeing his children. Neither Jones or Martin ever responded to his requests.

¶ 15 On December 1, 2009, Barnes appeared before the circuit court of Kane County for a hearing on his petition for visitation with his children. A representative of the State's Attorney was present for the hearing. The petition was granted.

¶ 16 That same day, Jones testified before a grand jury considering whether to indict Barnes for child abuse. Barnes alleges that Jones falsely testified that Dr. Gamelli stated that N.'s physical condition did not match Barnes's account of the how the injuries occurred. Barnes alleges that this testimony was the sole basis for the grand jury's decision to issue an indictment against Barnes charging him with heinous battery, aggravated battery of a child, and aggravated domestic battery. Barnes was arrested pursuant to the indictment at 5:30 p.m. on December 1. Because his bail was set at $500,000 and he could not afford to post bond, Barnes remained in jail until December 9. Even after he was able to post bond, one of the conditions of the bond was that Barnes not have any contact with his children. Barnes alleges that this condition was imposed at the request of the defendants.

¶ 17 On December 17, 2009, Barnes again petitioned for visitation with his children, but this time his request was denied. Barnes alleges that Brocker later told him that she turned against Barnes and refused to help him regain visitation rights because the investigating officers and prosecuting officers told her that Barnes had deliberately burned N. and that Barnes would be sent to jail for the rest of his life, and made numerous other disparaging remarks about Barnes. The investigators also asked for her assistance in prosecuting Barnes.

¶ 18 Barnes was eventually tried on the charges listed above. Barnes alleges that Dr. Gamelli testified at trial, *inter alia*, that on N.'s admission to the hospital, none of the hallmark indicia of

child abuse were present and that, although Dr. Gamelli was a mandated reporter of child abuse under Illinois law, he did not contact DCFS about N.'s injuries. After the State rested its case, Barnes successfully moved for a directed finding on the ground that, even taking the evidence in the light most favorable to the State, the State had not made out a *prima facie* case on the charges. Barnes incurred over $100,000 in attorney fees in defending himself against the criminal charges.

¶ 19 On December 1, 2011, Barnes filed suit against numerous defendants, including: Martin, the Child Advocacy Center, Kane County, and unknown investigators; Joseph McMahon, alleged to be the State's Attorney for Kane County and the director of the Child Advocacy Center; Jones, Jones's supervisor Police Chief Gregory Thomas, the City of Aurora, and unknown officers; Summer and the Village of North Aurora; Scott and unknown DCFS workers; Assistant State's Attorneys Laurie Schmidt and Debra Bree; and Bennet and Loyola. In October 2012, the trial court (Judge Judith Brawka presiding) granted certain defendants' motions to dismiss various claims, but permitted Barnes to file an amended complaint. He did so in January 2013.

¶ 20 All of the defendants then filed motions to dismiss the claims against them. The motion filed by Jones and the City of Aurora was brought pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) and alleged only that the allegations against them did not state a cause of action; the remaining motions were brought either under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)) or under both sections (see 735 ILCS 5/2-619.1 (West 2012)). In December 2013, the trial court (Judge James R. Murphy presiding) granted all of the motions and dismissed the amended complaint with prejudice. Barnes filed a timely notice of appeal.

¶ 21 ANALYSIS

¶ 22 On appeal, Barnes does not challenge the dismissal of the following defendants from the suit: Summer, the Village of North Aurora, McMahon, Bree, Schmidt, and Scott. Likewise, he does not appeal the dismissal of counts III, VI, VII, or IX of his amended complaint. Accordingly, we limit our analysis to the remaining defendants and claims. We review the trial court's dismissal of these defendants and claims *de novo*. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). We begin by addressing the claims against Bennet and Loyola.

¶ 23 A. Claims Against Bennet and Loyola – Statute of Limitations

¶ 24 The trial claim dismissed the claims against Bennet and Loyola on the ground that they were untimely—August 17, 2009, was the only date on which Bennet was alleged to have injured Barnes by preventing Barnes from seeing N., but the suit was not filed until December 1, 2011, over two years later. (Loyola's sole source of potential liability is Bennet's actions, as Loyola is sued either on a theory of vicarious liability or an alleged failure to properly train Bennet, resulting in Bennet's actions.) Barnes argues that the act of preventing him from seeing his son was a "continuing tort" and so the statute of limitations did not begin to run on August 17, 2009, but the allegations of his amended complaint do not support this argument.

¶ 25 Bennet and Loyola are named as defendants in five counts of the amended complaint: two state law tort claims (intentional infliction of emotional distress, and interference with family relations) and three claims under 42 U.S.C. § 1983 (2006), a federal civil rights statute. The statute of limitations applicable to the tort claims is two years. See 735 ILCS 5/13-202 (West 2010); *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003). The limitations period for § 1983 claims is the same, as it is based on the limitations period for personal injury claims under state law. *Kelly v. City of Chicago*, 4 F.3d 509, 511 (7th Cir. 1993).

¶ 26 A limitations period generally begins to run when the injury or event giving rise to the claim occurs. *Feltmeier*, 207 Ill. 2d at 278. However, when the tort "involves a continuing or

repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 345 (2002). It is important to note that a determination of a "continuing tort" must be based on "continuing unlawful acts and conduct, not *** continual ill effects from an initial violation." *Feltmeier*, 207 Ill. 2d at 278. "Thus, where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." *Id*. at 279.

¶ 27 Here, Barnes has alleged only one wrongful act by Bennet, which took place on August 17, 2009. Barnes argues that it could be reasonably inferred from the other allegations of the amended complaint that Bennet and Loyola continued to deny him access to his son, but this argument is not supported by the complaint. Barnes alleges that he contacted other defendants (Jones and Martin) repeatedly to ask about the purported safety plan and they did not respond, suggesting that they continued to deny him access to N. However, he has not identified any basis on which Bennet and Loyola could be liable for these acts or omissions of Jones and Martin. Thus, we reject the argument that Barnes has alleged a continuing tort by Bennet and Loyola.

¶ 28 In the alternative, Barnes asserts that he could amend his complaint to cure the defect, and he argues that the trial court should have granted him leave to amend on this basis. We reject this argument for several reasons. To begin with, there is no record that Barnes ever requested leave to amend his complaint so as to allege additional wrongful acts by Bennet or Loyola, and the trial court was under no obligation to grant such leave *sua sponte*. *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010). Even if we were to assume that such a request was made and rejected, we would find no error. A trial court's refusal to allow the amendment of a

complaint is reviewed for abuse of discretion, and depends on such factors as whether the proposed amendment would cure the defect in the pleadings. *Mendelson v. Ben A. Borenstein & Co.*, 240 Ill. App. 3d 605, 619 (1992). However, neither in the trial court nor on appeal did Barnes ever tender proposed amendments or identify specific allegations that he would include if granted leave to amend his complaint. Thus, we have no basis to conclude that Barnes could have cured the defect in his claims against Bennet and Loyola. *Id.*; see also *Eyman v. McDonough District Hospital*, 245 Ill. App. 3d 394, 397 (1993) (refusing to consider argument that trial court should have granted oral motion to amend where the record did not contain any evidence of the proposed amendment). Accordingly, we affirm the dismissal of Bennet and Loyola from this suit on the basis of untimeliness.

¶ 29 B. Claims against Kane County and the Child Advocacy Center:

Liability for Martin's Actions

¶ 30 Kane County and the Child Advocacy Center (collectively, "Kane County defendants") argue that they cannot be held liable for Martin's actions because Martin works for the Kane County State's Attorney, who is an officer of the State of Illinois; he is not actually employed by Kane County or the Child Advocacy Center. Moreover, they assert, Martin himself is an "officer" rather than an ordinary employee.

¶ 31 The assertion that Martin works for the state rests on an affidavit submitted from Christy DeChristopher, the executive assistant to the Kane County State's Attorney. (Martin filed the affidavit as an exhibit to his combined motion to dismiss the claims against him pursuant to section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2010).) DeChristopher averred that her job duties encompassed some personnel duties and thus she had knowledge regarding the employees of the Kane County State's Attorney's office. According to her, Martin was appointed in 2002 as a special investigator by former Kane County State's Attorney Meg

Gorecki, was employed by the State's Attorney's office, and was assigned to the Kane County Child Advocacy Center. DeChristopher attached a copy of the written appointment as an exhibit to her affidavit.

¶ 32 The Kane County defendants note that it is well established that state's attorneys and assistant state's attorneys are employed by the state, not the county in which they operate. This is so even though state's attorneys and assistant state's attorneys are paid from county funds. *Ingemunson v. Hedges*, 133 Ill. 2d 364, 367 (1990); *People ex rel. Landers v. Toledo, St. Louis & Western R. Co.*, 267 Ill. 142, 145 (1915). Moreover, state's attorneys and assistant state's attorneys are officers, that is, persons who hold an office, not ordinary employees. *Hedges*, 133 Ill. 2d at 367; *Landers*, 267 Ill. at 145. The Kane County defendants argue that special investigators like Martin, who are appointed pursuant to statute to assist state's attorneys in the performance of their duties (see 55 ILCS 5/3-9005(b) (West 2010)), are likewise state officers. For all of these reasons, the Kane County defendants argue that they cannot be held liable for Martin's actions.

¶ 33 We agree. In *Moy v. County of Cook*, 159 Ill. 2d 519, 527 (1994), the supreme court explained that "[t]here is a distinction between officers and employees; the terms are not interchangeable." To determine whether a person is an officer, a court considers whether the following characteristics are present: (1) the position is created by law; (2) the duties of the position are fixed by law, not by contract; (3) compensation is set by the county board and paid out of the county treasury; (4) the person is not engaged to perform a specific act, the completion of which ends his or her duty, but instead the duties of the position are continuous, without regard to the identity of the particular person who holds the office; and (5) the person exercises "some portion of the sovereign power of the State." *Id.* at 529. Applying these criteria, the

supreme court has determined that state's attorneys and assistant state's attorneys are state officers. *Hedges*, 133 Ill. 2d at 367; *Landers*, 267 Ill. at 145.

¶ 34 We believe that persons such as Martin who are appointed as special investigators to assist state's attorneys are likewise state officers. Their positions are created by law, and the duties of the position are likewise set by law. See 55 ILCS 5/3-9005(b) (West 2010) ("[t]he State's Attorney of each county shall have authority to appoint one or more special investigators to serve subpoenas, make return of process and conduct investigations which assist the State's Attorney in the performance of his [or her] duties," and such special investigators "shall have all the powers possessed by investigators under the State's Attorneys Appellate Prosecutor's Act"). Those duties are continuous, and do not depend on the identity of the particular persons who serve as special investigators, nor do those duties end with the completion of any specific act. Martin is paid by the county board. Finally, in carrying out his duties, Martin exercises a portion of the sovereign power of the state. Martin thus is an officer of the state.

¶ 35 The "application of the doctrine of *respondeat superior* requires the existence of an employment relationship." *Moy*, 159 Ill. 2d at 527. No such relationship exists where the person at issue is an officer rather than an employee, and thus a governmental entity may not be held vicariously liable for the actions of an officer. *Id.* at 530. Even when the officer in question is a county officer rather than a state officer and is indemnified by the county for any judgment against him or her, that merely gives the county the right to intervene in a suit against the officer if it wishes. *Id.* at 531. In the absence of such voluntary intervention, the county must be dismissed from a suit against an officer. *Id.* at 532.

¶ 36 Barnes contests the sufficiency of DeChristopher's affidavit under Supreme Court Rule 191(a), suggesting that it is conclusory. He also attacks the case law cited by the Kane County defendants, noting that it does not specifically address the employment status of special

investigators employed by state's attorneys. Finally, he argues that Martin's actions as a special investigator served the interests and were taken on behalf of the Kane County defendants. However, the supreme court specifically rejected this argument in *Moy*, holding that the benefit to the county from the officer's actions is irrelevant; instead, the test is the extent to which the county has the right to control the officer's actions, including the right to discharge the officer. *Id*. at 525. It is uncontested that Martin was appointed to his position by the Kane County State's Attorney, and it must be presumed that only the State's Attorney has the power to fire Martin. Moreover, Martin meets the legal definition of a state officer. We thus find that, as a matter of law, Kane County and the Child Advocacy Center cannot be held vicariously liable for Martin's actions. To the extent that the claims against them are premised on Martin's actions, those claims must be dismissed as to these defendants. *Id*. We therefore affirm the trial court's dismissal of counts II, V, X, XI, and XII as to Kane County and the Child Advocacy Center.

¶ 37 C. Claims against Martin - Immunities

¶ 38 We turn next to the claims against Martin. Martin argues that, as a state officer, he should be dismissed from this suit because (1) any state law claims against him must be brought in the Court of Claims; and (2) he is entitled to immunity from the federal claims against him under the eleventh amendment to the United States Constitution (U.S. Const., 11th amend.). We begin by analyzing the state law claims.

¶ 39 1. State Law Claims Against Martin

¶ 40 Barnes's state law claims against Martin assert intentional torts, including malicious prosecution, intentional infliction of emotional distress, civil conspiracy, and interference with family relations. Martin argues that, as a state officer, he is immune from suit in a circuit court. Instead, he contends, any claims against him must be brought in the Court of Claims.

¶ 41 The Illinois constitution of 1970 abolished the traditional doctrine of sovereign immunity, "except as the General Assembly may provide by law." Ill. Const. 1970, art. XIII, § 4. Thereafter, the legislature partially reinstated the doctrine via the Court of Claims Act (750 ILCS 505/1 *et seq*. (West 2010)). Under that statute, the Court of Claims has exclusive jurisdiction to hear and determine all tort claims "against the State." 750 ILCS 505/8(d) (West 2010). When a plaintiff sues a state employee rather than the State itself, the jurisdiction of the circuit court to hear the claim depends on whether the suit is really "against the State" or merely against the employee individually.

¶ 42 "[T]he rules governing this inquiry are well established." *Loman v. Freeman*, 229 Ill. 2d 104, 112 (2008). Whether the State of Illinois may be said to be the real party in interest depends on (1) the issues involved in the particular claim(s) against the state employee, and (2) the relief sought. *Id*. at 113. As to the first prong of this test, an action is against the State when there are " 'no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts.' " *Healy v. Vaupel*, 133 Ill. 2d 295, 309 (1990), *quoting Robb v. Sutton*, 147 Ill. App. 3d 710, 716 (1987). Martin argues that the claims against him do not meet this test because the amended complaint does not expressly allege that he acted beyond his authority. This argument ignores the fact that Barnes alleged that Martin committed intentional torts, *i.e.*, engaged in deliberate wrongdoing. In *Loman*, the supreme court held that allegations that a state employee committed an intentional tort met the *Healy* standard, noting that the State "cannot have a policy requiring its employees to commit *** intentional tort[s]." *Loman*, 279 Ill. 2d at 129 (finding that a claim of conversion brought against a state employee was properly brought in the circuit court).

¶ 43 The second prong of the test, the relief sought, asks whether " 'a judgment for the plaintiff could operate to control the actions of the State or subject it to liability.' " *Id*. at 113,

quoting Currie v. Lao, 148 Ill. 2d 151, 158 (1992). Here, a judgment for Barnes on his claims against Martin would not "operate to control the actions of the State" because, as noted above, the State has no policy encouraging its employees to engage in malicious prosecution, intentionally inflict emotional distress, or wrongfully interfere with family relations. Thus, a judgment for Barnes cannot operate to restrain state employees' performance of their lawful duties. See *id*. at 129. Nor would a judgment for Barnes subject the State itself to liability, as his claims were brought against Martin, not the State. Even if the State indemnifies Martin for any judgment entered against him as a result of his state employment, our supreme court has held that such indemnification does not amount to the State being "subjected to liability." *Id*. at 122 (explaining that indemnification is not the same as liability and rejecting the argument that indemnification of a state employee requires a suit to be brought in the Court of Claims). Accordingly, we reject Martin's argument that Barnes was required to assert his state law claims against Martin in the Court of Claims.

¶ 44 2. Federal Claims Against Martin

¶ 45 The amended complaint also set out claims against Martin based on federal law, alleging violations of Barnes's rights under § 1983 (42 U.S.C. S 1983 (2006)), including false arrest (count I), conspiracy to deprive Barnes of his civil rights (count IV), and the deprivation of the fundamental right to family society and companionship (count X). Martin asserts that, because he is a state officer, he is absolutely immune from suit on these claims under the principles of sovereign immunity. Martin also argues that he is entitled to have the federal claims against him dismissed on the basis of qualified immunity.

¶ 46 Martin cites *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), to support his claim to absolute immunity. *Will* holds that, because Congress is presumed to have acted with knowledge of the traditional sovereign immunities existing at the time it enacted § 1983,

neither a State nor state officials acting in their official capacities are "persons" who may be sued under § 1983 for damages in federal court. *Id*. at 71. Martin argues that this immunity to suit extends to § 1983 claims brought in state court as well, citing *Alencastro v. Sheahan*, 297 Ill. App. 3d 478, 485 (1998).

¶ 47 However, Martin acknowledges that, even if *Will* applies to suits in state court, it protects only against claims against officials in their *official* capacity. Barnes points out that he has sued Martin in his *individual* capacity. State employees sued in their individual capacities are "persons" who may be sued under § 1983:

> "State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them. [Citation.] By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortable with in the statutory term 'person.' " *Hafer v. Melo*, 502 U.S. 21, 27 (1991).

See also *Alencastro*, 297 Ill. App. 3d at 485 ("Generally, while official acts of state officers are considered acts of the state itself, acts that are illegal, unconstitutional, or performed under authority that the state official does not have render that official personally amenable to suit. [Citation.] In such a case, a plaintiff may bring suit against the officer in his or her individual capacity, as the action is no longer considered an action against the State of Illinois."). Barnes's § 1983 claims against Martin individually are not barred by sovereign immunity or *Will*.

¶ 48 Finally, Martin contends that he is entitled to qualified immunity from the § 1983 claims. Qualified immunity shields from suit a government employee who was performing a discretionary function and whose conduct did not violate clearly established federal statutory or constitutional rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, Martin's sole argument as to why qualified immunity

protects him is that Barnes has not adequately alleged a deprivation of his constitutional rights. This argument is not based on the *Harlow* standard, but on a more generalized argument that counts I, IV and X fail to state a cause of action—an argument that we consider separately below. We therefore decline to consider the issue of Martin's qualified immunity at this time.

¶ 49 D. State Law Claims Against Remaining Defendants

¶ 50 The state law claims at issue in this appeal include malicious prosecution (count II), intentional infliction of emotional distress (count V), civil conspiracy (count XI), and interference with family relations (count XII). The primary remaining defendants named in these counts are Jones and Martin.

¶ 51 Jones and Martin moved to dismiss these counts pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), arguing that the complaint failed to state any valid causes of action. In evaluating the sufficiency of a complaint under section 2-615, we must take as true all well-pled allegations and consider those allegations, together with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiff. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86-87 (1996). We also bear in mind that a claim should not be dismissed on the pleadings "unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover." *Id*. Taking each of these state law claims separately, we consider whether the trial court properly dismissed these counts with prejudice, applying a *de novo* standard of review. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002).

¶ 52 1. Count II – Malicious Prosecution

¶ 53 To state a claim for malicious prosecution, a plaintiff must allege that: (1) the defendant commenced or continued a criminal or civil judicial proceeding; (2) the proceeding terminated in favor of the plaintiff; (3) there was no probable cause; (4) the defendant acted out of malice; and (5) the plaintiff sustained damages as a result of the proceeding. *Gauger v. Hendle*, IL App (2d)

100316, ¶ 99. Barnes alleged that Jones and Martin "instituted the criminal charges" against him without probable cause and with malice, by excluding or ignoring exculpatory evidence, fabricating testimony, and creating false reports that misrepresented the evidence regarding N.'s injuries and Dr. Gamelli's evaluation of those injuries.

¶ 54 Martin argues that Barnes could not properly allege that the criminal proceeding against him lacked probable cause, because the grand jury indicted him. However, Barnes alleged that "[t]he sole basis of the indictment was *** false testimony" by Jones before the grand jury. Taking this allegation as true, the complaint adequately alleges that the indictment was unsupported and the criminal proceeding against Barnes lacked probable cause. Martin has cited no case law to support his argument that an allegedly unsupported indictment is conclusive proof of probable cause. To the contrary, our supreme court has held that, although an indictment is *prima facie* evidence of probable cause, it is not conclusive evidence of probable cause and may be rebutted by, among other things, evidence that the indictment was obtained through false testimony before the grand jury. *Freides v. Sani-Mode Manufacturing Co.*, 33 Ill. 2d 291, 296 (1965); see also *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 654 (2002). As the amended complaint alleges exactly this, we reject Martin's argument.

¶ 55 On appeal, Martin also argues that the statute of limitations bars this claim, because Barnes did not allege that he participated in the initiation of the criminal case against Barnes on or after December 1, 2009, the cut-off point for the statute of limitations. However, Martin never raised this argument before the trial court and he cannot raise it for the first time on appeal. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010) ("A reviewing court will not consider arguments not presented to the trial court"). Martin may, of course, make this argument to the trial court in the first instance upon remand, where Barnes will be free to raise any counterarguments he may have or seek leave to amend if he can do so.

¶ 56 Turning to Jones's arguments, he first argues that the complaint did not allege that he "was involved in any way in the prosecution's decision to indict" Barnes. This argument is contradicted by the complaint, which specifically alleges that Jones ignored exculpatory evidence, made false reports, and testified falsely before the grand jury in order to secure Barnes' indictment. Taken as true, these allegations are sufficient to raise a reasonable inference that Jones (and Martin) "played a significant role in causing the prosecution" of Barnes and thus are potentially liable. *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 349 (2000).

¶ 57 Jones's second argument—that he is absolutely immune from liability for his testimony before the grand jury—has more substance. In *Rehberg v. Paulk*, 132 S. Ct. 1497, 1506 (2012), the United States Supreme Court held that witnesses before a grand jury, like witnesses at trial, are entitled to absolute immunity from any claims based upon their testimony. Although *Rehberg* involved federal malicious prosecution claims brought under § 1983, Barnes has not shown that the standards for recognizing immunity for claims based upon a defendant's testimony would be different when state-law claims are involved. Accordingly, Jones is absolutely immune from liability on any claim based solely on his grand jury testimony.

¶ 58 Barnes cites to *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635 (2002), to support his argument that Jones is not absolutely immune from suit for his grand jury testimony. However, *Fabiano* was decided ten years before *Rehberg* was issued, and it relied in part on the observation that the United States Supreme Court had not yet decided whether to extend the common-law privilege protecting a witness's trial testimony to grand jury testimony. *Id*. at 653 ("The United States Supreme Court has yet to directly address" this issue). Of course, that observation is no longer correct in the wake of *Rehberg*.

¶ 59 However, *Fabiano* may be helpful to Barnes in another way. The court in *Fabiano* noted that, even if the defendant police officers' allegedly false grand jury testimony was absolutely

privileged, the officers could still be liable for malicious prosecution if that claim was not based solely on the alleged false testimony. *Id*. at 654. In *Fabiano*, the plaintiffs alleged several acts by the police officers in support of their malicious prosecution claim, including that the police officers "pressured the State's Attorney's office to bring charges against Sandra Fabiano, concealed and/or failed to reasonably investigate potentially exculpatory evidence, and attempted to coerce a potential witness to provide false testimony against Sandra Fabiano." *Id*. As the officers' allegedly false grand jury testimony was not the sole basis for the claim, the *Fabiano* court refused to find that the police officers were absolutely immune from liability for malicious prosecution.

¶ 60 Barnes made similar allegations of biased investigation and false reports by Jones and Martin. In light of these allegations, Jones's allegedly false testimony before the grand jury is not the sole basis for the claim of malicious prosecution, and *Rehberg* does not require dismissal of the claim. While Barnes eventually will have to come forward with evidence that Jones and Martin initiated the criminal charges against him, at this point it is not "clearly apparent" that no set of facts can be proved which would entitle him to recover. *Bryson*, 174 Ill. 2d at 86-87. We therefore reverse the dismissal of count II as to Jones and Martin.

¶ 61 2. Count V – Intentional Infliction of Emotional Distress

¶ 62 Count V of the amended complaint asserted a claim for intentional infliction of emotional distress. As with count II, the trial court dismissed count V with prejudice for failure to state a claim.

¶ 63 To state a claim for intentional infliction of emotional distress, a plaintiff must allege the following elements: (1) extreme and outrageous conduct by the defendant (2) that was either intended to cause severe emotional distress or undertaken with the knowledge that such emotional distress is highly probable, and (3) the conduct in fact caused severe emotional

distress. *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988). In the amended complaint, Barnes alleged the following: despite hearing only accounts of the incident that were consistent with Barnes's account, Jones and Martin accused Barnes of intentionally harming N. and pressured him to take a polygraph test; despite knowing the requirements for a safety plan and despite having no legal basis for their statements, Jones and Martin falsely told Barnes that there was a DCFS safety plan in place and that if he had contact with his children he would be subject to criminal sanction; and Jones appeared before a grand jury and testified falsely that Dr. Gamelli believed that Barnes' account was inconsistent with N.'s injuries. Further, Jones and Martin sought the imposition of a provision in Barnes's bond barring him from having contact with his children; and Jones and Martin told Brocker that Barnes deliberately abused N. and would be sent to jail for the rest of his life, and asked for her help in prosecuting him, with the result that she turned against Barnes and sought to bar him from seeing his children. Barnes alleged that Jones and Martin engaged in this conduct with the intent or knowledge that it was highly likely to cause Barnes severe emotional distress, and in fact the conduct did cause him such distress due to the resulting accusations, prosecution, and loss of contact with his children.

¶ 64 The trial court dismissed this claim because it found that the amended complaint did not contain any allegations amounting to extreme and outrageous conduct. It did not explain why it came to this conclusion, however, and we hold that it erred in dismissing the complaint on this basis. Although the definition of "outrageous conduct" does not cover " 'mere insults, indignities, threats, annoyances, petty oppressions or other trivialities' " (*id*. at 86, *quoting* Restatement (Second) of Torts, § 46, commend *d*, at 73 (1965)), the conduct alleged by Barnes went well beyond this level to include malicious interference in the parent-child relationship without legal justification and unsupported accusations of heinous criminal conduct.

¶ 65 In reaching this conclusion, we take note of *Fox v. Hayes*, 600 F.3d 819, 842 (7th Cir. 2010), in which the Seventh Circuit held that a police detective's conduct in telling the mother of a murdered 3-year old girl that her husband was a "f***ing liar" and a murderer was sufficiently outrageous to support a jury's verdict in her favor on her claim for intentional infliction of emotional distress. The court observed that the outrageousness of the conduct was heightened by (1) the fact that the police detective was in a position of power, as he "held [the mother's] family life in the balance" through his ability to procure the initiation of criminal charges against her husband, and (2) by the detective's knowledge that, "as the mother of a recently murdered child and the wife of the man accused, she was particularly susceptible to emotional distress." *Id.* Barnes has alleged that similar factors were present in this case. Further, none of the defendants have brought to our attention any case law in which similar allegations were held insufficient to state a claim for intentional infliction of emotional distress. Accordingly, we find that the trial court erred in holding that Barnes had not adequately alleged extreme and outrageous conduct.

¶ 66 Jones and Martin argue that they were merely pursuing a criminal investigation into serious allegations of child abuse, conduct that cannot amount to extreme and outrageous conduct. However, Barnes complained not about the investigation itself, but about the defendants' conduct of that investigation (and their intervention in the later visitation and child custody proceedings) in a manner that showed reckless disregard for the truth and a desire to harm or punish him. The fact that criminal investigation may have been within the scope of the defendants' job descriptions does not insulate them from claims that they abused their positions and deliberately sought to inflict emotional distress on Barnes. *Id.*

¶ 67 We similarly reject the defendants' other arguments regarding this claim. Jones argues that he and Martin had nothing to do with the formulation of any safety plan, as such plans are solely within the province of DCFS. However, Barnes did not allege that Jones and Martin

wrongfully created such a plan; he alleged that they "enforced" a putative safety plan that did not exist and thereby deprived him of contact with his children without legal justification. Martin points out that, on December 17, 2009, Barnes voluntarily signed an order waiving his right to visit with his children. This fact is irrelevant, however, to Barnes's claim that Martin and Jones deliberately sought to separate him from his children through a course of conduct that eventually led to his December 1, 2009, indictment on charges of child abuse and the vitiation of his custody rights. While Barnes's actions may provide a basis on which the defendants can contest damages at a later point in these proceedings, they do not prevent Barnes from stating a viable claim of intentional infliction of emotional distress. For all of these reasons, we reverse the trial court's dismissal of count V.

¶ 68 3. Count XI – Civil Conspiracy

¶ 69 Count XI was titled "Conspiracy to Deny Family Companionship" and (disregarding the defendants who have been dismissed already) was brought against Jones, Martin, and "unknown investigators and *** employees of DCFS and Kane County." In this count, Barnes alleged that: the defendants told him that he could not have any contact with his children and would face criminal charges if he did; they "worked together in furtherance of this conspiracy by deciding between and among themselves how and when to enact their goal of depriving [him of] access to his children"; and these actions were willful and wanton, and resulted in "substantial damages, including severe emotional distress and psychological trauma, damage to reputation, incarceration, attorney's fees and costs incurred in defendant against the false charges." Barnes also incorporated by reference many of the underlying allegations regarding the actions taken by Jones and Martin in accusing him, preventing him from seeing his children without legal justification, and instigating legal proceedings against him. The trial court dismissed this claim

with prejudice for failure to state a claim, saying that Barnes had failed to allege facts establishing the elements of conspiracy.

¶ 70 "To state a claim for civil conspiracy, the plaintiff must allege facts establishing: (1) an agreement to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means; (2) a tortious act committed in furtherance of that agreement; and (3) an injury caused by the defendant." *Kovac v. Barron*, 2014 IL App (2d) 121100. Conspiracy is not a separate and distinct tort in Illinois. *Mauvais–Jarvis v. Wong*, 2013 IL App (1st) 120070, ¶ 109. Rather, such a claim is a means of establishing vicarious liability among the co-conspirators for an underlying tortious act, even if that act was performed by only one person. See *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 49 (citing *Indeck North American Power Fund, L.P. v. Norweb PLC*, 316 Ill.App.3d 416, 432 (2000)).

¶ 71 The primary argument raised by Jones and Martin on appeal is that Barnes failed to allege any agreement between them to engage in the alleged tortious acts. However, the agreement necessary to plead a civil conspiracy need not be a formal agreement; a meeting of the minds shown by concerted action is sufficient. *Adcock v. Brakegate, Inc.*, 164 Ill. 2d 54, 62-63 (1994); *Bernhauser v. Glen Ellyn Dodge, Inc.*, 288 Ill. App. 3d 984, 996 (1997). Here, Barnes's allegation that Jones and Martin "worked together" to further a conspiracy implies that they were working toward a shared goal. A claim should not be dismissed if either the allegations or the inferences that reasonably can be drawn from those allegations set forth the elements of the cause of action. *Bryson*, 174 Ill. 2d at 86. Here, that test is met.

¶ 72 Martin also argues that Barnes did not identify any actions specifically undertaken in furtherance of the conspiracy. However, this is untrue: Barnes alleged multiple acts by Martin as well as Jones, all of which were alleged to have been in furtherance of the conspiracy. Jones argues that the conspiracy claim should be dismissed because none of the underlying torts were

adequately pled, but this argument fails inasmuch as we have found that the underlying tort counts should not have been dismissed. We therefore reverse the dismissal of count XI as well.

¶ 73 4. Count XII – Interference with Family Relations

¶ 74 In count XII, a state law claim titled "Interference with Family Relations," Barnes alleged that Jones, Martin, and unknown investigators and employees of DCFS and Kane County interfered in his relationship with his children by turning Brocker against him and by threatening him with criminal sanction if he tried to see his children, without legal justification. The trial court dismissed this count with prejudice on the ground that Illinois law does not recognize the tort of interference with family relations.

¶ 75 On appeal, Barnes argues that the trial court erred in dismissing this count because recognition of this cause of action is supported by treatises such as W. Prosser, Law of Torts, § 124, p. 873 (4th ed. 1971). However, our supreme court has refused to recognize such a cause of action on several occasions. See, *e.g.*, *Dralle v. Ruder*, 124 Ill. 2d 61 (1988); *Doe v. McKay*, 183 Ill. 2d 272 (1998); *Vitro v. Mihelcic*, 209 Ill. 2d 76 (2004). On the most recent occasion, Justice McMorrow noted that, although some of the supreme court's initial reasons for refusing to recognize the tort were subject to criticism, at least one particularly valid reason remained: "the choice of whether to recognize a new filial society claim is a policy decision that is better left to the legislature." *Vitro*, 209 Ill. 2d at 89. Given that our supreme court has not only rejected this potential cause of action repeatedly, but has also expressed the sentiment that courts should defer to the legislature in this area, we decline Barnes's request to blaze a new path. We affirm the trial court's dismissal of count XII for failure to state a legally cognizable claim.

¶ 76 E. Federal Claims Against Remaining Defendants

¶ 77 The federal § 1983 claims at issue in this appeal include false arrest (count I), conspiracy to deprive Barnes of his civil rights (count IV), failure to adequately train and supervise (count

VIII), and deprivation of the fundamental right to familial society and companionship without due process (count X). Like the state law claims, the trial court dismissed these counts with prejudice for failure to state a claim. Generally speaking, in order to plead a claim under § 1983, a plaintiff must allege the intentional deprivation of a constitutionally-protected right by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). As with the state law claims, we review the dismissal of these claims *de novo*, addressing each claim separately.

¶ 78 1. Count I – False Arrest

¶ 79 The trial court dismissed count I, Barnes's § 1983 claim alleging that he was falsely arrested, on the basis that the grand jury's indictment provided probable cause for Barnes's subsequent arrest. However, as we have noted above, although an indictment is *prima facie* evidence of probable cause, that evidence may be rebutted by where the indictment was obtained by false testimony. *Freides*, 33 Ill. 2d at 296. This principle extends to false arrest claims brought under § 1983: although generally a person arrested pursuant to a facially valid arrest warrant cannot claim false arrest, there is an exception where the "officers responsible for bringing about" the arrest knew that the authorizing body—here, the grand jury—had been deceived. *Juriss v. McGowan*, 957 F.2d 345, 350-51 (7th Cir. 1992). Barnes has alleged that the indictment was obtained through false testimony by Jones regarding Dr. Gamelli's opinions about the cause of N.'s injuries, and we must take this allegation as true at this stage of the proceedings. Accordingly, the indictment, standing alone, does not require dismissal of this claim.

¶ 80 Neither Jones nor Martin addresses *Juriss* in their arguments on appeal. Jones attempts to evade the holding of *Juriss* by citing to *Wallace v. Kato*, 549 U.S. 384, 389 (2007), in which the Supreme Court commented that the essence of a claim for false arrest or false imprisonment is "detention without legal process." (Emphasis removed.) Jones argues that an indictment is

"legal process" that cuts off any claim for false arrest. However, in *Kato* the Court explained that the "legal process" to which it was referring occurred *after* the arrest, when the defendant was "bound over by a magistrate or arraigned on charges." *Id*. Thus, the Court's comment in *Wallace* defines the point in time when a false arrest ends; it does not foreclose such a claim altogether. Jones also cites to *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 900 n.9 (7th Cir. 2001), in which the Seventh Circuit commented, as an aside, that the plaintiff's false arrest claim was more in the nature of a claim for malicious prosecution because she was arrested pursuant to a warrant, the issuance of which was "process." However, the *Snodderly* court did not cite any legal support for this statement, and we decline to follow it. See *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 78 (lower federal court decisions are at most persuasive authority and are not binding on Illinois courts). We have not discovered (and Jones has not cited) any legal support for the proposition that the exception recognized in *Juriss* has been abrogated. To the contrary, the *Juriss* exception was cited as a sound statement of the law of false arrest as recently as last year. See *Williamson v. Curran*, 714 F.3d 432, 442 (7th Cir. 2013) ("a facially valid warrant will pose no bar to a claim of false arrest when the officers responsible for effectuating the arrest knew that the warrant was issued without probable cause"). The other case law cited by Jones is not on point, as it involves malicious prosecution claims rather than false arrest claims. Accordingly, we reject Jones's argument that Barnes cannot bring a false arrest claim because of the indictment.

¶ 81 Jones also argues that Barnes did not allege that Jones participated in procuring the indictment against Barnes, but this is incorrect: Barnes specifically alleged that Jones testified falsely before the grand jury and that this false testimony led to the indictment. Further, read as a whole, the complaint reasonably implies that Jones knew the testimony was false when he gave it. For the purposes of section 2-615, these allegations are sufficient.

¶ 82 Martin, for his part, protests our consideration of Barnes's allegations about false testimony before the grand jury, suggesting that Barnes waived his ability to make them. (Barnes's initial complaint did not contain the allegations that Jones testified falsely before the grand jury and that this led to the indictment.) However, Martin cites no legal support for this proposition and thus his own argument is forfeited. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Additionally, the procedural history of this case supports our consideration of the allegation. Although Judge Brawka dismissed count I with prejudice, finding that the indictment served as a finding of probable cause that precluded any claim for false arrest, she also granted Barnes leave to file an amended complaint, and Barnes included this allegation among the general allegations in that amended complaint. There is no record that Martin (or any of the other defendants) ever objected to the inclusion of this allegation, and it was properly before the trial court (Judge Murphy) when the motions to dismiss the amended complaint were considered. Further, the allegation (and Barnes's reliance on *Juriss*) was brought to the attention of Judge Murphy during the briefing of those motions to dismiss: Barnes argued that it provided a reason not to dismiss his malicious prosecution claim. Barnes also argued orally that the *Juriss* exception for false testimony before the grand jury prevented the dismissal of his false arrest and malicious prosecution claims. Finally, in ruling on the motions to dismiss the amended complaint, Judge Murphy noted the existence of the allegation and indicated that he was aware that Barnes had raised it as a basis for reconsidering Judge Brawka's dismissal of count I, stating that, "[t]o the extent that plaintiff seeks a modification of Judge Brawka's previous ruling finding that the Grand Jury indictment establishe[d] probable cause as a matter of law ***, the court finds that said ruling should stand as to claims of false arrest and malicious prosecution." Under these circumstances, Barnes was not precluded from including this allegation in his amended

complaint, and on appeal he is not precluded from arguing that it provides a basis for reversing the dismissal of his false arrest claim.

¶ 83 Martin's second argument has a sounder footing, however. Martin notes that the amended complaint does not identify any way in which Martin was involved in Barnes's arrest. That is correct. Barnes alleged that he was arrested by North Aurora police officers, and that Jones's false testimony before the grand jury gave rise to the indictment, which in turn provided the basis on which he was arrested. However, he did not describe any involvement by Martin in his arrest. As the allegations of the amended complaint do not state a claim for false arrest against Martin, we affirm the dismissal of count I as to him.

¶ 84 2. Count X – Deprivation of Constitutional Right to Parent-Child Society

¶ 85 We next address count X, in which Barnes alleged that he was deprived of his right to the society and companionship of his children, and to be involved in their care and upbringing, without legal justification, by persons acting under the color of law. The remaining defendants named in this count are Jones, Martin, and unknown investigators and employees of DCFS and Kane County. The trial court dismissed this claim with prejudice on the basis that "the loss of contact with children *** is not a protected life, liberty or property interest," and therefore the deprivation of this interest could not give rise to a § 1983 claim.

¶ 86 The trial court's ruling was incorrect. The United States Supreme Court has noted that "the interest of parents in the care, custody, and control of their children *** is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This fundamental liberty interest is protected by the due process clause of the fourteenth amendment to the United States constitution (U.S. Const., amend. XIV). *Id.* at 66. Substantive due process forbids the government from infringing upon fundamental liberty interests at all unless that infringement is narrowly tailored to serve a compelling government

interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Here, although the defendants have not made the argument, we could posit that the State's interest in protecting the safety of children might serve as a compelling interest that, generally speaking, could justify state actors' interference with parents' right to the care and companionship of their children. However, Barnes alleges that, in this case, the defendants had no basis for such interference, given the lack of any evidence contradicting his account of the incident and the nonexistence of any safety plan, and thus the extent of their interference was neither justified nor narrowly tailored to the circumstances. The defendants have not identified any basis for the dismissal of this claim other than the trial court's incorrect understanding of federal law. Accordingly, we reverse the trial court's dismissal of count X.

¶ 87 3. Count IV – Conspiracy

¶ 88 We now turn to count IV, in which Barnes alleged that Jones and Martin violated § 1983 by conspiring to deprive him of his civil rights under the federal constitution by: failing to investigate realistic and credible leads, intimidating and coercing witnesses including the children's mother to turn against him and deny him access to his children, and testifying falsely before the grand jury and in open court, with the result that he was arrested, jailed for one week on "obviously false and unsubstantiated charges," deprived of a fair and impartial hearing through perjured testimony and the suppression of exculpatory evidence, and suffered severe emotional distress, damage to reputation, incarceration, and was required to incur attorney fees to defend against the false charges. The trial court dismissed this claim with prejudice on the ground that Barnes had failed to allege facts demonstrating that any of his constitutional rights had been violated or that the defendants had conspired in such a violation.

¶ 89 The trial court's first basis for dismissal—that Barnes had not alleged any valid underlying claim of constitutional deprivation—is no longer true, as we have found that count X

and count I (at least as to Jones) sufficiently stated § 1983 claims for the violation of constitutional rights. As to whether Barnes adequately alleged (1) an agreement between Jones and Martin, or (2) acts by either of them in furtherance of the conspiracy, the defendants raise the same arguments with respect to this federal civil conspiracy claim that they raised with respect to Barnes's state law claim of civil conspiracy (count XI). We reject these arguments for the same reasons stated above. Accordingly, we reverse the trial court's dismissal of count IV for failure to state a claim.

¶ 90 4. Count VIII – *Monell* Claim

¶ 91 In *Monell v. New York City Department of Social Services*, 436 U.S. 665, 694 (1978), the Supreme Court held that, although a municipal body cannot be held vicariously liable under § 1983 for the acts of its agents or employees, such a body may be liable under § 1983 when its own custom or policy caused the constitutional injury:

> "We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."

To allege the necessary municipal policy for a *Monell* claim, a plaintiff must allege that the constitutional deprivation arose from (1) an express policy adopted by the entity's lawmakers, (2) a practice that was so persistent and widespread that it constituted a custom with practically the force of law, or (3) the acts of a governmental actor with final policy-making authority. *Connick v. Thompson*, ___ U.S. ___, 131 S. Ct. 1350, 1359 (2011).

¶ 92 "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official

government policy for purposes of § 1983." *Id.* However, a governmental entity will only be liable under this theory where the entity's failure to train its employees amounted to " 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.' " *Id.*, quoting *City of Canton, Ohio v. Harris*, 485 U.S. 378, 388 (1989). " 'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Board of Commissioners of Bryan County v. Brown*, 520 U.S. 397, 410 (1997).

¶ 93 Barnes filed his *Monell* claim against Police Chief Thomas and the City of Aurora (for failing to train Jones) and the Kane County defendants (for failing to train Martin). (He also sued Bennet and Loyola, but we have already dismissed them from this suit on statute of limitations grounds.) Thomas argues that he is sued only in his official capacity, and thus the claim against him should be dismissed because it is the same as the claim against the City of Aurora. His legal argument is correct (see *Monell*, 436 U.S. at 690 n.55 (noting that "official-capacity suits generally represent only another way of pleading an action against [the] entity of which [the] officer is an agent")), and Barnes did not respond to this argument. Accordingly, we dismiss Thomas from this suit.[2]

¶ 94 The Kane County defendants argue that they also should be dismissed from this claim because they cannot be liable for failing to train Martin, who is not one of their employees. This argument overlooks the fact that a *Monell* claim does not rest on vicarious liability, and so the existence of an employment relationship is not a necessary element. Rather, the issue is whether the Kane County defendants were responsible for training Martin in his job duties as an

[2] The only other count in which Thomas was named as a defendant was count IX, the dismissal of which was not challenged by Barnes in this appeal.

investigator. It is undisputed that, although the Kane County State's Attorney appointed him, Martin was assigned to work for the Child Advocacy Center, and it is a reasonable inference that the Kane County defendants may have trained him for his duties in that role. At this point, the Kane County defendants have not demonstrated that they were *not* involved in Martin's training. Thus, dismissing them on this basis would be premature. We turn to the question of whether Barnes adequately pled a failure-to-train claim.

¶ 95 The defendants argue that Barnes did not adequately plead an official governmental policy amounting to deliberate indifference. As we have noted, this is a high standard to meet. Governmental policymakers may be deliberately indifferent if they were "on actual or constructive notice that a particular omission in their training program cause[d] *** employees to violate citizens' constitutional rights," but nevertheless chose to retain that program. *Connick*, 131 S. Ct. at 1360. Generally speaking, alleging that the governmental policymakers had such notice requires a plaintiff to allege a pattern of constitutional violations attributable to the same omission in the training program. *Id*.

¶ 96 Here, the allegations of the amended complaint do not meet the "deliberate indifference" standard. Read in the light most favorable to him, Barnes alleged that the defendants failed to adequately train Jones and Martim in the investigation and prosecution of child abuse cases, allowing them to engage in the custom or practice of restricting parents' contact with their children without legal justification. However, the amended complaint contains no allegations that the defendants' agents violated the constitutional rights of anyone besides Barnes, or that the defendants knew or should have known that their agents would be highly likely to engage in this course of conduct.

¶ 97 Barnes cites to the various sections of the Child Advocacy Center Act (55 ILCS 80/1 *et seq*. (West 2012)) for the proposition that the Child Advocacy Center was required by law to

adopt a written protocol for investigating and prosecuting child abuse cases. However, that statute prescribes the development of protocols for child sexual abuse, not nonsexual abuse of the kind Barnes was accused of. Further, Barnes has not alleged that the Child Advocacy Center lacked such a protocol, or that its written protocol was responsible in any way for Jones's and Martin's actions. Accordingly, this line of argument does not address Barnes's failure to state a § 1983 *Monell* claim.

¶ 98 Although we affirm the trial court's dismissal of count VIII, we modify that dismissal to reflect that it is without prejudice. If Barnes is able to amend his complaint to state a valid § 1983 failure-to-train claim under the principles discussed above, he may seek leave of the court to do so. Moreover, upon remand, Barnes should be permitted to conduct discovery regarding the other incidents of potentially improper handling of child abuse cases in order to determine the wisdom of repleading his *Monell* claim.

¶ 99 CONCLUSION

¶ 100 The dismissal of Barnes's amended complaint is affirmed in part and reversed in part. Specifically, we affirm the dismissal with prejudice of the defendants Bennet, Loyola, and Thomas from the suit. We also affirm the dismissal with prejudice of the defendants Kane County and the Child Advocacy Center with respect to all claims that rest upon a theory of vicarious liability for the conduct of defendant Martin.

¶ 101 To assist with the proceedings upon remand, we summarize below our holding as to each count.

¶ 102 As to count I, the § 1983 false arrest claim, we affirm the dismissal of this claim with respect to Martin only. However, we reverse the dismissal of this claim with respect to Jones.

¶ 103 As to count II, the state law malicious prosecution claim against Jones and Martin, we reverse the dismissal of this count.

¶ 104 Barnes did not contest the dismissal of count III and it is therefore affirmed.

¶ 105 As to count IV, the § 1983 conspiracy claim against Jones and Martin, we reverse the dismissal of this count.

¶ 106 As to count V, the state law claim of intentional infliction of emotional distress against Jones and Martin, we reverse the dismissal of this count.

¶ 107 Barnes did not contest the dismissal of counts VI and VII, and it is therefore affirmed.

¶ 108 As to count VIII, the § 1983 *Monell* claim against the City of Aurora, Kane County, and the Child Advocacy Center, we affirm the dismissal of this count, modifying that dismissal to reflect that it is without prejudice.

¶ 109 Barnes did not contest the dismissal of count IX and it is therefore affirmed.

¶ 110 As to count X, the § 1983 claim for deprivation of the right to family association asserted against Jones, Martin, and unknown investigators and employees of DCFS and Kane County, we reverse the dismissal of the count.

¶ 111 As to count XI, the state law civil conspiracy claim against Jones, Martin, and unknown investigators and employees of DCFS and Kane County, we reverse the dismissal of the count.

¶ 112 As to count XII, the state law claim for intentional interference with family relations, we affirm the dismissal of this count with prejudice.

¶ 113 As a final note, we emphasize that nothing in this disposition should be contrued as expressing an opinion regarding either the substantive merits of Barnes's claims or the validity of any other arguments that may be raised regarding those claims in the future.

¶ 114 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part and reversed in part, and remanded for further proceedings consistent with this opinion.

¶ 115 Affirmed in part and reversed in part; remanded.