IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Hitto NATHAN,
individually and as guardian
ad litem for R. N., a minor child;
and Hanny Nathan,
Plaintiffs-Appellants,

v.

DEPARTMENT OF HUMAN SERVICES;
Jodie Hoberg; Todd Hirano; Linda Canizales;
Holli Arnold Cissna; and Brent Klabo,
Defendants-Respondents.

Lane County Circuit Court
161319641; A158031

Charles D. Carlson, Judge.

Argued and submitted February 9, 2016.

Katie H. Haraguchi argued the cause for appellants. On the briefs were Cody Hoesly and Larkins Vacura LLP.

Susan Yorke, Assistant Attorney General, argued the cause for respondents. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and Lagesen, Judge, and Garrett, Judge.

ORTEGA, P. J.

Judgment granting summary judgment to defendants affirmed in part, reversed in part, and remanded; otherwise affirmed.

ORTEGA, P. J.

After an employee of the Department of Human Services (DHS) removed four-year-old R from the care of plaintiffs Hanny and Hitto Nathan,[1] they brought federal and state claims against DHS and several DHS employees who were involved in R's removal and the resulting dependency proceedings.[2] Plaintiffs alleged that they were entitled to civil damages under 42 USC section 1983 because defendants deprived them of various constitutional rights. Further, they alleged that defendants committed several torts under Oregon law.

Plaintiffs moved for partial summary judgment on two of their section 1983 claims. Defendants cross-moved for summary judgment, asserting that plaintiffs' federal claims were barred by absolute and qualified immunity and that plaintiffs' state law claims, to varying degrees, either failed as a matter of law or were barred by discretionary immunity. The trial court denied plaintiffs' partial summary judgment motion, granted summary judgment to defendants, and entered a judgment dismissing plaintiffs' claims. On appeal, plaintiffs assign error to both the denial of their motion and the grant of summary judgment to defendants. Ultimately, as to the court's denial of plaintiffs' partial summary judgment motion, we affirm; as to the court's grant of summary judgment to defendants, we affirm in part, reverse in part, and remand.

On appeal from cross-motions for summary judgment, when error is assigned to the granting of one and the denial of the other, both rulings are reviewable. *Bergeron v. Aero Sales, Inc.*, 205 Or App 257, 261, 134 P3d 964, *rev den*, 341 Or 548 (2006). The record on summary judgment "consists of documents submitted in support of and in opposition to both motions." *Citibank South Dakota v. Santoro*, 210 Or App 344, 347, 150 P3d 429 (2006), *rev den*, 342 Or 473 (2007).

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[1] Hitto is named as plaintiff in his individual capacity and in his capacity as guardian *ad litem* for R. Hanny is named as plaintiff in her individual capacity.

[2] Plaintiffs' federal claims were brought against various individual employees of DHS, and the state tort claims were brought against all named defendants, including DHS. In this opinion, as to the federal claims, we generally do not distinguish between the individual defendants except when necessary for clarity.

We review each of the cross-motions to determine whether there are any disputed issues of material fact and whether either party was entitled to judgment as a matter of law. *Oregon Southwest, LLC v. Kvaternik*, 214 Or App 404, 413, 164 P3d 1226 (2007), *rev den*, 344 Or 390 (2008). "We review the record for each motion in the light most favorable to the party opposing that motion." *Ellis v. Ferrellgas, L. P.*, 211 Or App 648, 653, 156 P3d 136 (2007). Here, because the majority of our analysis involves whether the court appropriately granted summary judgment to defendants, we state the relevant facts in the light most favorable to plaintiffs—*i.e.*, the parties opposing that motion.

I. FACTS

R was born in 2007 in the Marshall Islands. Plaintiffs are R's paternal grandparents and, shortly after R's birth, they adopted her and became her legal guardians under the common-law practices and customs of the Marshall Islands. Neither the common law nor the customs of the Marshall Islands include the "concept" of the termination of parental rights and no legal documentation is required in the Marshall Islands to establish plaintiffs' role as guardians or adoptive parents.

Plaintiffs travelled with R to Oregon in 2010 for a wedding and ended up extending their stay and living with their son Darren in his apartment in Eugene. Late on October 16, 2011, Darren and Hanny had about a 10-minute argument in the apartment. Darren was intoxicated and upset, and he retrieved his handgun and threatened to commit suicide. He then left the apartment without his gun. Hanny hid the handgun in a toy box in a bedroom. The next morning, while Hitto and R slept in another room, Hanny accidently discharged the gun while retrieving it from the toy box. The bullet traveled through the bedroom floor into the apartment below. Nobody was injured, but the downstairs neighbor contacted the Eugene Police Department to report the gunshot and the argument from the previous night.

When the police arrived shortly thereafter, their conversation with plaintiffs was hampered because plaintiffs spoke limited English. According to the police report,

plaintiffs initially denied knowledge of the gun. However, the police located it in Hanny's handbag. They also observed that Hitto was "carrying what looked like a beer mug" when they first approached him, although the report is silent as to whether the mug contained alcohol. Darren returned to the apartment and explained to the officers the circumstances of the argument from the night before. The officers confiscated the gun, contacted DHS, and cited plaintiffs for reckless endangerment, criminal mischief, and tampering with physical evidence.[3]

Defendant Hoberg, a DHS case worker, received the call about the disturbance at Darren's apartment. After the officers relayed information to her about what they had observed, she responded to the apartment and spent "a few hours" questioning plaintiffs about the incident. Hitto communicated to Hoberg that plaintiffs were R's adoptive parents and guardians and had raised her since birth. Hoberg separated R from plaintiffs and asked her where her "parents" were. She indicated that they were "inside." Hoberg "clarified the difference" between grandparents and parents to R and she "didn't appear to understand." Hoberg asked R additional questions about her family, but when she received no further details, she ended the "interview." Hoberg attempted to contact plaintiffs' other son, Hanto, to help with the language barrier and help her "understand the circumstances" better. Those attempts failed. At that point, Hoberg decided to take R into protective custody and place her in shelter care, given what Hoberg deemed the "severity of the circumstances," including R "possibly being subjected to her uncle holding a handgun and making suicidal threats, as well as a firearm being discharged in the child's bedroom" and because Hoberg did not know the "whereabouts" of R's biological parents, and "it is unknown whether or not the grandparents have any type of legal custody" of R.

After deciding to take R into protective custody, Hoberg attempted to explain that decision to plaintiffs, but she was uncertain whether they understood. She contacted Hanto's wife, Adelle, to explain the situation and to ask the

[3] Plaintiffs were not prosecuted for those citations.

family to attend a "family meeting" after the shelter hearing to gain some clarity as to R's circumstances.

Two days later, the juvenile court held a shelter hearing, *see* ORS 419B.185 (requiring evidentiary hearing after child taken into protective custody), at which DHS filed a protective custody report. That report identified R's biological parents as the persons with legal custody of R. It also noted that their whereabouts were unknown, but that it appeared that they resided in the Marshall Islands. DHS also filed a dependency petition asking the court to take jurisdiction of R. DHS named R's biological parents in the petition but did not name plaintiffs as parties to the dependency proceeding—*i.e.*, plaintiffs were not identified as parties on any of DHS's dependency pleadings and did not receive service of summons. Although Hoberg notified plaintiffs about the shelter hearing, they were not allowed to participate, and were not granted any of the rights that parties have in dependency proceedings. *See* ORS 419B.875(2) (specifiying some of the rights that parties have in juvenile dependency proceedings).[4]

The dependency petition included a statement that "[n]o person, not party to this proceeding, has physical custody of the child, or claims custody or visitation rights." Defendant Klabo, a DHS social worker, signed the petition based on information provided by Hoberg. At the close of the shelter hearing, the court ordered R into the custody of DHS and set a jurisdictional and dispositional hearing for early December 2011. DHS placed R in foster care.

After the hearing, a "family meeting" was held that included Hoberg, plaintiffs, Darren, Adelle, and Hanto. Hoberg explained DHS's concerns and learned that R's biological parents resided in the Marshall Islands and had not been involved in R's life except for occasional communications. At the meeting, plaintiffs gave Hoberg an "Affidavit of Identity" signed by R's biological mother that, in part,

[4] ORS 419B.875(2) provides that parties have rights that include, but are not limited to: the right to notice of proceedings, copies of petitions and other pleadings, the right to appointed counsel, the right to call witnesses, cross-examine witnesses and otherwise participate in hearings, the right to request a hearing, and the right to appeal.

indicated that plaintiffs had adopted R under the common-law practices and customs of the Marshall Islands. They also gave Hoberg an "Affidavit of Guardianship," also signed by R's biological mother, that stated that plaintiffs had "full legal guardianship duties and functions" until January 18, 2012. Defendants were "confused" by the documents and they did not amend the petition to name plaintiffs as R's guardians or parents.

At the jurisdictional and dispositional hearing in December 2011, R's biological father participated by telephone from the Marshall Islands and admitted to an allegation that he was unavailable to protect R or meet R's needs. R's biological mother did not participate. The court took jurisdiction based on father's admission.

Early in April 2012, plaintiffs gave DHS a declaration from the Marshallese Ambassador to the United States that confirmed the validity of plaintiffs' claims of adoption and guardianship. DHS filed an amended dependency petition, signed by defendant Cissna, that named plaintiffs as parties to the proceeding (as R's guardians), and added new jurisdictional allegations. Specifically, the petition stated that plaintiffs failed "to protect the child from Threat of Harm Physical Abuse and Mental Injury in that the child has been present during incidents of domestic violence, some involving firearms." It also included an allegation that Hitto's "use of alcohol interferes with his ability to safely care for the child. If left untreated, the guardian's substance abuse presents a threat of harm to the child." Those new allegations were based on Hoberg's initial report that stated that Hitto "was already consuming alcohol" when police arrived the morning of the initial incident and not on any further investigation by defendants.

The juvenile court held a hearing on April 26, 2012. At the close of that hearing, the court ordered R to remain in foster care and set an evidentiary hearing for June 20, 2012. On the morning of June 20, however, DHS moved to terminate the wardship and dismiss jurisdiction and the dependency petitions because "DHS and all parties *** have agreed that a return of the child to [plaintiffs] is in the child's best interests and [plaintiffs] have agreed to opening

a voluntary case with DHS." The court granted the motion, and R was reunited with plaintiffs, more than eight months after being removed from their care.

Based on the removal of R and the subsequent dependency proceedings, plaintiffs brought an action asserting several claims for civil damages under section 1983 and several claims based on Oregon tort law. Under section 1983, plaintiffs alleged that they were entitled to civil damages because defendants violated their constitutional rights by (1) removing R from their care without a warrant in the absence of an exigency that would have justified a warrantless removal (the "wrongful removal claim")[5]; (2) depriving plaintiffs of their due process rights to participate in the dependency proceedings by failing to serve them with the dependency petition and summons, failing to schedule and conduct hearings and reviews as required by Oregon's dependency code, failing to provide timely notice to the Marshallese Consulate that R was in DHS custody, and failing to provide necessary interpreter services during the initial removal of R and the subsequent dependency proceedings (the "due process claim")[6]; and (3) making deliberately or recklessly false statements in the dependency petition and the amended dependency petition that were material to the court's decision to continue R's placement in protective custody (the "judicial deception claim").[7] Plaintiffs also alleged state tort claims for invasion of privacy (intrusion upon seclusion), invasion of privacy (false light), negligence, negligence *per se*, intentional infliction of emotional distress (IIED), and wrongful use of a civil proceeding.[8]

Plaintiffs moved for partial summary judgment on their wrongful removal and judicial deception claims. They asserted that the record lacked any evidence that would allow a reasonable factfinder to conclude that R was in imminent threat of serious bodily injury when she

[5] Plaintiffs brought their wrongful removal claim against Hoberg.

[6] Plaintiffs brought their due process claim against all of the individual defendants.

[7] Plaintiffs brought their judicial deception claim against Cissna and Klabo.

[8] Plaintiffs also brought a claim for false arrest and requested declaratory relief, but ultimately withdrew those claims, and neither is at issue on appeal.

was removed from plaintiffs' care. Alternatively, plaintiffs asserted that, even if there was a question of fact on that point, Hoberg's actions exceeded the scope of action that was necessary to protect R from any threat. Accordingly, plaintiffs claimed that they were entitled to summary judgment on their wrongful removal claim. As for their judicial deception claim, plaintiffs asserted that there was no dispute of fact that a statement made by Klabo in the dependency petition and statements made by Cissna in the amended petition were deliberately or recklessly false and material. Thus, in plaintiffs' view, their claim for judicial deception was established as a matter of law.

Defendants responded to plaintiffs' summary judgment motion by asserting that their actions were justified by ORS 419B.150, which authorizes DHS to take a child into protective custody when a "child's condition or surroundings reasonably appear to be such as to jeopardize the child's welfare." DHS also asserted that, at the very least, there were disputed issues of material fact as to whether R was wrongfully removed and whether defendants' statements in the dependency petitions were misrepresentations.

Defendants cross-moved for summary judgment. First, they argued that the individual defendants, as public officials, were entitled to qualified immunity on plaintiffs' wrongful removal and due process claims because defendants' actions did not violate a "clearly established" constitutional right. Second, they maintained that Klabo and Cissna were entitled to absolute immunity on the judicial deception claim because filing a dependency petition is akin to initiating a prosecution, and, under *Imbler v. Pachtman*, 424 US 409, 96 S Ct 984, 47 L Ed 2d 128 (1976), prosecutors have absolute immunity from a civil suit under section 1983 for initiating a prosecution and presenting the state's case. Third, defendants maintained that they were entitled to discretionary immunity under the Oregon Tort Claims Act (OTCA), ORS 30.265(6)((c), for plaintiffs' state tort claims of negligence and negligence *per se* because the actions that provide the basis for those claims represented an exercise of their discretion—*i.e.*, making policy choices among alternatives with the authority to make such choices. Fourth, defendants asserted that they were absolutely

immune from the invasion of privacy claims because those claims were based on statements made in the dependency petitions, which qualify as "initiating a proceeding." Finally, defendants asserted that plaintiffs' remaining state tort claims failed as a matter of law. With respect to the IIED claim, defendants asserted that plaintiffs could not establish that defendants violated the duty that was claimed by plaintiffs—specifically, the duty not to wrongfully remove R. In defendants' view, because R was justifiably removed under ORS 419B.150, the IIED claim failed. As for plaintiffs' wrongful use of civil proceedings, defendants asserted that, as a matter of law, plaintiffs could not establish two elements necessary to prove such a claim. Specifically, defendants maintained that plaintiffs could not establish that the proceeding was terminated in their favor, and they could not show that defendants initiated the proceeding with malice.

Without explanation, the trial court denied plaintiffs' partial summary judgment motion and granted summary judgment to defendants. Subsequently, the court entered a judgment dismissing plaintiffs' claims.

II. ANALYSIS

On appeal, the parties generally reprise their arguments from below. We begin by addressing plaintiffs' federal claims before moving on to their state tort claims.

A. *Wrongful Removal Claim*

The doctrine of qualified immunity is a function of federal law and grants government officials immunity from civil liability if their "'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 US 223, 231, 129 S Ct 808, 172 L Ed 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 US 800, 818, 102 S Ct 2727, 73 L Ed 2d 396 (1982)). The doctrine balances two important interests—"the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. Because qualified immunity is an immunity from suit, as opposed to a defense to liability, "it is effectively lost if a case is

erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 US 511, 526, 105 S Ct 2806, 86 L Ed 2d 411 (1985).

As the United States Supreme Court has explained, the doctrine gives public officials "breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 US 731, 743, 131 S Ct 2074, 179 L Ed 2d 1149 (2011). That is, it protects a public official's reasonable mistaken judgment whether it is a "mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 US at 231. Whether qualified immunity can be invoked turns on the "objective legal reasonableness" of the official's acts. *Id.* at 244. Qualified immunity is lost only when the unlawfulness of an official's conduct is apparent in light of pre-existing law. *Id.* Therefore, the Court has stated that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 US 335, 341, 106 S Ct 1092, 89 L Ed 2d 271 (1986). So, "if a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability." *Ziglar v. Abbasi*, ___ US ___, ___, 137 S Ct 1843, 1867, 198 L Ed 2d 290 (2017).

As the Court explained in *Pearson*, qualified immunity claims are resolved by a two-pronged inquiry: (1) Do the facts as alleged or shown make out a violation of a constitutional right? (2) Was the right at issue "clearly established" at the time of the defendant's alleged misconduct? 555 US at 232. Courts have discretion to decide which of the two prongs of the qualified immunity analysis to address first. *Id.* at 236. Whether qualified immunity is established is a matter of law for the court to decide, but, if the availability of the defense depends on facts that are in dispute, the jury must determine those facts. *DeNucci v. Henningsen*, 248 Or App 59, 71, 273 P3d 148 (2012). In other words, summary judgment is improper if, resolving all disputes of fact in the summary judgment record in favor of the plaintiffs, the facts adduced show that the official's conduct violated a constitutional right, and that right was "clearly established" at the time of the violation. *See Kirkpatrick v. County of Washoe*, 843 F3d 784, 788 (9th Cir 2016) (explaining two-prong analysis at summary judgment stage of proceedings).

We begin with the first prong: Viewing the summary judgment record in the light most favorable to plaintiffs, does the evidence adduced show that there is a question of fact as to whether defendants violated a constitutional right?

Plaintiffs assert that Hoberg's removal of R violated their right to "familial association" under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Under the Fourteenth Amendment, parents have a "'well-elaborated constitutional right to live' with their children that 'is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency.'"[9] *Kirkpatrick*, 843 F3d at 788 (quoting *Wallis v. Spencer*, 202 F3d 1126, 1136 (9th Cir 1999)). Accordingly, pursuant to the constitution, a public official generally must obtain prior judicial authorization before removing a child from the custody of her parent. *Id.* at 790. However, the warrantless removal of a child is allowed "if the information [the official] possess[es] at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury." *Wallis*, 202 F3d at 1138; *cf. Tenenbaum v. Williams*, 193 F3d 581, 594 (2d Cir 1999) (warrantless removal of child authorized when "the child is immediately threatened with harm").

Plaintiffs argue that, as R's adoptive parents and legal guardians, Hoberg violated their rights because she removed R without a warrant despite the lack of reasonable cause to believe that R was in imminent danger of serious injury. They assert that Hoberg did not have an objectively reasonable basis to conclude that R faced such imminent danger because, by the time she showed up, the police had

[9] In his capacity as R's guardian *ad litem*, Hitto also made a claim on behalf of R that her removal violated her right to be free from unlawful seizures under the Fourth Amendment to the United States Constitution. *See Kirkpatrick*, 843 F3d at 789 (noting that the Fourth Amendment safeguards a child's right to be secure in their persons against unreasonable seizures without a warrant). Courts have stated that the test under the Fourteenth and Fourth Amendments for when an official may remove a child from parental custody without a warrant are equivalent. *See id.* Because it does not affect our analysis in this case, we do not distinguish between Hitto's individual claim and his claim on behalf of R.

already seized Darren's handgun, Darren had sobered up and calmed down, and plaintiffs were also calm. In other words, the situation had eased considerably and nothing put R in imminent danger of injury. Alternatively, plaintiffs claim that, even if there was an objectively reasonable basis to conclude that R's safety was imminently threatened, Hoberg's removal of R was more severe than necessary to address any threat to R.

Defendants respond that Hoberg did not violate any of plaintiffs' constitutional rights because, as R's grandparents, they did not have a "cognizable liberty interest" in their relationship with R at the time that she was removed. Defendants maintain that case law that establishes that *parents* have a Fourteenth Amendment right not to be separated from their children does not apply to a child's grandparents—particularly when the grandparents' custodial relationship is not "legally established" at the time the child is removed. Alternatively, defendants argue that, regardless of whether plaintiffs had a cognizable Fourteenth Amendment right, the circumstances supported Hoberg's removal of R.

For the following reasons, we conclude that the summary judgment record, viewed in the light most favorable to plaintiffs, demonstrates that there is a question of fact as to whether defendants violated plaintiffs' constitutional rights. As a starting point, viewing the record in the appropriate light demonstrates that plaintiffs are R's adoptive parents and legal guardians under the law of the Marshall Islands.[10] As such, they are protected by the Fourteenth Amendment's guarantee that "parents and children will not be separated by the state without due process of law except in an emergency." *Wallis*, 202 F3d at 1136.

However, as part of determining whether R's removal violated plaintiffs' due process rights, we must first address Hoberg's mistaken belief that plaintiffs were not R's adoptive parents and legal guardians because, as we noted above, 288 Or App at ___, qualified immunity allows

[10] We express no opinion on the scope and contours of any Fourteenth Amendment "familial association" rights that a custodial grandparent might have in circumstances similar to this case.

for "reasonable mistakes." *See Saucier*, 533 US at 205. In particular, if a public official has a reasonable but mistaken belief as to facts that establish exigent circumstances, the official does not violate the constitution and is entitled to qualified immunity. *Id.* at 206. In this case, the record demonstrates that Hoberg mistakenly believed that plaintiffs were not R's adoptive parents and legal guardians. She relied, at least in part, on that mistake to conclude that R's circumstances were such that an exigency justified removing R from plaintiffs. Because Hoberg removed R in part because she mistakenly believed that nobody at Darren's apartment had a claim of legal custody over R, we must first determine whether that belief was reasonable.

For the following reasons, we conclude that Hoberg's mistaken belief as to plaintiffs' status as adoptive parents and guardians was not reasonable at the time of R's removal. To recount the circumstances, viewing the record in the light most favorable to plaintiffs, plaintiffs specifically informed Hoberg that they were R's adoptive parents and legal guardians. Furthermore, when Hoberg separated R from plaintiffs, she told Hoberg that plaintiffs were her parents.[11] Hoberg, however, disbelieved those assertions because plaintiffs did not provide legal documentation to confirm their claims and the language barrier hampered Hoberg's understanding of the situation.

In that situation, we conclude that an objectively reasonable official would not have discounted plaintiffs' claims that they were R's parents and guardians in the absence of some evidence that called those claims into question—particularly in a situation where the child is in the physical custody of plaintiffs and the child herself has separately confirmed plaintiffs' claims. Defendants' argument to the contrary appears to be premised on the idea that plaintiffs, as adoptive parents or legal guardians, were required to "legally establish" their relationship to R at the time of the removal. That argument suggests that such parties should be held to a higher standard than biological parents—a suggestion that we disagree with. At least in the circumstances

[11] Evidence in the summary judgment record shows that R understood Hoberg when Hoberg spoke English.

at issue in this case, we do not view plaintiffs' failure to produce proof of their adoption and guardianship of R at the time of R's removal as a legitimate reason to discount their claims of custody. To be sure, there are situations where a public official may have reason to doubt a person's claim of custody, but the summary judgment record in this case, viewed in plaintiffs' favor, does not include any such legitimate reason.

Nevertheless, even though Hoberg's mistake of fact as to plaintiffs' status as adoptive parents and legal guardians was unreasonable, that does not necessarily mean that Hoberg violated plaintiffs' constitutional rights. That is, if the facts viewed in the light most favorable to plaintiffs show, as a matter of law, that exigent circumstances justified the removal of R, summary judgment was proper.

As noted, the Fourteenth Amendment guarantees that parents and children will not be separated by the state without due process of law except in an emergency. Accordingly, we must evaluate whether the warrantless removal of R was justified by an imminent threat of harm or serious injury. Here, when the circumstances are viewed in the light most favorable to plaintiffs, the record demonstrates that there is a question of fact as to whether an exigency existed that justified R's removal. That is, there remains a question of fact as to whether defendants violated plaintiffs' constitutional rights.

Although the scene that Hoberg encountered when she arrived at Darren's apartment could be described as confusing, viewed in the light most favorable to plaintiffs, it did not present an imminent threat of serious injury to R. Although plaintiffs first denied knowledge of the gun, they were cooperative after it was found by police, they remained calm throughout the encounter, the police had confiscated the accidentally discharged gun, and the relatively brief but serious dispute between Darren and Hanny had long ended. Although the police report indicated that Hanny was carrying a "beer mug," viewing the record in the light most favorable to plaintiffs, it does not indicate that Hanny was or had been drinking beer that morning, and there is no indication that any of the other parties were intoxicated that morning.

In total, the circumstances that Hoberg faced do not provide a basis on which to conclude that a reasonable factfinder would be compelled to determine that R faced an imminent threat of serious injury at the time of her removal. Hoberg unreasonably discredited plaintiffs' claims of adoption and guardianship in the absence of evidence calling those claims into question and the remainder of the circumstances that faced Hoberg in Darren's apartment that October morning present a factual question as to whether Hoberg's removal of R violated plaintiffs' constitutional rights.

Having determined that a factual question remains as to whether defendants violated plaintiffs' constitutional rights by removing R without a warrant, we address the second prong of the qualified immunity analysis: whether the law was "clearly established" at the time of the events at issue in this case. That is, even though plaintiffs have demonstrated that a factual question exists as to the first prong, summary judgment is appropriate unless, at the time of R's removal, the law "clearly established" the unconstitutionality of defendants' conduct.

The Supreme Court has cautioned lower courts "not to define clearly established law at a high level of generality." *Ashcroft*, 563 US at 742. That is, courts should examine "whether the violative nature of *particular* conduct is clearly established." *Id.* (emphasis added). That inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 US at 201. That means that the court must determine if it was clearly established that the law prohibited the official's conduct in the specific situation confronted by the official. *Mullenix v. Luna*, ___ US ___, ___, 136 S Ct 305, 309, 193 L Ed 2d 255 (2015). That inquiry "will often require examination of the information possessed by the *** officials." *Anderson*, 483 US at 641. And, although a case directly on point is not required, the Court has held that qualified immunity is available if no existing law "squarely governs" the case at issue. *Brosseau v. Haugen*, 543 US 194, 201, 125 S Ct 596, 160 L Ed 2d 583 (2004).

Mullenix provides a good example of what the Court meant when it cautioned lower courts against defining law

at a "high level of generality." In that case, the plaintiff brought a section 1983 claim against a state trooper, alleging that the trooper used excessive force when he shot and killed a motorist who was fleeing from arrest during a high-speed pursuit. ___ US at ___, 136 S Ct at 307. The United States Court of Appeals for the Fifth Circuit concluded that the trooper was not entitled to qualified immunity because he violated the "clearly established rule that a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.'" *Id.* at 308-09 (quoting *Luna v. Mullenix*, 773 F3d 712, 725 (5th Cir 2014)).

The Court rejected that formulation of the qualified immunity question. Instead, the Court, after noting the specific circumstances of the case (*i.e.*, the trooper "confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering [another] officer"), stated that the relevant inquiry "is whether existing precedent placed the conclusion that [the trooper] acted unreasonably in these circumstances 'beyond debate.'" *Id.* at 309. Noting the "hazy legal backdrop" of excessive force cases involving high-speed chases against which the trooper acted, the Court concluded that none of its precedents "squarely govern[ed]" the facts in the case, and, accordingly, the Court could not conclude that the trooper's actions were "plainly incompetent" or had "knowingly violate[d] the law." *Id.* at 310. Thus, the Court held that the trooper was entitled to qualified immunity. *Id.*

Given that framework, we must decide whether a reasonable official would have known that Hoberg's removal of R from plaintiffs' care was unlawful, in light of "clearly established" law, and the information that Hoberg possessed at the time that she removed R. Stated another way, based on existing law, is it "beyond debate" that Hoberg acted unreasonably by removing R in the circumstances that she faced? *See Mullenix*, ___ US at ___, 136 S Ct at 309 ("The relevant inquiry is whether existing precedent placed the conclusion that the [public official] acted unreasonably in these circumstances 'beyond debate.'"); *Ashcroft*, 563 US at 741 ("We do

not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.").[12] Moreover, if Hoberg made a "mistake as to what the law requires," as long as that mistake was reasonable, she is entitled to qualified immunity. *See Saucier*, 533 US at 205 ("If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.").

Defendants assert that the law governing Hoberg's conduct was not "clearly established" when she removed R from plaintiffs' care. They maintain that the factual circumstances that Hoberg faced were confusing and that "federal law did not directly address the situation in which she found herself because it related only to warrantless removal of children from their parents" and did not deal with the removal of a child from a grandparent "where there is no documentation indicating that any of those persons has parental-type rights to the child." Moreover, defendants point out that Hoberg was operating under ORS 419B.150(1)(a), which sanctions the warrantless removal of a child "[w]hen the child's conditions or surroundings reasonably appear to be such as to jeopardize the child's welfare."

In support of their assertion that Hoberg's violation of their constitutional rights was "clearly established," plaintiffs mainly rely on the decision by the United States Court of Appeals for the Ninth Circuit in *Rogers v. County of San Joaquin*, 487 F3d 1288 (9th Cir 2007). There the court held that a social worker who had removed two children from a home was not entitled to qualified immunity because "it would have been apparent to a reasonable social worker that no exigency existed." *Id.* at 1291. In that case, the social worker removed the children because of severe bottle rot, apparent malnourishment, and the disorderly state of the home. *Id.* The court concluded that there was no support

[12] We note that such a test is one example of how parties like plaintiffs—who come from a culture outside the United States and who faced a language barrier in dealing with police and DHS—encounter additional challenges beyond those encountered by parties who are part of the dominant culture in interacting with our legal system. That is, given that their experience and culture is outside the "mainstream," it is even less likely that "clearly established" law will address their "specific context." *See Saucier*, 533 US at 201.

in the record that the children were in imminent danger of serious bodily harm, and further concluded that the law was clearly established that "a family's rights were violated if the children were removed absent an imminent risk of serious bodily harm." *Id.* at 1297. Thus, in the court's view, the social worker was not entitled to qualified immunity.

However, later, in *Kirkpatrick*, the Ninth Circuit seemed to acknowledge that *Rogers* may have mistakenly defined "clearly established law at a high level of generality." 843 F3d at 792-93. *Kirkpatrick* involved the warrantless removal of a two-day old child from her mother based on concerns about the mother's drug use. Initially, a panel of the court, relying on *Rogers*, held that the social worker was not entitled to qualified immunity because she had violated the child's right to be free from unreasonable seizures, and that, as noted in *Rogers*, the law was clearly established that "a child could not be removed from the home without prior judicial authorization absent evidence of 'imminent danger of serious bodily injury.'" *Kirkpatrick v. County of Washoe*, 792 F3d 1184, 1195 (9th Cir 2015), *modified on reh'g en banc*, 843 F3d 784 (9th Cir 2016).

Subsequently, however, the court granted rehearing and issued an en banc opinion that held that the social worker was entitled to qualified immunity. 843 F3d at 793. First, the court acknowledged its holding in *Rogers* that "it was well-settled that a child could not be removed without prior judicial authorization absent evidence that the child was in imminent danger of serious bodily injury." 843 F3d at 792. However, the court then noted the United States Supreme Court's admonishment in *al-Kidd* to avoid defining "clearly established law" at a high level of generality. *Id.* Therefore, considering the specific circumstances at issue in the case, the court concluded that

> "it was not beyond debate that the confluence of factors set forth above would not support a finding of exigency. No Supreme Court precedent defines when a warrant is required to seize a child under exigent circumstances. And, *** none of the cases from this court explain when removing an infant from a parent's custody at a hospital to prevent neglect, without a warrant, crosses the line of reasonableness and violates the Fourth Amendment. *** In

> fact, very few cases from any circuit have addressed what constitutes exigent circumstances in a case that remotely resembles this one. *** No matter how carefully a reasonable social worker had read our case law, she could not have known that seizing [the child] would violate federal constitutional law. Without that fair notice, the social workers in this case are entitled to qualified immunity."

Id. at 793.

With that background, we return to the instant case. We conclude that, similarly to the Ninth Circuit in *Kirkpatrick*, it was not "beyond debate" that the "confluence" of facts that Hoberg faced that October morning would not support a finding of exigency. As the Ninth Circuit explained in *Kirkpatrick*, there is very little federal law in general that has addressed when exigent circumstances justify the warrantless removal of a child. Similarly, there do not appear to be any Oregon cases that address that issue. Moreover, to the extent existing precedent does address the warrantless removal of a child, none of that precedent resembles the circumstances faced by Hoberg closely enough to "squarely govern" this case—*i.e.*, a case that would have informed Hoberg that she was acting unlawfully by removing R in the circumstances that she faced on October 16, 2011. Therefore, we conclude that there was no existing precedent that placed the conclusion that Hoberg acted unreasonably by removing R "beyond debate." Accordingly, we cannot conclude that, by removing R, she was "plainly incompetent" or that she "knowingly violated the law."

To the extent that plaintiffs argue that, even if Hoberg properly concluded that exigent circumstances placed R at risk, "clearly established" law required Hoberg to address the risk through measures "less severe than removal," we reject that argument. Again, in the context of the qualified immunity analysis, we cannot conclude that existing law placed it "beyond debate" that Hoberg was required to take actions less severe than the removal of R.

Accordingly, the trial court properly granted summary judgment to defendants on plaintiffs' wrongful removal claim.

B. *Due Process Claim*

Next, we address whether the trial court properly granted summary judgment on plaintiffs' due process claim. In their complaint, plaintiffs asserted that due process under the Fourteenth Amendment guaranteed them a prompt post-removal hearing, and that their right to that hearing was denied by defendants' decision to not name them as parties to the dependency proceedings. Specifically, plaintiffs complained that because they were not named as parties, they did not receive summons and were denied a meaningful opportunity to participate in the shelter hearing that occurred on October 18, 2011, and were not given a meaningful opportunity to contest R's removal until eight months after defendants removed her from their care.[13]

On appeal, defendants assert that they are protected from plaintiffs' due process claim by absolute or qualified immunity. We decline to address defendants' absolute immunity argument because defendants did not raise that argument as a basis for summary judgment on plaintiffs' due process claim. As for qualified immunity, defendants argue that it protects them because they filed the dependency petition in compliance with ORS 419B.875(1)(a)(B), which specifies that the parties to a jurisdictional proceeding include the child's "parents or guardian." According to defendants, at the time that they filed the dependency petition, plaintiffs had not provided documentation that established legal guardianship over R and, to defendants' knowledge, R's biological parents were alive and in the Marshall Islands. Therefore, in defendants' view, their decision to name only R's biological parents as parties was a "perfectly reasonable choice" in the circumstances. In other words, given the information that they had, and in the absence of existing law that would have required them to name plaintiffs as parties to the proceeding, it is not "beyond debate" that their decision not to name plaintiffs as parties was unreasonable and in violation of plaintiffs' constitutional rights.

[13] As noted, 288 Or App at ___, DHS amended the dependency petition in April 2012 to add plaintiffs as parties, but a hearing was not scheduled until June 2012.

In response, plaintiffs assert that qualified immunity does not protect defendants because, as R's adoptive parents and legal guardians, plaintiffs' "clearly established" procedural due process rights were violated when defendants failed to name them as parties to the dependency proceedings.[14] They cite to various federal circuit court cases that stand for the proposition that parents are entitled to a prompt post-removal hearing when they are deprived of their custodial relationship with a child. They argue that, given that they were both R's adoptive parents and legal guardians, existing law required defendants to name them as parties under ORS 419B.875(1)(a)(B) (stating that the parents or guardian of the child are parties to a juvenile dependency proceeding), serve them with summons under ORS 419B.839(1)(a) and (b) (requiring service of summons on a child's parents and a child's legal guardian), and give them a meaningful opportunity to be heard.

We conclude that the trial court erred by granting summary judgment to defendants on plaintiffs' due process claim. Under the first prong, plaintiffs demonstrated that a question of fact exists as to whether their due process rights, as R's adoptive parents and legal guardians, were violated when defendants failed to name them as parties to the dependency proceedings. As we explained during our discussion of plaintiffs' wrongful removal claim, viewing the record in the light most favorable to plaintiffs, they established that they were R's adoptive parents and legal guardians under the laws and customs of the Marshall Islands. 288 Or App at ___. Further, a reasonable official would not have disbelieved their claims that they were R's adoptive parents and guardians in the absence of some evidence that called those claims into question. Accordingly, Hoberg's mistaken belief that plaintiffs were not R's parents or guardians does not help defendants establish that no constitutional violation occurred in this case.

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[14] In their complaint, plaintiffs' due process claim included allegations relating to the timing of the dependency proceedings, notice to the Marshallese Consulate, and the inadequacy of interpreter services. On appeal, however, their argument is focused on the failure of defendants to name them as parties to the dependency proceedings in the initial dependency filings. Accordingly, we focus on that aspect of their claim.

Accordingly, defendants failed to demonstrate that no question of fact exists as to whether plaintiffs' due process rights were violated when defendants failed to name them as parties to the dependency proceedings. Because of defendants' decision, plaintiffs were denied an opportunity to contest R's removal at the shelter hearing and they were denied an opportunity to be heard in subsequent dependency proceedings. Accordingly, plaintiffs satisfied the first prong of the qualified immunity analysis.

Plaintiffs also satisfied the second prong of the qualified immunity analysis. At the time that defendants filed the protective custody report and petitioned the juvenile court to take jurisdiction over R, as a general matter, federal procedural due process guaranteed a "prompt post-deprivation judicial review." *See Campbell v. Burt*, 141 F3d 927, 929 (9th Cir 1998) ("Federal procedural due process guarantees prompt post-deprivation judicial review in child custody cases."). Moreover, Oregon's juvenile dependency code explicitly provided that "parents or guardians" are parties to dependency proceedings, ORS 419B.875 (1)(a)(B), and the code also requires that parties be provided notice and an opportunity to be heard in such proceedings. *See, e.g.,* ORS 419B.839(1)(a) (requiring service of summons on a child's parents); ORS 419B.185 (providing opportunity for parent to present evidence at a shelter hearing). And notably, Oregon's dependency code is explicitly required to be "construed and applied in compliance with federal constitutional limitations on state action established by the United States Supreme Court with respect to interference with the rights of parents to direct the upbringing of their children." ORS 419B.090(4).

Given the state of the law, we are confident that, at the time defendants petitioned the juvenile court for jurisdiction, the unlawfulness of failing to name R's adoptive parents and legal guardians as parties to the dependency proceeding would have been apparent. That is, it is "beyond debate" that defendants acted unreasonably by failing to name plaintiffs as parties to the dependency proceedings given that plaintiffs were R's adoptive parents and legal guardians. Accordingly, the trial court erred by granting summary judgment on plaintiffs' due process claim.

C. *Judicial Deception Claim*

Next, we address whether summary judgment on plaintiffs' judicial deception claim was appropriate. That claim is based on plaintiffs' allegation that defendants violated their Fourth Amendment right to be "free from judicial deception." *See KRL v. Moore*, 384 F3d 1105, 1117 (9th Cir 2004) ("To support a § 1983 claim of judicial deception, a plaintiff must show that the defendant deliberately or recklessly made false statements or omissions that were material to the finding of probable cause."). They alleged that Klabo and Cissna deliberately or recklessly made false statements in the dependency petitions, and that those statements were material to the juvenile court's decision to keep R in the protective custody of DHS.

As for Klabo, plaintiffs claimed that his sworn statement in the petition that "[n]o person, not party to this proceeding, has physical custody of the child, or claims custody or visitation rights" was a false statement because plaintiffs told Hoberg that they were R's adoptive parents and legal guardians, and it was clear that they were claiming custody rights of R. They further asserted that Klabo recklessly made that false statement because he failed to conduct any investigation into the facts underlying it.

As for Cissna, plaintiffs asserted that she made two false statements in the amended petition. First, they claimed that she falsely swore that R "has been present during incidents of domestic violence, some involving firearms." Plaintiffs maintained that that statement was false because "there was only a single firearm and a single instance[] of 'domestic violence.'" Second, they claimed that Cissna falsely swore that R was at risk because Hitto's "use of alcohol interferes with his ability to safely care for the child." Plaintiffs alleged that that statement was false because nothing in DHS's investigation indicated that Hitto had an alcohol abuse problem. Further, they claimed that Cissna made that false statement recklessly because she relied solely on Hoberg's child welfare reports without any additional investigation.

Below, defendants initially asserted that they were entitled to summary judgment on plaintiffs' judicial

deception claim because Klabo and Cissna were entitled to absolute immunity. That is, defendants asserted that their actions constituted "initiating a proceeding" in juvenile court. *See Imbler*, 424 US at 427 (a prosecutor is entitled to absolute immunity under section 1983 for initiating and pursuing a criminal prosecution); *Butz v. Economou*, 438 US 478, 512-13, 98 S Ct 2894, 57 L Ed 2d 895 (1978) (agency officials performing certain functions analogous to those of a prosecutor are entitled to absolute immunity for those acts); *Tennyson v. Children's Services Division*, 308 Or 80, 88, 775 P2d 1365 (1989) (holding that DHS workers are entitled to absolute immunity for functions that are "integral parts of the judicial process," including filing a dependency petition in juvenile court).

Plaintiffs responded that defendants were not entitled to summary judgment because numerous courts have recognized that child welfare workers are not entitled to absolute immunity from claims that they made false statements in sworn juvenile court petitions. *See, e.g.*, *Beltran v. Santa Clara County*, 514 F3d 906, 908 (9th Cir 2008) (Social workers "are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute.").

In reply, defendants conceded that absolute immunity does not apply to section 1983 claims that a child welfare worker made false statements. Instead, for the first time, defendants argued that summary judgment was appropriate because the record contained no evidence that the statements at issue were false. As noted, the trial court did not explain why it granted summary judgment on plaintiffs' judicial deception claim.

On appeal, the parties square off on whether there is a genuine issue of material fact as to any of the elements of the judicial deception claim. Plaintiffs assert that summary judgment was inappropriate because "defendants' deliberateness and recklessness was substantiated as a matter of law" and because the statements were undisputedly false.

Thus, in plaintiffs' view, the court should have granted summary judgment *to them* on that claim because judicial deception was established as a matter of law.

Defendants, unsurprisingly, take the opposite view. They maintain that summary judgment was appropriate because plaintiffs failed to demonstrate the existence of a genuine issue of material fact as to elements of their judicial deception claim. In doing so, they assert that, based on the summary judgment record, no reasonable juror could conclude that either Klabo or Cissna deliberately or recklessly made false statements in the dependency petitions.

We conclude that, given how the issues were framed on summary judgment, the court erred by granting summary judgment to defendants on plaintiffs' judicial deception claim. As the Supreme Court reiterated recently, under ORCP 47 C, the party opposing summary judgment has the burden of producing evidence on any issue "raised in the motion" as to which that party would have the burden of persuasion at trial. *Two Two v. Fujitec America, Inc.*, 355 Or 319, 324, 325 P3d 707 (2014). Accordingly, a party does not have the burden of producing evidence on an issue that is not "raised in the motion," and, notably, an issue is not "raised in the motion" if it is first raised as a basis for summary judgment in the movant's reply memorandum. *Id.* at 325.

Here, the only issue "raised in the motion" as to plaintiffs' judicial deception claim was defendants' argument that they were entitled to absolute immunity. After plaintiffs responded with case law purporting to hold that absolute immunity does not apply to judicial deception claims, defendants conceded that point. Essentially, given defendants' concession, the trial court did not properly have an argument before it for granting summary judgment on plaintiffs' judicial deception claim. Defendants' attempt to raise an additional basis for summary judgment in its reply memorandum was ineffective for purposes of ORCP 47 C.[15] *See Eklof v. Steward*, 360 Or 717, 731, 385 P3d 1074

[15] We note that nothing in the record indicates that the trial court considered or ruled on defendants' belated basis for summary judgment.

(2016) (noting that only issue properly before the trial court on summary judgment was the issue raised in the movant's motion for summary judgment, not an issue raised for the first time in the movant's reply memorandum).

In short, because the argument that plaintiffs failed to demonstrate the existence of a genuine issue of material fact as to elements of their judicial deception claim was not raised in the trial court until defendants' reply memorandum, plaintiffs were not required by ORCP 47 C to produce evidence that established a genuine issue of material fact as to the falsity or recklessness of defendants' statements. In those circumstances, summary judgment was inappropriate.

Because the trial court incorrectly granted summary judgment to defendants on plaintiffs' judicial deception claim, we briefly address plaintiffs' contention that the trial court erred by not granting summary judgment to them on that claim. In short, viewing the summary judgment record in the light most favorable to defendants, we reject plaintiffs' argument that, as a matter of law, defendants' statements were false and made recklessly. Accordingly, the trial court properly denied plaintiffs' partial motion for summary judgment.

D. *State Tort Claims*

Finally, we address plaintiffs' state tort claims. Defendants moved for summary judgment on all of plaintiffs' tort claims. As to plaintiffs' claims for negligence and negligence *per se*, defendants asserted that they were immune from liability under the doctrine of discretionary immunity. As to plaintiffs' remaining tort claims for IIED, invasion of privacy (intrusion upon seclusion), invasion of privacy (false light), and wrongful use of a civil proceeding, defendants asserted that summary judgment was appropriate because defendants were entitled to absolute immunity or, alternatively, that, plaintiffs could not establish certain elements of those claims as a matter of law.

On appeal, plaintiffs assert that all of their "state law claims should go to trial" because discretionary immunity does not apply to those claims. However, plaintiffs' appellate argument appears, at least in part, to misunderstand their

task on appeal and how the summary judgment motion was litigated below. In general, as appellants, plaintiffs have the burden to demonstrate that the trial court erred in granting summary judgment. *Farhang v. Kariminaser*, 232 Or App 353, 356, 222 P3d 712 (2009). As noted, defendants sought summary judgment as to plaintiffs' IIED, invasion of privacy, and wrongful use of a civil proceeding claims based on absolute immunity or, alternatively, on the basis that the claims failed as a matter of law. Plaintiffs have the burden of demonstrating that the trial court erred by granting summary judgment on either of those bases.

However, on appeal, plaintiffs do not present any argument that the trial court erred by granting summary judgment based on absolute immunity or the failure of those claims as a matter of law. Therefore, plaintiffs have failed to carry their burden to demonstrate that the trial court erred. Accordingly, we affirm summary judgment on plaintiffs' claims for IIED, invasion of privacy (intrusion upon seclusion), invasion of privacy (false light), and wrongful use of a civil proceeding.[16]

As for plaintiffs' negligence and negligence *per se* claims—*i.e.*, the two claims that defendants asserted discretionary immunity as a basis for summary judgment—plaintiffs maintain that defendants were not entitled to discretionary immunity under the OTCA.

The OTCA generally makes governmental bodies subject to liability for the torts of their employees, ORS 30.265(1), but that liability is subject to certain exceptions. As relevant here, under the OTCA,

> "Every public body and its officers, employees and agents acting within the scope of their employment or duties *** are immune from liability for *** [a]ny claim based upon the performance of or the failure to exercise or perform a

[16] Plaintiffs argue in their reply brief that defendants' "attack on the merits of plaintiffs' state law claims" should be rejected. To the extent that they are asserting that summary judgment was not appropriate based on defendants' assertion that those state law claims failed as a matter of law, "[w]e will not consider a ground for reversal that is raised on appeal for the first time in a reply brief." *Federal National Mortgage Association v. Goodrich*, 275 Or App 77, 86, 364 P3d 696 (2015).

> discretionary function or duty, whether or not the discretion is abused."

ORS 30.265(6)(c). "Discretionary immunity under ORS 30.265(6)(c) is an affirmative defense, *** and it is the governmental defendant's burden to establish it." *John v. City of Gresham*, 214 Or App 305, 311, 165 P3d 1177 (2007), *rev dismissed as improvidently allowed*, 344 Or 194 (2008). Governmental conduct "amounts to performance of a 'discretionary function or duty' if it 'is the result of a choice among competing policy considerations, made at the appropriate level of government.'" *Turner v. Dept. of Transportation*, 359 Or 644, 652, 375 P3d 508 (2016) (quoting *Garrison v. Deschutes County*, 334 Or 264, 273, 48 P3d 807 (2002)). However, decisions by government actors that are "routine decisions made by employees in the course of their day-to-day activities, even though the decision involves a choice among two or more courses of action," are not subject to discretionary immunity. *Lowrimore v. Dimmitt*, 310 Or 291, 296, 797 P2d 1027 (1990).

> "A governmental actor performs discretionary functions and duties when exercising delegated responsibility for making decisions committed to the authority of that particular branch of government that are based on assessments of policy factors, such as the social, political, financial, or economic effects of implementing a particular plan or of taking no action. As this court has explained, '[w]hen a governmental body by its officers and employees makes [a policy] decision, the courts should not, without clear authorization, decide whether the proper policy has been adopted or whether a given course of action will be effective in furthering that policy.'"

Turner, 359 Or at 653 (quoting *Stevenson v. State of Oregon*, 290 Or 3, 10, 619 P2d 247 (1980)).

Notably, "[o]nce a discretionary choice has been made, the immunity follows the choice." *Westfall v. Dept. of Corrections*, 355 Or 144, 161, 324 P3d 440 (2014). Accordingly, "when a plaintiff is challenging the actions of an employee who is *required* to apply an otherwise protected policy choice, discretionary immunity applies unless 'an employee or agent makes an additional choice—one that is not subject to discretionary or other immunity.'" *Westfall v.*

Dept. of Corrections, 266 Or App 14, 23, 337 P3d 853 (2014) (quoting *Westfall*, 355 Or at 161).

Plaintiffs argue that there is no evidence in the summary judgment record that any of the individual defendants were exercising discretion in the actions that they took. That is, plaintiffs assert that defendants' actions constituted "routine decisions made by employees in the course of their day-to-day activities, even though the decision involves a choice among two or more courses of action." Plaintiffs further assert that defendants have failed to identify any "policy-level decision that required removal of [R] or the denial to [plaintiffs] of an opportunity to contest that removal." Instead, relying on *McBride v. Magnuson*, 282 Or 433, 578 P2d 1259 (1978), they argue that defendants' actions in this case were "ministerial in nature," and thus, not subject to discretionary immunity.

In *McBride*, the plaintiff alleged that a police officer's investigation and decision to report burns suffered by the plaintiff's child "intentionally, maliciously and without probable cause, caused [her son] to be placed in protective custody." *Id.* at 435 (brackets in original). The Supreme Court explained that

> "insofar as an official action involves both the determination of facts and simple cause-and-effect relationships and also the assessment of costs and benefits, the evaluation of relative effectiveness and risks, and a choice among competing goals and priorities, an official has 'discretion' to the extent that he has been delegated responsibility for the latter kind of value judgment."

Id. at 437. Accordingly, the court concluded that the officer could not claim discretionary immunity because "the decision to make an investigation and report involved no more than 'the determination of facts and simple cause-and-effect relationships.'" *Mosley v. Portland School Dist. No. 1J*, 315 Or 85, 90, 843 P2d 415 (1992) (quoting and explaining the holding in *McBride*, 282 Or at 437).

Defendants claim that they are entitled to discretionary immunity because their actions were in furtherance of implementing DHS policy. However, the record is unclear as to the DHS policies that defendants claim to have been

implementing.[17] As to the decision to remove R from plaintiffs' care, it seems that they are referring to the statutory directive to take a child into protective custody "[w]hen the child's condition or surroundings reasonably appear to be such as to jeopardize the child's welfare[.]" ORS 419B.150 (1)(a). In that sense, defendants appear to argue that their actions in removing R were simply implementing DHS policy. Similarly, they argue that their decision not to name plaintiffs as parties to the dependency proceeding was simply implementing DHS policy that precludes naming an individual on a petition as a guardian without some form of written documentation.

We conclude that defendants' actions are not entitled to discretionary immunity under the OTCA because their actions neither involved the creation of governmental policy, nor were "the actions of an employee who is *required* to apply an otherwise protected policy choice." *See Westfall*, 266 Or App at 23. As plaintiffs point out, their allegations of negligence are similar to the actions discussed in *McBride*. As noted, in *McBride*, the Supreme Court concluded that an officer was not entitled to discretionary immunity for "making an investigation and report of burns suffered by the child" that caused the child to be taken into protective custody. 282 Or at 435. The court reasoned that those actions involved no more than "the determination of facts and simple cause-and-effect relationships[,]" which is not the kind of delegated authority that involves discretion for these purposes. *Id.* at 437.

Here, plaintiffs' negligence allegations involve similar actions—defendants' investigation into R's circumstances and the legal relationship between plaintiffs and R,

[17] In defendants' answering brief, they generally assert that "the individual defendants were implementing DHS policy," and cite to approximately 15 pages of Hoberg's and Klabo's depositions. We presume that the deposition pages cited by defendants touched on the DHS policy on which defendants rely but, despite searching the appellate record, we could locate only one page of the deposition testimony cited by defendants. Accordingly, as plaintiffs appear to point out, the summary judgment record is void of any specific reference to the DHS policies that defendants claim provide discretionary immunity. Given that defendants bear the burden of proving the affirmative defense of discretionary immunity, their failure to develop the record to show the policies that defendants were implementing undermines their defense.

and defendants' management of R's dependency case. We see no meaningful difference between the actions at issue in this case and those that the Supreme Court concluded were not entitled to discretionary immunity in *McBride*. Accordingly, the trial court erred by granting summary judgment to defendants on plaintiffs' negligence and negligence *per se* claims.[18]

In sum, we affirm the trial court's grant of summary judgment to defendants on plaintiffs' wrongful removal claim and plaintiffs' claims for IIED, invasion of privacy (intrusion upon seclusion), invasion of privacy (false light), and wrongful use of a civil proceeding. We reverse summary judgment on plaintiffs' due process and judicial deception claims, as well as plaintiffs' negligence and negligence *per se* claims.

Judgment granting summary judgment to defendants affirmed in part, reversed in part, and remanded; otherwise affirmed.

[18] Defendants also argue on appeal that plaintiffs' negligence and negligence *per se* claims fail as a matter of law because "defendants acted reasonably at all times." However, that basis for summary judgment was not made, or at least was not developed, in defendants' summary judgment motion, and we decline to consider it further.