

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

CARA PAYNE,

Plaintiff,

vs.

No. CIV 16-0312 JB/GJF

LEE WILDER; MAYFRITZ BUCAG and  
DAVID CEBALLES,

Defendants.

**MEMORANDUM OPINION AND ORDER**

**THIS MATTER** comes before the Court on Defendant's Motion for Summary Judgment on the Basis of Qualified Immunity, filed February 23, 2017 (Doc. 38) ("MSJ"). The Court held a hearing on June 5, 2017. The primary issues are: (i) whether the undisputed material facts entitle the Defendant Lee Wilder to qualified immunity, because the Plaintiff Cara Payne ("C. Payne") has not demonstrated that Wilder violated her clearly-established constitutional rights when he executed a traffic stop of C. Payne for a suspended driver's license and further discussed with her -- and her ex-husband -- his investigation into allegations against her for child abuse, allegations which he considered to be cause to not entitle her to custody of her children in accordance with a civil custody agreement; and (ii) whether Wilder is entitled to summary judgment on C. Payne's claims brought pursuant to the New Mexico Constitution and premised in Wilder's same conduct. Because the Court concludes that, on this record of undisputed material fact, Wilder is entitled to qualified immunity on C. Payne's claims sounding in federal due process and unreasonable search and seizure theories, the Court will grant summary judgment as to those federal claims. The Court further concludes that Wilder is entitled to summary judgment as to C. Payne's claims sounding in New Mexico substantive due process

and unreasonable search and seizure, because this record of undisputed material facts demonstrates that Wilder did not commit such constitutional violations in the course of his alleged conduct. The Court concludes, however, that this record of undisputed material facts does not entitle Wilder to summary judgment as to C. Payne's claims sounding in New Mexico procedural due process, because C. Payne has asserted facts creating a genuine dispute whether Wilder's conduct resulted in a state-deprivation of her custody over her children without meaningful process before -- or after -- the deprivation. Accordingly, the Court grants in part and denies in part Wilder's MSJ.

### **FACTUAL BACKGROUND**

Before the Court addresses the MSJ's proffer of undisputed facts, the Court provides a brief synopsis of the background facts giving rise to C. Payne's case. The Court provides this background only for ease of readership and context. The Court draws recitation of the relevant background facts from the Plaintiff's Amended Complaint for Damages and Petition for Declaratory and Injunctive Relief, filed April 19, 2016 (Doc. 1-2)(“Complaint”).

#### **1. Background Facts Giving Rise to the Complaint.**

The Complaint alleges that, on July 8, 2015, Wilder, a law enforcement officer in Otero County, New Mexico, stopped and seized C. Payne in Alamogordo, New Mexico, for driving with a suspended license. See Complaint ¶ 7, at 1. Wilder represented that he was conducting a child abuse investigation, forced C. Payne to do a field sobriety test, and attempted to force C. Payne to allow him to search a home where C. Payne was staying as a house sitter for the owner of the home. See Complaint ¶¶ 7-11, at 2-3. Wilder -- C. Payne alleges -- did not have reasonable suspicion to support the notion that Payne was intoxicated. See Complaint ¶¶ 8-9, at 2. Regarding the home search, C. Payne refused to allow the search, and told Wilder that she

had previously been under investigation by the State of New Mexico Children, Youth, and Families Department (“CYFD”), but that the investigation did not support allegations of abuse. See Complaint ¶¶ 10-11, at 2-3. Upon her refusal, Wilder contacted Defendant Mayfritz Bucag, a CYFD investigator, who C. Payne alleges then contacted C. Payne’s ex-husband and ordered him to not allow C. Payne custody of their children. See Complaint ¶¶ 12-14, at 3. C. Payne did not have custody or visitation rights after this traffic stop, as a consequence of Wilder and Bucag’s directive, despite having the legal right to custody and visitation. See Complaint ¶¶ 15-16, at 3.

Wilder and Bucag then petitioned the district attorney’s office in Otero County to file criminal charges against C. Payne for refusing to allow the search of a house where she was staying as a house sitter for the home’s owner. See Complaint ¶ 18, at 4. In particular, the criminal charges would flow pursuant to N.M. Stat. Ann. § 30-6-4, which relates to obstruction of reporting or investigating child abuse or neglect. See Complaint ¶ 19, at 4. Wilder expects that charges will be filed against C. Payne. See Complaint ¶ 20, at 4. Defendant David Ceballos was the District Attorney for Otero County when C. Payne filed her Complaint. See Complaint ¶ 6, at 2.

## **2. The Undisputed Facts That Wilder’s MSJ and the Record Establish.**

“Deputy Lee Wilder was a Deputy Sheriff with the Otero County Sheriff’s Officer (“OCSO”) at the time of the July 8, 2015, incident.” MSJ ¶ 1, at 3 (asserting this fact). See Plaintiff’s Response to Defendant Wilder’s Motion for Summary Judgment ¶ 1, at 1, filed March 27, 2017 (Doc. 50)(“Response”)(not disputing this fact). “Deputy Wilder has never been employed by the New Mexico [CYFD].” MSJ ¶ 2, at 3 (asserting this fact). See Response ¶ 2, at 1 (not disputing this fact). “On July 8, 2015, Deputy Wilder received a referral from CYFD

and Intake Report as part of an investigation into an anonymous tip alleging child abuse and neglect of Plaintiff Cara Payne's two children." MSJ ¶ 3, at 3 (asserting this fact). See Response ¶ 3, at 1 (not disputing this fact). "Upon receipt of the CYFD referral and Intake Report, Deputy Wilder ran a background check on Plaintiff, Plaintiff's ex-husband, Robert Payne [(‘R. Payne’)], and Richard Herndon, including a check on the status of their driver's licenses and determined that Plaintiff's driver's license was suspended." MSJ ¶ 4, at 3 (asserting this fact). See Response ¶ 4, at 1 (not disputing this fact). "As part of the CYFD investigation, Deputy Wilder visited with Robert Payne, the children's father, to assess the validity of the facts in the anonymous tip." MSJ ¶ 5, at 3 (asserting this fact)(citing Deposition of Lee Wilder at 10:19-21 (taken November 16, 2015), filed February 23, 2017 (Doc. 38-1)(“Wilder Depo.”).<sup>1</sup>

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<sup>1</sup>C. Payne purports to dispute this assertion of fact, stating: "Plaintiff denies the allegations in Paragraph Five. The portion of the record cited explains that Mr. Payne was contacted but does not supply a basis for the reason of the contact." Response ¶ 5, at 1. The cited portions of the Wilder Depo. provide: "So then I contacted the second location listed which is the father, Robert Payne, at 708 and a half Adams." Wilder then, in Defendant Lee Wilder's Reply in Support of Motion for Summary Judgment on the Basis of Qualified Immunity (Doc. 38), filed April 17, 2017 (Doc. 49)(“Reply”), asserts that, “[i]n context, Deputy Wilder's deposition clearly reveals that the entire investigation started with an anonymous tip, which Deputy Wilder followed up with to obtain background information, as provided in [MSJ ¶¶ 3-4, at 3]. On this fact, Plaintiff presents no material dispute.” Reply ¶ 1, at 2. Regarding the litigants' tasks when litigating a motion for summary judgment, the D.N.M. LR-Civ require:

**Statement of Material Facts.** The moving party must file with the motion a written memorandum containing a short, concise statement of the reasons in support of the motion with a list of authorities relied upon (the “Memorandum”). A party opposing the motion must file a written memorandum containing a short, concise statement of the reasons in opposition to the motion with authorities (the “Response”). The moving party may file a written reply memorandum with authorities (the “Reply”).

- The Memorandum must set out a concise statement of all of the material facts as to which the movant contends no genuine issue exists. The facts must be numbered and must refer with particularity to those portions of the record upon which the movant relies.

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- The Response must contain a concise statement of the material facts cited by the movant as to which the non-movant contends a genuine issue does exist. Each fact in dispute must be numbered, must refer with particularity to those portions of the record upon which the non-movant relies, and must state the number of the movant's fact that is disputed. All material facts set forth in the Memorandum will be deemed undisputed unless specifically controverted. The Response may set forth additional facts other than those which respond to the Memorandum which the non-movant contends are material to the resolution of the motion. Each additional fact must be lettered and must refer with particularity to those portions of the record upon which the non-movant relies.
- The Reply must contain a concise statement of those facts set forth in the Response which the movant disputes or to which the movant asserts an objection. Each fact must be lettered, must refer with particularity to those portions of the record upon which the movant relies, and must state the letter of the non-movant's fact. All material facts set forth in the Response will be deemed undisputed unless specifically controverted.

D.N.M. LR-Civ. 56.1(b). At the outset, in this case, neither the Response nor the Reply “letter[]” their paragraphs as required; the Court, however, is -- without extra effort -- nonetheless capable of attributing each assertion to its response. Regarding the present dispute, whereby C. Payne disputes that Wilder has adequately supported his assertions that Wilder contacted R. Payne “[a]s part of the CYFD investigation,” MSJ ¶ 5, at 3, and “to assess the validity of the facts in the anonymous tip,” MSJ ¶ 5, at 3, the Court notes that C. Payne proffers no evidence which creates a dispute of these assertions and instead only argues that the assertions lack support in the record, see Response ¶ 5, at 1. The Court is not persuaded, however, that the assertions lack support in the record, because the course of the Wilder Depo. appears to be his chronological detailing of his investigation into the anonymous tip regarding C. Payne’s alleged child abuse. See Wilder Depo. at 8:8-15:16. Wilder discussed his actions at the “beginning in order to start the investigation,” Wilder Depo. at 8:17-20, that he discovered R. Payne’s contact information after running the license plate for C. Payne’s vehicle, and that he then contacted R. Payne and discussed how he had observed C. Payne’s home, and had run C. Payne’s license plate, and as a result had discovered R. Payne’s address, see Wilder Depo. at 9:17-11:10. Wilder explained that he next discussed the anonymous tip and C. Payne’s whereabouts with R. Payne. See Wilder Depo. at 11:10-21. The Court concludes, then, that the record supports Wilder’s assertions, because C. Payne has not specifically controverted the assertions with evidence in the record, leaving the Court without the ability to question the assertion’s veracity in light of the context. The Court deems the assertions -- that Wilder contacted R. Payne “[a]s part of the CYFD investigation,” MSJ ¶ 5, at 3, and “to assess the validity of the facts in the anonymous tip,” MSJ

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