UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

S.O.,
Plaintiff,

v. **Case No. 23-C-1241**

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT, et al.,
Defendants.

DECISION AND ORDER

The plaintiff, who is proceeding under the pseudonym S.O., alleges that she was sexually harassed and assaulted by a corrections officer while she was detained in the Milwaukee County Jail. She brings this action under 42 U.S.C. § 1983 and Wisconsin law against the alleged perpetrator of the harassment and assaults, Gilberto Fernandez-Rosa, and against the Milwaukee County Sheriff's Department[1] and Corrections Lieutenant Paul Hein (a supervisory employee at the jail). Before me now are two motions for summary judgment. The first was filed by Wisconsin County Mutual Insurance Corporation ("WCMIC"), the County's insurer, who has intervened in this case to dispute that it has a duty to defend or indemnify Fernandez-Rosa. Its motion seeks a declaration that it has no duty to defend or indemnify. The second motion for summary judgment was

[1] The Sheriff's Department is not a suable entity separate from Milwaukee County. *Whiting v. Marathon Cnty. Sheriff's Dep't*, 382 F.3d 700, 704 (7th Cir. 2004). Thus, I will construe plaintiff's claim against the Sheriff's Department as a claim against the County itself. *See Berger v. Wood Cnty.*, No. 22-2582, 2023 WL 2852813, at footnote * (7th Cir. 2023).

filed by Milwaukee County and Lieutenant Hein, who seek summary judgment on all claims asserted against them.

I. BACKGROUND

S.O. alleges that she was incarcerated in the Milwaukee County Jail from September 2020 through January 2021, when Fernandez-Rosa was a corrections officer in the area of the jail where plaintiff was housed. Plaintiff accuses Fernandez-Rosa of making sexual comments to her and forcing her to have sexual contact with him on several occasions while she was in custody. According to her allegations, on a date between September 2020 and January 2021, Fernandez-Rosa handed plaintiff a roll of toilet paper at her cell door and grabbed one of her hands, placed her hand on his genitals, and then cupped her genitals with his hand. On a different occasion during the same time period, plaintiff jokingly said to Fernandez-Rosa that his head was big, and he responded by telling her that his "other head was big, too." On January 13, 2021, plaintiff was sitting on a bench and Fernandez-Rosa was assigned to secure plaintiff's legs to the floor with restraints. As he was crouching down to fasten a restraint, he placed the front of her leg or the top of her foot against his genitals. On the night of January 23, 2021, Fernandez-Rosa stood at the door of plaintiff's cell and asked her questions about her sex life and told her that the next time he returned he would have her touch his penis. The next night, when he was assigned to bring plaintiff a new mattress for her cell, Fernandez-Rosa hugged plaintiff and, while doing so, placed his hands on her buttocks and used his hand to place one of her hands on his genitals.

On January 27, 2021, plaintiff told a nurse and a psychiatric nurse practitioner that a male officer had touched her inappropriately. That evening, three supervisors with the

Milwaukee County Sheriff's Office escorted plaintiff to the medical clinic in the jail to interview her about what had occurred. Based on the interview, the Sheriff's Office opened a criminal investigation. On January 29, 2021, Fernandez-Rosa was arrested, and the Sheriff's Office suspended his employment. Fernandez-Rosa resigned his employment approximately one week later. On February 3, 2021, a criminal complaint was filed against Fernandez-Rosa charging him with sexual assault based on his conduct towards plaintiff and towards a fellow corrections officer who came forward at about the same time. Following a guilty plea, Fernandez-Rosa was convicted of one count each of third- and fourth-degree sexual assault. He was sentenced to three years' confinement in state prison and three years' extended supervision.

In this suit, plaintiff seeks damages to compensate her for the harm caused by Fernandez-Rosa's conduct. She contends that the conduct deprived her of her constitutional rights and that Fernandez-Rosa, Lieutenant Hein, and Milwaukee County are liable to her under 42 U.S.C. § 1983.[2] The claims against Hein and Milwaukee County are based on theories of supervisory liability and liability under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). Further, plaintiff brings state-law tort claims, such as assault and battery and negligent supervision and hiring,

[2] In addition to § 1983, plaintiff cites 42 U.S.C. § 1986 in her complaint. That statute provides a remedy against individuals who fail to intervene to prevent a violation of 42 U.S.C. § 1985(3). *See Huber v. Beth*, 654 F. Supp. 3d 777, 795 (E.D. Wis. 2023). Section 1985(3), in turn, provides a damages remedy against public and private parties who conspire to deprive a person or class of persons of equal protection of the laws. *Id.* Here, plaintiff does not allege a conspiracy, so it's not clear what purpose her citation to § 1986 serves. In any event, a claim under § 1986 is time-barred if it is not commenced within one year. Plaintiff's claims accrued no later than January 2021, and she did not commence this suit until September 2023. Thus, the defendants are entitled to summary judgment on the § 1986 claim, and I will not discuss it further in this opinion.

that fall within the court's supplemental jurisdiction. *See* 28 U.S.C. § 1367. Finally, plaintiff alleges a direct action against the Sheriff's Office in which she contends that, under Wis. Stat. § 895.46, the County must pay any judgment entered against Fernandez-Rosa in this case.

After plaintiff filed suit, WCMIC intervened to contest that it has a duty to defend or indemnify Fernandez-Rosa for the conduct alleged in the complaint. Discovery on the merits and on coverage proceeded simultaneously, and WCMIC retained counsel to defend Fernandez-Rosa under a reservation of rights. But WCMIC now seeks summary judgment on its claim for declaratory judgment establishing that the policy does not provide coverage to Fernandez-Rosa. WCMIC contends that the policy does not apply because the alleged acts of sexual assault and harassment were not within the scope of Fernandez-Rosa's employment with the County, and therefore he is not an "insured" under the policy. WCMIC also points to policy exclusions for willful criminal conduct, injuries caused by intentional conduct, and deliberate wrongful acts or breaches of duty. Both plaintiff and Fernandez-Rosa (proceeding pro se as to the coverage issue) oppose WCMIC's motion.[3]

Milwaukee County and Lieutenant Hein have filed a separate motion for summary judgment. Like WCMIC, Milwaukee County contends that Fernandez-Rosa acted outside the scope of his employment when he sexually harassed and assaulted plaintiff. If that's correct, then the County would not be required by Wis. Stat. § 895.46 to pay any judgment

[3] Fernandez-Rosa's merits counsel also filed a response to WCMIC's motion, but only to make clear that there is a fact issue as to whether Fernandez-Rosa committed the acts alleged.

entered against him. The County also moves for summary judgment on plaintiff's *Monell* claim, and Lieutenant Hein moves for summary judgment on the claim for supervisory liability. Finally, the County and Hein move for summary judgment on plaintiff's state-law claims.

II. DISCUSSION

Summary judgment is required where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, I view the evidence in the light most favorable to the non-moving party and must grant the motion if no reasonable juror could find for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986).

A. Insurance Coverage

The issue of whether WCMIC's policy covers Fernandez-Rosa for the conduct alleged in this suit presents a question of contract interpretation governed by Wisconsin law. Therefore, I apply the law of that state as it would be applied by the Wisconsin Supreme Court. *See RCBA Nutraceuticals, LLC v. ProAmpac Holdings, Inc.*, 108 F.4th 997, 1000 (7th Cir. 2024).

The Wisconsin Supreme Court recognizes that contracts for insurance typically impose two main duties: the duty to indemnify the insured against damages or losses, and the duty to defend against claims for damages. *Olson v. Farrar*, 338 Wis. 2d 215, 228 (2012). Under the duty to indemnify, an insurer must indemnify an insured against losses that are covered under the terms of the policy. *Id.* The duty to defend is broader: The insurer must defend an insured in any action in which it would be obligated to indemnify the insured if the allegations of the complaint were proven true. *Id.* at 228–29. "The duty

of defense depends on the nature of the claim and has nothing to do with the merits of the claim." *Elliott v. Donahue*, 169 Wis.2d 310, 321 (1992). Thus, "[i]f the allegations in the complaint, construed liberally, appear to give rise to coverage, insurers are required to provide a defense until the final resolution of the coverage question by a court." *Olson*, 338 Wis. 2d at 229. Here, WCMIC asks in its motion for summary judgment that the court make a final resolution of the coverage question.

Wisconsin courts follow "an established framework for determining whether coverage is provided under the terms of an insurance policy." *Olson*, 338 Wis. 2d at 232. First, the court examines whether the policy's insuring agreement makes an initial grant of coverage. *Id.* If the initial grant of coverage is triggered by the claim, the court examines the various exclusions to determine whether an exclusion precludes coverage. *Id.* at 232–33. If so, the court then determines whether there is an exception to the exclusion that reinstates coverage. *Id.* at 233.Throughout this framework, the court interprets the language of the policy to mean what a reasonable person in the position of the insured would have understood the words to mean. *Id.*

In the present case, WCMIC first contends that the policy does not provide coverage to Fernandez-Rosa because he is not an "insured" under the insuring agreement's initial grant of coverage. As is relevant here, the policy defines an insured as the County's past or present employees "while acting within the scope of their employment or authority." (ECF No. 49-1 at 35 of 54.) WCMIC contends that the undisputed facts show that Fernandez-Rosa's alleged acts of sexual assault and

harassment, if they occurred, would not have been done while he was acting within the scope of his employment as a corrections officer.[4]

In general, under Wisconsin law, conduct is within the scope of employment only if it is of the kind the servant is employed to perform, it occurs substantially within the authorized time and space limits, and "it is actuated, at least in part, by a purpose to serve the master." *Olson v. Connerly*, 156 Wis. 2d 488, 499 n.10 (1990). The Seventh Circuit, applying Wisconsin law, has recognized that an act is not within the scope of employment "unless it is a natural, not disconnected and not extraordinary, part of the incident of the services contemplated." *Martin v. Milwaukee County*, 904 F.3d 544, 555 (7th Cir. 2018). Likewise, an act is not within the scope "if it is different in kind from that authorized, far beyond the authorized time or space, or too little actuated by a purpose to serve the employer." *Id.* However, an act is within the scope of employment "if it is so closely connected with the employment objectives, and so fairly and reasonably incidental to them, that it may be regarded as a method, even if improper, of carrying out the employment objectives." *Id.*[5]

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[4] Both plaintiff and Fernandez-Rosa point out in response to WCMIC's motion that whether he committed the alleged acts is still heavily disputed. While this is true, it has no bearing on WCMIC's motion. If Fernandez-Rosa did not commit the acts, then of course there would be no duty to indemnify because there would be nothing to indemnify for. And the duty to defend turns on whether the conduct *alleged* would be covered had it actually occurred, not on whether the allegations are true or false. *Elliott*, 169 Wis.2d at 321. Thus, the dispute over whether Fernandez-Rosa actually committed the alleged acts is not a material dispute for purposes of the coverage motion.

[5] The cases addressing scope of employment cited here do not involve insurance policy interpretation but were decided in the related context of a governmental body's statutory obligation to indemnify its employees under Wis. Stat. § 895.46. However, the parties do not contend that this difference in context affects the analysis, and courts have applied the indemnification standards to insurance cases. *See, e.g., J.K.J. v. Polk Cnty. Sheriff's Dep't*, Nos. 15-cv-428 & 15-cv-433, 2016 WL 6956662, at *4 (W.D. Wis. Nov. 28, 2016).

WCMIC contends that it is not possible to regard Fernandez-Rosa's acts of sexual harassment and assault as methods of carrying out his employment objectives. Rather, it argues, Fernandez-Rosa would have been motivated solely by his personal desire for sexual gratification.

Courts applying Wisconsin law generally recognize that acts of sexual assault perpetrated by an employee are not within the scope of employment. For example, in *Martin*, the Seventh Circuit confronted facts highly similar to this case. The plaintiff, a former inmate at the Milwaukee County Jail, sued a corrections officer for sexually assaulting her while she was in custody. 904 F.3d at 547. The assaults occurred while the corrections officer was in uniform, armed, and on duty working for the County. *Id.* at 549. To commit each assault, the officer had to use his keys, power, and authority as a corrections officer. *Id.* Some of the assaults occurred after the officer transported the plaintiff to the infirmary and an attorney booth. *Id.* at 548. The Seventh Circuit assumed for purposes of its decision that "the sexual assaults occurred during the authorized time and space limits of [the officer's] employment." *Id.* at 555. However, the court concluded that no reasonable jury could find that the sexual assaults were within the scope of the officer's employment. *Id.* The court stated that "[n]o reasonable jury could conclude the sexual assaults were natural, connected, ordinary parts or incidents of contemplated services; were of the same or similar kind of conduct as that [the officer] was employed to perform; or were actuated even to a slight degree by a purpose to serve County." *Id.* Further, it stated that "[n]o reasonable jury could conclude the sexual assaults were

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Further, the County's motion on plaintiff's indemnification claim, which I address below, raises the scope-of-employment issue in the context of Wis. Stat. § 895.46.

connected with the employment objectives (much less closely connected) or incidental to them in any way." *Id.* Finally, the court stated that "[n]o reasonable jury could regard the sexual assaults as improper methods of carrying out employment objectives." *Id.* In short, "all evidence and inferences pointed to purely personal goals." *Id.* at 556. The only reasonable inference was that the officer "intended to obtain personal sexual pleasure from the assaults." *Id.* Other cases applying Wisconsin law to the question of whether sexual conduct was within the scope of employment reach the same result as *Martin*. *See Olson*, 156 Wis. 2d at 497–501 (physician/therapist who had sex with a medical assistant was acting outside the scope of his employment); *Block v. Gomez*, 201 Wis. 2d 795, 807 (Ct. App. 1996) (therapist's sexual relationship with patient fell outside the scope of employment because therapist "stepped aside from the [employer's] business to procure a purely personal benefit"); *J.K.J.*, 2016 WL 6956662, at *4 (corrections officer acted outside scope of employment when he had sexual contact with jail inmates because he did so "solely for sexual or other personal gratification").

Plaintiff contends that Fernandez-Rosa's sexual assaults occurred within the scope of his employment because he was performing County business—such as delivering toilet paper, providing a new mattress, and placing plaintiff in restraints—concurrently with the assaults. Plaintiff points out that, to find that the assaults occurred outside the scope of employment, the court would have to find that one of Fernandez-Rosa's hands was acting within the scope of employment while the other was not. However, when an employee performs two distinct acts simultaneously, the fact that one act served the employer's interest would not cause the other to automatically fall within the scope of employment. Rather, if the other act was not intended to serve the

employer's interest, it would still fall outside the scope of employment. For example, in *Martin* and *J.K.J.*, the corrections officers committed sexual assaults while they were in uniform, on-duty, and in control of the inmate. *Martin*, 904 F.3d at 548–49; *J.K.J.*, 2016 WL 6956662, at *2. Thus, in each case, the assault occurred while the officer was furthering the employer's interest in supervising inmates. But because the assault was not a *method* of supervising inmates, the separate act of assaulting the inmate did not further the employer's interest and therefore fell outside the scope of employment. *Martin*, 904 F.3d at 555 ("No reasonable jury could regard the sexual assaults as improper methods of carrying out employment objectives."); *J.K.J.*, 2016 WL 6956662, at *5 (finding that "the allegations in the complaint, as well as the undisputed facts of record, are unlike those in the cases relied on by plaintiffs, where courts found tortious conduct was a means—albeit an improper means—to further the employer's purpose").

Similarly, in this case, no reasonable jury could view the assaults as improper methods of serving the County's interests. At his deposition, Fernandez-Rosa himself admitted that the alleged acts of sexual assault, if they occurred, would not have served the County's interests. (Dep. of Fernandez-Rosa at 68:4–69:15.) He testified that no part of handing an inmate toilet paper would require the guard to have sexual contact with the inmate. (*Id.* at 68:25–69:5.) He testified that no part of providing a new mattress to an inmate would require the guard to have sexual contact with the inmate. (*Id.* at 69:6–69:11.) And he testified that no part of putting restraints on an inmate would require the guard to have sexual contact with the inmate. (*Id.* at 69:12–69:15.) The fact that Fernandez-Rosa might have exploited his access to plaintiff during the times when he was performing these duties to commit the sexual assaults does not make the assaults

methods of serving the County's interests. *See Martin*, 904 F.3d at 552 n.5 (rejecting proposition that sexual assaults were within scope of employment because they were made possible by officer's position and responsibilities). Thus, no reasonable jury could find that the assaults were performed within the scope of Fernandez-Rosa's employment.

I acknowledge that the cases applying Wisconsin law do not hold that sexual assault categorically can never be within the scope of employment. *Martin*, 904 F.3d at 557. Indeed, one could imagine a scenario in which a corrections officer used sexual assault as not just an avenue for personal gratification, but also as an improper method of furthering the County's interests. For example, an officer might use sexual contact as a method of punishing inmates who disobey orders. In such a scenario, the officer's conduct might benefit the employer by furthering its interest in maintaining order within the prison and therefore fall within the scope of employment. *Cf. Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) (recognizing that when a salesperson lies to a customer to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer's policies). But no evidence in the record suggests that this is such a case. There is simply no evidence from which the jury could reasonably conclude that Fernandez-Rosa sexually assaulted plaintiff for any purpose other than to satisfy his own personal sexual desires.

Plaintiff also points out that cases such as *Martin* and *Olson* deal with sexual assaults only and do not address allegations of sexual harassment. Thus, she contends, those cases do not hold that Fernandez-Rosa's alleged sexual comments were made outside the scope of his employment. While it is true that the cases dealing with sexual assault do not also directly address sexual harassment, the same underlying principle

would apply: the sexual harassment would not be within the scope of employment if it was "too little actuated by a purpose to serve the employer." *Martin*, 904 F.3d at 553 (citing *Olson*, 156 Wis. 2d at 499–500). Further, in cases alleging sexual harassment under Title VII of the Civil Rights Act, courts have recognized that, as a general rule of agency law, sexual harassment is not conduct within the scope of employment because the conduct typically furthers only the employee's personal desires. *Ellerth*, 524 U.S. at 757. In the present case, plaintiff points to no way in which Fernandez-Rosa's sexual comments could reasonably be thought to have furthered the County's interests, and she points to no evidence in the record from which the jury could reasonably conclude that Fernandez-Rosa was motivated by a purpose to serve the County when he made the comments. Accordingly, the only reasonable conclusion is that both the comments and the assaults were acts falling outside the scope of employment.

Because I conclude that Fernandez-Rosa was not acting within the scope of his employment when he committed the harassment and assaults and therefore was not an "insured," WCMIC's motion for summary judgment will be granted. Having found that the insuring agreement does not apply to the conduct alleged, I do not consider WCMIC's alternative arguments based on the policy's exclusions.

B. Hein and County's Motion for Summary Judgment

Turning to Hein and the County's motion for summary judgment, I first address plaintiff's direct action against the County based on the County's alleged obligation under Wis. Stat. § 895.46 to pay any judgment entered against Fernandez-Rosa, as the issue presented is the same as that presented by WCMIC's motion, namely, whether the acts of sexual harassment and assault were within the scope of employment. I then turn to

plaintiff's *Monell* claim against the County and her claims for supervisory liability against Hein. Finally, I address plaintiff's claims against the County and Hein under state tort law.

1. Indemnification under Wis. Stat. § 895.46

As is relevant here, under Wisconsin law, a state or local government must pay any judgment entered against a public officer or employee (in excess of insurance) entered in an action in which the officer or employee "is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee" and "the jury or the court finds that the defendant was acting within the scope of employment." Wis. Stat. § 895.46(1)(a). Plaintiff brings a claim for indemnification against Milwaukee County pursuant to this statute.[6] The County moves for summary judgment on the claim to the extent it applies to a judgment entered against Fernandez-Rosa.[7]

The County, like WCMIC, contends that no reasonable jury could find that Fernandez-Rosa was acting within the scope of his employment for the County when he

[6] Plaintiff, rather than Fernandez-Rosa, has asserted the indemnification claim, and the County and Fernandez-Rosa have not filed cross claims against each other relating to the County's indemnification obligations. Although Wis. Stat. § 895.46 does not by its terms create a direct action by an injured party against the state or local government for payment of the indemnification obligation, no party disputes that such a direct action is available. Further, the Seventh Circuit has adjudicated a claim under Wis. Stat. § 895.46 brought by an injured party. *See Martin*, 904 F.3d at 547. Thus, for purposes of this case, I assume that an injured party may bring a direct claim for indemnification against the state or local government under § 895.46, at least when that direct claim is brought in the same action as the claim against the public officer or employee, as it is here.

[7] Plaintiff's indemnification claim does not mention defendant Hein. In theory, the County could be required to pay a damages judgment entered against Hein, as there is no dispute that he was acting within the scope of his employment at all relevant times. However, the County's insurance likely covers Hein, and therefore resort to Wis. Stat. § 895.46 is likely unnecessary for the claims against him. In any event, no party raises an issue as to Hein's entitlement to indemnification, and therefore the discussion in this section is limited to indemnification of Fernandez-Rosa only.

committed the alleged acts of sexual harassment and assault. As I noted above, the same scope-of-employment legal standards apply to both the coverage and indemnification questions. Further, the relevant facts are the same. Accordingly, for the same reasons I gave for granting summary judgment to WCMIC, I will grant the County's motion for summary judgment on plaintiff's indemnification claim.

2. Liability under § 1983

Plaintiff alleges that Fernandez-Rosa violated her Eighth Amendment right to be free from Cruel and Unusual Punishment. However, because plaintiff was a pretrial detainee at the time of the underlying events, plaintiff's § 1983 claim is governed not by the Eighth Amendment but by the Due Process Clause of the Fourteenth Amendment. *See Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015). Regardless, the County and Hein do not dispute that the alleged acts of sexual harassment and assault, if they occurred, would have deprived plaintiff of her constitutional rights. Instead, they contend that they are not liable under § 1983 for Fernandez-Rosa's conduct. The County contends that plaintiff cannot satisfy the standard of liability under *Monell*, and Hein contends that she cannot satisfy the standard for supervisory liability that applies in § 1983 actions.

a. County liability under *Monell*

Under *Monell v. Department of Social Services*, municipalities may be held liable for constitutional violations only when they themselves cause the deprivation of rights. 436 U.S. 658, 691–92 (1978). A municipality is not liable for an officer or employee's unconstitutional conduct under principles of vicarious liability or *respondeat superior*. *Id.* at 694–95. A threshold requirement to municipal liability is the showing that a municipal policy or custom caused the constitutional injury. *Id.* at 690–91. This policy requirement

"ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403–04 (1997).

The Seventh Circuit has recognized three types of municipal actions that can support the policy requirement: (1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) a decision by a person with final policymaking authority for the municipality. *Bohanon v. City of Indianapolis*, 46 F.4th 669, 675 (7th Cir. 2022). Inaction can also give rise to liability if it reflects the municipality's "conscious decision not to take action." *Id.* (quoting *Glisson v. Ind. Dep't of Corr.*, 849 F.3d 372, 381 (7th Cir. 2017) (*en banc*)). Finally, a municipality's failure to provide adequate training to its employees may be a basis for imposing liability. *City of Canton v. Harris*, 489 U.S. 378, 388–89 (1989); *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 675 (7th Cir. 2012). However, "the plaintiff must show that the failure to train reflects a conscious choice among alternatives that evinces a deliberate indifference to the rights of the individuals with whom those employees will interact." *Rice*, 675 F.3d at 675.

In the present case, I understand plaintiff to be alleging two *Monell* theories. The first is that Milwaukee County had a widespread practice of sexual harassment and assault within the jail. The second is that Milwaukee County failed to properly train its corrections officers (and the supervisors of such officers) on the prevention and detection of sexual mistreatment of inmates. Plaintiff does not contend that her injuries were caused

by enforcement of an express municipal policy or by a decision made by a person with final policymaking authority.

To establish a widespread practice, plaintiff follows the approach stated in *Jackson v. Marion County*, 66 F.3d 151, 152 (7th Cir. 1995) That is, she attempts to show "a series of bad acts" and invites the court to infer from them "that the policymaking level of government was bound to have noticed what was going on." *Id.* Under this approach, if the policymaking level of government is shown to have failed to do anything to discourage the practice, then the jury can infer that the policymakers "must have encouraged or at least condoned, thus in either event adopting, the misconduct of subordinate officers." *Id.*

Plaintiff attempts to establish the series of bad acts by presenting evidence that Fernandez-Rosa engaged in a pattern of sexual misconduct involving inmates and a fellow corrections officer. First, she points to evidence that Fernandez-Rosa sexually harassed and/or assaulted plaintiff on at least four distinct occasions. Second, plaintiff points to evidence that Fernandez-Rosa sexually harassed and assaulted a female corrections officer on January 23, 2021, shortly before plaintiff reported her own assaults to the prison nurse. Third, plaintiff points to reputation evidence indicating that, among other corrections officers and inmates, Fernandez-Rosa was known as a person who frequently made sexual comments about female inmates and staff. Fourth, plaintiff points to allegations by other inmates about instances in which Fernandez-Rosa sexually harassed them and forced them to engage in sexual contact. Fifth, plaintiff notes that a male inmate once filed a grievance against Fernandez-Rosa for making a sexual comment to him about a female staff member's body. When the grievance was investigated, Fernandez-Rosa denied making the statement, but his supervisor

counseled him to "remain professional at all times." (ECF No. 76-8.) Finally, plaintiff points to Fernandez-Rosa's own testimony about his request to supervisors to stop scheduling him to work in the female pod of the jail because so many inmates had been accusing him (falsely, in his view) of sexual misconduct. As far as the record reveals, the supervisors did not honor his request.[8]

Based on plaintiff's evidence, a reasonable jury could find that Fernandez-Rosa personally engaged in a pattern of sexual misconduct during his employment at the jail. However, it does not follow that a reasonable jury could find that the County tolerated a *widespread practice* of sexual misconduct by corrections officers within the jail. Aside from the incidents of sexual contact perpetrated by Fernandez-Rosa, there were no other substantiated incidences of sexual contact between a member of jail staff and an inmate between 2017 and 2021. (Decl. of Joshua Briggs ¶ 13.) Further, plaintiff does not present evidence of any unsubstantiated allegations of sexual misconduct against other officers. Thus, at trial, a reasonable jury would have no basis for finding that officers besides Fernandez-Rosa engaged in sexual misconduct in the period leading up to Fernandez-Rosa's sexual misconduct towards plaintiff. And during the time when plaintiff was housed in the jail, the Sheriff's Office employed on average more than 200 corrections officers and sergeants within the jail at any one time. (Briggs Decl. ¶ 12.) Over the same period, an average of about 1,700 inmates were booked into the jail each month. (*Id.*) In a jail of that size, the conduct of a single corrections officer, operating largely in secret, does not

[8] Plaintiff also points to a litany of job-performance issues that were documented in Fernandez-Rosa's personnel file. (Pl. Br. in Opp. at 6–7.) However, the issues did not involve sexual misconduct and thus do not help establish a widespread practice of sexual misconduct within the jail.

establish a practice that is so pervasive that a jury could reasonably infer that the policymaking level of County government must have known about it and tolerated or condoned it. *See Bridges v. Dart*, 950 F.3d 476, 480–81 (7th Cir. 2020) (observing that the number of incidences that might establish a widespread practice at a jail in a small town will not establish such a practice at a jail in a large metropolitan area).

Of course, direct evidence that the policymaking level of government was aware of Fernandez-Rosa's pattern of sexual misconduct and failed to act could also establish *Monell* liability. But we do not have any such evidence here. To be sure, there is evidence that some other staff members at the jail, including Fernandez-Rosa's immediate supervisors, were aware that some inmates had accused him of impropriety. First, there is the grievance filed by the male inmate who reported that Fernandez-Rosa had made a comment about a female worker's body, which was investigated through the prison grievance system. Second, on one occasion an inmate shouted out loud, in the presence of a supervisor, that Fernandez-Rosa was trying to have sex with inmates. (Pl. Prop. Findings of Fact ("PFOF") ¶ 27.) Finally, Fernandez-Rosa himself asked a supervisor to stop assigning him to the female pod because inmates kept accusing him of sexual harassment. However, Fernandez-Rosa's supervisors and the other staff members who learned about these allegations were not policymakers for the County,[9] so their

[9] The County has produced evidence showing that lieutenants at the jail are not final policymakers. They are "front line supervisors" that supervise different areas of the jail and supervise the corrections officers on duty. (Decl. of Joshua Briggs ¶ 25.) There are many layers of higher authority between lieutenants and the Sheriff, the arguable final policymaker for the County in this area. (*Id.* ¶ 26.) Plaintiff has not disputed this evidence, other than to note that she witnessed lieutenants making independent decisions while on shift. (Resp. to County PFOF ¶ 132.) However, an employee's ability to exercise discretion while performing a designated task does not make him or her a final

knowledge is not policymaker knowledge. Further, a reasonable jury could not infer that because Fernandez-Rosa's supervisors were aware of these accusations against him, the County's policymakers must have known about Fernandez-Rosa's alleged pattern of harassing and making sexual contact with inmates. The supervisors were aware of only a handful of accusations, none of which were substantiated. Although it is arguable that the supervisors could have done more to investigate, these known accusations cannot establish a widespread practice, such that the jury could reasonably infer that the policymaking level of government must have known about and tolerated or condoned it. *See Phelan v. Cook County*, 463 F.3d 773, 790 (7th Cir. 2006) ("It is not enough to demonstrate that policymakers could, or even should, have been aware of the unlawful activity because it occurred more than once. The plaintiff must introduce evidence demonstrating that the unlawful practice was so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision.").

Plaintiff's remaining theory of *Monell* liability is based on a failure to train. In *City of Canton v. Harris*, the Supreme Court observed that a municipality may be liable when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that a factfinder could find deliberate indifference to the need for training. 489 U.S. 378, 390 (1989). "In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." *Id.* Or, as the Seventh Circuit put it, "a risk of constitutional violations can be so high and the need for training

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policymaker. *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 780 (7th Cir. 2011). Rather, it is the absence of a higher authority that makes someone a final policymaker. *Id.*

so obvious that the municipality's failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation." *J.K.J. v. Polk County*, 960 F.3d 367, 380 (7th Cir. 2020).

Importantly, before liability based on failure to train could attach, the municipality must have had notice that its existing training practices (or the lack thereof) exposes those in its care to a high risk of experiencing constitutional deprivations. "Sometimes the notice will come from a pattern of past similar violations; other times it will come from evidence of a risk so obvious that it compels municipal action." *J.K.J.*, 960 F.3d at 381. Either way, the plaintiff must prove that the risk was "known or obvious." *Id.*

In the present case, a reasonable jury could find that the risk that a jail corrections officer will sexually harass or assault an inmate is known or obvious. As the Seventh Circuit has recognized, "[t]he confinement setting is a tinderbox for sexual abuse." *J.K.J,*, 960 F.3d at 382. However, the County acknowledged this risk and adopted policies and training practices designed to prevent and detect sexual abuse. First, the Sheriff's Detention Services Bureau issued a comprehensive policy prohibiting all forms of sexual harassment and contact between a staff member and an inmate. (Briggs Decl. Ex. 3.) That policy included provisions designed to prevent and detect sexual harassment. The policy required staff to immediately report any alleged sexual misconduct by another staff member to a supervisor, and it required supervisors to document and investigate all allegations of sexual harassment and report such allegations to the Sheriff's Internal Affairs Department. The policy also contained provisions for separating the inmate from the accused staff member without a loss of privileges. Second, the Sheriff's Office trained corrections officers in accordance with Wisconsin Department of Justice guidelines that

clearly explain that any kind of sexual contact with or harassment of inmates is prohibited and a crime under Wisconsin law. (*Id.* Ex. 5 at 39–41.) Third, the Sheriff's Office trained its officers on the Prison Rape Elimination Act ("PREA"), a law designed to deter the sexual assault of prisoners. In addition to training officers that any sexual contact with prisoners is forbidden, the PREA training instructed officers on the signs that an inmate might exhibit if he or she was being sexually abused by other inmates or jail staff. (County PFOF ¶¶ 101–02.) The PREA training also instructed officers to monitor their own behavior and the behavior of coworkers to help avoid, detect, and prevent sexual misconduct by staff towards inmates. (*Id.* ¶ 103.) Finally, officers were trained on the requirement to report any sexual misconduct by staff towards inmates. (*Id.* ¶ 104.)

Even though the County had written policies prohibiting sexual harassment and trained officers how to detect and prevent sexual misconduct by staff members, the County could be liable on a failure-to-train theory if plaintiff demonstrated that the policies and training contained "material gaps" and the County had notice that its existing training "was not working." *J.K.J.*, 960 F.3d at 378, 383. In *J.K.J.*, an inmate who had been sexually abused by a corrections officer at a jail in a small county in Northwestern Wisconsin presented expert testimony pointing to gaps in the county's policies. *Id.* at 378–79. The trial evidence showed that the county's training on preventing and detecting the sexual harassment and abuse of inmates "was all but nonexistent." *Id.* at 379. In particular, the court noted the absence of training on "the inherent vulnerability the confinement setting presents to female inmates," on "the symptoms of an inmate suffering from the trauma of abuse," and on the requirement that officers "report each other's misconduct." *Id.* The court concluded that evidence of these gaps allowed the jury to find

that the county's training was inadequate. However, that was not enough to establish the county's liability for failure to train. In addition, the plaintiff presented evidence showing that the county *knew* that its policies were deficient. *Id.* at 381–84. Specifically, the jury learned that a county official who was a final policymaker[10] was aware of prior sexual misconduct by corrections officers against female inmates. *Id.* at 382. Indeed, that official participated in sexually inappropriate banter with other officers. *Id.* Yet, that policymaking official did nothing to address the risk that officers were sexually mistreating inmates. As stated by the Seventh Circuit:

> And with red lights flashing, Polk County chose the one unavailable option—doing nothing. It did not change its sexual abuse policy, institute a training, inquire of female inmates, or even call a staff meeting. With the writing on the wall, Polk County deliberately chose to stand still, or at least a reasonable jury could have so concluded.

Id. at 383.

In the present case, plaintiff has not presented evidence from which a reasonable jury could conclude that the County's policymakers were aware that their sexual misconduct policies and trainings were inadequate to address the risk that a staff member would sexually abuse an inmate. First, unlike the plaintiff in *J.K.J.*, the plaintiff here does not have an expert witness who identifies specific deficiencies in the County's policies. Even if expert testimony is not required to establish a deficiency, plaintiff does not herself point to any "material gaps" in the County's policies akin to the gaps recognized in *J.K.J.* She does, however, contend that the County's policies fail to comply with two PREA

[10] The Seventh Circuit stated that this county official "was responsible for creating and implementing the jail's policies and standards, and his actions therefore could be attributed to the County for purposes of *Monell* liability." *J.K.J.*, 960 F.3d at 382.

guidelines: (1) the guideline recommending that an agency provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency, 28 C.F.R. § 115.51(b); and (2) the guideline recommending that facilities provide inmates with access to outside victim advocates for emotional support services related to sexual abuse, *id.*§ 115.53.

Regarding the first guideline, plaintiff contends that although the County provides multiple ways for an inmate to report sexual misconduct, including a hotline that is answered by jail administrators, none of the available options connect the inmate to an entity or office that is not part of the Sheriff's Office. The County disputes this fact. It notes that the inmate handbook states that inmates may report sexual misconduct by, among other things, notifying a medical or psychiatric professional. At the time plaintiff was in the Milwaukee County Jail, medical and mental-health staff were employed by a private contractor, Wellpath, LLC, rather than by Milwaukee County or the Sheriff's Office. The County contends that the ability to report abuse to Wellpath employees satisfied the PREA requirement of a reporting mechanism outside the agency. The County also notes that inmates are frequently in contact with friends, family, and attorneys by mail, telephone, and in-person visits and therefore could report sexual misconduct to them. As for the second PREA guideline at issue, the County concedes that it does not provide inmates with access to outside victim advocates for emotional support services related to sexual abuse. (County Resp. to Pl. PFOF ¶ 63.)

Whether or not the County failed to comply with both PREA guidelines or just one, a reasonable jury could not find the County liable under a failure-to-train theory. "PREA is not a constitutional standard, and jails are not required to adopt it." *J.K.J.*, 960 F.3d at

384. The actual constitutional standard asks whether the County had notice of deficiencies in its training that, if left unaddressed, would expose inmates to a known or obvious risk of sexual harassment or assault. Here, there is no evidence suggesting that the County was aware that not complying with the two PREA recommendations at issue exposed inmates to such a risk. Given the substantial training that the County provided its officers about how to prevent and detect sexual abuse, plus the avenues available to inmates for reporting such abuse, the County could have been no more than negligent in failing to adopt the two PREA recommendations at issue. Thus, a jury could not find that the County's training and policies reflected deliberate indifference to the rights of inmates. *See Miranda v. County of Lake*, 900 F.3d 335, 346 (7th Cir. 2018) (liability for failure to train requires deliberate indifference rather than negligence).

In addition to the alleged PREA non-compliance, plaintiff faults the County for not having training that "has to do specifically with female inmates." (Br. in Opp. at 18.) It is true that the County's training is gender neutral and does not mention female inmates specifically. But plaintiff does not explain why the County's gender-neutral training is not sufficient to address the needs of female inmates. Plaintiff alludes to "special training" regarding female inmates but does not specify what that might consist of. (*Id.*) Plaintiff also faults the County for allowing male guards "unsupervised access to female inmates" and suggests that "special safeguards" needed to be in place. (*Id.*) But again, plaintiff is silent as to what those safeguards might be. Notably, the County's policy requires two officers to always be present in the female pod, and thus Fernandez-Rosa was never left alone on that pod. (Decl. of David Rugaber ¶ 4.) Finally, plaintiff contends that understaffing at the jail may have contributed to a high risk of sexual abuse of female

inmates. But even if the jail was short-staffed when plaintiff was an inmate, there is no evidence that County policymakers were aware that understaffing was creating a known or obvious risk of sexual abuse. Further, the County's evidence shows that, per County policy, a second officer was always present with Fernandez-Rosa when he worked in the female pod, and that the jail was fully staffed on the dates when Fernandez-Rosa allegedly sexually abused plaintiff. (*Id.* ¶¶ 4–6.) Thus, a jury could not find that a policy of short staffing caused plaintiff's injuries.

In short, plaintiff has not produced evidence from which a reasonable jury could find that a County policy, practice, or failure to train caused her constitutional injuries. Accordingly, summary judgment will be granted on the *Monell* claim.

b. Hein's Supervisory Liability Under § 1983

Lieutenant Hein moves for summary judgment on plaintiff's claim for supervisory liability. To succeed on such a claim under § 1983, a plaintiff must show that the supervisor was personally involved in the constitutional violation. *Gill v. City of Milwaukee*, 850 F.3d 335, 344 (7th Cir. 2017). That means the supervisor "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see." *Id.* (quoting *Matthews v. City of E. St. Louis*, 675 F.3d 703, 708 (7th Cir. 2012)). It is not enough to show that the supervisor should have been aware of the subordinate's conduct and failed to prevent it, since "supervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable." *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988).

In the present case, plaintiff presents no evidence from which a reasonable jury could find that Hein knew about Fernandez-Rosa's misconduct towards plaintiff or turned

a blind eye. Instead, plaintiff points to Hein's response to a separate complaint of sexual misconduct against Fernandez-Rosa by a female corrections officer. That officer claimed that Fernandez-Rosa sexually harassed and assaulted her on January 23, 2021. The officer reported the misconduct to a jail nurse on January 26 or 27, and the nurse asked Hein to speak to the officer. When Hein spoke to the officer, she told Hein that Fernandez-Rosa had made inappropriate comments to her that were sexually graphic in nature, but she did not provide details and did not mention any sexual contact by Fernandez-Rosa with her or any inappropriate conduct by Fernandez-Rosa towards an inmate in the jail. The officer told Hein that she did not want to make a formal complaint and that she would deny that any inappropriate conduct had occurred if he reported the incident for her. Hein told the officer that he would give her a few days to think about it, but that the alleged conduct had to be reported.

Hein did not do anything further relating to the female corrections officer's complaint until after plaintiff reported her own abuse on January 27, 2021. On January 30, 2021, the detective investigating plaintiff's allegations learned from the jail nurse that the female corrections officer had also complained about Fernandez-Rosa. The detective spoke to the female corrections officer on January 31, 2021, and the officer told the detective that Fernandez-Rosa had made sexual comments to her and had had sexual contact with her without her consent. The detective then interviewed Hein on February 1. At this interview, Hein learned for the first time that plaintiff had accused Fernandez-Rosa of sexual misconduct. Because Hein did not immediately report the allegations of sexual misconduct made by the female corrections officer, the Sheriff's Office issued him a one-day suspension for violating its policies governing sexual-misconduct reporting.

Plaintiff seems to contend that, because Hein did not immediately ask the Sheriff's Office to investigate the female corrections officer's allegations against Fernandez-Rosa, he was somehow personally involved in Fernandez-Rosa's abuse of plaintiff. But Hein's failure to follow policy with respect to one complaint against Fernandez-Rosa does not imply that he was complicit in Fernandez-Rosa's conduct towards plaintiff, of which he remained unaware until after plaintiff reported it. In any event, the female corrections officer did not report her own abuse to Hein until after Fernandez-Rosa had committed all the acts that plaintiff now accuses him of. Specifically, the last act of sexual misconduct against plaintiff occurred on January 24, 2021, and the female corrections officer did not report her own experiences to Hein until January 26, 2021, at the earliest. Thus, even if Hein's failure to immediately report the officer's complaint could somehow be viewed as personal involvement in any *future* acts of misconduct by Fernandez-Rosa, it would not establish his personal involvement in Fernandez-Rosa's abuse of plaintiff.

Hein separately contends that he is entitled to qualified immunity. Whether qualified immunity applies turns on two questions: first, whether the facts presented, taken in the light most favorable to the plaintiff, describe a violation of a constitutional right; and second, whether the federal right at issue was clearly established at the time of the alleged violation. *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (per curiam). Once the defendant invokes the defense of qualified immunity, it becomes the plaintiff's burden to defeat it. *Jewett v. Anders*, 521 F.3d 818, 823 (7th Cir. 2008).

Here, plaintiff has not attempted to defeat qualified immunity. Instead, she contends that the court should wait to resolve qualified immunity until after the jury returns a verdict. (Br. in Opp. at 15.) However, qualified immunity is more than a "mere defense

to liability"; it provides "immunity from suit." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Thus, the defense must be resolved at the earliest possible stage of the litigation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). In the district court, that stage is usually summary judgment, where the court asks whether, when the evidence is viewed in the light most favorable to the plaintiff, a reasonable jury could find that the defendant violated a clearly established right. *See, e.g., Gaddis v. DeMattei*, 30 F.4th 625, 632 (7th Cir. 2022). The resolution of the defense may await trial only when a reasonable jury could find that the defendant violated a clearly established right under one version of the facts, but not another. Under those circumstances, the court should craft a special verdict to aid in the resolution of the immunity defense post-verdict. *See Taylor v. City of Milford*, 10 F.4th 800, 812 (7th Cir. 2021). Here, plaintiff has not satisfied her burden to show that, at trial, a reasonable jury could find that Hein violated her clearly established rights. She has not even attempted to defeat the qualified-immunity defense, and therefore she has forfeited her opportunity to do so. *See Torry v. City of Chicago*, 932 F.3d 579, 588–89 (7th Cir. 2019). Accordingly, I have no choice but to find that Hein is entitled to qualified immunity.

3. State Tort Claims

Plaintiff asserts claims against Milwaukee County and Lieutenant Hein for negligent infliction of emotional distress and negligent supervision and training.[11] The

[11] Plaintiff asserts additional state tort claims against Fernandez-Rosa, such as assault and battery. Unlike under § 1983, under state law Milwaukee County could be liable for Fernandez-Rosa's torts through *respondeat superior* if he was acting within the scope of his employment. However, as explained above in the context of indemnification, Fernandez-Rosa's acts of sexual harassment and assault were not committed within the scope of his employment. Accordingly, the County could not be liable for Fernandez-Rosa's torts under *respondeat superior*. *See DeRuyter by Jacquart v. Wis. Elec. Power Co.*, 200 Wis. 2d 349, 360 (Ct. App. 1996).

County and Hein move for summary judgment on these claims on several grounds. However, I will discuss only one ground—immunity under state law—because it is dispositive and renders the other grounds moot.

Under Wis. Stat. § 893.80(4), the County and its employees are immune from suit for "acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions." The Wisconsin Supreme Court has held that acts are quasi-judicial or quasi-legislative when they involve the exercise of discretion. *Scott v. Savers Prop. & Cas. Ins. Co.*, 262 Wis. 2d 127, 139 (2003). Ministerial acts, in contrast, do not fall within the scope of immunity. A duty is ministerial rather than discretionary "only when it is absolute, certain and imperative," involving the "performance of a specific task" that the law imposes and defines the "time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 301 (1976).

Plaintiff does not respond to Hein and the County's argument that they are entitled to immunity under Wis. Stat. § 893.80(4). She does not attempt to show that her claims for negligent infliction of emotional distress and negligent supervision and training involved ministerial rather than discretionary duties. Accordingly, she has forfeited the issue. *Torry*, 932 F.3d at 588–89. In any event, the Wisconsin Supreme Court has recognized that "the sheriff has discretion in deciding how best to attend to the needs of those inmates within [his] custody." *Swatek v. County of Dane*, 192 Wis. 2d 47, 60 (1995). Further, claims based on the failure to supervise or train a law enforcement officer have been deemed to fall within the scope of discretionary immunity. *Sheridan v. City of Janesville*, 164 Wis. 2d 420, 429 (Ct. App. 1991). Thus, even if plaintiff had not forfeited

the point, I would grant summary judgment to Hein and the County on the state-law claims based on their entitlement to immunity under Wis. Stat. § 893.80(4).

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that WCMIC's motion for summary judgment (ECF No. 48) is **GRANTED**. The court will enter a judgment declaring that: (1) No insurance coverage is available to Fernandez-Rosa under the policy of insurance issued by WCMIC to Milwaukee County for Fernandez-Rosa's actions as alleged by S.O. in her complaint; and (2) WCMIC has no duty to defend or indemnify Fernandez-Rosa for any of the claims asserted against him by S.O. in this lawsuit.

IT IS FURTHER ORDERED that the motion for summary judgment filed by Milwaukee County and Paul Hein (ECF No. 57) is **GRANTED**. All claims asserted against Milwaukee County and Paul Hein are dismissed with prejudice.

IT IS FURTHER ORDERED that the parties' motions to restrict access to parts of the record (ECF Nos. 51, 66 & 73) are **GRANTED**. I find good cause for restricting these parts of the record exists because the documents reveal the names of victims of sexual assaults.

FINALLY, IT IS ORDERED that a telephonic status conference will be held on March 13, 2025 at 11:00 am Central Time for the purpose of scheduling further proceedings on plaintiff's claims against Fernandez-Rosa.

Dated at Milwaukee, Wisconsin, this 13th day of February, 2025.

/s/ Lynn Adelman
LYNN ADELMAN
United States District Judge