In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 07-1435

Civil

JESSICA HINSLEY, PERSONALLY AND AS GUARDIAN AD LITEM FOR K.M., A MINOR

Appellants,

v.

STANDING ROCK CHILD PROTECTIVE SERVICES AND THE BUREAU OF INDIAN AFFAIRS,

Appellees.

Appeal from the United States District Court
for the District of North Dakota
District Court No. 1:05-cv-118-DLH-CSM

BRIEF OF THE APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR REVIEW ON THE BRIEFS

Jessica Hinsley and K.M., the Plaintiffs/Appellants, filed suit against the Defendants/Appellees on November 17, 2005, in the District of North Dakota, in District Court No. 1:05-cv-00118-DLH-CSM. Their complaint alleged that Defendant Standing Rock Child Protective Services ("CPS") negligently placed a child into the home of a host family. More specifically, CPS placed T.C., a child in its care, in Ms. Hinsley's home, despite knowing that T.C. had molested other children while in its custody. That agency failed to warn Ms. Hinsley of T.C.'s propensities, and T.C. sexually assaulted Ms. Hinsley's three-year-old daughter, K.M. Both Plaintiffs suffered injuries following this assault.

Defendants Bureau of Indian Affairs ("BIA") and CPS filed a motion for summary judgment on November 15, 2006, which the Plaintiffs resisted. Chief Judge Daniel L. Hovland granted the Defendants' motion for summary judgment, dismissing the case for lack of subject matter jurisdiction.

Ms. Hinsley filed a timely notice of appeal. Additionally, she respectfully requests that arguments to this Court be limited to the briefs and written materials submitted by the parties to this matter.

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JURISDICTIONAL STATEMENT

The Plaintiffs invoked the jurisdiction of the district court as conferred by 28 U.S.C. § 1346(b)(1), after first presenting their claim to CPS pursuant to 28 U.S.C. § 2675(a). Their complaint alleged that CPS negligently placed a known child molester in their home, and that CPS failed to warn them of that person's dangerous proclivities.

The district court entered a final judgment dismissing the case on January 22, 2007, and the Plaintiffs filed a timely notice of appeal on February 22, 2007. The U.S. Court of Appeals for the Eighth Circuit retains jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. THE DISCRETIONARY FUNCTION EXCEPTION TO LIABILITY DOES NOT OPERATE TO PROTECT CPS FROM THE CONSEQUENCES OF ITS RECKLESS FAILURE TO FOLLOW ROUTINE FOSTER CARE PLACEMENT PROCEDURES

United States v. Gaubert, 499 U.S. 315 (1991)

A. CPS broke the rules when it failed to warn Ms. Hinsley regarding T.C.'s history of sexually assaulting small children.

United States v. Gaubert, 499 U.S. 315 (1991)
N.D.C.C. § 50-11-05
N.D. Admin. Code § 75-03-19-06
NDDHS Manual § 640-20-10-01-35 (Rev'd 5/1/06) *available at*
http://www.state.nd.us/robo/projects/childabuse/childabuse.htm

B. Sound public policy dictates that CPS should have warned Ms. Hinsley that T.C. molested children before placing T.C. in her home.

United States v. Gaubert, 499 U.S. 315 (1991)
Hodge v. Jones, 31 F.3d 157 (4th Cir. 1994)

C. CPS is not entitled to immunity for its reckless conduct.

Coleman v. Parkman, 349 F.3d 534 (8th Cir. 2003)
Burton v. Richmond, 276 F.3d 973 (8th Cir. 2002)
Norfleet v. Dep't of Human Servs., 989 F.2d 289 (8th Cir. 1993)
Hodge v. Jones, 31 F.3d 157 (4th Cir. 1994)

STATEMENT OF THE CASE

1. Nature of the case.

This is an appeal from the district court's order granting the Defendants' motion for summary judgment and the judgment of dismissal, both filed January 22, 2007.

2. Course of the proceedings.

Ms. Hinsley filed claim forms with the Bureau of Indian Affairs, on behalf of herself and her daughter, K.M. (Appellants' App. at 1-3.) After receiving no response, she sued Standing Rock Child Protective Services and the BIA, claiming negligence under the Federal Tort Claims Act. (Appellants' App. at 4-11.)

The Defendants filed a motion to dismiss the action, asserting the defense of qualified immunity. (Id. at 18-51.) Ms. Hinsley resisted this motion, objecting to the Defendants' version of the facts and submitting her own motion and supporting materials. (Id. at 51-77, 83-155.) The district court issued an order granting the Defendants' motion, along with a judgment of dismissal. Hinsley v. Standing Rock Child Protective Servs., 470 F.Supp.2d 1037 (D.N.D. 2007); (Appellants' App. at 78). Ms. Hinsley filed a timely notice of appeal on February 22, 2007. (Id. at 79-82.)

STATEMENT OF THE FACTS

Sometime in August 2004, Jessica Hinsley received a telephone call from James McLaughlin, an investigator with Standing Rock Child Protective Services. (Appellants' App. at 94-95.) Mr. McLaughlin told her that her younger brother, T.C., had nowhere to live, and he asked her, as family, to take him into her home in Porcupine, North Dakota. (Appellants' App. at 95-96.) Ms. Hinsley, then twenty-one years of age, expressed doubts; her $7-per-hour bartending job was hardly enough to provide for her three small children. (Id. at 95-96, 104-05.) However, feelings of loyalty for her family prevailed, and Mr. McLaughlin told Ms. Hinsley that someone would bring T.C. to her home. (Id. at 96.) He did not tell her that T.C. would soon molest her three-year-old daughter, K.M. (Id. at 97.)

Mr. McLaughlin had some familiarity with Jessica Hinsley and her siblings. (Id. at 139.) Early in his tenure with CPS, he filed for custody of Ms. Hinsley, T.C., and their sister, after receiving allegations of abuse at the hands of their uncle in Aberdeen, South Dakota. (Id. at 139-40.) All three were quite young, and the pattern of abuse left its imprint on T.C. (Id. at 140.)

Mabel Medicine Crow, a case manager with CPS, seems to have initiated T.C.'s placement with Ms. Hinsley. (Id. at 44, 140-43.) T.C., born August 22, 1986, was nearing his eighteenth birthday, and CPS wanted to discharge him from its care. (Id. at 39, 44.) Ms. Medicine Crow, his case manager, told Mr. McLaughlin to contact Ms. Hinsley and ask if she would take care of T.C. (Id. at 44.) Ms. Medicine Crow knew that T.C. had a history of sexually abusing other children, and she told Mr. McLaughlin about it:

> [Mr. McLaughlin]. [Ms. Medicine Crow] told me to let [Ms. Hinsley] know that if she—if she keeps him, to be careful not to let him be alone with the children and not to trust him with the younger children. To let her know that much and to see if—to see if she'll keep him.
>
> [Mr. Hayden]. Did she give you any specifics about [T.C.] concerning prior acts of abuse and that type of thing?
>
> A. Yes. Prior abuse at the foster home that he was staying at, that was Defenders, Bucky Defender and Norma Defender's place. They're a foster home that was keeping him, and he was abusing the younger kids, younger girls in the house—trying to abuse them, but they caught him. The foster parents caught him and reported him to us. So we put him in a group home for his acts.
>
> Q. And why did Mabel tell you this information.

> A. So he won't—it won't happen again, for the safety of the children—other children.

(Id. at 44, 142-43.) The CPS director, Tracey Many Wounds, and another case manager, Wayland Bad Hand, also claim to have known about T.C.'s problematic history. (Id. at 42, 50.) Sadly, Ms. Hinsley discovered this information too late, just prior to her brother's federal sentencing for the molestation of K.M. (Id. at 119.)

Though the parties to this suit dispute the manner and substance of CPS's first contact with Ms. Hinsley regarding T.C., there is no dispute that that contact occurred prior to T.C.'s eighteenth birthday, which fell on August 22, 2004. (Id. at 39, 51-52, 95.) After learning that Ms. Hinsley agreed to take T.C. in, CPS rushed to get a court order discharging him from its care. (Id. at 44.) That court order is dated August 20, 2004, two days before T.C.'s birthday. (Id. at 48.) It is unknown whether CPS waited even a day after the hearing to push T.C. off on Ms. Hinsley. (Id. at 99.)

Ms. Medicine Crow asked Mr. Bad Hand to give T.C. a ride to Ms. Hinsley's home. (Id. at 45.) Mr. Bad Hand complied:

> [Mr. Hayden]. Did Wayland say anything to you when he dropped [T.C.] off?

> [Ms. Hinsley]. No, he didn't. He pulled in and handed me my brother's bags and pulled out, and that's usually how things go down there.

(Id. at 99.) Ms. Hinsley believed that a formal placement had occurred, even though she did not receive payments for taking her brother in:

> [Mr. Hayden]. And you didn't find it odd that during August, September, October, November, and December no Child Protection Service payments came in?
>
> [Ms. Hinsley]. No, I didn't find it odd. Because how I understand it under Child Protection is if you're placed with your family, they don't have to pay you, and I learned a lot about that when I worked under the tribe. I worked closely with CPS.

(Id. at 130.)

K.M.'s suffering began sometime during the span of October-December 2004. (Id. at 104.) Ms. Hinsley worked full time at the D&L Haven Bar in Selfridge, North Dakota, a fact known to Mr. McLaughlin prior to her acceptance of T.C. (Id. at 105, 152-53) While Ms. Hinsley worked, she had several babysitters for her children: her husband, her sister, and her brother, T.C. (Id. at 105-06.) The abuse occurred during T.C.'s babysitting sessions, when he was left alone with the children.

SUMMARY OF THE ARGUMENT

Standing Rock Child Protective Services asked Jessica Hinsley to take her younger brother into her home. This agency knew that T.C. molested children, yet its employees told Ms. Hinsley nothing about that fact. A CPS employee drove T.C. to Ms. Hinsley's home, dropped off his bags without saying a word and sped out of their lives. T.C. then sexually assaulted Ms. Hinsley's three-year-old daughter, K.M.

Child Protective Services should not escape liability for its failures in this case. Its discretion should have been guided by statute or internal policy. As such, that agency is not entitled to immunity.

Additionally, public policy favors warning a potential host family that it may be accepting placement of an individual with a history of sexual abuse. That individual's right to privacy, while important, is outweighed by the legitimate state interest in preventing child abuse.

Also, CPS's reckless failure to warn injured Ms. Hinsley's whole family, including its ward, T.C., who received a federal prison sentence. Such conduct is not protected by qualified immunity. For these reasons, the Plaintiffs request that the decision granting the Defendants qualified immunity be reversed and remanded for further proceedings.

ARGUMENT

I. THE DISCRETIONARY FUNCTION EXCEPTION TO LIABILITY DOES NOT OPERATE TO PROTECT CPS FROM THE CONSEQUENCES OF ITS RECKLESS FAILURE TO FOLLOW ROUTINE FOSTER CARE PLACEMENT PROCEDURES

Standard of Review

The Eighth Circuit "review[s] a grant of summary judgment *de novo*, applying the same standards as the district court." Williams v. City of Carl Junction, 480 F.3d 871, 873 (8th Cir. 2007) (*internal citation omitted*). A party moving for summary judgment "is entitled to summary judgment only upon a showing that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law." Lhotka v. United States, 114 F.3d 751, 752 (8th Cir. 1997); Fed.R.Civ.P. 56(c). Courts applying this standard must view all facts in the light most favorable to the non-moving party and draw all inferences in the non-moving party's favor. Lhotka, 114 F.3d at 752 (*internal citation omitted*).

Analysis

The Defendants are not entitled to immunity from suit in this case. Complaints lodged under the auspices of the Federal Tort Claims Act ("FTCA") are generally excepted from the United States' sovereign

immunity to suit. Smith v. United States, 507 U.S. 197, 204 (1993); Murray v. United States, 686 F.2d 1320, 1323 (8th Cir. 1982); 28 U.S.C. § 1346(b). However, this waiver of immunity does not apply to acts or omissions occasioned by the discretionary functions or duties of government agencies or employees. 28 U.S.C. § 2680(a).

The U.S. Supreme Court employed a two-part test to determine whether these acts or omissions are shielded by the discretionary function exception. United States v. Gaubert, 499 U.S. 315, 322-23 (1991). First, the conduct must be discretionary, involving judgment or choice. Gaubert, 499 U.S. at 322 (*internal citation omitted*). Second, sound public policy must back the decision. Id. at 322-23 (*internal citation omitted*).

In this case, CPS should have utilized established placement guidelines to protect Ms. Hinsley, her family, and T.C. from foreseeable sexual abuse. Further, public policy cuts against the inaction of CPS. For these reasons, which are explained below, this case should be reversed and remanded to the district court for a trial on the merits.

A. CPS broke the rules when it failed to warn Ms. Hinsley regarding T.C.'s history of sexually assaulting small children.

Child Protective Services had an established duty to warn Ms. Hinsley of T.C.'s history, the breach of which exposes CPS to liability under the FTCA. As stated before, the discretionary function can only shield acts or omissions involving "'an element of judgment or choice.'" Gaubert, 499 U.S. at 322 (*quoting* Berkovitz v. United States, 486 U.S. 531, 536 (1988)). Judgment or choice cannot exist where a "'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" Gaubert, 499 U.S. at 322 (*quoting* Berkovitz, 486 U.S. at 536).

Child Protective Services must have guidelines relating to the placement of children or adults in its care, especially pertaining to those individuals with histories of sexual abuse. In North Dakota, the Department of Human Services is required to investigate and assess reports of suspected child abuse or neglect:

> Assessments of reports of suspected child abuse or neglect must be conducted by the department or its authorized agents in substantial conformity with the policies of the department. Assessments of reports of suspected child abuse or neglect must reflect:

> 1. An assessment process designed to collect sufficient information whether services are required to provide for the protection and treatment of an abused or neglected child;
>
> 2. Assessment techniques that include interviewing and observing the subject, the child victim, and other interested or affected persons and documenting those interviews and observations;
>
> 3. Conclusions and a summary based on information gathered by assessment techniques described in subsection 2; and
>
> 4. If services are required, development of a treatment plan based on goals and objectives established by the department or its designee and the subject and the family of the child victim.

N.D. Admin. Code § 75-03-19-06.

In the case at bar, CPS received reports that T.C. was being sexually abused at a foster home as a small child. That agency also knew that T.C. sexually abused young females at a foster home. This information was recorded, as Ms. Hinsley read it before her brother received a federal prison sentence. She should have been given that information before the placement, and this failure rests squarely upon CPS.

Ms. Hinsley should have been made aware of the relevant contents of this record. The North Dakota Legislature addressed the confidentiality of records kept in association with foster care homes for children and adults:

> The records of facilities licensed under this chapter, pertaining to the children or adults receiving care, are confidential and may be made available:
>
> […]
>
> 3. To persons who have a definite interest in the well-being of the adults or children concerned, who are in a position to serve their interests, and who need to know the contents of the records in order to assure their well-being and interests.

N.D.C.C. § 50-11-05. Again, under the laws of the State of North Dakota, it appears that Ms. Hinsley should have been warned. Indeed, it appears that such a result is also mandated under North Dakota's CPS Manual 640:

> When a decision is made that services are required to provide for the protection or treatment of an abused or neglected child, the Child Protection Social Worker shall provide written notice of the decision to the parents or legally appointed guardian who is not the subject of the report of suspected child abuse or neglect.

NDDHS Manual § 640-20-10-01-35 (Rev'd 5/1/06) *available at* http://www.state.nd.us/robo/projects/childabuse/childabuse.htm.

It is near-inconceivable that the Standing Rock CPS operates without some handbook or manual limiting its discretion. While there is no such manual or handbook in the record, it would seem contrary to the spirit of justice to allow this case to be dismissed for such a minor failing—throwing the baby out with the bathwater, as it were.

The Defendants will argue that Standing Rock CPS's analogous handbook or manual did not apply during T.C.'s placement with the Hinsley family, due either to his age or legal status at the time. Such questions should be examined upon remand to the district court.

B. Sound public policy dictates that CPS should have warned Ms. Hinsley that T.C. molested children before placing T.C. in her home.

A child placement agency's decision not to warn a potential host family of its ward's history of sexual molestation goes against sound public policy and falls outside the aegis of the discretionary function exception. "[E]ven 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" Gaubert, 499 U.S. at 322-23 (*quoting* Berkovitz, 486 U.S. at 536). The exception is designed to uphold "'legislative and administrative decisions grounded in social, economic, and political policy[.]'" Gaubert, 499 U.S. at 323 (*quoting* United States v. Varig Airlines, 467 U.S. 797, 814 (1984)).

The statutes and handbook quoted in the foregoing section evidence the strong public policy backing potential host families' need for knowledge regarding those whom they would welcome into their homes. In response,

the Defendants identified a competing policy consideration: "[CPS] must balance the privileged record of the juvenile with his or her future interests once released." (Appellants' App. at 34.) However, "[t]he maxim of familial privacy is neither absolute nor unqualified, and may be outweighed by a legitimate governmental interest." Hodge v. Jones, 31 F.3d 157, 163-64 (4th Cir. 1994) (*citing* Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977)).

In Hodge, the Fourth Circuit examined a family's claims against Maryland officials for maintaining records concerning an investigation of suspected child abuse. Hodge, 31 F.3d at 160-62. The family filed suit under 42 U.S.C. § 1983, alleging due process violations emanating from "their liberty interest in familial privacy, and that failure to provide notice and a hearing before maintaining that record violated their procedural due process rights." Hodge, 31 F.3d at 162. The circuit panel reversed the decision below, upholding the defendants' claim of qualified immunity, because the government action did not violate a clearly established right: "The record before us presents no substantive due process violation of a familial privacy liberty interest by virtue of the retention of the Hodge investigation report." Id. at 167.

In reaching this conclusion, the Fourth Circuit weighed a family's right to privacy against the government's interest in preventing child abuse. "'The right to family integrity clearly does not include a constitutional right to be free from child abuse investigations.'" Id. at 164 (*quoting* Watterson v. Page, 987 F.2d 1, 8 (1st Cir. 1993)). The Hodge family even conceded, "as indeed they must, that Maryland has a legitimate interest in curtailing the abuse and neglect of its minor citizens." Hodge, 31 F.3d at 164 (*citing* Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

The policy interest in preventing child abuse operates in favor of Ms. Hinsley and her daughter in this case. All of the CPS employees were familiar with T.C.'s history, and their testimony and affidavits reveal that they knew of a need to warn her, but they failed to do so. Of course, this assertion is disputed, but that dispute becomes a question of fact for the jurors to decide. When even the parties at fault acknowledge the gravity of their failings, it cannot be argued that any harm resulting from disclosure of T.C.'s record would outweigh the harms visited upon K.M. and her mother. They are scarred for life, and they deserve redress.

C. CPS is not entitled to immunity for its reckless conduct.

Additionally, CPS should not be entitled to assert the defense of qualified immunity, because its employees knew that T.C.'s dangerous proclivities would be tested in Ms. Hinsley's household, yet they failed to warn her. "'[R]eckless disregard of a known risk'" is enough to overcome the qualified immunity defense in a 42 U.S.C. § 1983 action. Coleman v. Parkman, 349 F.3d 534, 538-39 (8th Cir. 2003). That standard should also apply in this case.

T.C.'s placement with Ms. Hinsley's family, notwithstanding his discharge from CPS, created a special relationship between the parties to this action, regardless of T.C.'s age or legal status. "The specific source of an affirmative duty to protect is the custodial nature of a 'special relationship' between the individual and the State." See Burton v. Richmond, 276 F.3d 973, 978 (8th Cir. 2002) (discussing the attachment of liability under 42 U.S.C. § 1983 for physical and sexual abuse in a foster care setting); see also Virgo v. Lyons, 551 A.2d 1243, 1245-46 (Conn. 1988) ("[T]he interrelationship of § 1983 and common law tort actions has been recognized by numerous courts."). Key analytical points for determining whether liability attaches are "whether the State has assumed a critical role in an

individual's life and whether, as a result of that role, the State has actively participated in creating the dangerous environment." Burton, 276 F.3d at 978-79 (*citing* Norfleet v. Dep't of Human Servs., 989 F.2d 289, 292-93 (8th Cir. 1993).

CPS assumed a custodial role in T.C.'s life, and that agency created a dangerous environment for everyone at Ms. Hinsley's home. "In foster care, a child loses his freedom and ability to make decisions about his own welfare, and must rely on the state to take care of his needs." Norfleet, 989 F.2d at 293. The Defendants knew that T.C. had been institutionalized since the age of two or three. They also acknowledge that their employees initiated contact with Ms. Hinsley regarding T.C.'s placement. Every CPS employee polled for this lawsuit knew that T.C. was a child molester. And yet, before they had him get in the car for the drive to his sister's family home, they did not warn her. A simple precaution could have saved a young man from a federal prison sentence; it would have spared the grief of an entire family. Failing to warn Ms. Hinsley was reckless at best, and CPS should not receive the benefit of immunity for such a spectacular failure.

CONCLUSION AND PRAYER FOR RELIEF

For all of the foregoing reasons, the Plaintiffs respectfully request that this Court reverse the district court's determination that qualified immunity applies here, remanding the case for further proceedings.

Dated at Bismarck, North Dakota, this 9th day of May, 2007.

_____

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CERTIFICATE OF COMPLIANCE

I, Justin Vinje, hereby certify that this brief complies with the type-volume limitations under Rule 32(a)(7)(B). I am using Corel WordPerfect for Windows 11.0 and have used Times New Roman in the font size of 14 as required. This word-processing program states that the number of words in the brief is 4,130.

_____

Justin Vinje
Attorney for the Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 9th day of May, 2007, I served a copy of the foregoing APPELLANT'S BRIEF AND ADDENDUM and APPELLANT'S APPENDIX, by placing in the U.S. Mail, upon:

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_____
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