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,

Appellant,

-vs-

STANDING ROCK CHILD PROTECTIVE SERVICES AND 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

APPELLEES' BRIEF

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

On April 6, 2005, Jessica Hinsley (Hinsley), personally and as Guardian ad litem on behalf of her minor daughter, K.M., filed an SF-95 Claim Form with the Bureau of Indian Affairs. Hinsley stated on the form that Child Protection Services (CPS) placed her step-brother, Thomas Hinsley (known as T.C.), in her home without warning her that T.C. had a history of sexually abusing young children. Hinsley further claimed that T.C. sexually abused K.M. (App. 1).

On November 15, 2005, Hinsley filed a lawsuit in the United States District Court for the District of North Dakota. The Complaint avers that "the claim was first presented to Child Protection Services pursuant to 28 U.S.C. § 2675 by letter and attachment of SF-95 dated April 6, 2005." (App. 4.)

The Complaint alleges that jurisdiction is based upon 28 U.S.C. § 1346 and/or 28 U.S.C. § 2679. Hinsley included as defendants The Standing Rock Child Protection Services and the Bureau of Indian Affairs. The only claim in the Complaint is based upon the alleged negligence of the defendants in failing to warn Hinsley that T.C. had "tendencies as a child molester." (App. 5.) Essentially, Hinsley alleged an action under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680.

In its Answer, the Federal defendants asserted the Discretionary Function

Exception, 28 U.S.C. § 2680, as an affirmative defense. (App. 14.) The United Stated filed a Motion for Summary Judgment on November 15, 2006, which asserted the Discretionary Function Exception to the Federal Tort Claims Act. (App. 18.)

On January 22, 2007, the United States District Court granted the defendants' Motion for Summary Judgment. Judgment was entered on January 22, 2007. (App. 78.) A timely Notice of Appeal was filed on February 22, 2007.[1]

Notwithstanding the plaintiff's factual allegations in her Complaint, the facts material to the Discretionary Function defense were either undisputed, or viewed in a light most favorable to Hinsley. Hence, as the District Court Stated: "Accordingly, for the purpose of this motion, the Court assumes that McLaughlin did not warn Hinsley regarding T.C.'s dangerous propensities of sexual abuse towards children." (Order Granting Defendants' Motion for Summary Judgment at 7). The duty to warn was the sole basis for Hinsley's claim of negligence as alleged in the Complaint.

The District Court correctly determined, however, that no statutes, rules, regulations or policies mandated a duty to warn when a person is released from

[1] The Notice of Appeal was filed on day 31, which would normally make an appeal untimely. Nevertheless, the parties have 60 days to file a notice of appeal since agencies of the United States are parties. See F. R. Civ. P. 4.

protection of the Child Protective Services. It was undisputed that on August 20, 2004, the Standing Rock Tribal Court issued an Order relieving Child Protective Services of the custody, control and supervision of Hinsley's, half-brother, T.C. The District Court also correctly applied the presumption that the employee's acts were grounded in policy. Hinsley did not contest this aspect of the discretionary function analysis. The District Court stated that: "Hinsley has not addressed the second step of the discretionary function exception analysis, and has offered no facts challenging the policy-based nature of the decision to warn" (Order Granting Defendants' Motion for Summary Judgment at 9).

In sum, the District Court considered a narrow set of facts material to the Discretionary Function Exception to the Federal Tort Claims Act. These facts are undisputed.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE DISCRETIONARY FUNCTION EXCEPTION TO LIABILITY UNDER THE FTCA BARRED HINSLEY'S CLAIMS.

A. Standard of Review.

On appeal, the standard of review of the District Court's decision regarding whether it possessed subject matter jurisdiction depends on whether the District

Court's conclusion was based on disputed or undisputed facts. See Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990). If the District Court's decision to dismiss was based on the Complaint alone, or on the Complaint supplemented by undisputed facts evidenced in the record, this Court's review is 'limited to determining whether the district court's application of the law is correct and, if the decision is based on undisputed facts, whether those facts are indeed undisputed.' Osborn, 918 F.2d at 730 (citations omitted); Appley Brothers v. United States, 164 F.3d 1164, 1169 (8th Cir. 1999).

In this case, the jurisdictional question centers on the discretionary function exception to liability under the FTCA. The District Court reviewed the pleadings and evidence proffered by the parties, and concluded that the discretionary function exception barred Hinsley's claims and causes of action. The operative facts on which it relied were undisputed. Accordingly, this Court is tasked with determining "whether those facts are indeed undisputed," and reviewing the District Court's application of the law de novo. Appley, 164 F.3d at 1169 (citation omitted).

B. The District Court correctly held that the Discretionary Function Exception to liability under the FTCA barred Hinsley's claims.

The United States, as sovereign, is immune from suit unless it waives its

immunity and consents to be sued. United States v. Dalm, 494 U.S. 596, 608 (1990); Miller v. Tony and Susan Alamo Foundation, 134 F.3d 910, 915 (8th Cir. 1998). "This consent must be unequivocally expressed in statutory text, and the scope of a sovereign immunity waiver is strictly construed in favor of the sovereign." Miller, 134 F.3d at 915 (citations omitted). The "party bringing a cause of action against the federal government bears the burden of demonstrating an unequivocal waiver of immunity." Bacon v. United States, 661 F. Supp. 8, 10 (E.D. Mo. 1986), aff'd, 810 F.2d 827 (8th Cir. 1987); Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990); Kirchmann v. United States, 8 F.3d 1273, 1277 (8th Cir. 1993); McElroy v. United States, 861 F. Supp. 585, 592 n.12 (W.D. Tex. 1994) ("Gaubert implies the burden rests on the tort plaintiff to show why the conduct of the government agency or employee is not protected under the exception." (citation omitted)).

The FTCA is a limited waiver of sovereign immunity with respect to tort claims against the United States, subject to substantive exceptions. 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). Section 2680 of Title 28 to the United States Code enumerates exceptions to the FTCA. If any of these exceptions apply, a court hearing a tort claim against the United States lacks subject matter

jurisdiction since sovereign immunity has not been waived.

Section 2680 provides, in pertinent part, that:

> The provisions of this chapter and section 1346(b) of this title shall not apply to --
>
> (a) Any claim . . . *based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*

28 U.S.C. § 2680(a) (emphasis added).

The purpose of the discretionary function exception, is to "prevent judicial 'second-guessing' of the legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984). This is essential as courts are not equipped to investigate and weigh factors which enter into the administrative decision-making process. Payton v. United States, 679 F.2d 475, 487 (5th Cir. 1982). The exception "'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" Dykstra v. United States Bureau of Prisons, 140 F.3d 791, 795 (8th Cir. 1998) (quoting Varig Airlines, 467 U.S. at 808).

C. The decision to warn involved an element of choice since no statutes, rules, regulations or policies limited the discretion of CPS.

As dictated by United States v. Gaubert, 499 U.S. 315, 322-23 (1991), Courts must employ a two-tier test in analyzing the United States' challenge to Hinsley's subject matter jurisdiction allegations. First, Courts must inquire whether the acts and/or omissions involved "an element of judgment or choice." Berkovitz v. United States, 486 U.S. 531, 536 (1988); Gaubert, 499 U.S. at 322. The discretionary function exception does not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. Berkovitz, 486 U.S. at 536. "In this event, the employee has no rightful option but to adhere to the directive. And, if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." Berkovitz, 486 U.S. at 536.

Here, the Federal Defendants are not aware of any statutes, rules, regulations or policies which mandate a warning about T.C.'s propensities to the public or a third party. By virtue of a Tribal Court Order, T.C. had been discharged on August 20, 2004, and was no longer under the supervision or jurisdiction of Child Protection Services. The Court Order reads as follows:

ORDERED

1. Child Protection Services is hereby relieved of care, custody, control/supervision over the minor child.
2. The minor child will reach the age of majority in two days, and thereafter will no longer be subject to the jurisdiction of the Children's Court, and for all intents and purposes, shall be deemed an adult.
3. This order is a final order of the court and as such, is subject to appeal as set forth in the Standing Rock Code of Justice.

(App. 48).

The decision to warn was completely discretionary.

The plaintiff proffered no statutes, rules, regulations or policies on point, guiding or limiting the discretion of the Child Protection Services under the facts presented here. It was her burden to do so. See Johnson v. United States, 47 F.Supp.2d 1075, 1080 (S.D. Ind. 1999) ("[I]n the context of a motion to dismiss based on the discretionary function exception, a complaint 'must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime,' focusing not on the actor's subjective intent, 'but on the nature of the actions taken and on whether they are susceptible to policy analysis.' Plaintiffs in this action have failed to link their claims with any facts or specific regulatory or policy guidelines that would call into doubt the discretionary nature of the Marshals'

actions."); ALX El Dorando, Inc. v. Southwest Savings and Loan Assoc./FSLIC, 36 F.3d 409, 411-12 (5th Cir. 1994) (plaintiff failed to allege a claim sufficient to survive a motion to dismiss based on the discretionary function exception because they failed "to point to even one relevant mandatory limitation on that statutory discretion").

The District Court correctly applied the first tier of the Discretionary Function Exception. In its decision, the District Court resolved all factual issues in favor of Hinsley. The only disputed fact was whether Child Protective Services had given Hinsley a warning about T.C.'s history. The District Court viewed this fact in a light most favorable to Hinsley. It concluded: "Accordingly, for the purpose of this motion, the Court assumes that McLaughlin did not warn Hinsley regarding T.C.'s dangerous propensities of sexual abuse towards children." (Order Granting Defendants' Motion for Summary Judgment at 7). Under a Discretionary Function analysis, the foregoing fact was nevertheless non-material to the summary judgment motion.

The only material question under the first tier was whether any statutes, rules, regulations or policies mandated a warning. Neither party produced any regulation mandating a warning. The District Court also stated that it was also unaware of any regulations or statutes mandating a duty to warn:

> The Court concludes that in the absence of any specific statute, rule, regulation, or policy which mandates a warning to third persons, the actions of Child Protective Services' employees must be considered a product of judgment or choice. There are no federal or state statutes, rules, regulations, or policies which specifically prescribe a course of action for the employee to follow. The Court finds that Child Protective Services' employees acted within their discretion in determining whether there was a need to warn third persons of T.C.'s dangerous propensities and, if so, the nature and extent of any such warning. Therefore, the first step of the discretionary function analysis is satisfied.

(Order Granting Defendants' Motion for Summary Judgment at 8).

D. The decision to warn was susceptible to a policy analysis and is the kind of choice that the discretionary function exception was designed to shield.

The second tier of the discretionary function analysis is whether the choice or judgment is "of the kind that the discretionary function exception was designed to shield." Berkovitz, 486 U.S. at 536. To be protected, the choice or judgment must be based on "considerations of public policy." Id. at 537; Gaubert, 499 U.S. at 323. Although the Supreme Court has opined that "decisions grounded in social, economic and political policy" are protected under the discretionary function exception, there are no rigid specifications regarding what decisions qualify under these categories. See Gaubert, 499 U.S. at 323. However, some broad principles articulated by courts clarify the nature of this requirement and the scope of the inquiry.

First, to fulfill the intent of the exception, "policy" should be defined expansively to include the vast array of considerations weighed in agency decision-making. As the Supreme Court in Dalehite noted, "[w]here there is room for policy judgment and decision there is discretion." Dalehite v. United States, 346 U.S. 15, 36 (1953). For example, the exception includes "more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." Dalehite, 346 U.S. at 35-36. The Supreme Court has explained, however, that "[d]iscretionary conduct is not confined to the policy or planning level," but includes day-to-day management of agency affairs which "regularly requires judgment as to which of a range of permissible courses is the wisest." Gaubert, 499 U.S. at 325. Further, "the fact that determinations are made at a relatively low level does not prevent the applicability of the exception." Layton v. United States, 984 F.2d 1496, 1500 (8th Cir. 1993), cert. denied, 510 U.S. 877 (1993) (citation omitted). Also, the discretionary function exemption may apply regardless of whether the Government is acting in a regulatory, proprietary or traditionally non-governmental role. See Jurzec v. American Motors Corp., 856 F.2d 1116, 1118 (8th Cir. 1988). "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given

case." Varig Airlines, 467 U.S. at 813; Berkovitz, 486 U.S. at 536. "[T]he basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability." Varig Airlines, 467 U.S. at 813.

The issue in the second tier analysis is not whether a particular actor actually balanced social, economic or political considerations, but whether the challenged conduct were "susceptible to policy analysis." Gaubert, 499 U.S. at 325. As the Supreme Court explained, the "focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." Id. (footnote omitted). Thus, evidence of an actual policy decision is not necessary. C.R.S. by D.B.S. v. United States, 11 F.3d 791, 796 (8th Cir. 1993) ("A decision, however, need not involve conscious consideration of policy factors by the government agent." (citing Gaubert, 499 U.S. at 325-26)); Kiehn v. United States, 984 F.2d 1100, 1105 (10th Cir. 1993) (concluding that "lack of record evidence describing an analysis of public policy factors in the NPS decision not to post warnings is immaterial."); Allen v. United States, 816 F.2d 1417, 1422 n. 5 (10th Cir. 1987), cert. denied, 484 U.S. 1004

(1988) ("It is also irrelevant whether the alleged failure to warn was a matter of 'deliberate choice,' or a mere oversight."); Elder v. United States, 312 F.3d 1172, 1182 (10th Cir. 2002) ("Application of Berkovitz's second prong does not require proof of the thought processes of the pertinent decision makers. On the contrary, 'courts should not inquire into the actual state of mind or decision making process of federal officials charged with performing discretionary functions.'" (citations omitted)).

Courts must assume that the discretionary decisions made by the agency were grounded in public policy. See Gaubert, 499 U.S. at 324 ("When established governmental policy, as expressed or *implied* by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be *presumed* that the agent's acts are grounded in policy when exercising that discretion." (emphasis added)). To overcome this presumption, Hinsley "must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. Otherwise, the plaintiff will not have met his burden of pleading facts which would establish the court's jurisdiction." Daigle v. Shell Oil Company, 972 F.2d 1527, 1542 (10th Cir. 1992) (citations omitted).

In this case, the decision to warn Hinsley was susceptible to policy analysis.

A child who is under the care of Child Protection Services has received the benefits offered by a public agency. The benefits include medical care, treatment, rehabilitative programs, education, and foster care. Child Protection Services must balance the privileged record of the juvenile with his or her future interests once released. Once a child is released from the jurisdiction of the Child Protection Services, these competing policy interests should be left to the discretion of the agency.

Hinsley proffered no facts challenging the policy-based nature of the decisions to warn and no evidence rebutting the presumption that when governmental policy permits the exercise of discretion, the acts are grounded in policy. "For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." Gaubert, 499 U.S. at 324-25. See also Dykstra v. United States Bureau of Prisons, 140 F.3d 791, 795 (8th Cir. 1998) (noting that "it is [plaintiff], not the United States, who must assert facts that show the decision was not based on policy considerations"); Chantal, 104 F.3d at 212 (looking to plaintiff/appellant to offer evidence rebutting the presumption that when governmental policy permits the exercise of discretion, the acts at issue are grounded in policy). Hinsley failed in this regard at the

District Court level.

The District Court stated that:

> Hinsley has not addressed the second step of the discretionary function exception analysis, and has offered no facts challenging the policy-based nature of the decision whether to warn. The Government essentially contends that decisions which involve a balancing of public safety issues against the need to protect and preserve a juvenile's confidential records, are decisions based on public policy considerations which are protected from tort liability by the discretionary function exception. The Court agrees.

(Order Granting Defendants' Motion for Summary Judgment at 9).

The District Court opinion is also in line with similar Discretionary Function decisions. See Demery v. U.S., 357 F3d 830, 832-33 (8th Cir. 2004) (BIA's decisions on whether and how to warn public about the danger of aeration system protected by the discretionary function exception); Moye v. United States, 735 F. Supp. 179 (E.D.N.C. 1990), (medical personnel were not liable, under the discretionary function exception to the FTCA, for the death of the father who was killed by the former patient where the father was fully aware of the former patient's dangerous propensities and had been for some time); Abernathy v. United States, 773 F.2d 184 (8th Cir. 1985) (a father, on behalf of his murdered son, argued that the government had knowledge of the attacker's violent nature and was negligent in its failure to commit him to a mental institution or to

prosecute him for a previous instance of assault and battery - discretionary function exception applied to any Department of Social Services decision on commitment to a mental institution or to any BIA decision not to prosecute the attacker for a previous incident); Sigman v. United States, 217 F.3d 785 (9th Cir. 2000). (The discretionary function exception under the FTCA applied to bar claims that the Air Force was negligent in failing to warn medical personnel at the Air Force Base of the release from military service of a serviceman who wounded and killed 27 people at the base.)

CONCLUSION

It is respectfully requested that this Court affirm the Judgment of Dismissal.

Dated this 9th day of July, 2007.

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Certificate of Compliance

The undersigned hereby certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7) and 8th Cir. R. 28A(c) in that the number of words contained in this brief is 4,599. Corel WordPerfect X3 is the name and version of the word processing software used to prepare this brief.

Pursuant to 8th Cir. R. 28A(d), I further certify that the CD-Rom provided with this brief has been scanned for viruses and that it is virus-free.

Dated this 9th day of July, 2007.

CAMERON W. HAYDEN
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Jessica Hinsley, personally, and as Guardian ad Litem for K.M., a minor,	)	
	)	Appeal No. 07-1435
Plaintiff - Appellant,	)	
	)	CERTIFICATE OF SERVICE
-vs-	)	[1:05-cv-00118 D.N.D.]
	)	
Standing Rock Child Protective Services and Bureau of Indian Affairs	)	
	)	
Defendants - Appellees.	)	

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the District of North Dakota and is a person of such age and discretion as to be competent to serve papers.

That on July 9, 2007, she served two copies of the APPELLEES' BRIEF and one computer disk containing the full text of the Brief, by placing said copies and the diskette in a postpaid envelope, with first-class postage affixed thereto, addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at Bismarck, North Dakota.

Addressee: Mr. Ralph A. Vinje
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The undersigned further certifies that on July 9, 2007, she dispatched to the Clerk, United States Court of Appeals for the Eighth Circuit, Thomas F. Eagleton Courthouse, 111 South 10th Street, St. Louis, Missouri, by Federal Express, the original and ten copies of the APPELLEES'S BRIEF and a computer disk containing the full text of the Brief.

M. Clark

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