AELE Monthly Law Journal

ISSN 1935-0007

Cite as: **2017 (4) AELE Mo. L. J. 101**

Civil Liability Law Section – April 2017

Civil Liability and Child Abuse Investigations

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❖ Introduction

Child abuse is an extremely serious problem. Vulnerable children subjected to physical or sexual abuse or to neglect are not able to take effective action to protect themselves and lack the maturity, legal rights, and resources to extricate themselves from abusive situations in their home, school, or other institutions. Abuse can occur in the family, in recreational activities such as sports, in religious centers, and in a wide variety of youth organizations, with many abusers being in a position of trust and authority over their minor victims.

The investigation of child abuse involves social workers, school personnel, medical personnel, police officers, and prosecutors. This three-part article examines some of the civil liability issues that arise in the context of such investigations, arrests, and prosecutions. In the first part, court cases involving the removal of children from

their homes, schools, or daycare centers are examined, as well as cases involving arrests and prosecution for abuse.

In part 2 next month, court cases involving police reliance on reports of abuse from doctors, parents, or others are examined, as well as cases alleging liability for failure to protect minors from abuse. In part 3 in June, cases arising concerning child abuse registries are examined, along with cases raising equal protection claims such as gender discrimination. Part 3 concludes with a presentation of some suggestions to consider, as well as some useful resources and references.

❖ Removal of Children

In instances where social workers or police reasonably believe that a child is being abused, exigent circumstances may require that they be removed from a home or school until further investigation or appropriate legal proceedings can occur. Removal of a child without such a reasonable belief, however, may violate the rights of a parent, the child, or both, and lead to potential civil liability. In cases arising in such contexts, defenses of either absolute or qualified immunity may come into play.

Hardwick v. County of Orange, #15-55563, 844 F.3d 1112 (9th Cir. 2017) is illustrative of this. In that case, a child removed from her mother's custody along with her minor sister sued the county and some of its employees, claiming that social workers maliciously used perjured testimony and fabricated evidence to secure her removal, in violation of her Fourth and Fourteenth Amendment rights to her familial relationship with her mother.

A federal appeals court upheld the denial of absolute immunity to the individual defendants, as the complaint alleged conduct well outside of social workers' legitimate roles as quasi-prosecutorial advocates presenting a case and making a discretionary decision as to whether to prosecute.

In that case, the plaintiff produced more than sufficient admissible evidence to create a genuine dispute as to whether her removal from her mother's custody violated her clearly established constitutional rights, and the defendants' case for qualified immunity from these charges was not supported by the law or the record. The use of perjured testimony and fabricated evidence in court in order to sever a child's familial bond with her mother, if true, was unconstitutional.

In *Barber v. Miller*, #15-1404, 2015 U.S. App. Lexis 22200, 2015 Fed. App. 296P (Unpub. 6th Cir.), a family member told state Children's Protective Services that a father was neglecting his son. This resulted in the agency's social worker interviewing the child at his elementary school with no court order or parental consent.

The social worker then interviewed the father, who maintained that both his marijuana use and prescription drug use were medically authorized. A second interview of the child was conducted at the school with his paternal grandmother present, but still without parental consent or a court order.

The social worker then obtained a court order placing the child in protective custody pending a hearing, and took the child from school. A judge returned the boy to his father, but ordered no more marijuana use and drug testing of the father. A federal appeals court found that the social worker was entitled to absolute and qualified immunity on claims that he interviewed the child without parental consent or a court order, allegedly stated falsehoods in the petition for the protective custody, and improperly removed the child from school.

In *Sjurset v. Button*, #13-35851, 810 F.3d 609 (9th Cir. 2015), officers who removed children from a home were entitled to qualified immunity when their belief that they had a basis for doing so was objectively reasonable, even if arguably mistaken. The case involved a man who filed a lawsuit against several officers, alleging that they improperly took his two minor children from his home without a court order or reasonable cause.

The officers maintained that they acted at the direction of employees of the state Department of Human Services (DHS), who had received reports that the man's live-in girlfriend, who was pregnant and the mother of one of the children and a legal guardian of the other, had tested positive for methamphetamine, and other drugs, and that the children might be in danger.

The undisputed facts showed that the officers were entitled to qualified immunity in removing the children. They were not incompetent in believing that they were legally authorized to act in reliance on the DHS determination that the children were in danger. Even if the officers were mistaken in their belief that they could remove the children at the direction of DHS without court authorization, their actions were objectively reasonable under the circumstances.

Objective reasonableness was also present in *Jarovits v. Monroe County Children and Youth Services*, #07-4336, 2009 U.S. App. Lexis 20875 (Unpub. 3rd Cir.), in which parents' minor children were removed from their custody by county workers after a drug raid at the home found both drugs and filthy living conditions. The parents claimed that their due process rights were violated because there was no custody hearing within 72 hours, as required by a Pennsylvania state statute, but instead a hearing four days later, which decided that the children should not be returned to them.

A federal appeals court held that the defendants were entitled to qualified immunity since it was objectively reasonable for them to believe they were acting lawfully under the circumstances presented.

- A violation of a state statute does not necessarily show a violation of federal constitutional procedural due process.

Protective custody of a minor was also justified in *Burke v County of Alameda*, #08-15658, 586 F.3d 725 (9th Cir. 2009), involving a fourteen-year old daughter who ran away from the home of her mother and stepfather. Her mother and father were divorced. When interviewed, she told an officer that her stepfather had struck her and also that he repeatedly grabbed her breasts. The officer, without contacting the father, and lacking a warrant, took the girl into protective custody.

The father, mother, and stepfather sued, claiming that the officer violated their Fourteenth Amendment right to familial association. A federal appeals court upheld summary judgment for the officer because he had a reasonable basis to belief that the girl faced imminent danger of physical harm, and the officer was entitled to qualified immunity on claims arising from his failure to contact the father. The county, however, was not entitled to summary judgment on the father's claim that the failure to contact him violated his rights.

Similarly, in *Barragan v. Landry*, #08-16790, 2010 U.S. App. Lexis 483 (Unpub. 9th Cir.), children were properly removed. In this case, parents and students claimed that a Nevada state child protection official improperly removed the students from a school during an abuse investigation.

The action was taken after the official had compiled a "significant amount" of evidence of sexual activity allegedly taking place at the school involving staff

members and students, as well as poor living conditions, inadequate medical care, the lack of supervision, and the possibility that two employees had criminal records.

The official, therefore, could have reasonably concluded that the removal of the students was justified by a concern for their safety and did not violate the Fourth Amendment. The actions also did not violate the parents' rights to family integrity under the Fourteenth Amendment, as the failure to contact them before removing the students did not violate clearly established law.

Wrongful removal of children from a home in *Watson v. City of San Jose*, #13-15019, 800 F.3d 1135 (9th Cir. 2015) resulted in an award of damages. A couple claimed that police officers had violated their rights by taking their children into protective custody without a warrant or court order. A jury awarded over $3 million in damages (including $2 million in punitive damages) and the trial judge ordered a new trial on compensatory and punitive damages, believing that the jury may have impermissibly awarded damages for injuries that would have been suffered even absent the constitutional violation.

A jury then awarded a total of $210,002, with only compensatory damages and no punitive damages awarded.

A federal appeals court found no error and upheld the reduced award, finding that the trial court could conclude that the jury in the first trial had awarded damages for emotional distress resulting from the separation from the children that was not caused by the defendant officers. Additionally, the punitive damages awarded after the first trial could have resulted from passion and prejudice rather than an assessment of what injuries the officers could properly be held responsible for.

While medical personnel, social workers, or police may be justified in removing a child based on an objectively reasonable belief of exigent circumstances of abuse, the absence of such circumstances may lead to civil liability. In *Jones v. Wang*, #12-55995, 2015 U.S. App. Lexis 16725 (9th Cir.), parents lost physical custody of their injured infant son after the mother took the child to a state university hospital seeking treatment and a medical director there suspected abuse, leading to months of proceedings before the child was returned.

A federal appeals court found that the plaintiff's version of the evidence supported a claim that the medical director seized the child, doing so without exigent circumstances, and that it was clearly established that doing so violated the

plaintiffs' constitutional rights. The defendant was not entitled, under these circumstances to state statutory immunities for those mandated to report suspected child abuse.

A contrasting case is *Doe v. Tsai*, #10-2655, 648 F.3d 584 (8th Cir. 2011), involving a woman who brought five children sleeping at her house (her minor daughter and four minor grandchildren) to the hospital. She had found blood on the underwear of her daughter and learned that the boys and girls had slept together rather than in gender-separate rooms. After she refused to consent to the sedation of the girl for purposes of a sexual assault examination, she attempted to leave with the children.

Medical staff members and police imposed a 72-hour hold on the girl and the boy suspected of assaulting her, and ultimately examinations of both children were carried out. Police and medical personnel were entitled to summary judgment on civil rights claims brought against them. The court found that they did not violate the Fourth Amendment or Fourteenth Amendment rights of the woman or the children under the circumstances.

Events from weeks before do not constitute exigent circumstances. In *Kovacic v. Cuyahoga County Dep't of Children & Family Serv*., #11-4002, 724 F.3d 687 (6th Cir. 2013), cert. denied, #10-7165, *Campbell-Ponstingle v. Kovacic*, #13-933, 134 S. Ct. 2696 (2014), a woman claimed that her rights, and those of her children, were violated when social workers, aided by police officers, used force to enter her home and remove her children.

On the issue of whether social workers were entitled to immunity with respect to Fourth and Fourteenth Amendment claims arising from the warrantless removal of children from their home, the federal appeals court held that the social workers were not entitled to absolute immunity because when the social workers removed the children from their home, they were acting in an investigative police capacity rather than as legal advocates or quasi-prosecutors.

They were not entitled to qualified immunity because incidents that occurred weeks before the children were removed could not establish exigent circumstances. Additionally, the law was clearly established that Fourth Amendment warrant requirements applied to the removal of children from their home by social workers, and no reasonable social worker could have concluded that the law permitted her to remove a child without notice or a pre-deprivation hearing where there was no

emergency.

❖ Arrests and Prosecutions for Abuse

Arrests and prosecutions for child abuse must be based on probable cause. In *Livingston v. Allegheny County*, #10-1596, 2010 U.S. App. Lexis 23339 (Unpub. 3rd Cir.), after a father was acquitted by a jury of charges that he had sexually abused his minor daughter, he filed a federal civil rights lawsuit for false arrest, malicious prosecution, and various other claims. Upholding summary judgment for the defendants, a federal appeals court rejected the argument that the investigation conducted "shocked the conscience."

While the investigation "certainly may have benefited from additional interviews and evidence collection," including information about a past accusation against the father by his other daughter that was found to be "unfounded," etc., there was still sufficient evidence of possible abuse to justify the arrest and prosecution. Both were supported by probable cause based on the daughter's accusations, and the opinions of a doctor's forensic interview of her.

Probable cause may be based on an officer's own direct observations. In *Herrera v. City of Albuquerque*, #09-2010, 589 F.3d 1064 (10th Cir. 2009), a police officer who went to a woman's home to respond to a domestic violence complaint concerning her boyfriend, who had fled, was justified in arresting her for violating a state child endangerment statute, based on her observations of the condition of the apartment, including her concerns that the woman's son could hurt himself by picking up the razor blades that were on the floor, ingesting the cigarette butts on the floor, being attacked by the pit bull in the kitchen, or drowning in the sewage that was in the bathtub

Similarly, in *Wilson v. Flynn*, #04-2491, 429 F.3d 465 (4th Cir. 2005), police officers who encountered an intoxicated man who threatened his wife, disabled her car, and refused to cooperate with being arrested and handcuffed did not act unreasonably in using physical force and mace to subdue him. They could reasonably believe, under the circumstances, that he posed a threat to his wife, children, others present, and themselves.

In this case, a North Carolina man arrested by two police officers claimed that they used excessive force against him, and sued both the officers and the town that

employed them. A federal appeals court upheld summary judgment for the officers on the basis of qualified immunity, and found that, given a finding of no violation of Fourth Amendment constitutional rights, there was no basis for the claims against the town.

The arrestee had allegedly consumed four twelve-ounce beers at his home, and when his wife came home, her teenage daughter told her that he was "drunk and tearing up the house." She took their 23-month-old child and drove to the police station for assistance, and a police officer accompanied her back to the house. Once there, after some "loud conversation" with the intoxicated man, the officer summoned another officer for backup.

The wife told one of the officers that there was a gun in the house, but that she had hidden it from her husband. The husband left the house, took a car's spark plug wires out of the vehicle his wife had been driving, put his hand on her face, and stated that she would not be "carrying my children no where." The wife told an officer that she wanted her husband arrested for domestic violence.

The arrestee allegedly refused to cooperate with being handcuffed, and a struggle ensued. The officers repeatedly told him to place his hands behind his back, but he refused to do so. During the fight, one of the officers allegedly punched the arrestee in the face, and the other officer sprayed him with mace. The arrestee later claimed that the officers stomped on his foot, punched him repeatedly, kicked him in the face and ribs, and sprayed his eyes with two cans of mace, as well as slamming his face into the fireplace screen.

At the time of the incident, however, he allegedly told health care workers immediately afterwards that he "fell against" the fireplace and "hit the fireplace screen during a fall."

The appeals court noted that it was undisputed that during the struggle between the arrestee and the officers, his mother, his son, his daughters and one of his daughter's boyfriends were also present. Further, even the arrestee conceded that all violence ceased as soon as he was in handcuffs. The arrestee was found guilty of assaulting a female and resisting arrest, but a judgment on these charges was continued, based on the arrestee entering and completing a domestic violence counseling program.

The appeals court noted that there was evidence that the arrestee had assaulted his wife, and from which a reasonable officer could "certainly conclude" that he

intended to hurt her if she did not go along with his wishes. He had been drinking, and the officers knew that there was a gun in the house, and they witnessed him disable the wife's car. Under these circumstances, his actions "cannot be dismissed as harmless," but rather demonstrated that a reasonable officer could conclude that the arrestee posed a threat to the safety of his wife, children, other onlookers, and the officers themselves.

The arrestee was actively resisting arrest, and the physical force used by the officers ceased after the handcuffing. The appeals court concluded that the officers did not act in an objectively unreasonable manner under the circumstances, and that their actions did not violate the arrestee's constitutional rights.

In another case, *Cornejo v. Bell*, #08-3069, 592 F.3d 121 (2nd Cir. 2010), cert. denied, *Cornejo v. Monn*, #09-1488., 562 U.S. 948 (2010)**,** attorney employees of a city's child welfare agency were entitled to absolute prosecutorial immunity for actions taken in connection with an investigation into the death of the plaintiff's infant son, since their function was similar to that of a prosecutor. Caseworkers involved in the case, however, acted more like investigators (which is also the role of law enforcement personnel) than prosecutors, so they could assert, at most, qualified immunity defenses, and were not entitled to absolute immunity from liability.

AELE Monthly Law Journal

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