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Civil Liability Law Section – May 2017

Civil Liability and Child Abuse Investigations

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❖ Reliance on Reports of Abuse

In taking action to protect children, police and child protective services may usually rely on reports of suspected abuse filed by medical personnel, school authorities, and others. In assessing whether actions taken for the purposes of protecting a child against the danger of abuse are reasonable, courts generally acknowledge the need for fairly broad discretion.

In *V.S. v. Muhammad*, #08-5157, 595 F.3d 426 (2nd Cir. 2010), a New York mother claimed that city employees had violated her rights and the rights of her infant child in taking actions accusing her of child abuse.

Rejecting these claims, despite the fact that the child abuse allegations were subsequently withdrawn, a federal appeals court found that a diagnosis of shaken baby syndrome by two doctors provided investigating personnel with adequate probable cause to initiate both custody removal and child abuse proceedings.

Even if the personnel involved had been aware of one doctor's alleged reputation, which included accusations that he overdiagnosed child abuse, it still would not have made it unreasonable for them to rely on her diagnosis in taking these steps. The child had been brought to the hospital with a swollen leg and was diagnosed with a fractured femur.

Medical personnel subsequently submitted a second report stating that the child also had a frontal skull fracture and old and new retinal hemorrhages. While such injuries could be caused by accidental falls as well as abuse, and the allegations of abuse were ultimately withdrawn after further investigation, it was not unreasonable under these circumstances to take initial actions to try to protect the child from abuse relying on a doctor's diagnosis. The city employees were entitled to qualified immunity from liability.

Similarly, in *Mueller v. Auker*, #07-35554, 576 F.3d 979 (9th Cir. 2009), a police detective was entitled to qualified immunity on a father's claim that his procedural due process rights were violated when the detective, acting on doctors' advice, without prior notice to the father, temporarily took the father's infant daughter into custody in order to provide the child with diagnostic tests and treatment.

The mother had brought the infant to the hospital. A federal appeals court found that there had been a genuine issue of fact as to whether or not the infant had been in imminent danger when she was removed from her mother's custody.

It was not clearly established, at the time of the incident, that the detective was legally required to provide pre-deprivation notice to an absent parent as well as to the parent at the hospital. Any right to post-deprivation notice that the father had was satisfied by one he received from a child protective services agency.

Reports of signs of possible abuse filed by school authorities, combined with a child's own statements provided an acceptable basis for protective actions in *Springer v. Placer County*, #08-15392, 338 Fed.Appx. 587, 2009 U.S. App. Lexis 13112 (Unpub. 9th Cir.). After school officials saw red marks on a boy's nose, they called child protective services and a social worker took the child into custody. The

child stated that he had been hit and pinched by his father and was afraid to go home, so he was placed into a child receiving home rather than allowed to go home on the school bus.

The boy's parents filed a federal civil rights lawsuit for violation of their son's Fourth Amendment rights and violation of their own Fourteenth Amendment rights to familial association. Under these circumstances, and given the very short time period within which to decide, a federal appeals court found, the social worker could have reasonably believed that her actions were lawful and needed to protect the boy against the danger of serious bodily harm. Even if these actions did violate the parents' rights, the social worker was entitled to qualified immunity.

Reports of possible abuse by family members or other eyewitnesses to alleged abusive actions may also reasonably be relied on. See *Crosset v. Marquette*, #C-060148, 2007-Ohio-550, 2007 Ohio App. Lexis 508 (1st Dist.), holding that a police officer had probable cause to arrest a husband for allegedly striking his daughter above her eye, based on a report by his wife.

❖ Failure to Protect

What about liability for failure to take action to protect children against suspected abuse? In general, the U.S. Supreme Court has held, there is no federal due process constitutional requirement to provide adequate protection against violence by private third parties. *DeShaney v. Winnebago County Dep't of Social Services*, #87-154, 489 U.S. 189 (1989).

An exception to the general rule has occasionally been found where the officers' actions or failure to act have arguably either created or enhanced the danger to the ultimate crime victim. This is often referred to by the courts as the "state-created danger" doctrine.

The landmark *DeShaney* case involved a child who was subjected to a series of beatings by his father, with whom he lived. A county department of social services and several of its social workers, received complaints that the child was being abused by his father, and took various steps to protect him; they did not, however, act to remove him from his father's custody. The father finally beat him so severely that he suffered permanent brain damage, and was rendered profoundly retarded. The child and his mother sued.

The Court ruled that a state's failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause, because it imposes no duty on the state to provide members of the general public with adequate protective services.

The Due Process Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security; while it forbids the state itself to deprive individuals of life, liberty, and property without due process of law. Its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

The Court further stated that there is no merit to the argument that the state's knowledge of the child's danger and expressions of willingness to protect him against that danger established a "special relationship" giving rise to an affirmative constitutional duty to protect.

While certain "special relationships" created or assumed by the state with respect to particular individuals may give rise to an affirmative duty, enforceable through the Due Process Clause, to provide adequate protection, the affirmative duty to protect arises not from the state's knowledge of the child's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty.

No such duty existed in this case, for the harms the child suffered did not occur while the state was holding him in its custody, but while he was in the custody of his natural father, who was in no sense a state actor.

While the state may have been aware of the dangers that he faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them, such as by creating or enhancing the danger. Under these circumstances, the Due Process Clause did not impose upon the state an affirmative duty to provide petitioner with adequate protection.

The Court acknowledged that, by voluntarily undertaking to provide a child with protection against a danger it played no part in creating, the state may have acquired a duty under state tort law to provide him with adequate protection against that danger. But the Due Process Clause does not transform every tort committed by a state actor into a constitutional violation.

In *Town of Castle Rock v. Gonzales*, #04-278, 545 U.S. 748 (2005), the U.S. Supreme Court rejected a claim that a woman granted a restraining order against her estranged husband had a constitutionally protected due process property interest in having police enforce it. She alleged that the failure of police to do so resulted in the murder of her three minor daughters by her husband while violating the order.

The Court found that the "benefit" of having such a restraining order enforced by police was not a protected property interest, rejecting the argument that Colorado, in passing its laws concerning restraining orders had created such an entitlement to the enforcement of the order.

A true "mandate" of police action, the Court ruled, would require "some stronger indication" from the Colorado legislature than "shall use every reasonable means to enforce a restraining order." This case is discussed in more detail in Civil Liability and Domestic Violence Calls -- Part One, 2008 (5) AELE Mo. L.J. 101.

[AELE, which publishes this journal, joined an amicus brief of black and women police officers filed in the *Town of Castle Rock v. Gonzales* case discussed above, supporting the civil rights suit brought against the town for the lack of police response to the mother's complaint that her estranged husband had the children, was in violation of a court order, and that harm might occur.]

[AELE supported the International Association of Chiefs of Police (IACP) Model Domestic Violence Policy and disagreed with the Town that they owed no legal duty to protect the children or to enforce the court order. That amicus brief, and the appendix, which contains the IACP Model Policy, are available on-line. The appendix also contains an IACP National Law Enforcement Policy Center Concepts and Issues Paper on Domestic Violence.]

Officers typically must exercise discretion when determining which potential victims to protect or which particular avenues of protection to pursue, and will ordinarily not be held liable for making those decisions. In *Hudson v. Hudson*, #05-6575, 475 F.3d 741 (6th Cir. 2007), the court ruled that police officers were entitled to qualified immunity for allegedly failing to prevent the murder of a son by his father, despite repeated calls to the police and the existence of a protective order, since the officers had discretion as to what actions to take in enforcing the protective order issued under Tennessee state law.

In *Starr v. Price*, #E3:03 CV 636, 385 F. Supp. 2d 502 (M.D. Pa. 2005), it was held that law enforcement agencies were not liable for the deaths of a mother and son shot and killed by their estranged husband and father, whose gun, previously taken away when officers responded to a domestic violence call, was subsequently returned to him and then used to shoot them.

First, the estranged husband/father had access to another gun in any event, and secondly, the murder victims had no constitutionally protected property interest, protected by the due process clause of the Fourteenth Amendment, to enforcement of a domestic violence protective order entered under Pennsylvania law.

The immediacy of the danger may be a factor that a court will look at in determining whether an officer's alleged failure to take a particular action was reasonable. In *Sheets v. Mullins*, #00-4162, 287 F.3d 581 (6th Cir. 2002), a father's murder of his infant daughter was found to be "too remote" from a sergeant's actions in responding to the mother's call reporting domestic violence four days earlier to support a claim by the mother for deprivation of her constitutional rights.

Some cases pursued under state law have found a duty to protect. In *Florence v. Town of Plainfield*, #CV-03 00695808, 849 A.2d 7 (Conn. Super. 2004), the court ruled that a woman's estate could pursue a negligence claim under Connecticut law against a town and police officers for allegedly failing to protect her and her unborn fetus from being fatally shot by her estranged boyfriend, who was the father.

The court ruled that the defendants did not have tort immunity because the decedents were identifiable persons facing imminent harm. It was alleged that the officers knew of two prior assaults and a kidnapping that the boyfriend had perpetrated against the woman, and that the woman had expressed fear for her life.

In *Ortega v. Sacramento County Dept. of Health & Human Services*, #C054262, 161 Cal. App. 4th 713, 74 Cal. Rptr. 3d 390, 2008 Cal. App. Lexis 470 (3rd Dist.), on the other hand, a minor failed to show that there was a mandatory duty under California state law to protect her from violence by her father, who stabbed her in the heart and lung. The father had previously been arrested for screaming in an uncontrollable manner in the street and around his apartment, and violently banging on a refrigerator.

Following the arrest, a urine test showed that he was under the influence of phencyclidine. Even though the ensuing investigation by a social worker was

"lousy" and failed to make a proper determination about the risk of returning the minor to her father, there was immunity from liability for the exercise of discretion under these circumstances.

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