



Fourth Circuit Finds Social Worker Has Qualified Immunity In Sex Abuse Case

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The Supreme Court in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989), considered the issue of whether a state's social services department could be held liable under the constitution when a child was beaten severely by his father and the department had knowledge of a long history of physical abuse---as a result of the beating, Joshua DeShaney was left profoundly mentally retarded. The Supreme Court answered in the negative, finding that because the child was in the custody of his father, rather than the state, and the state played no part in creating the abusive environment, although knowing the environment existed, there was no state action; thus, no constitutional violation. This ruling led to Justice Blackmun's famous "Poor Joshua!" dissent. But *DeShaney* did not answer the question of whether and under what circumstances a child who has been involuntarily removed from her home by state social workers and knowingly placed in a dangerous foster care environment may state a constitutional claim. The Fourth Circuit considered this issue in *Doe v. South Carolina Department of Social Services*, ___ F.3d ___, No. 08-2161 (4th Cir. 2010).

To say the least, the facts before the court were tragic. Jane Doe, age 4, and her brother, Kameron, age 8, were sexually abused by both their natural born parents and taken into protective custody by the South Carolina Department of Social Services ("SCDSS"). Kameron was subsequently evaluated by a psychologist who found "he posed a threat to himself and to Jane" and needed psychiatric hospitalization. The evaluation went on to say that Kameron "had a history of depression, suicidal and homicidal thoughts, and had become increasingly aggressive and hostile toward Jane." The therapist also documented "a history of sexual experimentation by Kameron and Jane with each other, possible sexual abuse, and possible intergenerational incest."

Debby Thompson was assigned to Jane and Kameron's case and she knew of the psychologist's report. Even though she knew that Kameron posed a threat to Jane, Thompson sought to keep the two together to continue the family bond. The two were placed eventually with the Johnson family for prospective adoption, but Kameron was removed from the home because he displayed sexually aggressive behavior. Jane remained with the family. Later, it

came to light that Kameron had sexually abused Jane for years, even while they were in foster care. Jane also alleged that she reported the abuse to Thompson who responded that Jane should not tell anyone of the abuse or they would never adopt her.?

As a result of the continued abuse, Jane's behavior became intolerable. According to the Johnsons, Jane cannot be left alone or trusted, they are unable to obtain any help supervising her, and they cannot leave her alone with other children for fear that she will act out sexually. Among other things, she is physically and sexually aggressive, violent towards the Johnsons and their biological children, and abusive to animals.?

The Johnsons subsequently filed suit on theirs and Jane's behalf, asserting claims under 28 U.S.C. § 1983 and the South Carolina Tort Claims Act. As to the § 1983 claim, the Johnsons argued that Thompson violated Jane's substantive due process rights under the Fourteenth Amendment by placing her in foster care settings with Kameron while knowing Kameron was sexually abusive toward her. Additionally, the Johnsons alleged that Thompson violated their substantive due process rights by failing to disclose fully Jane and Kameron's sexual history prior to Jane's adoption. Thompson argued that, as a state actor, she could not be held liable under the qualified immunity doctrine.

Saucier v. Katz, 533 U.S. 194 (2001), provided that the qualified immunity question was a two-part test: the first part of the inquiry considers whether the plaintiff alleged facts demonstrating the deprivation of a constitutional right, and the second asks whether the right was clearly established at the time of the alleged wrongdoing. In *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009), the Supreme Court modified this two-part order of battle and allowed lower courts to exercise discretion to determine which issue to consider first. The court considered first whether a constitutional right was violated. The court reasoned based on dicta from *DeShaney* and the decisions of other circuit courts that Jane had a substantive due process right to be free of abuse once she was taken into custody by the SCDSS and that SCDSS had breached its duty by being deliberately indifferent to the child's safety and security. The court limited its ruling by explaining that a violation would only arise where state officials were deliberately indifferent to known dangers.

Proceeding to the second part of the test, the court found that none of its earlier decisions, or decisions of the Supreme Court, had clearly established a "positive" substantive due process right. Thus, the court ultimately denied Jane relief on her constitutional claim.

Judge Wilkinson, while concurring in the judgment, made a vigorous consequentialist argument that the majority's finding that the Constitution "imposes upon states a 'duty to protect' children from harm by non-state actors" would ultimately harm abused children. Because the majority had expanded substantive due process rights in this context and opened the door to future § 1983 actions, in his view, states will be deterred from taking legal custody of abused children and potential foster parents will be discouraged from becoming foster parents out of fear of litigation.

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