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Legal Report

SWAN Legal Services Initiative

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Legal Training Team

Division Manager
Lauren Peters, Esq.

Training Specialists

Alyssa H. Holstay, Esq.
Shawn Sangster, Esq.
Sara Steeves, Esq.
Rachel Thiessen, Esq.

471 JPL Wick Drive
P.O. BOX 4560
Harrisburg, PA 17111
www.diakon-swan.org

lsiwarmline@diakon-swan.org



COMMONWEALTH COURT OF PENNSYLVANIA

Lancaster County Children and Youth
Social Services Agency v. DHS

Date of Decision: July 1, 2020
Citation: 1255 C.D. 2019

Holdings:

1. Mother created a reasonable likelihood of bodily injury to Child when she overdosed on heroin while alone with Child in her car.
2. Department of Human Services (DHS) erred in holding to expunge Mother's indicated report of child abuse. Order reversed and DHS directed to maintain the indicated report of child abuse on the ChildLine and Abuse Registry.

Facts and Procedural History: Lancaster County Children and Youth Social Services Agency (CYS) appealed a DHS, BHA order that granted Mother's appeal to expunge an indicated report of child abuse naming Mother as the perpetrator. The report arises from a police report that stated that Mother overdosed on heroin while in her vehicle, at a public park, with her 11-month-old buckled into his car seat in the back. The temperature that day was 90 degrees and all of the car windows were up. After investigation, CYS filed an indicated report. Mother appealed, and there was a hearing in front of an administrative law judge (ALJ) that focused on whether Child was in the car while Mother overdosed and, if so, whether that created a reasonable likelihood of bodily injury. The ALJ excluded testimony from the police officer that Father had told him that Child was in the car with Mother as hearsay. Mother and Father testified that Child was with Father in a different area of the park. The ALJ found that CYS did not provide substantial evidence that Mother was alone with Child when she overdosed and recommended expunging the report.

Issues:

1. Did Mother create a reasonable likelihood of bodily injury to Child when she overdosed on heroin?
2. Did DHS err in holding Mother's indicated report of child abuse should be expunged?

Rationale: The Court first considered the admissibility of the police officer's testimony about Father saying that Mother was alone in the car with Child at the time of the incident. The Court found that it was hearsay, but that it fit into the "excited utterance exemption." The Court reasoned that Father discovering Mother unconscious was a sudden and stressful situation for him and the state of nervous excitement continued as EMS worked on Mother and as the police officer began to question him. The Court held that DHS erred in excluding the officer's testimony. The Court then concluded that the officer's testimony can be used to meet CYS's burden to prove that Mother was alone with Child when she overdosed. Using the ALJ's determinations that the officer was credible and that Father and Mother were not, the Court found ample evidence to conclude that Mother was alone with Child when she overdosed and that it created a reasonable likelihood of bodily injury to Child.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIAP.L. v. Department of Human Services

Date of Decision: July 24, 2020

Citation: 1047 C.D.2019 (Philadelphia)

Holdings:

1. Children and Youth Services (CYS) did not demonstrate that Mother used unreasonable force, disregarded a substantial and justifiable risk, or grossly deviated from the standard of care a reasonable person would observe in her situation; therefore, criminal negligence was not proven.
2. Department of Human Services' (Department) adjudication is reversed and remanded with direction to expunge Mother's indicated report from the ChildLine and Abuse Registry

Facts and Procedural History: Mother petitioned for a review of the Department's denial of her request to expunge an indicated ChildLine report. The report stems from an incident where Mother injured Child when she used a broom handle to stop Child from jumping on the couch. Mother contends that she meant to tap child on the shoulder but she missed and hit his head causing a laceration to his scalp. CYS filed an indicated report of child abuse naming Mother as the perpetrator. Mother appealed and a hearing was conducted by an administrative law judge (ALJ) appointed by the Department's Bureau of Hearings and Appeals. The ALJ denied Mother's appeal and reasoned that corporal punishment is child abuse when the perpetrator has acted with criminal negligence. The ALJ found that because Mother struck Child with "what amounts to be a weapon," instead of her hand, that the force used was unreasonable.

Issues:

1. Did Mother act with criminal negligence?
2. Did the Department err by refusing to expunge the indicated report of child abuse?

Rationale: To begin, the Court reviewed the precedent in this area and noted that to differentiate "accident" from "abuse" the best standard is criminal negligence. ([*P.R. v. Department of Public Welfare, Office of Hearings and Appeals*, 569 Pa. 123, 801 A.2d 478, 486-87 \(2002\)](#)). Criminal negligence requires disregard of a substantial and unjustifiable risk that involves a gross deviation from the standard of care that a reasonable person would observe in the situation. (18 Pa. C.S. § 302(b)(4)). Additionally, the Court looked to 23 Pa.C.S. § 6304(d), which authorizes a parent to use reasonable force to supervise, control, and discipline a child. The Court found the Department's conclusion that corporal punishment may only be administered by hand to avoid a finding of criminal negligence has no support in the Child Services Law or in the case law and was, thus, error. Mother's testimony that she meant to tap Child's shoulder to get his attention was not discredited. The Court also considered the other children's testimony that Mother did not hit them, but rather, usually sent them to their room as punishment. The Court, therefore, concluded that CYS did not meet its burden.

Petri v. Erie Cty Children & Youth**Date of Decision:** July 17, 2020**Citation:** 2020 WL 4041552 (Erie)**Holdings:**

1. Motion to Dismiss filed by Ferris is granted. Federal claims are dismissed with prejudice, state claims are dismissed without prejudice.
2. Motion to Dismiss filed by Erie County Children and Youth (CYS) is granted.
3. Claims against Erie County CYS and the county employees are dismissed without prejudice and Petri is granted leave to file an amended complaint as to those Defendants.

Facts and Procedural History: This dispute arose in 2014 when two reports of child abuse naming Petri as the perpetrator against her children were indicated and then subsequently expunged. Petri claims that this caused her to lose custody of her children to their father, and to lose her career as a nurse. Petri, *pro se*, filed a complaint that the Court said “appears to allege” state law claims of defamation, fraud, and intentional infliction of emotional distress as well as violations of her Fourth, Eighth, and Fourteenth Amendment rights. Before the court was a Motion to Dismiss filed by Ferris, Petri’s ex-husband and father of her children, and a Motion to Dismiss filed by Erie County CYS.

Issue:

Should the defendants’ Motions to Dismiss be granted?

Rationale: First, the Court granted Ferris’s Motion to Dismiss for lack of jurisdiction because he is a private citizen and thus, not subject to a §1983 claim. Second, the Court granted Erie County CYS’s Motion to Dismiss. The Court noted that Plaintiff did not allege that any of the state court procedures were constitutionally deficient. Therefore, she has failed to state a procedural due process claim. As for the substantive due process claim, the Court pointed out that Plaintiff must show that the County employees abused their power in an arbitrary manner which “shocks the conscience.” Here, Plaintiff alleged only that the investigation was unfair because “they relied only on information provided by her ex-husband” and that the reports were subsequently expunged. The Court concluded that the facts as plead, do not rise to the level of conscience-shocking actions. Because of her *pro se* status, the Court granted Petri leave to file an amended complaint to cure deficiencies in her pleading as to the Erie County CYS and the county employees.

Did you know?

§1983 of title 42 of the U.S. Code makes a person liable for depriving another of any rights, privileges, or immunities secured by the U.S. Constitution and laws while acting under color of any statute, ordinance, regulation, or custom.

“Section 1983.” *Merriam-Webster.com Legal Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/legal/section%201983>

Guest v. Allegheny Cty

Date of Decision: July 17, 2020

Citation: 2020 WL 4041550 (Allegheny)

Holding:

Defendants' Motion to Dismiss is granted with respect to Count II and denied with respect to Count I.

Facts and Procedural History: Plaintiffs alleged that Allegheny County and a county employee violated their substantive and procedural due process rights by obtaining an Emergency Custody Authorization (ECA) under false pretenses. The county received a report about an incident of domestic violence in the Plaintiffs' home in which Husband sustained a bloody nose and during which Wife was holding a child. Both parents denied the incident. In April of 2019, the county caseworker filed a dependency petition alleging that the Guest children were without proper care or control. The petition referenced information about a 2014 domestic violence-related incident where Husband was court-ordered to complete anger management and drug and alcohol counseling. At the hearing on May 15, 2019, the Judge ordered that: "Parents have screens today [;] if positive referred [sic] for [drug and alcohol] evaluation. If any new allegations of [Intimate Partner Violence] or physical abuse allegations are received by OCYF - OCYF to obtain an ECA." The order did not state that the children should be placed in foster care if the parents did not complete the drug and alcohol screens or even if the screens came back positive. Plaintiffs went that day to have the screens. Wife's was negative and Husband was unable to provide a sample and was advised to return the following day. The tester noted all of this on the form but checked the box for "refused." That evening, the county employee obtained an ECA from a different Judge based solely on the fact that Husband had not submitted a urine sample. The children were placed into foster care. The youngest child, then two months old, was breastfed by Wife. When given formula in the foster home, the baby developed hives and required hospitalization. On May 17, 2019, at the Shelter Care Hearing, custody of the children was returned to Plaintiffs who later filed a §1983 suit. The County subsequently filed a Motion to Dismiss.

Issue: Should the defendants' Motions to Dismiss be granted?

Rationale: Defendants first asserted that the *Rooker-Feldman* doctrine¹ barred the Plaintiffs' claims. Here, the Court noted that Plaintiffs were not seeking injunctive relief overturning the ECA, but rather claimed injury as a result of Defendants' conduct and concluded that *Rooker-Feldman* does not bar jurisdiction. Next, Defendants claimed that because every Pennsylvania county is required to have a children and youth office and because these agencies have no autonomy, they should be considered "arms of the state" for Eleventh Amendment immunity purposes. The Court rejected this argument and stated that in general, counties and county agencies are not extended Eleventh Amendment immunity and, here, the fact that county commissioners establish and oversee CYS agencies make them "highly autonomous" weighing against Eleventh Amendment Immunity.

¹ The *Rooker-Feldman* doctrine stands for the proposition that "federal courts lack jurisdiction over suits that are essentially appeals from state-court judgments." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010).

Substantive Due Process Claim (Count I)

Defendants made several arguments in support of their motion to dismiss Plaintiffs' substantive due process claims.

1. *Sufficiency of Allegations*

Defendants contend that the act of seeking removal of the children based on Husband's failure to complete the drug screen was not "conscience-shocking," especially since the children were returned within two days. The Court held that given the facts here, a reasonable person could find these actions to be conscience-shocking and without a reasonable basis and, therefore, were sufficient to state a claim.

2. *Absolute Immunity*

The county employee contended that she is entitled to absolute immunity for the actions she took in this case because all her actions were taken in a prosecutorial capacity. The Court noted that the question of where to draw the line between prosecutorial and investigative functions is challenging. That Court concluded that it was premature to conclusively determine whether any of the employee's conduct was investigatory or if it was all prosecutorial. Therefore, Defendants' motion to dismiss on this basis will be denied.

3. *Qualified Immunity*

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Court found that the allegations in the Complaint, accepted as true, supported a conclusion that a reasonable person would have known that her conduct violated clearly established constitutional rights. Therefore, the Court found that the employee was not entitled to qualified immunity.

4. *Municipal Liability*

Plaintiffs alleged that the County maintained policies, practices, and customs that harmed them and pointed specifically to the fact that the employee contacted a supervisor who instructed her to proceed with the removal despite the existing circumstances. The Court concluded that accepting these allegations, as the Court must for purposes of a motion to dismiss, Plaintiffs have pleaded a basis for imposing municipal liability on Allegheny County.

Procedural Due Process Claim (Count II)

Plaintiffs alleged that their procedural due process rights were violated when the children were separated from them based upon false representations made in the application for the ECA and in the Shelter Care Application. Defendants argue that these allegations fail to state a claim for relief. First, the Court pointed out that a due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Zinerman v. Burch*, 494 U.S. 113, 126, (1990). Here, the family received a prompt hearing within 72 hours of the children's removal, and the children were returned to them. Thus, the Court holds that Count II fails to state a claim upon which relief can be granted.

SPOTLIGHT

Commonwealth v. Luster**Date of Decision:** July 6, 2020**Citation:** 2020 PA Super 153 (Allegheny)

Luster appealed from the judgment of sentence, entered in the Court of Common Pleas of Allegheny County, following his conviction for involuntary deviate sexual intercourse with a child, unlawful contact with a minor, indecent assault of a person less than 13 years of age, and endangering the welfare of children. The victim participated in a forensic interview concerning the abuse. The Commonwealth provided oral notice, during plea negotiations, one week before the trial of their intention to present video of the forensic interview under the Tender Years Hearsay Act (Act). During jury selection, the Commonwealth gave oral notice a second time. On the day of the trial, the Commonwealth provided formal written notice. While the Act does not require written notice, it does require notice “**sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.**” (42 Pa.C.S. § 5985.1(b) (emphasis added)). The Superior Court held that the trial court’s admission of Child’s hearsay was improper due to inadequate notice under the Act. The Court vacated the convictions and remanded for a new trial.

OCYF Bulletin**Special Transmittal:****Subsidized Permanent Legal Custodian- Successor****Date issued:** July 17, 2020**Effective date:** December 28, 2015

This transmittal provides information related to the process of naming a successor legal guardian and transferring the subsidy to a named successor. PA’s Act 92 of 2015 implemented several provisions of the federal Preventing Sex Trafficking and Strengthening Families Act of 2014. The provisions related to Subsidized Permanent Legal Custodianship (SPLC) are located in the Human Services code in section 1303.2. The law allows SPLC guardians the opportunity to name a successor to care for the child in the event of their incapacity or death. Naming a successor is voluntary. When a successor candidate is named, the county children and youth agency (CCYA) must exercise due diligence to ascertain if the candidate meets the requirements under 23 Pa.C.S. §6344 (relating to employment in child-care and approval as a resource parent). Upon the death or incapacitation of the SPLC guardian, the successor must obtain all relevant clearances and obtain legal custody of the child prior to the transfer of the subsidy. The successor must be willing to follow the original SPLC agreement and must make a long-term commitment to caring for the child. Since all of these steps may take time, there is the ability to make retroactive payments back to the date of the custody filing. The successor may also be reimbursed up to \$2,000 per child for non-recurring actual costs related to obtaining legal custodianship. CCYAs should revise their annual contact forms to include information about the Successor, then any changes and/or additions must be included in an amendment to the existing SPLC agreement.

Pennsylvania Legislation

Act 59: Training on Child Abuse for Magisterial District Judges and Police Officers

Magisterial District Justices are now mandated to complete a course in the identification and reporting of suspected child abuse and court proceedings involving children as part of their annual continuing education requirement. (42 Pa.C.S. §3118(a)(1)). Additionally, Act 59 mandates police officers to receive training specific to: (1) recognizing mental illness, intellectual disability, and autism, (2) recognizing and reporting suspected child abuse, and (3) the efficacy of conducting forensic interviewing of child abuse victims within the setting of a children's advocacy center. (53 Pa.C.S. §§ 2164(1.1), (17) and (18)). Act 59 was signed into law on July 14, 2020 and the additional training requirements are effective in 60 days.

Act 65: Mental Health Age of Consent

Act 65 seeks to clarify questions of consent for mental health treatment for minors and the release of related medical records. Under this act:

- A parent or guardian may consent to voluntary *inpatient* mental health treatment for a minor, even over the minor's objection, as long as the treatment is determined to be necessary by a physician, psychologist, or other mental health professional.
- A parent or guardian may consent to *outpatient* mental health treatment for a minor, even over the minor's objection.
- A minor, who is at least 14 years old, can consent to their own inpatient and outpatient treatment even without parental consent.
- A minor or another parent or guardian cannot abrogate consent provided by a parent or guardian on the minor's behalf, nor can a parent or guardian abrogate a minor's consent to their own treatment.

Act 65 also aims to clear up some questions regarding whose consent is needed to release a minor's medical records related to mental health treatment.

- When a parent or guardian has consented to the treatment they can:
 - Consent to the release of records to the current mental health provider.
 - ◆ This may include past treatments to which the minor consented if deemed pertinent by the current provider.
 - Consent to the release of records to the primary care provider if the current mental health provider does not believe the release would be detrimental to the minor.
 - Obtain records and information necessary to provide consent for treatment including symptoms, conditions to be treated, medications and other treatments to be provided, risks and benefits and expected results.
- Outside of the above-outlined exceptions, minors shall control the release of their own mental health treatment record to the extent allowed by law.

Rule Changes

Amendments to Pa. R.C.P. 1915.3, 1915.5 and 1915.15

Several Pennsylvania Rules of Civil Procedure pertaining to custody filings have been amended to be consistent with Act 21 of 2018. Act 21 added a new class of third-party standing to individuals seeking custody of a child whose parents do not have care and control of the child. Please note that this does not apply if a juvenile dependency proceeding has been initiated or if there is a permanent legal custodian. (See 23 Pa.C.S. §§ 5324-5325).