

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JAN 23 2001

JAMES R. MANSPEAKER
CLERK

Civil Action No. 00 - D - 1285

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES and LESLIE GONZALES,

Plaintiff,

v.

CITY OF CASTLE ROCK, and AARON AHLFINGER, R.S. BRING, and MARC RUISI,
Officers of the City of Castle Rock Police Department,

Defendants.

ORDER

THIS MATTER is before the Court on Defendants' Motion to Dismiss filed August 7, 2000. The Motion urges that the causes of action contained in the Complaint fail to state claims upon which relief can be granted. I held a hearing on this Motion on Thursday, January 4, 2001 and took the matter under advisement.

FACTUAL BACKGROUND

Plaintiff Jessica Gonzales is the mother of deceased minor children Rebecca, Katheryn and Leslie Gonzales. In May 1999 Plaintiff obtained a temporary restraining order ("TRO") against her estranged husband, Simon Gonzales, which prevented him from molesting or disturbing the peace of Plaintiff or her three children. The TRO was served on Simon and, by stipulation, was made permanent as of June 4, 1999. The permanent order provided Simon with certain "parenting time" with the children, which included a pre-arranged, advance notice mid-week dinner visit.

On Tuesday, June 22, 1999 Simon Gonzales abducted the three children from Plaintiff's home. No advance notice or arrangements were made for Simon to have "parenting time" with the children that evening. Plaintiff called the Castle Rock Police Department for assistance at approximately 7:30 p.m. Two police officers, Defendants Brink and Ruisi were dispatched to Plaintiff's home. She showed them the TRO, told them Simon had taken the children, and requested that the TRO be enforced. Brink and Ruisi told Plaintiff there was nothing that they could do, and suggested that Plaintiff contact the Police Department if the children were not home by 10:00 p.m.

At approximately 8:30 p.m., Plaintiff confirmed that Simon Gonzales had the children by contacting him on his cellular telephone. Simon told Plaintiff that he and the children were at Elitch Gardens amusement park in Denver. Plaintiff called the Police Department and requested that Brink have someone check for Simon or his vehicle at Elitch Gardens. Brink told the Plaintiff to wait until 10:00 p.m. At 10:10 p.m. Plaintiff again called the Police Department to report that her children had not been returned. She then went to Simon's apartment and called the Police Department. She was told to wait there for an officer, but none came. At approximately 12:50 a.m. Plaintiff went to the Police Station and filled out an incident report.

Over an eight hour period, Plaintiff repeatedly asked Defendants to enforce the TRO and retrieve the children. Defendants repeatedly told Plaintiff to wait and did nothing to enforce the TRO or locate the children. At approximately 3:20 a.m. on June 23, 1999, Simon drove to the Castle Rock police station and opened fire on the station

with a semi-automatic handgun. Police shot and killed Simon. The three girls were found murdered in the cab of Simon's truck.

SUMMARY OF COMPLAINT ALLEGATIONS

Plaintiff's Complaint alleges due process and 42 U.S.C. §1983 violations stemming from the alleged failure of Defendants City of Castle Rock and police officers in the Castle Rock Police Department to enforce the TRO against Simon. Plaintiff argues that the TRO created a property right under the Fourteenth Amendment, and in turn created a constitutional duty on behalf of Defendants to enforce the TRO. Plaintiff further argues that section 18-6-803.5(3) of the Colorado Revised Code required the Defendants to use "every reasonable means to enforce" the TRO and "arrest" or "seek a warrant for the arrest of" Simon Gonzales for his violations of the TRO. COLO. REV. STAT. § 18-6-803.5(3) (1999). Plaintiff alleges that Defendants failure to enforce the TRO constituted a denial of both her substantive and procedural due process rights pursuant to 42 U.S.C. §1983.

STANDARD OF REVIEW

In deciding a Motion to Dismiss, the court "must accept all the well-pleaded allegations as true and must construe them in the light most favorable to the plaintiff." David v. City and County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996), cert. denied, 118 S.Ct. 157 (1997) (quoting Gagan v. Norton, 35 F.3d 1473, 1474 n. 1 (10th Cir. 1994)). "A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only 'if the plaintiff can prove no set of facts to support a claim for relief.'" Id. (quoting Jojoia v. Chavez, 54 F.3d 488, 490 (10th Cir. 1995)).

Defendants seek dismissal of the Complaint for failure to state a claim for relief pursuant to Rule 12(b)(6). The individual Defendants also seek dismissal arguing that they are entitled to qualified immunity; Castle Rock seeks dismissal arguing that Plaintiff has failed to allege facts sufficient to support a municipal liability claim.

DUE PROCESS CLAIMS

To sustain an action under 42 U.S.C. § 1983 a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law and (2) that the conduct deprived the plaintiff of a constitutional right. See Blum v. Yaretsky, 457 U.S. 991, 1002 (1982). The parties do not dispute that Defendants were acting under color of state law. The issue is whether their conduct deprived Plaintiff of a constitutional right.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Plaintiff contends that § 14-10-108 of the Colorado Revised Statutes is the basis for a property interest which is protected by due process. Under § 14-10-108, a party to proceedings for dissolution of marriage may obtain a temporary order "[e]njoining a party from molesting or disturbing the peace of the other party or of any child." Plaintiff sought and obtained such an order in this case (the TRO). The TRO was made permanent and served on Simon Gonzales on June 4, 1999.

The means to enforce a TRO issued pursuant to § 14-10-108 is established by § 18-6-803.5(3) of the Colorado Revised Statutes which provides that

(a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every

reasonable means to enforce a restraining order. (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a restraining order; and (II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.

COLO. REV. STAT. § 18-6-803.5(3) (1999).

Even when there is a protectable property interest, the Due Process Clause does not generally confer an "affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago, 489 U.S. 189, 196 (1989)

Substantive Due Process

Substantive Due Process protects people from arbitrary and unreasonable action that deprives them of life, liberty or property. Plaintiff contends that the State,¹ by its inaction, arbitrarily deprived her of a property interest created by the TRO. The starting point for analyzing the validity of Plaintiff's substantive due process claim is DeShaney v. Winnebago, where the Supreme Court held that the Constitution only

imposes upon the State affirmative duties of care and protection with respect to particular individuals when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs.

Id. at 198 & 200. Even if the State knows of an individual's predicament or expresses intent to help an individual, its failure to protect does not violate substantive due

¹As used here, the term "State" refers generically to state and local governmental entities and their agents.

process. Id. at 198. Instead, "[t]he affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [an individual's] freedom to act on his own behalf." Id.

In this case, it is clear that the State imposed no such limitation. The harms suffered by Plaintiff and her children occurred not while they were in the State's custody, but instead, while the children were in the custody of their father. As in DeShaney, "[w]hile the State may have been aware of the dangers that [the children] faced in the free world, it played no part in their creation, nor did it do anything to render [them] any more vulnerable to them." Id. at 201.

The Tenth Circuit has recognized two exceptions to the general DeShaney rule: (1) the special-relationship doctrine, and (2) the danger-creation theory. Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir.1995). Consistent with DeShaney, both exceptions apply only where the State creates the danger. The special-relationship doctrine "requires that a plaintiff must show involuntary restraint by the government . . . if there is no custodial relationship there can be no constitutional duty." DeAnzosa v. City and County of Denver, 222 F.3d 1229, 1234 (10th Cir. 2000); see also Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir.1993) (citations omitted).

Under the danger creation theory, a state may be liable for an individual's safety only "if it created the danger that harmed the individual" Uhlrig, 64 F.3d at 572. Plaintiff must establish that:

- (1) [Plaintiff and her children] were members of a limited and specifically definable group;
- (2) Defendants' conduct put [Plaintiff and her children] at substantial risk of serious,

- immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

Id. at 574. To satisfy the "shock the conscience" standard, plaintiff must demonstrate "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." Id. at 574. This requires more than a showing that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. See id. A plaintiff must show that defendants' affirmative acts subjected plaintiff to the injury-causing danger. See Graham v. Independent School Dist., No. 1-89, 22 F.3d 991, 995 (10th Cir.1994).

"Inaction by the state in the face of a known danger is not enough . . . the state must have limited in some way the liberty of a citizen to act on his own behalf." Id. at 994 (quoting Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir.1993)), cert. denied, 510 U.S. 947 (1993). Moreover, "foreseeability [on the part of the state] cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship." Id. at 994.

Applying the foregoing principles to the facts as alleged in the Complaint, I find that Plaintiff has failed to state a claim. Plaintiff does not allege that Defendants affirmatively created the danger which was posed to Plaintiff and her children nor does she allege a custodial relationship. Instead, Plaintiff alleges Defendants' inaction and failure to enforce the TRO as the basis for her claim. Inaction, however, is not enough. Plaintiff argues that reckless inattention to the TRO and enforcement mechanism in

§ 18-6-803.5(3) created the possibility of danger to she and her children. Such facts do not rise to the level of conscience-shocking affirmative conduct or indifference. The childrens' deaths are simply "too remote a consequence of [defendants'] action to hold them responsible under the federal civil rights law." Graham, 22 F.3d at 995 (quotation omitted). Accordingly, Plaintiff has not alleged facts which support a violation of the substantive due process clause and I will GRANT the Motion to Dismiss as to Plaintiff's substantive due process claim.

Procedural Due Process

Procedural Due Process protects individuals from deprivation of life, liberty or property without appropriate procedural safeguards. See Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).² Plaintiff argues that the State, by failing to enforce the TRO as required by § 18-6-803.5(3), deprived her of the property interest created by the TRO without proper procedure such as notice and/or a hearing to vacate the TRO.

"A property interest protected by the due process clause results from a legitimate claim of entitlement created and defined 'by existing rules or understandings that stem

²Plaintiff argues that DeShaney governs both the substantive and procedural due process claims. The Court in DeShaney, however, explicitly limited its holding to substantive due process. 489 U.S. 189, 195 (1989)(finding that the claim at issue was "one invoking the substantive rather than the procedural Due Process Clause"). Plaintiff in DeShaney sought to raise a procedural due process argument, but the Court expressly declined to consider it because it was untimely. Id. at 195 n2. As a result, while I acknowledge that the Court's opinion in DeShaney is somewhat confusing in that it at some points discusses "due process" without explicit limitation to the substantive component, it would be inapposite for me to extend DeShaney to procedural due process given that the Court explicitly declined to examine procedural due process issues.

from an independent source such as state law." Jacobs, Wisconsin & Jacobs v. City of Lawrence, 927 F.2d 1111, 1116 (10th Cir. 1991) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). Whether § 13-6-303.5(3) gives rise to a legitimate claim of entitlement depends upon whether "the regulatory language [is] so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process." Cosco v. Uphoff, 195 F.3d 1221, 1223 (10th Cir. 1999).³

³Plaintiff urges the Court to follow Siddle v. City of Cambridge, 761 F. Supp. 503 (S.D. Ohio 1991), and Coffman v. Wilson Police Dept., 739 F. Supp. 257 (E.D. Pa. 1990) to find that the TRO and enforcement statute created within Plaintiff a protectable property interest. In Siddle, the District Court in the Southern District of Ohio found that a protective order, such as the one in this case, "creates a property right which incurs a duty on the part of the government." 761 F. Supp. at 509. "[T]he government's failure to adequately perform this duty may constitute a denial of a right to procedural due process." Id. The Court in Coffman reached the same conclusion by determining that protective orders create special relationships which, when served on the police department, "create[] a Roth property interest that could only be removed through due process of law (here, presumably a hearing on the motion to vacate protective order)." 739 F. Supp. at 265.

The 10th Circuit has not recognized the reasoning in either Siddle or Coffman. No Colorado law analogous to Siddle and Coffman holds that a valid protective order creates a property interest that can only be removed through due process of law. Instead, Cosco v. Uphoff, 195 F.3d 1221, 1223 (10th Cir. 1999), governs the determination of whether a statute creates a protectable interest within an individual such that the individual's interest is afforded procedural due process protection.

Moreover, I note that this case is factually distinguishable from both Siddle and Coffman. In Siddle, the very statute authorizing the protective order provided the enforcement mechanism, specifically, that an "officer of a law enforcement agency shall enforce a protection order." 761 F. Supp. at 508-09; OHIO REV. CODE § 3113.31 (1991). By contrast, Colorado has separate statutes which authorize a protective order and then provide an enforcement mechanism. The Coffman Court found that a property interest was created where the protective order was "properly served upon the [Police] Department." 739 F. Supp. at 265. Also, the Court noted that the "special relationship" created by the protective order arose as a matter of Pennsylvania state law. Id. at 265 and n9. In this case, there is no evidence or argument that the TRO was "properly served" upon the Castle Rock police department. Moreover, there is no indication that

Defendants argue that the regulatory language in § 18-6-803.5(3) is not "mandatory" as described by Cosco because its obligations are triggered only where there is probable cause to believe the restraining order has been violated. While it is true that probable cause is measured against an objective standard, see Beck v. Ohio, 379 U.S. 89, 96 (1964), the process of determining whether probable cause exists implicitly requires that police officers exercise discretion. Because the statute requires that police exercise discretion, its obligations are, by definition, not mandatory.

Because the obligation imposed by § 18-6-803.5(3) is not mandatory under Cosco, I am unable to conclude that Plaintiff had a protectable property interest. Accordingly, Plaintiff has not alleged facts which support a violation of the procedural due process clause and I will GRANT the Motion to Dismiss as to Plaintiff's procedural due process claim.

CONCLUSION

The individual Defendants seek dismissal of the claims against them on the basis of qualified immunity. The City of Castle Rock seeks dismissal of the claims against it on the ground that Plaintiff cannot establish municipal liability. Because I find that Plaintiff has failed to state a claim upon which relief can be granted, I will not address these arguments.

Colorado law is sufficiently analogous to Pennsylvania law such that I would be warranted in finding that the TRO created a "special relationship" giving rise to a property interest.

The tragic facts of this case make the conclusion that Plaintiff has no cause of action for violation of her federal constitutional rights under 42 U.S.C. § 1983 a troubling one. It is appropriate to repeat the Court's remarks in DeShaney,

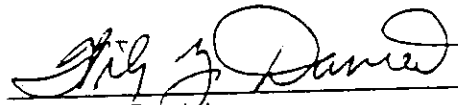
Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for [the deceased children] and [their] mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the [Defendants], but by [Simon Gonzales].

489 U.S. at 202-03. Accordingly, it is

ORDERED that Defendants' Motion to Dismiss is GRANTED. It is FURTHER ORDERED that this case is DISMISSED WITH PREJUDICE, each party to bear its own costs and attorneys fees.

Dated: January 22, 2001.

BY THE COURT:



Wiley Y. Daniel
U. S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-D-1285

CERTIFICATE OF MAILING

I hereby certify that a copy of the above Order was mailed to the following on
January 22, 2001:

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