IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 07-1435
Civil

JESSICA HINSELY, PERSONALLY, AND
AS GUARDIAN AD LITEM FOR K.M., A MINOR

Appellant,

-vs-

STANDING ROCK CHILD PROTECTIVE SERVICES AND
BUREAU OF INDIAN AFFAIRS

Appellees.

Appeal from the United States District Court
for the District of North Dakota
District Court No. 1:05-cv-118-DLH-CSM

REPLY BRIEF OF THE APPELLANT

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LAW AND ARGUMENT

I. WHEN DISCRETIONARY IMMUNITY IS CLAIMED AS A PLOY TO SHIELD OTHERWISE ACTIONABLE CONDUCT, A GOVERNMENT AGENCY SHOULD NOT BE GRANTED THAT PROTECTION.

Child Protective Services ("CPS") argues that it is immune from suit, based on discretionary immunity, after knowingly placing a sex offender into a home with three young children. Such immunity, it maintains, is based on the agency's policy decision to protect the privacy interests of its former ward. By this argument, CPS creates a smokescreen within which to hide from liability, despite its flagrant abuse of a system that it is duty-bound to protect. If allowed, this argument will only serve to harm other children in the future.

CPS safeguards the health and welfare of children in its care. In addition to providing education and medical care, CPS also oversees a foster care program. The agency remains responsible for the well-being of children in foster care; it must investigate reports of abuse, and it can remove children from their homes, if doing so is in the children's best interests. In this case, CPS completely failed to live up to its obligations, permanently worsening the lives of the people whom it had touched.

The agency removed T.C. from an abusive home. While in a foster home, T.C. went on to abuse young children himself. CPS then removed T.C. from this

setting and alerted the authorities regarding these matters. Under the burden of this knowledge, CPS approached T.C.'s half-sister, Ms. Hinsley, and requested that she take T.C. into her home—a home filled with small children and a working mother, facts also known to CPS. The agency created a danger within Ms. Hinsley's home, and it failed to apprise her of facts that may have affected her ultimate decision to accept custody. Had Ms. Hinsley been told of T.C.'s background prior to accepting him into her home, she could have taken steps to protect her children and to ensure that T.C. received treatment in accordance with his needs, or refused to accept him.

CPS failed an incredibly vital task, and now it seeks to hide behind the law, claiming that it is entitled to discretionary immunity. However, the facts of this case are far removed from the congressional intent behind the Federal Tort Claims Act. The Act was not meant to limit liability; its purpose was to open the United States to suit.

The legislative background of the FTCA leads one to believe that the conduct here at issue should be litigable:

> It is neither desirable nor intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort. […] On the other hand, the common law torts of employees of regulatory agencies, as well as of all other

> Federal agencies, would be included within the scope of the bill. Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942) (statement of Assistant Attorney General Francis Mr. Shea).

United States v. Varig Airlines, 467 U.S. 797, 809-10 (1984). "[I]n cases where the government is alleged to have committed negligence in the performance of a function such as that performed by a private citizen, rather than in the fulfillment of a broad policy-making duty, the government is subject to suit." Marlys Bear Medicine v. United States, 241 F.3d 1208, 1213 (9th Cir. 2001) (*citing* Varig Airlines, 467 U.S. at 813 ("it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case")).

CPS should be held accountable for T.C.'s acts, in much the same way a parent would. "At common law, the torts of children do not impose vicarious liability upon parents qua parent, although parental liability may be created by statute […] or by independently negligent behavior on the part of the parents." Kaminski v. Town of Fairfield, 578 A.2d 1048, 1051 (Conn. 1990). A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to

know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control. Restatement (Second) of Torts § 316 (1965). North Dakota recognizes such a cause of action: "[A] parent may be liable for an injury which is directly caused by his child, where the parent's negligence has made it possible and probable for the child to cause the injury complained of." Peterson v. Rude, 146 N.W.2d 555, 557 (N.D. 1966). Here, CPS admits that it knew of T.C.'s proclivities—it even admits its desire to warn Ms. Hinsley—and yet this warning was not communicated. This failure directly caused the harms suffered by T.C., K.M., and Ms. Hinsley, and such lax caretaking renders it liable for those harms.

CPS attempts to conflate the issue by arguing that it protected T.C.'s privacy interests when it failed to disclose his history of sexually abusing children. This cannot be allowed:

> It is vitally important to recognize that "the government may not immunize an otherwise tortious action simply by showing that the government took the action in order to implement some policy purpose. Instead, the courts must carefully disaggregate the government's course of conduct in order to focus on the specific action at issue and determine whether the action was truly grounded in policy."

Limone v. United States, 271 F.Supp.2d 345, 353 (D.Mass. 2003) (*internal citation omitted*). CPS urges the court to "assume that the discretionary decisions made by

the agency were grounded in public policy." Appellees' Br. at 13. This assumption, however, is unwarranted, because the challenged actions fly in the face of the established overarching policy of the regulatory regime, which is to safeguard and protect the interests of children. This aim outweighs T.C.'s privacy interest in his treatment history; after all, CPS did refer T.C.'s earlier sexual misconduct to the authorities. CPS's admission that it wished to warn Ms. Hinsley belies the agency's assertion of a loftier policy consideration:

> "Courts consistently focus on the particular events that proximately caused the injuries for which recovery is sought, not the broad policy authority pursuant to which particular actions were taken" nor the constituent subparts of those particular actions. […] If it were otherwise, the government could always avoid liability by manipulating the lens of abstraction through which the complaint is viewed.

Limone, 271 F.Supp.2d at 355. This Court should not allow itself to be swayed by CPS's clever tactics. If ratified, the agency's argument will become a benchmark memorandum for future institutional failures of the most wretched kind.

II. THE CASES CITED BY CPS ARE INAPPOSITE TO THE FACTS OF THIS APPEAL.

Additionally, care must be taken to distinguish the cases cited by CPS in support of the district court's decision. Moye differs from the facts alleged here. In that case, "[t]he decedent was fully aware that his son was dangerous and had

been for some time." Moye v. United States, 735 F.Supp. 179, 181 (E.D.N.C. 1990). Sigman is also unlike the matter on appeal. The Air Force's decision not to warn medical personnel regarding a service member's release from service was discretionary, because Sigman "[did] not involve a failure to warn about any easily foreseeable physical hazard to particular individuals. The danger in [that] case was not so easily predictable, and the risks of causing unfounded alarm were real." Sigman v. United States, 217 F.3d 785, 796-97 (9th Cir. 2000). Ms. Hinsley and her family were completely unaware of T.C.'s history of sexual misconduct. Additionally, no legal tract need be cited regarding the ongoing danger associated with pedophilia. In this case, the harm was palpable and virtually guaranteed.

Demery can also be distinguished. In that case, the BIA escaped liability because it had no established policy to warn the public regarding a potentially-dangerous lake aeration system. Demery v. United States, 357 F.3d 830, 834 (8th Cir. 2004). In the case at bar, it is true that no policies or guidelines have been revealed to direct CPS's actions regarding warning prior to placement of dangerous sex offenders. However, when examining policies maintained by sister child protection agencies, this argument loses its persuasiveness. CPS cannot be allowed to benefit from such a criminal lack of direction. If CPS does have some guidance in this regard, Ms. Hinsley should be allowed to examine it, as a discretionary

immunity claim is merely a threshold jurisdictional argument, rather than a decision on the merits of the case.

Abernathy supports Ms. Hinsley's position. "In both the parent/child and the institution/mental patient cases, the chief factors justifying imposition of liability are 1) the ability to control the person and 2) knowledge of the person's propensity for violence." Abernathy v. United States, 773 F.2d 184, 189 (8th Cir. 1985). In this case, CPS knew of T.C.'s previous sexual misconduct. Additionally, CPS could have continued to maintain control over T.C. However, two days before his eighteenth birthday, CPS obtained a court order releasing him from their custody. T.C. was then promptly deposited on Ms. Hinsley's doorstep. These acts speak for themselves.

CONCLUSION

For all the foregoing reasons, the Appellant respectfully requests that this Court reverse the decision of the district court and remand the proceedings for a trial on the merits.

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I, Ralph A. Vinje, hereby certify that this brief complies with the type-volume limitations under Rule 32(a)(7)(B). I am using Corel WordPerfect for Windows 11.0 and have used Times New Roman in the font size of 14 as required. This word-processing system states that the number of words in the brief is 1,621.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of July, 2007, the following document:

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