

### CASE SUMMARY:

Joshua DeSHANEY, a minor, by his guardian ad litem, Curry FIRST, Esq.; and Melody DeShaney, Plaintiffs-Appellants,

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, et al, Defendants-Appellees.

No. 86-2188.

United States Court of Appeals, Seventh Circuit

Argued Jan. 13, 1987

Decided Feb.12, 1987

Rehearing and Rehearing En Bane

Denied April 21, 1987

This appeal requires us to decide whether a reckless failure by Wisconsin welfare authorities to protect a child from a parent's physical abuse deprives the child of liberty or property within the meaning of the Fourteenth Amendment.

The principal plaintiff, Joshua DeShaney, was born in 1979, the son of Melody and Randy DeShaney (Melody is also a plaintiff). Joshua was born in Wyoming, where the DeShaneys then lived and where his mother still lives. In 1980 a court in Wyoming granted the DeShaneys a divorce. The court awarded custody of Joshua to his father. Shortly afterward, Randy moved to Wisconsin, bringing Joshua with him. There he married (and shortly afterward divorced) a woman whose lawyer told the police in 1982 that Randy had "hit the boy, causing marks and is a prime case for child abuse."

In January 1983, Randy DeShaney's girlfriend, Marie, brought Joshua to a hospital. He was covered with bruises and abrasions - from an attack by another child, she said, but the emergency room personnel suspected child abuse. They notified the Winnebago County Department of Social Services immediately, and by the end of the day Joshua had been admitted to the hospital. The Department had obtained an order from a Wisconsin juvenile court placing him temporarily in the hospital's custody. Three days later an ad hoc "child protective team," consisting of a pediatrician, a psychologist, a police detective, a lawyer for the county, a caseworker for the Department named Ann Kemmeter, her superior, and others, discussed the situation. On the basis of this discussion the county's lawyer decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court (authorized by Wisconsin law if "probable cause exists to believe that if the child is not held he or she will... be subject to injury by others." So Joshua was returned to Randy DeShaney's custody. The team recommended, however, that Randy be required to enroll Joshua in the Headstart program, receive counseling from the Department, and tell Marie to move out of Randy's house - for Randy had suggested that she might be abusing Joshua. This recommendation was embodied in a written agreement between Randy and the Department, a form of informal disposition of juvenile cases that Wisconsin law authorizes.

Three weeks later the court closed the child-protection case that the Department had brought. A month after this Ann Kemmeter received word from the hospital that Joshua had again been treated for suspicious injuries. But after talking to the hospital's social worker she concluded that there was no evidence of child abuse.

Ann Kemmeter visited the DeShaney household in May. She noticed a bump on Joshua's forehead. Randy and Marie said he had gotten it falling off a tricycle. Kemmeter visited the household again in July, and noticed that Marie still hadn't moved out and that Joshua still hadn't been enrolled in Headstart. In September she visited again and asked to see Joshua but was told by someone that Randy and Marie had taken Joshua to the emergency room with a scratched cornea. In October she visited again and noticed another bump on Joshua's head. On her next visit, which was in November, she noticed that Joshua had a scrape on his chin; it looked to her like a cigarette burn. Later that month Joshua was treated at the emergency room for a cut forehead, bloody nose, swollen ear, and bruises on both shoulders. Emergency room personnel notified the Department of Social Services that they believed that he was a victim of child abuse, but there was no reaction from the Department.

Kemmeter next visited the DeShaney household in January (1984), but was told she couldn't see Joshua because he was in bed with the flu. She returned on March 7 and was told that several days earlier Joshua had fainted in the bathroom for no apparent reason. She did not ask to see him on this occasion - and has not been able to give a reason why not. The next day Randy DeShaney beat Joshua so severely that he critically injured Joshua's brain. The neurosurgeon who treated Joshua found evidence of previous traumatic injury to the head, and Joshua's body was covered with bruises and lesions of different vintages. Joshua's mother was summoned from Wyoming. When she arrived Kemmeter told her, "I just knew the phone would ring some day and Joshua would be dead." He was not dead, but half his brain had been destroyed. He is confined to an institution for the profoundly retarded, and will remain institutionalized for the rest of his life. Randy DeShaney was convicted of child abuse and given a sentence of two to four years in prison.

This suit, brought by Joshua and his mother, charges Winnebago County, its Department of Social Services, Ann Kemmeter, and her supervisor with having deprived Joshua of his liberty without due process of law, in violation of section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Section 1 imposes liability on anyone who, acting under color of state law, "subjects, or causes to be subjected," a person to "the deprivation of" his federal rights. The complaint contains a "pendent party" claim against Randy DeShaney, but the district court relinquished jurisdiction of this claim when it dismissed the federal claim on the defendants' motion for summary judgment. The court held that the failure of a state agency to render protective services to persons within its jurisdiction does not violate the due process clause.

There are two possible theories on which the defendants (excluding Randy DeShaney, who is not a defendant in the section 1983 count and who was not acting under color of state law when he abused his son) might be thought to have violated Joshua DeShaney's Fourteenth Amendment rights. First, the defendants might be thought to have deprived him of a right - a form of liberty or property - to be protected by the Department of Social Services from the brutalities perpetrated by his father. Second, they might be thought to have deprived him of his right to bodily integrity (again viewed as a form of liberty or property within the meaning of the due process clause) by failing to protect him from his father.

## **HOW THE COURT RULED:**

[1] The first theory is foreclosed by the rule, well established in this circuit, that the state's failure to protect people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected property or liberty. These cases are based on the principle that the Constitution is a charter of negative rather than positive liberties; and while there are exceptions to this as to virtually all legal generalizations - none of them is applicable here. The state does not have a duty enforceable by the federal courts to maintain a police force or a fire department, or to protect children from their parents.

[2] We may assume without having to decide that the failure of the Winnebago Department of Social Services to protect Joshua from his father was a sufficiently aggravated form of negligence. However, if the defendants, though blameworthy, did not cause Joshua's injuries, they cannot be said to have deprived him of his liberty; deprivation implies causation. And if the conduct of the Department of Social Services didn't appreciably increase the probability of Joshua's injuries, then under conventional tort principles of causation which are presumptively applicable to statutory and constitutional torts as well as to common law torts, and cases cited there, the Department did not cause those injuries.

[3] This can be seen most clearly by asking whether, if the Department had never existed, Joshua would have sustained the injuries for which he is seeking damages in this suit. The answer, almost certainly, is "yes." For we are supposing a case where the State of Wisconsin has no institutional commitment to child abuse - a gap in its laws that, as we said earlier, would not be actionable in a suit under section 1983. It is unlikely that Ann Kemmeter's well intentioned but ineffectual intervention did Joshua any good at all, but it is most unlikely that it did him any harm. She merely failed to protect him from his bestial father.

[4] That the state's inaction may have brought about a trivial increase in the probability that Joshua would be severely injured by his father does not enable a conclusion that the state deprived Joshua of his right to bodily integrity.

The recklessness in this case came later, when Ann Kemmeter inexplicably failed to act on mounting, and eventually overwhelming, evidence that Joshua was in great peril from his father. And by then Joshua was back in his father's lawful custody. Had Joshua been a foundling in the custody of the state, which then placed him with foster parents who it knew or strongly suspected would abuse the child, this case would be like *Doe v. New York City Dept. of Social Services*, supra, 649 F.2d at 138-40, 142. But he was not.

[5] We reject the proposition embraced by a divided panel of the Third Circuit that once the state is aware of the danger that a particular child may be abused, a special relationship arises between it and the child and places on the state a constitutional duty to protect the child from the abuse.

To place every state welfare department on the razor's edge, where if it terminates parental rights it is exposed to a section 1983 suit (as well as a state-law suit) by the parent and if it fails to terminate those rights it is exposed to a section 1983 suit by the child, is unlikely to improve the welfare of American families, and is not grounded in constitutional text or principle.

## *MINI- SUMMARY for SMALL GROUP EXERCISE*

Re: **DeShaney v. Winnebago County Dept Social Services**

The minor child Joshua DeShaney was awarded to the custody of his father in 1980 by private court action. In 1982 father's new wife reported to the Wisconsin police that father hit the boy leaving marks. In January 1983 his girlfriend brought the child to the hospital with bruises claiming that another child caused them. After investigation, it was determined that insufficient evidence of abuse existed but a recommendation for services was made. Two months later the same caseworker was again called to the hospital for suspicious injuries to the child and again concluded no evidence of abuse existed. In May the caseworker visited the home and noted a bump on the child's forehead which was explained as a fall. She visited again in July and stated that the family was not cooperating with recommended services. In September she learned of another hospital visit, and in October and November she visited the home and observed new injuries to the child. In late November the child was again seen in the emergency room with injuries. A report was made to the caseworker but no action was taken. A visit was made in January at which time the caseworker was not permitted to see the child. Another home visit was made in March, but the worker did not ask to see the child. The next day the child was beaten to the point of being institutionalized with brain damage. The caseworker was known to have made previous comments that she knew some day the child would be killed. The agency, caseworker and supervisor were sued for failing to protect the child from his father.