

No. 99 - 01749

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

CITY OF DAVIS,

Davis Child Protective Services,
Eunice Memorial Hospital,
Officer R.P. Coltrane, Felicia Ferguson,
Mario Pistone, Ph.D, Lena Rozas,
Rodes Harlin, M.D., Henry Cherry, M.D.,

Petitioners

v.

Andrew and Amy SPARKS,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

September 22, 2000

Counsel
Number 291

Best Brief Winner:
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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment Due Process right to family association include a parent's right to accompany and comfort his/ her children during invasive medical examinations even in cases of suspected child abuse?
2. Is "custom" a valid ground for municipal liability under 42 U.S.C. §1983 in light of the Supreme Court Decisions subsequent to *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978)?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents Andrew and Amy Sparks live in the City of Davis with their six year-old daughter, Kirsten, and their four year-old son, Tate. In April, 1997, Mrs. Sparks' sister, Felicia Ferguson, made an unsubstantiated report to Davis Child Protective Services (DCPS), alleging that Mr. Sparks was sexually abusing Kirsten. DCPS investigated, but found no credible evidence to support the allegations and took no action against Mr. Sparks.

Subsequent to this incident, Ferguson was hospitalized for treatment of multiple personality disorder. After several months of treatment, she was released from the hospital on September 19, 1998. The day after her release, she visited the Sparks residence, seeking to reconcile relations with her sister. She found Tate in the home with a bruised face and what appeared to be a broken arm, with the arm was in a cast. Kirsten was nowhere to be found, but Ferguson could see Mr. and Mrs. Sparks arguing in the back yard. Ferguson left the home before the Sparks returned to the house.

Ferguson relayed her story to her therapist, Dr. Mario Pistone, who in turn gave the information to Lena Rozas at Davis Child Protective Services (DCPS). Rozas also learned of Ferguson's allegations of cult membership by the Sparks, and was

told of a ritualistic murder of a young male potentially planned for September 23, 1998.

Rozas informed Officer R.P. Coltrane of the Davis Police Department and a district attorney named Gary Ransdall of the allegations. On September 22, 1998, Rozas informed Coltrane that Ransdall had a pick-up order authorizing the police to remove the Sparks children from their home. After consulting with other officers about whether to wait for a copy of the order, Coltrane was told that it was customary to take at "face-value" the representations of other agencies relative to the existence of a pick-up order. It is undisputed that no pick-up order existed, nor had the district attorney yet petitioned the court for such an order.

Later on September 22, 1998, the police sought to enforce the purported court order. After interviewing the parents and telling them a DCPS investigation had been conducted, the police removed the Sparks children from the home and took them to Shady Brook Children's Home. On September 23, 1998, Coltrane took the Sparks children to Eunice Memorial Hospital, where he ordered evidentiary physical examinations in accordance with police policy to determine if the children had been sexually abused. The Sparks were not informed the examinations were to be conducted and did not consent to them. The examinations, conducted by Dr. Rodes Harlin, included internal body cavity

examinations. The results of these examinations ultimately proved inconclusive, and the Sparks children were returned to their parents on December 6, 1998.

Andrew and Amy Sparks brought action in the Federal District Court for the Western District of Davis against the City of Davis and several of its employees, as well as various healthcare providers, alleging violations of 42 U.S.C. § 1983 and other state law claims. The claims were based on the invasive physical examinations conducted on the Sparks children without the knowledge or consent of their parents. All parties, except for the City of Davis, have either reached out of court settlements or been granted summary judgment on grounds not presently at issue. The City of Davis, as the only remaining defendant in the case, went to trial solely on the Sparks' § 1983 claim.

The district court granted Davis' motion for a directed verdict, concluding that the right to family association did not include a right for parents to be present at physical examinations in cases of suspected abuse. The court reasoned that a governmental entity had a duty to intervene when parental fitness is uncertain and a child is threatened. The district court also rejected the Sparks' argument that the City of Davis was liable for the alleged deprivation based on custom under § 1983. The court concluded that the invasive physical

examinations resulted from the acts of individuals, not from governmental custom; thus, in accordance with United States Supreme Court decisions interpreting § 1983, the City of Davis could not be liable under that statute.

The United States Court of Appeals for the Sixteenth Circuit reversed. The Sixteenth Circuit found that the right to family association includes the right to be present during invasive medical procedures. In addition, the court found that liability under § 1983 for violation of the right to family association could be grounded in the government's "custom" of taking children away from their parents without first confirming the existence of a court order.

The City of Davis filed a petition for a writ of certiorari, which this Court granted on August 16, 2000.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment includes the "right to family association." This right includes the rights of parents to make decisions regarding the care, custody and control of their children. This right further includes the right of parents to make medical decisions for their child, even in cases of suspected abuse. The state cannot abrogate this right in the context of evidentiary examinations absent either a life-threatening medical emergency requiring immediate attention or a reasonable likelihood that evidence of a crime will disappear if immediate action is not taken. The state's interest in protecting the welfare of children cannot be asserted over the parent's right to family association without such a determination by a neutral factfinder.

Municipal liability can be established under § 1983 if a constitutional deprivation is caused by a municipality's customs. The policy underlying the causation requirement is ensuring that municipalities are not held liable solely for injuries inflicted by their employees.

DISCUSSION

I. THE RIGHT TO FAMILY ASSOCIATION UNDER THE DUE PROCESS CLAUSE INCLUDES THE RIGHT OF PARENTS TO MAKE MEDICAL DECISIONS FOR THEIR CHILDREN, EVEN IN CASES OF SUSPECTED ABUSE.

A. THE RIGHT TO THE CARE, CUSTODY AND CONTROL OF CHILDREN INCLUDES THE RIGHT TO MAKE MEDICAL DECISIONS

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV. In addition to certain procedural rights, the Due Process Clause contains substantive rights that "provide[s] heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

This case concerns the liberty interest of parents in the care, custody and control of their children. The United States Supreme Court has long recognized that there are deep cultural and historical traditions favoring parental autonomy over the care of their children. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a

unit with broad parental authority over minor children.").

Against this backdrop, the Court has repeatedly held that the "right to family association" includes a right to the care, custody and control of one's children. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1948) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents...."); *Troxel v. Granville*, 120 S. Ct. 2054, 2060 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

The right of parents to make decisions regarding the care of their children includes the right to make medical decisions for their children. Indeed, such a right stems from not only the parents right to make such decisions, but also from a child's right to have those decisions made by their parents. *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (stating that a child's right to have medical decisions made by parents is "inextricably linked with the parents' interest in and obligation for the welfare and health of the child.").

Federal appellate courts also recognize the right of parents to make medical decisions for their children, specifically in the context of evidentiary investigations for suspected abuse. In *Van Emrik v. Chemung County Department of*

Social Services, 911 F.2d 863 (2nd Cir. 1990), a social worker investigating a case of suspected physical abuse ordered an x-ray of a child's leg without the parents' knowledge or consent. The Second Circuit held that the x-ray violated the parents' rights to make medical decisions for their child, stating:

We believe the Constitution assures parents that, in the absence of parental consent, x-rays may not be undertaken for investigative purposes at the behest of state officials unless a judicial officer has determined, upon notice to the parents and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances.

Id. at 867. Similarly, in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), a social worker suspecting parental abuse gained entry to the child's home and forced the mother to pull down the child's pants to inspect the child's buttocks. The Ninth Circuit concluded that "[T]here is a very substantial interest... in the mother's dignity and authority in relation to her own children." *Id.* at 820. The Court went on to say, "The government's interest in the welfare of children... includes protecting children's interests in the privacy and dignity of their homes and in the lawfully exercised authority of their parents." *Id.* at 820.

The facts of the above cases are very similar to those of the present case; in fact, in light of the extreme invasiveness of the medical procedures in this case, a stronger case for

parental control is established. Here, the investigation ordered by the police went beyond a strip search, *see, e.g., Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980) (stating that "[I]t does not take a constitutional scholar to conclude that a nude search of a thirteen year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity."), to become perhaps the most invasive of all procedures, vaginal and rectal examinations, complete with photographs of each area. Both Kirsten and Tate were very upset throughout the examinations, and continually asked for their parents. Not only do such procedures violate the rights of parents to make such decisions for their children, but it violated the rights of Kirsten and Tate to have their parents aid and comfort them during this most difficult of times. The right to family association would be a right in name only if it did not allow families to be together during such periods of stress and discomfort.

B. THERE WAS NO EMERGENCY OR POSSIBILITY OF EVIDENCE DISAPPEARING TO JUSTIFY PROCEEDING WITH THE MEDICAL EXAMINATIONS WITHOUT PARENTAL NOTICE OR CONSENT.

The Supreme Court has recognized in at least one instance that a person's individual constitutional rights may be trumped by the state if there is an emergency or possibility that evidence may dissipate or disappear if immediate action is not

taken. See *Schmerber v. State of California*, 384 U.S. 757 (1966). The facts of this case, however, do not fit that framework.

In *Schmerber*, a man receiving hospital treatment following an automobile accident asserted a Fourth Amendment violation against the state after a police officer who suspected he was intoxicated ordered a blood withdrawal while the man was being treated. The Supreme Court held that the withdrawal did not violate Fourth Amendment rights, because the police officer "might reasonably believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.* at 770 (citations omitted). Because of the fact that the man's blood alcohol level would diminish over time, the man's usual Fourth Amendment protections against unreasonable search and seizure had to yield to the state's interest in preserving evidence.

Here, Officer Coltrane was not confronted with such an emergency, nor was there a possibility that evidence of child abuse would disappear if immediate action was not taken. The record discloses nothing to suggest that any suspected signs or symptoms of child abuse would disappear even overnight. Additionally, in conducting the examinations the state was not providing treatment for any life-threatening condition. In the

absence of such conditions, the state simply is not justified in infringing upon the right to family association.

C. THE STATE'S INTEREST IN PROTECTING THE WELFARE OF CHILDREN CANNOT BE ASSERTED OVER THE RIGHTS OF PARENTS WITHOUT A DETERMINATION BY A NEUTRAL FACTFINDER

Even in the absence of an emergency, it may be argued that governmental entities, in the context of a parent's suspected abuse of a child, may preclude parents from allowing them to make medical decisions for their children, particularly in the area of evidentiary investigations. The state's right, it could be said, springs from its "traditional and 'transcendent interest'" in protecting children from abuse. *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (citations omitted). The Supreme Court has recognized a state's right, in limited circumstances, to protect children, even when the state's interest conflicts with a parent's rights.

In *Parham v. J.R.*, 442 U.S. 584 (1979), minor children challenged a Georgia law that allowed parents to voluntarily commit their children to mental institutions. The Court noted the seeming conflict between the rights of parents to make medical decisions for their children and a child's right to be free of the stigma attached to residence in a mental facility. While holding that the law was constitutional, the Court found that the state had an interest in assuring that commitment was

in the best interest of the child. To that end, the Court found that proceedings before a "neutral factfinder" were necessary to decide the propriety of commitment. *Id.* at 611-613. Thus, the only way the state could assert its interests over those of the parent were through a neutral party.

Such circumstances are not present here. First, it may be said that a state's interest in protecting a child from commitment to a state mental facility is more compelling than the interests here. Commitment is a medical decision of indefinite duration. Also, because the commitment is to a state institution, the state has an interest in ensuring the efficient and most cost effective operation of the facility. *Id.* at 605.

Perhaps more importantly for this case is the provision for a "neutral factfinder" to weigh the competing interests. Significantly, the Court explicitly recognized that parents have a right to make medical decisions for their children. *Id.* at 602. It is only after a hearing before a neutral factfinder that a state can assert its interests over those of the parents. In this case, the medical examinations were undertaken after a unilateral decision by a police officer incident to an unlawful separation of the children from their parents. Without some finding by a neutral party that the examinations are necessary, a parent's right to family association evaporates into nothing,

as the state can, on the shakiest of evidence, order invasive medical procedures without the parent's knowledge or consent.

II. CUSTOM IS A VALID BASIS FOR IMPOSING MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983

A. MUNICIPALITIES CAN BE LIABLE UNDER § 1983 FOR CONSTITUTIONAL DEPRIVATIONS CAUSED BY CUSTOMS

§ 1983 provides that "[E]very person who, under color of any statute, ordinance, regulation, custom, or usage of any state... subjects, or causes to be subjected, any citizen... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall... be liable to the party injured in an action at law... 42 U.S.C. § 1983 (Supp. 2000) (emphasis added). Implicit in this language are two requirements. First, there must be a constitutional deprivation. See Part I, *supra*. Second, that deprivation must be caused by some type of municipal policy or custom. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 817 (1985) (stating that § 1983 action must establish two elements).

The Supreme Court established the framework for determining § 1983 municipal liability in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). In *Monell*, female employees of the Department of Social Services sued New York City over a policy that forced pregnant employees to take unpaid leaves of absence before their leaves were required for medical reasons. After finding a constitutional

deprivation, the Court went on at length to discuss the extent of municipal liability under § 1983. First, the Court concluded that municipalities are "persons" for purposes of § 1983 analysis. *Id.* at 690. Second, the Court held that

[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation, local governments... may be sued for deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels.

Id. at 690. In coming to such a conclusion, the Court noted that some "customs" in fact have the force and effect of law: "[D]eeply embedded traditional ways of carrying out state policy... are often tougher and truer law than the dead words of the written text." *Id.* at 691 (quoting *Nashville, Chattanooga and St. Louis Railway v. Browning*, 310 U.S. 362 (1940)). It is significant to note, however, that the Court rejected holding municipalities vicariously liable for the actions of its employees. Thus, "[I]t is when execution of a government's policy or custom... inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

The present case contains substantial evidence that Officer Coltrane, in removing Kirsten and Tate from their parents, was acting pursuant to a custom of the City of Davis. At trial, the officers acknowledged to be the most knowledgeable about the police department's policies in this area, Maxwell Santini and

Leroy DiPasquale, indicated that removing children without in fact having a court order was a regular practice in the department. DiPasquale testified that it "happened fairly often." Santini testified that "if someone tells you they have a pick-up order, it would be taken at face value that they did, in fact, have a pick-up order." Santini went on to say that such action was settled practice within the department.

The lack of official approval of the policy or pronouncement by a government official does not alter this analysis. There is no evidence in the record to demonstrate that the custom of relying on representations made by other municipal employees was ever approved by the city council or an administrative official. Nevertheless, the custom of a municipality "may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 1283 (1997).

It must also be noted that liability can be established for customs that are not facially unconstitutional. *City of Canton v. Harris*, 489 U.S. 378 (1989). Thus, without resolving the constitutionality of routinely picking up children without court orders, municipal liability can still be established.

B. THE POLICY UNDERLYING THE CAUSATION REQUIREMENT IN § 1983 IS ENSURING THAT MUNICIPALITIES ARE NOT HELD LIABLE SOLELY FOR THE ACTS OF ITS EMPLOYEES

The Court in *Monell* did not establish the "full contours" of municipal liability under § 1983 because there was little doubt that the municipal policy there at issue deprived the plaintiffs of constitutional rights. The Court did, however, hint at a causation requirement: the official policy must be the "moving force" behind the deprivation. *Monell*, 436 U.S. at 694. In subsequent cases, the Court has struggled to refine this "moving force" standard. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986), the Court stated that "[M]unicipal liability under § 1983 attaches where- and only where- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." More recently, in *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), the Court held that a plaintiff "must demonstrate a direct causal link between the municipal action and the deprivation of federal rights."

While the ultimate standard used to determine causation is murky, the policy underlying the causation requirement is ensuring that municipalities are not held liable solely for the actions of its employees. See, e.g., *id.* at 405; see also

Monell, 436 U.S. at 694. In the present case, the acts of Office Coltrane at all times complied with the customs and policies of the Davis Police Department. The pick-up of the Sparks children was done in accordance with what was acknowledged by a senior officer to be "settled practice" within the department. Similarly, the invasive evidentiary examinations ordered by Coltrane were performed in accordance with established police policy. Quite simply, this is not a case where otherwise constitutional policies were administered in an unconstitutional manner by an employee. Rather, Officer Coltrane at all times complied with the customs and policies of the David Police Department, and it is those policies which caused the deprivation alleged.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that this Honorable Court affirm the decision of the Sixteenth Circuit Court of Appeals.

Respectfully Submitted,

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