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CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police

From: James R. Touchstone, Esq.

WHERE STATE ACTORS LEFT TEN-MONTH-OLD TWINS IN A MORE DANGEROUS SITUATION THAN THE ONE IN WHICH THEY FOUND THEM, THE STATE-CREATED DANGER EXCEPTION APPLIED

In a 2-1 decision, the Ninth Circuit Court of Appeals concluded that plaintiffs adequately stated their 42 U.S.C. section 1983 claims against a police sergeant under the state-created danger exception. In *Murguia v. Langdon*,[1] the majority found that the plaintiffs adequately alleged a police sergeant knew that a mother's mental health crisis posed a serious risk of physical harm to herself and her ten-month-old twins but disregarded that risk and left the twins in a situation more dangerous than how he found them.

Background

According to Plaintiffs' First Amended Complaint ("FAC"),[2] on December 5, 2018, Heather Langdon experienced a mental health crisis. Plaintiff Jose Murguia, with whom Langdon lived and had five children, called 911 seeking emergency mental health assistance for Langdon. The couple had a troubled relationship, which was well documented due to multiple encounters with the legal system and County of Tulare's Child Welfare Services ("CWS"). For example, Langdon had in January 2016 pleaded guilty to drunk driving and willful cruelty to a child and pleaded guilty to willful cruelty and inflicting injury on a child in October 2016. As of the time of the events here, CWS had at least one open case against Langdon.

Murguia's 911 call set in motion a chain of events that ultimately led to the death of Langdon's and Murguia's ten-month-old twin sons, Mason and Maddox, at Langdon's own hand. Over the course of that day, Langdon interacted with three groups of law enforcement officers. First, Tulare County Sheriff's Department

[1] Murguia v. Langdon, 61 F.4th 1096 (9th Cir. 2023).

[2] The Ninth Circuit accepted the facts taken from the First Amended Complaint ("FAC") as true for the appeal.

Deputies Lewis and Cerda arrived at the Murguia home[3] where they separated Murguia from Langdon, leaving her with the twins; deputies then allowed Langdon and a neighbor (Rosa[4]) to take the twins to a church and prevented Murguia from following. Second, a City of Visalia police officer drove Langdon and the twins from the church to a women's shelter. Third, City of Tulare Police Department ("TPD") officers (including TPD's Crisis Intervention Technician Officer, Sergeant Garcia) acting in part based on information provided by CWS Emergency Response Social Worker Roxanna Torres, arranged for a motel to provide Langdon with free lodging and drove Langdon and the twins from the shelter to the motel to spend the night. Left unsupervised at the motel where she continued to suffer from a mental health crisis, Langdon drowned the twins.

Murguia, on behalf of himself and the estates of twins Mason and Maddox (collectively, "Plaintiffs"), brought a 42 U.S.C. section 1983 action against, among others, four of the state actors who interacted with Langdon on December 5, 2018: Deputy Lewis and Sergeant Cerda, TPD Sergeant Garcia, and CWS's Torres (collectively, "Individual Defendants"). The District Court dismissed the action for failure to state a claim. Plaintiffs appealed.

Discussion

The Ninth Circuit Court of Appeals observed that a plaintiff stating a claim under 42 U.S.C. section 1983 must allege that "(1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a federal constitutional or statutory right." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011). The Court stated that the claims of Plaintiffs here were rooted in the Fourteenth Amendment's Due Process Clause, which provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, Section 1. The Court observed that the Due Process Clause is a limitation on state action rather than a guarantee of minimum levels of state protections, so the state's failure to prevent acts of private parties is typically insufficient to establish liability under the Due Process Clause. *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019).

The Court explained, however, that the Ninth Circuit has recognized two exceptions to this rule: (1) "when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger (the state-created danger exception)"; and (2) "when a special relationship exists between the plaintiff and the state (the special-relationship exception)." *Patel*, 648 F.3d at 971-72 (internal quotation marks omitted). The Court stated that these are the only two exceptions to the general rule against

[3] The FAC stated, "Before arriving at Murguia's home, Lewis and Cerda knew or should have known that Langdon had a history of mental illness, attempting suicide, and violence towards children, that Langdon had falsely reported a school shooting threat two days earlier and Langdon had behaved bizarrely the prior evening and that she had an open CWS case."

[4] Rosa worked at a hospital and had supervised people on involuntary psychiatric holds. The FAC stated that Rosa "told the [Deputies] that Langdon needed professional help, and that Langdon should not have charge of the twins." However, it was unclear from the FAC whether the deputies knew about Rosa's work and that she may have had specialized knowledge.

failure-to-act liability for Section 1983.[5]

The Ninth Circuit explained that the special-relationship exception "applies when [the] state 'takes a person into its custody and holds him there against his will.'" *Patel*, 648 F.3d at 972 (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)). The Court of Appeals concluded that the special-relationship exception did not apply here because Defendants did not have custody of the twins. The twins remained with Langdon at all times, and the twins were not institutionalized or placed in foster care. Although Murguia was temporarily physically separated from the twins, Murguia and Langdon retained long-term responsibility for the care of the twins, as well as long-term control over decisions regarding the twins. The Court next considered the state-created danger exception.

The Court of Appeals observed that the state-created danger exception was initially expressed in the United State Supreme Court's decision in *DeShaney*. There, the high court held that social workers and local officials were not liable under Section 1983 on a failure-to-act theory for injuries inflicted on a child by his father. The state actors had received complaints that the child was abused by his father but did not remove the child from his father's custody. The Supreme Court reasoned that "[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it *played no part in their creation*, nor did it do *anything to render him any more vulnerable* to them." 489 U.S. at 201 (emphasis added). The Supreme Court acknowledged that the state once took temporary custody of the child and then returned him to his father, but reasoned that the state "placed [the child] in no worse position than that in which he would have been had it not acted at all[.]" *Id.* Given that the state actors did not create or enhance any danger to the child, the *DeShaney* Court concluded that the state did not have a constitutional duty to protect him from the private violence inflicted by his father.

The Court of Appeals noted that the Ninth Circuit "ha[s] interpreted *DeShaney* to mean that if affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises under [Section] 1983."[6] The Court explained that the state-created danger exception has two requirements.[7] "First, the exception applies only where there is 'affirmative conduct on the part of the state in placing the plaintiff in danger.' Second, the exception applies only where the state acts with 'deliberate indifference' to a 'known or obvious danger.'" *Patel*, 648 F.3d at 974 (internal citation omitted) (quoting *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000) and then quoting *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)).

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[5] The Court rejected Plaintiffs' assertion that the failure to comply with a legally required duty, without more, can give rise to a substantive due process claim.

[6] *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997).

[7] According to the Court, the Ninth Circuit has occasionally analyzed the state-created danger exception under a three-prong test by dividing the first requirement into two components: (1) affirmative conduct creating or enhancing a danger to the plaintiff, and (2) foreseeability. See, e.g., *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019).

For the first requirement, a plaintiff "must show that the officers' affirmative actions created or exposed [him] to an actual, particularized danger that [he] would not otherwise have faced." *Martinez*, 943 F.3d at 1271. In examining whether an officer affirmatively places an individual in danger, courts within the Ninth Circuit "examine whether the officers left the person in a situation that was more dangerous than the one in which they found him." *Munger*, 227 F.3d at 1086. "The critical distinction is not . . . an indeterminate line between danger creation and enhancement, but rather the stark one between state action and inaction in placing an individual at risk."[8] Moreover, the plaintiff's ultimate injury must have been foreseeable to the defendant. *Martinez*, 943 F.3d at 1273. "This does not mean that the exact injury must be foreseeable. Rather, 'the state actor is liable for creating the foreseeable danger of injury given the particular circumstances.'" *Id.* at 1273-74 (quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064 n.5 (9th Cir. 2006)).

As to the second requirement, the Ninth Circuit explained that "[d]eliberate indifference is 'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'" *Patel*, 648 F.3d at 974 (*Bryan Cnty v. Brown*, 520 U.S. 397, 410 (1997)). This standard is higher than gross negligence and requires a culpable mental state. *Id.* at 974. When assessing non-detainee failure-to-protect claims, courts within the Circuit apply a purely subjective deliberate indifference test. *Herrera v. L.A. Unified Sch. Dist.*, 18 F.4th 1156, 1161 (9th Cir. 2021). "For a defendant to act with deliberate indifference, he must 'recognize[] the unreasonable risk and actually intend[] to expose the plaintiff to such risks without regard to the consequences to the plaintiff.'" *Id.* at 1158 (quoting *Grubbs*, 92 F.3d at 899). In other words, the state actor must "know[] that something *is* going to happen but ignore[] the risk and expose[] [the plaintiff] to it." *Grubbs*, 92 F.3d at 900 (emphasis in original). "The deliberate-indifference inquiry should go to the jury if any rational factfinder could find this requisite mental state." *Patel*, 648 F.3d at 974.

The District Court had held that Plaintiffs failed to allege affirmative conduct on the part of any of the Individual Defendants because "[t]he decedents were in their mother's custody before the officers arrived on the scene, and they remained in her custody after the officers intervened." The Ninth Circuit stated that the District Court erred in limiting the analysis to whether Langdon had custody of the twins because the state-created danger exception did not require that the state actor have custody of the plaintiffs. Moreover, in limiting the analysis to whether Langdon had custody of the twins, the District Court ignored other factors that affected the risk of physical harm that Langdon posed to the twins, including the presence of third parties. The lower court thus used the wrong standard in applying the state-created danger exception. Rather than ask whether Langdon had custody of the twins before and after the intervention of each Individual Defendant, the District Court should have asked more broadly "whether the officers left the [twins] in a situation that was more dangerous than

[8] *Penilla*, 115 F.3d at 710.

the one in which they found [them]." *Munger*, 227 F.3d at 1086. The Ninth Circuit considered this issue as to each of the Individual Defendants.

The Court held that Plaintiffs' state-created danger claim against Deputy Lewis and Sergeant Cerda failed because Plaintiffs failed to allege facts from which one could plausibly conclude that Defendants created or enhanced any danger to the twins. Plaintiffs argued that Lewis and Cerda increased the danger to the twins by allowing Langdon to remove the twins from their home and preventing Murguia from following Langdon and the twins to the Church. The Court stated that if Lewis and Cerda had left the ten-month-old twins alone with Langdon in her dangerous and unstable condition, such conduct would almost certainly have constituted affirmative action enhancing a risk of physical harm to the twins. However, Lewis and Cerda also entrusted the twins to Rosa, Langdon's friend and neighbor, who had experience supervising people with mental health disorders. The Court could not say, however, that amendment would be futile given Plaintiffs' vague FAC allegations and because the District Court applied an incorrect custody standard. The Court of Appeals thus vacated the District Court's dismissal order with an instruction to allow Plaintiffs to amend their complaint.

The Ninth Circuit next held that Plaintiffs adequately stated their Section 1983 claims against City of Tulare Police Sergeant Garcia under the state-created danger exception. The Court agreed with Plaintiffs that Sergeant Garcia increased the risk of physical harm to the twins by arranging a room for them at a motel, transporting Langdon and the twins from the Lighthouse shelter to the motel, and leaving them there. The Court explained that Sergeant Garcia removed them from the supervision of the Lighthouse staff and rendered the twins more vulnerable to physical injury by Langdon as a result of their isolation with her.

The Court also concluded that Plaintiffs pleaded facts plausibly demonstrating that Garcia acted with deliberate indifference to the risk that Langdon would physically harm the twins. Plaintiffs alleged that Garcia knew about the events that occurred at Lighthouse—those events he learned of from his colleagues as well as those he witnessed himself. Before Garcia arrived, Lighthouse staff called the police twice for help dealing with Langdon. Among other things, Langdon yelled at police, collapsed to the floor, and claimed to be having contractions. According to the FAC, making all reasonable inferences in favor of Plaintiffs, the Court determined that Sergeant Garcia learned about Langdon's bizarre behavior at Lighthouse when a TPD officer updated Garcia on the call. After Garcia arrived, Langdon collapsed to the floor and claimed she was going into labor before rising and asking someone if she wanted a manicure. Langdon did not have a diaper bag, diapers, baby bottles, or a change of clothing indicating she was capable of caring for the twins. Garcia's attempts to communicate with Langdon were fruitless.

Based on these allegations, the Court decided that Sergeant Garcia was aware that Langdon was having a mental health crisis.

Given the extreme vulnerability of the ten-month-old twins, the Court found that the complaint adequately alleged that Garcia was aware that Langdon posed an obvious risk of physical harm to the twins based on her worrisome behavior. At ten months old, the twins were fully dependent on the care of others for survival, yet Garcia left the twins alone with Langdon in a motel room overnight. Thus, the Court decided that Garcia could be charged with deliberate indifference for ignoring the obvious risk of leaving the babies unattended with Langdon. The Ninth Circuit accordingly concluded that the complaint adequately alleged that Sergeant Garcia knew Langdon's mental health crisis posed a serious risk of physical harm to the twins but nonetheless disregarded this risk and left the twins in a situation that was more dangerous than how he found them.

The Ninth Circuit similarly concluded that Plaintiffs adequately alleged a state-created danger claim against CWS Social Worker Torres. Plaintiffs alleged in the FAC that Torres lied to Garcia in falsely stating that Langdon was homeless, and "falsely stat[ing] that Langdon had no history of child abuse, even though CWS [k]new of three criminal convictions for child cruelty and prior cases including one open case against Langdon." The Court took these allegations to mean that Torres herself possessed the knowledge that Langdon had a history of child abuse, including abuse against her own son, and that CWS had an open case against Langdon. The Court stated that when Torres provided Garcia with false information, she rendered the twins more vulnerable to physical injury by Langdon by eliminating the most obvious solution to ensuring the twins' safety: returning them to Murguia's custody. Absent Torres' affirmative misrepresentation, the Court explained, Garcia may have conducted an independent investigation into Langdon's criminal history and living situation prior to settling on the decision to take the family to the motel.

The Court found that given Torres' knowledge of Langdon's current angry and erratic behavior as well as her history of child abuse, it was foreseeable "as a matter of common sense" that Langdon might harm the twins if left alone with them (See *Martinez*, *supra*, 943 F.3d at 1274). It was similarly foreseeable that the misinformation Torres provided would impact Garcia's decision about whether to separate Langdon from the twins. Moreover, the Court found that Plaintiffs had alleged that Torres acted with deliberate indifference. The Court thus concluded that a reasonable jury could find that Torres was aware of the risk that Langdon would physically harm the twins and nevertheless lied to Garcia about Langdon's background, and in doing so ignored the consequences of her actions. The Court added that its conclusion was "bolstered by the young age and utter defenselessness of the ten-month-old twins."

Because the Ninth Circuit reversed the dismissal of some of Plaintiffs' section 1983 claims against Sergeant Garcia and Torres, the Court of Appeals reversed the District Court's dismissal of Plaintiffs' *Monell* claims against the County and City of Tulare, reversed the dismissal of Plaintiffs' state law claims, and remanded for further proceedings.

Dissenting in part, Judge Ikuta stated that the majority's expansion of the state-created danger doctrine into the realm of tort law conflicted with Supreme Court precedent and was out of step even with the Ninth Circuit's broad state-created danger doctrine. The dissent acknowledged that tragic consequences may flow from negligence, mistakes of judgment, and the failure to provide safety and security to those who need it, as the case here demonstrated. However, the dissent stated, "victims of such lapses must pursue redress through tort law, because these mistakes do not rise to the level of egregious abuse of government power that violates citizens' constitutional rights." The dissent maintained that the majority made three mistakes. First, the majority opinion found a substantive due process violation in the absence of any abusive exercise of state authority. Second, the majority opinion indicated that officials may be liable for failing to take affirmative actions to protect children from a dangerous parent. However, as *DeShaney* held, that failure to protect is not an egregious abuse of state-assigned power. Finally, the majority-imposed liability for substantive due process violations when the plaintiffs' allegations amounted to mere negligence.

HOW THIS AFFECTS YOUR AGENCY

Agencies will note that the Ninth Circuit found that the District Court used the wrong standard in applying the state-created danger exception by asking simply whether the twins were in the mother's custody before and after the deputy and sergeant intervened, rather than asking more broadly whether the twins were rendered more vulnerable by their actions. The state-created danger exception did not require that the state actor have custody of the plaintiffs.

Agencies should observe that a key dispute between the majority and Judge Ikuta's dissent is whether Sergeant Garcia's conduct in transporting Langdon and the twins to a motel and arranging for them to stay there amounted to exercising his authority to force the twins into an obviously dangerous situation, or whether it was mere negligence. The facts of this case are no doubt tragic. Plaintiffs would have a legal remedy to pursue even absent a finding that the state-created danger exception applied here. Nevertheless, agencies should examine the facts and law set forth in this case and address future similarly encountered situations with these issues in mind.

As always, if you want to discuss any of this in greater detail, do not hesitate to contact James Touchstone at jrt@jones-mayer.com or by telephone at (714) 446-1400.

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