

FILED

FOR THE DISTRICT OF COLORADO
Judge Wilton V. Davis

JAN 23 2007

Civil Action No. 00 - D - 1285

JAMES R. MANSPEAKER
CLERK

JESSICA GONZALES, individually and as next best friend of her deceased minor

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.

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.

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 of the Complaint

they are entitled to qualified immunity; Castle Rock seeks dismissal arguing that Plaintiff has failed to allege facts sufficient to support a claim that the individual Defendants

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

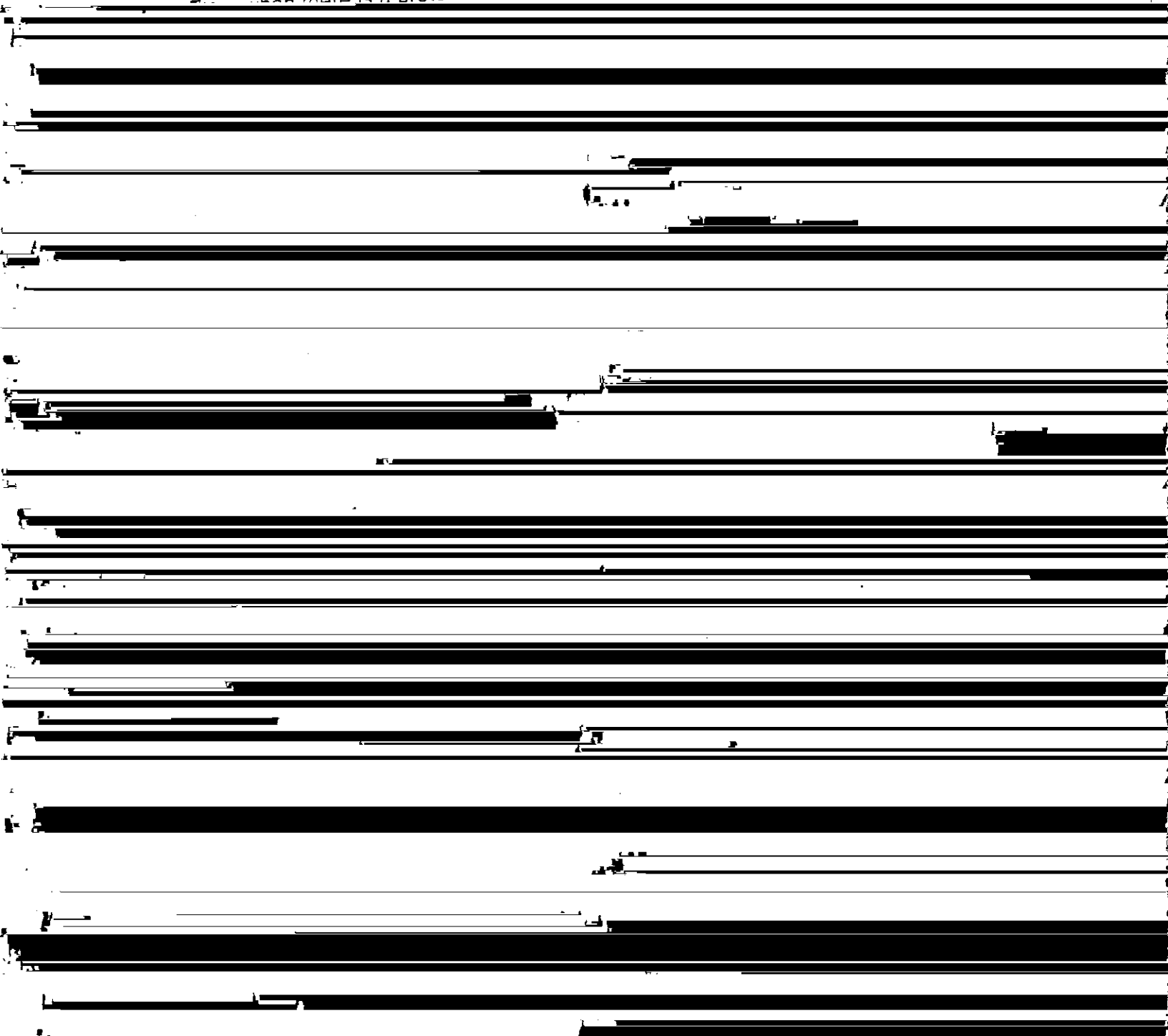
(2) that the conduct deprived the plaintiff of a constitutional right.

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).

When there is a protectable property interest, the Due Process Clause does



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, "while 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.

Id. at 201. "While the State may have been aware of the dangers that the children

- 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

S. 18-6-803.5(3) created the possibility of danger to the good health of...

got rise to the level of negligence checking affirmative conduct...

childrens' deaths are simply "too remote a consequence of [defendants'] action to hold

them responsible under the federal civil rights law." Cochran, 89 F.3d at 225 (quoting...

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

State v. Lohoff, 195 F.3d 1221.

1223 (10th Cir. 1999).³

³Plaintiff urges the Court to follow Siddle v. City of Cambridge, 761 F. Supp. 503 (E.D. Pa. 1990) and Wilson Police Dept., 739 F. Supp. 257 (E.D. Pa. 1990).

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, 370 U.S. 89, 96 (1962), the process of determining whether there is probable cause

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

The tragic facts of this case make the conclusion that Plaintiff has no cause of

action 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:

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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