

Court of Appeal affirms \$4.9 parental rights verdict and \$1.6 million fee award for civil rights counsel

After a grueling 7-week jury trial and a 3-plus year appeal, the Fourth Appellate District, Division Three, issued its Opinion on June 14, 2010, affirming a \$6.6 million Judgment obtained by North County attorney Sondra Sutherland and co-counsel, Shawn McMillan, against the County of Orange, Department of Social Services. The Court reversed and remanded with directions to strike the injunctive relief from the Judgment, but in all other respects affirmed the Judgment. This is reputed to be the largest civil (parental) rights Judgment against a child protective services agency in U.S. history and has made quite a splash since the Verdicts were reached in March 2007.

The 1983 action was originally filed in 2001 by Deanna Fogarty-Hardwick, a former Miss California and mother of two young girls, one of whom is autistic. The girls, one of whom alleged abuse by their father, were reluctant to visit with their father. In spite of assurances that they would not be forced to visit, one of Orange County's social workers threatened the girls, "if you don't visit with your father, the judge is going to put you in a home". An emotional scene ensued at the Agency's office. When the mother begged for guidance as to what more she could do, the worker said, "you'd better call your attorney". She also commented, "What, I'm not warm and fuzzy enough for you?" Two days later, to cover-up their wrongdoing, the social workers concocted the false tale that the mother had told the girls that their father was trying to take them away from her, and that she caused the girls to skip a mandatory visit with the father. The Dependency Court Referee ordered the children removed from the mother. The Agency continued to reiterate the false allegations and refused to return the children to their mother, even after the Dependency Court authorized them to do so. Indeed, they refused any relative placement and insisted the girls remain in foster care. The worker threatened Fogarty-Hardwick, "if you do not 'submit' to me, you will never see your kids again." Supervisors backed up their subordinates every step of the way while ignoring and failing to investigate complaints made by numerous individuals about the workers' conduct. Instead of disciplining the social worker who lied to the Dependency Court, the agency promoted her to Supervisor. The children decompensated psychologically as they lingered in a children's home for over a month, followed by another two months in foster care. Finally, feeling she had no other choice to free her children from foster care, the mother agreed to relinquish custody to the father. It would take her six years and cost her about a half million dollars in legal fees and other costs before she would finally regain shared physical custody of her children. The autistic daughter is now 18 and resides with her mother full-time, of her own free will.

The jury found that the social workers intentionally violated Fogarty-Hardwick's right to familial association and privacy, that the conduct occurred as a result of the official policy or custom of the County of Orange, and that the County was deliberately indifferent to the need to train and/or supervise its employees adequately. They also found that the social workers acted with malice, oppression or fraud. The jury awarded damages totaling \$4,912,866. The trial court followed with a \$1.6 million fee award to Ms. Sutherland and Mr. McMillan.

The Appellate Court rejected each of the County's arguments challenging liability, and similarly rejected its challenge to the amount of damages awarded, or the trial court's use of a fee multiplier in connection with its award of attorney fees to Fogarty-Hardwick. For example, in rejecting the County's argument that this was an attempt to "relitigate" the issue of custody, the Court observed (among other things), "Because the outcome of the dependency case was irretrievably prejudiced by the very misconduct which is at the core of this case, it cannot be cited as evidence of what would have happened in the absence of that misconduct." "Stated simply, her injuries arose out of the proceeding in which the perjury occurred, i.e., the corrupted dependency proceeding, and she had no ability to assert any claim based upon those injuries within that proceeding".

The Court rejected the County's absolute immunity argument, noting, "the County does not even mention in its opening brief on appeal that it failed to plead absolute immunity as a defense in its answer, or that it moved to add the defense to its answer only shortly before trial. We find it quite remarkable that [the] opening brief does not acknowledge that the court denied that motion as untimely, and that the County did not include that order as part of the record on appeal." Nor did the County make any effort to demonstrate that the trial court abused its discretion in making that order.

As to its claim for qualified immunity, the Court explained that qualified immunity is ordinarily defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury", explained the Court. "In this case, the jury specifically concluded that [the social workers] lied, falsified evidence, and suppressed exculpatory evidence -- all of which was material to the dependency court's decision to deprive Fogarty-Hardwick of custody -- and that they did so with malice." The Court concluded, these findings were sufficient to defeat qualified immunity.

On the County's liability under Monell, the Court noted the County's "intriguing acknowledgement" that it had admitted that the social workers acted pursuant to municipal policy or custom. "Assuming, as the County states, it represented in discovery that its social workers (whom the jury concluded had lied and fabricated evidence) 'acted pursuant to municipal policy and custom,' that admission would be sufficient to sustain the challenged finding."

In support of its attack on the \$1.6 million fee award, the County argued that the court erroneously double-counted the complexity of the case when it relied on that factor both to assign a lodestar amount and as a basis for its 2.5 multiplier. In support, it offered only one "somewhat equivocal (and apparently nonexistent)" quotation from a case, and "completely failed to demonstrate why this case would necessarily run afoul of" that case.

The Court had this to say about its reversal on the injunctive relief:

"However, our decision to strike the injunctive relief from the judgment should not be viewed by the County as a sign we view it as insignificant.

Quite the contrary is true. The fact that a very well respected member of the superior court bench viewed the issuance of injunctive relief as necessary here highlights the egregiousness of defendants' conduct in this case. Stated plainly, the outcome of this case cannot be dismissed as merely the unfortunate product of a runaway jury. The evidence adduced at trial obviously caused both the jury and the judge to conclude not only that something seriously wrong was done to Fogarty-Hardwick in this case, but also that the wrongful conduct was not an isolated incident. That conclusion is something the County should be taking very seriously."

"With the strong rebuke of the County's conduct by the jury, the trial judge and now the Appellate Court, it is hard to say the nine-year battle has been in vein", said Sutherland.

For a complete copy of the Decision, go to <http://www.courtinfo.ca.gov/opinions/nonpub.htm> or contact Ms. Sutherland at sondra@ssslegal.com.