

3-28-09
HB-340

LINCOLN DZIEKONSKI

SENATE JUDICIARY

Exhibit No. 10

Date 3-28-09

Bill No. HB 340

District and Appellate Court precedent

Warren v. District of Columbia (1981) Two women were upstairs in a townhouse when they heard their roommate, a third woman, being attacked downstairs by intruders. They phoned the police several times and were assured that officers were on the way. After about 30 minutes, when their roommate's screams had stopped, they assumed the police had finally arrived.

When the two women went downstairs they saw that in fact the police never came, but the intruders were still there. As the Warren court graphically states in the opinion: "For the next fourteen hours the women were held captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands of their attackers." The three women sued the District of Columbia for failing to protect them, but D.C.'s highest court exonerated the District and its police, saying that it is a "fundamental principle of American law (going back to 1856 in *South v. Maryland*) that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen." *Warren v. District of Columbia*, 444 A.2d 1 (D.C. Ct. of Ap., 1981).

In **McKee v. City of Rockwall, Texas** (1989) the U. S. District Court of Appeals for the Fifth Circuit held that "no constitutional violation [occurred] when the most that can be said of the police is that they stood by and did nothing..." Certiorari was denied by the Supreme Court in 1990..

Riss v. City of New York (1958) Ms. Riss was being harassed by a former boyfriend, in a familiar pattern of increasingly violent threats. She went to the police for help many times, but was always rebuffed. Desperate because she could not get police protection, she applied for a gun permit, but was refused that as well. On the eve of her engagement party she and her mother went to the police one last time pleading for protection against what they were certain was a serious and dangerous threat. And one last time the police refused. As she was leaving the party, her former boyfriend threw acid in her face, blinding and permanently disfiguring her.

Her case against the City of New York for failing to protect her was, not surprisingly, unsuccessful. The lone dissenting justice of New York's high court wrote in his opinion: "What makes the City's position [denying any obligation to protect the woman] particularly difficult to understand is that, in conformity to the dictates of the law [she] did not carry any weapon for self-defense. Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her." *Riss v. City of New York*, 22 N.Y.2d 579, 293 NYS2d 897, 240 N.E.2d 860 (N.Y. Ct. of Ap. 1958).

(Peter Alan Kasler; <http://www.firearmsandliberty.com/kasler-protection.html#12>)

In 1982 (**Bowers v. DeVito**), the Court of Appeals, Seventh Circuit held, "...there is no Constitutional right to be protected by the state against being murdered by criminals or madmen."

Supreme Court precedent

In the case of **Castle Rock v. Gonzales (2005)**, the Supreme Court found that Jessica Gonzales did not have a constitutional right to police protection, *even in the presence of a restraining order*.

By a vote of 7-to-2, the Supreme Court ruled that Gonzales has no right to sue her local police department for failing to protect her and her children from her estranged husband.

In 1999, Gonzales obtained a restraining order against her estranged husband Simon, which limited his access to their children. On June 22, 1999, Simon abducted their three daughters. Though the Castle Rock police department disputes some of the details of what happened next, the two sides are in basic agreement: After her daughters' abduction, Gonzales repeatedly phoned the police for assistance. Officers visited the home. Believing Simon to be non-violent and, arguably, in compliance with the limited access granted by the restraining order, the police did nothing.

The next morning, Simon committed "suicide by cop." He shot a gun repeatedly through a police station window and was killed by returned fire. The murdered bodies of Leslie, 7, Katheryn, 9 and Rebecca, 10 were found in Simon's pickup truck.

In her lawsuit, Gonzales claimed the police violated her 14th Amendment right to due process and sued them for \$30 million. She won at the Appeals level.

What were the arguments that won and lost in the Supreme Court?

Winners: local officials fell back upon a rich history of court decisions that found the police to have no constitutional obligation to protect individuals from private individuals.

In 1856, the U.S. Supreme Court (*South v. Maryland*) found that law enforcement officers had no affirmative duty to provide such protection.

*Origin of the Public Duty Doctrine:
South v. Maryland*

Legal authority in the United States that there is no liability for the failure to protect individuals by law enforcement officers generally is accepted as originating in *South v. Maryland*, for states implementing it under the public duty doctrine. In this case, Robinson, a resident of Washington County, owed a judgment debt to Pottle, a resident of Massachusetts. When Pottle and a party consisting of his attorney and a deputy sheriff attempted to assert a levy upon Robinson's property, they were surrounded by a group of workmen armed with stones and other weapons. The workmen threatened violence should any attempt be made to assert the levy. After Pottle and his party took refuge in a nearby house, the workmen (described in the case as "rioters") maintained an armed guard around it. The deputy sheriff left Pottle and his attorney imprisoned in the house and went to consult with the High Sheriff, South. When South returned with the deputy, Pottle demanded that he be protected from the armed workmen, but South refused to do so. Pottle and his attorney were released, after four days of imprisonment, when they paid the workmen \$2,500, a sum apparently equal to the amount of back wages owed them by Robinson.

After the federal Circuit Court for the District of Maryland found for the plaintiff Pottle in a civil suit for damages against the sheriff, South appealed to the Supreme Court. The Supreme Court, in reversing the lower court, found no cause of action under Maryland common law. The Court held that a sheriff, as a public officer, was liable personally only for misfeasance or nonfeasance of ministerial acts, where the sheriff is bound to an individual for a fee or salary, but not for a breach of his public duty. For failure to perform a public duty, where the plaintiff does not allege a special individual right or privilege which "has been restrained or hindered by the malicious act," a public officer is punishable only by indictment. In bringing the claim, the Court noted that Pottle apparently postulated that every breach or neglect of a public duty subjects an officer to a civil suit by any individual who, as a result, suffers damages, which the Court found contrary to any recorded case in American or English law.

The history of the law for centuries proves this to be the case. Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.

South v. Maryland, 59 U.S. (18 How.) 396, 402 (1856).

Various state courts during the late 1800s began to use *South* as a method for limiting governmental liability for the acts of its agents. Gradually, the public duty doctrine took its present form as a method of limiting state liability to a particular person resulting from a general duty owed to the public.

DeShaney v. Winnebago County

Docket: 87-154

Citation: 489 U.S. 189 (1989)

Petitioner: DeShaney

Respondent: Winnebago County

Oral arguments: Wednesday, November 2, 1988

Decision: Wednesday, February 22, 1988

Issues: Civil Rights, Juveniles

Facts of the Case

In 1984, four-year-old Joshua DeShaney became comatose and then profoundly retarded due to traumatic head injuries inflicted by his father who physically beat him over a long period of time. The Winnebago County Department of Social Services took various steps to protect the child after receiving numerous complaints of the abuse; however, the Department did not act to remove Joshua from his father's custody. Joshua DeShaney's mother subsequently sued the Winnebago County Department of Social Services, alleging that the Department had deprived the child of his "liberty interest in bodily integrity, in violation of his rights under the substantive component of the Fourteenth Amendment's Due Process Clause, by failing to intervene to protect him against his father's violence."

Question

Does a state's failure to protect an individual against private violence constitute a violation of the Due Process Clause of the Fourteenth Amendment?

Conclusion

No. The Due Process Clause does not impose a special duty on the State to provide services to the public for protection against private actors if the State did not create those harms. "The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security; while it forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."

(http://www.oyez.org/cases/1980-1989/1988/1988_87_154/)

Similar legislation becomes law in Texas

On Tuesday, March 27, 2007 Governor Rick Perry (R) signed Senate Bill 378. Governor Perry's signature made Texas the first state to adopt such legislation in 2007. SB 378 will protect individuals who use force to defend themselves in their home, car and their place of business or employment, from criminal prosecution and civil lawsuits. It also states that you have no "duty to retreat" from an attack if you are in a place where you have a right to be, if you did not provoke your attacker, and if you are not engaged in criminal activity yourself.
