IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JOSEPH F. SHUCOFSKY,
as personal representative of
the Estate of D.S., and
GLORIA D. SYKES,

OPINION and ORDER

Plaintiffs,

10-cv-393-bbc

v.

DANE COUNTY and LYNDA SYKES,

Defendants.[1]

- -

This case presents the sad story of D.S., a child who suffered from abuse for most of her short life. Plaintiff Gloria Sykes (D.S.'s mother) fled Wisconsin and left two-year-old D.S. in the care of defendant Lynda Sykes (Gloria's half-sister) after defendant Dane County began investigating allegations of abuse against Gloria and discovered various marks and scars on D.S.'s body. (For simplicity, I will refer to plaintiff Gloria Sykes as "Gloria,"

[1] Plaintiffs list "John Does #1-100" as defendants in their amended complaint, dkt. #4, but they have not sought to amend the complaint to identify these John Does, so I have deleted them from the caption. Plaintiffs cannot maintain claims against parties who have not been served with the complaint.

defendant Lynda Sykes as "Lynda" and defendant Dane County as "the county" for the remainder of the opinion.)

When Gloria did not return for D.S., the county filed a petition to intervene in D.S.'s care and Lynda filed a petition for guardianship. After the circuit court granted her petition, Lynda sought permission to move to Ohio with D.S. The county recommended granting the request, despite its knowledge that Lynda had a criminal history that included serious acts of violence, because it concluded that placement with Lynda was the best option. The county lost track of Lynda shortly after the move and the order authorizing supervision over Lynda expired one year later. Eventually, county officials in Ohio took custody of D.S. because of allegations of abuse against Lynda. For reasons that are not clear, Ohio returned D.S. to Lynda in April 2008. Two months later (nearly three years after Lynda and D.S. had left Wisconsin), D.S. was dead. Lynda pleaded guilty to involuntary manslaughter and is incarcerated in Ohio.

Gloria and D.S.'s estate brought this case against the county and Lynda, asserting a claim under the due process clause against the county and a state law wrongful death claim against both defendants. (Originally, plaintiffs sued Cuyahoga County, Ohio as well, but I dismissed that defendant for lack of personal jurisdiction. Dkt. #38.) The county's motion for summary judgment is ready for decision. Dkt. #49. Lynda, who is proceeding without a lawyer, has not filed her own motion for summary judgment or any materials in response

to the county's motion.

The county advances several arguments in support of its motion with respect to plaintiffs' federal claim: (1) under DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), it cannot be held liable for failing to protect D.S. from abuse because D.S. was not in its custody and it did not create the danger that led to D.S.'s death; (2) it did not know or suspect that Lynda would abuse D.S.; (3) it exercised professional judgment in deciding to recommend D.S.'s placement with Lynda; (4) its actions are not the proximate cause of D.S.'s death; and (5) it is entitled to absolute immunity or qualified immunity. Although a number of these arguments have merit, I conclude that the county is entitled to summary judgment on the ground that it used professional judgment in making its recommendation.

In hindsight, it is easy to blame the county for failing to heed the warning signs present in Lynda's criminal history. However, it is clear that county officials carefully considered the positive and negative factors of a placement with Lynda. The county knew of Lynda's troubled past, but believed that she had turned over a new leaf and it was encouraged by the parenting skills she had demonstrated in the six months since Gloria had left. As it turns out, the county was overly optimistic regarding Lynda's ability to be a parent. But even if the county's decision could be described as negligent, that is not enough to hold the county liable under the Constitution.

Because I am dismissing plaintiffs' federal claim, I am declining to exercise supplemental jurisdiction over plaintiffs' state law claims. 28 U.S.C. § 1367(c)(3).

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Gloria Sykes and defendant Lynda Sykes are half-sisters. In early 2005 Gloria was living in Texas and Lynda was living in Wisconsin. While Lynda was visiting Gloria in Texas, Lynda invited Gloria and her minor daughter, D.S., to live with Lynda in Wisconsin because she believed Gloria's living conditions were "very poor." In April 2005 Gloria moved to Wisconsin and moved in with Lynda. D.S. was two years old at the time.

On April 14, 2005, the county's Department of Human Services received a report about possible physical abuse of D.S. (The parties do not say who provided this report.) On April 20, 2005, an official from the county visited Lynda's home and observed "marks" on D.S.'s arms and legs and "what looked like fingernail marks on the front of her armpits." Dkt. #51-2, at 1-2. When the official asked Gloria how D.S. received the marks, Gloria said she did not know and "appeared uninterested" in D.S. Id. at 2. However, Gloria admitted that she had hit D.S. on the head out of frustration. In addition, the county received information that Gloria was schizophrenic, bipolar, suicidal and had a long history of mental

health concerns. (The parties do not say how the county learned this, but plaintiffs do not dispute that Gloria suffered from all of these problems.)

On May 2, 2005, a county official accompanied Lynda, Gloria and D.S. on a visit to the doctor. The doctor observed that D.S. had excessive scarring. A nurse who examined D.S. wrote that D.S. had "blunt force trauma, some with patterns consistent with finger marks, bruises and tears, in various stages of healing." An examination for sexual assault was inconclusive.

The same day Gloria told a county employee that she was returning to Texas and that she wanted Lynda to care for her daughter while she was gone. Gloria left on May 3. While Gloria was gone, county officials spoke with family and friends of Gloria; all of them agreed that Gloria was not able to care for her daughter.

On May 20, the county filed a "Petition for Protection or Services" (commonly called a "CHIPS petition") for D.S. in the Circuit Court for Dane County. The county cited Wis. Stat. § 48.13(3) and (10), which apply when the child "has been a victim of abuse" or the child's guardian is "seriously endanger[ing] the physical health of the child." On June 1, the circuit court appointed a guardian ad litem for D.S.

In a report titled "Initial Assessment," the county wrote the following:

> Lynda Sykes has indicated that she is in a position to care for [D.S.] She stated that she recently moved from Ohio and that she is retired and home during the day. She indicated that she has no AODA issues. A check of her

> background indicates that she has a criminal history that includes charges ranging from Disorderly Conduct to 2nd Degree Recklessly Endangering Safety that date from 4/2/87 through 4/11/97. Ms. Sykes was incarcerated in 5/16/96 and released 12/21/99. Despite Ms. Sykes' criminal history, she appears to be able to function satisfactorily now. She has a[n] immaculate home, has indicated that she has saved enough that she can retire at an early age and has no apparent mental health or AODA issues.

(The parties do not explain the specific reason this report was prepared or whether it was given to the circuit court.)

On June 3, 2005, Lynda filed a petition with the circuit court for guardianship of D.S. Neither the county nor Gloria was involved in that proceeding. Attempts by the guardian ad litem to contact Gloria were not successful. On June 9, the commissioner appointed Lynda to be D.S.'s guardian.

On June 29, 2005, court staff attempted to contact Gloria in connection with the CHIPS petition, but were unsuccessful. On June 30, 2005, a county official spoke with Gloria over the phone. Gloria told the official that Lynda had told her, "No one wants your bad ass baby."

On July 1, 2005, one county official told another county official that D.S.'s godmother "is willing to take the child while Gloria works on getting her act together."

On July 6, 2005, the guardian ad litem called the county to say that "there was no discussion about criminal background or kinship care" at the guardianship hearing. Dkt. #66-18, at DCHS 384.

On July 8, 2005, the court issued a summons for Gloria to appear at a hearing. The summons explained that "[t]he purpose of this hearing is to determine whether any party wants to contest the petition and the Court's jurisdiction." It included a warning that the court could enter a default judgment against Gloria if she did not appear. In a July 14 telephone conversation between a county official and D.S.'s godmother, the godmother said that Gloria had not returned to Madison because Lynda had told her that she would be arrested if she did. Gloria did not appear at the hearing and the court found her in default.

In July 2005, Lynda applied for "kinship care," which is a type of financial assistance. The county interviewed Lynda as part of the application process. In summarizing the interview, the county wrote that Lynda

> grew up in a family where violence between men and women was frequent and accepted. She witnessed her father abusing her mother and her stepmothers and learned that this is how one attains and holds power within a relationship . . . She recalls thinking that in order to avoid getting beaten she needed to strike first.

In the county's review of that application, it noted the following facts about Lynda:

- in 1987, she stabbed her ex-boyfriend;
- in 1989, she was arrested after another woman alleged that Lynda hit her over the head with a handgun (Lynda said she punched her but did not hit her with a gun);
- in 1993, she stabbed her nephew in the left shoulder blade;

- in 1995, she stabbed another woman in the shoulder;
- she had "been under federal supervision after a time in a federal institution for financial crimes";
- she "had some trouble with drugs and alcohol" in the past;

The county noted that Lynda "expressed no concern or remorse for the injury caused to others."

On August 23, 2005, the county denied Lynda's application for kinship care. In the decision, a county official stated, "I find her suggestion that after a history of this level of difficulty managing her behavior that she can simply let go of her anger to be unlikely." In addition, the official noted that Lynda had failed to comply with a request to submit her fingerprints for a background check related to her time in Ohio (1999-2005).

One week before the dispositional hearing on the CHIPS petition, Lynda notified the county that she was planning to move by October 1, 2005 to Ohio, where she had lived before moving to Madison. After investigating the situation, the county made a recommendation to the court to allow D.S. to remain under Lynda's care:

> First of all I think it's important that we remember that this matter was brought to the agency's attention because of Gloria's maltreatment of her daughter [D.S.] It is not Lynda's treatment of [D.S.] that is in question. There is no doubt that Lynda's past is one that causes great apprehension given the aggressive nature of the crimes. However, she has not had any new criminal charges in nearly 8 1/2 years. More importantly, she has consistently demonstrated over the last six months that she can appropriately care for and

> provide for [D.S.]. She was granted guardianship of [D.S.] in June 2005 and has obtained the necessary documents and has ensured that [D.S.]'s medical, psychological and educational needs have been met.
>
> Although I do not necessarily see the urgency in Lynda's need to move to Ohio, I believe that it is in [D.S.]'s best interest to remain with her aunt and move to Ohio with her. [D.S.] is attached to Lynda and Lynda has demonstrated her commitment to [D.S.] by her continued cooperation with the department and other services. Lynda has been assertive and pro-active in obtaining necessary services for [D.S.] in Madison and I am confident that she will continue to do so in Ohio.
>
> As for Gloria, she left [D.S.] in Madison in May 2005 and has not made any efforts to return for her. It is not likely that she will be available to appropriately care for [D.S.] in the near future and [D.S] needs someone who will consistently meet her needs. Lynda has been doing a good job doing so for the last six months and I am confident she will continue to do so.
>
> In the event that the court does authorize [D.S.] to move with Lynda to Ohio, I would ask that the court dismiss the current CHIPS petition. Maintaining jurisdiction would be a logistical nightmare and it would be nearly impossible for the department to provide case management services to any of the parties.

In discussing Lynda's history, the county noted that Lynda "cared for her niece . . . in 1998 because [Lynda's] sister was not able to care for her. Notes . . . suggest that [Lynda] was a strong advocate for [her niece] and was seen as an asset to the team."

The circuit court gave interested parties an opportunity to object to placing D.S. with Lynda, but neither Gloria nor anyone else filed an objection.

On September 20, Lynda told a county official that she did not have a job lined up in Ohio. The reason she wanted to move is that she had broken up with her fiancé. Lynda

did not provide the official her Social Security number as requested.

In an order dated September 21, 2005, the court wrote the following:

> Court places [D.S.] in her own home with her guardian, Lynda J. Sykes D.O.B. April 24, 1963, in full recognition that Lynda Sykes is planning to move to Ohio with the child.
>
> The Department is directed to structure that move to provide supervision services and protection for the child in Cuyahoga County, Ohio.
>
> Gloria Sykes is to have no contact with the child unless specific advance notice and approval of the guardian [is given]. If the visitation is not approved by the guardian, Gloria Sykes is to make application to the appropriate court for visitation.
>
> The District Attorney's office is directed to assist the Department in transferring supervision to Cuyahoga County, Ohio through an interstate compact agreement. The court directs the expedition of this agreement as soon as possible.

The order stated it would expire on September 20, 2006.

After a few initial contacts, neither Dane County nor Cuyahoga County was able to locate Lynda throughout much of 2006. On August 10, 2006, a Dane County official wrote that she "continued to try and write, call, etc, to reach Lynda w/o success. Will wait for supervision to expire."

In March and April 2007, Cuyahoga County "received reports that [D.S.] had been abused." Dft.'s PFOF ¶ 78, dkt. #48. (The county does not say where these reports came from and it does not discuss the nature of the abuse or identify who inflicted it. Defendant

cites a note from Cuyahoga County that D.S. had "an injury on both her left and right arm" and that these injuries were "inconsistent with the provided story" from Lynda. Dkt. #51-23.) On May 2, 2007, D.S. was "committed to the emergency care and custody" of Cuyahoga County.

In April 2008, Cuyahoga County returned D.S. to Lynda's care. (The parties do not discuss what happened in the interim or why D.S. was returned to Lynda.) On July 16, 2008, D.S. died from injuries inflicted by Lynda. Lynda was convicted of involuntary manslaughter and is incarcerated.

OPINION

A. Federal Law Claim

As a general matter, the Constitution does not impose on public employees a "duty to rescue" private citizens from harm caused by a third party. Sandage v. Board of Commissioners of Vanderburgh County, 548 F.3d 595, 596 (7th Cir. 2008) ("There is no federal constitutional right to be protected by the government against private violence in which the government is not complicit."). This is because "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). The seminal case is

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989), in which the Supreme Court held that a Wisconsin county could not be held liable under the due process clause for failing to remove a boy from the custody of his father, who later beat the child so badly that he suffered severe brain damage. This was so even though the county had received multiple reports that the father was abusive. Id. at 192-93.

An exception to the general rule exists when action by the government makes a person less safe. This can occur when the government takes custody of the individual and thus limits her ability to fend for herself or when it takes an "affirmative act" that creates a heightened risk of harm. Sandage, 548 F.3d at 599-600. Plaintiffs argue that both situations were present in this case.

D.S. was not in the county's custody when she died, so it is difficult to see how that exception could apply in this case. The cases plaintiffs cite involved children who were in foster care at the time the abuse occurred. Waubanascum v. Shawano County, 416 F.3d 658, 661 (7th Cir. 2005); J.H. ex rel. Higgin v. Johnson, 346 F.3d 788, 791 (7th Cir. 2003); Camp v. Gregory, 67 F.3d 1286, 1287-88 (7th Cir.1995); K.H. Through Murphy v. Morgan, 914 F.2d 846, 849 (7th Cir. 1990). In Waubanascum, 416 F.3d at 665, the court stated explicitly that "the state must have custody over the child, or it cannot be liable under the special relationship exception to DeShaney." See also Lewis v. Anderson, 308 F.3d 768, 773-74 (7th Cir. 2002) ("The relevant time frame for our inquiry is between the time when

the state became the guardian of the children and when it relinquished guardianship to the adopting family—that is, between May 31, 1990 and April 23, 1991—when the children were formally adopted.").

Plaintiffs' only response to this problem seems to be that D.S. *should have* been in the county's custody. She writes:

> [T]he CHIPS order was only terminated following Dane County's failure to properly ascertain the whereabouts of D.S., let alone their failure to monitor Defendant Sykes' guardianship of D.S. in compliance with the express terms of the CHIPS order, which required DCDHS to provide supervision, services and protection for D.S. It is certainly possible that had DCDHS and its officials not lost D.S. after recommending her freedom to move out of Dane County, WI with Defendant Sykes, the court would have continued the CHIPS order, given the fact that Defendant Sykes cut off communication with officials of the DCDHS shortly after she was given permission to leave Wisconsin.

Plt.'s Br., dkt. #67, at 17.

There are two problems with this argument. The first is that it assumes that D.S. was in county custody while the circuit court's September 21, 2005 order was in force, but plaintiffs fail to support that assumption with any law or facts. The circuit court appointed Lynda as D.S.'s guardian, not her foster parent. Although Lynda remained under county supervision, plaintiffs fail to explain why supervision should be deemed the constitutional equivalent of custody.

In any event, that order expired *almost two years* before D.S. died. By arguing that the

county should have sought an extension of the order and that it failed to adequately monitor Lynda, plaintiffs raise a claim that the Supreme Court and the court of appeals have rejected. Under DeShaney and its progeny, that kind of failure to act cannot rise to the level of a constitutional violation. Sandage, 548 F.3d at 599-600 (no liability for sheriff's department's failure to act on harassment complaint); Losinski v. County of Trempealeau, 946 F.2d 544 (7th Cir. 1991) (no liability for deputy sheriff's failure to prevent husband from killing his wife, even though deputy was present when wife was attacked).

This leaves the exception regarding "affirmative acts." In considering that exception, it is important to identify the action or actions that plaintiffs are challenging. Plaintiffs' task is to point to something the county did that placed D.S. in greater danger than she was in before it intervened. Stevens v. Umsted, 131 F.3d 697, 705 (7th Cir. 1997) ("In order for the state created danger theory to be available, the state [must] *affirmatively* place[] a particular individual in a position of danger the individual would not otherwise have faced.") (internal quotations omitted); Wallace v. Adkins, 115 F.3d 427, 430 (7th Cir. 1997) ("There are two parts of this inquiry: what actions did the prison officials affirmatively take, and what dangers would [the plaintiff] otherwise have faced?"). Despite the limitation on municipal liability articulated in Monell v. Dept. of Social Services, 436 U.S. 658 (1978), both sides seem to assume that any actions by the county's employees may be imputed to the county, so I will do the same.

As the county points out, it never "placed" D.S. with Lynda, either temporarily or permanently. Originally, it was *Gloria* who asked Lynda to care for her daughter when she left for Texas and it was the circuit court that appointed Lynda as the guardian and then granted Lynda permission to take D.S. to Ohio. The county's only involvement in the placement decision was to write a recommendation. Plaintiffs mention a number of alleged failures in their brief, such as "fail[ing] to properly investigate and monitor" defendant Lynda, but, again, these represent failures to act that did not create a danger that otherwise would not have existed. Id. at 705 ("Stevens's complaint is phrased entirely in terms of Umsted's failure to act, and thus, does not allege an affirmative act by the state.").

Is a recommendation an "affirmative act" under DeShaney? Neither side cites any authority on this question. Arguably, it is not an affirmative act because the recommendation itself changed nothing. To the extent any act by a Wisconsin official increased the danger to D.S., it was the orders of the circuit court. In some circumstances, the court of appeals has held that officials may be held liable for a constitutional violation even if they are not the final decision maker. E.g., Jones v. City of Chicago, 856 F.2d 985, 993-94 (7th Cir. 1988) (police officers who gave knowingly false reports to prosecutor could be held liable for charging decision that relied on those reports). However, the question in Jones was about personal involvement under 42 U.S.C. § 1983, not whether the officers' conduct could render them liable under DeShaney. Further, it seemed important to the

court that the officers had "deliberately supplied misleading information" to the prosecutor. Id. at 994. In this case, plaintiffs do not suggest that the county provided any false information to the circuit court or hid relevant facts. It may be that the county's recommendation influenced the circuit court, but plaintiffs do not point to anything in the court's order that would support that conclusion. Because neither side develops an argument on this issue, I am reluctant to decide the case on this ground.

Even if I assume that the county's recommendation qualifies as an "affirmative act" under DeShaney, plaintiffs cannot prevail. In their briefs, both sides assume that the constitutional standard for foster care placement should apply in this case. Dft.'s Br., dkt. #50, at 18-20; Plt.'s Br., dkt. #67, at 17. Under that standard, "liability will only arise if the state actor knows or suspects that the agency or foster parents with whom a child is placed are likely to abuse the child." J.H., 346 F.3d at 795. See also Lewis, 308 F.3d at 773 ("In order to survive summary judgment, the plaintiffs needed to put forth a case that the DHSS defendants actually knew of or suspected the existence of child abuse in the prospective adoptive family.").

In this case, it is not clear what facts about Lynda's past the county knew when it wrote its recommendation. The county's own reports show that it knew that Lynda had a significant criminal history, including several instances of stabbing. However, it is not clear whether the county knew that one of the victims was 15 years old at the time, that Lynda

had struck a woman in the face in 1997, that her niece had behavioral problems while living with her in 1998, that she had lied about her criminal history in her 1998 and 2005 applications for kinship care or that she had used aliases in the past. The documents plaintiffs cite in support of these facts were not prepared by the county and plaintiffs do not propose any facts showing whether any county employee involved in writing the recommendation was aware of them before the recommendation was prepared.

The county cannot be held liable for failing to consider facts of which it was not aware, even if it could have or should have known them through a better investigation. J.H., 346 F.3d at 795 ("[T]here is no liability under § 1983 for what a defendant should have known, nor is there an affirmative duty of inquiry on the defendants' part to learn disqualifying information.") (citations and internal quotations omitted); Lewis, 308 F.3d at 773 ("[O]fficials cannot be held liable on the basis of facts they did not actually know or suspect, even if they might have learned about disqualifying information if they had conducted a more thorough inquiry."). Plaintiffs' failure to establish these facts is important, particularly with respect to the fact that one of Lynda's victims was 15 years old, because that is the only evidence in the record that Lynda had ever used violence against a minor. (Although plaintiffs emphasize that Lynda's niece had behavioral problems, plaintiffs do not adduce any evidence that Lynda mistreated her niece in any way or that the county suspected mistreatment.)

Even if I assume that the county was aware of these facts *and* that the county knew of a risk that Lynda would abuse D.S., that is not enough to establish liability.

> Even when resources are not severely limited, child welfare workers and their supervisors have a secure haven from liability when they exercise a bona fide professional judgment as to where to place children in their custody. Only if without justification based either on financial constraints or on considerations of professional judgment they place the child in hands they know to be dangerous or otherwise unfit do they expose themselves to liability in damages.

K.H., 914 F.2d at 854.

In this case the record shows conclusively that county employees used professional judgment in deciding to recommend D.S.'s placement with Lynda. In its recommendation, the county considered Lynda's criminal history and the difficulty presented by out-of-state supervision. However, it thought that other factors outweighed those: it had been more than eight years since Lynda's last criminal charge, D.S. was attached to Lynda, Lynda had been cooperating with the county and, most important, Lynda had done a good job over the previous six months in caring for D.S. In particular, she "ensured that [D.S.]'s medical, psychological and educational needs have been met" and she had "been assertive and pro-active in obtaining necessary services for [D.S.] in Madison." (Plaintiffs hint in their brief that Lynda may have been responsible for the injuries D.S. suffered in 2005, but they do not adduce any evidence to support that view or even deny that Gloria was responsible for the abuse.) Finally, the county noted the lack of alternatives. Gloria had left Madison

and had expressed no interest in caring for her small daughter.

In arguing that the county is not entitled to summary judgment on this issue, plaintiffs say only that "[w]hether or not Dane County officials exercised their bona fide professional judgment is a question of fact that should be left for a jury to decide." Plt.s' Br., dkt. #67, at 21. That is not sufficient. Long ago, the Supreme Court rejected the view that plaintiffs have an absolute right to present all fact questions to the jury. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (citations omitted).

In this case, the undisputed facts show that the county gave careful consideration to all of the factors and tried to make the best of an unfortunate situation. Under these circumstances, no reasonable jury could find that the county simply disregarded D.S.'s health and safety.

It is true that the county acted somewhat inconsistently when it rejected Lynda's application for kinship care because of her criminal history. However, this does not show that county employees failed to use professional judgment in recommending placement with Lynda, only that the recommendation was not a foregone conclusion. Certainly, the county could have reviewed Lynda's past and concluded reasonably that she presented too great a

risk to D.S.'s safety. The county may have been prescient in its decision rejecting the kinship care application when it wrote that it was "unlikely" that Lynda "can simply let go of her anger" after "a history of this level of difficulty managing her behavior." However, the government cannot be held liable under the due process clause simply because reasons existed to reach a different decision.

Further, plaintiffs do not argue that any viable placement alternatives were available. Compare K.H., 914 F.2d at 851 (suggesting in dicta that government would not violate Constitution if "the supply of competent foster parents is, through no fault of the defendants, inadequate, and they take a well-meaning, calculated risk, which turns out badly, in placing the child with a foster parent of dubious competence or character"), with Hutchinson on Behalf of Baker v. Spink, 126 F.3d 895, 900 (7th Cir. 1997) (allowing case to go forward when plaintiff alleged that "the State knowingly passed up the chance to place Andrew in a household with risks far lower than those posed by the Spinks"). Gloria had not given any indication that she wanted custody of D.S. and no other relatives had stepped forward.

In their proposed findings of fact, plaintiffs cite an email from one county official to another stating that D.S.'s godmother "is willing to take the child while Gloria works on getting her act together." However, plaintiffs adduce no evidence that placement with the godmother, who lived in Texas, was a desirable or even a realistic possibility. Thus, the

choice for the county was between a close relative who already had been caring successfully for D.S. or a foster home. In light of the law's bias in favor of placing children with their relatives, e.g., Camp, 67 F.3d at 1294, the county's decision cannot be classified as "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." K.H., 914 F.2d at 859.

Plaintiffs' claim has yet another requirement, which is that "the failure on the part of the state to protect an individual from . . . danger must be the proximate cause of the injury to the individual." King ex rel. King v. East St. Louis School District189, 496 F.3d 812, 818 (7th Cir. 2007). The term "proximate cause" is most often translated to mean "reasonably foreseeable." E.g., CDX Liquidating Trust v. Venrock Associates, 640 F.3d 209, 214-15 (7th Cir. 2011); BCS Services, Inc. v. Heartwood 88, LLC, 637 F.3d 750, 754 -756 (7th Cir. 2011). The county argues that plaintiffs cannot satisfy this requirement because nearly three years passed after Lynda left Wisconsin before D.S. died and because of "supervening causes," such as Ohio's decision to return D.S. to Syke's care after removing her once for allegations of abuse. Although I am inclined to agree with the county, especially because plaintiffs do not cite any cases in which a court has allowed a case to go forward with such a substantial time gap between the government's "affirmative act" and the injury, I need not resolve this question because I have concluded that the county is entitled to summary

judgment on the ground that it exercised professional judgment in deciding to recommend placement with Lynda.

B. State Law Claims

When all the federal claims in a case have been dismissed, the general rule is that a district court should decline to exercise jurisdiction over any remaining state law claims under 28 U.S.C. § 1367(c)(3). Redwood v. Dobson, 476 F.3d 462, 467 (7th Cir. 2007). Although exceptions to this general rule exist, neither side asks the court to retain jurisdiction over the state law claims in the event the federal claims are dismissed. Further, if I decided to exercise jurisdiction over the state law claims, this would mean holding a trial on plaintiffs' claim against Lynda, who has not filed her own motion for summary judgment. Because neither side has shown that it would be an efficient use of judicial resources to resolve the state law claims, I am declining to exercise jurisdiction over them.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Dane County, dkt. #49, is GRANTED with respect to the federal claim of plaintiffs Gloria Sykes and Joseph Shukofsky, as personal representative of the Estate of D.S. That claim is DISMISSED WITH PREJUDICE. I decline to exercise supplemental jurisdiction over

plaintiffs' state law claims. Those claims are DISMISSED WITHOUT PREJUDICE to plaintiffs' refiling them in state court. The clerk of court is directed to enter judgment accordingly.

Entered this 24th day of August, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge