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Proskauer Defeats Motion to Dismiss Filed Against Immigrant Mother and Daughter Affected by Family Separation Policy

Proskauer For Good on **September 7, 2023**

In April 2022, Proskauer, with co-counsel Public Counsel and Squire Patton Boggs, filed suit in Arizona federal court on behalf of a Guatemalan mother and daughter who were forcibly separated by border patrol agents in 2018. Earlier this summer, the Court denied a motion to dismiss brought by the federal government. The separation at issue in this case was among the thousands that occurred due to prior administration's family separation policy. Five years later, many of the issues impacting these families are still unresolved, and, despite publicly denouncing the policy, the government continues to defend family separation in federal lawsuits filed across the nation.

The federal government has sovereign immunity from the actions of its employees. However, the plaintiffs brought their claims under the Federal Tort Claims Act ("FTCA") which allows individuals to sue the government for common law torts. The complaint details the treatment of plaintiffs by government officials including confinement in inadequate facilities, the physical separation of Plaintiffs resulting in both bodily and emotional injury, and the deprivation of information regarding each other's wellbeing or what would happen to them.

The United States moved to dismiss the plaintiffs' claims, arguing, among other things, that its acts of detention and separation were protected by the discretionary function exception to the FTCA, which applies if the government can show that its conduct involved an element of judgment or choice and was based on considerations of public policy.

The government argued that it was exercising prosecutorial discretion by detaining and separating families even though the plaintiffs in this case were never charged with a crime. It asserted that the political, economic, and social impact of immigration meant its decisions were justified because they were based on considerations of public policy.

The government also argued that its actions fell within the due care exception, which allows the government to defeat an FTCA claim if it can show that its employee exercised due care when executing a statute or regulation. The government argued that it separated plaintiffs pursuant to the Trafficking Victims Protection Reauthorization Act, a statute intended to protect *unaccompanied* minors entering the country.

Despite these arguments, Judge Michael Liburdi of the District Court of Arizona denied the government's motion to dismiss in part, holding that the Court was bound by Ninth Circuit precedent stating that the discretionary function exception does not allow the federal government to violate the Constitution, specifically the right to family integrity. The Court also rejected the government's due care argument, stating that the government was relying solely on executive policy and failed to show a statute or regulation mandating separation prior to criminally charging the mother. Several of the plaintiffs' claims survived the motion to dismiss, including allegations that government officials, through their conduct, intentionally inflicted emotional harm and acted negligently.

To date, over 40 family separation lawsuits bringing claims under the FTCA are pending against the government. Many of these lawsuits are currently in discovery, where plaintiffs are gathering evidence supporting their claims of the severe harms caused by the government's forced separations and neglect for the plaintiffs' wellbeing. For now, a mother and daughter will enjoy a victory that brings them a step closer to redressing the wrongs they suffered.

The Proskauer team representing plaintiffs includes partners Shawn Ledingham and Mike Mervis, pro bono counsel Michelle Moriarty, associates Tim Burroughs, Hena Vora, and William Rose, summer associate Edwin Chikukwa, and paralegal Nikhil Sadaranganey.

Special thanks to Proskauer summer associate Edwin Chikukwa for his contributions to this post.

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