

CRIMINAL BACKGROUND CHECKS FOR YOUTH SPORT COACHES

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In general, absent a "special relationship," there is no legal duty to protect others from the conduct of third parties. A special relationship may exist when a plaintiff is particularly vulnerable and dependent upon a defendant who, correspondingly, has some control over the plaintiff's welfare. In general, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. Courts have frequently recognized a special relationship between children and their adult caregivers, giving rise to a legal duty to prevent harms caused by the intentional or criminal conduct of third parties.

In the case of *Doe v. United States Youth Soccer Association, Inc.*, 2017 Cal. App. LEXIS 148 (2/22/2017), the question before the court was whether a special relationship existed between youth sports organizations and a child participating on a youth soccer team. Specifically, the court considered whether youth sports organizations had a legal duty to "conduct criminal background checks of all adults who would have contact with children involved in their programs." (Courts may allow the use of the "Jane Doe" pseudonym to protect the privacy and actual identity of a plaintiff, in this case the victim of sexual childhood sexual abuse.)

Plaintiff Jane Doe, a minor, was sexually abused by her former soccer coach (Fabrizio). Fabrizio sexually abused plaintiff from May 2011 until March 2012 when she was 12 years old. After Fabrizio pleaded no contest to continuous sexual abuse of a child and lewd and lascivious acts on a child under age 14, he was sentenced to 15 years in state prison.

The trial court had held the youth soccer league and association defendants (Association) owed no legal duty to protect plaintiff from criminal conduct by a third party. Accordingly, on appeal, the issue was whether the Association had a legal duty to "conduct criminal background checks of all adults who would have contact with children involved in their programs."

Defendant US Youth is a national youth soccer association. Defendant Cal North is US Youth's designated state association; defendant West Valley is an affiliated league of Cal North. Under US Youth's bylaws, Cal North and West Valley were required to comply with US Youth's rules for the operation of US Youth soccer programs. Fabrizio was employed by West Valley and was a member of US Youth. Plaintiff participated in US Youth soccer programs and played for West Valley's soccer teams.

As plaintiff's coach, Fabrizio, violated several of the US Youth safety guidelines by making "excessive and disproportionate physical contact with plaintiff," including driving plaintiff to and from practices and games alone. Fabrizio also helped plaintiff "put away equipment after practices as the other players were leaving or had left and they could not be seen from the field."

Fabrizio had spent extensive time alone with plaintiff on June 11 and 12, 2011. He drove her alone to and from a tournament in Santa Cruz, even though her parents attended 30 minutes of the final game. During the tournament, Fabrizio took plaintiff alone for two walks.

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After parents and girls speculated about whether there was romantic or sexual activity between plaintiff and Fabrizio, plaintiff became upset by the girls' comments and told the coaches and a team parent. The coaches later held two team meetings to discuss the comments and tried to get the girls to apologize to plaintiff.

On November 12, 2011, Scott Hughes, a member of the West Valley Board of Directors was informed that there had been “rumors” about Fabrizio having “some bad intentions” toward some of the players on the team. Later that day, Fabrizio was notified that he was suspended from coaching duties at West Valley.

Fabrizio's suspension, in part, was based on his spending one-on-one time with players, including plaintiff. West Valley subsequently notified team parents that Fabrizio had been suspended from coaching, but provided no reasons for the suspension. West Valley never interviewed plaintiff, other players, or their parents about Fabrizio.

Following his suspension, it became more difficult for Fabrizio to have contact with plaintiff, but he continued to do so. West Valley did not inform plaintiff's parents that Fabrizio had been suspended due to inappropriate touching of plaintiff and one-on-one contact with plaintiff. Moreover, West Valley withheld information that would have put plaintiff's parents on notice that they needed to be “extra vigilant” in keeping Fabrizio away from plaintiff. West Valley chose not to interview plaintiff and her parents, because it did not want a scandal or lawsuit.

A week after his suspension, Fabrizio was informed that West Valley had conducted an investigation which had found that he had not followed several Cal North rules, including the physical contact rules. Fabrizio was then informed that his coaching privileges would not be reinstated.

VOLUNTARY DISCLOSURE

US Youth bylaws required its state associations and each affiliate league to collect and screen criminal conviction information on its coaches, trainers, volunteers, and administrators who would have contact with US Youth child members, including those like plaintiff. US Youth permitted its state associations and leagues to collect this information by means of a “voluntary disclosure” form.

US Youth did not require criminal background checks by independent third parties. US Youth, however, had negotiated a discounted rate with an online vendor to permit state associations, leagues, or teams to obtain nationwide criminal background checks on an applicant for \$2.50 per search.

By 2010, nearly all of the state associations within West Valley's region used third party independent sources to run annual criminal background checks on their volunteers, coaches, and trainers. US Youth kept records regarding which state associations did and did not conduct these background checks. US Youth also distributed monthly reports indicating which individuals had been disqualified from participation in US Youth soccer programs due to prior convictions.

Although US Youth knew that voluntary disclosure by an applicant of his or her criminal convictions was ineffective, US Youth did not require its affiliates to conduct criminal background checks. While the risk management committee of US Youth recommended requiring mandatory criminal background checks, it was concerned that such a requirement could increase exposure to potential liability for negligence. A memorandum to US Youth stated as follows:

From a risk management standpoint it certainly makes good sense to conduct criminal background checks of all volunteer and paid adults that have contact with US Youth Soccer players. But, from a negligence standpoint, regularly conducting criminal background checks of volunteers and paid adults creates a self-imposed duty to do the same for all that serve in a similar capacity. The failure to conduct such a check would be considered as a breach of duty, which, in turn could mean liability.

When Fabrizio applied for a coach position with West Valley in 2010, he was required to fill out a form which asked whether he had been convicted of a felony, a crime of violence, or a crime against a person. The disclosure form stated that US Youth might deny certification to any person who has been convicted of these types of offenses. Though Fabrizio had been convicted in 2007 of battery against his spouse, he answered no to each of these categories and authorized Cal North and West Valley to confirm this information. Neither Cal North nor West Valley conducted a criminal background check to verify Fabrizio's denial of any violent criminal behavior. West Valley knew that a criminal background check would identify applicants who had lied about their background on the self-disclosure form, but it failed to conduct criminal background checks.

SPECIAL RELATIONSHIP DUTY

In her complaint, plaintiff alleged her injuries were caused by the negligence of defendants US Youth, Cal North, and West Valley. In so doing, plaintiff claimed defendants had a duty to protect her from Fabrizio's criminal conduct. Specifically, plaintiff alleged defendants had "breached their duties to her by failing to conduct criminal background checks."

In response, US Youth claimed it "lacked physical custody and control, and thus had no special relationship with plaintiff." The appeals court acknowledged that "defendants had no duty to plaintiff unless they stood in a special relationship to her." However, under the circumstances of this case, the appeals court found a special relationship did indeed exist between defendants and plaintiff.

While "parents were present at games and social events," the court noted the presence of parents at practices was usually limited to when "they dropped off the players or arrived to pick them up." As a result, the court found players typically spent far more time at practices with their coaches than at games or soccer social events attended by their parents. Accordingly, by assuming responsibility for the safety of the players during these practices, the court found the Association's coaches acted as "quasi-parents," similar to adults employed in school, daycare, and scouting settings. Having "entrusted their children to defendants," in the opinion of the

court, the parents had a reasonable expectation that their children "would be kept physically safe and protected from sexual predators while they were at soccer practices."

Since plaintiff was a member of US Youth and played on a West Valley team, a local affiliate of US Youth and Cal North, the appeals court concluded "West Valley was required to comply with the policies and rules of US Youth." These US Youth rules included established standards under which coaches were hired, including screening for criminal conviction information on coaches.

Having determined which individuals, including Fabrizio, had "custody and supervision of children involved in its programs," the appeals court concluded US Youth had a legal duty to exercise reasonable care in the selection and hiring of coaches. The court then considered whether reasonable care under this special relationship between the Association and youth soccer participants, like plaintiff, should have included a criminal background check of Fabrizio.

FORESEEABLE ABUSE

As noted by the appeals court, a legal "duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." In making this determination, the court would consider whether "the degree of foreseeability is high enough to charge the defendant with the duty to act on it." According to the court: "Heightened foreseeability can be shown by evidence of prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults."

In this particular instance, the specific issue was before the court was "whether it was foreseeable that a soccer coach would sexually abuse a player." Plaintiff had contended there was "heightened foreseeability of sexual abuse by a coach based on defendants' knowledge of prior incidents and other indications of risk." In response, Cal North and West Valley argued that plaintiff has shown only "a mere possibility of the risk of sexual abuse."

US Youth also maintained there was "no foreseeability as a matter of law, because it did not have actual knowledge of Fabrizio's assaultive propensities." Specifically, US Youth claimed it had "no knowledge that Fabrizio had previously sexually or physically abused anyone or had a propensity to do so." The appeals court rejected this argument.

As noted by the appeals court, US Youth was "aware of incidents of physical and sexual abuse of US Youth Soccer's members by its coaches at a steady yearly rate of between 2 and 5 per year." Moreover, the court found US Youth had adopted the KidSafe Program "in recognition of the risks of sexual abuse to its players." <http://kidsafefoundation.org/sexual-abuse-prevention-program/>

Moreover, the court noted that the KidSafe Program included a pamphlet which acknowledged the following:

One out of every 4 girls and one out of every 6 boys will be sexually abused before the age of 18... Pedophiles are drawn to places where there are children. All youth sports, including youth soccer, are such places.

In the opinion of the appeals court, these facts were indicative of "an acknowledgement by US Youth that children playing soccer were at risk for sexual abuse." Similarly, Cal North and West Valley had adopted the KidSafe Program, effectively acknowledging their soccer programs attracted those who might sexually abuse their players, including past incidents of sexual abuse. Further, the appeals court noted "the year before Fabrizio submitted his application, both Cal North and West Valley were aware of multiple sexual abuse incidents involving the founder of West Valley."

Based on these facts, the appeals court concluded "it was reasonably foreseeable to defendants that a child participating in their soccer program would be sexually abused by a coach."

The present case involved criminal conduct by a member of an organization that provided activities exclusively for children. More importantly, here, defendants were aware that sexual predators were drawn to their organization in order to exploit children and that there had been prior incidents of sexual abuse of children in their programs.

Fabrizio was an employee of West Valley and a member of US Youth and these organizations controlled which individuals had access to the children in their programs.

BACKGROUND CHECK BURDEN

Having found sexual abuse by a coach was reasonably foreseeable, the appeals court also considered "the burden to defendants of requiring and implementing criminal background checks."

US Youth had argued that it would "impose a tremendous burden to mandate criminal background checks for employees and volunteers in defendants' programs, because the availability of criminal background checks varies among the states." Further, US Youth claimed "volunteers working with children in the majority of states are not required to undergo criminal background checks and private entities are not allowed to obtain national criminal background checks on volunteers in many states." The appeals court disagreed.

As noted by the appeals court, "the American Youth Soccer Organization, another national youth soccer organization, has required criminal background checks for its volunteers and coaches in these jurisdictions." Moreover, the court found US Youth had "required criminal background checks for all coaches and referees participating in its youth olympic development program in the state associations since 2008." In addition, the appeals noted US Youth had "kept records of which state associations did and did not obtain these criminal background checks, and distributed reports of individuals who had been disqualified from participation in its youth programs."

In the opinion of the appeals court, these facts demonstrated US Youth had "the administrative ability to ensure compliance with mandatory criminal background checks." As a result, the court concluded "the burden would not have been significant" to require criminal background checks.

Similarly, the appeals court concluded criminal background checks would not have been overly burdensome to Cal North and West Valley. In reaching this determination, the appeals court noted "nearly all of the state associations in Region IV had been conducting criminal background checks on all volunteers, coaches, and trainers since 2010."

US Youth had also argued that "the cost of mandating criminal background checks would be substantial." According to US Youth, if criminal background checks cost \$2.50 per check, registration for "over 900,000 administrators, coaches and volunteers" annually would "amount to \$2.25 million."

The appeals court, however, found defendants would not have born the cost if "members of a team or the applicant had paid for the criminal background check." More importantly, the appeals court noted "there was and continues to be no cost for criminal background checks in California pursuant to Penal Code section 11105.3." In particular, the court found this statute provides that "no fee shall be charged to nonprofit organizations for criminal background checks." (Similar cost free on line resources for criminal background checks are available in a number of jurisdictions.)

DUTY TO PROTECT CHILDREN

As noted by the appeals court, the "parties agree that plaintiff was injured by Fabrizio's conduct." Further, the appeals court found the "connection between plaintiff's harm and defendants' failure to conduct a criminal background check was close."

According to the court, it would have been highly unlikely that Fabrizio would have been hired had defendants conducted a criminal background check of Fabrizio. Specifically, in a criminal background check, the court found defendants could have discovered Fabrizio's prior conviction for domestic violence. As a result, in the opinion of the court, Fabrizio would have had far fewer, if any opportunities to sexually abuse plaintiff if defendants had conducted a criminal background check prior to his having been retained as a youth soccer coach.

More importantly, under the circumstances of this case, the appeals court found imposition of a legal duty to conduct criminal background checks on defendants would assist in the achievement of a "paramount goal" in society to prevent future harm, viz., "the protection of children from sexual abuse." The appeals court, therefore, concluded "defendants had a duty to conduct criminal background checks of adults who would have contact with children in their soccer programs."

As a result, the appeals court reversed the earlier determination by the trial court that the youth soccer league and association (Association) owed no legal duty to protect plaintiff from criminal conduct by a third party (Fabrizio). On remand, the trial court would conduct further proceedings to determine whether negligence liability should be imposed on Association defendants for their failure to conduct criminal background checks prior to hiring Fabrizio as a youth soccer coach.

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<http://cehdclass.gmu.edu/jkozlows/lawarts/12DEC00.pdf>

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[James C. Kozlowski *Parks & Recreation* . Feb 1997. Vol. 32, Iss . 2; P. 36 \(6 Pages\)](#)
<http://cehdclass.gmu.edu/jkozlows/lawarts/02FEB97.pdf>

AGENCY LIABILITY FOR SEXUAL MISCONDUCT (Kozlowski Vimeo Video Lecture)
<https://vimeo.com/68155372>

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