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Case Number 143,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TONYA GRIFFIN, as Next Friend and Guardian *ad litem* for EVAN FAULKNER, a minor,	)	No. 143, 2018
Plaintiff Below, Appellant,	)	Court Below:
v.	)	Superior Court of the State of Delaware in and for New Castle County
DFS DIRECTOR LAURA MILES, *individually and in her official capacity;* DFS DIRECTOR VICTORIA KELLY PSY.D., *individually and in her official capacity*; FAMILY CRISIS THERAPIST TRINA N. SMITH, *individually and in her official capacity*; JAMIE ZEBROSKI M.S.W., *individually and in her official capacity as a Supervisor for DFS*; CRYSTAL BRADLEY, M.S., *Individually and in her official capacity as a Senior Family Services Specialist for DFS*; NANCY CRAIGHTON, *individually and in her official capacity as a Supervisor for DFS*; JAVONNE RICH, *individually and in her official capacity*;	)	C.A. No. N16C-07-115 FWW
Defendants Below, Appellees.	)	

APPELLEES' ANSWERING BRIEF

STATE OF DELAWARE
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Date: July 27, 2018

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INTRODUCTION

> *The social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit.*[1]

DFS caseworkers face daily the challenging and unenviable task of deciding whether a parent may be abusing or neglecting their own children. Their duties require that they make the tough call to commence a process that may ultimately result in the state taking the parent's child, thus interfering with one of our republic's most-treasured and protected rights: the "primacy of family."[2] Subjecting caseworkers, like those sued here, to personal liability or even to "a time-consuming and financially devastating civil suit," greatly inhibits individual discretion and judgment in the "fluid environment of custodial supervision."[3]

The facts underlying this action are tragic. A young girl lost her life, far too early and at the hands of her mother. But this action does not seek to hold her

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[1] *Meyers v. Contra Costa County Dep't of Soc. Workers*, 812 F.2d 1154, 1157 (9th Cir. 1987).

[2] *See Newmark v. Williams*, 588 A.2d 1108, 1115 (Del. 1991) (noting that the "primacy of the family unit is a bedrock principle of law" in decision reversing award of custody to DFS where parent was refusing to allow certain medical treatment for child).

[3] *J.L. v. Barnes*, 33 A.3d 902, 914 (Del. Super. 2011).

responsible. Instead, it seeks to hold seven current and former DFS caseworkers and officials *personally* liable for the mother's actions. These defendants did not act or fail to act in a *grossly* negligent manner, and they did not violate a ministerial duty that caused Plaintiff harm. Because the pleadings below made this clear, the Superior Court correctly dismissed this action after allowing Plaintiff an opportunity to amend the Complaint to cure the many deficiencies the Court noted in its first dismissal decision. Plaintiff's Opening Brief provides no sound reason for this Court to reverse the Superior Court's Order.

NATURE OF THE PROCEEDINGS

Tonya Griffin ("Plaintiff") appeals the October 31, 2017 Order of the Superior Court, dismissing her suit against seven employees of the Delaware Division of Family Services ("DFS") (collectively, the "DFS Defendants"). Plaintiff asserts that faulty DFS investigations resulted in harm to her minor ward, Evan Faulkner ("Evan"), while he was in the custody of his mother, Tanasia Milligan ("Milligan"). Plaintiff brings this action on Evan's behalf as his legal guardian and next friend. Plaintiff is Milligan's sister and Evan's maternal aunt.

Plaintiff filed her original Complaint in the Superior Court on July 15, 2016. In addition to the DFS Defendants, Plaintiff named Budget of Delaware, Inc. ("Budget"). Budget owns a hotel where Evan and his sister, Autumn Milligan ("Autumn"), lived for a time with Milligan, until Autumn's death. The DFS Defendants moved to dismiss Plaintiff's Complaint under the Tort Claims Act, 10 *Del. C.* § 4001 (the "TCA"), for failure to state a claim, and because the claims are time-barred.[4] The Superior Court granted the DFS Defendants' motion but granted Plaintiff leave to amend.[5]

[4] D.I. 10. Budget answered the Complaint on August 8, 2016. D.I. 8.
[5] [*Griffin*] *for* [*Faulkner*] *v. Budget of Delaware, Inc.*, 2017 WL 729769, at *1 (Del. Super. Ct. Feb. 22, 2017).

Plaintiff filed her Amended Complaint on March 24, 2017.[6] The DFS Defendants again moved to dismiss on the bases asserted in their first motion.[7] The Superior Court dismissed Plaintiff's Amended Complaint against the DFS Defendants on October 31, 2017.[8] The court held that the TCA barred the action because Plaintiff failed to allege the violation of a ministerial duty or facts stating a claim that DFS Defendants acted with gross negligence. The court also held that the Amended Complaint's five counts against the DFS Defendants[9] failed to state a claim. Finally, the Court held the claims against the DFS Defendants were not timely. Contrary to Plaintiff's assertions in her Opening Brief, Budget was *not* dismissed from the action below. In fact, the case is scheduled for trial this March.[10]

2017 WL 5149274

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[6] D.I. 20 (App. to Pl.'s OB at A-073 ("hereinafter A-___")).
[7] D.I. 28 (A-111).
[8] [*Griffin*] *for* [*Faulkner*] *v. Budget of Delaware, Inc.*, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017).
[9] Both the Complaint and the Amended Complaint asserted the following counts against the DFS Defendants: (1) gross negligence; (2) due process and equal protection; (3) state created danger; (4) negligent hiring and supervision; and (5) intentional infliction of emotional distress (IIED). Notably and oddly, the only mention in the Amended Complaint of non-discretionary duties appears in Count II ("ministerial" is never mentioned) where Plaintiff apparently claimed that failures to act under titles 29 and 16 supported constitutional due process and equal protection claims. She never even alleged that the violation of a ministerial duty overcame the TCA.
[10] *See* OB at 2; [*Griffin*], 2017 WL 5149274 (Del. Super. October 31, 2017) (denying Budget's motion to dismiss Plaintiff's Amended Complaint); *see also* Scheduling Order at D.I. 45.

On February 5, 2018, and because defendant Budget was not dismissed, Plaintiff filed a motion under Superior Court Civil Rule 54(b) to declare the court's judgment "final" as to the DFS Defendants, facilitating this appeal.[11]

On June 28, 2018, Plaintiff filed her Opening Brief.[12] Plaintiff asserts four arguments in support of reversal. First, Plaintiff argues that the Superior Court erred in concluding that Plaintiff failed to allege the violation of ministerial duties. Second, Plaintiff contends she adequately alleged gross negligence against the DFS Defendants. Third, Plaintiff argues that she adequately stated a viable claim under the state created danger doctrine. Finally, Plaintiff challenges the court's ruling that the action was not filed within the applicable statute of limitations.[13] None of these arguments warrants reversal.

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[11] D.I. 40 (A-219); App. D.I. 1.

[12] App. D.I. 18.

[13] Plaintiff *does not* challenge several of the Superior Court's specific rulings under Rule 12 for dismissal of other counts in the Amended Complaint. For instance, the court ruled that a negligent hiring/retention/supervision claim (Count IV) cannot be asserted against the individual DFS Defendants, as that type of claim can only be asserted against employers. [*Griffin*], 2017 WL 5075372, at *4. The court also held that Plaintiff failed to address the argument that she did not state a claim in Count II (the due process and equal protection claims). *Id.* at *4 (stating that "Plaintiff's response, however, does not address the equal protection and due process claim, but focuses solely on the state created danger claim [Count III]."). Finally, Plaintiff did not challenge the Court's ruling that she failed to state an IIED claim (Count V). Those rulings are final because they are not challenged in Plaintiff's Opening Brief. *Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1242 (Del. 2004). Thus, even if the Court finds the TCA does not bar such claims, their dismissal was nonetheless proper for failure to state a claim.

SUMMARY OF ARGUMENT

I. **Denied**. Plaintiff has failed to show that *any* DFS Defendant failed to comply with a non-discretionary, ministerial duty. Indeed, Plaintiff's Amended Complaint did not even plead that the TCA was overcome by the violation of such a duty. And the Amended Complaint actually alleges *compliance* with the only, arguable ministerial duty noted by Plaintiff in her Opening Brief (the requirement for a home assessment).

II. **Denied**. The Superior Court correctly held that Plaintiff failed to allege *facts* (rather than hyperbole and legal conclusions) stating a claim that any DFS Defendant acted with gross negligence.

III. **Denied**. The Superior Court correctly held that Plaintiff failed to allege *facts* stating a state created danger claim.

IV. **Denied**. The Superior Court correctly held that Plaintiff's claims, based upon facts occurring more than two years before the filing of this action, are time-barred and not subject to tolling under the plain language of the applicable tolling statute.

STATEMENT OF FACTS[14]

A. The DFS Defendants

Trina M. Smith ("Defendant Smith") and Crystal Bradley ("Defendant Bradley") are DFS caseworkers. Jamie Zebroski ("Defendant Zebroski") and Nancy Craighton ("Defendant Craighton") are DFS investigative supervisors. Laura Miles ("Defendant Miles") and Victoria Kelly ("Defendant Kelly") are former DFS Directors. There were no allegations against Defendant Javonne Rich.[15]

Plaintiff's case is based upon four DFS investigations of Milligan spanning a five-year period from 2009 to 2014. The actions each DFS Defendant took during the investigations are detailed *infra* but are briefly identified here for convenience:

(1) **2009 Investigation**. Defendant Smith conducted this investigation under Defendant Craighton's supervision. Defendant Miles was DFS Director.

(2) **2012 Investigation**. An unidentified DFS caseworker conducted this investigation. Defendant Kelly was DFS Director.

(3) **2013 Investigation**. An unidentified DFS caseworker conducted this investigation. Defendant Kelly was DFS Director.

(4) **2014 Investigation**. Defendant Bradley conducted this investigation under Defendant Zebroski's supervision. Defendant Kelly was DFS Director.

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[14] The DFS Defendants, in this procedural posture, accept the facts in the Amended Complaint as true.

[15] Plaintiff conceded below that no allegations were alleged against Javonne Rich (*see* [*Griffin*], 2017 WL 5075372, at *5), and her dismissal is, appropriately, not challenged on appeal.

B. The DFS Investigations

1. The 2009 Investigation (*See* Amended Complaint ¶ 13 (A-080))

In January 2009, Defendant Smith interviewed Milligan after Evan's birth because hospital tests detected marijuana in his system. The interview occurred at Milligan's home in Bear, Delaware, less than 24 hours after Evan was born. Milligan acknowledged to Defendant Smith that she had smoked marijuana during her pregnancy to address nausea. Defendant Craighton oversaw this investigation. Defendant Smith determined that Evan was "well cared for" after she visited Evan and Milligan at their home. After 41 days, Defendants Smith and Craighton closed the case as "unsubstantiated with concern." Defendants Smith and Craighton identified risk factors of possible substance abuse and lack of cooperation with recommended services. Defendant Miles was the DFS Director at this time and allegedly directly supervised the investigation.

2. 2012 Investigation (*See* Amended Complaint ¶ 14 (A-081))

Three years later with seemingly no additional issues with Milligan, DFS learned that a neighbor found Evan and Autumn outside late at night. Milligan's sixteen-year-old brother had been watching the children. The police did not charge Milligan or her brother with a crime. An unidentified DFS caseworker met twice with Milligan and determined that the children were developmentally delayed. Milligan did not follow through with the unidentified caseworker's program referrals

for evaluation. Far from showing negligence, the unidentified caseworker attempted to follow-up with Milligan six additional times. After 55 days, the unidentified caseworker "closed the case … as 'unsubstantiated with concern.'" Defendant Kelly was the DFS Director at this time and allegedly directly supervised the investigation.

3. 2013 Investigation (*See* Amended Complaint ¶ 15 (A-082))

In Spring 2013, unidentified caseworkers investigated allegations that the children were locked in a room for long periods in Milligan's residence in Smyrna, Delaware, and that the children could not communicate appropriately. An unidentified caseworker met twice with Milligan and the children. The caseworker determined that the children were clean and well fed, but developmentally delayed. After 46 days, "the case was closed as 'unsubstantiated.'" An internal review later noted that an unidentified caseworker did not complete a risk assessment form, which led to the case being closed prematurely. Defendant Kelly was the DFS Director at this time and allegedly supervised the investigation. Defendant Kelly did not train the unidentified caseworker on the use of a risk assessment tool, "particularly how it relates to case history."

4. 2014 Investigation (*See* Amended Complaint ¶¶ 18-20 (A-084-87))

Finally, on April 7, 2014, Plaintiff was watching Evan and Autumn at her house. Milligan and her boyfriend appeared to be under the influence of drugs when they came to pick up the children. Plaintiff refused to allow the children to go with

the couple, but Milligan's boyfriend entered Plaintiff's house and forcibly removed the children. Plaintiff and her sisters called a child-protection hotline. DFS labelled the case a high priority, and the case was assigned to Defendant Bradley, a Senior Family Services Specialist of the DFS Investigative Unit. Defendant Zebroski also was assigned as Defendant Bradley's supervisor.

Again, far from showing negligence let alone gross negligence, Defendant Bradley met with Milligan and the children "multiple times" at Budget Motor Lodge, where they were then living, over a period of 52 days.[16] In addition, Defendant Bradley spoke with Milligan six times by phone. Plaintiff alleges that she and her sisters "mentioned marks on the children's bodies,"[17] but the Amended Complaint fails to identify the person to whom they spoke. Defendant Kelly later reported that caseworkers' notes did not indicate that the children had been examined for marks. Defendant Bradley did not speak to other Budget Motor Lodge guests during her investigation.[18] Nonetheless, Defendants Bradley and Zebroski ultimately identified and reported the following concerns and risk factors during their 52-day investigation: "(1) Drug and alcohol; (2) Mental health; (3) Appropriate parenting/discipline; (4) Housing; (5) Evan and Autumn's developmental delay; (6) Evan and Autumn's speech delay; (7) Evan and Autumn's medical and educational

[16] Am. Compl. at ¶ 19 (A-085).
[17] *Id*. at ¶ 18 (A-085).
[18] *Id*. at ¶ 19 (A-085).

needs."[19] Defendants Bradley and Zebroski closed their investigation on May 29, 2014, and recommended moving the case for "treatment" to address the concerns and risk factors they had identified.[20] However, Milligan later "failed in many respects to comply with the caseworker's prescribed, mandatory treatment plan."[21] DFS did not petition the Family Court for an order to compel her cooperation with the treatment plan.[22]

C. Autumn's Death and Harm to Evan (*See* Amended Complaint ¶ 22)

Autumn died about three months following the close of the fourth investigation. Though Plaintiff does not allege how Autumn died, tragically it was the result of an assault by her mother. Plaintiff alleges Evan's harm vaguely, asserting that he has been "permanently and irrevocably damaged in ways that are impossible to know at this time."[23]

D. Plaintiff's Opening Brief Improperly Cites to Materials Outside of the Pleadings Thereby Acknowledging the Amended Complaint's Deficiencies.

Plaintiff relies extensively on allegations that are not contained in her Amended Complaint or in the record below. In her statement of facts, Plaintiff

[19] Am. Compl. at ¶ 20 (A-086).
[20] *Id*.
[21] *Id*.
[22] *Id*. at ¶ 21 (A-087).
[23] *Id*. at ¶ 22 (A-087).

alleges that Milligan "beat [Autumn] to death before [Evan's] eyes."[24] The DFS Defendants do not dispute that Milligan pleaded guilty to the murder of her daughter, but Plaintiff's assertion that Evan witnessed it—a fact not alleged in the Amended Complaint—cannot be given consideration.[25] In her argument section, Plaintiff cites deposition testimony in the Superior Court case still proceeding against Budget, which Plaintiff took on June 13, 2018, more than seven months after the Superior Court issued the decision now on appeal.[26] Plaintiff has also included internet reviews of Budget Motor Lodge[27] and a DFS "Root Cause Analysis,"[28] neither of which is part of her Amended Complaint or the record. Plaintiff's untimely attempts to buttress her Amended Complaint are an admission that it does not stand on its own.

[24] OB at 10.
[25] Plaintiff cites to page 72 of her Appendix, which is a page from her Amended Complaint, where this allegation does not appear.
[26] OB at 27-28.
[27] OB at 28, n2.
[28] OB at 1.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY RULED THAT PLAINTIFF DID NOT MEET HER BURDEN OF SHOWING THAT A DFS DEFENDANT FAILED TO OBEY A MINISTERIAL DUTY

A. QUESTION PRESENTED

Did Plaintiff carry her burden under the TCA despite being unable to cite any instance where a DFS Defendant failed to comply with a ministerial duty?

B. STANDARD OF REVIEW

"This Court reviews a trial's court grant of a motion to dismiss *de novo*."[29] Although well-pleaded allegations must be accepted as true, the Court will not "credit conclusory allegations that are not supported by specific facts or draw unreasonable inferences in the plaintiff's favor."[30]

C. MERITS OF ARGUMENT

Although adorned different ways in five separate legal cloaks, the gravamen of this action is a claim that DFS failed to remove children from the custody of their mother who, at least, was neglecting their care. It should be axiomatic that caseworker decisions to initiate and pursue proceedings to forcibly remove children from their parents' custody, breaking the "primacy of family," involve *significant* discretion. It is therefore unsurprising that the Superior Court repeatedly determined

[29] *RBC Capital Markets, LLC v. Education Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014).
[30] *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013).

that the "DFS Defendants' actions [were] inherently discretionary" and not ministerial.[31] Plaintiff advances two arguments that the Superior Court erred on this front. First, Plaintiff focuses on two statutory provisions purportedly containing "non-discretionary" duties that she alleges Defendants Zebroski, Bradley, and Kelly failed to perform.[32] Second, Plaintiff asserts that the Superior Court committed legal error by deciding to create a sweeping "new standard" that "any investigative conduct" is discretionary.[33] Plaintiff's arguments are without merit.

1. It Is a Plaintiff's Burden to Identify a Defendant's Failure to Fulfill a Duty Defined with Precision and Certainty, Containing No Discretion

The TCA shields state officers and employees from liability where the act or omission complained of arises from: (1) an official duty involving discretion; (2) the officer or employee acts in good faith; and (3) the act or omission was done without gross or wanton negligence.[34] It is Plaintiff's burden to demonstrate that one of the three prongs has not been met.[35] Under the first prong, which is the subject of Plaintiff's first argument in this appeal, the TCA affords state officials and

[31] *See, e.g.*, [*Griffin*], 2017 WL 5075372, at *2.
[32] OB at 14-17.
[33] OB at 12; 17-20.
[34] 10 *Del. C.* § 4001.
[35] *Id*. ("the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section").

employees "immunity for discretionary acts, but not for ministerial ones."[36] An act is ministerial if it "involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act."[37] A "ministerial duty" is a duty that is "prescribed with such precision and certainty that nothing is left to discretion or judgment."[38] "The determination of whether a particular act is discretionary or ministerial is a question of law, which may sometimes require a factual determination."[39]

2. Plaintiff Did Not Meet Her Burden to Demonstrate that Defendants Zebroski, Bradley, and Kelly Failed to Perform a Ministerial Statutory Duty

Plaintiff first argues that a portion of 16 *Del. C.* § 906(b) establishes ministerial duties for individual DFS caseworkers. Subsection 906(b) provides, in relevant part: "It is the policy of this State that the investigation and disposition of cases involving child abuse or neglect shall be conducted in a comprehensive, integrated, multidisciplinary manner …." Far from setting forth any concrete duty for an individual DFS caseworker, subsection 906(b) is expressly a policy statement.

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[36] *Hughes ex rel. Hughes v. Christiana Sch. Dist.*, 950 A.2d 659 (Del. 2008) (quoting *Sussex County v. Morris*, 610 A.2d 1354, 1359 (Del. 1992) (internal quotations omitted)).
[37] *Sussex County v. Morris*, 610 A.2d 1354, 1359 (Del. 1992) (quoting Restatement (Second) of Torts § 895D, cmt. h. (1979)).
[38] *Brittingham v. Town of Georgetown*, 113 A.3d 519, 524 (Del. 2015) (defining the term "ministerial duty" in the context of a mandamus action).
[39] *Hughes ex rel. Hughes v. Christiana Sch. Dist.*, 950 A.2d 659 (Del. 2008).

There is nothing in subsection 906(b) that prescribes any mandatory action by a DFS caseworker with "such precision and certainty that nothing is left to discretion or judgment."[40] To the contrary, the General Assembly deliberately left this subsection open to considerable institutional judgment as to how best to implement the General Assembly's policy goals.[41] As a matter of law, subsection 906(b) does not set forth ministerial duties, and thus no factual determination is warranted to determine whether the DFS Defendants complied with it.

Plaintiff next singles out this portion of 16 *Del. C.* § 906(e)(8) as creating a ministerial duty: "The [DFS] investigation shall include, but need not be limited to … assess[ing] the home environment …."[42] Plaintiff's argument that the DFS Defendants did not comply with this purported ministerial duty fails on four independent grounds. **First**, Plaintiff did not fairly present her argument concerning this subsection to the Superior Court. The closest Plaintiff came to preserving this argument is in her answering brief to the DFS Defendants' motion to dismiss her Amended Complaint, where Plaintiff stated:

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[40] *Brittingham v. Town of Georgetown*, 113 A.3d 519, 524 (Del. 2015).
[41] *See* 16 *Del. C.* § 906(b)(4) (requiring the State and Child Protection Accountability Commission to create a memorandum of understanding to effect the policy goals in the subsection).
[42] OB at 16. Plaintiff misquotes the pre-2017 version of subsection 906(e)(8), which did not include the word "assess." *See* 81 Del. Laws, c. 144, § 6.

> Plaintiff's First Amended Complaint alleges that individual Defendants failed to act in accordance with their mandatory, statutory duties. *See* 16 *Del. C.* §§ 901, 902, and 906(e)(2), (3), and (8)-(14).[43]
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> …
>
> [Delaware Code] outlines the role of DFS as an organization, and uses the term "shall" to explain the duties of the individuals in their respective rolls [sic] as state actors employed through DFS. 16 *Del. C.* 906(e).[44]

Plaintiff did not argue to the Superior Court that Defendants Zebroski, Bradley, and Kelly (or any DFS Defendant) failed to comply specifically with subsection 906(e)(8) by failing to "assess the home environment," a phrase that is buried in the multitude of provisions she cited. Plaintiff simply left it up to the Superior Court to figure out what ministerial duties were contained in those provisions.[45] **Second**, by its own terms, section 906(e) is directed to DFS, not specific DFS caseworkers.[46] **Third**, assessing a home environment entails a significant element of discretion and judgment, and is not ministerial. **Fourth**, and probably most significantly, the Amended Complaint actually alleged *compliance* with this arguable duty. Plaintiff

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[43] D.I. 30, at 14.
[44] *Id*. at 15.
[45] The Superior Court noted in its decision that § 901 is a statutory statement of purpose, while § 902 is a lengthy definitional section – neither of which are likely to set forth a ministerial duty. [*Griffin*], 2017 WL 5075372, at *2.
[46] 16 *Del. C.* 906(e) ("In implementing the Division's role in the child protection system, *the Division shall* do all of the following:") (emphasis added). *See Brooks v. Lynch*, 150 A.3d 274 (Del. 2016) (obligations imposed by statute were owed by State agency to which it was directed).

alleged that "Defendant Bradley met with Ms. Milligan and her children ***at the motel multiple times*** over a period of 52 days."[47] Defendant Bradley did so "under the direct supervision of Defendants Zebroski and Kelly."[48] Defendants Bradley and Zebroski ultimately concluded that Milligan and the children's "housing" was a "risk" requiring "treatment."[49] Defendants Bradley, Zebroski, and Kelly complied with any purported ministerial duty contained in subsection 906(e)(8) by assessing Evan's home environment.[50]

3. Plaintiff Mischaracterizes the Superior Court's Holding in Order to Create a Claim of Legal Error, and the Cases She Cites Support the Superior Court's Analysis

Plaintiff did not meet her burden by directing the Superior Court to any ministerial duty, defined with "precision and certainty," that a DFS Defendant failed

[47] Am. Compl. at ¶ 19 (emphasis added) (A-085).
[48] *Id*.
[49] *Id*. at ¶ 20 (A-086).
[50] Plaintiff mentions in passing that 16 *Del. C.* § 906(c)(1)(c) includes an "important non-discretionary duty." (OB at 15). In addition to Plaintiff not citing this statute below, Plaintiff makes no attempt to show its applicability here, and it has none. It applies to "Investigation Coordinators" who learn of abuse or neglect "by a person known to be licensed or certified by a Delaware agency or professional regulatory organization…." An "investigation coordinator" is not a DFS employee; rather, an investigation coordinator is a Delaware attorney employed by the Office of the Child Advocate ("OCA") to independently monitor certain DFS investigations. 16 *Del. C.* § 902(20). The OCA is a separate agency from DFS. 29 *Del. C.* § 9001A. None of the DFS Defendants was an "investigation coordinator," or employed by the OCA.

to perform.[51] The Superior Court consequently determined that Plaintiff offered nothing "that would enable the Court to determine how any individual DFS Defendant's action is alleged to be ministerial as opposed to discretionary."[52] Moreover, the Superior Court correctly recognized that "[d]iscretion is at the very heart of the investigative process" of assessing child abuse or neglect.[53] The Amended Complaint itself supports this fact: after each investigation, the DFS caseworker made a judgment as to whether the allegation of abuse or neglect was "substantiated" or "unsubstantiated," "with" concern" or "without concern."[54] The Superior Court suitably was "convinced that the DFS Defendants' actions [were] inherently discretionary."[55]

Plaintiff now mischaracterizes the Superior Court's holding as a broad-sweeping "new standard," claiming it applies to "any investigatory activity."[56] Arguing against this straw man, Plaintiff marshals a "parade of horribles" leading to the erosion of civil rights protected by the United States Constitution[57] (this, despite

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[51] 10 *Del. C.* § 4001 ("the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section").
[52] [*Griffin*], 2017 WL 5075372, at *2.
[53] *Id.*
[54] Am. Compl. at ¶¶ 13-15; 20 (A-080-83; A-086).
[55] [*Griffin*], 2017 WL 5075372, at *2.
[56] OB at 12. Plaintiff actually misquotes the Superior Court as holding: "the investigative process is inherently discretionary." OB at 18. That phrase does not appear in the Superior Court's decision.
[57] OB at 19, n.1.

the fact that constitutional civil rights are not subject to the discretionary duty prong of the TCA[58]). The Superior Court's holding, which expressly addressed "the DFS Defendants' actions" "in conducting investigations and assessments," does not support Plaintiff's characterization.[59] Moreover, the cases Plaintiff cites from other jurisdictions do not back her claim that investigations and assessments of allegations of child abuse are ministerial acts. In fact, they support the Superior Court's holding.

Plaintiff first cites *Department of Health & Rehabilitative Services v. Yamuni*,[60] which is distinguishable. The *Yamuni* court applied a Florida legal standard, derived from a Florida statute,[61] which extends Florida state agencies' immunity from suit to discretionary acts exercised only at the "policy making or planning level."[62] This is not the legal standard in Delaware, where the TCA extends immunity not only to "a determination of policy," but more broadly to "*any other* official duty involving the exercise of discretion."[63] Notably, the Florida Supreme Court observed on appeal in *Yamuni*: "We have no doubt that the … caseworkers

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[58] *See* U.S. Const. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land").
[59] [*Griffin*], 2017 WL 5075372, at *2.
[60] *State, Dep't of Health & Rehab. Servs. v. Yamuni*, 498 So. 2d 441, 443 (Fla. Dist. Ct. App. 1986), *approved sub nom. Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So. 2d 258 (Fla. 1988).
[61] Fla. Stat. Ann. § 768.28 (1979).
[62] *Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So. 2d 258, 260 (Fla. 1988).
[63] 10 *Del. C.* § 4001(1) (emphasis added).

exercised discretion in the dictionary or English sense of the word, but discretion in the *Commercial Carrier*[64] sense refers to discretion at the policy making or planning level."[65] Thus, *Yamuni* supports the Superior Court's holding.

Boland v. State[66] is also distinguishable. In *Boland*, a child-protective services hotline operator recorded an allegation of abuse and "decided—in an exercise of discretion—that the information reasonably constituted a report of child abuse."[67] However, the operator then failed in her "statutory duty to 'immediately' convey that information to the 'appropriate' local child protective unit," because she referred the complaint to the wrong county.[68] The *Boland* court held that this constituted dereliction of a statutory ministerial duty. Unlike the plaintiff in *Boland*, Plaintiff here has not identified the DFS Defendants' failure to comply with a precise and certain statutory duty involving no judgment. Additionally, the *Boland* court held that the operator exercised her discretion in determining that the information she had received constituted an allegation of abuse,[69] consistent with the Superior Court's holding.

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[64] *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022 (Fla. 1979) (establishing that the state of Florida is statutorily immune only for "governmental activity which involves broad policy or planning decisions").
[65] *Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So. 2d 258, 260 (Fla. 1988).
[66] *Boland v. State*, 161 Misc. 2d 1019, *aff'd*, 218 A.D.2d 235 (1996)).
[67] *Id*. at 1030.
[68] *Boland*, 161 Misc. 2d at 1030 (quoting N.Y. Soc. Serv. Law § 422 (1996)).
[69] *Id.* at 1030.

Finally, Plaintiff cites *Jensen v. South Carolina Dept. of Social Services*,[70] which held that a plaintiff stated a claim that the caseworker did not perform her ministerial duties when the caseworker completely failed to "make[] a home visit,"[71] and then applied the wrong statutory legal standard in closing the case.[72] In the instant case, Plaintiff argues similarly that Defendants Bradley, Zebroski, and Kelly failed to "assess the home environment" under 16. *Del. C.* § 906(e)(8), despite pleading in her Amended Complaint that Defendant Bradley visited Milligan and the children at Budget Motor Lodge "multiple times over a 52-day period."[73] As argued above, to the extent subsection 906(e)(8) can be said to establish a ministerial duty, the Amended Complaint alleges it was met by Bradley. And *Jensen* supports those arguments. Moreover, *Jensen* held that "the decision that a case [of alleged abuse] is 'unfounded' involves the application of judgment to the particular facts of that case and is, therefore, a discretionary act."[74]

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[70] *Jensen v. S.C. Dep't of Soc. Servs.*, 377 S.E.2d 102 (S.C. Ct. App. 1988), *aff'd sub nom. Jensen v. Anderson County Dep't of Soc. Servs.*, 403 S.E.2d 615 (S.C. 1991).
[71] *Id*. at 107.
[72] *Id*. at 107-108.
[73] Am. Compl. at ¶ 19 (A-085).
[74] *Jensen*, 377 S.E.2d at 107.

The Superior Court's holding is consistent with the law of Delaware,[75] as well as the three cases Plaintiff cites from other jurisdictions.[76] This Court should affirm the Superior Court's decision that Plaintiff failed to plead that the DFS Defendants failed to fulfill a ministerial duty.

[75] *See e.g.*, *Martin v. State*, 2001 WL 112100, at *6 (Del. Super. Ct., Jan. 17, 2001) ("[T]he ministerial act that was required of the State employees was the act of conducting an investigation; which they did. The actions complained of by the Plaintiff however, concern the *manner* in which the State employees carried out their duty to investigate.... How it was done involved an exercise of judgment and therefore, discretion. The existence of the first element under the Act must be deemed to have been established as a result.") (emphasis in original).

[76] Established federal law extending absolute immunity to child welfare workers, like DFS Defendants, for actions taken in connection with removal proceedings recognizes the inherent discretion in their critical judgments. "Like a prosecutor, a child welfare worker must exercise independent judgment in deciding whether or not to bring a child dependency proceeding, and such judgment would likely be compromised if the worker faced the threat of personal liability for every mistake in judgment." *Ernst v. Child & Youth Servs. of Chester County*, 108 F.3d 486, 496 (3d Cir. 1997); *see also Rippy v. Hattaway*, 270 F.3d 416, 423 (6th Cir. 2001) (affording absolute immunity to caseworkers, including claim related to alleged failure to investigate); *Ortega v. Sacramento County Dep't of Health and Human Services*, 74 Cal. Rptr. 713, 732-33 (Cal. Ct. App. 2008) (applying discretionary immunity to decision to release child back to father who had stabbed her).

II. THE SUPERIOR COURT ACCURATELY DETERMINED THAT PLAINTIFF FAILED TO PLEAD FACTS SUPPORTING A CLAIM OF GROSS NEGLIGENCE AGAINST ANY PARTICULAR DFS DEFENDANT

A. QUESTION PRESENTED

Did Plaintiff meet her burden under the TCA despite failing to plead facts sufficient to support a claim of gross negligence against any individual DFS Defendant?

B. STANDARD OF REVIEW

See *supra* Argument, 1.B.

C. MERITS OF ARGUMENT

Again, the gravamen of Plaintiff's case is that, in hindsight of Autumn's tragic death, DFS should have removed Evan from his mother's custody some time before August 2014. Plaintiff's true claim is against DFS, but that claim is barred by the State's sovereign immunity.[77] Plaintiff therefore seeks to hold the DFS Defendants personally liable, because State officials and employees acting in their individual capacities do not enjoy sovereign immunity. However, none of the DFS Defendants

[77] At times Plaintiff does not disguise this fact. For example, Plaintiff opens her statement of facts with the assertion that *DFS* conducted the investigations "by and through their individually named agents." OB at 5.

had the personal discretion to permanently remove Evan from Milligan's custody.[78] Thus, Plaintiff has focused instead on each DFS Defendants' circumscribed role in each of the four separate DFS investigations of Milligan.

Even the Court embraces Plaintiff's artificially fragmentary view of this case, which is designed to indirectly attack the State, the Superior Court properly decided that none of the DFS Defendants' individual acts or omissions, as pleaded, constituted "gross negligence." Further, the Superior Court accurately held that Plaintiff's claims of grossly negligent hiring, retention, and supervision against DFS Defendants Kelly, Craighton, Miles, and Zebroski are "official capacity" claims, barred by sovereign immunity.

1. Plaintiff Did Not Meet Her Burden to Plead Facts Sufficient to Sustain a Claim that Any DFS Defendant Was Grossly Negligent

The TCA affords State officials and employees immunity unless their acts or omissions constitute "gross negligence."[79] "Gross negligence, though criticized as

[78] DFS may petition to have custody of a child removed from a parent. Obviously, custody decisions are ultimately left to the Family Court. *See generally* 13 *Del. C.* ch. 25; Rules 200-219 of the Family Court Rules of Civil Procedure. Moreover, any duty to seek the removal of a child is an official public duty of the agency, DFS, not a personal duty of a particular caseworker in their individual capacity. *See e.g.*, *Brooks*, 150 A.3d 274, *2 (holding that statutory obligations directed at State agency were owed by State agency, not the agency's employees in their individual capacities).

[79] 10 *Del. C.* § 4001(3).

a nebulous concept, signifies more than ordinary negligence or inattention."[80] "Gross negligence is a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'"[81] Where the "alleged acts of gross negligence … involve[] errors of judgment," as is the case here, "the burden on the plaintiff is a substantial one."[82] This Court has cautioned against the use of "hindsight bias" in coloring an analysis of whether a government actor's individual conduct, at the time, constituted more than ordinary negligence.[83] In affording State officials and employees immunity under the TCA, the General Assembly intended "to discourage lawsuits which might create a chilling effect on the ability of public officials or employees to exercise their discretionary authority."[84] This Court recently quoted with approval the following passage from the Restatement (Second) of Torts, describing the "important policy underpinnings" of protecting State officials and employees from suit:

> Public officers and employees would be unduly hampered, deterred and intimidated in the discharge of their duties if those who act improperly

[80] *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).
[81] *Brown v. Robb*, 583 A.2d 949, 953 (Del. 1990) (quoting W. Prosser, Handbook of the Law of Torts 150 (2d ed. 1955)).
[82] *Knoll v. Wright*, 544 A.2d 265 (Del. 1988) (analyzing whether the TCA barred a claim against a school principal) (citing *Jardel Co. v. Hughes*, 523 A.2d 518, 531 (Del. 1987) (observing that an error in judgment is "a form of passive negligence," requiring the plaintiff to demonstrate that "the precise harm which eventuated must have been reasonably apparent but consciously ignored in the formulation of the judgment")).
[83] *McCaffrey v. City of Wilmington*, 133 A.3d 536, 549-550 (Del. 2016).
[84] *Doe v. Cates*, 499 A.2d 1175, 1180-81 (Del. 1985).

> were not protected in some reasonable degree by being relieved from private liability. The basis of the immunity has been not so much a desire to protect an erring officer as it has been a recognition of the need of preserving independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits. This, together with the manifest unfairness of placing any person in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight, has led to a general rule that tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function.[85]

The allegations against the DFS Defendants must be viewed through these lenses.

Defendants Smith, Craighton and Miles Were Not Grossly Negligent. Defendant Smith, under the supervision of Craighton and Miles, conducted the 2009 investigation because Evan was born with marijuana in his system. Defendant Smith visited Evan and Milligan at their home in Bear. Milligan admitted to using marijuana during her pregnancy to alleviate her nausea, but she did not perform Defendant Smith's recommended drug screen. Defendants Smith and Craighton closed the case as "unsubstantiated with concern" after a 41 day investigation (an allegation that itself belies a claim of gross negligence), determining that Evan "was

[85] *McCaffrey*, 133 A.3d at 546 (quoting Restatement (Second) of Torts § 895D cmt. b (1979) (internal alterations omitted)); *see also Ernst v. Child & Youth Servs. of Chester County*, 108 F.3d 486, 496 (3d Cir. 1997) (discussing policy underlying absolute immunity for child welfare workers).

well cared for," although they identified risk factors of substance abuse and lack of cooperation with recommended treatment. It is hard to conceive, and Plaintiff has not adequately explained, how these facts state a gross negligence claim (or even a negligence claim). Further, Plaintiff fails to allege any facts demonstrating, even under the most liberal pleading standard, how Defendants Craighton or Miles were grossly negligent in their supervision of Defendant Smith. The Superior Court correctly dismissed the Amended Complaint against Defendants Smith, Craighton, and Miles.

Defendant Kelly was Not Grossly Negligent. Defendant Kelly supervised an unidentified caseworker in the 2012 investigation. This investigation took place after a neighbor found Evan and Autumn outside at night after their babysitter, Milligan's brother, fell asleep. Plaintiff does not allege with any level of particularity how Kelly was grossly negligent with respect to the 2012 investigation, and only alleges generally that she had a duty to train and supervise.[86] Defendant Kelly also supervised an unidentified caseworker in the 2013 investigation, conducted in response to a complaint that Evan and Autumn were locked in a room for long periods of time and could not communicate appropriately. In her Opening Brief, Plaintiff's only particular claim of gross negligence is that Kelly, a division director, failed to comport with a "ministerial duty" found in 16 *Del. C.* § 906(b)

[86] Am. Compl. at ¶ 14 (A-081-82).

(the statutory policy statement, discussed, *supra*), by failing to train and supervise the unidentified caseworkers in the "use of a risk assessment tool related to case history."[87] Again, this allegation does not support a claim of "gross negligence."[88]

Defendants Bradley and Zebroski were Not Grossly Negligent. Defendant Bradley conducted the fourth investigation in 2014, after Milligan and boyfriend appeared at Plaintiff's house to pick the children up while appearing intoxicated. Defendants Zebroski and Kelly supervised this investigation. Plaintiff claims Defendant Bradley's investigation amounted to gross negligence because "collateral contacts … were not used appropriately."[89] This allegation fails to support a claim of gross negligence. What's more, the Amended Complaint shows that Defendant Bradley did not act with gross negligence. Defendant Bradley met with Milligan and the children "multiple times" over the course of 52 days, and spoke with Milligan on the telephone six times.[90] Defendant Bradley, after concluding her investigation, referred Milligan and the children's case to treatment for multiple

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[87] OB at 25-26.

[88] As noted below, Plaintiff here and elsewhere, when discussing supervisor defendants, fails to address the Superior Court's ruling that Kelly and the other supervisors cannot be held personally liable for failure to train, retain and supervise, since they are not the employer. [*Griffin*], 2017 WL 5075372, at *4; *see also Dollard v. Callery*, 2018 WL 1830938, at *6 and n.28 (Del. Super. Ct. Apr. 16, 2018) (dismissing similar claims against DHSS supervisors and discussing, in other contexts, how the courts have rejected similar, employer claims alleged against individual supervisors).

[89] Am. Compl. at ¶ 19 (A-085-86).

[90] *Id*. (A-085).

concerns and risk factors, including housing. In no way do Defendant Bradley's (or her supervisors') actions support Plaintiff's incongruous and hyperbolic assertion that Defendant Bradley made "an intentional or conscious decision to disregard [Evan's rights] that was so unreasonable and so dangerous [that she] knew or should have known that harm to [Evan] was not only a likely result, but was inevitable."[91] Rather, Defendant Bradley was demonstrably concerned and took appropriate action in escalating Milligan and the children's case to treatment. Neither Defendant Bradley, nor her supervisors Defendants Zebroski and Kelly, acted with gross negligence in the 2014 investigation.

The Superior Court appropriately decided that Plaintiff failed to carry her substantial burden in demonstrating that a DFS Defendant acted with gross negligence, and this Court should uphold that decision.

2. Grossly Negligent Hiring, Retention, and Supervision are Claims Against the State that Are Barred by Sovereign Immunity

The Superior Court held that the State, as employer—and not State officials and employees in their *individual* capacities—held the duty to hire, retain, and supervise DFS investigators.[92] As noted previously, the Superior Court accordingly

[91] OB at 29 (relying on previous reference to Del. P.J.I. Civ. § 5.10 (2000), at OB 23).
[92] [*Griffin*], 2017 WL 5075372, at *4 (citing *Fanean v. Rite Aid Corp. of Delaware, Inc.*, 984 A.2d 812, 825–26 (Del. Super. Ct. 2009)).

dismissed Plaintiff's claims of grossly negligent hiring, retention, and supervision against DFS Defendants Kelly, Craighton, Miles, and Zebroski in their individual capacities.[93] Plaintiff makes no attempt in her Opening Brief to address the Superior Court's holding, and consequently has waived her right to challenge it. The Superior Court's holding was correct and consistent with the law in Delaware[94] and in other jurisdictions,[95] and should be upheld.

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[93] [*Griffin*], 2017 WL 5075372, at *4. State officials and employees enjoy sovereign immunity for claims against them in their official capacities. *See e.g.*, *Christman v. State Dep't of Health & Soc. Servs.*, 99 A.3d 226 (Del. 2014) (observing that a federal claim against an individual employee in her "official capacity" is an action against the State, barred by the Eleventh Amendment); *Harris v. Hospital for the Chronically Ill*, 2001 WL 1739190, at *3 (Del. Super. Ct. Dec. 27, 2001) (official capacity tort claims are barred by sovereign immunity).

[94] *E.g.*, *Fanean*, 984 A.2d at 825–26 (Del. Super. Ct. 2009) (holding claims of negligent supervision and hiring speak to "the direct liability of the employer rather than its employee's negligence imputed through vicarious liability") (citing *Smith v. Williams*, 2007 WL 2677131 (Del. Super. Ct. Sept. 11, 2007)); *see also Dollard*, 2018 WL 1830938, at *6 (recognizing that claim of deliberate indifference of need for a policy implicates a supervisor's official job duties and cannot be viewed as an individual capacity claim).

[95] *E.g.*, *Harris v. Boreham*, 233 F.2d 110, 117 (3d Cir. 1956) (holding that negligence of an employee is attributable to municipality that employs him under the doctrine of *respondeat superior*, but is not attributable to his supervisor, who is merely an intermediary owing no duty); *Brown v. Budz*, 398 F.3d 904, 918 (7th Cir. 2005) (recognizing that failure to train claims can be maintained only against municipalities and dismissing individual capacity claims); *Duran v. Warner*, 2013 WL 4483518, at *8 (D.N.J. Aug. 20, 2013) ("[T]he tort of negligent hiring or retention is cognizable against an employer through the principles of agency and vicarious liability. It is not cognizable against individual supervisors in their personal capacity."); *Harvey v. Evans*, 2007 WL 701048, at *3 (E.D. Tenn. 2007) (dismissing supervision claims against a sheriff, noting "these negligence claims cannot stand against [the sheriff] in his individual capacity. Absent official capacity, the sheriff has no duty to train his deputies.").

III. THE SUPERIOR COURT PROPERLY DISMISSED PLAINTIFF'S STATE CREATED DANGER CLAIM

A. QUESTION PRESENTED

Did Plaintiff state a viable claim of state created danger, despite failing to plead facts sufficient to meet any of the four elements required to establish it?

B. STANDARD OF REVIEW

See *supra* Argument, 1.B. This Court is bound by the United States Supreme Court's interpretation of the Federal Constitution.[96]

C. MERITS OF ARGUMENT

The Superior Court correctly held that Plaintiff's state created danger claim failed as a matter of law. "The state created danger doctrine places an affirmative duty under the due process clause on an official to protect and care for an individual when the official has placed the individual in a dangerous position that he would not have otherwise faced."[97] The elements of this claim are: (1) the harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's

[96] *E.g. Jones v. State*, 745 A.2d 856 (Del. 1999) (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).
[97] *J.L. v. Barnes*, 33 A.3d 902, 917 (Del. Super. Ct. 2011) (internal quotations and citation omitted).

acts, or a member of a discrete class of persons subjected to the potential harm brought by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.[98] As the United States Supreme Court has made clear, a due process claim brought under this theory requires that the state take custody of a person or take some other *affirmative* act that places a person in a greater danger than they would have been had they done nothing.[99] "It is the misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause."[100]

Plaintiff did not plead facts demonstrating that DFS took custody of Evan, resulting in his harm. In fact, Plaintiff pled the opposite. The crux of Plaintiff's case is that DFS failed to use its authority to remove Evan from his mother's custody. Put another way, the danger was, sadly, Evan's mother, not the State. Under established precedent, this cannot give rise to a state created danger claim. In *Deshaney v. Winnebago Department of Social Services*,[101] the United States Supreme Court examined a substantive due process claim premised on Wisconsin

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[98] *McCaffrey v. City of Wilmington*, 2013 WL 4852497, *8 (Del. Super. Ct. June 26, 2013), *judgment vacated in part on reconsideration*, 2014 WL 598030 (Del. Super. Ct. Jan. 31, 2014).
[99] *See Bright v. Westmoreland Co.*, 443 F.3d 276, 280-81 (3d Cir. 2006) (affirming Rule 12(b)(6) dismissal of state created danger, due process claim).
[100] *Id.* at 282.
[101] 489 U.S. 189 (1989).

state social workers' failure to remove a child from his physically abusive father, despite having received and documented reports of abuse. In addition, the State of Wisconsin took temporary custody of the child, but then placed him back into the custody of his father, who continued to abuse him. The *Deshaney* Court ruled that the Due Process Clause does not require the State to protect its citizens from private actors, and that the State's failure to act to protect the child from a danger not of the State's own making could not give rise to a due process violation. The *Deshaney* Court observed:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for [the child] and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by [the child's] father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.[102]

Plaintiff here attempted to bring the exact claim the *Deshaney* Court rejected. Similarly, in *Bright v. Westmoreland County*, the Third Circuit examined a state created danger claim that was again premised on a county's failure to intervene,

[102] *Deshaney,* 489 U.S. at 202-03.

rather than its affirmative act.[103] The plaintiff in *Bright* claimed that county employees and officials failed to timely revoke a probationer's parole before he killed a young girl. The *Bright* court described the case in terms equally applicable here: the "reality of the situation described in the [Amended Complaint] is that what is alleged to have created a danger was the failure of the [DFS] defendants to utilize their state authority in a manner that rendered [Evan] more vulnerable to [Milligan] than [he] would have otherwise been."[104] The Third Circuit held that the alleged failure to intervene timely to prevent harm by a third party (which is Plaintiff's claim here) cannot give rise to a state created danger claim, and it affirmed the trial court's dismissal of the claim.[105]

Plaintiff failed to plead facts as to the elements of a state created danger claim. It cannot be seriously contended that Smith, Craighton and Miles, for example, should have reasonably foreseen in 2009 that five years later Milligan would beat her daughter to death. Even with the latter investigations, there are no allegations that any DFS Defendant was actually aware of physical abuse and should have foreseen what tragically occurred. The Amended Complaint does not even allege

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[103] *Bright*, 443 F.3d at 282.
[104] *Id.* at 284.
[105] *Id.* ("Liability requires affirmative state action; mere failure to protect an individual against private violence does not violate the Due Process Clause.") (internal quotations and citations omitted).

serious physical harm to the children prior to the attack on Autumn. The ultimate harm was anything but "fairly direct." There are no allegations that any DFS Defendant acted with such culpability that could be said to have shocked the conscience. Further, the DFS investigations did not create a relationship between Evan and the State that satisfied the third element of the claim.[106] And, as noted above, there is no claim that an affirmative act placed Evan in greater harm than he would have been had the DFS Defendants not acted at all. Indeed, had they not acted at all, the status quo would have, and did, remain the same.[107] Plaintiff argues that the DFS investigations affirmatively gave her a false sense of security that she did not have to take action on her own to protect Evan, but the United States Supreme Court and Third Circuit Court of Appeals have rejected identical arguments.[108] The Superior Court correctly held that Plaintiff failed to adequately plead a state created danger claim.

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[106] *See Deshaney*, 489 U.S. at 197 (rejecting the argument that State created a "special relationship" that obligated it to take affirmative action despite the State specifically expressing "by word and by deed" that it intended to protect child).

[107] *See id.* at 201 ("[t]hat the State once took temporary custody of [the child] does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all").

[108] *See id*. at 200 (holding that no "affirmative duty to protect arises … from the State's … expressions of intent to help" an individual at risk); *see also Bright*, 443 F.3d at 284 ("Officer Franzaglio assured Bright approximately three weeks before Annette's death that Koschalk would be arrested and '[i]n reliance upon these assurances, Bright failed to take defensive actions, such as leaving the area with his family, hence creating the opportunity for the damages ultimately sustained.' State-created danger liability cannot be predicated on these facts, however.").

IV. THE SUPERIOR COURT CORRECTLY DETERMINED THAT PLAINTIFF'S COMPLAINT WAS TIME-BARRED UNDER 10 *DEL. C.* § 8119

A. QUESTION PRESENTED

Did the Superior Court correctly determine that Plaintiff's untimely initial complaint could not be salvaged under the "time of discovery" rule, or by use of the tolling provisions of 10 *Del. C.* § 8116?

B. STANDARD OF REVIEW

It is appropriate to dismiss a complaint on limitations grounds where "it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it."[109] *See also supra* Argument, 1.B.

C. MERITS OF THE ARGUMENT

Plaintiff acknowledges that her state claims are subject to the two-year limitations period for personal injury actions under 10 *Del. C.* § 8119; by extension, so are her federal claims.[110] "Generally, a cause of action in tort 'accrues' at the time the tort is committed."[111] Here, the last act or omission alleged against a DFS Defendant is the date DFS closed the final investigation: May 29, 2014. Plaintiff

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[109] *Reid v. Spazio*, 970 A.2d 176, 184 (Del. 2009); *see also Parker v. Gadow*, 893 A.2d 964 (Del. 2006) (affirming dismissal of 42 U.S.C. § 1983 claim on timeliness grounds).

[110] *E.g.*, *Cole v. Delaware League of Planned Parenthood, Inc.*, 530 A.2d 1119, 1123-24 (Del. 1987).

[111] *Boerger v. Heiman*, 965 A.2d 671, 674 (Del. 2009) (citations omitted).

filed her initial complaint on July 15, 2016, more than two years later. Accordingly, the Superior Court ruled that § 8119 barred Plaintiff's claims.

In so ruling, the Superior Court rejected Plaintiff's arguments that the "time of discovery" rule, and the tolling provisions of 10 *Del. C.* § 8116, salvaged her filing that was untimely under § 8119. Plaintiff claims legal error on both fronts. For the reasons that follow—namely that the Amended Complaint itself demonstrates that Evan's alleged harm was not "inherently unknowable," and that § 8116 does not apply to § 8119—the Superior Court's holdings were correct.

1. The Time of Discovery Rule Does Not Apply

"The time of discovery exception … is narrowly confined in Delaware to injuries which are both: (a) 'inherently unknowable'; and (b) sustained by a 'blamelessly ignorant' plaintiff."[112] Under the rule, "the statute of limitations begins to run upon the discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts."[113]

The Superior Court rejected Plaintiff's assertion that Evan's injuries were "inherently unknowable" prior to the State removing him from his mother's custody in August 2014: "It is clear to the Court that [Evan's] claimed injuries were not

[112] *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 835 (Del. 1992).
[113] *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 842 (Del. 2004) (quotations and citations omitted) (emphasis in original).

unknowable to him (or more realistically, someone acting on his behalf, such as his next friend in this litigation) prior to the death of his sister."[114] The Superior Court also recognized that "the Amended Complaint itself is replete with examples of claimed wrongs committed by DFS Defendants knowable to [Evan] or his responsible relatives."[115] Indeed, there is an inherent and unresolvable tension in Plaintiff (the sister of Evan's mother) arguing on one hand that Evan's harm was "inherently unknowable," and on the other, that state caseworkers should be held personally liable for ignoring obvious harm posed by Evan's mother.

Plaintiff does not address the Superior Court's specific holdings in her Opening Brief. Moreover, she does not attempt to apply the "time of discovery" rule to her case. Instead, Plaintiff argues generally that the time of discovery rule can apply to personal injury actions, and that the DFS Defendants' actions were not "complete" until Evan was removed from his mother's custody in August 2014.[116] Plaintiff cites no authority for this 'completion' rule, which is not grounded on the "time of discovery" rule, or the date of the last DFS Defendant's act or omission (i.e., May 29, 2014) applicable under the general rule.[117] Plaintiff's argument appears instead to be related to her argument below (rejected by the Superior Court

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[114] [*Griffin*], 2017 WL 5075372, at *5.
[115] *Id*.
[116] OB at 36.
[117] *See Boerger*, 965 A.2d at 674 ("Generally, a cause of action in tort 'accrues' at the time the tort is committed.").

and not raised in this appeal) that the DFS Defendants' individual actions constituted one "continuing wrong." This Court recently rejected a similar argument in *Clouser v. Doherty*.[118]

Plaintiff has failed to demonstrate that the Superior Court erred in determining the time of discovery rule did not apply to Plaintiff's untimely lawsuit.

2. The Tolling Provisions of 10 *Del. C.* § 8116 Do Not Apply to the Limitations Period Set Forth in 10 *Del. C.* § 8119

The Superior Court held that Plaintiff could not rely on 10 *Del. C.* § 8116's tolling provisions for Evan's infancy or incompetence because § 8116—by its own terms—does not apply to personal injury actions subject to § 8119. Delaware Courts have repeatedly rejected plaintiffs' attempts to apply § 8116 to personal injury actions subject to § 8119.[119] Section 8116 provides, *in toto*:

> If a person entitled to any action *comprehended within §§ 8101-8115* of this title, shall have been, at the time of the accruing of the cause of such action, under disability of infancy or incompetency of mind, this chapter shall not be a bar to such action during the continuance of such disability, nor until the expiration of 3 years from the removal thereof.

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[118] 175 A.3d 86 (Del. 2017) (rejecting the argument that school district employee "defendants should be considered as one group and the statute of limitations should be tolled for all of the defendants due to continuing wrongs by individual defendants within the group").

[119] *E.g. Campanella v. Buczik*, 1996 WL 769773, *1 (Del. Super. Ct. Nov. 1, 1996); *Estate of Atmore*, 1994 WL 374312, *2 (Del. Super. Ct. June 6, 1994). *Hurwitch v. Adams*, 151 A.2d 286 (Del. Super. Ct. 1959)).

(emphasis added). Plaintiff acknowledges that her action falls under § 8119. She does not assert that her action is "comprehended within" §§ 8101-8115. Section 8116 simply does not apply here, as the Superior Court accurately decided. Plaintiff also offers no precedent in support of her argument that § 8116 applied at least during the time Evan was in the State's legal custody from August 8, 2014 to January 21, 2016,[120] and the statute cannot be interpreted rationally to support her argument. Based on the preceding, Plaintiff has failed to establish that the Superior Court erred in determining that her claims were time-barred.

[120] OB at 27. Plaintiff was represented in the Family Court proceedings by her counsel in this action and on this appeal, who assisted Plaintiff in gaining permanent guardianship of Evan.

CONCLUSION

For the above reasons, the DFS Defendants respectfully request that the Court affirm the Superior Court's Order, dated October 31, 2017, dismissing the DFS Defendants, and grant them such other relief as the Court may deem just and appropriate.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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