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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;*	§	C.A. No. N16C-07-115 FWW
Defendants Below, Appellees.	§	

AMENDED OPENING BRIEF

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NATURE OF PROCEEDINGS

Tonya Griffin ("Ms. Griffin"), maternal Aunt of minor Plaintiff ("Plaintiff"), was granted permanent guardianship of Plaintiff pursuant to a Family Court order on January 21, 2016. (A-235). Thereafter, she filed this civil action against the individual Defendants, employees of the Division of Family Services (with the exception of Nancy Craighton) in their individual and official capacities, on July 15, 2017. (A-017). Named Defendants included Budget of Delaware, Inc., DFS Directors Laura Miles ("Miles") and Victoria Kelly ("Kelly"), Family Crisis Therapist Trina N. Smith ("Smith"), DFS Supervisor Jamie Zebroski M.S.W ("Zebroski"), DFS Senior Family Services Specialist Crystal Bradley ("Bradley"), M.S., and Master Family Services Specialist for DFS Javonne Rich ("Rich"). *Id* The original complaint was dismissed without prejudice by the Superior Court on the motion of the then-named DFS Defendants, and Plaintiff was granted leave to amend the Complaint to allege specific facts detailing the individual DFS Defendants' culpability so as to overcome their civil immunity. (A-062). Certain counts alleging negligence and gross negligence were also amended to be pled with particularity as required by Superior Court Civil Rule 9(b). *Id.*

Thereafter Plaintiff made a Freedom of Information Act (FOIA) request on the State of Delaware for the results of a "Root Cause Analysis" and received a

report to that effect on March 21, 2017. (A-298). This report included confirmatory information that was incorporated into the Plaintiff's Amended Complaint, however no specific individual Defendants were named, as the identities were in effect redacted. *Id.*

The First Amended Complaint added Defendant and DFS Supervisor Nancy Craighton ("Craighton"), and contains the following Counts: Count I – Negligence, Gross Negligence, and Recklessness (Against all DFS Defendants); Count II – Civil Rights Violations Under 42 U.S.C. § 1983 and the United States and Delaware Constitutions (Against all DFS Defendants); Count III – State Created Danger Under 42 U.S.C. § 1983 (Against all DFS Defendants); Count IV – Negligent, Grossly Negligent, and Reckless Hiring Retention and Supervision (Against Defendants Miles and Kelly); Count V – Intentional Infliction of Emotional Distress (Against all Defendants); and Count VI – Negligent Infliction of Emotional Distress (Against Defendant Budget Motor Lodge). (A-073). The Superior Court dismissed all parties and all claims. *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017).

On February 5, 2018, Plaintiff filed a Motion for Entry of Judgment with respect to all claims against all Defendants. (A-219). The Court granted the

Motion, and final judgment was entered in favor of Defendants on February 21, 2018. (A-223). Plaintiff thereafter initiated the instant appeal.

SUMMARY OF ARGUMENT

I. Individually Named Defendants are not Entitled to the Statutory Shield of Qualified Immunity Because They Each Repeatedly Failed to Complete Their Non-Discretionary (i.e., mandatory) Duties, Under 16 Del. C. § 906.

1. Defendants Zebroski, Bradley, and Kelly in Particular are not Entitled to Qualified Immunity, Because Each Failed to Complete Their Ministerial Duties Under 16 Del. C. § 906 thereby falling below the minimum standard of care that the legislature intended qualified immunity to protect.

II. The Superior Court erred when it ruled that Plaintiff has not alleged facts susceptible to proof of grossly negligent conduct in her Amended Complaint because there are many facts alleged susceptible to proof of at least gross negligence.

III. The Superior Court erred when it held that Plaintiff's claims fail under The State Created Danger Doctrine, because Plaintiff can meet each for the four prongs for a state created danger claim.

IV. The Superior Court committed error when it ruled that Plaintiff's claims were time-barred under 10 Del. C. §8119, and not subject to tolling under 10 Del. C. 8116 because Plaintiff's claims were timely filed, and in the alternative are subject to tolling for lack of legal capacity.

STATEMENT OF FACTS

Over the course of five (5) years, culminating in the death of Plaintiff's half-sister Autumn Milligan on August 8th of 2014, The Department of Family Services by and through their individually named agents (hereinafter referred to as: "Defendants," "Individual DFS Defendants," or "Individual Defendants") conducted no fewer than four (4) faulty, grossly negligent and/or reckless investigations that ignored a history of physical abuse, drug abuse, appalling neglect, staggering developmental delays, unsafe and unsanitary living conditions, and imminent threat of permanent harm, that unfortunately became a reality for this then five-year-old boy. (A-088).

Despite being a subject of State investigations from the day of his birth, and despite Plaintiff's legal and permanent *guardian ad litem* in this matter (his maternal Aunt) repeatedly demanding that the specifically named individual Defendants act in accordance with their duty to remove Plaintiff from this unreasonably and indisputably unsafe living environment, nothing was done to prevent the harm that was so foreseeable as to be inevitable. *Id*.

Plaintiff Ford was born on January 19, 2009. DFS investigated Ms. Milligan on at least four (4) separate occasions between Plaintiff's birth and his sister's tragic death on August 8th of 2014. Caseworkers, including the individually named Defendants, noted that Plaintiff and his sister could barely speak, were

developmentally delayed, and wore diapers much longer than appropriate for their ages. (A-079-080). Caseworkers, including the individually named Defendants, also continued to note complaints about Ms. Milligan's drug abuse, the children's rotting teeth, and marks on the children's bodies. (A-080-081). Throughout these investigations, the status and categorization of the harm to the children observed would change, but in each case, and as specifically alleged in Plaintiff's Amended Complaint, either through gross negligence, recklessness, or a combination of the two, the individual Defendants failed to act in accordance with their duty and remove these children from what was a deadly and quickly worsening situation. (A-298, A-079-082).

Specifically, in January 2009, following Plaintiff's birth, hospital tests detected marijuana in Plaintiff's system. (A-081). DFS was notified and assigned a "P1" label to the case—the highest level of priority at DFS. *Id.* A P1 level requires authorities to make face-to-face contact with the child and family within 24 hours. *Id*. When first interviewed, Ms. Milligan admitted to the caseworker that she smoked marijuana while pregnant with Plaintiff because it helped with her nausea. *Id*. The caseworker assigned to the case attempted twice to schedule a meeting with Ms. Milligan for a drug evaluation; however, a drug screen was never completed. *Id*. The caseworker did visit the home in Bear where Ms. Milligan then resided with Plaintiff. *Id*. The caseworker determined Plaintiff was "was well-

cared for." *Id*. The case was closed after 41 days as "unsubstantiated with concern." *Id*.

The second DFS investigation arose after Plaintiff and his sister were found wandering outside of their residence after midnight, in diapers. (A-081-082). About 1:00 a.m. on September 8, 2012, a neighbor found Plaintiff and his sister outside and called Middletown police. *Id*. DFS was notified around 4:00 a.m. that same morning. *Id*. Ms. Milligan's sixteen-year-old brother had been watching the children for Ms. Milligan and had fallen asleep. *Id*. The children then left the house through a broken screen door and were running around outside in their diapers. *Id*. No charges ever materialized, and the case was assigned a "P3" label—the lowest priority in the DFS system. *Id*. The caseworker assigned to the case met with Ms. Milligan twice following the incident, only once with Plaintiff and his sister present, and determined both children were developmentally delayed. Ms. Milligan did not follow through with program referrals and failed to have Plaintiff and his sister evaluated. *Id*. After six (6) failed attempts to follow-up with Ms. Milligan, DFS closed the case within 55 days as "unsubstantiated with concern." *Id*.

The third DFS investigation arose out of a Spring 2013 incident in Smyrna when caseworkers investigated allegations that the children were locked in a room for long periods of time and could not communicate appropriately. (A-082-083).

Although this was the third official investigation opened against Ms. Milligan, the case was assigned the lowest level of priority at DFS. *Id*. The individual caseworker assigned to this case met with Ms. Milligan, twice with Plaintiff and his sister present, and determined that the children were clean and well fed, but developmentally delayed. *Id*.

Defendant Kelly, head of the Delaware DFS, has indicated that by this third investigation, those involved should have thought to look into whether a pattern was developing "and begin to look at the mounting weight of the history and what that might say," yet the case was closed as "unsubstantiated" after 46 days. *Id*. An internal review later noted that a caseworker failed to fill out a risk assessment form in accordance with their own policy, which led to the case closing prematurely, and as admitted by Defendant Kelly, improperly. (A-083).

By the fall of 2013, Ms. Milligan was living at the Budget Motor Lodge in New Castle with her children and Mr. Willie Reeder, Ms. Milligan's boyfriend and 'pimp.' (A-083-084). Residents noted that Ms. Milligan often hit her children for misbehaving and that both children were often locked in the motel room alone. *Id*.

On April 7, 2014, Ms. Milligan and Mr. Reeder appeared at her sister's house, Plaintiff's *guardian ad litem* (herein "Tonya Griffin"), to pick up the children while under the influence of drugs. (A-084-085). When Ms. Griffin refused to permit the children to go with the couple, Mr. Reeder barged into the

home and forcibly took them. *Id*.

Ms. Griffin and Ms. Milligan's other sisters called the child-protection hotline, which eventually resulted in the fourth DFS investigation against Ms. Milligan. *Id*. This case was assigned a "P1" label—the highest level of priority at DFS. *Id*. Although the sisters mentioned marks on the children's bodies, Defendant Kelly later reported that the caseworkers' notes did not indicate that an examination was ever completed, again in dereliction of their own mandatory policies and duties. *Id*.

A caseworker then met with Ms. Milligan and her children at the motel multiple times over a period of 52 days and found both children to be significantly developmentally delayed. (A-085-086). Thereafter, that caseworker reportedly spoke with Ms. Milligan by phone six (6) additional times, but four (4) subsequent attempts to reach her by phone were unsuccessful. *Id*. Although this was the fourth investigation against Ms. Milligan, an internal review later published in the local paper of record noted that caseworkers failed to interview motel residents or other collateral contacts that could have been helpful in providing the information needed to adequately investigate the claims by Ms. Milligan's sisters that she was neglecting and abusing Plaintiff and his sister. *Id*.

This fourth and ultimately final case was closed on May 29, 2014 as "unsubstantiated with concern," but moved into treatment, incredibly, for only the

first time. (A-086-087). Although Ms. Milligan had originally permitted DFS to send the children to medical treatment with a pediatrician and agreed to undergo drug screening, she later failed in many respects to comply with the caseworker's prescribed, mandatory treatment plan for her and the children. *Id*. Caseworkers were aware that Ms. Milligan had completely ignored the mandatory conditions placed on her through her DFS prescribed treatment plan, but failed to hold her accountable, or act in any way other than to falsely certify that the case had been "closed" as a product of some form of thoughtful review. *Id*.

Fewer than three (3) months after this fourth DFS "investigation," and as a direct and proximate result of the gross negligence, dereliction of duty, and recklessness by the individual caseworkers and their respective supervisors, Plaintiff's mother beat his sister to death before his eyes. (A-088).

Upon the death of his sister and the removal from his Mother's home (as she was taken off to eventually serve a lengthy prison sentence for the murder of her daughter), Plaintiff was placed into the physical custody of his maternal Aunt, Ms. Griffin, but the State at all times retained the Guardianship of Plaintiff, until a full (and lengthy) proceeding in the Family Court resulted in the grant of Permanent Guardianship by Order of the Family Court on January 21, 2016. (A-234).

ARGUMENT

I. Individually Named Defendants Are Not Entitled To the Statutory Shield of Qualified Immunity Because They Each Repeatedly Failed to Complete Their Non-Discretionary (i.e., mandatory) Duties, Under 16 *Del. C.* § 906.

A. QUESTION PRESENTED

Whether the Superior Court erred in determining that the DFS defendants were entitled to qualified immunity under the Delaware State Tort Claims Act, because their acts were inherently discretionary? *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017). (A-73, 89-93, A-146, 164-165).

B. STANDARD OF REVIEW

A trial court's grant of a motion to dismiss is reviewed *de novo*. *RBC Capital Markets, LLC v. Education Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014).

C. MERITS OF ARGUMENT

The Superior Court ruled that Plaintiff, without the benefit of any formal discovery, has failed to state a claim upon which relief can be granted under Rule 12(b)(6). A motion to dismiss for failure to state a claim pursuant to Superior Court Rule 12(b)(6) should not be granted if the "plaintiff may recover under any reasonably conceivable set of circumstances susceptible to proof under the complaint. *Browne v. Robb*, 583 A.2d 949, 950 (Del. 1990). In ruling on a 12(b) motion, the Court "must draw all reasonable factual inferences in favor of the

party opposing the motion. *Doe v. Cahill,* 884 A.2d 451, 458 (Del. 2005). Dismissal is warranted "only if it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief. *Id*.

The Superior Court committed error when it made findings of fact with respect to the well-pled allegations in Plaintiffs' Amended Complaint. Specifically, the Court erred when it denied the existence of any mandatory duties that the individual Defendant's are subject to under 16 *Del. C.* §906, and went even further in announcing a new standard, which extends the protections of the Delaware State Tort Claims Act (DSTCA) any "investigative activity," finding without citation to any legal authority, and without the benefit of any discovery that:

> "The Court is convinced that DFS Defendants' actions *are inherently discretionary*. To the extent that § 906 imposes mandatory duties upon the Division of Family Services in opening and closing cases, and conducting investigations and assessments, that section requires workers and supervisors to exercise their discretion at virtually every tum. *Discretion is at the very heart of the investigative process*."

Greenfield for Ford v. Budget of Delaware, Inc., C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017) at *8-9. (emphases added). Here, the Superior Court sweeps all "investigative" conduct under the protections of the DSTCA, and effectively cuts-off access to a remedy that the legislature specifically intended to apply when, as they did here, the actions of individual

State employees fall below an acceptable standard of care.

The Superior Court also erred when, in support of the opinion that the alleged acts were inherently discretionary, it determined "… Plaintiff offer[ed] no facts that would enable the Court to determine how any individual DFS Defendant's action is alleged to be ministerial as opposed to discretionary." *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017) at *9.

Pursuant to Superior Court Civil Rule 9, negligence and gross negligence claims must be pled with particularity. Super. Ct. Civ. R. 9 (2007). The pleading must advise defendant "(1) what duty, if any was breached; (2) who breached it, (3) what act or failure to act breached the duty, and (4) the party upon whom the act was performed." *Myer v. Dyer*, 542 A.2d 802, 805 (Del. Super. Ct. 1987). In this case, the duty owed by the individual DFS Defendants was to, "at minimum," fulfill their non-discretionary (i.e., mandatory) duties under 16 *Del. C.* § 906; and to refrain from performing their discretionary duties with gross negligence. Their breaches occurred, as alleged in Plaintiff's Amended Complaint, when Defendants Zebroski, Bradley, and Kelly failed to discharge their mandatory duties under 16 *Del. C.* § 906, to conduct their investigation(s), *inter alia*, in a comprehensive, integrated, and multi-disciplinary manner, but also to conduct specific inquiries that were not done (such as the requirement under 16 *Del. C.* § 906(e)(8) to assess

the home environment, as discussed *infra*). Failing to meet these minimal requirements is not an 'exercise of discretion,' it is a dereliction of duty and a betrayal of public trust.

Claims against the individual DFS Defendants are not precluded by the DSTCA, because Defendants' failures arose out of and in connection with the performance of official duties that were non-discretionary (mandatory) in nature, and the Superior Court committed reversible error when it held that any "investigative" activity carried out by the individual Defendants here (or indeed any State employee by logical extension) will automatically trigger the protections of the DSTCA and effectively cut-off an intended remedy, specifically carved out by the legislature, for those who are injured but-for the failure of a State actor to actually *perform* their duty to investigate. See 16 Del. C. § 906 (2017) (amending 16 Del. C. § 906 (2016)); see also H.B. 181, 149th Gen. Assem. (2017), Summary.

1. Defendants Zebroski, Bradley, and Kelly in Particular Are Not Entitled to Qualified Immunity, Because Each Failed to Complete Their Ministerial Duties Under 16 *Del. C.* § 906 thereby falling below the minimum standard of care that the legislature intended qualified immunity to protect.

The DSTCA protects the state from causes of action against it, its employees, and its agencies, (also known as qualified immunity), if the act or omission complained of: (1) arises from an employee performing an official duty involving discretion; (2) is done in good faith; and (3) is done without gross or

wanton negligence. DEL. CODE ANN. Tit. 10 § 4001 (2018). A plaintiff can avoid application of DSTCA if they show that the defendant negligently engaged in non-discretionary (ministerial or 'mandatory') statutory duties. The negligent dereliction of these mandatory duties is what the Defendants in this case are alleged to have done. An act is ministerial in nature if it is routine and involves "conduct directed by mandatory rules or policies." *J.L v. Barnes*, 33 A.3d 902, 914 (Del. Super. 2011).

Plaintiff's Amended Complaint asserts that many of the individual Defendants' duties were ministerial under 16 *Del. C.* § 906, and that individual Defendants failed to act in accordance with these mandatory statutory duties. For example, § 906(b) mandates the investigation and disposition of cases involving child abuse or neglect *shall be conducted in a comprehensive, integrated, and multi-disciplinary manner.* DEL. CODE ANN. Tit. 16 § 906(b) (2017). The term "shall" is used to explain the duties of the individuals in their respective roles as state actors employed through DFS, and this word is a clear indicator that such duties are mandatory.

Another important non-discretionary duty is found in § 906(c)(1)(c), which states that once DFS asserts its right into the family home and triggers its obligations under the statute, their duties change to an individual mandatory duty to file a report in the case within 5 days.

Critically to this case, 16 *Del. C.*§ 906(e)(8), during the relevant timeframe at issue, provided that individual DFS caseworkers engaged in an investigation, just as Defendants Bradley, Zebroski, and Kelly were here, had certain mandatory minimum requirements:

> **The investigation *shall* include, but need not be limited to,** the nature, extent, and cause of the abuse or neglect; collect evidence; identify the alleged perpetrator; determine the names and condition of other children and adults in the home; **assess the home environment**, the relationship of the subject child to the parents or other persons responsible for the child's care, and any indication of incidents of physical violence against any other household or family member; perform background checks on all adults in the home; and gather other pertinent information.

16. *Del. C.* § 906(8) (effective until August 29, 2017).

The Legislature revised this section, along with other sections of 16 *Del. C.* § 906, in 2017, under House Bill 181. The notes to the revision make clear that the legislature was creating some new mandatory duties and clarifying the language of prior duties, and had no intention of removing or lessoning the mandatory duties of individual DFS caseworkers conducting investigations as they were doing here. H.B. 181, 149th Gen. Assem. (2017), Summary. These revisions echo what Plaintiff has been consistently arguing in this case since its inception: that the duties found in 16 *Del. C.* 906, and specifically those in subsections (e)(8), are non-discretionary. In other words, the non-discretionary subsections of 16 *Del. C.*

§ 906, such as subsection (e)(8), set a floor, not a ceiling, for an acceptable level of conduct sufficient to discharge the duty without negligence. These are not aspirational duties. They are mandatory, as the legislature made clear when they revised this same section to reflect it's current language:

> **At a minimum**, investigate the nature, extent, and cause of the abuse or neglect; collect evidence; identify the alleged perpetrator; determine the names and condition of other children and adults in the home; **assess the home environment**, the relationship of the subject child to the parents or other persons responsible for the child's care, and any indication of incidents of physical violence against any other household or family member; perform background checks on all adults in the home; and gather other pertinent information.

16. Del. C. § 906(e)(8) (2017) (amending 16 Del. C. § 906(e)(8) (2016) (emphasis added).

In light of the plain language of § 906, and in particular the non-discretionary passages cited *supra*, it was error for the Superior Court to hold that there are no mandatory duties implicated by Plaintiff's Amended Complaint.

The Superior Court held that DFS Defendants' actions were inherently discretionary, and that discretion is "at the heart of the investigative process," despite citing to no authority in support of this determination. *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017) at *9. Whether or not the investigatory duties of the DFS Defendants were discretionary is surely a mixed question of law and fact,

however it was error for the Court, without any facts developed through discovery, to make the factual findings necessary to underpin such holdings.

The Superior Court goes a step farther by appearing to adopt a judicially created rule, squarely applicable to the DSTCA that: "the investigative process is inherently discretionary." *Id*. Such a ruling would render the first prong of the DSTCA effectively moot, and thus deny a remedy to any and all persons harmed by ministerial errors during state "investigative processes." If the harm was in any way the result of an "investigative process," the Superior Court's Opinion in this case, would absolve the demands of discovery, inquiry, and ultimately a remedy altogether, to any alleged harm that is claimed as a result of an "investigative process."

There is no case law that supports the view that *all* investigative processes are by nature discretionary and thus cannot trigger mandatory duties. In fact, cases from across many jurisdictions have held the exact opposite. *See Dept. of Health & Rehabilitative Services v. Yamuni*, 498 So. 2d 441 (Fla. App. D3 1986) (holding the state employees' alleged negligent conduct to be "operational" rather than discretionary, and therefore it was incumbent upon the department to investigate, in a competent manner, the reports of the child's abuse or face the consequences for its negligence because such operational acts were not excepted from the state statutory waiver of sovereign immunity); *see Boland v. State*, 161 Misc.2d 1019

(NY Ct. Cl. 1994) (holding that when a State child abuse intake worker made errors that led to delay in investigation, that conduct triggered an exception to the general rule of state non-liability for governmental functions in situations where an injury results from negligence in performing activity that is ministerial, as opposed to discretionary or quasijudicial); *see Jensen v. South Carolina Dept. of Social Services*, 297 S.C. 323 (App. Ct. 1987) (holding court erred in dismissing suit against defendants where complaint alleged facts indicating that official immunity did not apply because child abuse statutes imposed ministerial rather than discretionary duty on them, and where complaint also alleged facts indicating that investigation of abuse reports may have been inadequate).[1] Whether or not particular state defendants had a ministerial or discretionary duty depends on the facts of the case, and the language and intent of 16 *Del. C.* § 906. Imposing a wide-sweeping rule that all DFS investigations are inherently discretionary is both and unwise precedent to set and is unfair to plaintiffs. Such a judicially created rule is

[1] It is not hard to marshal the 'parade of horribles,' for victims of State created harms should the Superior Court's *sua sponte* determinations of fact be endorsed by this Honorable Court. There are a litany of black-letter Constitutional claims that necessarily involve investigative activity, that nevertheless invite civil liability if conducted below the Standard of Care (i.e., with gross negligence, or in dereliction of a mandatory duty): Fourth Amendment Excessive Force violations, Fifth Amendment Due Process violations, and Sixth Amendment Right to Counsel violations, are all examples of investigative processes that carry the potential of subjecting grossly negligent, and inexcusably absent State actors to civil liability.

not in line with holdings in nearly all other jurisdictions (including the State of Delaware) or the intent of the Delaware Legislature. 2017 Reg. Sess. H.B. 181.

II. The Superior Court erred when it ruled that Plaintiff has not alleged facts susceptible to proof of grossly negligent conduct in her Amended Complaint because there are many facts alleged susceptible to proof of at least gross negligence.

A. QUESTION PRESENTED

Whether the Superior Court erred in determining that Plaintiff failed to plead facts supporting a claim of gross negligence against any DFS Defendant? *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017). (A-146, 154-164).

B. STANDARD OF REVIEW

A trial court's grant of a motion to dismiss is reviewed *de novo*. *RBC Capital Markets, LLC v. Education Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014).

C. MERITS OF ARGUMENT

Even if the individual DFS Defendants' duties under 16 *Del. C.* § 906 identified by Plaintiff in his Amended Complaint, subsequent briefing, and in the instant Appeal, are not deemed to be ministerial, but rather discretionary, they would still not be afforded the protections of qualified immunity under the DSTCA because the individual Defendants are alleged to have acted with gross negligence. (A-089).

Discretionary acts are covered by the DSTCA, but only if they are done in good faith and without gross or wanton negligence. *Barnes*, 33 A.3d at 914 (explaining that discretionary acts done with gross negligence prohibit qualified

immunity). The Individual DFS Defendants each asserted their power, derived from the State, into Plaintiff's family, at least in part for his express benefit, and then mandated conditions, evaluations, goals, and tasks for his mother to complete - effectively leaving her to administer her own social services. The individual Defendants then repeatedly took no action that was required of them, or did so at least in a grossly negligent manner.

The Superior Court committed reversible error when it found, under the standards applicable to 12(b)(6) determination, that Plaintiff has not asserted claims that are susceptible to a finding of gross negligence. *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017) at *9. However, deciding whether an individual defendant acted with gross negligence is a factual question. *Barnes*, 33 A.3d at 916 (finding that question of gross negligence is not subject to summary disposition due to lack of discovery); *see also Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 276 (Del. 2010) (finding issues of gross negligence and willful or wanton conduct are intended for jury). Gross negligence "signifies more than ordinary inadvertence or inattention." *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987). It is an "extreme departure from the ordinary standard of care." *Browne v. Robb*, 583 A.2d 942, 953 (Del. 1990) (quoting W. Prosser, Handbook of the Law of Torts 150 (2d ed. 1955). Plaintiff's allegations against Defendants

Braley, Zebroski, and Kelly, which must be viewed in a light most favorable to Plaintiff, accepting all well-pled allegations as true, form the basis of multiple acts and/or omissions that, even at this stage, satisfy the standard of *at least* gross negligence.

Delaware Civil Pattern Jury Instructions define the requisite derivation from the duty of care, to act with willful and wanton conduct. The instructions explain that willfulness "indicates an intent, or a conscious decision, to disregard the rights of others." Del. P.J.I. Civ. § 5.10 (2000). It further explains that "[w]illfulness is a conscious choice to ignore consequences when it is reasonably apparent that someone will probably be harmed." Del. P.J.I. Civ. § 5.10 (2000). A Delaware jury could also be instructed that "[w]anton conduct occurs when a person, though not intending to cause harm, does something so unreasonable and so dangerous that the person either knows or should know that harm will probably result." Del. P.J.I. Civ. § 5.10 (2000).

Delaware's model instructions define reckless conduct as "a knowing disregard of a substantial and unjustifiable risk." Del. P.J.I. Civ. § 5.9 (2000); *see also Jardel*, 523 A.2d at 530. It "occurs when a person, with no intent to cause harm, performs an act so unreasonable and so dangerous that he or she knows, or should know, that harm will probably result." Del. P.J.I. Civ. § 5.9 (2000). Under the reasonably conceivable set of facts alleged, a juror could find that the

Defendants' acts and/or omissions, were done with a conscious disregard for the rights of Plaintiff, and/or the alleged failures were done with knowing disregard and for the foreseeable harm to Plaintiff that was so likely to occur as to constitute a substantial and unjustifiable risk to Plaintiff. Therefore the acts and/or omissions alleged meet the standard at this stage for making out a claim for at least grossly negligent conduct, based on *inter alia* the following facts with respect to each individual Defendant.

From the time Plaintiff was born with marijuana in his system in 2009, until 2013, three investigations were opened into Plaintiff's mother, Tanasia Milligan. Various individual DFS employees conducted each of these investigations, and each was ultimately closed as "unsubstantiated with concern."

During the first investigation conducted by Defendants Smith and Craighton and personally supervised by Defendant Miles, concerns and risk factors, like substance abuse and failure to cooperate, were identified, yet the case was closed after 41 days as "unsubstantiated with concern." (A-080-081). Defendant Miles knew or should have known that the employees under her direct supervision were "performing their duties in a negligent, grossly negligent, or reckless manner, likely to cause harm or the deprivation of [Plaintiff's] statutorily established, and constitutionally mandated rights[.]" (A-092). First Amended Complaint alleges that Defendant Craighton, an Investigation Supervisor for DFS,

was involved in the first investigation, and identified risk factors and concerns, including substance abuse and a lack of cooperation, yet the investigation was closed after 41 days as "unsubstantiated with concern," and Defendant Craighton was negligent, grossly negligent, and reckless in the performance of her duties. (A-080-081, 089). Plaintiff's First Amended Complaint alleges that Defendant Smith, a Family Crisis Therapist for DFS during the timeframe included in this action, was grossly negligent in the performance of her mandatory, statutory duties by personally identifying concerns and risk factors, including substance abuse and a lack of cooperation with recommended services, but closed the case despite these concerns and Ms. Milligan's failure to perform a drug screen, which is at least arguably enough to meet the standard applicable here, of 'more than mere inadvertence or inattention.' (A-080-081); *Jardel*, 523 A.2d at 530.

In addition, Defendant Kelly independently supervised at least two investigations into Plaintiff in which caseworkers found that he was developmentally delayed and that Ms. Milligan failed to abide by program referrals, and yet Defendant Kelly admitted that caseworkers improperly failed to fill out a risk assessment form in accordance with their own policy, which led to the case closing prematurely. (A-081-083). Defendant Kelly also failed to properly train caseworkers on the use of the risk assessment tool, specifically related to case history, in violation of mandatory, statutory duties that mandate

inter alia investigations "involving child abuse or neglect *shall* be conducted in a comprehensive, integrated, multi-disciplinary manner[.]" 16 *Del. C.* § 906(b) (emphasis added).

On May 29th, 2014, Defendants Kelly, Zebroski, and Bradley finally initiated a formal investigation under the procedures and statutes applicable to DFS caseworkers, triggering the mandatory duties detailed *supra*. Defendants Zebroski, an Investigation Supervisor for DFS, along with Defendant Kelly, directly managed and personally oversaw the 2014 investigation into Plaintiff mother.A-084-086, 092). Caseworkers and specialists under the supervision of Defendants Zebroski and Kelly failed to make contact with individuals who may have had information related to the allegations outlines in the report to the child protection hotline, and did so with full knowledge of likely harm to Plaintiff. (A-085-086). Defendant Bradley, a Senior Family Services Specialist with DFS, personally conducted the 2014 investigation and found Plaintiff to be significantly developmentally delayed. Despite this, she failed to "interview motel residents and other collateral contacts" that could have provided additional information necessary for the investigation of the abuse and neglect claims. (A-084-086).

In addition, there was a complete failure to "assess the home environment" of Plaintiff, because even a preliminary assessment of the Budget Motor Lodge would have revealed that it was not a suitable home environment for children.

During the *at least one full year* that Plaintiff spent living at the Budget Motor Lodge, there were no security cameras on the premises, nor were there any other security measures in place despite the open and notorious nature of the prostitution, drug sales, and use occurring on a daily and nightly basis. (A-305, A-313). The owner of the motel, Mr. Balu Patel, stated on record in the companion case severed as a result of the Superior Court's Denial of Budget Motor Lodge's Motion for Summary Judgment, that he never felt that his motel needed security. (A-304-305, 313-314, 319, 320).

Not only did the motel not have any security measures in place whatsoever during Plaintiff's time spent living there, the rooms were accessed through simple mechanical key cards, rather than the contemporary, widely used, and safer electronic key cards. (A-325-326). As a result, there was no record kept as to the comings and goings of motel guests, and therefore the motel "policy" that guests were not permitted past 6:00 pm was virtually unenforceable. (A-322, 325-326).

Publicly available contemporaneous reviews of the Budget Motor Lodge reinforce the argument that it was an unsafe and clearly unsuitable home environment for children, and Defendant Zebroski, Bradley, or Kelly need only Google the residence to see it's glaring unfitness for suitability of dwelling.[2]

[2] A non-exhaustive sample of these reviews from popular websites such as Expedia, Yelp, Google and Booking.com include such information as: "… if some

These reviews, many of which are contemporary with the exact time period Plaintiff was living at Budget Motor Lodge, show that the motel was unsuitably fetid, lacked standard accommodations, was bug infested, tolerated an enormous amount of criminal activity (and indeed is repeatedly alleged to be complicit in and participating in illegal prostitution on premises) and was certainly an unsafe, ultra-hazardous environment for a five-year-old child. With the history of DFS investigations into Tanasia Milligan, as well as her suspected drug use which gave rise to the 2014 investigation, combined with the reputation and conditions of the Budget Motor Lodge where Tanasia was living with her children in the year before murdering her daughter, it is clear that all Defendants involved in the 2014 investigation into Plaintiff's family were grossly negligent in assessing this home environment, as required by 16 *Del. C.* 906(e)(8).

The Superior Court made another improper factual determination that the involvement of Defendant Bradley did not square with the ultimate harm to Plaintiff, and that her investigation was too far removed from the end result to rise to the level of gross negligence. *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017)

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hooker isn't hangin in the parking lot turning tricks while blastin Bel Biv Devo, consider that a good night." [Sic.] (Yelp Review May 2011); "PEOPLE HANGIN OUT IN THE PARKIN LOT… STAY AWAY !!!" [Sic.] (Expedia Review June 2014).

at *11. Yet, this is factually incorrect as well as legally improper. As alleged, Defendant Bradley handled the last investigation prior to the death of Plaintiff's sister, which occurred as a result of a complaint by Tonya Griffin and others that Plaintiff's mother and her boyfriend had arrived at Griffin's home to pick up Plaintiff and his sister and forcibly removed them while under the influence of drugs. This investigation was closed after 52 days as "unsubstantiated with concern" but moved into treatment. Given the history of investigations into Plaintiff's family, the handling of *this* 2014 investigation by DFS Defendants Kelly, Zebroski, and Bradley constituted an extreme departure from the ordinary standard of care, and evidences an intentional or conscious decision to disregard the rights of Plaintiff that was so unreasonable and so dangerous that each of the individual Defendants knew or should have known that harm to Plaintiff was not only a likely result, but was inevitable.

Viewed in a light most favorable to Plaintiff, a reasonable juror could find that the individual Defendants' acts and/or omissions were grossly negligent, willfully wanton, and/or reckless - even at this stage, and without the benefit of formal discovery. The individual Defendants' affirmative acts in dereliction of mandatory and statutory duties, in substantial part, resulted in the permanent disability of Plaintiff, and but-for their grossly negligent and reckless acts and/or omissions, a proximate cause of his harm would not have occurred.

III. The Superior Court erred when it held that Plaintiff's claims fail under the state created danger doctrine, because Plaintiff can meet each for the four prongs for a state created danger claim.

A. QUESTION PRESENTED

Whether the Superior Court erred when it ruled that Plaintiff cannot meet any of the four required elements for a state created danger §1983 claim. (A-146, 162-164).

B. STANDARD OF REVIEW

A trial court's grant of a motion to dismiss is reviewed *de novo*. *RBC Capital Markets, LLC v. Education Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014).

C. MERITS OF ARGUMENT

In granting Defendants' motion to dismiss, the Superior Court held that Plaintiff could not establish any of the four required elements of a state created danger § 1983 claim. In so holding, the Court reiterated its previous conclusion, that Plaintiff was not a foreseeable victim of the DFS Defendants' conduct because the Defendants' involvement was "too attenuate a link in the chain and too difficult to square with the resulting harm." In addition, the Court held that no facts were elicited which indicated that DFS Defendants' actions "shock the conscience," and because Plaintiff's harm was the direct result of his mothers actions, the DFS Defendants' exercise of authority did not render Plaintiff more vulnerable to danger than had DFS not acted at all. The Court went so far as to

state that Plaintiffs harm would have been more severe had the DFS not investigated his mother. *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017) at *15.'

The prongs for a state-created danger 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 acts, or a member of a discrete class of persons subjected to the potential harm brought about 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.

McCaffrey v. City of Wilmington, 2013 WL 4852497 (Del. Super. June 26, 2013), judgment vacated in part on reconsideration, 2014 WL 598030 (Del. Super. Jan. 31, 2014

As to the first prong, it is foreseeable that when employees at the Department of *Family Services* improperly investigate families and act with gross negligence in fulfilling their duties, harm to children who are at risk, such as Plaintiff and his sister, will result. The Plaintiff adequately alleged facts supporting this in his Amended Complaint. (A-091-092).

Second, DFS Defendants prematurely closed investigations, they failed to take past investigations into adequate consideration, and failed to perform their mandatory duties as alleged in Plaintiff's Amended Complaint. (A-090). These repeated failures, which took place despite obvious signs that the children were in danger and were living in an unsuitable environment, could shock the conscience of a reasonable person, as alleged in Plaintiff's Amended Complaint. (A-093).

The Superior Court held that because Plaintiff's harm was directly at the hands of his mother, the third prong could also not be established. *Greenfield for Ford v. Budget of Delaware, Inc.*, 2017 WL 5075372 at *14-15. However, the Court ignores well-established tort law which states that harm occur as a result of the acts of more than one concurrent cause. Del. P.J.I. Civ. § 21.2 (2000) ("There may be more than one cause of an accident/injury. The conduct of two or more persons, corporations, etc. may operate at the same time, either independently or together, to cause injury / damage. Each cause may be a proximate cause."). When DFS Defendants failed to conduct their investigations in a "comprehensive, integrated, and multi-disciplinary manner," and repeatedly closed them prematurely, there was no one left to protect Plaintiff and his sister from suffering a substantial and foreseeable harm at the hands of their mother. *See* 16 *Del. C.* §906(b).

Lastly, DFS Defendants affirmatively used their authority in a way that created an increased risk of danger to Plaintiff. Plaintiff's aunt, Tonya Griffin, was under the impression that when she reported the child abuse that the investigations would be handled in a competent manner, and her niece and nephew would be protected. DFS Defendants did not simply fail to investigate, but rather affirmatively investigated Plaintiff's mother, in a grossly negligent manner. As a result of these investigations, it was reasonable for Tonya Griffin to assume as she did, that the individual Defendants would be principally in charge of Plaintiff's safety, and so she refrained from taking further steps to protect Plaintiff herself. This rendered Plaintiff and his sister more vulnerable to danger than had DFS not investigated at all.

IV. The Superior Court committed error when it ruled that Plaintiff's claims were time-barred under 10 *Del. C.* §8119, and not subject to tolling under 10 *Del. C.* 8116.

A. QUESTION PRESENTED

Whether the Superior Court erred when it ruled that Plaintiff's claims were time barred when initially filed on July 15, 2016, and otherwise his claims are not subject to tolling? (A-55, 57-59, 146, 167-168).

B. STANDARD OF REVIEW

A trial court's grant of a motion to dismiss is reviewed *de novo*. *RBC Capital Markets, LLC v. Education Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014).

C. MERITS OF ARGUMENT

The Superior Court held that all of Plaintiff's claims were "untimely," and is precluded from filing this action by operation of 10 *Del. C.* § 8119. *Greenfield for Ford v. Budget of Delaware, Inc.*, C.A. No. N16C-07-115 FWW, 2017 WL5075372 (Del. Super. Ct. Oct. 31, 2017) at *6-17.The Court supported this holding with the following ruling of law as to the applicability of 10 *Del. C.* § 8119: "… the Court does not accept the Plaintiff's argument that the statute of limitations begins to run at the time of discovery of the injury." *Id*. the proposition that the Delaware personal injury statute begins to run from the date of the last negligent act or omission (i.e., the time of injury vs. the discovery of injury) is unique to actions sounded in Medical Negligence. *See Dambro v. Meyer,* 974 A.2d

121 (Del. 2009); *see also Morton v. Sky Nails*, 884 A.2d 480, 482 (2005) (since [plaintiff's] negligence claim is not a medical malpractice claim, it remains subject to the time of discovery rule."). The time of discovery rule controls this personal injury action, as it does every other non-medical negligence action in the State of Delaware. *Id.* "The two-year statute of limitations begins to run when the plaintiff should have known about the injury in question. *Dickens v. Taylor*, 671 F. Supp. 2d 542, 547 (D. Del. 2009) *citing Moody v. Kearney,* 380 F.Supp.2d 393, 397 (D.Del.2005). To hold otherwise was error.

Under the 'time of discovery rule,' Plaintiff asserted that the proper date for the statutory period to begin to run (before applying any tolling theories whatsoever) is the date that Autumn Milligan died on August 8, 2014. (A-167-168). It was not until the death of Plaintiff's sister, and his immediate removal from his home by agents for the DSCYF, DOJ, and DFS, and placement into State's custody, were the negligent actions of the individually named Defendants complete. *Id*.

The Superior Court additionally found that Plaintiff's claims were not subject to tolling under 10 *Del. C*. § 8116. (A-217-218).

While Plaintiff does not need to claim *any* tolling period to survive a defense of statute of limitations under Delaware Law's time of discovery rule applicable to these personal injury causes of action, he nevertheless could rely on

the tolling statute for the period that he was in the State's legal custody from on or about August 8, 2014 until January 21, 2016. (A-235).

The State of Delaware did not elect to assert Plaintiff's rights against itself, as can be expected, for it is rare for parties to sue themselves. Despite this apparent syllogism, (equally applicable to Plaintiff's mother with respect to the desire to protect their own interest above those of Plaintiff), it was nevertheless "clear," to The Superior Court, that Plaintiff's injuries "were not unknowable to him… or more realistically someone acting on his behalf as his next friend in this litigation." *Greenfield for Ford v. Budget of Delaware, Inc*., C.A. No. N16C-07-115 FWW, 2017 WL 5075372 (Del. Super. Ct. Oct. 31, 2017) at *16-17. In contrast to the finding of the Court, the fact that Plaintiff had no willing party with the legal capacity to represent his interest or pursue his claims until the Permanent Guardianship Order of the Family Court was issued on January 21, 2016. (A-235). Then and only then, did Plaintiff have a willing party to represent his interests in seeking a civil remedy, and filed this complaint within six (6) months of that date. (A-017).

In addition to lacking any actual procedural capacity, Plaintiff's Amended Complaint, and initial Complaint of July 15, 2016, make reference to the developmental, emotional, and mental delays that Plaintiff was forced to labor under, because of the neglect and abuse that the DFS Defendants were grossly

negligent in allowing to continue and worsen. *See* 10 *Del. C.* §8116 (Savings for infants *or persons with disabilities*) (emphasis added).

For the foregoing reasons Plaintiff's claims should not be deemed time-barred subject to 10 *Del. C.* § 8119, and in the alternative should be afforded the benefit of the tolling provisions of 10 *Del. C.* § 8116, for his lack of cognizable legal capacity.

V. CONCLUSION

WHEREFORE, Plaintiff-Appellant moves this Honorable Court to enter an Order remanding Plaintiff's claims as-alleged in his Amended Complaint, to the Superior Court for entry of a scheduling Order, and the commencement of the discovery process.

CERTIFICATE OF SERVICE

I, Andrew C. Dalton, Esq., hereby certify that on this 18th day of July 2018, I caused a true and correct copy of the foregoing Amended Appellant's Opening Brief to be filed and served via File & ServeXpress upon the parties listed below:

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