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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.	§	

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Appellant Evan Faulkner, by and through his *guardian ad litem,* Tonya Griffin, asserts that his psychological harm, as a result of being left with his mother while she meted out horrible abuse to him was caused in part by the negligence and gross negligence of the individually-named DFS Defendants. For that negligence, he seeks a ruling that he has met his initial pleading burden and may engage in the discovery process. In other words, this case is about whether a helpless child who is significantly injured by the negligence of State employees—those who had a legal and moral duty to protect him—has a remedy at law. The question for this Court is whether the Superior Court committed error when it dismissed this case before the Appellant had a chance to develop facts through discovery that manifest the true depth and character of the State employees' negligence.

COUNTER-STATEMENT OF FACTS

Appellees' contend, in their Statement of Facts, that "Plaintiff's Opening Brief Improperly Cites to Materials Outside of the Pleadings Thereby Acknowledging the Amended Complaint's Deficiencies." Appellees' Answering Brief at 11 (hereinafter "AB"). Appellees are correct when they note that the materials from the Budget Motor Lodge deposition and the online reviews were not before the Court below and should not be considered for that purpose. However, the Budget deposition and publicly-available, contemporaneous internet reviews were offered by Appellant as the type of evidence that even a cursory investigation within the relevant statutory provisions (*e.g.*, to "assess the home environment") would have revealed to the individual DFS Defendants as well as what may be revealed through the course of discovery. Similarly, these sources cut against the oft-repeated fact that Ms. Bradley visited the home "Multiple times . . . over a period of 52 days." AB at 10, 18, 22, 29. The fact that multiple assessments could have been made, and resulted in no action to remove Evan Faulkner from what was, by any reasonable inference, a den of prostitution and drug abuse only underscores the adequacy and specificity of the allegations in the Second Amended Complaint.

While it is true that these 'Budget facts' were not considered by the Court below as to the individual DFS Defendants, they were considered when the Court

denied Defendant Budget Motor Lodge's Motion to Dismiss.[1] (A-213). Again, for the purposes of this appeal, these facts are not offered for any purpose other than to flesh out the good faith basis to allege the facts as to the individual Defendants that Evan Faulkner has—prior to any discovery process.

This is not a fishing expedition, and it is not hindsight. The State, not a party here, has admitted the individual Defendants acted with at least negligence. This has been admitted on behalf of the State, in the Root Cause Analysis, and the local press. The sole question at issue, thus, is whether Delaware law provides any remedy to Evan Faulkner for those admissions.

The Appellees are incorrect as to the role of the Root Cause Analysis and its consideration by the Court below. Appellant's Second Amended Opening Brief at 12 (hereinafter "OB"). As noted in Appellant's Opening Brief in the Nature of Proceedings section, Appellant incorporated the facts from the Root Cause analysis into the Second Amended Complaint. AB at 2. The additional facts alleged, and the identities of the named individuals tied to the conduct, mirrored the Root Cause

[1] Appellees are also correct to point out that Appellant's Second Amended Opening Brief erroneously states that 'all Defendants' were dismissed as a result of the Superior Court's grant of the motions to dismiss below. AB at 5. That statement was made in error: The Superior Court did not grant Defendant Budget Motor Lodge's motion to dismiss and the case continues to proceed against it.

Analysis as to the specific individual Defendants in the Second Amended Complaint. *Id*.

ARGUMENT[2]

I. Appellant Met Her Burden of Proof to Show Defendants Violated Their Non-Discretionary Duties to Evan Under Any Reasonably Conceivable Set of Circumstances.

Appellee cites three cases in support of the proposition that actions of the individual Defendants were "inherently discretionary." AB at 19. These cases support Appellant's argument and undermine the Superior Court's grant of summary judgment on the basis that Defendants' conduct was discretionary in nature. Further, these cases apply a framework for analyzing whether a ministerial act, or a discretionary act done with gross negligence, is shielded from immunity—an analysis Appellant urges this Court to employ.

In *State, Department of Health & Rehabilitative Services v. Yamuni*,[3] the Florida District Court of Appeal looked at the issue of immunity and state employees. The Court viewed the conduct through a lens of whether a duty was mandatory or involved discretion and judgement that make application of immunity inappropriate. *Yamuni*, 498 So.2d at 444. The Court found that when looking at

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[2] Appellant will respond herein only to arguments as necessary, and in all other respects will rely on the previous papers and arguments, except where clearly noted. Appellant specifically relies on the previous arguments made with respect to Sections I(1), (2), III, and IV(2).

[3] *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).

conduct of the individual State employees, under the second question in the Florida '*Collective Carrier* analysis,' that these workers—just like the individual Defendants here—are tasked with implementing "policy decisions which have already been made" at the policy-making levels of government. *Id*. at 443. This is the same outcome Appellant argues is appropriate in this case, under existing Delaware law, where the non-discretionary provisions of § 906 speak in terms of things that *shall* be done, not questions to consider or aspirational administrative policy goals. An additional procedural point in *Yamuni* is that the decision in that case came following a full trial on the merits, not at the Rule 12(b)(6) stage as here. *See id*. at 442.

In *Boland v. State*,[4] the Court of Claims of New York overruled the application of sovereign immunity for a state employee where the employee's conduct was held to be ministerial. The Court's analysis in *Boland* is offered to show that, while the Superior Court in the present case found that the "investigative process is inherently discretionary," other courts, such as *Boland*, have distinguished between an investigative act and a mandatory obligation where the controlling statute is replete with non-discretionary language, even when aspects of the employee's conduct require some initial discretion. *See Boland*, 161 Misc.2d at

[4] 161 Misc.2d 1019 (N.Y. Ct. Cl. 1994), *aff'd*, 218 A.D.2d 235 (1996).

1030. This Court should also find such a duty in the plain, non-discretionary sections of § 906.

Finally, the case of *Martin v. State*, 2001 WL 112100 (Del. Super. Ct. Jan. 17, 2001), is factually inapposite to the facts alleged by Evan Faulkner. The timeframe and nature of the allegations occur over a far more abbreviated timeframe (one year, at most) as opposed to the entirety of Evan Faulkner's first five years of life as alleged here. *See id*. at *1. Similarly, in *Martin*, there was no allegation of an opened investigation that triggered the non-discretionary portions of § 906 because the contact was so preliminary and far less pervasive than in the case of Appellant. *See id*.

II. Appellant Pled Facts Sufficient to Sustain a Claim for Gross Negligence.

Appellees claim a "chilling effect" could result from not applying immunity to the actions of the individual Defendants. They cite to a passage of *McCaffrey v. City of Wilmington*,[5] that warns against the need for State employees to defend personal injury and other "vexatious suits." AB at 27. The individual Defendants speak with one voice through their collective counsel—the Delaware Department of Justice—and cannot avail themselves of the policy considerations of preventing a chilling effect on speech. The individual Defendants, represented by their employer-provided counsel, in a collective capacity, argue that State workers would need to worry about the cost of hiring lawyers, etc., in defending these "vexatious suits," presumably in an every-person-for-themselves battle royale, reminiscent of a dystopian legal 'Wrestlemania.'

More significantly, the State should not be allowed to use policy considerations as a sword and a shield, arguing a factual fiction (that these individuals are being sued personally and are subject to legal fees and expenses) to advance a false policy consideration. The principal policy consideration at issue

[5] 133 A.3d 536, 546 (Del. 2016) (quoting to RESTATEMENT OF TORTS § 895D cmt. b (1979)).

here is whether Delaware law provides a remedy to Evan Faulkner, and whether he can engage in the discovery process to fully define and pursue his claims.[6]

[6] Appellant concedes any argument as to the dismissal of her negligent hiring, retention, and supervision claims against the individual Defendants in their individual capacities. AB at 30-31.

III. Appellant's Claims Are Timely.

Appellant's claims accrued on May 29, 2014. It is on this date that Evan, through his *guardian ad litem*, can be charged with notice of the harm, but more importantly it is the *end* of the harm.

It is not Appellant's argument, as stated in Appellees' Answering Brief, that this is a theory of continuing harm; rather it is simply the end of the negligence, the denouement. AB at 40. Until this event occurs, the harm is not complete and the alleged negligence and gross negligence has not ended.

As such, Appellant need not avail herself of a tolling theory. However, in the alternative, tolling would apply. From May 29, 2014 to January 2016, Evan was in the State's sole legal custody. Once Tonya Griffin had the legal capacity to act on his behalf, and undertake an investigation into the complex and tragic circumstances of her nephew, she filed the original Complaint within six months of the day she was granted that right. Filing such a case in any less time would potentially implicate aspects of Rule 11 and Rule 9, and would not advance any of the myriad policy considerations that the individual DFS Defendants collectively urge this Court to consider in their favor.

Policy considerations in this matter need to be read, as with all facts and well pled allegations at this stage, in a light most favorable to one person alone: Evan Faulkner.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I, Andrew C. Dalton, Esq., hereby certify that on this 13th day of August, 2018, I caused a true and correct copy of the foregoing Appellant's Reply Brief to be filed and served via File & ServeXpress upon the parties listed below:

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