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A Knife in a Gunfight: The Inadequate Protection Provided to West Virginia's Foster Children by Statutory and Common Law

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A KNIFE IN A GUNFIGHT: THE INADEQUATE PROTECTION PROVIDED TO WEST VIRGINIA'S FOSTER CHILDREN BY STATUTORY AND COMMON LAW

I.	INTRODUCTION	979
II.	THE LAW AND WEST VIRGINIA'S FOSTER CARE SYSTEM.....	984
III.	A DUTY TO PROTECT	988
	A. <i>A Statutory Duty: The Child Welfare Act</i>	989
	B. <i>A Common Law Duty: The Special Relationship Exception to the Public Duty Doctrine</i>	993
IV.	A GENERAL BAR TO CLAIMS NOT COVERED BY THE STATE'S LIABILITY INSURANCE COVERAGE POLICY	998
	A. <i>The State's Current Liability Insurance Policy and WV DHHR</i>	1003
V.	IMMUNITY AND THE STATE.....	1005
	A. <i>Breaching the State's Statutory Immunity</i>	1005
	B. <i>Overcoming the State's Qualified Immunity</i>	1009
VI.	RECOMMENDED COMMON LAW AND STATUTORY REFORMS	1011
	A. <i>Arguments Against Liability</i>	1011
	B. <i>Arguments for Liability</i>	1012
	C. <i>Common Law Reforms</i>	1013
	1. Establish a Statutory Duty of Protection.....	1013
	2. Deem CPS Investigations Ministerial.....	1014
	D. <i>Statutory Reform</i>	1014
	1. BRIM Requirements.....	1014
VI.	CONCLUSION.....	1015

I. INTRODUCTION

*It is as much the duty of government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals.*¹

In January of 1978, the West Virginia Department of Health and Human Resources (“WV DHHR”)² received a report that twelve-year-old Kimberly

¹ Abraham Lincoln, First Annual State of the Union Message (Dec. 3, 1861).

² See W. VA. CODE, § 49-2B-1 (1996) (granting WV DHHR the responsibility to protect the state's foster children).

Merrill had been sexually abused by her father.³ Kimberly declined to disclose the details of this abuse, because the social worker assigned to investigate the allegations never interviewed Kimberly outside of the presence of her sexually abusive father.⁴ Though Kimberly's father admitted to forcing Kimberly to pose for a series of nude photographs,⁵ WV DHHR declined to take any action on Kimberly's behalf until July of 1982, following a subsequent report of sexual abuse.⁶ During the four and a half-year period between January of 1978 and July of 1982, Kimberly "endured regular sexual abuse from her father."⁷

Kimberly Merrill's situation, while tragic, is far from unique. After being sexually abused by her father, Teresa Mayfield was removed from her home in 1984 and placed in foster care.⁸ In August of 1985, following an "improvement period," WV DHHR returned Teresa to her parents' home.⁹ Teresa soon reported the abuse had resumed, but incredibly, WV DHHR did not remove her from the home.¹⁰ On her eighteenth birthday, Teresa received medical treatment for the injuries she sustained in her second suicide attempt, while WV DHHR, no longer responsible for protecting her, closed her file.¹¹

In a separate case, a Kanawha County child was killed after being placed back in the custody of an abusive parent.¹² In yet another case, five-day-old Jonathan Coffman froze to death in his unheated home.¹³ The social worker assigned to supervise Jonathan and his mentally handicapped mother knew that the Coffman home had no heat, but took no action.¹⁴ In another case, a twenty-nine-day-old boy was taken to the hospital with a broken arm.¹⁵ Though physical abuse was suspected, the WV DHHR social worker assigned to the case permitted the child to return home with his parents.¹⁶ Approximately one week

³ *Merrill v. W. Va. Dep't of Health & Human Res.*, 632 S.E.2d 307, 310 (W. Va. 2006) (dismissed for failing to comply with the statute of limitations).

⁴ *Id.*

⁵ *Id.* at 310; *see also* Brief of Petitioner-Appellant at 21-22, *Merrill v. W. Va. Dep't of Health & Human Resources*, No. 32856 (W. Va. Oct. 19, 2005).

⁶ *Merrill*, at 310.

⁷ *Id.*

⁸ *Id.* at 317. Ms. Mayfield's case, which was adjudicated in the same opinion as Ms. Merrill's, was dismissed for failure to comply with the statute of limitations.

⁹ *Id.*; *see also* Brief of Petitioner-Appellant at 21-22, *Merrill v. W. Va. Dep't of Health and Human Res.*, No. 32856 (W. Va. Oct. 19, 2005).

¹⁰ *Id.*

¹¹ *Id.*

¹² *W. Va. Dep't of Health & Human Res. v. Kaufman*, 506 S.E.2d 93, 94 (W. Va. 1998).

¹³ Michelle Saxton, *State Settles Lawsuit for \$850,000*, CHARLESTON DAILY MAIL, Oct. 20, 2005, at D6.

¹⁴ *Id.*

¹⁵ *Kaufman*, 506 S.E.2d at 94.

¹⁶ *Id.*

later, the boy, just over one month old, had been beaten so severely that he suffered permanent brain damage, blindness, physical deformity, and mental retardation.¹⁷

The abuse that Kimberly Merrill, Teresa Mayfield, Jonathan Coffman, and the unnamed minors in the cases detailed above—as well as the incompetence and callousness that these young victims encountered in their interactions with WV DHHR—reflect a larger pattern in America’s child welfare system, particularly within the foster care system.¹⁸ It is impossible to pinpoint the exact number of foster children in America who have been or are abused¹⁹ or neglected,²⁰ because many—if not most—cases likely go unreported.²¹ However, in 1999, the United States Department of Health and Human Services reported that the rate of child maltreatment in foster care was more than seventy-five percent higher than in the general population.²² The same study concluded that the mortality rate for foster children resulting from maltreatment was almost 350% higher than the mortality rate resulting from maltreatment among children

¹⁷ *Id.*

¹⁸ It also appears that foster children are more likely to be neglected than children in the general population, though the evidence on this front is largely antidotal. Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 160 (2003). One commentator, for example, reported in a recent study that foster children are typically given cheaper food and clothing than biological children, restricted to certain areas of the house, and sometimes forbidden to open the refrigerator or watch television with the biological family. *Id.* Another commentator expressed concern that foster children often do not receive proper medical or psychiatric attention. Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 7 (1995). It is, however, common for foster parents to seek medication to ease the burden of “controlling” their foster children. Mundorff, *supra* note 1, at 160.

¹⁹ See W. VA. CODE § 49-1-3(a) (1977) (“‘Abused child’ means a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or (2) Sexual abuse or sexual exploitation; or (3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen, article four, chapter forty-eight of this code; or (4) Domestic violence as defined in section two hundred two, article twenty-seven, chapter forty-eight of this code.”).

²⁰ See W. VA. CODE § 49-1-3(j) (1977) (“‘Neglected child’ means a child: (A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child’s parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or (B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child’s parent or custodian”).

²¹ Michael B. Mushlin, *Unsafe Havens: the Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.C.L. L. REV. 199, 205 (1988).

²² Sharon Balmer, *From Poverty to Abuse and Back Again: the Failure of Social Service Agencies to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 938 (Sept. 2005) (citing Barbara E. Handschu, NEW YORK CIVIL PRACTICE: FAMILY COURT PROCEEDINGS § 46.04(c) (2005)).

in the general population.²³ Additionally, the rate of sexual abuse is four times higher for children in foster care than for children in the general population.²⁴

At least one cause of the higher rates of abuse that foster children suffer is easy to pinpoint: foster children are often placed into homes without adequate investigation of the home beforehand, and without adequate supervision of the foster family after the placement is made.²⁵ As a result, an estimated forty-three percent of all foster children live in “unsuitable” foster homes, and fifty-seven percent are at risk of harm in foster care.²⁶

WV DHHR does not maintain a database which tracks abuse and neglect rates within West Virginia’s foster care system, but the agency’s failure to intervene on behalf of abused and neglected children is well documented. A 2004 review conducted by the United States Department of Health and Human Services rated West Virginia’s response to reports of child abuse and neglect among the worst in the nation.²⁷ Thus, it is not surprising that the rate of child abuse and neglect in West Virginia is also among the worst in the nation.²⁸ In 2005, the most recent year for which statistics are available, West Virginia attributed sixteen child deaths to abuse or neglect in 2005, a rate of 4.18 fatalities per 100,000 children,²⁹ the second highest rate in the nation and more than twice the national average.³⁰ These statistics, combined with harrowing anecdotal evidence,³¹ indicate a systemic failure on WV DHHR’s part to adequately per-

²³ *Id.*

²⁴ *Id.* at 938 (citing Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: the Failure to Serve Children in State Care*, 25 N.Y.U. REV. L & SOC. CHANGE 1, 7 (1999)). One commentator has suggested that this statistic can be attributed to the fact that “the incest taboo does not apply within the foster family structure.” See Mushlin, *supra* note 21, at 205.

²⁵ Mushlin, *supra* note 21, at 209-11.

²⁶ Susan Lynn Abbott, *Liability of the State and its Employees for the Negligent Investigation of Child Abuse Reports*, 10 ALASKA L. REV. 401, 401-402 (1993) (“[t]ens of thousands of . . . children” have been seriously injured while under the protection of a social service agency.)

²⁷ Dawn Miller, *West Virginia’s Child-Abuse Solution Not Working*, CHARLESTON GAZETTE, Nov. 6, 2004, at A4 (“West Virginia . . . flunked miserably on a federal review of how it responds to complaints of child abuse and neglect.”).

²⁸ U.S. DEP’T OF HEALTH & HUMAN SERV., CHILD WELFARE OUTCOMES 2003: ANN. REP., ch. VI, W. Va. (2003) available at <http://www.ocf.hhs.gov/programs/cb/pubs/cwo03/index.htm> [hereinafter *Child Welfare Outcomes*].

²⁹ Jake Stump, *Child Abuse Deaths High in West Virginia*, CHARLESTON DAILY MAIL, June 18, 2007, at 1A.

³⁰ *Id.* (Oklahoma reported the nation’s worst fatality rate, with 4.80 abuse or neglect related deaths per 100,000 children).

³¹ See, e.g., Andrew Clevenger, *Doctor, Wife Charged With Child Neglect; Couples Son Faces Trial in Logan Goodall’s Death*, CHARLESTON GAZETTE, Jan. 23, 2007, at 1A (deceased child’s father sues WV DHHR after the agency allegedly failed to respond to his repeated reports that mother and step-father burned his two-year-old son’s heels, buttocks, and testicles; child was subsequently sexually abused and murdered); Associated Press, *DHHR Sued Over Boy’s Alleged Abuse*, CHARLESTON GAZETTE, Aug. 13, 2005, A6 (father sues WV DHHR for failing to respond to his repeated reports that his son suffered sexual abuse at the hands of mother’s live-in boy-

form its statutory duty to protect abused and neglected children after the abuse has been reported to the agency.³²

Children in the general population – that is, those not residing in foster care – are significantly less likely to find justice after social worker negligence results in their abuse or neglect, because it is well established that the state has no duty to protect a child from abuse or neglect perpetrated by the child’s parents.³³ Thus, a discussion of the limited legal remedies available to children in the general population for damages that result from WV DHHR’s negligence is beyond the scope of this article.

Rather, this Note focuses on the legal claim that a foster child may have to seek redress for abuse and neglect that results from WV DHHR’s negligent placement of the child in an unsuitable foster home, negligent supervision of the child after his or her foster care placement, or negligent investigation of a report of foster child abuse or neglect.

This Note will describe the expensive tortuous path a foster child must follow in order to litigate such a claim on its merits, and will recommend reform in this inequitable and overly complicated area of the law. This Note begins, in Part II, with a description of the law that governs WV DHHR’s placement and supervision of foster children. Part III of this Note describes that first hurdle an abused or neglected foster child must overcome prior to litigating a negligence claim against WV DHHR: establishing the existence of a legal duty of protection owed by WV DHHR to the state’s foster children. Part IV describes the second pre-trial obstacle in such a claim: proving that the state’s liability insurance policy covers the negligence asserted in the plaintiff-foster child’s claim; in the absence of such coverage, the plaintiff-foster child’s claim will undoubtedly be barred. Part V describes the immunities WV DHHR will likely assert in such a claim, as well as the legal tactics a plaintiff-foster child may use to breach these immunities. Part VI sets forth recommended common law and statutory reforms which – if implemented – would decrease the likelihood that a negligence suit filed by a foster child against WV DHHR will be dismissed on a

friend); Associated Press, *Ravenswood Mom Sentenced in Baby Boy’s Strangulation*, CHARLESTON GAZETTE, Feb. 13, 2004, at 11A (neighbor allegedly reported to WV DHHR that 15-month old boy was abused and neglected by his mother, but the agency did not investigate or otherwise act on the report; child was subsequently strangled to death by mother; trial court states that “[WV] DHHR failed this child”); Susan Williams, *Mercer Man, DHHR Differ on Response to Neglect Allegations*, CHARLESTON GAZETTE, Apr. 11, 2007, at A6 (director of nonprofit group reports that WV DHHR did not respond to his repeated reports to the agency that three minors were not adequately fed or clothed, and lacked access to running water).

³² In fact, studies conducted in several states reveal that “approximately twenty-five percent of all child fatalities resulting from abuse or neglect occur after the abuse has been reported to a state child protective agency.” Abbott, *supra* note 26, at 401.

³³ *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S.189, 193-95 (1989) (holding that the state of Illinois had no duty to protect a child from “private violence” perpetrated by his physically abusive father, though the state knew or should have known of the abuse).

technicality, and would, in turn, better enable plaintiff-foster children to litigate negligence claims on the merits.

II. THE LAW AND WEST VIRGINIA'S FOSTER CARE SYSTEM

WV DHHR and its Child Protective Services ("CPS") workers are authorized to take involuntary custody of abused and neglected children and provide them with a substitute,³⁴ alternate home until the cause of the child's abuse or neglect has been rectified.³⁵ When possible, a child will be placed with another relative until he or she can safely return to his or her original home.³⁶ When it is not possible to place an abused or neglected child with a relative, the child will be placed in West Virginia's foster care system.³⁷ Over four thousand children³⁸ resided in West Virginia's three-hundred and eighty-four³⁹ licensed foster care homes in 2003.⁴⁰ WV DHHR certifies each of these foster care homes, insuring that prospective foster parents meet certain minimum eligibility

³⁴ W. VA. DEP'T OF HEALTH & HUMAN RES., FOSTER CARE POL'Y § 1.4, (2008) *available at* http://www.wvdhhr.org/bcf/children_adult/foster/policy.asp [hereinafter FOSTER CARE POLICY] (stating that one of the three primary purposes of foster care is "[t]o reunite the child in foster care with his family by providing services aimed at reunification whenever possible and when the safety of the child can be assured.").

³⁵ *Id.* at § 1.2.

³⁶ *Id.* at § 1.7. A 2003 study concluded that "fifty-three percent of the young people leaving the system in [fiscal year] 2003 were reunified with their birth parents or primary caregivers." CHILD. BUREAU, U.S DEP'T OF HEALTH & HUMAN SERV., ADOPTION & FOSTER CARE ANALYSIS & REP. SURVEY, REP. #14., (2006) [hereinafter "AFCARS"] *available at* http://www.acf.hhs.gov/programs/cb/stats_research/index.htm.

³⁷ FOSTER CARE POLICY, *supra* note 34, at § 1.16. Technically, there are six different ways that a child may enter the foster care system in West Virginia: (1) a parent may request that his or her child be placed in the foster care system when there is a family crisis; (2) when the parent is unable to meet the child's physical or mental needs; (3) a child protective services worker may, in accordance with section 49-6-3(c) of the West Virginia Code, take a child into emergency custody and place him or her in the foster care system; (4) a "status offense" may bring the child to the attention of juvenile court; (5) the child may be adjudicated as a delinquent for engaging in criminal behavior; and (6) a former foster care youth over the age of 18 may decide to continue living as a foster child. *Id.*

³⁸ CHILD WELFARE OUTCOMES, *supra* note 28.

³⁹ CHILD WELFARE LEAGUE OF AM., NAT'L DATA ANALYSIS SYS., *available at* http://ndas.cwla.org/data_stats/access/predefined/Report.asp?ReportID=127

(last visited Feb. 10, 2008). Additionally, there are nine "specialized foster care" providers located in West Virginia. Specialized foster care providers are private – rather than state – entities which provide care for children with "more intense service and treatment needs." S. Pires & G. Silber, GEO. UNIV. CHILD DEV. CTR., *More Precious Than Gold: Voices of Foster Children in West Virginia*, *available at* http://www.wvvoices.org/library_downloads/Foster_Care_Report_2002.pdf (last visited Feb. 26, 2009). Such homes are "certified and monitored by the private foster care provider agencies" and thus outside the scope of this Note. *Id.*

⁴⁰ CHILD WELFARE OUTCOMES, *supra* note 28. In 2003, the average length of stay for children in foster care in West Virginia was 12.8 months.

requirements set forth in the department's Foster/Adoptive Care Provider Homefinding Policy.⁴¹

Additionally, while children reside in foster care, WV DHHR "[a]ssumes part or all of the responsibility [for these children] that ordinarily rests with the parents."⁴² Thus, in order to ensure that foster children remain safe while they are in foster care, WV DHHR employs 520 CPS workers,⁴³ who are tasked with identifying threats to children, including the state's foster children, and securing their safety.⁴⁴ CPS workers are the "first responders" in the state's child abuse prevention scheme. After WV DHHR receives a report that a foster child has been abused or neglected, the report is screened-in, or assigned, to a CPS worker who is tasked with the initial investigation of the report.⁴⁵ WV DHHR developed and, in 2006, promulgated a "Child Protective Services Policy," which sets specific standards for such investigations.⁴⁶ Under these standards, CPS workers must respond to and conduct initial investigations of reports of abuse or neglect within two hours, 72 hours, or 14 days, depending on the severity and urgency of the allegations contained in the report.⁴⁷

Following the initial investigation, the CPS worker will complete an initial assessment and safety evaluation of the case.⁴⁸ During this part of the process, the CPS worker will conduct face-to-face interviews with the allegedly abused or neglected foster child, the person who made the report, the alleged "maltreater," and any other person who may be able to provide useful informa-

⁴¹ FOSTER CARE POLICY, *supra* note 34, at §14.2. Most of the eligibility criteria are objective. Prospective foster parents, for example, must be 21 years of age, U.S. citizens, etc. However, the Policy sets forth some subjective criteria as well, requiring, for example, that applicants be "nurturing, responsible, patient, stable, flexible, mature, healthy adults capable of meeting the individual needs of children referred for placement services."

⁴² *Id.* at § 1.7.

⁴³ Kris Wise, *Protective Services Caseload Criticized*, CHARLESTON DAILY MAIL, Aug. 30, 2007, at A1.

⁴⁴ FOSTER CARE POLICY, *supra* note 34, at §1.5. Additionally, a CPS worker may take emergency custody of a child and place the child in foster care. W. VA. CODE 49-6-3(c) (1977).

⁴⁵ U.S. DEP'T OF HEALTH & HUMAN RES., NAT'L STUDY OF CHILD PROTECTIVE SERV. SYS. & REFORM EFFORTS (Mar. 2001), <http://aspe.hhs.gov/hsp/protective01/index.htm> (last visited Feb. 26, 2009).

⁴⁶ See generally W. VA. DEP'T OF HEALTH & HUMAN SERV., CHILD PROTECTIVE SERVICES POL'Y (June 16, 2006) [hereinafter CPS POLICY], http://www.wvdhhr.org/bcf/children_adult/cps/policy/cpspolicy_june2006.doc.

⁴⁷ CPS POLICY, *supra* note 46, at §2.4. In determining response time for accepted CPS intakes, the supervisor must consider the presence of allegations of imminent danger to the physical well-being of the child(ren) or of serious physical abuse. *Id.* The West Virginia Code requires the same. See W. VA. CODE § 49-6A-9(4) (1999).

⁴⁸ CPS POLICY, *supra* note 46, at § 3.1. ("Initial assessment of a report of child maltreatment sets the stage for the problem validation, service provision, and the establishment of a helping relationship in CPS. The initial assessment process includes information gathering and analysis to determine safety needs.")

tion regarding the case.⁴⁹ The Child Protective Services Policy sets forth specific standards and lists certain concerns that CPS workers should inquire about in these interviews.⁵⁰ At the conclusion of the CPS worker's investigation, the CPS worker and a CPS supervisor will develop a risk assessment for the case,⁵¹ the goal of which is to determine whether the alleged abuse or neglect took place and how likely such "maltreatment is to occur in the future."⁵² Finally, the CPS worker and CPS supervisor will make a decision as to whether the foster child should remain in the home in which the alleged abuse or neglect took place.⁵³ If the CPS worker and supervisor determine that the child should remain in the home, they will develop a plan for future monitoring of the home.⁵⁴ If the CPS worker and CPS supervisor determine that the child is in "imminent danger of serious bodily or emotional injury or death,"⁵⁵ or that the child has been subject to "aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse,"⁵⁶ then WV DHHR is required to remove the child from the home.⁵⁷

The regulations governing CPS are clear, comprehensive, and sound. All too often, however, they are not followed.⁵⁸ A 1996 legislative audit found

⁴⁹ W. VA. CODE § 49-6A-9 (1999); *see also* CPS POLICY, *supra* note 46, at §3.4.

⁵⁰ CPS POLICY, *supra* note 46, at §3.5.

⁵¹ *Id.* at § 3.6.

⁵² *Id.* at §3.6-3.7.

⁵³ W. VA. CODE § 49-2D-3 (1999).

⁵⁴ CPS POLICY, *supra* note 46, at §3.16. Paragraph 3.16 states that:

For situations in which it is believed that the child's welfare or life is immediately threatened and that immediate action must be taken to prevent serious harm or additional serious harm and that the situation meets the definition of imminent danger, the worker will consult with supervisor, insofar as possible, to determine the best course of action; proceed to implement any temporary measures to protect the child in-home, if indicated; proceed to initiate legal action, with supervisory approval, if available, to protect the child; proceed with the sequence of steps for completing the initial assessment and safety evaluation, once the child is in temporary protection; and implement the in-home or out-of-home safety plan, as indicated. Once the immediate crisis is resolved, it may be possible, based upon the information now available to the worker and supervisor, to return the child and implement an in-home safety plan.

⁵⁵ W. VA. CODE § 49-2D-3 (1999).

⁵⁶ W. VA. CODE § 49-6-5(a)(7) (1999).

⁵⁷ *Id.*

⁵⁸ *See, e.g.,* Dawn Miller, *West Virginia Fails to Keep Children Safe, Review Finds Problems With DHHR's Care of Abused and Neglected Children*, CHARLESTON GAZETTE, Nov. 12, 2002, at B5 (reporting that a review by the United States Department of Health and Human Services concluded that WV DHHR consistently fails to develop written case plans for the state's abused and neglected children; that WV DHHR consistently fails to conduct "urgent" investigations and interviews within the statutorily mandated twelve hour time period; that abused and neglected children are routinely denied adequate time with their WV DHHR caseworkers).

that CPS conducted face-to-face interviews with the allegedly abused child in only one-third of the cases surveyed.⁵⁹ In thirty-seven percent of the cases surveyed, CPS had no record of conducting a face-to-face interview, despite the fact that WV DHHR's standards⁶⁰ and the West Virginia Code⁶¹ require that such interviews be conducted no more than fourteen days after the report was received.⁶² "In the remaining 30% of the cases [surveyed], face-to-face interviews were . . . conducted well in excess of the [required] fourteen-day standard."⁶³ A subsequent audit covering January 1, 1997 through September 30, 1997, revealed that ten percent of reported cases of child abuse or neglect had no record of a face-to-face interview.⁶⁴ In 1999, nearly one in five reports of child abuse or neglect (18.5%) still did not meet the standards set by WV DHHR.⁶⁵

WV DHHR's consistent failure to meet the standards it sets for itself is one of the primary causes⁶⁶ of the system's appalling failure to protect children like Kimberly Merrill,⁶⁷ Teresa Mayfield,⁶⁸ and Jonathan Coffman.⁶⁹

The imposition of legal liability in tort for damages that are proximately caused by WV DHHR's negligence would provide an incentive to WV DHHR and its employees to conduct thorough investigations and respond aggressively to the suspected abuse and neglect of the state's foster children.⁷⁰ Prior to liti-

⁵⁹ PERF. EVALUATION RES. DIV., OFFICE OF THE LEGISLATIVE AUDITOR, COMPLIANCE REVIEW OF CHILD PROTECTIVE SERVICES (1997), available at <http://www.legis.state.wv.us/Joint/PERD/perdrep/cpsupdate2.html> [hereinafter 1997 REVIEW].

⁶⁰ See *supra* note 49 and accompanying text.

⁶¹ *Id.*

⁶² 1997 REVIEW, *supra* note 59.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ OFFICE OF THE LEGISLATIVE AUDITOR, UPDATE, COMPLIANCE REVIEW OF CHILD PROTECTIVE SERVICES (1999), <http://www.legis.state.wv.us/Joint/PERD/perdrep/cps1999.html>. (noting that "[t]his should be a concern for obvious reasons; children are at risk of further abuse the longer it takes for intervention. It also becomes more difficult to substantiate an allegation of abuse the longer it takes to conduct a face to face interview. For example, physical evidence of abuse may heal.").

⁶⁶ Catherine D. Munster, *Child Abuse*, CHARLESTON GAZETTE, Aug. 21, 2005, at E1. Inter-agency coordination, for example, is a rarity among the state's prosecutors, police, and WV DHHR. The absence of unfettered inter-agency dialog causes many abuse and neglect incidents detected by local prosecutors and police to escape WV DHHR's attention. See also Editorial, *All the Details Must Come Out*, CHARLESTON DAILY MAIL, Aug. 12, 2005, at A4. Additionally, recruiting and retaining skilled, dedicated CPS workers has proven to be a challenge for WV DHHR, as the state's CPS workers are asked to work long hours for low pay—on average about \$27,000 per year.

⁶⁷ See *supra* notes 3-7 and accompanying text.

⁶⁸ See *supra* notes 8-11 and accompanying text.

⁶⁹ See *supra* notes 13-14 and accompanying text.

⁷⁰ See generally PETER H. SCHUCK, *SUING GOVERNMENT* 80, 102-03 (1983) (arguing that expanding government liability deters governmental negligence, incompetence, and waste).

gating his or her claim on the merits, though, the plaintiff-foster child in such a suit must prove: (1) the existence of a duty owed by WV DHHR to the plaintiff-foster child and the existence of a cause of action based on the breach of that duty;⁷¹ (2) the existence of liability insurance that provides coverage for the negligent acts of WV DHHR and its employees;⁷² and (3) that his or her suit is not barred by the state's statutory and governmental immunity.⁷³ The following section traces the first step that a plaintiff-foster child must take in a cause of action based on the negligence of WV DHHR and its CPS workers: establishing the existence of a duty and a cause of action based on a breach of that duty.

III. A DUTY TO PROTECT

The first element a foster child must prove in a negligence case against WV DHHR or a CPS worker is the existence of a duty owed by the state to the plaintiff-foster child.⁷⁴ The question of whether a duty exists is generally a matter of law for a court—as opposed to the jury—to decide.⁷⁵ Generally, federal law does not impose upon the states a duty to protect children from violence.⁷⁶ The United States Supreme Court, however, explicitly delegated to the states the power to create a duty to protect foster children from abuse or neglect.⁷⁷ Though West Virginia has not directly addressed the issue of whether WV DHHR and its CPS workers owe any duty of care to the state's foster children, the following subsections argue that when faced with the issue, a West Virginia

⁷¹ See *infra* Part III.

⁷² See *infra* Part IV.

⁷³ See *infra* Part V.

⁷⁴ See W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984) (The prima facie elements of negligence are the existence of a duty, a breach of that duty which proximately causes the plaintiff's injury, and an injury that is compensable with damages). See also *Uthermohlen v. Bogg's Run Min. & Mfg. Co.*, 40 S.E. 410, 411 (W. Va. 1901) (stating that there must be a duty resting by law on one person to charge him with damage from the negligence of another, and that no action for negligence will lie without a legal duty broken); *Aikens v. Debow*, 541 S.E.2d 576, 578 (W. Va. 2000) (stating that to establish a prima facie case of negligence in West Virginia, a plaintiff must show that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff, and no action for negligence will lie without a duty broken); *Reed v. Phillips*, 452 S.E.2d 708, 712 (W. Va. 1994) (stating that to establish a cause of action of negligence, a plaintiff must show that the alleged tort-feasor was under a legal duty or obligation requiring a certain standard of conduct).

⁷⁵ *Lockhart v. Airco Heating and Cooling, Inc.*, 567 S.E.2d 619, 622 (W. Va. 2002).

⁷⁶ See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 191-93 (1989).

⁷⁷ *Id.* at 202. Here the court noted that when the state takes custody of a child and negligently places the child in danger or otherwise fails to affirmatively protect the child from harm, state tort law may provide the injured child with a remedy. See also Restatement (Second) of Torts § 323 (1965) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion); see generally W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984) (discussing "special relationships" which may give rise to affirmative duties to act under the common law of tort).

court can – and probably will – determine that such a duty stems from both the state’s common and statutory law.

A. *A Statutory Duty: The Child Welfare Act*

While WV DHHR appears to enjoy considerable autonomy and discretion in developing most of its protocols and standards,⁷⁸ Section 49 of the West Virginia Code (hereinafter the “Child Welfare Act”) imposes certain statutory duties on WV DHHR and its child protective services workers.⁷⁹ These duties include the duty to set standards for foster care homes;⁸⁰ the duty to “visit every certified foster home as often as is necessary to assure that proper care is given to the children;”⁸¹ the duty to remove an abused or neglected child from a foster home, if the state or one of its agents has reasonable cause to believe that a foster child is the victim of abuse or neglect;⁸² the duty to close foster homes which provide inadequate care to foster children;⁸³ and the duty to investigate all reports of abuse and neglect.⁸⁴

When a state agency such as WV DHHR negligently breaches a statute or regulation, the agency’s breach can give rise to a common law negligence claim if the statute implies a private cause of action.⁸⁵ In assessing whether a statute implies a private cause of action against the state arising from a state agency’s negligence, a West Virginia court will apply a four-prong test devel-

⁷⁸ See, e.g., CPS POLICY, *supra* note 46; FOSTER CARE POLICY, *supra* note 34.

⁷⁹ W. VA. CODE § 49-1-1, *et. seq.*

⁸⁰ W. VA. CODE § 49-2-10 (1941) (“It shall be the duty of the state department in cooperation with the state department of health to establish reasonable minimum standards for foster-home care to which all certified foster homes must conform.”). The duty to establish standards for the licensing of foster homes is almost certainly a “discretionary function,” for which WV DHHR is afforded immunity from liability. A pre-placement investigation of a potential foster home—a background check of the potential foster parents, for example—could be deemed a “ministerial function,” for which a CPS worker would not enjoy any immunity. See *infra* Part V.

⁸¹ W. VA. CODE § 49-2-11 (2002); see also W. VA. CODE § 49-6A-9 (2008) (creating a duty to perform announced or unannounced visits to foster homes at least one time per year).

⁸² W. VA. CODE § 49-2-14 (2002). This section also imposes a duty on the state to remove any other children currently residing in the foster home in which the abuse or neglect allegedly took place. “If the department determines that reasonable cause exists to support the allegation, the department shall remove all foster children from the arrangement and preclude contact between the children and the foster parents.” A similar duty is imposed by W. VA. CODE § 49-2-12. (“If at any time the state department shall find a child in an unsupervised foster home where the child is subject to undesirable influences or lacks proper or wise care and management, it shall take necessary action to remove the child and arrange for his care.”).

⁸³ W. VA. CODE § 49-2B-12 (1977).

⁸⁴ W. VA. CODE § 49-6A-9 (1977) (imposing a duty to “provide care” for neglected children upon WV DHHR).

⁸⁵ W. VA. CODE § 55-7-9 (1926) (permitting the recovery of damages that result from the violation of a statute); *Arbaugh v. Board of Education*, 591 S.E.2d 235, 239 (W. Va. 2003) (West Virginia may assume civil liability by failing to act when action is required by statute).

oped in *Hurley v. Allied Chemical Corporation*.⁸⁶ Under the *Hurley* test, a court will analyze (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted, (2) whether the Legislature intended to create a private cause of action through the statute, (3) whether a private cause of action is consistent with the underlying purposes of the Legislative scheme, and (4) whether a private cause of action would intrude into an area delegated exclusively to the federal government.⁸⁷

When a West Virginia court applies this test to the question of whether the Child Welfare Act gives rise to civil liability based on negligence that results in the abuse or neglect of a foster child, the first and fourth prongs will be decided in the plaintiff-foster child's favor. An abused or neglected foster child is undoubtedly a member of the class that the Child Welfare Act was designed to protect,⁸⁸ and the federal government has explicitly abstained from adjudicating negligence claims of this nature.⁸⁹ The state may argue, however, that the creation of a private cause of action is contrary to the legislature's intent and the legislative purpose underlying the Child Welfare Act.⁹⁰

This argument, if raised, will likely fail, because in drafting and enacting the Child Welfare Act, the legislature clearly intended to assure the security,⁹¹ safety,⁹² and physical well-being of the state's children.⁹³ As previously stated, WV DHHR has failed and continues to fail in its efforts to meet these goals.⁹⁴ The threat of civil liability is likely to spur the agency and its employees to thoroughly address and rectify the shortfalls which have resulted in the abuse and neglect of children like Kimberly Merrill,⁹⁵ Teresa Mayfield,⁹⁶ and Jonathan Coffman.⁹⁷ Indeed, at least one commentator has suggested that allowing private causes of action against government entities results in "organized deterrence" and "better problem-solving" through improved hiring, training, and

⁸⁶ 262 S.E.2d 757, 763 (W. Va. 1980).

⁸⁷ *Id.*

⁸⁸ See *supra* notes 78-84 and accompanying text; see also *infra* notes 92-93.

⁸⁹ See *DeShaney* 489 U.S. at 202 (barring a federal suit by an abused plaintiff-child, but explicitly delegating to the states the discretion to create a private cause of action in tort against state child protective services agencies, stating that a "state may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes.").

⁹⁰ See, e.g., *Arbaugh*, 591 S.E.2d at 241.

⁹¹ W. VA. CODE § 49-1-1(b) (1999) (it is "the intention of the Legislature to require that any reunification, permanency or preplacement preventative services address the safety of the child.").

⁹² W. VA. CODE 49-1-1(a)(1) (1999) ("The purpose of this chapter is to . . . assure each child care [and] safety.").

⁹³ W. VA. CODE 49-1-1(a)(2) (1999) ("The purpose of this chapter is to . . . provide for the physical well-being of each child.").

⁹⁴ See *supra* notes 27-32 and accompanying text.

⁹⁵ See *supra* notes 3-7 and accompanying text.

⁹⁶ See *supra* notes 8-11 and accompanying text.

⁹⁷ See *supra* note 13 and accompanying text.

investigatory practices.⁹⁸ The United States Supreme Court also noted that the threat of such liability encourages governmental entities to implement internal procedures and protocols to prevent employee misconduct.⁹⁹ In short, allowing private causes of action in this area would serve the goals and underlying intent of the Child Welfare Act.

Indeed, a majority¹⁰⁰ of the states which have addressed the issue have found that statutes similar to the Child Welfare Act will give rise to civil liability when a breach of the statutorily created duty results in the abuse or neglect of a foster child.¹⁰¹ In *Vonner v. State Department of Public Welfare*,¹⁰² for example, the Superior Court of Louisiana found Louisiana's Department of Welfare (analogous to WV DHHR) liable for breaching its statutory duty to provide for a foster child's "care and well-being" by conducting an inadequate investigation of reports that the plaintiff-foster child had been severely beaten by his foster father.¹⁰³ The *Vonner* court found that the plaintiff/foster child's death was proximately caused by the Department of Public Welfare's haphazard investigation of an abuse report that preceded the child's death,¹⁰⁴ and held that the Department of Public Welfare could not "absolve itself from the results of its failure in the performance of its legal responsibility that the children be adequately fed, clothed, and protected from intentional physical abuse causing serious injury"¹⁰⁵ The highest courts of appeals in New York,¹⁰⁶ Vermont,¹⁰⁷ and

⁹⁸ John Cameron McMillan, Jr., *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505, 507-09 (1987).

⁹⁹ *Owen v. City of Independence*, 445 U.S. 622, 652 (1980).

¹⁰⁰ *Vonner v. State Dep't of Pub. Welfare*, 273 So.2d 252, 257-58 (La. 1973) (holding that statute creates duty to provide for the physical, mental, moral and emotional well-being of foster child, breach of which gives rise to tort liability, sovereign immunity notwithstanding); *Haselhorst v. State*, 485 N.W.2d 180, 184 (Neb. 1992) (holding that county child protective services internal regulations created a duty to investigate potential foster child placements; negligent breach of this duty owed to foster children gave rise to tort liability); *Bartles v. County of Westchester*, 76 A.D.2d 517, 521-22 (N.Y. 1980) (holding that where statute required state child protective services agency to provide services and protection to foster children, negligent failure to provide such services and protection gave rise to liability in tort. Specifically, the court noted that "one assuming to act, though not under a duty, must act with care, especially when looking after children."); *LaShay v. Dep't of Soc. and Rehab.Servs.*, 625 A.2d 224, 228 (Vt. 1993) (holding that statute creates ministerial duty for social worker to relay reports of foster child abuse to supervisor, breach of which gives rise to tort liability).

¹⁰¹ *Id.*

¹⁰² 273 So.2d 252 (La. 1972).

¹⁰³ *Id.* at 255 ("[T]he Department's liability rests upon a broader base than negligent compliance with its own regulations for the health and care of children in its custody. Nevertheless, even on this latter basis, the evidence in this record supports recovery against the Department.").

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 256.

¹⁰⁶ *Bartles*, 76 A.D.2d at 521-22 (N.Y. 1980) (holding that where statute required state child protective services agency to provide services and protection to foster children, negligent failure to provide such services and protection gave rise to liability in tort. Specifically, the court noted

Nebraska¹⁰⁸ have also found that statutes similar to West Virginia's Child Welfare Act create legal duties, a breach of which gives rise to a private cause of action.

When faced with the issue, a West Virginia court is likely to follow the majority's lead. Indeed, an analysis of West Virginia's assumed duty of care regarding the protection of its prisoners may foreshadow the duty the state is likely to assume regarding the protection of its foster children. In *Hackl v. Dale*,¹⁰⁹ the Supreme Court of Appeals of West Virginia recognized that prison officials must act with reasonable care to insure that prisoners are protected from physical and sexual abuse.¹¹⁰ Though the *Hackl* court stated that this duty stemmed from the Eighth and Fourteenth Amendments of the United States Constitution,¹¹¹ two years after the *Hackl* opinion was issued, the court found that the state's duty to protect its prisoners was statutory in nature, stemming from the Corrections Management Act's¹¹² mandate "that the Commissioner of the West Virginia Department of Corrections 'shall manage, direct, control and govern' those institutions."¹¹³ Finally, in *Skaff v. West Virginia Human Rights Commission*,¹¹⁴ the court recognized "the right to damages for those inmates who [have been] assaulted" as a result of a breach of this duty.¹¹⁵

Much like the Corrections Management Act, the Child Welfare Act sets forth certain duties and responsibilities which WV DHHR and its CPS workers are obliged to perform.¹¹⁶ It is unlikely that when faced with the issue, the Supreme Court of Appeals will determine that the state's foster children are entitled to less protection than the state's prisoners. Rather, the court will probably adopt the majority position and hold that the state has a duty of reasonable care with respect to the protection of the state's foster children, and that a breach of this duty gives rise to liability in tort.¹¹⁷

that "one assuming to act, though not under a duty, must act with care, especially when looking after children."); see also *Doe by Hickey v. Jefferson County*, 985 F.Supp. 66 (N.D.N.Y. 1997).

¹⁰⁷ *LaShay*, 625 A.2d at 228 (Vt. 1993) (holding that statute creates ministerial duty for social worker to relay reports of foster child abuse to supervisor, breach of which gives rise to tort liability).

¹⁰⁸ *Haselhorst*, 485 N.W.2d at 184 (Neb. 1992) (holding that county child protective services internal regulations created a duty to investigate potential foster child placements; negligent breach of this duty owed to foster children gave rise to tort liability).

¹⁰⁹ 299 S.E.2d 26 (W.Va. 1982).

¹¹⁰ *Id.* at Syl. Pt. 2.

¹¹¹ *Id.* at 28 (citing *Holt v. Sarver*, 442 F.2d 304, 308 (8th Cir. 1971)).

¹¹² See W. VA. CODE § 25-1-1, *et. seq.*

¹¹³ *Bishop v. McCoy*, 323 S.E.2d 140, 145 (W. Va. 1984) (citing W. VA. CODE § 25-1-3 (1977)).

¹¹⁴ 444 S.E.2d 39 (W.Va. 1994).

¹¹⁵ *Id.* at 42 (citing *LaMarca v. Turner*, 995 F.2d 1526 (11th Cir. 1993)).

¹¹⁶ See *supra* notes 79-84.

¹¹⁷ See *supra* notes 100-108 and accompanying text.

In summary, a private, civil cause of action will deter negligence¹¹⁸ on the part of WV DHHR and the state's CPS workers, thereby furthering the underlying intent and overarching goals of the Child Welfare Act.¹¹⁹ Therefore, when a plaintiff-foster child seeks to hold WV DHHR or a CPS worker liable for negligence that leads to his or her abuse or neglect, a West Virginia court will likely conclude that all four prongs of the *Hurley* test¹²⁰ are met, and that the Child Welfare Act, much like the Corrections Management Act,¹²¹ gives rise to a private cause of action in tort.

The Child Welfare Act, however, is not the only source of law that creates a duty owed by WV DHHR and its CPS workers to the state's foster children. As the next section shows, the state—through WV DHHR and its CPS workers—has a “special relationship” with its foster children, and this special relationship creates a common law duty for WV DHHR to protect the state's foster children from abuse and neglect.

B. A Common Law Duty: The Special Relationship Exception to the Public Duty Doctrine

Under the Public Duty Doctrine, “a duty to all is a duty to none.”¹²² In other words, when a governmental agency deals generally with the welfare of all, it does not owe a duty to any individual, unless a special relationship exists between the governmental agency and an individual.¹²³ The Public Duty Doctrine has protected employees of the West Virginia's political subdivisions (counties, cities, and townships) from tort liability since its adoption in *Benson v. Kutsch*¹²⁴ in 1989.¹²⁵ The question of whether the doctrine applied to the state government was not addressed until the Supreme Court of Appeals of West Virginia explicitly adopted it and its “Special Relationship Exception” in *Parkulo v. Board of Probation and Parole*.¹²⁶ In *Parkulo*, the court held that Chandra Parkulo—a woman who had been abducted, sexually assaulted, and beaten by a man who had been negligently released from prison—failed to set forth an actionable claim, because “recovery may be had for negligence only if a duty has

¹¹⁸ See *supra* notes 91-99.

¹¹⁹ See *supra* notes notes 91-93.

¹²⁰ See *supra* note 86 and accompanying text.

¹²¹ See *supra* note 112 and accompanying text.

¹²² Cannon v. Univ. of Utah, 866 P.2d 586, 588-89 (Utah 1993).

¹²³ *Id.*; see also *Parkulo v. Bd. of Prob. & Parole*, 483 S.E.2d 507 (W. Va. 1997); DAN B. DOBBS, THE LAW OF TORTS 333 (West Group 2000).

¹²⁴ 380 S.E.2d 36 (W. Va. 1974), *overruled on other grounds by* O'Neil v. City of Parkersburg, 237 S.E.2d 504 (W. Va. 1977).

¹²⁵ *Id.* (applying the Public Duty Doctrine to a political subdivision).

¹²⁶ 483 S.E.2d 507, 524 (W. Va. 1998).

been breached which was owed to the *particular person* seeking recovery.”¹²⁷ The Department of Corrections, the court determined, owed no specific duty to Parkulo—rather, the department’s duty to maintain custody of its prisoners was owed to society as a whole.¹²⁸ Because “a duty to all is a duty to none,”¹²⁹ Parkulo lacked standing to assert a claim against the department.¹³⁰

Though the Public Duty Doctrine insulates state government entities from liability where the duty allegedly breached was owed to the public as a whole, when a government entity has a “special relationship” with a plaintiff, the rationale underlying the Public Duty Doctrine—that “a duty to all is a duty to none”¹³¹—is nullified.¹³² Thus, under the “Special Relationship Exception” to the Public Duty Doctrine, a governmental entity may have a common law duty to protect an individual from harm.¹³³ West Virginia adopted the Special Relationship Exception to the Public Duty Doctrine in *Parkulo*.¹³⁴ Specifically, the court adopted a four-prong test to determine whether a special relationship exists between a governmental entity and a plaintiff seeking recovery based on

¹²⁷ *Parkulo*, 483 S.E.2d at 518 (emphasis added). One justification for the public duty doctrine is that “[i]ndividuals, juries, and courts are ill-equipped to judge governmental decisions as to how particular community resources should be or should have been allocated to protect individual members of the public.” *Ezell v. Cockrell*, 902 S.W.2d 394, 398 (Tenn. 1995). One court suggested that such decisions are best reviewed by supervisory personnel who are familiar with the responsibilities and operations at issue in a particular case. *Morgan v. District of Columbia*, 468 A.2d 1306, 1312 (D.C. App. 1983). Another court has suggested the public duty doctrine abrogates the unfairness that results when a judge or jury making a liability determination enjoys the benefit of hindsight, while the allegedly negligent actor who made the decision did not. *Shore v. Town of Stonington*, 444 A.2d 1379, 1382-84 (Conn. 1982). Finally, one court has suggested that the public duty doctrine adds an element of practicality to the otherwise complex and confusing subject of governmental liability. *Landis v. Rockdale County*, 445 S.E.2d 264, 268 (Ga. 1994).

¹²⁸ *Parkulo*, 483 S.E.2d at 524.

¹²⁹ *Gadd v. United States*, 971 F.Supp. 502, 511 (Utah 1997).

¹³⁰ *Parkulo*, 483 S.E.2d at 526 (finding that the public duty doctrine applies to the defendant and precludes liability, and that nothing in the record disclosed any special relationship between Parkulo and the defendant).

¹³¹ *Gadd*, 971 F.Supp. at 511.

¹³² In *DeShaney v. Winnebago County Dep’t. of Soc. Servs.*, 489 U.S. 189 (1989), the Supreme Court noted that where a “special relationship” stemming from a custodial relationship exists between a state and one of its citizens, an exception arises to the general rule that a state has no affirmative duty to protect persons from violence inflicted by private actors. *Id.* at 199-200. The *DeShaney* Court explicitly left open the question of whether the state has an affirmative duty to protect a child who has been placed in foster care. *Id.* at 201. “Had the state by the affirmative exercise of its power removed [the child] from free society and placed him in a foster home operated by its agents,” the Court stated, “we might have a situation sufficiently analogous to incarcerations or institutionalization to give rise to an affirmative duty to protect We express no view on the validity of this analogy, as it is not before us in the present case.”) Some courts have exploited this concept and applied the special relationship exception to state immunity in cases where children have been placed and subsequently abused or neglected in foster care.

¹³³ *Parkulo*, 483 S.E.2d at 524.

¹³⁴ Syl. Pt 10, *Parkulo*, 483 S.E.2d 507.

that entity's negligent failure to protect him or her from harm.¹³⁵ This test requires: (1) an assumption by the state governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the state governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the state governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the state governmental entity's affirmative undertaking.¹³⁶

A juxtaposition of two recent cases illustrates the contours of the Special Relationship Exception to the Public Duty Doctrine. In *Tucker v. Department of Corrections*,¹³⁷ the administrator of a plaintiff-decedent's estate alleged that the West Virginia Department of Corrections negligently placed a violent criminal in a work-release program, thus allowing the criminal to escape and murder Reginald T. Seamon.¹³⁸ First, the *Tucker* court analyzed whether the Department of Corrections—and by extension, the state—owed Mr. Seamon a legal duty of protection from harm.¹³⁹ The court focused on whether a special relationship existed between the Department of Corrections and Mr. Seamon.¹⁴⁰ The *Tucker* court found that Mr. Seamon failed to meet the third prong of the Special Relationship Exception test, because he never had any direct contact with the Department of Corrections.¹⁴¹ Thus, no special relationship existed between Mr. Seamon and the Department of Corrections, and Mr. Seamon's suit was barred by the Public Duty Doctrine.¹⁴²

A similar claim led to a different outcome in *McCormick v. West Virginia Department of Public Safety*.¹⁴³ Here, a prisoner escaped after being placed in a work-release program and murdered Alicia McCormick, a therapist employed by the Department of Corrections.¹⁴⁴ Mrs. McCormick's claim succeeded where Mr. Seamon's had failed because Mrs. McCormick served as a therapist for the Department of Corrections, and had actually counseled her murderer on several occasions.¹⁴⁵ In its analysis of Mrs. McCormick's claim, the court stated that the "interconnectedness among the victim, her assailant, and the public safety agency" raised a factual question as to whether the Department of Corrections had a special relationship with Mrs. McCormick that created a

¹³⁵ Syl. Pt 12, *Parkulo*, 483 S.E.2d 507.

¹³⁶ *Id.*; see also *Jeffrey v. W. Va. Dep't of Pub. Safety*, 511 S.E.2d 152, 155 (W.Va. 1998).

¹³⁷ 530 S.E.2d 448 (W. Va. 1999).

¹³⁸ *Id.* at 449-50.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 451-52.

¹⁴¹ *Id.* at 451.

¹⁴² *Id.* at 452.

¹⁴³ 503 S.E.2d 502 (W. Va. 1998)

¹⁴⁴ *Id.* at 507-09.

¹⁴⁵ *Id.* at 504-06.

common law duty to protect her from harm.¹⁴⁶ Thus, Mrs. McCormick's claim against the state for the negligent supervision of a violent felon was litigated on its merits, while Mr. Seamon's claim was barred by the Public Duty Doctrine.¹⁴⁷

The characteristics that made Mrs. McCormick's claim successful—the close relationship between the victim, the assailant, and a state agency¹⁴⁸—would also be present in an abused or neglected foster child's negligence action against WV DHHR and its CPS workers. Indeed, at least two federal courts and four state courts have used the Special Relationship Exception to impose a common law duty and tort liability on child protective services agencies in cases where a social worker's negligence proximately caused a foster child's abuse or neglect.¹⁴⁹ It appears that the Supreme Court of Appeals of West Virginia is prepared to do the same: the court recently performed a special relationship analysis in *Barbina v. Curry*,¹⁵⁰ where a plaintiff alleged that WV DHHR's negligence resulted in the sexual abuse of a minor.¹⁵¹ After John Barbina and Kelly Curry divorced, Ms. Curry was awarded custody of the couple's daughter ("A.B.").¹⁵² In the summer of 1998, A.B., then ten years old, was sexually abused by Charles Curry, her maternal grandfather.¹⁵³ In September of 1998,

¹⁴⁶ *Id.* at 508 (citing *Randall v. Fairmont City Police Dep't*, 412 S.E.2d 737 (W. Va. 1991)).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ The Eleventh Circuit, for example, applied the special relationship exception to a case in which a child had been abused in foster care; here, the court found the state liable in tort for failing to protect the foster child. *Taylor v. Ledbetter*, 818 F.2d 791, 794-97 (11th Cir. 1987). Similarly, the Second Circuit found tort liability where a state liable for negligently failing to protect a child who had been sexually abused while in foster care. *Doe v. N.Y. City Dep't of Soc. Servs.*, 709 F.2d 782, 787 (2d Cir. 1983). For write-ups of the *Taylor* and *Doe* cases, and an overview of a foster child's constitutional right to safety and federal causes of action that may arise under 42 U.S.C. 1983, see Terrance J. Dee, *Foster Parent Liability Under Section 1983: Foster Parents' Liability as State Actors for Abuse to Foster Children*, 69 WASH. U. L.Q. 1201, 1205-28 (1981). Additionally, some of the states' highest appellate courts have issued similar rulings. See, for example *Elton v. County of Orange*, 3 Cal. App. 3d 1053, 1056 (1970), where the California Court of Appeals determined that the special relationship exception applied and overcame state immunity, and found that a cause of action exists when the state fails to comply with its foster home regulations unless its employees consciously exercise discretion in connection with negligent acts or omissions. Similarly, in *Vonner v. State*, 273 So.2d 252, 255 (La. 1973), Louisiana's highest appellate court found the state liable for violating its foster care rules, because adherence to the rules would have led to the discovery of the abuse that the claimant/foster child alleged against the state. New York's Supreme Court found that a county has a non-delegable duty to care for its foster children and is thus not immune to liability. *Bartles v. County of Westchester*, 429 N.Y.S.2d 906, 910 (1980). Finally, Utah has created a statutory duty for child protective services agencies to protect children who reside in foster homes. *Little v. Utah Div. of Family Servs.*, 667 P.2d 49, 53-54 (Utah 1983).

¹⁵⁰ 650 S.E.2d 140 (W. Va. 2007).

¹⁵¹ *Id.* at 143-44.

¹⁵² *Id.* at 144.

¹⁵³ *Id.*

A.B. reported the incident to her therapist, Helen Lough.¹⁵⁴ Ms. Lough stated under oath that she reported the incident to WV DHHR, but WV DHHR denied receiving the report.¹⁵⁵ On November 25, 1999, Ms. Curry invited Charles Curry to her home for Thanksgiving.¹⁵⁶ At some point during the visit, Mr. Curry again sexually assaulted A.B.¹⁵⁷ On February 6, 2000, A.B. told Mr. Barbina about the two incidents of sexual abuse by Mr. Curry.¹⁵⁸ Mr. Barbina reported the incidents to DHHR the next day.¹⁵⁹ Mr. Barbina also informed the police of the matter, and Mr. Curry was subsequently arrested.¹⁶⁰ Mr. Barbina filed charges against WV DHHR, alleging that the agency's failure to adequately investigate the 1998 report of sexual abuse proximately caused A.B.'s 1999 injuries.¹⁶¹ Specifically, Mr. Barbina asserted that: (1) WV DHHR had a duty to protect A.B. after the initial abuse was reported; (2) WV DHHR breached this duty; and (3) A.B. was sexually abused as a result.¹⁶² The court initiated its analysis of Barbina's claim by seeking to determine whether WV DHHR had a duty to protect A.B. from sexual abuse after the initial 1998 abuse report.¹⁶³

In its analysis of Mr. Barbina's claim, the court modified the third prong of the Special Relationship Exception test—the prong that Mr. Seamon failed to meet¹⁶⁴—for cases involving child abuse or neglect.¹⁶⁵ Specifically, the court abrogated the “direct contact” requirement, stating that “due to the statutory duty of [WV DHHR] to investigate reports of child abuse, the ‘direct contact’ requirement of the special relationship doctrine is satisfied through competent evidence showing that a report of child abuse was actually made to and received by the [WV DHHR].”¹⁶⁶ Yet surprisingly, the court unanimously held that Barbina's complaint failed to meet the modified third prong of the Special Relationship Exception test, because the records produced by Ms. Lough—A.B.'s therapist—which indicated that Ms. Lough reported the initial incident of sexual abuse to WV DHHR were “insufficient to establish a jury question about [WV] DHHR's knowledge of the sexual abuse”¹⁶⁷ In short, Mr. Barbina's com-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* WV DHHR claimed that it could find no record showing that such a referral existed.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* Mr. Curry pled guilty to two charges of first degree sexual abuse, and was sentenced to two consecutive prison sentences of one to five years.

¹⁶¹ *Id.*

¹⁶² *Id.* at 147.

¹⁶³ *Id.*

¹⁶⁴ See *supra* notes 137-142 and accompanying text.

¹⁶⁵ *Barbina*, 650 S.E.2d at 147.

¹⁶⁶ *Id.* at 148.

¹⁶⁷ *Id.*

plaint was dismissed for factual shortfalls.¹⁶⁸ The existence of a duty owed by WV DHHR to A.B., however, was not called into question by the court.¹⁶⁹ *Barbina* strongly suggests that the Special Relationship Exception to the Public Duty Doctrine creates a common law duty for WV DHHR to protect the state's foster children from abuse and neglect.

In summary, when faced with the issue, a West Virginia trial court will likely find that WV DHHR and its CPS workers have both a common law and a statutory duty to protect the state's foster children from abuse and neglect. Indeed, a statutory "duty to protect" has been imposed on the state as a result of the Corrections Management Act, and it is unlikely that a court would find that the state's foster children are entitled to less protection than the state's prisoners. Further, a plaintiff-foster child will almost certainly be able to prove the existence of a special relationship and an accompanying common law "duty to protect" under the Special Relationship Exception test. *McCormick* shows that a close relationship between the victim, the assailant, and a state agency can create a "duty to protect,"¹⁷⁰ and *Barbina* suggests that the Supreme Court of Appeals of West Virginia has adopted such a duty in child abuse and neglect cases.¹⁷¹ Establishing the existence of a duty, however, will not enable a plaintiff-foster child to hold WV DHHR and its CPS workers legally liable for negligence that causes his or her abuse or neglect. As the following sections show, the mere existence of a duty does not abrogate the state's second defense against liability—"sovereign immunity."

IV. A GENERAL BAR TO CLAIMS NOT COVERED BY THE STATE'S LIABILITY INSURANCE COVERAGE POLICY

There is no simple answer to the question of whether West Virginia is immune from liability for negligence that leads to child abuse or neglect, as the extent of the immunity that West Virginia enjoys from legal liability in tort has been a consistent point of contention over the last twenty-five years.¹⁷² In fact, since the early 1970s, the scope of the governmental immunity in West Virginia

¹⁶⁸ *Id.* at 149.

¹⁶⁹ *Id.* at 146-49.

¹⁷⁰ *See supra* notes 143-147.

¹⁷¹ *See supra* notes 150-169.

¹⁷² *W. Va. Univ. v. Graf*, 516 S.E.2d 741, 747 (W. Va. 1998) (Starcher, J., dissenting) ("Someday, I think, a number of thorny sovereign immunity issues should and will be more thoroughly addressed by this Court. My sense is that our sovereign immunity jurisprudence has come to be – from a theoretical or academic perspective – fairly confused. I further sense that this jurisprudential confusion has unfortunately created a fertile field for opportunistic attempts by litigants to escape liability for their wrongdoing, by the last-minute assertion of sovereign immunity.").

has been abolished,¹⁷³ revived,¹⁷⁴ expanded,¹⁷⁵ and abrogated¹⁷⁶ by the state's common law, sometimes in the same opinion.¹⁷⁷

While the nature and the scope of the state's immunity from liability based on tort has been modified through the common law,¹⁷⁸ the existence of the state's immunity stems from Article VI, Section 35 of the West Virginia State Constitution, which states that "[t]he State of West Virginia shall never be made defendant in any court of law or equity."¹⁷⁹ Though the immunity provided to the state through Article VI, Section 35 has been described as "absolute" and "non-waivable,"¹⁸⁰ West Virginia, like most states,¹⁸¹ has created a plethora of exceptions to the state's immunity from legal liability.¹⁸² The origins of these exceptions to state immunity are also constitutional in nature, stemming from Article III, Section 17 of the West Virginia State Constitution, which provides that "[t]he courts of this State shall be open, and every person,

¹⁷³ Long v. City of Weirton, 214 S.E.2d 832 (W. Va. 1975), *superseded by statute*, W.VA. CODE § 29-12A-1, *et. seq.* (holding that the "rule of municipal governmental immunity was abolished in West Virginia.").

¹⁷⁴ Higginbotham v. City of Charleston, 204 S.E.2d 1 (W. Va. 1974), *overruled on other grounds* by O'Neil v. City of Parkersburg, 237 S.E.2d 504 (W. Va. 1977) (holding that art. VI, § 35 of the West Virginia Constitution, granting sovereign immunity to the State, does not apply to municipalities; rather, cities can be held liable in private actions for failing to repair and maintain streets and sidewalks, in violation of state statute).

¹⁷⁵ Clark v. Dunn, 465 S.E.2d 374 (W. Va. 1995) (expanding common law qualified immunity that public officials enjoy to preclude liability for any "discretionary act," except where the official abuses that discretion by violating a clearly established constitutional right).

¹⁷⁶ Pittsburgh Elevator v. W.Va. Bd. of Regents, 310 S.E.2d 675, 688-89 (W. Va. 1983) (allowing, for the first time, a negligence claim against the state to be litigated on its merits, and stating that recovery may be had "under and up to" the limits of the state's liability insurance policy).

¹⁷⁷ See Parkulo v. Bd. of Prob. and Parole, 483 S.E.2d 507, 523 (W. Va. 1996) (adopting and applying all common law immunities that had been afforded to political subdivisions to the state, but affirming the *Pittsburgh Elevator* court's assertion that recovery may be had in spite of sovereign immunity so long as the state's liability insurance policy provides coverage for the occurrence which gave rise to the plaintiff's injury). Additionally, the *Parkulo* court recognized the Public Duty Doctrine, which prohibits recovery for duties that the state or one of its agencies "owes to society as a whole", but also adopted the Special Relationship Exception to the Public Duty Doctrine, which allows for recovery when a state agency negligently fails to protect a plaintiff with whom it had a special relationship. *Id.* at 519-20, 524-25.

¹⁷⁸ See *supra* notes 172-177 and accompanying text.

¹⁷⁹ W. VA. CONST. art. VI, § 35.

¹⁸⁰ Mellon-Stuart Co. v. Hall, 359 S.E.2d 124, 129 (W. Va. 1987); Grant P.H. Shuman, Note, *Common Law Tort Immunity For State Officials in W. Va. After the Parkulo v. W. Va. Bd. Of Prob. Decision*, 103 W. VA. L. REV. 261, 266-67 (2000).

¹⁸¹ Pittsburgh Elevator Co. v. Bd. of Regents, 310 S.E.2d 675, 680 n.6 (W. Va. 1983) (noting that nationwide, "[s]overeign immunity of the state is now the exception rather than the rule.").

¹⁸² See, e.g., Parkulo, 483 S.E.2d 507, 519-20, 523-25 (W. Va. 1996) (adopting the Special Relationship Exception to the Public Duty Doctrine, and affirming the *Pittsburgh Elevator* court's assertion that a plaintiff may recover against the state under and up to the limits of the state's liability insurance policy).

for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.”¹⁸³

The Supreme Court of Appeals of West Virginia addressed the incongruity of Article VI, Section 35 and Article III, Section 17 in *Pittsburgh Elevator Company v. West Virginia Board of Regents*.¹⁸⁴ Here, the Court considered the case of four-year-old Joseph Martin, who was injured after falling from the stage of the main theater in the Creative Arts Center at West Virginia University.¹⁸⁵ Joseph’s parents filed suit against the West Virginia Board of Regents (the “Board”) as owner of the Creative Arts Center.¹⁸⁶ The lower court granted the Board’s motion to dismiss,¹⁸⁷ and the Martins subsequently appealed.

In an attempt to reconcile Article VI, Section 35’s ostensibly broad grant of immunity to the state with Article III, Section 17’s guarantee of due process and open courts, the court drew a distinction between the state and the “government of the state.”¹⁸⁸ The state, the court opined, represents the “ideal person, intangible, invisible, immutable”¹⁸⁹ The *government* of the state, in contrast, is “a mere agent, and, within the spirit of the agency, a perfect representative, but outside of that, a lawless usurper.”¹⁹⁰ Because the state is “[p]ure, unsullied, and infallible,” it is immune from legal liability.¹⁹¹ In contrast, the state government—comprised of the state’s tribunals and officers—is capable of “doing wrong” and may be “disavowed” and “repudiate[d]” by the state for its negligence or malfeasance.¹⁹²

Ultimately, the court ruled in Martin’s favor, allowing him to breach the shield of immunity that had previously protected the West Virginia Board of

¹⁸³ W. VA. CONST. art. III, § 17; *see also* *Deller v Naymick*, 342 S.E.2d 73, 80 (W. Va. 1985) (stating that to prevent an injured party from collecting against the state where the state has insurance coverage is a violation of due process); *Jeffrey v. W.Va. Dep’t. of Pub. Safety, Div. of Corr.*, 482 S.E.2d 226, 232 (“Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State’s liability insurance coverage, fall outside the traditional constitutional bar to suits against the State.”). Conversely, where the state does not have coverage, liability cannot attach. *State ex. Rel. Thrasher Eng’g v. Fox*, 624 S.E.2d 481, 487 (W. Va. 2005).

¹⁸⁴ 310 S.E.2d 675 (W. Va. 1983).

¹⁸⁵ *Id.* at 677.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* Though the Board’s motion to dismiss simply asserted that suits against the state may only be filed in the Circuit Court of Kanawha County, the *Pittsburgh Elevator* court considered at length the implications of art. VI, § 35’s grant of immunity to the state.

¹⁸⁸ *Id.* at 683.

¹⁸⁹ *Id.* (citing *Poindexter v. Greenhow*, 114 U.S. 270, 290 (1885)).

¹⁹⁰ *Id.* (citing *Poindexter v. Greenhow*, 114 U.S. 270, 290-91 (1885)).

¹⁹¹ *Id.* (citing *Coal & Coke Ry. Co. v. Conley*, 67 S.E.2d 613, 619-20 (W. Va. 1910)).

¹⁹² *Id.* (“Though [the state’s] officers and tribunals may [do wrong], [the state] never sustains nor upholds them in it. On the contrary, she disavows and repudiates their wrongful acts.”).

Regents¹⁹³—and the state’s other agencies—in the past,¹⁹⁴ reasoning that once the distinction between the state and the government of the state is recognized, “the traditional bar to suit contained in Article VI, [Section] 35 loses all validity.”¹⁹⁵ To assuage concerns that governmental liability may be detrimental to the state’s financial health,¹⁹⁶ the court in *Pittsburgh Elevator* set forth a comprehensive overview of the relationship between governmental immunity and the insurance purchased by the state to insure against tort liability.¹⁹⁷ The court noted that in essence, when the government’s insurance policy covers a given occurrence, monies sought by plaintiffs as a result of such an occurrence are not sought from the state, but from the state’s insurer.¹⁹⁸ Thus, the “paramount justifi-

¹⁹³ The Supreme Court of Appeals of West Virginia had previously held in *City of Morgantown v. Ducker*, 168 S.E.2d 298 (1969), that the West Virginia Board of Regents was constitutionally immune from suit under W. VA. CONST. art. VI, § 35.

¹⁹⁴ *Id.*; see also *Hughes-Bechtol, Inc. v. W.Va. Bd. of Regents*, 527 F.Supp. 1366 (S.D. Ohio 1981); *Santiago v. Clark*, 444 F.Supp. 1077 (N.D. W. Va. 1978); *Kondos v. W. Va. Bd. of Regents*, 318 F.Supp. 394 (S.D. W. Va. 1970), *aff’d*, 441 F.2d 1172 (4th Cir.1971); *Scott v. Taylor*, 160 S.E.2d 146 (W. Va. 1968).

¹⁹⁵ *Id.* at 684. The *Pittsburgh Elevator* court found a lengthy and strongly-worded defense of the distinction between the state and the government of the state in *Poindexter v. Greenhow*, 114 U.S. 270, 291 (1885), where the United States Supreme Court asked:

Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle field [sic] and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State.

The *Poindexter* Court concluded that the doctrine of sovereign immunity “cannot be tolerated,” as “[i]t is the doctrine of absolutism, pure simple [sic] and naked; and of communism, which is its twin; the double progeny of the same evil birth.” *Id.*

¹⁹⁶ Proponents of governmental immunity generally assert that the state should be able to provide for the “protection of the public without thereby exposing the taxpayers to liability for omissions in its attempts to enforce [the law].” See, e.g., *Benson v. Kutsch*, 380 S.E.2d 36, 38 (W.Va. 1989). In short, the importance of the state’s financial health is the primary justification for affording the state immunity against liability stemming from its performance or delivery of services and protection. See also *Pittsburgh Elevator*, 310 S.E.2d at 688 (W.Va. 1983) (citing *State v. Ruthbell Coal Co.*, 56 S.E.2d 549 (W.Va. 1949)) (“The paramount justification underlying the constitutional grant of immunity is to protect the financial structure of the state.”).

¹⁹⁷ *Russell v. Busch & Burchett, Inc.*, 559 S.E.2d 36, 43 (W. Va. 2001) (“W.Va. CODE, 29-12-1 evidences a remedial legislative purpose that the State establish mechanisms that will assure that the State is financially responsible and accountable for injuries occasioned by culpable State action” without diverting state monies from legislatively appropriated purposes.). See also *Shuman*, *supra* note 180, 266-67.

¹⁹⁸ *Pittsburgh Elevator*, 310 S.E.2d at 688 (“Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State’s liability insurance coverage fall outside the traditional constitutional bar to suits against the State.”).

fication”¹⁹⁹ for state immunity—the financial well-being of the state—is nullified, as long as the compensation that an adverse party receives does not exceed the limits of the state’s insurance policy.²⁰⁰

Applying this principle, the *Pittsburgh Elevator* court reasoned that Martin did not, in fact, seek recovery of monies from the state, but from the state’s insurer,²⁰¹ and Martin’s claim survived the Board’s motion to dismiss.²⁰²

In the wake of *Pittsburgh Elevator*, the Supreme Court of Appeals of West Virginia addressed numerous cases in which plaintiffs sought to hold the state government legally liable for damages “under and up to” the limits of the state’s liability insurance coverage.²⁰³ While the outcomes of such cases have varied considerably, the decisive factor in each of *Pittsburgh Elevator*’s progeny is whether the conduct the plaintiff complained of was covered by the state’s liability insurance policy.²⁰⁴ When the conduct is covered in the state’s liability insurance policy, the state’s sovereign immunity is negated; when the conduct is not covered, sovereign immunity applies and the plaintiff’s claim will be barred.²⁰⁵

As the next section shows, West Virginia’s liability insurance policy provides coverage for the negligent acts and omissions of WV DHHR and its employees, thus potentially allowing a plaintiff-foster child who is abused or

¹⁹⁹ See *supra* note 196 and accompanying text.

²⁰⁰ *Id.* at 688. See also *Madden v. W. Va. Dep’t of Transp.*, 453 S.E.2d 331, 334 (W. Va. 1994) (noting that the state’s “[i]mmunity is relaxed only to the extent of the liability coverage.”).

²⁰¹ *Pittsburgh Elevator*, 310 S.E.2d at 688. Suits that seek “no recovery from state funds, but rather allege that recovery is sought under and up to the limits to the State’s liability insurance coverage fall outside of the traditional constitutional bar to suits against the State.” See also *Jeffrey v. W. Va. Dep’t. of Pub. Safety, Div. of Corr.*, 482 S.E.2d 226, 232 (W. Va. 1996) (“Suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State’s liability insurance coverage, fall outside the traditional constitutional bar to suits against the State.”). Technically, section 29-12-5 does not waive the state’s constitutional immunity, rather the statute renders such immunity inapplicable to the extent of insurance coverage purchased by the state. *Pittsburgh Elevator*, 310 S.E.2d at 689. The logic underlying this scheme was captured in the *Pittsburgh Elevator* court’s assertion that “where recovery is sought against the State’s liability insurance coverage, the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable.” *Id.*

²⁰² *Pittsburgh Elevator*, 310 S.E.2d at 690.

²⁰³ See, e.g., *King v. Heffernan*, 591 S.E.2d 761 (W. Va. 2003); *Shaffer v. Stanley*, 2003 WL 22850002 (W. Va. 2003); *Arnold Agency v. W. Va. Lottery Comm’n*, 526 S.E.2d 814 (W. Va. 1999); *W. Va. Univ. v. Graf*, 516 S.E.2d 741 (W. Va. 1998); see also *Roach v. Burke*, 825 F.Supp. 116 (N.D. W.Va. 1993); *Haney v. County Comm’n*, 575 S.E.2d 434 (W. Va. 2002).

²⁰⁴ Compare *Eggleston v. Dep’t of Highways*, 429 S.E.2d 636 (W. Va. 1993) (finding that the state liable in tort for the negligent maintenance of an incomplete road, because the state’s liability insurance policy provides coverage for negligence connected to the maintenance of state roads that are under construction) with *Shrader v. Holland*, 414 S.E.2d 448 (W. Va. 1992) (finding the state immune from liability in tort for the negligent maintenance of an state road, because the state’s liability insurance policy did not provide coverage for negligence connected to the maintenance of roads which were not under construction).

²⁰⁵ *Id.*

neglected as a result of such negligence to hold the government of the state liable in tort for his or her injuries.

A. *The State's Current Liability Insurance Policy and WV DHHR*

Under the state's current liability insurance policy, a plaintiff-foster child who alleges that WV DHHR's or a CPS worker's negligence proximately caused his or her abuse or neglect could likely prove that such negligence is covered by the "wrongful acts" provision of the state's liability insurance policy. In 2007, the West Virginia Board of Risk and Insurance Management (BRIM) purchased the state's current liability insurance policy (covering the period from July 1, 2007 to July 1, 2008) from the National Union Fire Insurance Company of Pittsburgh, Pa.²⁰⁶ "Coverage E" of this policy insures the state against liability and damages stemming from "wrongful acts" of the state, its agencies, and its employees.²⁰⁷ Under the terms of the policy, "wrongful acts" includes "any actual or alleged act, *breach of duty, neglect, error, misstatement, misleading statement or omission* by [the state, its agencies, or its employees] *in the performance of their duties* for [West Virginia]."²⁰⁸ Like the terms in any insurance contract, "Coverage E" is to be read in accordance with the maxim that "[l]anguage in an insurance policy should be given its plain, ordinary meaning."²⁰⁹ Thus, even if *Shaffer's* unfounded assertion that BRIM is required to procure insurance for all of DHHR's responsibilities and activities is overruled, narrowed, or otherwise abrogated, it is likely that a West Virginia court will determine that "Coverage E" of the state's current liability insurance policy insures the state against WV DHHR's and CPS workers' negligent acts and omissions.²¹⁰

²⁰⁶ NAT'L UNION FIRE INS. CO. OF PITTSBURGH, PA, WEST VIRGINIA COMPREHENSIVE LIABILITY COVERAGE FORM (2006–2007), <http://www.state.wv.us/Brim/Under/2008%20Policies/State%20Liability%20Policy.pdf> (last visited Feb. 27, 2009).

²⁰⁷ *Id.* at 14.

²⁰⁸ *Id.* at 16 (emphasis added).

²⁰⁹ *Soliva v. Shand, Morahan & Co., Inc.*, 345 S.E.2d 33, 33 (W. Va. 1986), *abrogated on other grounds* by *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W. Va. 1987). Thus, "[w]here provisions in an insurance policy are plain and unambiguous ... the provisions will be applied and not construed." *Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639, 642 (W. Va. 1985); *Keffer v. Prudential Ins. Co. of America*, 172 S.E.2d 714, 715 (W. Va. 1970) ("[W]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.").

²¹⁰ The Supreme Court of Appeals of West Virginia recently held that Coverage E's broad verbiage insured the state against the legal damages that resulted from multiple instances of sexual assault committed by a teacher against four elementary students. *Bender v. Glendenning*, 632 S.E.2d 330, 332-35, 337 (2006); *see also* *Syl. Pt. 2 Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639 (W. Va. 1985); *Keffer v. Prudential Ins. Co. of Am.*, 172 S.E.2d 714, 715 (W. Va. 1970) ("[W]here the provisions of an insurance policy contract are clear and

In short, for the time being, a foster child who is abused or neglected as a result of WV DHHR's or a CPS worker's negligence will almost certainly be able to prove that the state's liability insurance policy provides coverage for such negligence.

The existence of such coverage in the future is by no means guaranteed. Under § 29-12-5 of the West Virginia Code, the West Virginia Board of Risk and Insurance Management, BRIM, is tasked with negotiating and procuring a liability insurance policy for the State of West Virginia.²¹¹ Section 29-12-5 does not direct BRIM to purchase liability insurance coverage for WV DHHR, but delegates BRIM the authority to do so at its discretion.²¹² In short, the ability of a foster child who is abused or neglected as a result of WV DHHR's negligence to hold the state accountable for such negligence depends on whether BRIM renews WV DHHR's liability insurance coverage from year to year. Should BRIM choose to narrow the scope of or even discontinue coverage, the plaintiff-foster child's ability to litigate his or her claim on the merits will be seriously jeopardized.

Even assuming such coverage continues, the State will undoubtedly assert one or more common law or statutory immunities in a motion to dismiss the plaintiff's claim. As the next section shows, overcoming the state's common law and statutory immunities will likely prove to be the most challenging aspect of the plaintiff-foster child's claim.

unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.”).

²¹¹ W. Va. CODE § 29-12-5(a) (1933).

²¹² WV DHHR is defined as a “charitable organization” under West Virginia Code § 29-12-5(b)(1)(B) and West Virginia Code § 29-12-5(b)(2) (BRIM “may, but is not required to, provide property and liability insurance to insure the property, activities and responsibilities of . . . charitable [organizations] . . .”). Cf. *Shaffer v. Stanley*, 593 S.E.2d 629, 639 (W. Va. 2003) (“Board of Risk and Insurance Management had a statutory duty to purchase or contract for insurance to provide coverage for all of the DHHR’s activities and responsibilities.”). Though the language of the statute is clear, the Supreme Court of Appeals of West Virginia inexplicably held in *Shaffer v. Stanley*, 593 S.E.2d 629, 631-42 (W. Va. 2003), that § 29-12-5(a) requires BRIM to procure insurance which provides coverage for “all of the [WV] DHHR’s activities and responsibilities.” Justice Davis, in a strong and emphatic dissent to the *Shaffer* opinion, chastised the majority for stating in a “sweeping and unprecedented manner” that BRIM has a statutory duty to provide coverage for “all” of WV DHHR’s activities and responsibilities. *Id.* at 642. In fact, Justice Davis is correct in characterizing the majority’s opinion as “profoundly misguided,” as § 29-12-5 unambiguously grants BRIM the discretion to determine the “amount and kind of coverage” provided to WV DHHR through the state’s liability insurance policy. *Id.* at 642; see also W. Va. CODE § 29-12-5(a)(1)(B)-(C) (delegating to BRIM the authority to determine the “amount” and “kind of coverage” provided to most of the state’s agencies—including WV DHHR—through the state’s liability insurance contract). Indeed, the majority declined to provide any rationale for its assertion that BRIM is required to insure WV DHHR against liability based on tort. Thus, *Shaffer* is vulnerable to being overruled, should it ever be challenged on appeal. See, e.g., *State v. Guthrie*, 461 S.E.2d 163, 185 n. 28 (W. Va. 1995) (“[A] precedent-creating opinion that contains no extrinsic analysis of an important issue is more vulnerable to being overruled.”).

V. IMMUNITY AND THE STATE

West Virginia has not yet addressed the extent of immunity that WV DHHR or CPS workers enjoy from liability in tort. The issue was raised in *West Virginia Department of Health and Human Resources v. Kaufman*,²¹³ where WV DHHR and two CPS workers attempted to assert that statutory immunity²¹⁴ and qualified immunity²¹⁵ warranted the dismissal of a negligence suit against WV DHHR. The *Kaufman* court did not address the substance of WV DHHR's immunity claims, opting instead to remand the case "for thorough evaluation of each of the immunities alleged by [WV] DHHR."²¹⁶ The following sections argue that when WV DHHR and its CPS workers assert the same immunities in future cases, a plaintiff-foster child will be able to overcome both statutory immunity and qualified immunity, and hold both WV DHHR and its CPS workers liable in tort for negligence that results in the child's abuse or neglect.

A. *Breaching the State's Statutory Immunity*

Section 49-6A-6 of the West Virginia Code ostensibly provides WV DHHR and its employees with complete immunity from civil liability, so long as they act in good faith.²¹⁷ However, a juxtaposition of two recent cases—*Shrader v. Holland*²¹⁸ and *Eggleston v. Department of Highways*²¹⁹—provides an illustration of the limits of statutory sovereign immunity under West Virginia common law. Both of these cases involved negligence claims against the Department of Highways ("DOH") based on the allegedly defective condition of state roads that DOH was responsible for maintaining.²²⁰ In both cases, DOH

²¹³ 506 S.E.2d 93 (W. Va. 1998).

²¹⁴ *Id.* at 95.

²¹⁵ *Id.* Additionally, WV DHHR asserted that it enjoyed "quasi-judicial immunity" from such claims. A discussion of quasi-judicial immunity is beyond the scope of this Note, however, as such immunity would provide immunity to officials who participate in judicial proceedings related to the decision of whether to adjudicate a child "abused" or "neglected." *See, e.g.,* *Moats v. Preston County Comm'n*, 521 S.E.2d 180, 186-87 (W. Va. 1999); *Riffe v. Armstrong*, 477 S.E.2d 535, 553 (W. Va. 1996). Quasi-judicial immunity would not apply to the negligent investigation of a foster home prior to placement, or to the negligent investigation of a report of abuse or neglect. *Id.* *See generally* *Shuman, supra* note 180, at 279-80 (note that *Shuman's* overview applies to employees of political subdivisions).

²¹⁶ *Kaufman*, 506 S.E.2d 93, 95 (W. Va. 1998).

²¹⁷ W. Va. CODE § 49-6A-6 (1977) ("Any person, official or institution participating in good faith in any act permitted or required by [the Child Welfare Act] shall be immune from any civil or criminal liability that otherwise might result by reason of such actions.").

²¹⁸ 414 S.E.2d 448 (W. Va. 1992).

²¹⁹ 429 S.E.2d 636 (W. Va. 1993).

²²⁰ *Shrader*, 414 S.E.2d at 449; *Eggleston*, 429 S.E.2d at 638.

claimed that the plain language of § 17-4-37²²¹ of the West Virginia Code provided complete immunity from suits based on the negligent maintenance of state roads.²²² In fact, § 17-4-37 actually does provide DOH with a broad grant of immunity from negligence claims, stating that “[t]he State shall not be made the defendant in any proceeding to recover damages because of the defective construction or condition of any state road or bridge.”²²³ The outcomes of these cases, however, turned not on extent of statutory immunity that § 17-4-37 granted DOH, but on the extent of the coverage provided to DOH in the state’s liability insurance policy.²²⁴

In *Shrader*, a plaintiff sued Sysco Corporation (“Sysco”) on behalf of her deceased husband, who was killed in a vehicle accident with a Sysco truck.²²⁵ Sysco filed a third party complaint against DOH.²²⁶ DOH, in turn, filed a motion to dismiss Sysco’s third party complaint on the grounds that § 17-4-37 provided it with statutory immunity from Sysco’s complaint.²²⁷ Surprisingly, the Supreme Court of Appeals of West Virginia barely addressed § 17-4-37’s grant of immunity, focusing instead on the terms of the policy provision, which did not provide coverage for claims related to the:

[o]wnership, maintenance, supervision, operation, use of [sic] control of streets . . . but this exclusion does not apply to bodily injury or property damages which arises out of and occurs during the performance or [sic] construction, street cleaning, and repair operations, or arises out of the maintenance or use of sidewalks which abut buildings covered by this policy.²²⁸

Applying the language of this policy provision to the case at hand, the Supreme Court of Appeals determined that the state’s liability insurance policy did not provide coverage that would compensate Sysco in the event Sysco’s third-party claim was successful.²²⁹ Thus, Sysco’s claim was dismissed.²³⁰ Though Sysco failed to breach the state’s shield of immunity, dicta in *Shrader* indicated that *even where the state has explicitly afforded itself immunity by*

²²¹ West Virginia Code § 17-4-37 (1933) provides that “[t]he State shall not be made the defendant in any proceeding to recover damages because of the defective construction or condition of any state road or bridge.”

²²² *Shrader*, 414 S.E.2d at 449; *Eggleston*, 429 S.E.2d at 638.

²²³ W. Va. CODE § 17-4-37 (1933).

²²⁴ *Shrader*, 414 S.E.2d at 450; *Eggleston*, 429 S.E.2d at 642.

²²⁵ *Shrader*, 414 S.E.2d at 449.

²²⁶ *Id.* (the court did not state what Sysco’s third party complaint alleged against the DOH).

²²⁷ *Id.*

²²⁸ *Id.* at 450.

²²⁹ *Id.*

²³⁰ *Id.*

statute, the immunity is abrogated so long as the conduct a plaintiff complains of is covered by the state's insurance policy.²³¹

Two years after issuing its opinion in *Shrader*, the court reinforced this point in *Eggleston v. Department of Highways*,²³² where Homer Eggleston asserted that the DOH negligently failed to post appropriate warning signs on an incomplete road.²³³ Mr. Eggleston claimed that he sustained serious injuries as a result of the DOH's negligence.²³⁴ The DOH moved for summary judgment, citing *Shrader* and asserting that it was immune from Eggleston's suit.²³⁵ The circuit court granted the DOH's motion, and Mr. Eggleston appealed.²³⁶

On appeal, the Supreme Court of Appeals of West Virginia's analysis of Mr. Eggleston's complaint mirrored the court's analysis in *Shrader*. Specifically, the court noted that Section 17-4-37 provides that the state will not be made a defendant "in any proceeding to recover damages because of the defective construction or condition of any state road"²³⁷ However, the court's true focus in *Eggleston*, much like the court's focus in *Shrader*,²³⁸ was on whether the conduct Mr. Eggleston complained of was covered by the state's liability insurance policy.²³⁹ The policy provision which governed the outcome in *Shrader* was identical to the policy provision at issue in *Eggleston*, providing coverage only for claims that "arise[s] out of and occur[s] during the performance or [sic] construction, street cleaning, and repair operations"²⁴⁰ Unlike Sysco's complaint in *Shrader*, Mr. Eggleston's complaint alleged that the road at issue was still under construction at the time of the accident in question.²⁴¹

²³¹ *Id.*; see also *Louck v. Isuzu Motors, Inc.*, 479 S.E.2d 911, 917 (W. Va. 1996) (holding that because the State's wrongful act liability policy did not provide coverage against alleged wrongful acts of Department of Highways in connection with accident, department could not be held liable under exception to sovereign immunity).

²³² 429 S.E.2d 636 (W. Va. 1994).

²³³ *Id.* at 637-38.

²³⁴ *Id.*

²³⁵ *Id.* at 637.

²³⁶ *Id.*

²³⁷ *Id.* at 638 (citing W. Va. CODE § 17-4-37). The court also noted that "W. Va. CODE 29-12-5(a) (1986), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy 'shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits.'" *Id.*

²³⁸ See *supra* notes 225-231 and accompanying text.

²³⁹ *Eggleston*, 429 SE.2d at 638-39 ("Our focus is . . . whether the insurance policy at issue provides coverage for the type of accident that occurred in this case.").

²⁴⁰ *Id.*

²⁴¹ *Id.* at 640.

Specifically, Mr. Eggleston stated that because DOH planned and intended²⁴² to post appropriate warning signs on the portion of the road where Eggleston's accident occurred, construction was not yet complete.²⁴³ Thus, argued Mr. Eggleston, his claim fell under the "performance of construction"²⁴⁴ clause in the governing provision of the state's liability insurance policy.²⁴⁵

Following an analysis of the terms "construction"²⁴⁶ and "performance,"²⁴⁷ the court ruled in favor of Mr. Eggleston, and reversed the circuit court's grant of summary judgment to the DOH. The court reasoned that while the majority of the work on the road in question had been completed, at least some work—specifically, the installation of the warning sign that Mr. Eggleston based his pleading on—remained to be done.²⁴⁸ Thus, the court concluded that Mr. Eggleston's suit fell within the purview of the "performance of construction" exception in the state's liability insurance policy, and Mr. Eggleston's claim was allowed to proceed in spite of the broad grant of immunity afforded to DOH in section 17-4-37.²⁴⁹

In short, *Eggleston* and *Shrader* illustrate the limits of statutory immunity in West Virginia. Comparing the two cases reveals that when the state's liability insurance policy provides coverage for the negligence that causes an individual's injuries, the negligence is actionable in tort even where a statute explicitly provides immunity to the negligent actor. Because the state's current liability insurance policy currently provides coverage for WV DHHR and CPS worker negligence,²⁵⁰ a plaintiff-foster child should have little difficulty overcoming the statutory immunity granted to WV DHHR and CPS workers in Section 49-6A-6 of the West Virginia Code.

²⁴² The DOH stipulated to Eggleston's accusation that the project plan for the road at issue called for a large warning sign to be posted on the hill where Eggleston's accident took place. *Id.* at 642.

²⁴³ *Id.* at 641.

²⁴⁴ While the policy provision at issue originally read "performance or construction", the *Eggleston* court determined that the provision was meant to read "performance of construction." *Id.* at 640.

²⁴⁵ *Id.* at 641.

²⁴⁶ *Id.* at 640 (concluding that "construction" does not end "before the thing constructed is complete.").

²⁴⁷ *Id.* at 641 (citing THE OXFORD ENGLISH DICTIONARY 689 (1970)) (citing with approval *The Oxford English Dictionary's* definition of the term, which reads "accomplishment, execution, carrying out, working out of anything ordered or undertaken; the doing of any action or work.").

²⁴⁸ *Id.* at 642 ("We cannot say that there was complete performance of construction because there was a portion of the work left to be done according to the project plans.").

²⁴⁹ *Id.* at 641.

²⁵⁰ See *supra*, note 206-209 and accompanying text.

B. *Overcoming the State's Qualified Immunity*

Under West Virginia common law, “qualified immunity” insulates public officials and the agencies they work for—such as CPS workers and WV DHHR—from liability that arises from “discretionary” duties.²⁵¹ A public official acts in a discretionary manner when he or she enjoys latitude in deciding whether and how to carry out a particular duty.²⁵² Conversely, the state’s common law jurisprudence does not provide immunity for liability arising from “ministerial” acts.²⁵³ A duty is deemed ministerial when it is “absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion.”²⁵⁴

Thus, a plaintiff-foster child seeking to hold WV DHHR or a CPS worker legally liable for negligence that proximately causes his or her abuse or neglect must prove that the CPS worker either negligently performed or failed to perform a *ministerial* function, and that this negligence proximately caused his or her injuries.²⁵⁵ If, on the other hand, the CPS worker can prove that the negligent act or omission that gave rise to the plaintiff-foster child’s claim was “discretionary” in nature, then qualified immunity might apply²⁵⁶ and bar the claim.²⁵⁷

Unfortunately, the extent of the qualified immunity that West Virginia’s public officials enjoy is ill-defined. So too are the precise definitions of what constitutes a “ministerial” and a “discretionary” act.²⁵⁸ The contours of “discretionary” act-based qualified immunity were partially illustrated in *Clark v. Dunn*,²⁵⁹ where a plaintiff sought recovery for injuries allegedly caused by a

²⁵¹ *Parkulo v. Board of Prob. and Parole*, 483 S.E.2d 507, 524 (W. Va. 1998); *Clark v. Dunn*, 465 S.E.2d 374, 379 (W. Va. 1995).

²⁵² *State v. Chase Sec., Inc.*, 424 S.E.2d 591, 597 (W. Va. 1992).

A public official may be found personally liable for his or her official acts if it is shown that the official, in the exercise of discretionary powers, has injured a party through the violation of clearly established statutory or constitutional rights of which a reasonable person would have known. The official may escape liability by showing that the statutory or constitutional right was not so clearly established that a reasonable official would have been aware of it.

Id.

²⁵³ *Clark*, 465 S.E.2d at 379 (W. Va. 1995) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

²⁵⁴ *Chase*, 424 S.E.2d at 598-99 (1992) (providing the quoted definition, but noting that it is sometimes “virtually impossible” to distinguish between ministerial and discretionary acts).

²⁵⁵ See *supra* note 251 and accompanying text.

²⁵⁶ See *supra* notes 253-254 and accompanying text.

²⁵⁷ See *supra* note 252 and accompanying text.

²⁵⁸ See *supra* note 254.

²⁵⁹ 465 S.E.2d 374.

Department of Natural Resources (“DNR”) officer’s negligence. While the facts of this case are not entirely clear, the record may be summarized as follows.

The defendant, DNR Officer Dunn, suspected that Dale Clark was poaching deer on state property.²⁶⁰ Officer Dunn confronted Clark and another suspected poacher, Eugene Bailey, and ordered them to unload their rifles and set them on the ground.²⁶¹ Clark complied with Officer Dunn’s order.²⁶² Bailey, however, attempted to retrieve his hunting license while still holding his weapon.²⁶³ Officer Dunn drew his pistol and held it on Bailey.²⁶⁴ At some point Officer Dunn’s weapon accidentally discharged, wounding Clark in the leg.²⁶⁵ Clark filed suit against Officer Dunn and the DNR, alleging that Officer Dunn was negligent throughout the confrontation and that Dunn’s negligence proximately caused his injury.²⁶⁶ Officer Dunn successfully argued that he enjoyed qualified immunity from such a suit and thus could not, as a matter of law, be held liable for any alleged negligence.²⁶⁷ In affirming the lower court’s dismissal of Clark’s claim, the Supreme Court of Appeals of West Virginia stated that when a public officer is either authorized or required to make a decision and to perform acts in the making of that decision, “he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.”²⁶⁸

When faced with the issue, it is possible that the Supreme Court of Appeals of West Virginia will find that a CPS worker enjoys the same qualified immunity in performing his or her duties that Officer Dunn enjoyed in executing

²⁶⁰ *Id.* at 376.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 376. The qualified immunity that Officer Dunn referred to in his motion for summary judgment is a common law creation, adopted in West Virginia in *State v. Chase Securities*, 424 S.E.2d 591 (W. Va. 1992). Here, the Supreme Court of Appeals held that public officials—such as Officer Dunn—are immune from liability arising out of acts committed within the scope of their employment unless the act or acts violate “clearly established laws of which a reasonable official would have known.” *Id.* at 600. The rationale underlying this rule is that a public official should not be hindered in the execution of their duties, so long as the public official is not blatantly, knowingly violating the law in executing such duties. The point was best summarized by the United States Supreme Court as follows: “A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probably cause, and being mulcted in damages if he does.” *Clark*, 465 S.E.2d at 379 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). The court noted that because Officer Dunn had not violated a clearly established law in his confrontation with Clark and Bailey, he could not be held liable for the mere negligence that Clark asserted. *Id.*

²⁶⁸ *Clark*, 465 S.E.2d at 380.

the arrest of Clark and Bailey. Such a ruling is not a foregone conclusion, though. In fact, a majority of the jurisdictions that have addressed the issue have concluded that at least some of the duties that CPS workers perform on behalf of foster children—including the duty to investigate a foster home prior to licensing the home,²⁶⁹ the duty to investigate reports of abuse inflicted on a foster child by his foster parents,²⁷⁰ the duty to inspect and supervise foster parents,²⁷¹ and the duty to execute any duty related to foster care that is proscribed by statute or regulation²⁷²—are ministerial, rather than discretionary, in nature. A similar ruling by the Supreme Court of Appeals of West Virginia would be rational, as CPS workers have “absolute, certain, and imperative”²⁷³ statutory²⁷⁴ and regulatory²⁷⁵ mandates to perform each of these tasks.

VI. RECOMMENDED COMMON LAW AND STATUTORY REFORMS

Parts III through V of this Note traced the path that a plaintiff-foster child must follow in order to hold WV DHHR and its CPS workers liable for negligence that results in his or her abuse or neglect. While the plaintiff-foster child could succeed in such an action, he or she would have to engage in lengthy, costly pre-trial litigation prior to arguing his or her claim on the merits. The remaining parts of this Note urge the passage of legislation and argue in favor of common law reforms that would expedite the pre-trial litigation process in cases involving the abuse or neglect of a foster child in West Virginia.

A. *Arguments Against Liability*

Proponents of granting child protective services agencies—such as WV DHHR—immunity from suits based on negligence argue that the imposition of tort liability in such circumstances would hinder “effective governmental decision making.”²⁷⁶ Specifically, commentators and courts have argued that the

²⁶⁹ Koepp v. County of York, 251 N.W.2d 866, 869-71 (Neb. 1977) (adopting the rule that “the discretionary-function exemption extends only to the basic policy decisions and not to ministerial acts arising therefrom;” under this narrow definition of “discretionary function” a child protective services agency was held liable in tort for damages that resulted from its negligent investigation of abuse that took place in a foster home, as well as its negligent supervision of allegedly abusive foster parents).

²⁷⁰ *Id.*

²⁷¹ Elton v. County of Orange, 84 Cal. Rptr. 27, 30-31 (Cal. Dist. Ct. App. 1970).

²⁷² Stanley v. State Indus., Inc., 883 P.2d 793, 811-12 (Mont. 1993).

²⁷³ See *supra* note 254.

²⁷⁴ See *supra* parts II and III.

²⁷⁵ See *supra* part II.

²⁷⁶ See, e.g., Abbott, *supra* note 26, at 423-26; Dep’t of Health & Rehabilitative Servs. v. Yamuni, 529 So.2d 258, 265-66 (Fla.1988) (Overton, J., dissenting); Williams v. State, 376 N.W.2d 117, 119 (Mich. Ct. App. 1985) (citing Elliott v. Dep’t of Soc. Servs., 333 N.W.2d 603 (Mich. Ct.

prospect of agency liability would encourage child welfare agencies to focus on avoiding such liability rather than focusing on the best interests of the abused and neglected children they are tasked with protecting.²⁷⁷ Though counterintuitive on its face, this argument is not without merit. In some circumstances, the prospect of liability might encourage a child welfare agency to act in an overly aggressive manner (i.e., by removing a foster child from a safe, suitable foster home because of a false allegation of abuse or neglect). Further, aspiring social workers may avoid seeking employment in jurisdictions where personal liability is a concern;²⁷⁸ this argument is especially relevant in West Virginia, where low pay, long hours, and meager benefits have already led to CPS personnel shortfalls of “crisis proportions.”²⁷⁹ Each of these arguments raise valid concerns, but these concerns can be minimized through carefully calibrated legislation and common law reform, and are, at any rate, outweighed by the positive effects of imposing liability for negligence that proximately causes the abuse or neglect of a foster child.

B. *Arguments for Liability*

Foster children are unique plaintiffs. Much like the state’s prisoners they are “no one’s constituents and wield little, if any, political clout,” and are therefore in need of the most vigilant protection from the courts.²⁸⁰ The streamlining of the pre-trial litigation in the plaintiff-foster child’s favor will serve the goals of providing justice to a plaintiff who would otherwise not have the means to seek redress for his or her injuries, and—perhaps more importantly—deter such negligence in the future. When threatened with liability WV DHHR will likely become more creative and energetic in searching for solutions to the problems identified in Parts I and II of this Note.²⁸¹

At a minimum, if immunity is abrogated and liability is imposed on WV DHHR, the agency will be given an incentive “to ensure thorough training, supervision and enforcement of its guidelines—that its caseworkers thoroughly

App.1983)); Timothy J. Courville, *Government Liability for Failure to Prevent Child Abuse: A Rationale for Absolute Immunity*, 27 B.C. L. REV. 949, 980 (1986).

²⁷⁷ *Id.*

²⁷⁸ *In re Brandon H.S.*, 629 S.E.2d 783, 790 (W. Va. 2006) (referring to WV DHHR staffing levels in the eastern panhandle as having reached “crisis proportions”).

²⁷⁹ *In re Brandon Lee H.S.*, No. 32872, Supreme Court of Appeals of W. Va. (per curiam, Jan. 2006).

²⁸⁰ *Riley v. Rudloff*, 575 S.E.2d 377, 389 (W. Va. 2002) (quoting *Ray v. McCoy*, 321 S.E.2d 90, 93 (W. Va. 1984)); see also Christine M. Dine, *Protecting Those Who Cannot Protect Themselves: State Liability for Violation of Foster Children’s Right to Safety*, 38 CAL. W. L. REV. 507 (2002).

²⁸¹ See generally Dine, *supra* note 280, at 523; Abbott, *supra* note 26, at 423-26.

investigate reports of abuse and remain alert to signs that a child should be placed in protective custody.”²⁸²

A final, equally compelling justification for the imposition of liability in such circumstances is that civil liability will provide compensation to the victims of WV DHHR’s negligence. The compensation that the plaintiff-victim receives would also set a precedent in which “society, rather than the injured individual . . . bear[s] the cost of the state’s negligence.”²⁸³ In fact, the fiscal cost to society of imposing liability on WV DHHR would prove minimal, as the state’s liability insurance policy would have to cover any damages stemming from WV DHHR’s or a CPS worker’s negligence in order for a claim to proceed.²⁸⁴

The remaining portion of this Note proposes recommendations which, if implemented, would better serve the mutually supporting goals of providing justice to foster children who have been abused or neglected as a result of a social worker’s negligent acts or omissions, and deterring such negligence in the future.

C. Common Law Reforms

1. Establish a Statutory Duty of Protection

The Supreme Court of Appeals of West Virginia should—at its first opportunity—adopt and impose upon WV DHHR and its employees a duty to act with reasonable care²⁸⁵ when conducting investigations of child abuse and neglect. This standard has been imposed on the West Virginia Department of Corrections in executing its statutory duty to protect the state’s prisoners from violence.²⁸⁶ The state’s foster children are entitled to at least as much protection as the state’s prisoners—yet no standard has been imposed on WV DHHR in executing its statutory duty to protect the state’s foster children from harm. Though commentators have argued that the imposition of such liability may hinder effective decision-making on WV DHHR’s part, the adoption of the widely-used “reasonable care” standard in this area would render such concerns largely

²⁸² Abbott, *supra* note 26, at 426-27.

²⁸³ White v. Beasley, 552 N.W.2d 1, 22 n.51 (Mich. 1996).

²⁸⁴ See *supra* part IV. Additionally, any financial “losses” that result from the imposition of liability in this area would probably be offset by savings in other areas. One recent national study estimated that forty percent of foster children end up on welfare or in prison. Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L & SOC. CHANGE 1, 8 (1999). The same study estimated that foster children are sixty-seven times more likely to be arrested than children who did not grow up in foster care. *Id.*

²⁸⁵ See *supra* notes 109–121 and accompanying text.

²⁸⁶ See *supra* notes 109–121 and accompanying text.

moot, as any diligent, good faith investigation of child abuse or neglect would likely meet the “reasonable care” standard.²⁸⁷

2. Deem CPS Investigations Ministerial

A majority of the jurisdictions which have addressed the issue have deemed CPS investigations of child abuse and neglect “ministerial” in nature. The Supreme Court of Appeals of West Virginia should, at its first opportunity, follow the majority’s lead and do the same. In explicitly deeming CPS investigations “ministerial,” the court would eliminate the possibility that qualified immunity might prevent a plaintiff-foster child (or any other child) from holding a CPS worker legally liable for conducting a negligent investigation. The imposition of such liability “would encourage state agency workers to be more attentive in their choice of foster homes and subsequent supervision of foster care placements.”²⁸⁸ It would, in short, deter negligent investigations.

D. Statutory Reform

1. BRIM Requirements

The state’s *current* liability insurance policy almost certainly covers the negligent acts and omissions of WV DHHR and its CPS workers. However, BRIM negotiates a new liability insurance contract annually, and has the discretion to discontinue or adjust the scope of the coverage provided to WV DHHR in any given year. Should BRIM choose to scale back the coverage provided to WV DHHR and its employees, a plaintiff-foster child’s ability to hold WV DHHR and its CPS workers liable for negligence that results in his or her abuse or neglect would, under *Pittsburgh Elevator*, be jeopardized.

As detailed in part IV, the existence of liability insurance coverage allows plaintiffs to overcome the state’s sovereign immunity to suit. In contrast, in the absence of such coverage, a plaintiff may not hold the state legally liable in tort for monetary damages.²⁸⁹ Once again, a comparison between the rights afforded to the state’s prisoners and the state’s foster children reveals that foster children come up short. Section 29-12-5(a) requires BRIM to procure liability insurance that covers all of the Department of Correction’s negligent acts,²⁹⁰ in

²⁸⁷ See, e.g., *Lesley v. Dept. of Soc. and Health Servs.*, 921 P.2d 1066 (Wash. 1996) (finding that a statute imposes a duty to investigate on social workers, and a duty to perform such investigations with reasonable care exists, and that a breach of the reasonable care standard can give rise to a cause of action in tort).

²⁸⁸ See Dine, *supra* note 280, at 523.

²⁸⁹ See *supra* notes 203–205 and accompanying text.

²⁹⁰ W. Va. CODE § 29-12-5(a) provides:

In accordance with the provisions of this article, the state board of risk and insurance management shall provide appropriate professional or other liability

contrast, BRIM may discontinue WV DHHR's liability insurance coverage at any time.²⁹¹ The incongruity between the rights of the state's foster children and the state's prisoners to hold the state accountable for injuries caused by the state's negligence is inexcusable, and should be rectified by the Legislature as soon as possible.

Additionally, the Legislature should require BRIM to include in the state's liability insurance policy a provision that explicitly and unambiguously waives the state's insurer's right to assert statutory or qualified immunity when WV DHHR or its employees are named as defendants in a negligence suit. Such a provision would relieve a plaintiff-foster child of the burden of having to prove that these immunities are inapplicable, and would improve the child's odds of having his or her case adjudicated on the merits, rather than dismissed on a technicality.

VI. CONCLUSION

WV DHHR's failures are appalling and well-documented, yet the agency's officers and employees are rarely held accountable. The state's foster children are especially likely to pay for WV DHHR's mistakes, as numerous studies have shown that foster children are at far higher risk of physical abuse, sexual abuse, and neglect than children in the general population.

The best way to protect the state's foster children from such harm is to hold WV DHHR legally liable for its mistakes. WV DHHR's employees should be held to the widely-used "reasonable care" standard in conducting pre-placement foster home investigations, in periodically inspecting and supervising foster parents, and investigating reports of abuse and neglect within foster homes. Further, the Supreme Court of Appeals of West Virginia should, at its first opportunity, deem CPS investigations "ministerial" so that any challenge to a plaintiff-foster child's lawsuit based on qualified immunity fails.

In order to guarantee that a plaintiff-foster child can litigate a breach of the reasonable care standard on the merits, the Legislature should impose on the state Bureau of Risk and Insurance Management a statutory duty to procure liability insurance coverage for WV DHHR.

Taking these steps will not scare WV DHHR into complying with its statutory and common law duties to protect the state's foster children. Indeed, most of the agency's employees already undoubtedly do their best to protect the

insurance for . . . employees and officers of the state department of corrections. Said insurance shall cover any claim, demand, action, suit or judgment by reason of alleged negligence or other acts resulting in bodily injury or property damage to any person within or without any . . . correctional institution if, at the time of the alleged injury, the . . . officer of the department of corrections was acting in the discharge of his duties, within the scope of his office, position or employment, under the direction of the . . . commissioner of corrections or in an official capacity as . . . commissioner of corrections.

²⁹¹ See *supra* notes 211-212 and accompanying text.

children they are responsible for—and do so with extremely limited resources and low pay. The imposition of liability, however, will spur WV DHHR to transfer or terminate those CPS workers whose performance fails to meet the “reasonable care” standard. The state’s most vulnerable citizens will, in turn, be better protected from abuse and neglect at the hands of the foster parents that the state selected on their behalf.

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