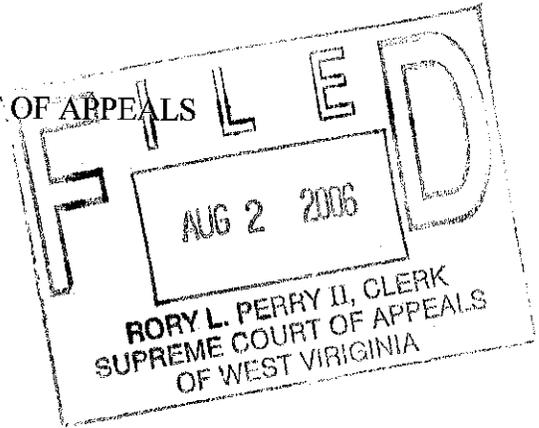


WEST VIRGINIA SUPREME COURT OF APPEALS

No. 33102



JOHN BARBINA, individually  
and as parent of ANISSA BARBINA,  
an infant,

Appellants,

vs.

CHARLES CURRY,  
KELLEY A. CURRY,  
THE WEST VIRGINIA DEPARTMENT  
OF HEALTH AND HUMAN RESOURCES,  
LORI GLOVER, CLARK SINCLAIR, as  
Sheriff of Taylor County, West Virginia, and  
VALLEY COMPREHENSIVE COMMUNITY  
MENTAL HEALTH CENTER, INC.,

Respondents.

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APPEAL FROM  
THE CIRCUIT COURT OF  
TAYLOR COUNTY, WEST VIRGINIA

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BRIEF OF APPELLANTS

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THE KIND OF PROCEEDING AND NATURE OF THE  
RULING IN THE LOWER TRIBUNAL

This is an Appeal of an Order entered on the 20<sup>th</sup> day of September, 2005, by the Circuit Court of Taylor County, West Virginia, that awarding summary judgments to Lori Glover, Clark Sinclair, the now former Sheriff of Taylor County, West Virginia, the West Virginia Department of Health and Human Resources (hereinafter referred to as "the WVDHHR"), and Valley Comprehensive Community Mental Health Center, Inc., (hereinafter referred to as "Valley").

STATEMENTS OF FACTS

Anissa Barbina is the infant daughter of John Barbina and Kelly A. Curry, who are divorced from one another. Kelly A. Curry had custody of Anissa Barbina from the time of their separation until a point in the unfolding of the facts of this case. Charles Curry, who was 63 years of age on August 28, 2001, is the maternal grandfather of Anissa Barbina.

In the warm weather of 1998, when Anissa Barbina, who was born June 21, 1988, was 9-10 years of age, and while Anissa Barbina was alone with Charles Curry, Charles Curry willfully, wantonly, or intentionally sexually assaulted and/or abused Anissa Barbina. On or about September 17, 1998, Anissa Barbina advised Helen Lough, who was then employed by Valley Healthcare System, which is a trade name of Valley, during a therapy session, that Anissa Barbina had been sexually assaulted and/or abused by Charles Curry. On or about September 17, 1998, Kelly A. Curry was advised by Helen Lough at Valley that Anissa Barbina had been sexually assaulted and/or abused by Charles Curry and that Helen Lough was making a referral to Child Protective Services of the WVDHHR as required by law.

On or about September 18, 1998, Helen Lough and/or other persons employed by Valley

either made or negligently failed to make a referral to Child Protective Services of the WVDHHR concerning Anissa Barbina's disclosures on the prior day. On or about September 18, 1998, the WVDHHR either did not receive a referral from Valley that Anissa Barbina had been sexually assaulted and/or abused by Charles Curry or negligently failed to document and/or investigate a referral from Valley concerning Anissa Barbina's disclosures. Deposition testimony of Valley employees was that the referral was made and deposition testimony of the WVDHHR employees was that the referral was not made. Neither Valley, nor the WVDHHR, then reported the sexual abuse to the police.

From September 17, 1998, until October of 1998, Anissa Barbina had two therapy sessions with Helen Lough at Valley. During that time Kelly A. Curry took Anissa Barbina for dinner with Charles Curry. Kelly A. Curry, through February of 2000, instead of protecting Anissa Barbina, neglected Anissa Barbina by failing to continue psychological treatment for Anissa Barbina as long as was needed by refusing repeated requests of Helen Lough that Anissa Barbina be maintained in counseling. Kelly A. Curry stopped future counseling sessions for Anissa Barbina at Valley or any other healthcare providers who could competently deal with the sexual abuse and/or sexual assault issues.

On Thanksgiving Day of 1999, Anissa Barbina was having Thanksgiving with her mother and maternal relatives, including Charles Curry. Charles Curry caught Anissa Barbina and her brother in a bedroom, pulled Anissa Barbina from beneath the bed where she was hiding from him, and "French kissed" her.

On Sunday, February 6, 2000, while returning home from a weekend visit with John Barbina in Lost Creek, West Virginia, Anissa Barbina first revealed to John Barbina the essence

that Charles Curry sexually assaulted and/or abused her. John Barbina did not previously know what had happened to Anissa Barbina. John Barbina went to the WVDHHR on Monday, February 7, 2000, and made a CPS referral concerning what Anissa Barbina had reported to him. The WVDHHR took the position through Lori Glover's deposition that they did not have to do anything, since Charles Curry did not live in the same residence as Anissa Barbina. However, the WVDHHR would give the CPS report the same status as an out of state or out of county referral by doing a "courtesy interview." The deposed WVDHHR employees testified that they do not investigate out of home perpetrator situations (See Page 7, line 22 to Page 9, line 17 of Exhibit 1 attached hereto) .

The WVDHHR referred the case to Lori Glover to do a "courtesy interview." Lori Glover commenced the investigation and obtained Anissa Barbina's statement and the statement of her cousin, a daughter of her maternal aunt.

Bonnie Nelson, who was the CPS intake worker at the time Helen Lough allegedly made her initial referral, testified at her deposition that WVDHHR made a referral to the Taylor County Sheriff's Department and the Taylor County Prosecutor on February 8, 2000. The Sheriff and Deputies of the Taylor County Sheriff's Department and the Taylor County Prosecutor testified at their depositions that they had not received the CPS referral from the WVDHHR.

On or about February 14, 2000, John Barbina went to the Taylor County Courthouse and told then Deputy (now Sheriff) Beltner what his daughter told him. Then Deputy Beltner referred him to the Taylor County Magistrate Court for help. There, John Barbina obtained a restraining order against Kelly A. Curry.

Lori Glover showed up on February 22, 2000, the day of the restraining order hearing at

the Taylor County Magistrate Court. Lori Glover persuaded the parties to use a child protective order, which they did, and gave John Barbina and his domestic lawyer assurances that

it was supposed to protect Anissa Barbina from Charles Curry, it was to provide Anissa Barbina with counseling, Child Protective Services of the West Virginia Department of Health and Human Resources would do an investigation, if Kelly A. Curry was found to be neglectful, Child Protective Services of the West Virginia Department of Health and Human Resources would remove Anissa Barbina from the house of Kelly A. Curry, Child Protective Services of the West Virginia Department of Health and Human Resources would file a copy of their report with the West Virginia Department of Public Safety, a.k.a West Virginia State Police, and Child Protective Services of the West Virginia Department of Health and Human Resources would keep John Barbina and Heidi Barbina, the spouse of John Barbina, advised of the status of the investigation (John Barbina affidavit of 6<sup>th</sup> day of April, 2005)

John Barbina also petitioned for a modification of custody in the divorce action that had taken place in Taylor County, West Virginia.

Lori Glover and/or Sharon Corley, her CPS supervisor, also testified at their depositions that in 2000 they brought Anissa Barbina's case to the attention of the investigatory multi-disciplinary team in Taylor County, West Virginia, that included a representative from the Taylor County Sheriff's Department and the Taylor County Prosecutor. John Barbina's domestic lawyer was communicating with Lori Glover and pushing for action and/or services. Lori Glover testified at her deposition that the Taylor County Sheriff's Department and the Taylor County Prosecutor were not pursuing the criminal investigation. Lori Glover and/or Sharon Corley testified at their depositions that Anissa Barbina's case and three others slipped through the cracks.

Not knowing Anissa Barbina's case had slipped through the cracks, John Barbina became frustrated with the delays and reported the case to Sgt. Paul Ferguson with the West Virginia

State Police. Sgt. Paul Ferguson interviewed Charles Curry who denied any wrong doing, except Charles Curry admitted "French kissing" Anissa Barbina and her brother. Sgt. Paul Ferguson had Charles Curry agree to a polygraph. Dallas Wolfe, who is a member of the West Virginia State Police, was to administer the polygraph. Before the polygraph was administered and after signing a Miranda waiver, Dallas Wolfe testified at his deposition that Charles Curry admitted to him the following events:

a. While babysitting Anissa Barbina for Kelly A. Curry, Charles Curry had touched the vagina of Anissa Barbina, while explaining and touching the abdominal muscles while she was using an abdominal developer; and

b. They retired to a couch and were laying side by side when his penis accidentally fell out of his shorts against Anissa Barbina when he was moving over top of her.

Sgt. Paul Ferguson testified at his deposition that Charles Curry made the same admissions to him that Dallas Wolfe testified Charles Curry made. Jarrod DeVault, Charles Curry's lawyer, was called out to the barracks by the state police and Jarrod DeVault testified that in front of state police, that Charles Curry made the same statements.

Charles Curry thereafter threatened to commit suicide to family members. A family member(s) contacted Charles Curry's niece who worked at Chestnut Ridge Hospital, a psychiatric hospital in Morgantown, West Virginia. She arranged his admission, which was for three days. According to the deposition of Dr. Ryan Finkenbine and Dr. Shahnoor Kahn, both of whom were doctors that administered treatment to Charles Curry at Chestnut Ridge Hospital, Charles Curry admitted to Dr. Shahnoor Kahn that he touched the "pubis" or pubic area or private area of his granddaughter.

Charles Curry was indicted in 2001 for two counts of sexual abuse. In August of 2001, he completed a 75-question statement in support of his guilty plea. At his plea hearing on August 28, 2001, he testified that he had inappropriately touched the victim (i.e., Anissa Barbina) on two separate occasions, one was a kiss and one touching her by the belt by her waist line. A pre-sentence investigation was ordered. During the pre-sentence investigation Charles Curry denied doing anything to Anissa Barbina and said he had been pressured into entering the guilty plea. At his sentencing hearing, Judge Alan Moats questioned Charles Curry as to the statements and Charles Curry admitted he had touched her once on the pubic area and had her touch him on the penis.

Charles Curry, at his deposition in this case, testified that he had not done anything wrong to Anissa Barbina. In spite of his statements to Sgt. Paul Ferguson, Dallas Wolfe, Jarrod DeVault, Dr. Shahnour Khan, and Judge Moats, Charles Curry testified at his deposition that he did not do it.

John Barbina, individually and on behalf of Anissa Barbina, initially sued Charles Curry, Kelley A. Curry, the West Virginia Department of Health and Human Resources, and Lori Glover. As depositions were taken and parties implicated other parties, the suit was amended to add Clark Sinclair, as Sheriff of Taylor County, West Virginia, and Valley Comprehensive Community Mental Health Center, Inc.

Plaintiff moved to amend to add Bonnie Nelson and Sharon Corley, who are employees of the WVDHHR as party plaintiffs, which was denied by an order entered April 17, 2002. Judge Moats granted Lori Glover a summary judgment on May 13, 2003, basically on the basis that since the WVDHHR was a party that would involve their policy of insurance that having

additional individual defendants was not necessary, since respondeat superior would reach the WVDHHR's policy, as the WVDHHR admitted she was acting within the scope of her authority.

Kelley A. Curry filed bankruptcy and discharged the plaintiffs. Not believing that adequate proof existed that Kelley A. Curry's actions were wilful and malicious towards Anissa Barbina under 11 U.S.C. § 523(a)(6), the plaintiffs' bankruptcy adviser did not file an adversary proceeding.

Clark Sinclair, the now former Sheriff of Taylor County, West Virginia, moved for a summary judgment. Judge Moats granted such on the theory that there was no special relationship and no damages because any fear Anissa Barbina would have that Charles Curry would strike again from September 17, 1998, to the time of his arrest and/or imprisonment would not be recoverable because there was no physical injury.

Plaintiff moved to amend to assert a claim against the WVDHHR and Valley for failing to report the incident to the police. At or about this time the case was stayed because this Court had agreed to review the certified question of Judge Keeley in *Arbaugh vs. Board of Education*, 214 W.Va. 677, 591 S.E.2d 235 (W.Va. 2003). Plaintiffs were granted permission to file an amicus brief in that case by this Court.

After *Arbaugh vs. Board of Education*, 214 W.Va. 677, 591 S.E.2d 235 (W.Va. 2003), was decided on December 3, 2003, plaintiffs moved to amend the pleadings, Valley and the WVDHHR moved for summary judgments. Judge Moats granted complete summary judgments to Valley and the WVDHHR and the Sheriff of Taylor County. Plaintiffs later moved to have all summary judgment orders treated as a Rule 54 appeal, which was granted by an order entered September 20, 2005.

In October of 2005 (before the bankruptcy Act's amendments went into effect) Charles Curry filed a Chapter 7 bankruptcy with a notice filed with the Clerk on October 17, 2005. He named plaintiffs and the undersigned as creditors that he was seeking a discharge from. Plaintiffs and the undersigned filed an adversary proceeding claiming the debt was non-dischargeable under 11 U.S.C. § 523(a)(6). The Bankruptcy Court said to submit interrogatories to the jury and the answer would determine whether or not the debts were dischargeable.

THE ASSIGNMENTS OF ERROR RELIED UPON  
ON APPEAL AND THE MANNER IN WHICH THEY  
WERE DECIDED IN LOWER TRIBUNAL

1. The trial court erred in granting Clark Sinclair, the now former Sheriff of Taylor County, West Virginia, a summary judgment;
2. The trial court erred in granting the WVDHHR a summary judgment; and
3. The trial court erred in granting Valley a summary judgment

Each of these rulings was adverse to the petitioners. Petitioners objected to the trial court's rulings.

POINTS AND AUTHORITIES RELIED UPON

STATUTES:

West Virginia Code § 49-5D-2

CASES:

*Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (W.Va. 1963)

*Arbaugh vs. Board of Education*, 214 W.Va. 677, 591 S.E.2d 235 (W.Va. 2003)

*Banfi v. American Hosp. for Rehabilitation*, 207 W.Va. 135, 529 S.E.2d 600 (W.Va.

2000)

*Courtney v. Courtney*, 186 W.Va. 597, 413 S.E.2d 418 (W.Va. 1991)

*Johnson v. West Virginia University Hospitals, Inc.*, 186 W.Va. 648, 413 S.E.2d 889  
(W.Va. 1991)

*Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (W.Va. 1996)

*Minshall v. Health Care & Retirement Corp. of America*, 208 W.Va. 4, 537 S.E.2d 320,  
322-323 (W.Va. 2000)

*Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 674, 425 S.E.2d 629 (1992)

*State v. Brandon B.*, 624 S.E.2d 761 (W.Va. 2005)

*Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (W.Va. 1989)

#### SECONDARY:

<http://www.secasa.com.au/index.php/family/11/46>

Newsweek on September 5, 2005, at page 36, "The Things They Carry"

#### DISCUSSION OF LAW

##### Opening

The standard of review of a circuit court's entry of summary judgment is de novo. Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). We have held that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Further,

[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. pt. 4, *Painter*, 192 W.Va. 189, 451 S.E.2d 755. Finally, "[a]lthough our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl. pt. 3, *Fayette County Nat'l Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 [208 W.Va. 7] (1997)

*Minshall v. Health Care & Retirement Corp. of America*, 208 W.Va. 4, 537 S.E.2d 320, 322-323 (W.Va. 2000).

*Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (W.Va. 1963), held in applicable part as follows:

2. On a motion for summary judgment all papers of record and all matters submitted by both parties should be considered by the court.
3. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.
4. If there is no genuine issue as to any material fact summary judgment should be granted but such judgment must be denied if there is a genuine issue as to a material fact.
5. The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined.
6. A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.

1. THE TRIAL COURT ERRED IN GRANTING CLARK SINCLAIR, THE NOW FORMER SHERIFF OF TAYLOR COUNTY, WEST VIRGINIA, A SUMMARY JUDGMENT

*Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (W.Va. 1989), held as follows:

1. "If a special relationship exists between a local governmental entity and an individual which gives rise to a duty to such individual, and the duty is breached causing injuries, then a suit may be maintained against such entity." Syl. pt. 3, *Benson v. Kutsch*, 181 W.Va. 1, 380 S.E.2d 36 (1989).

2. To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local 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 local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

In paragraph 26 of the amended complaint mailed the Sheriff's counsel on May 22, 2002, which Sheriff's counsel answered and in paragraph 26 of the second amended complaint it was alleged as follows:

26. A special relationship existed between the plaintiff and the West Virginia Department of Health and Human Resources and/or Clark Sinclair, Sheriff of Taylor County, West Virginia, which gives rise to a duty to Anissa Barbina, which duty was to protect Anissa Barbina, to obtain her healthcare for the sexual contact, and to keep plaintiffs advised as to the progress of the investigation and the duty was breached causing injuries because Anissa Barbina was kept at high risk of further sexual assault and/or abuse by Charles Curry, Anissa Barbina was kept with a neglectful person, Anissa Barbina was kept from receiving sufficient health care treatment, Anissa Barbina was kept in a state of fear from there being no legal intervention against Charles Curry, and John Barbina incurred additional legal fees, costs, and/or expenses.

Charles Curry did not do any acts to Anissa Barbina after Thanksgiving Day of 1999.

John Barbina learned of Charles Curry's sexual abuse of Anissa Barbina on February 6, 2000, made a CPS report to the WVDHHR February 7, 2000, and he reported it to the Sheriff's office on February 14, 2000. Her case was presented to the investigatory MDT monthly until December of 2000 (according to Lori Glover), the Sheriff's office did not give it the proper

attention (according to Lori Glover), John Barbina went to Sgt. Ferguson of the State Police, and unattended cases by the Sheriff's Office, including Anissa Barbina, was assigned to the State Police by John Bord because the Sheriff's office would do nothing. Under W. Va. Code, § 49-5D-2, the Sheriff's office breached its duty "... for coordinating or cooperating in the initial and ongoing investigation. . . ." The statements herein, which are disputed, are more fully substantiated by direct evidence or inference below. The reasons concerning why the WVDHHR and Valley should not be granted summary judgments are incorporated by reference herein, as if fully set forth herein.

Sheriff Sinclair mailed a motion for summary judgment on April 1, 2003, which was set for a hearing on May 5, 2003, but the undersigned filed an affidavit on May 2, 2003, which summarized some of the depositions, which stated as follows:

3. **Lori Glover**, who was the **Child Protective Service worker for the West Virginia Department of Health and Human Resources, and who was on the investigative multi disciplinary team** authorized by W. Va. Code, § 49-5D-2, was deposed on the 26<sup>th</sup> day of February, 2002, and during her deposition testified in summary form under oath to the following:

- a.. Anissa's case was handled like this: referral was assigned to her on February 8<sup>th</sup>; on (*February*) 8<sup>th</sup> she sent it to the Sheriff's office (See page 10, lines 16-23);
- b. That referral was sent by letter (See pages 10-11, lines 24-1);
- c. She has no idea if there was anyone in the Sheriff's Dept. at that time that typically received or handled those referrals (See page 11, lines 2-4);
- d. At that time if they knew the perpetrator lived in the city limits they sent the referrals to the city police; if the perpetrator lived outside the city limits they sent it to the Sheriff's Dept; if they didn't know they automatically sent it to the Sheriff's Dept.(See page 11, lines 5-16);
- e. ***Documentation to substantiate that the Dept. notified the Sheriff's office: (1) Bonnie Nelson, receptionist social worker, documented that she sent the law enforcement a***

- copy of the referral, on a different form and a cover letter; (2) FACTS automatically prints it in an abbreviated version; there is a form cover letter; (3) she also sent it to Bord; (4) she doesn't know if Nelson documented anywhere that she sent it to Bord and Sheriff; (5) she doesn't know if Nelson checked w/Bord or Sheriff to see if they received it (See pages 11-12, lines 17-14);*
- f. **It is brought up at the investigative MDT meeting once a month and her, her supervisor and Bord are present (See page 12, lines 15-25);**
- g. *Her supervisor then was Sharon Corley; various officers from different agencies, state, county, and city would attend; she doesn't recall who would have been attending back in 2000 (See page 13, lines 1-7);*
- h. **An investigative MDT was held in connection with Anissa; those MDT investigations were not documented at that time; they are now (See page 13, lines 8-15);**
- i. *The Dept. takes responsibility of documenting those; she created a special form for it (See page 13, lines 16-21);*
- j. *To her knowledge disputes as to whether the prosecutor and police received the reports did not occur in the first 2-3 months of the Barbina case (See pages 13-14, lines 22-4);*
- k. **The investigative team was having problems on Anissa's case and it was reassigned to the State Police (See page 14, lines 5-10);**
- l. *She doesn't recall when it was reassigned to the State Police (See page 14, lines 11-13);*
- m. **As to why it was sent to the State Police:**  
**(1)She doesn't know what the underlying problem was**  
**(2)She didn't suspect sabotage**  
**(3)There were some cases not being tended to for awhile**  
*(See page 14, lines 1-24);*
- n. **At each MDT meeting the Dept. would raise the case names involved; she's not sure what happened; all those cases were sent to the State Police (See pages 14-15, lines 25-5);**
- o. *The cases that were sent to the state police had been assigned to the County; she doesn't know who assigned the individual cases to the Sheriff's dept; there was more than one person showing up at the meetings; attendance was sporadic (See page 15, lines 6-24);*
- p. *When asked if she thought the Sheriff's Department was*

*dropping the ball, she said she felt that cases were not getting the attention they deserved* (See pages 15-16, lines 25-3);

q. The Dept. would bring up the cases at the MDT meetings; then the cases were not tended to; she doesn't know what John Bord's position was; I would have to ask him (See page 16, lines 4-12);

r. **She isn't aware that Bord displayed any emotion like anger or disgust that the Sheriff was not following through** (See page 16, lines 13-15);

s. **During an investigative meeting Bord advised he was reassigning the cases to the state police; Bord was just informing her supervisor he was reassigning to Ferguson** (See page 16, lines 16-24); and

t ***With regard to the cases not getting well tended to through the Sheriff's department she knows there were three other cases of sexual abuse of children, but she knows the abuse did not get repeated in one of those cases*** (See pages 71-72, lines 22-18)

(Bold face and bold face italics added; the italicized boldface denotes the Sheriff's involvement).

4. **Sharon Corley, who was the Child Protective Service supervisor for the West Virginia Department of Health and Human Resources, and who was on the investigative multi disciplinary team** authorized by W. Va. Code, § 49-5D-2, was deposed on the 24<sup>th</sup> day of February, 2003, and during her deposition testified in summary form under oath to the following:

a. ***Glover's comments in her deposition that there were 3 cases that had fallen through the cracks, no MDT meetings held on, between Feb 2000 and Dec 2000 are accurate, and this includes Barbina*** (See pages 29-30, lines 7-1);

b. **She does recall 2 cases besides Barbina** (See page 30, lines 2-8);

c. ***CPS-1's were sent to the police agency for the city, county, and in addition to the prosecutor*** (See page 30, lines 9-18);

d. **From February 2000 when the report first came in about Anissa Barbina to December of 2000 when Ferguson first received the case to commence investigation she says that "is a significant amount of time"**(See page 36, lines 12-23);

e. **She does not recall the time elapsed from the CPS referral**

- to when the police began handling the cases; the state police were brought in on one; **the case had stalled somewhere else but she doesn't remember where; the state police completed the case** (See page 46, lines p-23);
- f. ***The delay was certainly longer than the Dept thought there should have been; SC is not sure if the Barbina was the longest*** (See pages 46-47, lines 24-4)

(Bold face and bold face italics added; the italicized boldface denotes the Sheriff's involvement).

5. Bonnie E. Nelson testified under oath at her deposition on the 13<sup>th</sup> day of January, 2003, and during her deposition testified in summary form under oath to the following:

- a. ***That on 2/8/2000 a CPS was sent to Bord and the sheriff and they claim to never having received such,*** this claim has been made before by them on other occasions (See pages 38-39, lines 22-7);
- b. Where it says "Additional information on page two" "CPS-1 sent to prosecutor and sheriff" that was protocol to do that (See pages 103-104, lines 17-9);
- c. She would have typed that in; the system does not type that in (See page 104, lines 10-22)

(Bold face italics added; the italicized boldface denotes the Sheriff's involvement).

6. **John L. Bord, who is the prosecuting attorney for Taylor County, West Virginia and who was deposed on the 14<sup>th</sup> day of January, 2003, and during his deposition testified in summary form under oath to the following:**

- a. **When he came in to the prosecutor's office in 1998 there was no file on Anissa Barbina** (See pages 4-5, lines 22-1); and
- b. ***Reason JLB sent it to Fergie is because he couldn't get the Sheriff's Dept to send anyone to the MDT meetings; JLB sent the Sheriff a memo, perhaps in 2000, because Durrett was not coming to the meetings; JLB told the Sheriff in the note that if Durrett didn't come to the meetings he was sending the cases to the state police; Durrett wasn't coming because the Sheriff wouldn't pay overtime*** (See page 6, lines 8-20).

(Bold face italics added; the italicized boldface denotes the Sheriff's involvement).

Anissa Barbina's case was to be handled by the Investigatory Multi Disciplinary Team in

Taylor County, West Virginia, in conformity with W. Va. Code, § 49-5D-2, which provides as follows:

(a) The prosecuting attorney shall establish a multidisciplinary investigative team in each county. *The multidisciplinary team* shall be headed and directed by the prosecuting attorney and *shall include as permanent members* the prosecuting attorney or his or her designee, a local child protective services caseworker from the department of health and human resources, *a local law-enforcement officer employed by a law-enforcement agency in the county* and, where appropriate to the particular case under consideration and available, a child advocacy center representative, and a representative from the licensed domestic violence program serving the county. The department of health and human resources and any local law-enforcement agency or agencies selected by the prosecuting attorney shall appoint their representatives to the team by submitting a written designation of the team to the prosecuting attorney of each county within thirty days of the prosecutor's request that the appointment be made. Within fifteen days of the appointment, the prosecuting attorney shall notify the chief judge of each circuit within which the county is situated of the names of the representatives so appointed. Any other person or any other appointee of an agency who may contribute to the team's efforts to assist a minor child as may be determined by the permanent members of the team may also be appointed as a member of the team by the prosecutor with notification to the chief judge.

(b) Any permanent member of the multidisciplinary investigative team shall refer all cases of accidental death of any child reported to their agency and all cases when a child dies while in the custody of the state for investigation and review by the team. *The multidisciplinary investigative team shall meet at regular intervals at least once every calendar month.*

(c) *The investigative team shall be responsible for coordinating or cooperating in the initial and ongoing investigation of all civil and criminal allegations pertinent to cases involving child sexual assault, child sexual abuse, child abuse and neglect, and shall make a recommendation to the county prosecuting attorney as to the initiation or commencement of a civil petition and/or criminal prosecution.*

(d) State, county and local agencies shall provide the multidisciplinary investigative team with any information requested in writing by the team as allowable by law or upon receipt of a certified copy of the circuit court's order directing said agencies to release information in its possession relating to the child. The team shall assure that all information received and developed in connection with the provisions of this article remains confidential. For purposes of this section, the term "confidential" shall be construed in accordance with the

provisions of section one, article seven of this chapter.  
(***Bold face italics added; the italicized boldface denotes the Sheriff's statutory involvement.***)

As testified to by some employees of the West Virginia Department of Health and Human Resources, they were on the Investigatory Multi Disciplinary Team in Taylor County, West Virginia.

The Taylor County Sheriff's Department was a part of the Investigatory Multi-Disciplinary Team. The Taylor County Sheriff's Department as a part of the team was an action that amounted to the Taylor County Sheriff's Department acting on behalf of Anissa Barbina whose name was mentioned at the meetings of the investigatory multi disciplinary team that meet monthly according to Lori Glover's deposition. As testified to by employees of the West Virginia Department of Health and Human Resources, the case of Anissa Barbina slipped through the cracks of the Investigatory Multi Disciplinary Team and nothing was being done for Anissa Barbina. The team failed its duties under W. Va. Code, § 49-5D-2(b) and (c) to Anissa Barbina. There is evidence sufficient for a jury to consider that the first element for a special relationship is satisfied ([1] an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured). W. Va. Code, § 49-5D-2 together with the Prosecuting Attorney naming the Sheriff's Department to the investigatory multi-disciplinary team together with Anissa Barbina's case being one undertaken by the investigatory multi-disciplinary that the sheriff's department is an action (by having Anissa Barbina's name) on a case to have been of an affirmative duty on behalf of Anissa Barbina.

Until a child predator is apprehended, the non-apprehension can lead to the child being

further victimized, which is not paranoia, as Anissa Barbina had already been twice victimized by Charles Curry (and even if it was paranoia, it is a mental injury and the consequences were detailed by Helen Lough in her deposition, which is set forth below under "d. The Trial Court Erred in Granting Valley a Summary Judgment" and incorporated herein, as is if fully set forth herein), can lead to a child apprehending being further victimized, and/or can lead to a child worrying about others being victimized. The county investigatory multi-disciplinary team should be one of the most knowledgeable of this given there is a CPS supervisor, a CPS worker, the police, and the prosecutor on the team. The team members see more of these cases than about any other group in the county (with school counselors and therapists also ranking at the top).

Law enforcement officers know that until there is apprehension, there is an increased risk of any lawbreaker repeating their behavior, as they broke it the first time and people are usually creatures of habit. While the child sexual victim waits for the child predator to be caught, the child predator can further victimize the child and/or the child's fear of being again victimized can harm the child through added stress and/or anxiety, which can lead to physical and mental health issues. This is a matter of common sense, which the jurors are usually instructed they can use in their deliberations. The common sense second element of the special relationship is satisfied (i.e., "... knowledge on the part of the local governmental entity's agents that inaction could lead to harm. . . .").

Bonnie Nelson testified she faxed Anissa Barbina's CPS referral to the sheriff on February 8, 2000, which is a form of contact with the Taylor County Sheriff's Department. John Barbina on behalf of Anissa Barbina and himself, as her parent, had direct contact with the

Taylor County Sheriff's Department concerning Charles Curry sexually abusing Anissa Barbina. He detailed such in his counter-affidavit that was filed May 2, 2003, which states in applicable part as follows:

3. Anissa Barbina gave me further details that are generally on a report I made to the West Virginia Department of Health and Human Resources on Monday, February 7, 2000, which states as follows (with me being the reporter):

Reporter states that the child has alleged sexual abuse on 2 occasions. Last summer, just before school left (sic) out for the summer, she was at her grandfathers (sic) home lying on the floor watching t.v. the he was drinking/drunk maternal grandfather came over sat on her legs and started touching her between her legs and then he put his hand in her underwear and was rubbing her. She tried to get up but couldn't after a little while he got up and she ran behind the sofa, but he made her get out. She grabbed a blanket and covered herself up really tight with it. Her mom came about that time and they went home. On Thanksgiving of 1999 at her house mom had sent her to her room, after she was there for a little while grandpa came up stairs and laid on top of her and tried to kiss her and tried to stick his tongue in her mouth.

4. *On February 14, 2000, I decided to contact the Taylor County Sheriff's Department because I was concerned that nothing seemed to be taking place about Charles Curry and my daughter.*

5. *I went in the Taylor County Courthouse and on the first floor I spoke with a female employee of the Taylor County Sheriff's Department and generally told her what I told the West Virginia Department of Health and Human Resources on Monday, February 7, 2000.*

6. The female employee of the Taylor County Sheriff's Department told me that the Taylor County Sheriff's Department did not know anything about it.

7. *She talked with a male employee of the Taylor County Sheriff's Department, who was in the office with the female employee I talked to, and I told the male employee of the Taylor County Sheriff's Department what I told the West Virginia Department of Health and Human Resources on Monday, February 7, 2000.*

8. He testified in his deposition in this case as follows:

7 Q. Do you remember when you asked her about

8 this?

9 A. It was February 6.

10 Q. Of what year?

11 A. '98 -- no, I'm sorry, 2000.

12 Q. Of 2000. And you hadn't learned about the

13 first incident until then?

14 A. That's correct.

15 Q. So you didn't know, as we understand it  
16 from what we've learned in the case, we're talking  
17 about two incidents of sexual abuse; is that correct?

18 A. Yes, ma'am.

19 Q. And you didn't know about either one of  
20 them until February of 2000; is that correct?

21 A. Correct.

22 Q. And where were you when you had the  
23 conversation with Anissa?

24 A. We were, it was February 6, it was a

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John Barbina -- by Ms. Rose

1 Sunday evening, and I was bringing her back to Grafton  
2 after my weekend visit.

3 Q. Did the conversation take place in the car?

4 A. Yes.

5 Q. Tell me what you can remember about the  
6 conversation.

7 A. **I just remember just basically, in**  
8 **thinking back on some of the bedwetting and the**  
9 **soiling of the pants and some of the other things that**  
10 **I witnessed in the past, I just pretty much went**  
11 **straight for the something sexual thing, I just went**  
12 **ahead and straight-out asked her.**

13 I just said, "Listen, I know something is  
14 bothering you, and you're getting in trouble at  
15 school." I just pretty much straight-out asked her.  
16 I said, "You know, we've had lots of talks about good  
17 and bad touches." I've always talked to her about  
18 that type of thing, from an early age. I said, "You  
19 know, we've always talked about that."

20 And I said, "Has anyone ever touched you  
21 where they shouldn't be touching you?" And she just  
22 kind of put her head down, she didn't give an answer.  
23 And I just kept on with it and on with it, you know.

24 I said, "Listen, you really need to tell me, if

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John Barbina -- by Ms. Rose

1 something happened, you need to tell me."

2 And I figured out she wasn't going to come

3 out and tell me, so I started, the only way I could

- 4 find out was to fish, maybe give her the answer and
- 5 see if she would agree with, you know, what I'm
- 6 saying. So I said, "Is it Tim, did Tim ever touch you
- 7 somewhere?" "No."

(Bold face italics added for direct contact with the Sheriff's Department and bold face added to show basis of a real mental injury).

Heidi Barbina is the step-mother and present spouse of John Barbina. She signed a counter-affidavit that was filed May 2, 2003. It stated in applicable part as follows:

2. John Barbina has had custody of Anissa Barbina since approximately November of 2000 and I take care of Anissa Barbina when John Barbina is out of town, including transporting her during such times to and from her counseling sessions concerning matters following her being sexually abused by Charles Curry.

3. *I had my first contact with the Taylor County Sheriff's Department on or about December 1, 2000, when I inquired as to why nothing was taking place on Charles Curry and the Taylor County Sheriff's Department said they knew nothing about it.*

4. I contacted Terry Tichenor, who represented John Barbina on the custody case concerning Anissa Barbina, and she agreed to write a letter to Lori Glover.

5. She received a copy of a letter Terry Tichenor allegedly sent to Lori Glover, which is attached hereto as Exhibit 1.

6. She maintains a calendar at her employment and she has the following entries on it with the following dates:

- a. 121500 Got copy of letter from CPS stating that Lori Glover did file a report with State Police
- b. 121900 Talked to Pros. Atty. Office John Borkd (sic) "No statement filed with State Police."  
***Called Sheriff dept. "Don't have statement from CPS"***
- c. 122000 Called Pros. Atty office They are going to check with police
- d. 020101 Filed complaint with Sgt. Ferguson with State Police
- e. 021201 Talked to John Hinebaugh @ Pros. Office
- f. 041101 Talked with Pros. Atty

7. I recall John Bord's secretary told me they called the Sheriff's Department and they had nothing and they looked everywhere.

(Bold face italics added for direct contact with the Sheriff's Department)

There is evidence of a direct contact by the non-custodial parent and step-parent of an

infant sexual abuse victim with the Sheriff's Office. John Barbina acted in the capacity of a parent of Anissa Barbina. He directly contacted the Taylor County Sheriff's Department for her and himself. This satisfies the third element of a special relationship (i.e., "... some form of direct contact between the local governmental entity's agents and the injured party. . .").

Then, John Barbina and Anissa Barbina went for months waiting for something to be done. He had direct contact with WVDHHR and the Taylor County Sheriff's Department. His wife's affidavit showed the family unit had direct contact with the Prosecuting Attorney's office and the Sheriff's office. He and his wife had worked with all agencies and/or offices on the investigatory multidisciplinary team. They were dealing with the chief law enforcement officer for the county, a county law enforcement agency, and the most powerful state agency in the county for coming to the aid of sexually abused children.

One can reasonably rely on a prosecutor following the statutory mandates of W.Va. Code, § 49-5-2; one can reasonably rely on a supervisor of the CPS and CPS worker for the WVDHHR to follow the statutory mandates; and one can reasonably rely on the police to follow the statutory mandates. The reliance is only heightened by combining the expertise of those three individually (pursuant to a specific statute that sets forth what they are to do and expecting them to do it) and turning them loose to protect our children. The fourth and final element is satisfied (i.e., "... party's justifiable reliance on the local governmental entity's affirmative undertaking.").

Petitioners have demonstrated that there is evidence on each element of the four elements to establish a special relationship between them and the Sheriff's Department of Taylor County, West Virginia. The Sheriff of Taylor County breached its duty to Anissa Barbina as a sexual abuse victim as specifically required to protect her as set forth in W. Va. Code, § 49-5D-2.

Anissa Barbina was injured by the breach between February 8 or 14, 2000, or whenever the Investigative Multi Disciplinary Team first discussed Anissa Barbina's case and the imprisonment of Charles Curry. Lori Glover testified the Sheriff's Department of Taylor County, West Virginia, was not giving three cases plus Anissa Barbina's case the attention they deserved was the reason the cases languished, although the names were brought up at the sporadically attended meetings. Anissa Barbina physical manifestations of her mental damage is what drew her father's attention to sexual abuse, as the eleven year old commenced defecating in her underwear. A powerful amount of stress would bring about that change. Unfortunately, it is all too common for sexual abuse victims. (See <http://www.secasa.com.au/index.php/family/11/46> [item 6 under "Behavioural indicators of child sexual abuse" or Google: sexual + abuse + victim + Defecation + underwear). Heidi Barbina's affidavit showed that Anissa Barbina was going to counseling. Given the breach and the psychological damages, a jury should be given the opportunity to decide special relationship and if satisfied, then damages.

The trial court incorrectly decided a physical injury was needed to recover damages because Anissa Barbina's fear of being victimized again was not enough. *Johnson v. West Virginia University Hospitals, Inc.*, 186 W.Va. 648, 413 S.E.2d 889 (W.Va. 1991), held in part:

10. "An individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious." Syllabus point 2, *Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 674, 425 S.E.2d 629 (1992).

11. A claim for emotional distress without an accompanying physical injury can only be successfully maintained upon a showing by the plaintiffs in such an action of facts sufficient to guarantee that the claim is not spurious and upon a showing that the emotional distress is undoubtedly real and serious.

*Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (W.Va. 1996), held in

applicable part as follows:

11. A claim for emotional distress without an accompanying physical injury can only be successfully maintained upon a showing by the plaintiffs in such an action of facts sufficient to guarantee that the claim is not spurious and upon a showing that the emotional distress is undoubtedly real and serious.

*Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 674, 425 S.E.2d 629 (1992), held at Syllabus Point 2 as follows:

An individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious.

Anissa Barbina was the actual victim of the abuse and she had a very real basis to fear being victimized again, as the ball on her case was dropped from the warm weather of 1998 starting with Charles Curry's breach of his duty to October 30, 2001, when Charles Curry went off to prison. Sexual abuse victims are oftentimes traumatized for years or life. Whether or not Anissa Barbina has a valid claim should be by a jury evaluating her, instead of a trial judge evaluating competing documents, since her counter-affidavits raise a question of fact. There is a material factual dispute of whether a special relationship existed between Anissa Barbina and the WVDHHR.

First, in considering the propriety of the summary judgment award, we are of the opinion that the varying accounts of the facts surrounding Mrs. Cunningham's fall demonstrate a genuine issue of material fact so as to preclude summary judgment on the issue of the defendants' culpability for this incident. Rule 56(c) of the West Virginia Rules of Civil Procedure renders proper the summary disposition of a case when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." (Emphasis added).

Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more

disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Syl. pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). Accord *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211-12 (1986) (A "dispute about a material fact is 'genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); Syl. pt. 2, in part, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995) ("An issue is 'genuine' when the evidence relevant to it, viewed in the light most favorable to the party opposing the motion, is sufficiently open ended to permit a rational factfinder to resolve the issue in favor of either side.").

*Banfi v. American Hosp. for Rehabilitation*, 207 W.Va. 135, 529 S.E.2d 600, 607 (W.Va. 2000).

## 2. THE TRIAL COURT ERRED IN GRANTING THE WVDHHR A SUMMARY JUDGMENT

The WVDHHR was granted a summary judgment. There is a stronger case of a special relationship with the WVDHHR than even the Sheriff because there was more direct contact. The first contact is September 18, 1998, when Helen Lough of Valley has testified that she made a CPS referral to the WVDHHR of Anissa Barbina's revelation on September 17, 1998 that Charles Curry had sexually abused her. WVDHHR denies receipt of the referral. The trial court decided that assuming it was true that the CPS referral was made by Valley, that it was not good enough because it did not make it past the intake worker for direct contact to exist between the WVDHHR and Anissa Barbina. If it had been placed by the intake worker into the system in September of 1998, the other elements of the special relationship would have then occurred. The trial court noted there was no direct contact between John Barbina and the WVDHHR concerning Anissa Barbina until February of 2000, that the abusive acts were prior to that time, and therefore there was no liability. The reasons concerning why the Sheriff and Valley should not be granted summary judgments are incorporated by reference herein, as if fully set forth

herein.

The WVDHHR has greater duties when it comes to children in difficult situations<sup>1</sup>.

On February 7, 2000, there was initial direct contact between John Barbina and the WVDHHR through Bonnie Nelson when he filed a CPS report. Anissa Barbina had direct contact with the WVDHHR through Lori Glover when Lori Glover took her statement. John Barbina had direct contact with WVDHHR through Lori Glover on February 22, 2000.

On February 22, 2000, there was direct contact between John Barbina and the WVDHHR when Lori Glover met John Barbina at the Taylor County Courthouse prior to a magistrate hearing. Lori Glover negotiated a course of action for John Barbina and his domestic lawyer. Lori Glover promised services for Anissa Barbina. Additionally, as to the investigatory MDT,

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<sup>1</sup> Of note is Syllabus Points 4-6 of *State v. Brandon B.*, 624 S.E.2d 761 (W.Va. 2005), which held as follows:

4. "It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.' Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 300 S.E.2d 86 (1982)." Syllabus point 1, *E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997).

5. "The language of W. Va. Code § 49-5D-3 [(1996) (Repl. Vol. 1996)] is mandatory and requires the Department of Health and Human Resources to convene and direct treatment teams not only for juveniles involved in delinquency proceedings, but also for victims of abuse and neglect.' Syl. pt. 3, *E.H. v. Matin*, 201 W. Va. [463], 498 S.E.2d 35 (1997)." Syllabus point 8, *State ex rel. Ohl v. Egnor*, 201 W. Va. 777, 500 S.E.2d 890 (1997).

6. The language of W. Va. Code § 49-5D-3 (2004) (Repl. Vol. 2004) requires every county to establish a multidisciplinary treatment planning process, and the West Virginia Department of Health and Human Resources is required to convene and direct treatment teams for juveniles involved in delinquency proceedings when the court is considering placing the juvenile out-of-home at the expense of the West Virginia Department of Health and Human Resources, or when the court is considering placing the juvenile in the custody of the West Virginia Department of Health and Human Resources.

Lori Glover testified at her deposition that Anissa Barbina's name came up each month. Sharon Corley, the WVDHHR supervisor, admitted Anissa Barbina's case and at least two others fell through the cracks. This satisfied the first element of a special relationship (i.e., "... an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured. . . ."). Contact continued between John Barbina's domestic lawyer and Lori Glover with the WVDHHR. All of this direct contact between John Barbina and Anissa Barbina and the WVDHHR established the third element of the special relationship (i.e., "... some form of direct contact between the local governmental entity's agents and the injured party. . . .").

Sharon Corley's testimony that Anissa Barbina's case fell through the cracks, February of 2000 to December of 2000 is a significant amount of time, and that the delay was certainly longer than the WVDHHR thought it should have been gives a reasonable inference that the WVDHHR knew that inaction could lead to harm. This is sufficient evidence to establish the second element of the special relationship (i.e., "... knowledge on the part of the local governmental entity's agents that inaction could lead to harm. . . .").

As detailed within the undersigned's comments as to the Taylor County Sheriff being inappropriately granted a summary judgment, Lori Glover testified that the WVDHHR was a part of the Investigatory MDT and Anissa Barbina's case was overlooked by the Investigatory MDT. The WVDHHR normally quickly arranges counseling for sexual abuse victims because they know they need the services as quick as possible to start resolving the problems, so they do not fester. Newsweek on September 5, 2005, at page 36, "The Things They Carry," reported that the military was having a lot less chronic PTSD from our soldiers coming back from Iraq than those

returning from Vietnam because "If we intervene early, most cases resolve with just a little support and therapy."

As stated before within the undersigned's comments as to the Taylor County Sheriff being granted a summary judgment, John Barbina could justifiably rely on the most powerful state agency in the county for coming to the aid of sexually abused children that has resources and connections with professionals to provide help to children who have been sexually abused. The WVDHHR with Lori Glover and Sharon Corley was a part of the investigatory MDT. The fourth element of the special relationship has evidence to support it (i.e., "... party's justifiable reliance on the local governmental entity's affirmative undertaking. . . .").

Plaintiffs have produced evidence or inferences to establish the special relationship between the Barbinas and the WVDHHR. The trial court committed prejudicial error in granting the summary judgment based on no abuse by Charles Curry occurring after Thanksgiving of 1999 because Anissa Barbina has to fear the perpetrator until at least he is apprehended.

The trial court noted that the parties each argued *Arbaugh vs. Board of Education*, 214 W.Va. 677, 591 S.E.2d 235 (W.Va. 2003). After rejecting a cause of action based on WV Code § 49-6A-2, it says at pages 241-242:

[7] In so holding, we have not ignored Mr. Arbaugh's plea to carve out a private cause of action for more egregious situations, such as where an eye-witness has failed to report. Despite the underlying merit to this request, we are bound to refrain from making such policy determinations since "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]" *State v. Richards*, 206 W.Va. 573, 577, 526 S.E.2d 539, 543 (1999), quoting *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted). **We note that children harmed by such egregious circumstances are not without remedy, where in an otherwise proper case a cause of action may be brought**

**based on negligence with the failure to report admissible as evidence in that context.**

(Bold face added)

The trial court concluded it was not “egregious circumstances.”

Appellants interpret that this Court in the sentence it boldfaced above from *Arbaugh* is keeping a negligence claim alive. *Arbaugh* takes away prima facie negligence based on violation of a statute. It does not reverse all cases to the contrary (e.g., Syllabus Point 3 of *Courtney v. Courtney*, 186 W.Va. 597, 413 S.E.2d 418 (W.Va. 1991)). Appellants had initially plead negligence against the mandatory reporters without reference to WV Code § 49-6A-2, which was also before the *Arbaugh* decision was ever docketed. Additionally and alternatively, appellants interpret the mention of “egregious circumstances” is referring to a child being seriously physically abused, sexually assaulted, or sexually abused, not a trial court measuring how perverse a sexual abuse or sexual assault is to see if it qualifies for consideration by a jury. In such a scenario, whether or not “egregious circumstances” exist is not a matter of law, but a question of fact for a jury. Appellants maintained to the trial court that summary judgment was not appropriate because the bold faced sentence above permitted a negligence claim against Valley and the WVDHHR. Additionally, a factual dispute existed as to whether or not WVDHHR had reported the incidents to the police, who denied receiving such. It would be negligent not to report such to the police by the WVDHHR. The trial court committed prejudicial error in granting the summary judgment to the WVDHHR.

### 3. THE TRIAL COURT ERRED IN GRANTING VALLEY A SUMMARY JUDGMENT

The trial court concluded that a factual dispute existed as to whether Valley reported the

sexual abuse to the WVDHHR. Additionally, the trial court indicated there was no evidence Valley reported the incident to the police as required by WV Code § 49-6A-2. The trial court concluded neither matter mattered and that there was no factual dispute precluding summary judgment.

The trial court looked at the last paragraph of *Arbaugh*, which is set forth on pages 28-29 herein, and concluded it had no application to the case at bar, as it applied, for example to "... where a victim or a victim's representative seeks to hold an eyewitness to the abuse liable." This statement makes no sense because it seems to be saying that the eyewitness to the abuse (without clarifying a relative, although the trial court recalls such in killing a negligent infliction of emotional distress and a claim for pain and suffering of John Barbina) has greater standing to recover than the victim or parent of the child victim.

The trial court is wrong that Anissa Barbina's sexual abuse and/or sexual assault is not egregious enough that failing to report such would not be negligence. Her maternal grandfather, while acting as her babysitter, touched her pubic area to see how it felt after conning her into using an abdominal developer so it would give him a pretext for feeling below her abdominal muscles. He also just so happened to be laying beside her on a couch and needs to get up and roll across her, when his penis drags across her. He has to give French kisses to his then 9-10 year old granddaughter. The reasons concerning why the Sheriff and the WVDHHR should not be granted summary judgments are incorporated by reference herein, as if fully set forth herein, especially the last paragraph of the argument against the WVDHHR having been granted a summary judgment.

If Valley did not report it as the WVDHHR insists, it was negligent. It would be

negligent not to report such to the police by the WVDHHR. *Arbaugh* states, “. . . a cause of action may be brought based on negligence with the failure to report admissible as evidence in that context.” Valley defends not through love, but its antithesis of fear of all the litigation that would be stirred up. How many cases of failure to report have been decided in West Virginia? Not all states have reported decisions on such.

If Valley failed to report, as the WVDHHR says, the difference it made is that Charles Curry's attack of Thanksgiving 1999 may have been avoided and she would have suffered less trauma. Valley defends saying it reported to Kelly Curry, which is a very good example of why the statutes require the report to be to the WVDHHR and the police because parents can be in denial as to what their parents are really like. The trial court committed prejudicial error in granting the summary judgment to the WVDHHR.

Anissa Barbina has been repeatedly failed. After Charles Curry failed her, she gets a chance for early intervention. She is to get fairly early therapeutic intervention after opening up, which could have minimized damages. Her mother takes her to break bread with Charles Curry. She only gets two therapy sessions in after opening up when her mother discontinues her therapy. Her mother permits Charles Curry to be alone with her two children on Thanksgiving Day of 1999. He seizes the opportunity to physically dominate her and control her and seals it with French kisses to her and her brother. Valley allegedly tried to rein in her mother to no avail. Anissa Barbina is lost from Valley, which apparently does no follow up to see what the status of its disputed CPS referral is. If Valley had done that, maybe, just maybe, the system would have kicked in and Anissa Barbina might have had early intervention. Valley certainly knew the damage that would result from their failure.

Helen Jean Lough gave some insight during her deposition:

5 Q. Did you feel that Anissa had made enough  
6 progress in the two therapy sessions that you  
7 did have with her that you should terminate any  
8 future sessions?

9 A. No.

10 Q. As far as when -- maybe I should first  
11 off ask: Have you dealt with other children  
12 that had been sexually assaulted prior to  
13 dealing with Anissa?

14 A. Yes.

15 Q. And for the children that you had dealt  
16 with that had been sexually assaulted, had you  
17 done therapy session with those children?

18 A. It wasn't the main focus. I've never  
19 been an expert in or -- that wasn't my  
20 specialty, was sexual abuse.

21 Q. When you at least had a client that had  
22 been sexually abused, did you feel comfortable  
23 going forward with therapy sessions with the  
24 victim?

22

1 A. Yes.

2 Q. It may vary from person to person. Do  
3 you have any, I guess, estimate as far as the  
4 sort of a range in terms of the number of  
5 therapy sessions that it might -- I shouldn't  
6 say that it might -- that are normal for a child  
7 that's been sexually abused to have to go  
8 through?

9 A. There isn't a specific range or number  
10 that I could give. If you're trying to say that  
11 two would not be enough, I agree that two would  
12 not be enough.

13 Q. I would agree with that, too. I'm only  
14 thinking if there was some sort of -- if there  
15 was a range, whether it's 50 or 100 or something  
16 less than that. I'm just mentioning numbers as  
17 to where you might see -- normally see  
18 sufficient recovery that a child wouldn't have  
19 to have further therapy sessions.

20 A. It's always individual.

21 Q. Was there any attempt by you or anybody  
22 else at Valley that you know of to make any  
23 inquiry either of Anissa, Kelley, or the  
24 department as to whether or not there have been

23

1 any follow-up to the CPS referral by the  
2 department, and that's the Department of Health

3 and Human Resources?

4 A. Could you restate your question?

5 Q. Sure. What I'm interested in, and I'll  
6 maybe try to simplify it. Was there any attempt  
7 by you or by anybody else at Valley to try to  
8 find out whether or not the Department of Health  
9 and Human Resources had followed up on the  
10 referral that you had made?

11 A. No. I had no reason to think that they  
12 wouldn't follow-up. Never before had they not.

13 Q. Do you have any idea how many referrals  
14 you might have made to the Department of Health  
15 and Human Resources prior to Anissa's?

16 A. I don't know a number, but many.

17 Q. With those that you had previously  
18 reported, had any of those involved either  
19 sexual assault, sexual abuse, or sexual contact?

20 A. Not that I remember.

21 Q. Were you surprised by Anissa's  
22 revelations by sexual abuse or sexual assault by  
23 her grandfather?

24 A. I believed her.

24

1 Q. In terms of I guess my talking about  
2 maybe with this being, let's say -- I take it,  
3 then, it was the first time that there had been  
4 a revelation to you by a child of being sexually  
5 assaulted or sexually abused; is that correct or  
6 incorrect?

7 MS. DeFAZIO: Objection as to form.

8 Go ahead and answer.

9 THE DEPONENT: There has been times  
10 when, of course, there's been references to but  
11 maybe not as specific.

12 BY MR. SWEENEY:

13 Q. Was she specific in terms -- was Anissa  
14 specific in terms of, let's say, what exactly  
15 her grandfather had done to her?

16 A. Yes.

17 Q. And do you document everything that a  
18 child, I guess, that had been abused or  
19 assaulted, whether that's sexual or physical or  
20 in some other fashion, do you document  
21 everything, or is there, I guess, you just  
22 highlight it, or how do you -- I guess, how are  
23 you as a documenter?

24 A. I documented what specifics that she had  
25

1 told me, and that's what I reported to Child  
2 Protective Services.

3 Q. So everything on the document that you  
4 have before you for September the 18th of '98  
5 would have been matters that she related to you?

6 A. Yes.

7 Q. This isn't meant to be unduly  
8 repetitious, if it is repetitious. Bonnie  
9 Nelson, your other times that you had made  
10 reports, had any of those been to Bonnie Nelson?

11 A. Yes.

12 Q. Were you reporting to anybody other than  
13 Bonnie Nelson at the Department of Health and  
14 Human Resources?

15 A. Not that I can recall.

16 Q. Have you ever had occasion to have any  
17 conversation with Bonnie Nelson about the Anissa  
18 Barbina matter since September the 18th of '98  
19 up to present?

20 A. No.

21 Q. Have you ever talked with any other  
22 individuals from the Department of Health and  
23 Human Resources concerning Anissa Barbina?

24 A. No, not until actually the lawyer had  
26

1 contacted me and asked me if --

2 Q. Wait. Which lawyer?

3 A. Child Protective Services. That was the  
4 first time.

5 Q. That was the first time? That would be

6 Lisa Rose, then?

7 A. I guess it was you, wasn't it?

8 MS. ROSE: Yes.

9 BY MR. SWEENEY:

10 Q. Okay. And what do you recall about that  
11 incident?

12 A. That there was going to be a case come  
13 up, and she was requesting records.

14 Q. Okay. Do you recall discussing the case  
15 any with her?

16 A. She asked me if I recalled, or I had  
17 reported. I said, Yes.

18 I knew that we always cooperate with the  
19 Department of Health and Human Services when it  
20 comes to child abuse cases. But then when she  
21 told me that it was a legal, I felt that maybe I  
22 shouldn't discuss the case, and that she should  
23 contact the Taylor County office.

24 Q. Of Valley?

27

1 A. Yes.

2 Q. Were you still working with Valley at  
3 that time?

4 A. Yes.

5 Q. Are you aware that the Department of  
6 Health and Human Resources has taken the  
7 position that you had not made a report?

8 A. Yes. That's what --

9 Q. Okay. You can't say what your attorney  
10 said, but have you looked at the complaint that  
11 was filed in this case?

12 A. No.

13 Q. Okay. And I'm not trying to get you to  
14 tell me what your attorney said either. So  
15 that's privileged information. But it wasn't  
16 with Lisa since she wasn't your attorney. That  
17 was the distinction.

18 As far as a victim of sexual abuse, from  
19 your experiences, can they continue to have  
20 problems as a result of that later into life?

21 A. Yes.

22 Q. What types of problems might one expect  
23 to see later in life?

24 A. Well, of course, should I start with

28

1 children or --

2 Q. Sure.

3 A. You only mean adults?

4 Q. Well, I was thinking of manifestations  
5 in adults from childhood abuse, and I didn't  
6 know if you had any dealings with that or not?

7 A. Uh-huh.

8 Q. That's a "yes"?

9 A. Yes.

10 Q. Okay. Could you explain?

11 A. Of course, with children, you can have  
12 many acting-out behaviors. You could have maybe  
13 lying, setting fires. There's lots of  
14 indicators for sexual assault.

15 And then in adulthood, it can even get  
16 as severe as disassociating, not being aware of  
17 your surroundings, to describe that a little bit  
18 more.

19 Q. Do you know whether or not people can,  
20 in essence, develop mental illnesses as a result  
21 of being sexually abused as children?

22 A. Yes.

23 Q. Is that generally accepted by  
24 therapists, that that could be a manifestation?

29

1 A. Yes.

2 Q. And from your personal experiences, do  
3 you believe that to be true?

4 A. Yes.

5 Q. And does the literature that's generally  
6 accepted by the other experts in your field,  
7 does that literature support that opinion?

8 A. Yes.

9 Q. As far as sexually abused children are  
10 concerned, do they, at times, act out sexually  
11 in sexually inappropriate ways?

12 A. Yes.

13 Q. Do they, at times, get to the point of  
14 being what I'll say as being promiscuous?

15 A. Yes.

16 Q. Can they also go to the other extreme

17 where they may totally reject having sexual  
18 relations?

19 A. Yes.

20 Q. Do sexual abuse victims frequently  
21 consider that they were the -- or somehow  
22 responsible for being sexually abused?

23 A. Yes.

24 Q. Does that produce within them feelings  
30

1 of guilt?

2 A. Yes.

3 Q. What can be done about that, then, if  
4 anything? What do you see that needs to be  
5 done?

6 A. Of course, to have them in counseling,  
7 and I would also encourage the mother or the  
8 caretaker to be open for discussion.

9 Q. If one of the parents, when we have a  
10 sexually abused child by, let's say, another  
11 relative, if one of the parents starts or  
12 expresses disbelief through, I guess, either  
13 word or deed, does this impair the child's  
14 ability to recover from the sexual trauma?

15 A. Yes, I would think so.

16 MS. ROSE: Let me interrupt and go off  
17 the record for a second.

18 MR. SWEENEY: Certainly.

19 VIDEOGRAPHER: We're taking a break at  
20 20 until 1:00.

21 (Off the record.)

22 VIDEOGRAPHER: We're resuming the  
23 deposition at 5 till 3:00.

24 BY MR. SWEENEY:

31

1 Q. At the time we recessed, as I recall, I  
2 was asking you about some problems at least that  
3 sexually abused children might endure later or  
4 during, I guess, at any point in their life, and  
5 I wanted to ask you some more about some of  
6 those matters.

7 Do you know whether or not sexually  
8 abused children have a more difficult time  
9 trusting people?

10 MS. DeFAZIO: Objection as to form.  
11 THE DEPONENT: I wouldn't be able to  
12 say. You know, they're all going to be  
13 different. They could be.

14 BY MR. SWEENEY:  
15 Q. How about expressing their feelings? Do  
16 you know what I'm meaning by that in terms of  
17 with therapy being able to adequately express  
18 their feelings?

19 MS. DeFAZIO: Objection as to form.  
20 Laverne, are you, in your question,  
21 saying these may be symptoms that they may  
22 possibly have, or are you attempting to say this  
23 is something that all sexually abused children  
24 have?

32

1 MR. SWEENEY: I'll phrase it another  
2 way.

3 BY MR. SWEENEY:  
4 Q. Is these things that we've been going  
5 over, are those -- well, maybe I'll touch on  
6 some others.

7 Let's say, for instance, depression.  
8 Would children have been sexually abused be more  
9 likely to develop depression?

10 A. Yes.

11 Q. Would children that have been sexually  
12 abused be more likely to have difficulties  
13 expressing their feelings?

14 A. More likely, yes.

15 Q. Would sexually abused children have --  
16 would it be more likely that they would have  
17 troubles trusting other humans?

18 A. I think that all depends on the person  
19 and the interaction of whom they're interacting  
20 with. I mean, some sexually abused children  
21 might have a more difficult time relating to  
22 men, or a man therapist, per se. And, you know,  
23 those are always issues that we address.

24 Q. Okay. How about with sexually abused

33

1 children, are they more likely to be predators  
2 themselves?

3 A. It does happen, yes.  
4 Q. Are they -- are sexually abused children  
5 more likely to have difficulties forming  
6 relationships? Close, personal relationships?  
7 A. Very likely, yes.  
8 Q. Are sexually abused children more likely  
9 to have what I'll term regressive behaviors?  
10 A. Developmentally.  
11 Q. Yes.  
12 A. It very well -- it very well could  
13 possibly be.  
14 Q. And what about, are they -- sexually  
15 abused children more likely to develop fears?  
16 A. Yes.  
17 Q. One thing that I'm curious about. In  
18 terms of as a therapist, let's say when you're  
19 conducting therapy sessions, do you, in essence,  
20 try to uncover, in essence, what fears might be  
21 at the, say, at the core of somebody?  
22 A. Yes.  
23 Q. And usually -- isn't it usually true  
24 that whatever that fear might be will be causing

34

1 maybe what might be perceived as the abnormal or  
2 erratic behavior manifested?  
3 A. Yes.  
4 Q. As far as with women, have you done any  
5 reading in terms of the likelihood that women  
6 being involuntarily committed might be actual  
7 victims of sexual abuse in their childhood?  
8 MS. DeFAZIO: Objection as to form.  
9 You can answer.  
10 THE DEPONENT: Are you meaning has it  
11 been my experience that more women that are  
12 committed -- I guess I need to have you repeat  
13 it.  
14 BY MR. SWEENEY:  
15 Q. Okay. Would you agree or disagree that  
16 greater than 50 percent based upon the  
17 literature, greater than 50 percent of the women  
18 that are involuntarily hospitalized have been  
19 victims of sexual abuse?  
20 A. Based on my own experience, I would say

21 yes.  
22 Q. Are sexually abused children more likely  
23 to engage in serious, harmful behavior to  
24 themselves or others?

35

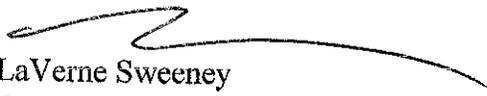
1 A. It wouldn't surprise me if I had a child  
2 that were displaying harmful behaviors if they  
3 did not have sexual abuse in their past.  
4 Q. That could be either suicidal or  
5 homicidal or just the intent to maim another?  
6 A. It could go that far.

She finally trusts her father enough to give up what she previously told the therapist and her mother. He immediately responds by going to the WVDHHR and Sheriff. It looks promising, but Anissa is failed again as the finger pointing defendants drop the ball, let her slip through the cracks for months, so the residual effects of her trauma worsen. She files suit and is kicked out of the court house and good old dependable Charles Curry copies Anissa Barbina's mom and files bankruptcy. Bet she has a lot of faith in the system working.

RELIEF PRAYED FOR

Appellants prays that this Honorable Court reverse the decision of Taylor County concerning awarding summary judgments to Lori Glover, Clark Sinclair, the now former Sheriff of Taylor County, West Virginia, the WVDHHR, and Valley.

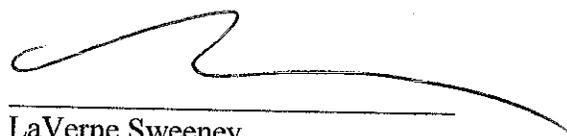
Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served on each of the attorneys of record of all parties to the above-styled cause by enclosing the same in an envelope addressed to each such attorney and/or party, if a party has filed pleadings and is not represented by counsel, at his or her respective address as disclosed by the pleadings a record herein and set forth below, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Grafton, West Virginia, on the 2<sup>nd</sup> day of August, 2006, as set forth below:



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