

WEST VIRGINIA SUPREME COURT OF APPEALS

No. 33102

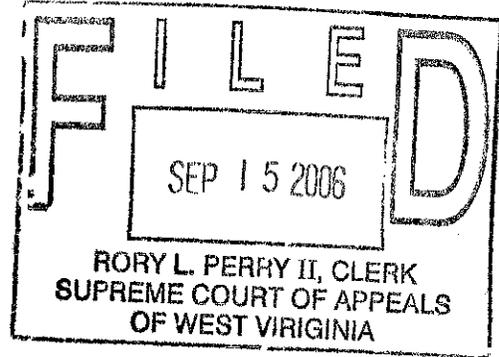
JOHN BARBINA, individually
and as parent of ANISSA BARBINA,
an infant,

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.



APPEAL FROM
THE CIRCUIT COURT OF
TAYLOR COUNTY, WEST VIRGINIA

REPLY BRIEF OF APPELLANTS TO WVDHHR

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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 20th 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

Appellants do not disagree with the facts WVDHHR sets forth with their policy concerning out of home perpetrators. Appellants do disagree with WVDHHR when it says their policy has no application to this appeal because the WVDHHR just made an argument in the their statement of facts, which directly or impliedly says the WVDHHR was following policy, so it's another nail in appellants' hoped for coffin.

For lack of a better place to respond and following the lead of the WVDHHR to include it in the statement of facts, appellants are disturbed that the WVDHHR policy is such that it does not do a full initial assessment and safety evaluation for out of home perpetrators.

The reason for appellants being disturbed is that a huge number of coupled family units have all the adults working so that they can survive. Additionally, a large percentage of single parent family units are headed by an adult who has to work.¹ The working couples and single

¹ According to the United States Census Bureau, 2005 American Community Survey, there are 55,224,773 "Married-couple families" with 52.1% having both a husband and wife in the labor force and 62.7% of them have children under 18 years of age. Additionally there are 19,116,376 "Other families" and 73.3% of these are "Female householder, no husband present" with 51.2% being "In labor force" and for such, 61.3% have children under 18 years of age. See <http://www.census.gov/hhes/www/occupation.html> or Exhibit 1 attached hereto.

working parents plus non-working parents who want a respite oftentimes use babysitters/childcare providers. Sometimes the babysitters/childcare providers are family or friends doing the job gratuitously and sometimes babysitters/childcare providers are paid for their services.² The same babysitters/childcare providers are often reused because the parents trust them and/or the child(ren) are familiar with the reused babysitters/childcare providers. This is sometimes a huge mistake, as it was in the case at bar, where grandpa did not have his grandchild's best interests at heart.

The policy of the WVDHHR for its CPS worker of not doing a full initial assessment and safety evaluation for out of home perpetrators provides less safety for those children who are and will be abused by babysitters/childcare providers. The WVDHHR using such a policy approach increases the risk for more children to be abused by babysitters/childcare providers because of doing a small scale investigation. Additionally, the babysitters/childcare providers often times deal with various children, which increases the number of children to be abused by those babysitters/childcare providers who are perpetrators. The undersigned does not know what the costs are for one sexually abused child, but if you look at what Helen Jean Lough testified to at her deposition and consider the costs of one victim,³ it is very significant. The WVDHHR

² A detailed breakdown of how childcare is provided is found in "Who's Minding the Kids? Child Care Arrangements: Winter 2002. It is published by the U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau and can be found at <http://www.census.gov/prod/2005pubs/p70-101.pdf>.

³ Helen Jean Lough's testimony is set forth on pages 32 to 40 of appellants' brief. That presents a view of the possibilities of some of the damages to the victim. These are very devastating possibilities for the victim. It doesn't end there. There are consequences to those the victim attempts to have an intimate relationship with, as well as any children the victim has or that the victim is involved with raising or caring for. If WVDHHR substantiates abuse that requires intervention with an abuse and neglect petition, then there are the costs of an abuse and

policy of not doing a full initial assessment and safety evaluation for out of home perpetrators is negligent at best. The WVDHHR policy is a band aid approach to protect the children of out of home perpetrators. The WVDHHR is part of the investigatory multi-disciplinary team by virtue of West Virginia Code, § 49-5D-2(a) and has an ongoing duty by virtue of West Virginia Code, § 49-5D-2(c) as a member of the ongoing investigative team concerning out of home perpetrators.

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 appellants. Appellants objected to the trial court's rulings.

POINTS AND AUTHORITIES RELIED UPON

CONSTITUTIONS:

5th Amendment to the United States Constitution

14th Amendment to the United States Constitution

neglect case with waiting time, transportation officer's time and expenses, judicial time, the value of hearing room(s) with utilities, court reporter's time, prosecutor's time, bailiff's time, court appointed lawyers fees and expenses for the perpetrator(s), court appointed lawyers fees and expenses for the non-abusing parent, guardian ad litem(s) fees and expenses, therapist's charges, psychiatrist's charges, drug expenses, foster care or specialized foster care expenses, clothing vouchers, independent living expenses, administrative costs for all the fees and expenses, costs of prosecuting and imprisoning the perpetrators, etc

Article 3, § 10, of the West Virginia Constitution

STATUTES:

West Virginia Code, § 49-5D-2

CASES:

Arbaugh v. Board of Education, 591 S.E.2d 235 (W.Va. 2003).

DISCUSSION OF LAW

A. The Circuit Court Incorrectly Concluded that No Special Relationship Existed

Appellants do not claim that the WVDHHR did anything in about late spring or early summer of 1998 to cause Anissa Barbina to be twice sexually abused by Charles Curry. However, Valley clearly takes the position that it verbally reported to Bonnie Nelson, an intake worker of the WVDHHR, on September 18, 1998, in conformity with W. Va. Code § 49-6A-2 that Anissa Barbina was sexually abused by Charles Curry. Though the WVDHHR denies receiving the report, the appellants are to get the benefit of the report in deciding if the WVDHHR are entitled to a summary judgment. Whether or not it establishes a special relationship, it ultimately shows the thinking of the trial court, who decided that since the WVDHHR did not have a document of the referral that it did not take place and/or the appellants failed to show the CPS referral was processed higher up the chain of command. Bonnie Nelson was the employee of the WVDHHR who was chosen by the WVDHHR to be the point person for CPS referrals. If there is evidence of a verbal referral to her, while doing her job duties at the WVDHHR, it is attributable to the WVDHHR through respondeat superior.

Appellants' counsel's thinking has evolved during the course of the progress of this case (even as I read the reply brief of the WVDHHR) to believe that abused children have a special

relationship with the the multidisciplinary investigative team from the moment they can be identified. The statutory basis for such is West Virginia Code, § 49-5D-2. West Virginia has enacted special laws to protect children.⁴

Another law to protect special children that the West Virginia Legislature enacted was West Virginia Code, § 49-5D-2. The special children that the West Virginia Legislature sought to protect are those sexually assaulted, sexually abused, abused and neglected.

The West Virginia Legislature wanted permanent members on the team from the WVDHHR, the police, the prosecutor, and other children specialists. This meets the first element for a special relationship.

The West Virginia Legislature cherry picked who they wanted to be on the team and repeatedly used the phrase, as well as multidisciplinary investigative team. The West Virginia Legislature said "(s)tate, county and local agencies shall provide the multidisciplinary investigative team with any information requested in writing by the team as allowable by law. . .", which made these agencies subservient to the multidisciplinary investigative team. There can be no doubt that implicit within the duties in subparagraph "c" and the balance of the statute is that if nobody else knew that inaction could lead to harm to sexually assaulted, sexually abused, abused and neglected children, the multidisciplinary investigative team knew, which satisfies the second element.

Sexually assaulted, sexually abused, abused and neglected children who are less than one year of age cannot reasonably be expected to call the multidisciplinary investigative team . Sad

⁴ e.g., West Virginia Code § 49-7-7 (contributing to delinquency of a child); West Virginia Code § 61-8C-2 (involving minor in sexually explicit conduct); West Virginia Code § 21-6-7.

to say, but the undersigned was not even aware of this statute or the multidisciplinary investigative team until depositions were being taken in this case. The method of direct contact between children and the multidisciplinary investigative team should not be very restrictive when it comes to children. "Some form of direct contact" when it comes to children having a special relationship, especially sexually assaulted, sexually abused, abused and neglected children, should be when one of the permanent members knows or should know the identity of a sexually assaulted, sexually abused, abused and neglected child. Such should start from the time a CPS referral is made, as strong evidence shows was done in the case at bar on September 18, 1998.

The West Virginia Legislature was counting on the multidisciplinary investigative team to take the lead. Sexually assaulted, sexually abused, abused and neglected children need special protection, including being able to know when their secret is out that help is on the way. The West Virginia Legislature wants the special children who have been sexually assaulted, sexually abused, abused and neglected to be able to rely on the multidisciplinary investigative team because often the ones the children have learned to trust from the womb are often the ones who are the perpetrators that sexually assault, sexually abuse, abuse and neglect them.

The case at bar had a bankrupt mother who had custody and who chose to believe her convicted father's sporadic denials over his admissions of guilt to multiple people (i.e., police, lawyer, doctor, plea forms, and judge) over Anissa Barbina. Unfortunately, Anissa is not the first and won't be the last. The West Virginia Legislature probably realized the cost of the special children who have been sexually assaulted, sexually abused, abused and neglected

The WVDHHR argues it did no damage after it was notified on February 7, 2000, because Anissa Barbina had no contact with Charles Curry thereafter. The Sheriff did the

same.

Lori Glover at her deposition in a summarized form said,

- 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);

Doing nothing on Anissa Barbina's case for the approximately ten months violated the duty of West Virginia Code, § 49-5D-2(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.

This Court stated in *Brandon Lee, In Re*: H.S. 32872 (030106 Berkeley County):

Numerous statutes evidence the paramount importance that we attach to protecting and safeguarding this state's children from abusive and neglectful environs.

From Lori Glover's deposition summaries, it is apparent that Anissa Barbina's was brought up monthly, and nothing was done. The Good Samaritan story provides two types of wrongs.

Those of commission by the robbers and thieves; those of omission by the priest and Levite who walked on by to let the victim continue hurting with untreated wounds that might not properly heal without intervention. Here, the WVDHHR did not coordinate or cooperate or recommend.

Doing nothing on Anissa Barbina's and letting her case slide through the cracks is an error of

omission that is “. . . manifestly outside the scope of employment or official responsibilities.”

They were put in a special job to protect special kids, like Anissa Barbina. They damaged the kids they were to care for. Sharon Corley said it was a significant amount of time that went by.

Article 3, § 10, of the West Virginia Constitution, which provides as follows:

§ 10. Safeguards for Life, Liberty and Property

No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

This is similarly provided in the Fifth and Fourteenth Amendments to the United States Constitution. It is up to a jury, not a Judge, to determine if “his or her acts or omissions were manifestly outside the scope of employment or official responsibilities.” same.

Article 3, § 10, of the West Virginia Constitution and the Fifth and Fourteenth Amendments to the United States Constitution provide due process rights and jury trial rights for persons, which includes Anissa Barbina. The person of Anissa Barbina is comprised of her body, mind, and spirit (with the latter based on the faith of most people). Mental damages includes fear, which is the core of most people’s neurosis(es). The father and custodian of Anissa Barbina had in his counter-affidavit that:

12. Anissa Barbina was damaged a little more with each day that she did not receive counseling and with each day she knew that Charles Curry remained free to possibly strike again.

and he provided graphic evidence to support what raised his initial concerns that his daughter was a sexual abuse victim at page 37 of his deposition:

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.

Appellants provided extensive testimony from the deposition of Helen Jean Lough to show the damages that sexual abuse victims, such as Anissa Barbina, can have (which is referenced in footnote 3 herein). A fair reading of what John Barbina had to say in conjunction with what Helen Jean Lough, who is/was a therapist for Valley supports a clear inference that Anissa Barbina was damaged. Appellant was not given the benefit of that inference by the trial court. Appellants brought these to the attention of the trial judge in counter-affidavits to the summary judgment motions. Damages were sufficiently established to avoid a summary judgment.

For a judge to say she is not mentally damaged steals her constitutional due process rights and jury trial rights for her deprivation of a life free of her mental damage from the sexual abuse and battery. For a judge to say she is not mentally damaged steals her constitutional due process rights and jury trial rights for her deprivation of her liberty to obtain whatever employment she might have been able to pursue without the layer of mental damage from the sexual abuse and battery that can impair her ability to strive in school to achieve the fundamentals necessary for certain jobs and can impair the development of social skills for properly interacting at her place of employment.

The Circuit Court Wrongly Applied *Arbaugh v. Board of Education*

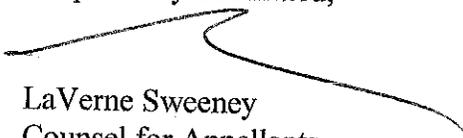
The decision as to whether or not the sexually abusive acts towards Anissa Barbina were egregious are up to a jury to decide under Article 3, § 10, of the West Virginia Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Most human beings

might reasonably conclude that a 60+ year old grandfather rubbing his 9-10 year old granddaughter's genitals to see what it felt like and to allow his penis to fall out of his shorts and against her is egregious, especially one who made multiple admissions. Appellants case was pending on the same issues as *Arbaugh* when it was decided and appellants' case was stayed pending the *Arbaugh* decision. The undersigned submitted a brief on behalf of appellants in *Arbaugh*. Appellants should not be banned from the the *Arbaugh* decision by saying it only has prospective application.

RELIEF PRAYED FOR

Appellants prays that this Honorable Court reverse the decision of Taylor County concerning awarding summary judgment to the WVDHHR.

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 13th day of September, 2006, and by faxing such on the same day to each such attorney and/or party, if a party has filed pleadings and is not represented by counsel to his or her fax number as set forth below:


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