MINISTERIAL VERSUS DISCRETIONARY ACTS OR OMISSIONS IN CHILD WELFARE LITIGATION

ANDREA MACIVER[*] & DANIEL POLLACK[**]

I. INTRODUCTION

Too often the child welfare system fails our children, especially foster children, leaving our most vulnerable population at risk of harm.[1] Many children in the welfare system are injured or even killed because "[t]he system frequently fails to provide children with stable, secure care" and "fails to meet foster children's basic medical, psychological, and emotional needs."[2] This system-wide failure is the result of several recurring problems, which are on the rise, including: inadequate investigation of prospective foster parents and their families, placing children in inappropriate homes, overcrowded foster homes, placing children with first-time foster parents who are inexperienced and become overwhelmed, and inadequate supervision of foster homes.[3] These recurring problems have resulted in harm to those children under the care of the child welfare system, leading many of them to seek redress in the courts.[4]

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[*] Andrea MacIver, J.D., DePaul University College of Law. Appellate Judicial Clerk for the Honorable Nathaniel R. Howse, Jr.

[**] Daniel Pollack, M.S.S.A. (M.S.W.), J.D., Professor at the School of Social Work, Yeshiva University in New York City, and a frequent expert witness in cases involving child welfare and developmental disabilities. Contact information: dpollack@yu.edu; (212) 960-0836.

[1] *See* Nelson Hincapie, Op-Ed, *The Foster-Care System Has Failed Our Children*, MIAMI HERALD (Dec. 8, 2014), http://www.miamiherald.com/opinion/op-ed/article4371831.html.

[2] Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 6–7 (1995) ("Although there are several reasons for the failures, three have been particularly determinative: (1) an upsurge in the number of children in need of care, (2) an overburdened system and agencies, and (3) an inadequate number of foster parents.").

[3] *See* Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397, 421 (2014).

[4] *See* Carolyn A. Kubitschek, *Holding Foster Care Agencies Responsible for Abuse and Neglect*, 32 HUM. RTS. 6, 6–7 (2005).

When a child is harmed while under the care of child welfare services, that child may have a viable cause of action in state or federal court.[5] Although some argue the children may fare better in federal court, which would still be an uphill battle,[6] this article focuses on state claims. When pursuing state claims against a state agency, the first challenge a child will face is whether the state agency and its employees are immune from liability in the matter.[7] Although each state's immunity provisions differ, many states offer immunity where the act or omission of the state employee is discretionary, as opposed to an act or omission that is ministerial.[8] This distinction is key because in many states, official immunity does not shield officials from liability arising from negligent performance of ministerial acts or functions (i.e., directives the officials are required to follow and involve no discretion on the part of the employee).[9] Conversely, an official acting with discretion may be found immune from liability.[10]

Although the distinction between an act or omission that is discretionary and one that is ministerial may be difficult to determine in practice,[11] the rationale and justification behind granting state employees or officials immunity for discretionary acts or omissions may help clarify why courts have found it so important to make the distinction in the first place. First, "[i]f the government and its employees are subject to tort liability [any time they] exercis[e] their discretion" in decision-making, the potential for an overwhelming amount of lawsuits could "stifle vigorous decision-making and thus lower the quality of the ultimate decision."[12]

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[5] *See* Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 940 (2005).

[6] *See id.*

[7] *See id.* at 941.

[8] *See, e.g.*, OHIO REV. CODE ANN. § 2744.03 (West 2012).

[9] *See, e.g.*, *id.* § 2744.03(A)(2) (state actors not immune for negligent conduct "required by law or authorized by law").

[10] *See, e.g.*, *id.* § 2744.03(A)(3) (providing for immunity where the action or failure to act "was within the discretion of the employee").

[11] *See, e.g.*, Charron v. Thompson, 939 S.W.2d 885, 886 (Mo. 1996).

[12] Laura Huber Martin, Comment, *Caseworker Liability for the Negligent Handling of Child Abuse Reports*, 60 U. CIN. L. REV. 191, 204 (1991). *See also* Steven G. Carlino, *The History of Governmental Immunity in Ohio*, 32 OHIO N.U. L. REV. 59, 87–88 (2006).

> The public service would be hindered and the public safety endangered if the state and its political subdivisions would be subjected to monetary

(*continued*)

Second, separation of powers dictates that courts should not review the discretionary decisions made by state employees or officials.[13] When a state employee or official is not using any discretion in his or her decision-making (i.e., where the act or omission is ministerial) these rationales for immunity cease to exist.[14]

State child welfare laws, regulations, and manuals are voluminous and can run many hundreds or even thousands of pages.[15] But is every sentence of a specific directive nature to be defined as a ministerial action? From a plaintiff's perspective, the compulsion is to answer "yes." The manual instructs an action be taken and it was not. The state's perspective is much less certain. All would agree every directive in the state's child welfare manual is not created equally. Ensuring a criminal background check is completed before issuing a foster care license is not comparable to ensuring a clothing reimbursement voucher is signed in exactly ten days.[16] Nevertheless, a plaintiff will want to characterize a criminal background check and any other specific directives as ministerial to avoid immunity of the actor.[17] Failing to do any one act may not necessarily result in a finding of negligence, but, depending on its importance, and assuming a convincing causation case can be made, it certainly might.

From the state's perspective, does the public child welfare agency itself have the authority to definitively designate which directives are ministerial and which are discretionary? Probably not. The way in which

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> damages at the instance of every claim made by a citizen. It is necessary that judges, scholars, and legal practitioners abandon the fiction that governments and their officials can "do no wrong" and replace it with the understanding that the modern reasoning for governmental immunity is for the protection of the citizenry.

Id.

[13] *See id.* at 203 ("[T]he judiciary should not oversee and evaluate the appropriateness of a policy decision by a coordinate branch.").

[14] *See id.* at 203–04.

[15] *See, e.g.*, KAN. DEP'T FOR CHILDREN AND FAMILIES, PREVENTION AND PROTECTION SERVICES POLICY AND PROCEDURE MANUAL (2015) (containing over 600 pages of directives).

[16] As one example, compare the language of the requirement for criminal records checks and fingerprinting in OHIO REVISED CODE ANN. § 2151.86 (West 2012) with the regulations for reimbursing foster care costs in OHIO ADMIN. CODE 5101:2-47-11 (2012).

[17] *See, e.g.*, OHIO REV. CODE ANN. § 2744.03(A)(3) (immunizing state actors where the action "was within the discretion of the employee"). Conversely, ministerial, or non-discretionary, acts do not immunize the actor from liability. *See, e.g.*, *id.*

a directive is phrased will have great weight, but the characterization of a duty as ministerial or discretionary is determined by the nature of the action, not by the agency or department of the one performing the action or omission.[18]

Courts have found that "[a] duty is discretionary if the government actor is required to exercise his or her judgment or discretion in performing the duty."[19] On the other hand, "a duty is ministerial and not discretionary if it is imposed by law and its performance is not dependent on the employee's judgment."[20] The Supreme Court of the United States explained that "[t]he requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'"[21] In assessing whether a function is discretionary or ministerial, courts generally conduct a case-by-case determination, weighing "such factors as the nature of the official's duties, the extent to which the acts involve policymaking or the exercise of professional expertise and judgment."[22]

In the field of public child welfare services, then, exactly which acts or omissions are ministerial, and which are discretionary? Each state has its own unique constitution, case law, statutes, regulations, child welfare manuals, and structure.[23] This complexity does not allow for categorical

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[18] *See, e.g.*, Nebraska v. Ellis, 77 N.W.2d 809, 813 (1956) (describing an official ministerial duty as one which "is absolute, certain, and imperative," and describing the character of the duty as "determined by the nature of the act to be performed").

[19] Miss. Dep't of Human Servs. v. S.W., 974 So. 2d 253, 258–59 (Miss. Ct. App. 2007). *See also* Dancy v. E. Miss. State Hosp., 944 So. 2d 10, 16 (2006) (citing T.M. v. Noblitt, 650 So. 2d 1340, 1343 (Miss. 1995)); Hawkins v. Holloway, 316 F.3d 777, 789 (8th Cir. 2003).

[20] Miss. Dep't of Transp. v. Cargile, 847 So. 2d 258, 267 (2003) (citing Mohundro v. Alcorn County, 675 So. 2d 848, 853 (Miss. 1996)); *see also* Charron v. Thompson, 939 S.W.2d 885, 886 (Mo. 1996) (explaining a ministerial act is one which is required to be performed "upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to [the official's] own judgment or opinion" (quoting Rustici v. Weidemeyer, 673 S.W. 2d 762, 769 (Mo. 1984)).

[21] United States v. Gaubert, 499 U.S. 315, 322 (1991) (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).

[22] *Charron*, 939 S.W.2d at 886 (quoting Kanagawa v. State, 685 S.W.2d 831, 836 (Mo. 1985)).

[23] *See* Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 286 (2007) (*continued*)

rules on this subject matter, but this article nonetheless attempts to offer some meaningful guidelines on which state actions are discretionary and which are ministerial.

II. DISCRETIONARY VERSUS MINISTERIAL ACTS OR OMISSIONS APPLIED

A. State Surveys

Below is an analysis of how various states have used the discretionary versus ministerial acts or omissions dichotomy in determining whether state immunity applies in cases involving children who are harmed while under the state's care. In reviewing these cases, it is important to pay attention to how the plaintiff frames his or her claims, how the court ultimately categorizes the plaintiffs' claims—as either arising out of discretionary or ministerial acts or omissions—and how the legislature has impacted the courts' rulings, if at all.

1. Michigan

In Michigan, the issue of whether a state social worker's acts or omissions are discretionary or ministerial has only been addressed by the courts a handful of times.[24] In *Walker v. Gilbert*,[25] immunity for state workers was upheld as "discretionary-decisional" because of the workers' "personal deliberations, decisions and judgments."[26] In that case, multiple Department of Social Services workers were sued for negligence and willful and reckless misconduct.[27] The department removed two minors from their mother's care and placed the children with a foster family, the Gilberts.[28] After being placed with the Gilberts, the department confirmed the foster father had slapped one of the children.[29] The foster parents agreed to counseling, and the department left the minors in the Gilberts' care.[30] However, following this first confirmed incident, a nurse reported bruising on one child, which the foster parents attributed to a fall, and the

("[S]ignificant policy differences [exist] throughout the states [regarding] family law issues.").

[24] *See, e.g.*, Walker v. Gilbert, 408 N.W.2d 423, 425–26 (Mich. Ct. App. 1987); Williams v. Horton, 437 N.W.2d 18, 20 (Mich. Ct. App. 1989).

[25] 408 N.W.2d 423 (Mich. Ct. App. 1987).

[26] *Id.* at 425.

[27] *Id.* at 424.

[28] *Id.*

[29] *Id.*

[30] *Id.*

other child was hospitalized for brain injuries, including partial paralysis, as a result of a beating from the foster father.[31] Because an incident had been reported prior to the child being hospitalized, the complaint sought to hold the state workers liable.[32] The appellate court affirmed the trial court's dismissal of the case on the issue of immunity because it held the state workers' selection of the foster family, its placement of the child with that family, and the continuation of that placement after receiving and investigating reports of abuse was "discretionary-decisional" conduct for which they were immune.[33] Specifically, the court reasoned:

> Because several foster homes were available, significant decision-making was involved in selecting the Gilberts as a foster family, and that decision process remained significant even in the face of limited vacancies at the time of placement. Significant decision-making was also involved in maintaining the Gilbert placement after investigation of reported abuse: it was not until after a [department] meeting, an investigation, and the Gilberts' admission of their error and promise to attend counseling that [the department] decided to continue the Gilbert placement.[34]

Two years after *Walker* was decided, the Michigan courts again upheld immunity for a state social worker's discretionary actions.[35] In *Williams v. Horton*,[36] a fifteen-year-old ward of the state left a group home to live with her cousin, where the minor was then beaten to death by her cousin and her cousin's friends.[37] The trial court found the state delinquency services worker negligent in placing and supervising the minor.[38] Specifically, the trial court judge commented that the "effort of placing the child would be a ministerial effort" because the social worker made the decisions about placing and supervising the minor within the guidelines of the department.[39]

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[31] *Id.*

[32] *Id.*

[33] *Id*. at 425–26.

[34] *Id.*

[35] *See* Williams v. Horton, 437 N.W.2d 18, 19 (Mich. Ct. App. 1989).

[36] 437 N.W.2d 18 (Mich. Ct. App. 1989).

[37] *Id.* at 19.

[38] *Id.*

[39] *Id.* at 20.

The appellate court, however, disagreed and found governmental immunity applied because, in settling upon a proper placement for the child, "significant decision-making was required" by the department worker.[40] In its ruling, the appellate court noted:

> In determining a proper placement, [department worker] had to consider and weigh several factors, including the goal of the intensive treatment program, [the minor's] history, state policies, the suitability of local and available placement openings, and the need for care in a structured setting or environment.[41]

In both Michigan cases, the allegations were serious and the resulting injuries were severe: a brain injury resulting in partial paralysis and death.[42] Nevertheless, because the courts viewed the actions that allegedly caused these injuries as discretionary, the plaintiffs were unable to hold the state social workers liable.[43] Even if they could prove the injuries in each case were caused by the actions of the state social workers or that the actions of the state social workers were willful or grossly negligent, discretionary immunity barred them from recovery.[44]

2. Mississippi

In *Mississippi Department of Human Services v. S.W.*,[45] the court found three actions by the state workers to be ministerial and thus not subject to immunity.[46] In this case, a minor filed a negligence action against the Mississippi Department of Human Services.[47] The minor was sexually abused by employees of the child care facilities in which he was placed.[48] Therefore, the minor alleged the department breached its statutory duties to him while the minor was in its care and custody.[49] The trial court entered a judgment against the department because it found the department did not make required in-person contacts with the minor each

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[40] *Id.*

[41] *Id.*

[42] *See Walker*, 408 N.W.2d at 424; *Williams*, 437 N.W.2d at 19.

[43] *See Walker*, 408 N.W.2d at 425–26; *Williams*, 437 N.W.2d at 20–22.

[44] *See Walker*, 408 N.W.2d at 425–26; *Williams*, 437 N.W.2d at 20–22.

[45] 974 So. 2d 253 (Miss. Ct. App. 2007).

[46] *Id.* at 259–60.

[47] *Id.* at 256.

[48] *Id.*

[49] *Id.*

month, the department did not sufficiently investigate reported abuse, and the department did not provide counseling for the minor when he returned home. [50]

The department appealed the trial court's ruling, arguing it was immune from liability because its alleged negligent conduct was discretionary in nature.[51] The appellate court addressed each of the trial court's three findings separately.[52]

With respect to the required monthly face-to-face contacts with the minor, the appellate court found the department's omissions to be ministerial and thus not immune from liability:

> Although the manner in which to execute the monthly contacts involves an element of choice, [department] employees are not at liberty to choose whether or not to adhere to the minimum contact requirements. At bottom, the manual requires (1) weekly contact during the first month of placement and monthly contact thereafter, whether face-to-face, by telephone calls, or written correspondence. [sic] and (2) quarterly face-to-face contact. [department] employees have no discretion to make less than the required contact.[53]

With respect to the department's alleged failure to sufficiently investigate the report of sexual abuse, the appellate court found these omissions were ministerial and not subject to immunity either.[54] The appellate court reasoned:

> [The department's] duty to investigate involves both ministerial and discretionary functions. [Department] workers are certainly called upon to exercise their own policy-based judgment in deciding whether a report of abuse is substantiated. However, the decision whether to substantiate the report requires, as a precondition, that [the

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[50] *Id.* at 256–57.

[51] *Id.* at 258.

[52] *Id.* at 259–60.

[53] *Id.* at 259.

[54] *Id.* at 260.

> department] conduct an investigation of the alleged abuse.[55]

Therefore, the court held the department "ha[d] no discretion to prematurely terminate an investigation without fully performing the outlined duties; to do so violate[d] specific mandatory directives."[56]

With respect to the department's alleged failure to provide medical care in the form of counseling, the appellate court again found this duty to be ministerial.[57] In arriving at this conclusion, the court stated:

> [Department] employees are required to call upon their own policy-based judgment to determine whether the child needs a particular service—in the instant case, mental health treatment. However, once the determination is made, [the department] is ultimately required to ensure that the child receives the service. The duty to ensure that the child receives the needed service involves no policy-based judgment or discretion.[58]

In this case, the department determined the minor needed counseling and made an appointment for those services, but then for quite some time failed to ensure he actually received the counseling. Therefore, the court found these omissions to be ministerial, and the discretionary function exemption did not bar the minor's claim that the department failed to ensure his medical needs were being met.[59]

The outcome in this Mississippi case—in which immunity did not bar the plaintiff's claims[60]—differed from the Michigan cases—in which immunity did bar the plaintiffs' claims[61]—because the acts that allegedly caused the injuries were, in fact, omissions.[62] Because the state actors

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[55] *Id.* at 259–60. Another case with similar reasoning is T.M. v. Noblitt, 650 So. 2d 1340, 1345 (Miss. 1995). "While the duty to investigate was of a ministerial nature, the next step of deciding whether reasonable cause actually existed to report the incident was inarguably one which required personal discretion." *Id.*

[56] *Miss. Dep't of Human Servs.*, 974 So. 2d at 260.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *See id.* at 259–60.

[61] *See Walker*, 408 N.W. 2d at 425–26; *Williams*, 437 N.W. 2d at 20–22.

[62] *See Miss. Dep't of Human Servs.*, 974 So. 2d at 256.

failed to act, the Mississippi courts could not find their inaction to be discretionary, and, accordingly, the state social workers were held liable.[63]

3. Missouri

The Eighth Circuit Court of Appeals, applying Missouri law, found state social workers immune from liability where their acts or omissions were discretionary in nature.[64] In *James* ex rel. *James v. Friend*,[65] a minor died from abusive head trauma while in foster care and after reports of abuse.[66] In this case, the minor was removed from his home and placed in a foster home.[67] While in the foster home, the minor was taken to the hospital for seizures, and responders reported suspected abuse.[68] Although the department found the reports unsubstantiated, the social workers on the minor's case, along with a team of others invested in the minor's best interests, decided the minor should be placed in a different home.[69] Despite the decision to move the minor, however, the minor was placed back into the original foster home, and the social workers on the case never informed the team members of this occurrence.[70] A few days after being placed back into the original foster home, the minor was rushed to the hospital for abusive head trauma at the hands of his foster parents.[71] The minor died as a result of those injuries.[72] On appeal, the minor's representative argued the department policy manual, which requires the state employees "[t]o keep all team members informed of significant changes in status of the case," imposed a ministerial duty on the defendant social workers to notify the team members that the minor would not be placed in a different home following the meeting where unfounded abuse was discussed.[73] The Eighth Circuit Court of Appeals disagreed, finding the social workers exercised considerable discretion. For example:

> [I]n complying with the policy, [the social workers] were required to determinate [sic] whether a change in status

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[63] *Id.* at 264.

[64] *See* James *ex rel.* James v. Friend, 458 F.3d 726, 731–32 (8th Cir. 2006).

[65] 458 F.3d 726 (8th Cir. 2006).

[66] *Id.* at 728–29.

[67] *Id.* at 728.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 729.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 731.

> had occurred and whether that change was significant enough to impose upon them a duty to notify the other team members. Moreover, even for significant changes, the policy requires the team members to exercise judgment regarding the urgency of notification. The policy does not require the notification of each day-to-day detail that could be construed as a change, nor does it require immediate notification of all team members. Accordingly, [the social workers'] decision not to notify the team members that [the minor] would not be immediately removed from the [original foster parents'] care constituted a discretionary act protected by official immunity.[74]

The alleged act that resulted in injury in this Missouri case was framed by the plaintiff as an omission: the failure to notify the team of a significant change in the minor's care.[75] Because the court found the state social workers had discretion in determining *when a change is significant*, the social workers were therefore immune from liability.[76] Despite a casual observer believing that placing a minor back into a dangerous home is a "significant change," the social workers were given discretion in determining whether it was in fact a significant change; therefore they were granted immunity regardless of how they used that discretion.[77]

4. Georgia

In *Georgia Department of Human Services. v. Spruill*,[78] the Supreme Court of Georgia found the actions of state human services workers to be discretionary and therefore subject to immunity.[79] In this case, twin infants born prematurely were suspected by their physician to be severely underweight, and the grandfather of the infants suspected the parents were abusing alcohol or drugs.[80] A Department of Human Services specialist visited the home and worked with the parents, but the problem worsened, and the infants were again hospitalized and deemed "within hours to days"

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[74] *Id.* at 731–32.

[75] *Id.* at 731.

[76] *Id.* at 731–32.

[77] *See id.*

[78] 751 S.E.2d 315 (Ga. 2013).

[79] *Id.* at 316.

[80] *Id.* at 317.

of dying.[81] The lawsuit alleged the department was negligent in its investigation of the reported neglect.[82] Specifically, the guardians alleged the defendant case worker was required to see the boys within twenty-four hours of his receipt of the report of neglect, required to visit the parents' home unannounced following the report of neglect, and required to undress the boys and visually inspect their undressed bodies following the report.[83] The trial court dismissed the lawsuit, finding the "discretionary function" exception properly applied, thus affording the state employees with immunity.[84] But the Court of Appeals disagreed and reversed.[85] The case then went before the Supreme Court of Georgia to consider whether the "discretionary function" exception applied, and the high court held it did.[86] In finding that the discretionary function exception applied, the Supreme Court of Georgia reasoned,

> The decisions as to which [the social worker] exercised discretion—how best to investigate the pediatrician's report, including how best to make initial contact with the boys, how best to assess the extent to which the boys were in danger, and whether to insist in his initial visit that the children be undressed for his inspection—were decisions that necessarily implicated a number of "social, political, and economic" policy considerations.[87]

The court went on to note,

> How best to allocate the limited resources and time available for investigation—when, for instance, [department] personnel have tried unsuccessfully to make contact with a family—necessarily requires a policy judgment as well, weighing the limited resources and time available, the perception of the risk of harm in a particular case, the demands of other cases that must compete for the

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[81] *Id.* at 319.

[82] *Id.* at 316.

[83] *Id.* at 321.

[84] *Id.* at 324.

[85] Spruill v. Georgia Dep't of Human Services, 729 S.E.2d 654, 655 (Ga. Ct. App. 2012).

[86] *Spruill*, 751 S.E.2d at 316.

[87] *Id.* at 322.

> limited resources and time, and the enforcement and protective priorities of the agency.[88]

In this Georgia case, the plaintiff framed the issue as one of omissions: the failure to see the boys within twenty-four hours of the alleged neglect, the failure to visit the parents' home unannounced, and the failure to undress to the boys when checking for signs of neglect.[89] Nevertheless, the Georgia Supreme Court found the social worker ultimately had discretion in determining "how best" to investigate the reports of neglect.[90] Therefore, the state social workers were immune from liability.[91]

5. California

California courts have heard a number of foster care cases.[92] In *County of Los Angeles v. Superior Court*,[93] the court granted immunity for the discretionary acts of the county department.[94] In this case, a minor was placed in a foster home where he was sexually molested.[95] The foster parent did not have a criminal record, but was not otherwise verified or cleared for the role, and had not completed licensing.[96] Almost immediately after being placed in the foster home, the minor was sexually abused, and the abuse continued throughout the three-month placement.[97] The complaint alleged the county violated its mandatory statutory directives and was negligent in its placement and supervision of the minor.[98] The Court of Appeal of California vacated the trial court's denial of the county's motion for summary judgment on the basis of immunity.[99] The court noted that determining whether a foster home is appropriate "seems to . . . be an activity loaded with subjective determinations and

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[88] *Id.* at 323.

[89] *See id.* at 321.

[90] *Id.* at 322.

[91] *Id.* at 321.

[92] *See, e.g.*, County of Los Angeles v. Superior Court, 125 Cal. Rptr. 2d 637 (Cal. Ct. App. 2002); Ortega v. Sacramento County Dep't of Health & Human Servs., 74 Cal. Rptr. 3d 390 (Cal. App. Ct. 2008); AE v. Cty. of Tulare, 666 F.3d 631 (9th Cir. 2012); Scott v. Cty. of Los Angeles, 32 Cal. Rptr. 2d 643 (Cal. App. Ct. 1994).

[93] 125 Cal. Rptr. 2d 637 (Cal. Ct. App. 2002).

[94] *Id.* at 639.

[95] *Id.* at 640.

[96] *Id.* at 641.

[97] *Id.* at 642.

[98] *Id.*

[99] *Id.* at 650.

fraught with major possibilities of an erroneous decision,"[100] and held that county social workers were entitled to discretionary act immunity for all negligent foster care placement decisions and negligent supervision of the child in that placement "unless the social worker fails to provide specific services mandated by statute or regulation."[101] Thus, because the court found that the actions of the social workers involved discretion, the social workers were immune from liability.[102]

Six years later, in *Ortega v. Sacramento County Department of Health & Human Services*,[103] the court again found discretionary immunity for the county department in a child welfare case.[104] In this case, a minor was stabbed in the heart and lung by her drug-abusing father.[105] The minor survived.[106] This incident occurred after the County Department of Health & Human Services took the minor into protective custody because police officers arrested her father for an unrelated incident.[107] A department social worker investigated the situation but returned the minor to her father's home three days later, and the minor was stabbed four days after being returned.[108] The trial court granted summary judgment to the department because it determined the actions of the social workers were discretionary.[109] The Court of Appeal of California affirmed the lower court's finding of immunity[110] noting the department was statutorily required "to conduct an investigation and determine the potential risk to the child. Neither of these are ministerial duties, and both involve a formidable amount of discretion."[111] The Court of Appeal went on to point out,

> [D]efendants complied with the duties imposed by the statute and regulation, by conducting an investigation and making a determination about potential risk to the child. Clearly, the investigation was "lousy" (as defense counsel

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[100] *Id.* at 649.
[101] *Id.* at 649–50.
[102] *Id.* at 633.
[103] 74 Cal. Rptr. 3d 390 (Cal. App. Ct. 2008).
[104] *Id.* at 392.
[105] *Id.* at 391.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 392.
[111] *Id.* at 400.

> conceded in oral argument to the trial court), and clearly the determination was the wrong one. However, that is what . . . immunity does—it immunizes discretionary decisions "whether or not such discretion be abused."[112]

Because the court found the act of placing the minor back into the home of her father was a decision made in that social worker's discretion, the social worker was immune from any liability that may have resulted from that placement.[113]

The Ninth Circuit Court of Appeals in *AE v. County of Tulare*[114] reversed and remanded the district court's order dismissing claims against the county.[115] The court did not recommend any particular disposition of the claims.[116] In this case, a minor was placed in a foster home where he was sexually assaulted by his foster brother.[117] The county was sued for failing to intervene before the assault despite knowledge of "escalating threats and violence" against the minor.[118] The minor brought a federal civil rights claim as well as state negligence claims against the county.[119] Specifically, the minor alleged the county knew the foster brother was on probation, was dangerous, and was a threat to the minor.[120]

The district court dismissed all the minor's claims against the county, but the Ninth Circuit reversed.[121] With respect to the state claims, the Ninth Circuit noted that the California Government Code provides that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."[122] The court then determined the burden of proving immunity based on discretionary act immunity rested with the state.[123] Because the dismissal of the state claims in *Tulare* occurred at the pleading stage, before the state had put forth a defense, the court held it could not dismiss the complaint

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[112] *Id.* at 400–01.

[113] *See id.* at 392.

[114] 666 F.3d 631 (9th Cir. 2012).

[115] *Id.* at 640.

[116] *Id.*

[117] *Id.* at 634.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See id.* at 639.

[123] *Id.* at 640.

based on discretionary act immunity.[124] In doing so, the court noted, "It would be odd indeed if a plaintiff included in a Complaint allegations that would establish a basis for finding discretionary act immunity on the part of government defendants."[125] Thus, although the Ninth Circuit allowed the plaintiff's complaint to survive a motion to dismiss based upon the pleadings, the court still recognized the claims could be dismissed if the state could prove the county's actions were discretionary.[126]

Finally, in *Scott v. County of Los Angeles*,[127] the court held the county was not immune from liability because its actions violated a ministerial requirement.[128] In this case, a minor was burned with scalding water by her grandmother, with whom the county placed the minor.[129] The county employee failed to visit the minor at least monthly as required by a department regulation.[130] A jury found for the minor and awarded damages against the county for negligent supervision of the minor in foster care.[131] The Court of Appeal held the trial court decision to be proper because the county was not immune from liability.[132] In making this finding, the court concluded the applicable regulation required the social worker to monitor and safeguard the child while in placement, which included monthly face-to-face contact.[133]

> [R]egular periodic contacts are required unless the placement has been determined to be stable, the child is placed with a relative, or there exist other facts, inapplicable here, *and* written second level supervisory approval for less frequent visits has been obtained. . . . [T]he requirement of monthly face-to-face contact, *plainly constituted mandatory requirements* which left [the county] no choice on the issue of the frequency of visits to [the minor].[134]

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[124] *Id.*

[125] *Id.*

[126] *See id.*

[127] 32 Cal. Rptr. 2d 643 (Cal. App. Ct. 1994).

[128] *Id.* at 647.

[129] *Id.*

[130] *Id.* at 646.

[131] *Id.* at 649.

[132] *Id.* at 646–47.

[133] *Id.* at 651.

[134] *Id.*

Unlike the other California cases discussed above, in *Scott*, the alleged act that resulted in injury to the minor was *an omission*—the failure to visit the minor in accordance with the state's regulations—and the social worker did not exercise any discretion.[135] Therefore, the worker could be held liable for the injuries that resulted from his or her failure to make those visits.[136]

6. Ohio

Ohio is unique from the states previously discussed. In Ohio, courts have struggled with determining whether an act or omission is discretionary or ministerial for purposes of governmental immunity,[137] but the legislature has narrowed that discussion through legislative enactments.[138] Ministerial acts allow for a defense of "qualified immunity," whereas discretionary acts are subject to a defense of "absolute immunity."[139]

In *Brodie v. Summit County Children Services Board*,[140] the court decided qualified immunity is not a defense to the allegation of failure to perform ministerial acts.[141] In this case, a minor, who was living with her father and a woman who was not the minor's mother, was starved, shackled, burnt, and beaten, among other atrocities.[142] Despite reports of child abuse, the county board did not file dependency or neglect proceedings and did not order an independent examination of the minor.[143] The board was sued for negligent failure or refusal to investigate the reports of child abuse.[144]

The Supreme Court of Ohio found the doctrine of absolute immunity did not apply in this case, because it is only a defense where "the public

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[135] *Id.*

[136] *Id.*

[137] *See, e.g.*, Adamov v. Ohio, 46 Ohio Misc. 1 (Ohio Ct. of Cl. 1975) ("The exercise of discretion is frequently the subject of judicial discussion. It is a troublesome term.").

[138] *See* OHIO REV. CODE ANN. § 2744.02 (West 2012).

[139] *See, e.g.*, E.J. v. Hamilton County, 707 F. Supp. 314, 318 (S.D. Ohio 1989) ("Although defendants rely on the doctrine of immunity established in O.R.C. 2744, this immunity is not absolute. It is qualified in whether the judgment or discretion [was] exercised. . . .").

[140] 554 N.E.2d 1301 (Ohio 1990).

[141] *Id.* at 1307.

[142] *Id.* at 1303.

[143] *Id.*

[144] *Id.*

official's duties are of a highly discretionary nature."[145] Therefore, the Supreme Court of Ohio examined the doctrine of qualified immunity and found the defendants could have been immune from liability under qualified immunity.[146]

> The doctrine of good faith qualified immunity as applied in Ohio is based on a three-part test: whether the official's action was taken within the scope of his or her authority; whether the actions consisted of duties involving the exercise of discretion and judgment; and whether the individual actions were made in good faith.[147]

The court went on to hold public officials immune for discretionary acts "unless a plaintiff challenging the public officer's good faith can show that the official acted in willful, reckless or wanton disregard of rights established under law[,]"[148] and "[q]ualified immunity may not be asserted as a defense to an action alleging the failure of a public official to perform ministerial acts."[149]

Ultimately, though, because the guardian ad litem alleged common law tort actions that encompassed ministerial as well as discretionary actions, the court remanded the matter back to the trial court to determine whether the defendants "acted in good faith in the performance of discretionary duties and whether they fulfilled their duty to perform statutorily required ministerial acts."[150]

Since *Brodie* was decided, however, the Ohio legislature created several delineated exceptions to governmental liability in the Political Subdivision Tort Liability Act (Act), which narrows and defines the former discretionary versus ministerial act or omission analysis.[151] Subject to a few exceptions, section 2744.02(A)(1) of the Act provides that political subdivisions are "not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in

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[145] *Id.* at 1306.

[146] *Id.*

[147] *Id.*

[148] *Id.* at 1307.

[149] *Id.*

[150] *Id.*

[151] *See* OHIO REV. CODE ANN. § 2744.03 (West 2012).

connection with a governmental or proprietary function."[152] With respect to discretionary acts or omissions, section 2744.03(A)(5) states:

> The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.[153]

Further, the immunity extended to employees of political subdivisions under section 2744.02(A)(1) of the Act is limited by three exceptions to immunity listed in section 2744.03(A), which states:

> (6) [T]he employee is immune from liability unless one of the following applies:
>
> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
>
> (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term 'shall' in a provision pertaining to an employee.[154]

The Ohio legislature has assisted courts in what was once a discussion of whether an act or omission is discretionary or ministerial by defining

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[152] *Id.* § 2744.02.

[153] *Id.* § 2744.03(A)(5).

[154] *Id.* § 2744.03(A)(6).

when acts or omissions are not discretionary such that government actors are immune from liability.[155] As stated by one author,

> The statutory scheme of providing general immunity, specific instances of liability, and discretionary defenses effectively combines the governmental-proprietary and discretionary-ministerial distinctions. If a court determines that an act is both governmental and discretionary, no liability will be imposed. Non-liability in this situation is a result of the blanket immunity for discretionary acts provided under the Act.[156]

Accordingly, Ohio's legislature has created a more detailed framework for courts to employ when determining whether immunity applies in any given set of facts.[157] Although the distinction between ministerial acts or omissions and discretionary acts or omissions is still recognized, the legislature has taken away blanket immunity for discretionary acts and has allowed the courts to examine the intent of the state actors in imposing liability when the state actor's discretionary judgment is alleged to have caused injuries to another.[158] This requires further inquiry from the courts, but it leaves open more opportunities for plaintiffs to pursue their claims and avoid the pitfall of discretionary immunity in appropriate cases.

B. Conclusion

A review of the case law from several states shows that the distinction between a ministerial act or omission and a discretionary act or omission is important when a plaintiff attempts to hold state actors liable for alleged harms.[159] Even more important is how the courts categorize the alleged act or omission as discretionary or ministerial.[160] In many of the cases discussed above, the plaintiffs framed their claims as harms resulting from ministerial actions or omissions of state actors.[161] Nevertheless, if the courts held that those acts were in fact discretionary, the plaintiffs' claims were dismissed regardless of how they were framed.[162] Overall, plaintiffs

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[155] *Id.*

[156] Carlino, *supra* note 12, at 87.

[157] *See* OHIO REV. CODE ANN. § 2744.02 (West 2012).

[158] *See generally id.*; *Brodie*, 554 N.E.2d 1301 (Ohio 1990).

[159] *See supra* Part II.A.

[160] *See supra* text accompanying notes 42–43.

[161] *See supra* Part II.A.

[162] *See supra* Part II.A.

did not fare as well where they alleged that an act, as opposed to an omission, resulted in harm.[163] This is possibly because when an act is alleged to have caused harm, the court has more leeway to find the act was discretionary.[164] In contrast, it is harder and possibly illogical for a court to hold that a true omission is a discretionary act.[165] It would certainly be unusual for a court to rule that the state actor's failure to abide by rules or regulations was within the state actor's discretion; why have rules or regulations at all if that were the case? Plaintiffs are generally more successful in court where the case involves an omission, whereas the state generally is more successful where the case involves an act.[166]

Where courts have found acts or omissions to be discretionary, state actors have been immune from liability, even in cases where it appears obvious (from a lay person's perspective) that the state actor did not use his or her discretion wisely.[167] This is a harsh result, especially in cases which have resulted in severe injuries or even death to children in the state's care.[168] States like Ohio have sought to soften this harsh outcome, and the legislature has essentially done away with blanket liability where injuries are caused by discretionary acts or omissions.[169] Although the Ohio statute only allows a few exceptions to discretionary act liability,[170] it appears to be a trend to deal with the harsh effects of blanket liability for discretionary acts or omissions.[171]

III. GUIDANCE FOR FUTURE CASES

Child welfare liability cases are not always black and white. Some acts or omissions appear to be a combination of ministerial and discretionary.[172] Each case has unique facts which make it difficult to draw the line between ministerial and discretionary.[173] For this reason, states may follow in the footsteps of Ohio, where the legislature delineates between discretionary acts or omissions and ministerial acts or omissions

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[163] *See supra* text accompanying notes 60–63.

[164] *See supra* text accompanying notes 89–91.

[165] *See supra* text accompanying notes 135–136.

[166] *See supra* text accompanying notes 60–63.

[167] *See supra* text accompanying notes 42–44.

[168] *See supra* text accompanying notes 42–44.

[169] *See supra* Part II.A.6.

[170] *See supra* Part II.A.6.

[171] *See* Martin, *supra* note 12, at 218–19.

[172] *See* Carlino, *supra* note 12, at 71.

[173] *See id.*

by defining what is not a discretionary act or omission.[174] Additional definitions and guidelines from the legislature clearly narrow a court's consideration when determining whether governmental immunity applies.[175] This could make the issue of immunity more predictable in cases where a child has allegedly been injured because of the acts or omissions of a state employee.[176] One author argued the discretionary-ministerial dichotomy should be abolished for the following reasons:

> First, the judicial interpretation of what constitutes a discretionary act results in inconsistent conclusions. Such variability in judicial interpretation is a frightening prospect for caseworkers who are consequently unable to predict the legal consequences of their actions. Second, a judicial finding that a caseworker's actions were discretionary forecloses recovery for innocent victims in the many instances where the state cannot be sued. Finally, in the other instance where the court determines that an act was ministerial and therefore subject to liability, the caseworker may be liable even when he or she acted in good faith.[177]

Additional statutory guidelines from the legislature could be a positive trend for all those involved in litigation where a child is injured or killed while under the care of the state and its employees. Given the mixed outcomes when courts are merely asked to determine whether an act or omission is discretionary or ministerial, the process by which a court determines whether governmental immunity applies in any given case is a toss-up.[178] Where the law is unclear, litigants cannot predict with any accuracy the outcome of their cases. And the issue of unpredictability is

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[174] *See* OHIO REV. CODE ANN. § 2744.03. In Kansas, the Department for Children and Families published its policy manual on July 1, 2015 setting forth which procedures are ministerial and which are discretionary by stating: "Statements containing the terms shall, must and will indicate that a policy is applicable or a course of action will be taken. The term should is a policy statement that indicates there may be discretion." KAN. DEP'T FOR CHILDREN AND FAMILIES, PREVENTION AND PROTECTION SERVICES POLICY AND PROCEDURE MANUAL 5 (2015).

[175] Martin, *supra* note 12, at 219.

[176] *Id.*

[177] *Id.* at 218–19.

[178] *See id.* at 204, 207 (contrasting approaches in California, Michigan, and Ohio with those in Florida, Indiana, and Oregon).

exacerbated by the fact-driven nature of the governmental immunity analysis.[179] The facts of many of these cases involving state social workers and injuries or death to young children are often so disturbing and egregious that it is difficult for judges to apply the law in an unbiased fashion. This unpredictability leads most cases to settle before the issue of immunity is determined, which could be another reason why many states have not focused more attention on assisting the courts in deciphering the discretionary-ministerial dichotomy—it is simply not an issue which makes its way to through the courts very often.[180] However, if the legislature and courts could create more predictability on the issue of liability in cases where the state and its employees have allegedly caused injuries to children, it is likely that, rather than settle, more cases will proceed through the judicial system.

Nonetheless, from a review of published case law, where a social worker completely fails to perform a regulation or mandate (i.e., an omission), plaintiffs have fared better in avoiding governmental immunity on their state claims, and have been more successful in having their claims decided at trial.[181] However, where plaintiffs have not fared well is when a mandate is performed, but performed negligently or even incorrectly.[182] Thus, although acts or omissions on behalf of state welfare workers both have the potential to cause harm to children in state care, a harm caused by an omission is more likely to fall outside the scope of state immunity provisions.[183]

Ultimately, whatever tasks are deemed ministerial, or whatever analysis each state imposes in determining governmental immunity, the importance of abiding by the laws, regulations, and manuals which impose specific obligations on child welfare workers, supervisors, and administrators in the scope of their work cannot be overstated.

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[179] *See supra* Part II.A (surveying various outcomes in state courts); Martin, *supra* note 12, at 212–13, 216–17.

[180] Florida, for example, encourages parties to child welfare litigation to settle. *See* Noel Semple, *Whose Best Interests? Custody and Access Law and Procedure*, 48 OSGOODE HALL L. J. 287, 294–95 (2010).

[181] *See, e.g.*, County of Los Angeles v. Superior Ct., 125 Cal. Rptr. 2d 637, 650 (Cal. Ct. App. 2002).

[182] *See id.*

[183] *See id.* at 649.