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COURT OF APPEALS  
STATE OF NEW YORK

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WEISBROD-MOORE,  
  
Appellant,  
  
-against-  
  
CAYUGA COUNTY,  
  
Respondent.  
-----

NO. 7

20 Eagle Street  
Albany, New York  
January 8, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Weisbrod-Moore v. Cayuga County.

3 MR. HERMAN: Good afternoon. May it please the  
4 court. I'm Jeff Herman from Herman Law with my co-counsel,  
5 Mark Zauderer, representing the appellant. I'd like to  
6 reserve three minutes for rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MR. HERMAN: Thank you. We're asking the court  
9 to reverse and to reinstate this complaint. The Fourth  
10 Department erred by not applying and creating a special  
11 relationship from the custodial duty doctrine.

12 JUDGE SINGAS: So are you asking for a separate  
13 standard for the special relationship, or are you arguing  
14 under the voluntary duty assumption under a regular rubric  
15 that this fits under that second step?

16 MR. HERMAN: Right. We could get there both  
17 ways, but my main argument is that under the custodial  
18 relationship, that a special duty was created.

19 JUDGE SINGAS: Okay. So under the voluntary  
20 assumption.

21 JUDGE CANNATARO: Could you really get there both  
22 ways? Because I'm not sure in the complaint, as a matter  
23 of pleadings, whether you laid out the other one - - - the  
24 - - - the Cuffy type undertaking.

25 MR. HERMAN: Well, I - - - I do believe we can

1 get there both ways. But just to clarify, the - - - the -  
2 - - the main argument is - - - is not under Cuffy, the  
3 voluntary assumption. It's that, because the parties were  
4 in a custodial relationship, because the county took  
5 custody of Jackie as a child, a special relationship was  
6 created.

7 JUDGE TROUTMAN: So your argument and your focus  
8 is that the special relationship alone takes it outside of  
9 special duty, and you don't even have to deal with special  
10 duty. You can get there through special relationship?

11 MR. HERMAN: Well, yes, just in the sense that  
12 special duty is created because of the special  
13 relationship. It's very similar to - - -

14 JUDGE SINGAS: Is that preserved below? Did you  
15 make that argument below?

16 MR. HERMAN: Yes. Yes. Yes, we did. Yeah. And  
17 it was completely ignored, frankly, by the Fourth  
18 Department, not - - - not even a mention of it in the  
19 opinion. But we argued extensively that the Cuffy doesn't  
20 even - - - we don't even get the Cuffy, just like in  
21 previous cases with prison inmates, with school children -  
22 - -

23 JUDGE HALLIGAN: Can - - - can you address, on  
24 that front, the difference - - - your adversary, I think,  
25 rests fairly significantly on the distinction between

1 physical and legal custody. So what should we make of  
2 that?

3 MR. HERMAN: Yeah. It's a distinction without a  
4 difference. And that's because, as this court has held  
5 before, the reason there is a special duty in a  
6 relationship created in a custodial relationship is because  
7 the person in - - - in custody loses their ability to  
8 protect themselves. They must rely on the custodian, the  
9 government, to protect them. It's even more true when it's  
10 a child put in foster care. The child's parents' rights  
11 are terminated. The child necessarily relies on the county  
12 to protect them, to protect their interests. It's in the -  
13 - -

14 JUDGE HALLIGAN: So - - - so if we - - -

15 CHIEF JUDGE WILSON: When you - - - when - - -  
16 sorry. Go ahead.

17 JUDGE HALLIGAN: Yeah. If we were to agree with  
18 you, then what sort of evidence would you say would bear on  
19 the question of negligence?

20 MR. HERMAN: Well, then it becomes a typical  
21 negligence case. This is - - -

22 JUDGE HALLIGAN: I understand, but specifically  
23 in this context - - -

24 MR. HERMAN: Right.

25 JUDGE HALLIGAN: - - - what would you think - - -

1 MR. HERMAN: Yes.

2 JUDGE HALLIGAN: - - - would be fair game in this  
3 case?

4 MR. HERMAN: So these cases and in this case, the  
5 - - - the - - - the facts are that are alleged, is that  
6 this little girl was - - - was being sexually violated,  
7 raped, things stuck in her vagina.

8 JUDGE HALLIGAN: But - - - but - - -

9 MR. HERMAN: And - - -

10 JUDGE HALLIGAN: - - - it might well be the case  
11 in some set of circumstances that - - - that the state, the  
12 locality, would not have any reason to foresee that that  
13 would happen. And - - - and so what, in your view, would  
14 you have to prove in order to establish reasonable  
15 foreseeability in - - - in these kinds of circumstances?

16 MR. HERMAN: Right. So in these kinds of cases,  
17 the evidence that typically comes in that's relevant is,  
18 for example, there's a duty to monitor the child, supervise  
19 the child, and make visits. If they don't do that and they  
20 don't know the child's being molested and there's physical  
21 signs, then arguably, that's negligence. There's cases  
22 where the child has told the county social worker, I'm  
23 being molested by the foster father, and the county ignores  
24 it. We have cases where that - - - that's documented in  
25 the - - - in the files.

1 JUDGE CANNATARO: That's not this case, though,  
2 right?

3 MR. HERMAN: Not this case.

4 JUDGE CANNATARO: Before you get too far afield,  
5 I just want to ask you, because I think what you said is,  
6 once you accept the proposition that there's a special  
7 relationship by virtue of the custodial relationship, then  
8 it becomes, I think you said, a regular negligence case.  
9 And I was just wondering, because I read some language in  
10 cases like Ferreira, for example, that seem to say, even if  
11 there is a special relationship that arises, the county  
12 would still be able to avail itself of an affirmative  
13 defense that it was acting in a government - - - in a  
14 discretionary governmental capacity. Do you - - - would  
15 you agree that they could still raise that defense?

16 MR. HERMAN: Absolutely. The government can  
17 still raise - - - the defense would be that they were  
18 engaged in a discretionary action, not - - - not  
19 ministerial, and that they - - - they can avail themselves  
20 of that defense here as well. I don't think it flies, but  
21 they could raise that. It's an affirmative defense, which  
22 really isn't properly before this court because this is a  
23 motion to dismiss. But the policy, which is very  
24 important, that the - - - that the county is asking for is  
25 blanket immunity. What the county is saying is that any

1 time a child is in foster care and they are negligent,  
2 which - - - which causes the child to be abused, they're  
3 immune.

4 CHIEF JUDGE WILSON: Can I just - - -

5 MR. HERMAN: That would be a dangerous precedent.

6 CHIEF JUDGE WILSON: Let me go back to something  
7 you said and something Judge Halligan asked just so we can  
8 put a pin in it. I think you said that there's no - - -  
9 distinction without a difference between physical custody  
10 and legal custody. And I'm wondering whether you would  
11 agree that the types of things that a state government,  
12 whatever, institution, could be held liable for when  
13 physical custody is present might be different than when  
14 it's simple legal custody and physical custody is with  
15 someone else.

16 MR. HERMAN: Well - - - and that gets to the  
17 negligence case.

18 CHIEF JUDGE WILSON: That's right. That's what  
19 I'm asking.

20 MR. HERMAN: Because we still have to prove - - -  
21 the plaintiff still has to prove that the county was  
22 negligent doing something that had, if they acted  
23 reasonably, would have - - -

24 CHIEF JUDGE WILSON: And those - - - and that's -  
25 - - that might be a different universe of things if the

1 county, for example, had physical custody of the child than  
2 if the custody - - - the county didn't.

3 MR. HERMAN: Arguably, the facts would be - - -  
4 would - - - would be different. But the - - - the - - -  
5 the county maintains legal custody even when they put a  
6 child in foster - - -

7 CHIEF JUDGE WILSON: Of course.

8 MR. HERMAN: - - - care, and it's considered to  
9 be a temporary placement. The county retains the right to  
10 have physical custody of the child. In fact, the county's  
11 duties require, if the child is in danger, to physically  
12 remove that child.

13 JUDGE HALLIGAN: But just to - - - to put a  
14 further pin in it if we can, it - - - it seems to me - - -  
15 and - - - and perhaps this is what the Chief is getting at  
16 that - - - that in the context of physical custody, right?  
17 And you see this in the prison cases, the question is - - -  
18 and - - - and with the child, it might - - - it might turn  
19 on safety issues, for example, has - - - has really to do  
20 with the interaction. For - - - did - - - did the, you  
21 know, caregiver, provide significant supervision such that  
22 the kid shouldn't have gone up the slide and jumped off the  
23 top, right? Or did the prison facility provide enough  
24 oversight so that fights were going to be identified and -  
25 - - and tamped down earlier? But when you're talking about

1 negligence in a placement choice, aren't - - - isn't that a  
2 totally different set of questions that really have to do,  
3 as I thought you were getting at, with whether or not the  
4 choice to place the child in this particular spot with  
5 these particular people, whether the - - - whatever the - -  
6 - the due diligence is that has to be done under the - - -  
7 under the statute and the regulations was complied with,  
8 whether complaints were ignored. Those just seem like very  
9 different sets of questions to me. Would you agree?

10 MR. HERMAN: Yeah. I mean, they're - - - they're  
11 case-specific. But the nature of - - - of - - - of acting  
12 reasonably, you know, the concept is the same. So even in  
13 a prison case, just because an inmate is injured doesn't  
14 make the - - - the state liable. There has to be evidence  
15 that they were negligent. And in fact, in the - - - in the  
16 Flaherty case, which is the 1947 case applying this  
17 custodial doctrine, the state wasn't liable even though  
18 they had custody because it wasn't reasonably foreseeable  
19 that that juvenile would have been injured. But - - - so  
20 it's case-specific.

21 JUDGE CANNATARO: But Counsel, this might be the  
22 same question. But it's - - - it's one thing to say that  
23 you were negligent in the selection of the foster parent.  
24 You were negligent in placing this child with this family.  
25 It's something else that sounds almost like a kind of

1 vicarious liability to say that the acts of the - - - of  
2 the foster parent, negligent or intentionally harmful acts,  
3 are imputed to the county. Are you arguing that all of it  
4 comes under the umbrella?

5 MR. HERMAN: No. No. Let me clarify this point,  
6 very important point. So we're not arguing for strict  
7 liability. We're not saying when a child - - - just  
8 because a child is in a - - - just because a child's  
9 injured in a foster home, the county is liable. What we're  
10 saying is only where we can prove the county was negligent  
11 in their - - - for example, in this case, their supervision  
12 of the foster child would they be negligent.

13 CHIEF JUDGE WILSON: So if the parent were - - -  
14 were liable - - - well, sorry. If the parent were  
15 negligent but the county wasn't, no county liability?

16 MR. HERMAN: That's correct. The only state  
17 that's adopted that, as I'm aware of, is New Orleans. But  
18 we're not arguing for vicarious liability. What we're  
19 arguing for is specific - - - I mean, Louisiana - - - is  
20 specifically a negligent-based case.

21 JUDGE RIVERA: You - - - you - - - you've tied,  
22 as I understand it, their responsibility to the duties  
23 given that they place a child in foster care. That - - -  
24 that might vary, right?

25 MR. HERMAN: Right. I mean - - -

1 JUDGE RIVERA: - - - depending - - - depending on  
2 the nature of the placement, depending on the needs of the  
3 child, depending on the information that the county has in  
4 advance and during the placement, regarding the - - - the -  
5 - - the foster parents, right?

6 MR. HERMAN: Right. The - - - the duties  
7 continue. They don't just drop the child off and say, oh,  
8 you know, we'll see this child hopefully when he's  
9 eighteen. No. They have a duty as legal custodian with  
10 responsibilities to monitor and ensure the safety. It  
11 makes no sense to say - - -

12 JUDGE CANNATARO: Is that - - - is that a common  
13 law duty or a duty imposed by statute?

14 MR. HERMAN: Statute. It's very specific. It  
15 requires them to visit the child monthly to ensure their  
16 safety. So - - -

17 JUDGE SINGAS: Aren't you asking us really to  
18 make a policy decision that is best left to the other  
19 branches of government? I mean, Judge Smith and McLean  
20 talked about the crushing burden, the financial  
21 responsibilities of the city, having - - - the municipality  
22 having to defend for, I guess, the class of people now will  
23 be anyone under the age of eighteen that's placed in a  
24 foster home, right? I mean, shouldn't maybe the  
25 legislature have some hearings in which - - - there should

1 be a more fulsome discussion before we expand the class of  
2 liability so dramatically?

3 MR. HERMAN: I don't think we're expanding the  
4 class because of the custodial duty doctrine. This court  
5 has already adopted that principle. When arguing under  
6 McLean - - - and on rebuttal, I will address the - - - the  
7 Cuffy duties very briefly, but this court has never applied  
8 the Cuffy factors to a custodial case. And that's because  
9 the court has accepted that when the government takes  
10 custody over an individual, deprived them of the - - -

11 JUDGE TROUTMAN: So are you arguing here  
12 regardless of the physical custody of the child? Because  
13 the county had legal custody, the custody cases that have  
14 traditionally been applied should be applied here  
15 irrespective of Cuffy?

16 MR. HERMAN: Yes. And it's even more important  
17 here because it's a vulnerable child whose parents have  
18 been prohibited from inner - - - from being part of their  
19 safety net. The parents are not allowed. They're - - -  
20 they're cut off. And the state says, *parens patriae*, we  
21 are stepping in as the parents for this child, and we have  
22 the duty to protect this child.

23 JUDGE TROUTMAN: But that works - - -

24 JUDGE GARCIA: Would it be - - -

25 JUDGE RIVERA: Just to your point - - - your

1 point is legal versus physical custody, that when - - -  
2 what - - - what undergirds that - - - that view from this  
3 court is that the person who's in physical custody cannot  
4 care for themselves, right? There's some limitation on  
5 their ability to protect themselves that they would have  
6 otherwise been able to do, but that a child in foster care  
7 is unable to do that.

8 MR. HERMAN: Yes. And I'll - - - and I'll quote  
9 this court in the Pratt case, where - - - it was a school  
10 case, where the court said, because the kid was dropped off  
11 at the school stop - - - school bus stop, the parents then  
12 had the obligation to reassume their protection of the  
13 child. That same principle applies here in the sense that  
14 the parents never have the right to reassume their  
15 protection of the child. This little girl is left at the  
16 mercy of the county.

17 JUDGE GARCIA: Counsel, wouldn't - - - there  
18 seems to be a lot of emphasis on the state coming in and  
19 saying you're unfit. The government comes in; we're taking  
20 this child now. We have responsibility. What if the state  
21 doesn't do that? What if it's an abandoned child, there  
22 are no parents? Is it a different rule then?

23 MR. HERMAN: Well, we're talking about a - - - I  
24 mean, the - - - the law requires, I think, the statutes, if  
25 a child's abandoned, for the government to come in and take

1 custody of them. But if the - - - if the - - -

2 JUDGE GARCIA: But they haven't come in and said,  
3 oh, no, you parents, you're not involved in this anymore.  
4 We're - - -

5 MR. HERMAN: Then those - - - these principles  
6 don't apply.

7 JUDGE GARCIA: So then that would not be a  
8 custodial liability case?

9 MR. HERMAN: Correct. Correct. Now, there may  
10 be a way to get there under Cuffy. I don't know the facts  
11 - - - you know, these theoretical facts, but I'm only  
12 saying - - -

13 JUDGE RIVERA: I don't understand. Why is that  
14 not a custodial liability case? I thought this whole thing  
15 turned on the custody, right? That it's a legal custody.  
16 The foster parents may have physical custody, but that the  
17 county, as you point out, at any time, could regain  
18 physical custody because it's got this continuing duty and  
19 obligation to oversee - - -

20 MR. HERMAN: Yes. But - - -

21 JUDGE RIVERA: - - - the - - - the foster  
22 placement.

23 MR. HERMAN: Yeah. But I'm sorry. The fact  
24 pattern that I understood was presented was that custody  
25 was never taken.

1 JUDGE GARCIA: No. No. No. No. That is not -  
2 - -

3 CHIEF JUDGE WILSON: Well, but the question is  
4 this, what - - - what happens if custody isn't taken away  
5 from the parents? A child is found abandoned somewhere.

6 JUDGE GARCIA: Yes. Who has custody in that  
7 case?

8 CHIEF JUDGE WILSON: No one knows who the parent  
9 is. But - - -

10 JUDGE CANNATARO: There's still custody.

11 CHIEF JUDGE WILSON: - - - the state assumes  
12 legal custody over the child.

13 JUDGE RIVERAA: Correct.

14 CHIEF JUDGE WILSON: What happens in that  
15 circumstance?

16 MR. HERMAN: Well, once the - - - well, it  
17 doesn't - - - it doesn't happen the state assumes legal  
18 custody, and they leave him with the parents.

19 CHIEF JUDGE WILSON: No. No. No.

20 JUDGE RIVERA: No. No. No.

21 CHIEF JUDGE WILSON: They don't know who the  
22 parents are. There's an abandoned baby at the doorstep  
23 like in the Santa Claus movie.

24 MR. HERMAN: Yes. Then under - - - under Social  
25 Services Law, the government does take custody of the

1 child.

2 JUDGE GARCIA: And so your rule would apply?

3 MR. HERMAN: Yes.

4 JUDGE GARCIA: So then it really doesn't matter  
5 at all that the state comes in and says to the parents,  
6 you're not fit; we're taking this child? Because you seem  
7 to rely on that a lot, at least in terms of a high ground  
8 position. You - - - the state are coming in and you're  
9 saying, you're unfit. We're taking over. You have no - -  
10 - I forget how you phrased it just now, but no ability to  
11 protect this child anymore. And I'm wondering if that's  
12 your entry into this custodial world, why that same logic  
13 would apply to the child abandoned that the state has no -  
14 - -

15 MR. HERMAN: I misunderstood your - - - your - -  
16 - your - - - your question. So yes, it would apply. As  
17 Justice Hahn said, once the state acts, it has to act  
18 reasonably.

19 JUDGE GARCIA: So the fact that they come in and  
20 take custody away from a parent is irrelevant?

21 MR. HERMAN: Once they have custody, they're  
22 responsible to protect the child reasonably, not - - - not  
23 a - - - we're not saying it's, again, a strict liability.

24 JUDGE RIVERA: I - - - I thought your point was  
25 in part that whatever this duty is, it might - - - there

1           might be a different standard by which you'd measure this  
2           negligence if indeed there are parents who are also  
3           responsible that the child could turn to.

4                     JUDGE GARCIA: Is that right?

5                     MR. HERMAN: I'm sorry. So you - - -

6                     JUDGE RIVERA: Perhaps I misunderstood you.

7                     MR. HERMAN: Yeah.

8                     JUDGE RIVERA: I thought in part your argument  
9           was the child is so vulnerable. Obviously, if a child is  
10          abandoned, there is no one other than the state and the  
11          foster parents perhaps. I think that's the way you were  
12          arguing that. Maybe I'm wrong. But if the child has  
13          parents, that the parents cannot even intercede.

14                    MR. HERMAN: That's correct.

15                    JUDGE RIVERA: So that was your argument?

16                    JUDGE GARCIA: That's a different standard of  
17          liability, the fact that you have parents who could  
18          intercede, but now can't intercede? That's a different  
19          standard than the baby that's abandoned?

20                    JUDGE HALLIGAN: I thought your point was just  
21          that when a child - - - here we have an infant, I think,  
22          particularly, but when a child is in the state's custody  
23          and therefore not in the custody of a parent or anybody  
24          else, that the child is unable to make any choices for  
25          themselves, obviously true here, and - - - and that that's

1 what, just like the prison context, gives rise to the - - -  
2 to the special duty regardless of how it came to be that  
3 the child is in the state's custody. Is that right?

4 MR. HERMAN: Yes. Yeah. And I'm not aware of  
5 any situation where the custody is split between the - - -  
6 the county and the parents. It's - - - it's one way or the  
7 other. An abandoned child, if - - - if they're taken by  
8 the - - - by the county, the parents have lost their  
9 rights.

10 JUDGE GARCIA: I guess the bottom line is, does  
11 it make any difference to your standard whether the child  
12 was taken from parents or found abandoned?

13 MR. HERMAN: No. And it's the same statute that  
14 applies, actually, that gives affirmative duties to protect  
15 the child.

16 CHIEF JUDGE WILSON: Well, there are cases where  
17 the state has taken physical custody but not yet taken  
18 legal custody, right?

19 MR. HERMAN: Well, I - - - I - - - I think in - -  
20 -

21 CHIEF JUDGE WILSON: Emergency removal where  
22 there hasn't been a determination that the child should be  
23 - - - that the parental rights should be terminated, right?

24 MR. HERMAN: Yeah. I - - - I think. And there  
25 you - - - I mean, like a school case, the - - - the - - -

1 the - - - the - - - they take physical custody of students  
2 for six hours a day and then they give it back. And that's  
3 determinative on - - - on - - - on, you know, their  
4 responsibility when they're - - - when they have custody of  
5 the child. In that case, yes, they would.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. HERMAN: Thank you.

8 MR. LARKIN: Good afternoon. May it please the  
9 court. Matthew J. Larkin of Barclay Damon on behalf of the  
10 respondent, Cayuga County. I'm joined by my colleague,  
11 David Fulvio, today. Your Honors, what plaintiff-appellant  
12 is arguing for today is for the court to create an ad hoc  
13 exception to the special duty rule. The precedent of this  
14 court - - -

15 JUDGE TROUTMAN: Why don't the custody cases  
16 apply to this situation where we have a child that legal  
17 custody by this - - - has been assumed by the government.  
18 Why is the child treated any differently than you would a  
19 person in a penal institution or a child at a school during  
20 the day?

21 MR. LARKIN: Every one of those cases that are  
22 cited in the - - - in briefs on both sides involved a  
23 setting where, for instance, their inmates are both in the  
24 legal and physical custody of the institution.

25 JUDGE TROUTMAN: Why - - - why does the physical



1 custody make a difference here? Do - - - do you agree that  
2 once the state or the county assumes legal custody, those  
3 foster parents don't have the right on - - - to make all  
4 decisions involving that child? They can't just take the  
5 child where they want. They can't keep the child forever.  
6 Why is there a difference because the state is not in  
7 physical custody?

8 MR. LARKIN: The state gains legal custody  
9 through a court order, and under the statutory scheme of  
10 the Social Services Law, has legal duties defined by  
11 statute. And - - - and this court has already determined  
12 that there isn't an actionable cause of action - - -  
13 private right of action under the Social Services Law.  
14 That was decided by the Mark G. decision.

15 JUDGE TROUTMAN: But why is it different for this  
16 child - - -

17 MR. LARKIN: Right.

18 JUDGE TROUTMAN: - - - or any child in foster  
19 care, once the government takes custody of them, legal  
20 custody, they make all decisions. There is no one else,  
21 unlike in the Maldovan case. Why should this child be  
22 treated differently?

23 MR. LARKIN: Because it's different facts, Your  
24 Honor. I don't agree, and I don't think the record, even  
25 though, as small as it is, supports that there is no one

1 else. There is somebody else. It's the foster parents.  
2 That's who is responsible - - -

3 JUDGE TROUTMAN: So the - - - so the legal  
4 custody - - - the physical custody triumphs the legal  
5 custody of the county. Is that what you're saying?

6 MR. LARKIN: What I'm saying is the legal custody  
7 defines the specific - - - or rather the Social Services  
8 Law decides the legal duties of the county and the physical  
9 well-being - - -

10 JUDGE TROUTMAN: So the county could place the  
11 child anywhere - - -

12 MR. LARKIN: No. Of course not.

13 JUDGE TROUTMAN: - - - with - - - with - - -  
14 without regard to whether they're appropriate or not and  
15 not be responsible?

16 MR. LARKIN: Absolutely not. There - - - there's  
17 - - - there's requirements that are set forth in both  
18 statute and regulation that require the county to place the  
19 children with foster parents who've gone through training,  
20 that have been certified, that don't appear on the sex  
21 offender - - -

22 JUDGE CANNATARO: And counsel, but isn't - - -

23 MR. LARKIN: - - - registry. Things like that.

24 JUDGE CANNATARO: - - - isn't that the difference  
25 right there? Your - - - your adversary conceded to a



1 question I asked that we're not talking about vicarious  
2 liability. We're not holding the county responsible for  
3 whatever acts the foster parents undertook. The - - - the  
4 liability arises in the - - - you know, screening of the  
5 foster parents, the placement, the failure to supervise the  
6 foster parents. So what does - - - what does physical  
7 custody matter if the - - - if the claimed wrongs are not  
8 arising out of the physical custody?

9 MR. LARKIN: Well, the - - - the claimed wrongs  
10 that you just listed, Your Honor, arise out of the  
11 statutory obligations.

12 JUDGE CANNATARO: Yes. I know you have - - - you  
13 might have a defense with respect to the statutory  
14 obligations, but that's - - - that's what he's talking  
15 about.

16 MR. LARKIN: But it's more than a defense. This  
17 court has already foreclosed that whole avenue of liability  
18 under Mark G.

19 JUDGE HALLIGAN: So - - - so - - -

20 JUDGE RIVERA: But - - - but - - - but left open  
21 a common law based liability.

22 MR. LARKIN: It left open that for another day,  
23 and I guess today is the day. Because it hasn't been the  
24 same, but - - -

25 JUDGE RIVERA: It - - - it may very well be, so

1 let's go there.

2 MR. LARKIN: But the intervening - - - the  
3 intervening precedent of this court on special duty really  
4 trumps that.

5 JUDGE HALLIGAN: But this is a - - - a - - - a  
6 case, I think, that's presented as one about custody as  
7 opposed to the - - - the Cuffy factors. It seems to me  
8 under your rule - - - the - - - the rule that you want us  
9 to adopt, that no matter how reckless - - - forget  
10 negligent - - - the county might be - - - I'm not  
11 suggesting that that's true here, but in a hypothetical  
12 where the county ignores flagrant red flags. Let's assume,  
13 for example, the potential foster parent has repeated  
14 convictions for child abuse, sexual assault, whatever it  
15 is. Let's suppose there are repeated and credible  
16 complaints to the agency about the conduct of the foster  
17 parent, that there would still be no avenue for liability.  
18 Do - - - do you agree with me that that would be the  
19 consequence of your rule?

20 MR. LARKIN: Let - - - let me first say that  
21 there are no allegations in this complaint.

22 JUDGE HALLIGAN: I think that's a yes. I - - -  
23 of course there - - - I - - - I appreciate that. I'm not -  
24 - - I'm asking a hypothetical, though.

25 MR. LARKIN: No. I - - - I don't agree with



1 that.

2 JUDGE HALLIGAN: So under - - - under what path  
3 could there be liability under the circumstances that I'm  
4 outlining?

5 MR. LARKIN: By establishing a special duty under  
6 Cuffy.

7 JUDGE HALLIGAN: Well - - - but I'm asking you,  
8 if - - - if instead we treat this case as one where a  
9 special duty were to attach, if it attached as a function  
10 of custody, you're - - - I take it you're saying that can  
11 never - - - that - - - that can - - - that has no traction  
12 here at all and the only avenue is through Cuffy?

13 MR. LARKIN: I'm saying that's what this court's  
14 precedent says. That's what it says.

15 CHIEF JUDGE WILSON: Well, so how would you - - -  
16 how - - - what facts would you turn to under Cuffy if you  
17 were trying to fit it under one of the Cuffy factors in the  
18 hypothetical Judge Halligan gave you?

19 MR. LARKIN: For - - - for this particular case?

20 CHIEF JUDGE WILSON: No, no, no, give me - - -  
21 give me hypothetical facts that would let - - - let you  
22 meet that for - - -

23 MR. LARKIN: I mean, if the - - - if the - - -

24 CHIEF JUDGE WILSON: - - - for a - - - for a two-  
25 year-old who's put into foster care?



1 MR. LARKIN: Well, for a two-year-old, I would  
 2 imagine there would have to be somebody else who made some  
 3 type of complaint or brought in some type of investigation,  
 4 that there was some direct involvement with the child where  
 5 they did some type of, you know, oversight and review in  
 6 addition to what the statutory requirements are of just - -  
 7 -

8 CHIEF JUDGE WILSON: So if they just did what the  
 9 statute required, then what? I mean, you - - -

10 MR. LARKIN: Then I believe, Your Honor's - - -

11 CHIEF JUDGE WILSON: How - - - how do you get to  
 12 the point - - - how do you get to the point - - - I assume  
 13 you're talking about the Cuffy factor, where you've taken  
 14 some affirmative step to create a special relationship with  
 15 the person. And you would say the statutory scheme is not  
 16 enough to do that. So then, what beyond the statutory  
 17 scheme and the things required by the statutory scheme  
 18 would you point to to surmount the third Cuffy factor?

19 MR. LARKIN: Well, I think that the - - - the - -  
 20 - the statutory scheme is not shut down by my argument  
 21 necessarily, but I believe it is under the Mark G. holding  
 22 that - - - that that's just not enough by itself.

23 CHIEF JUDGE WILSON: Right. So we don't get - -  
 24 -

25 MR. LARKIN: I think - - - I think there has - -



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CHIEF JUDGE WILSON: - - - liability that way.  
So we're all asking, so how do you get liability?

MR. LARKIN: So I think - - - like I was saying,  
if there was a scenario where there was a report of some  
abuse that it was investigated, that there was some reason  
for the county to know that the child was being abused and  
then recklessly disregarded that.

JUDGE CANNATARO: But does that really get you to  
Cuffy? Because, you know, I - - - I've racked my brain now  
for a few days trying to figure - - - on the justifiable  
reliance prong of Cuffy, you know. How does an infant - -  
- I think we could all agree that there's no way an infant  
is going to justifiably rely on any representation. And I  
can't think of any third-party who would be able, under the  
way we've articulated the Cuffy requirements, who would  
fill the shoes of the infant in that, especially in a  
situation like this where there's been a termination of  
parental rights.

MR. LARKIN: Well, I mean, if - - - if - - -

JUDGE CANNATARO: Basically what I'm asking is, I  
think under Cuffy, there can never be liability, you know.  
There can never be a special duty in a case like this.

MR. LARKIN: That may be the result, but that's  
not the argument. And I don't know that the court needs to

1 go that far because what I'm saying is that the special  
2 duty rule requires the plaintiff to make those allegations  
3 and prove them, and he hasn't. And - - -

4 JUDGE HALLIGAN: But that's only if - - - if we  
5 agree with you, I think, that the sole applicable framework  
6 here is Cuffy, and - - - and we don't agree with your  
7 adversary that the fact that the infant is in the custody  
8 of the county, as with Flaherty and the other custodial  
9 cases, is - - - is sufficient to give rise to a duty. And  
10 then the question is, was there negligence?

11 MR. LARKIN: Well - - -

12 JUDGE HALLIGAN: So why - - - why are we not in a  
13 - - - why is custody not sufficient here?

14 MR. LARKIN: Because - - - because in Flaherty  
15 and in Pratt and those other cases, you're dealing with  
16 more than legal custody. In all those cases we - - -

17 JUDGE HALLIGAN: So we have to agree with you  
18 that physical custody is required along with legal custody.  
19 Is that the nub of it?

20 MR. LARKIN: Well, what I'm saying is, in those  
21 cases, that's the facts that the court relied on.

22 JUDGE HALLIGAN: They are. But I think the  
23 rationale for the cases, and - - - and tell me if you have  
24 a different view, is that the individuals in those  
25 circumstances, because of the custodial setting, are unable

1 to fend for themselves in a way that any of us otherwise  
2 would. And it seems to me, probably, I think we'd agree,  
3 that an infant in this setting cannot fend for itself. And  
4 - - - and so I'm just trying to understand why, if that's  
5 correct, the same principle wouldn't apply, even though  
6 you're right, it's - - - it's factually distinguishable and  
7 that there's not physical custody?

8 MR. LARKIN: Because every one of those cases  
9 involved more and they - - - for instance, in Flaherty,  
10 they talk about the fact the school - - - I'm sorry, the  
11 state would be liable for the institutions that it runs  
12 such as schools and prisons and hospitals. It's more than  
13 - - - than just a pure governmental function like we have  
14 with - - - with DSS or the county in a foster care setting.  
15 Same with Pratt, the - - - the school wasn't liable because  
16 the child was no longer on their grounds.

17 CHIEF JUDGE WILSON: Well, so how about - - - how  
18 about Page v. State - - -

19 MR. LARKIN: Right.

20 CHIEF JUDGE WILSON: - - - where the child is  
21 sent to - - - the state is held liable, and the child is  
22 sent to a privately run reformatory.

23 MR. LARKIN: That the state, I believe - - -

24 CHIEF JUDGE WILSON: Yeah. State was held  
25 liable.

1 MR. LARKIN: If I - - - if I have that case  
2 correctly, it - - - that was a case where the state had  
3 custody and then used a state contractor to - - - where  
4 they sent them to the boarding school or whatever it was at  
5 the time, which is different than this type of setting.

6 JUDGE RIVERA: Why - - - why - - -

7 CHIEF JUDGE WILSON: Well, why is this - - -

8 JUDGE RIVERA: Why - - - why is that so? The - -  
9 - the government is responsible for the placement, has to  
10 vet the foster parents, has to accept that it's a proper  
11 placement. Why aren't they an extension of - - - of  
12 government?

13 MR. LARKIN: In - - - in the case the - - -

14 JUDGE RIVERA: And - - - and - - - and again, at  
15 any point in time, the child could be removed from the  
16 foster parents.

17 MR. LARKIN: Well, the - - - the right to remove  
18 is different than actually having them in an institution  
19 that the - - - that the county is running and that the  
20 county is staffing with county employees and where the  
21 county owns the physical property and is responsible for  
22 the - - - the safety of anybody who reasonably is there.

23 CHIEF JUDGE WILSON: But maybe not very much  
24 different from an institution that is privately owned and  
25 privately run and has a contract. I mean, effectively,

1 what's happened over time is there was an idea that  
2 children shouldn't be put in these reformatories, and they  
3 should be deinstitutionalized. The foster care was a  
4 better setting. But the consequence of your argument is to  
5 say that that change which was meant to benefit children  
6 renders the state not liable because now they're using  
7 foster care instead of institutions. Even if the  
8 institutions were privately owned and privately run, there  
9 would have been liability and now there's not.

10 MR. LARKIN: There - - - there would be liability  
11 under - - - under this court's precedent if the state was  
12 actually owning and operating the institution.

13 CHIEF JUDGE WILSON: I think Page is not owned  
14 and operated.

15 MR. LARKIN: Right. But I believe that was one  
16 of the contract where - - - where - - -

17 CHIEF JUDGE WILSON: Right. So why - - -

18 MR. LARKIN: - - - where the - - - where the  
19 state actually had the legal obligation for custody, both  
20 physical and legal, and they contracted out the physical  
21 part. Under the Social Services Law, that's not what's  
22 happening here. The state or the county, rather, is taking  
23 legal custody and under the Social Services Law, placing  
24 them into a foster home. And the difference between this  
25 setting and all of those other scenarios is there is a

1 third party who's potentially liable. It's the foster  
2 parent. The foster parent - - -

3 JUDGE RIVERA: Yes. Liable for - - - for their  
4 particular conduct. And I think that's what Judge  
5 Cannataro was pointing out, that the liability that they're  
6 arguing about is liability for the actions or the omissions  
7 of government.

8 MR. LARKIN: Right. And to get there, they need  
9 to prove a special duty under this - - - the - - - the case  
10 law. It - - - it - - - you know, Ferreira is quite clear.  
11 It says, if it's a - - - a municipal liability based on a  
12 government function, they must plead and prove a special  
13 duty. And - - - and his position - - - plaintiff's  
14 position is that they don't have to do that. It's not that  
15 they met it. The first time they argued that they met the  
16 duty was in their reply brief. And - - -

17 CHIEF JUDGE WILSON: Right, his position is they  
18 don't have to do it because they have legal custody, which  
19 in Ferreira was - - -

20 MR. LARKIN: His position is - -

21 CHIEF JUDGE WILSON: - - - in Ferreira was not  
22 the case.

23 MR. LARKIN: As I understand, his position is  
24 that there's a common law duty under foster care, which I  
25 don't believe there's a - - -

1 JUDGE TROUTMAN: Because - - -

2 MR. LARKIN: - - - single case that says that.

3 JUDGE TROUTMAN: Isn't the difference - - - the  
4 special relationship takes place once they take legal  
5 custody. In general cases where people are seeking to sue  
6 municipality, you have to first establish a relationship  
7 because the government can't be responsible insurers of  
8 all. The - - - there has to be that special relationship.  
9 Isn't it different with a foster child versus general  
10 public here?

11 MR. LARKIN: It's - - - it is different from the  
12 general public, but - - - but it's not different than any  
13 other child who falls under the foster care statutes that -  
14 - - what's alleged in this complaint, that - - - that the  
15 county assumed any duties beyond that. What they - - -  
16 what they were - - - were required to do is to comply with  
17 the Social Services Law and nothing else. There's nothing  
18 alleged in the complaint or in any of the briefs that  
19 describes any common law duties that you would have or the  
20 county would have to this child other than what's required  
21 by statute.

22 JUDGE TROUTMAN: So when you're reading special  
23 duties, special relationship is the same thing. So Cuffy  
24 is always the operative?

25 MR. LARKIN: Well, it wouldn't be the situation

1 if this child was placed in an institution that was run by  
2 the county itself or was contracted with the county, which  
3 is not what a foster home setting is under the statutes and  
4 the regulations. So - - - so this is different than all of  
5 those cases like - - -

6 JUDGE RIVERA: Would you agree that, apart from  
7 the statutes, if government separates a child from their  
8 parents and takes custody and then places that child with  
9 someone else, that they have a duty, at a minimum, to  
10 ensure that the placement is safe?

11 MR. LARKIN: They have a duty under the Social  
12 Services Law to put them in a safe setting.

13 JUDGE RIVERA: I'm saying apart from that. Do  
14 you believe that if there was no such law, you'd say the -  
15 - - and government actually took a child and separated it  
16 from their parents and placed it in - - - with a third  
17 party, that there would be no responsibility to ensure that  
18 that's a safe environment?

19 MR. LARKIN: Well, I - - - I suppose if they were  
20 acting outside the scope of their legal authority, they  
21 would have liability. But the only reason there's any  
22 relationship between this child and the county is the  
23 Social Services Law. There's nothing beyond that. The  
24 county is not going into homes unauthorized and - - - and  
25 grabbing children. They were - - - they were placed - - -

1 the child was placed with them through a court proceeding  
2 under the Social Services Law. And - - -

3 JUDGE RIVERA: So - - -

4 MR. LARKIN: And - - - I'm sorry.

5 JUDGE RIVERA: No, no, no. That's okay. So - -  
6 - but just to be clear because when I asked you before,  
7 didn't we have an open question after Mark G., you said,  
8 maybe that's the question here. But really, your position  
9 is not that it's an open question. Your position is, we  
10 have answered that question in cases subsequent to that  
11 decision by saying there's only one path.

12 MR. LARKIN: Right.

13 JUDGE RIVERA: Correct?

14 MR. LARKIN: I think - - - I think that Mark G.  
15 left the issue open.

16 JUDGE RIVERA: Yes.

17 MR. LARKIN: And I think that, you know, Valdez,  
18 McLean, those cases say that if you're seeking a negligence  
19 case - - -

20 JUDGE RIVERA: But why - - - why - - - why send  
21 it back to replead if it's an open question? Why not - - -  
22 doesn't that suggest that the court was deciding there  
23 really is a common law claim; let's see if you can plead  
24 it? Which is different from - - -

25 MR. LARKIN: Oh, you mean in Mark G. - - -

1 JUDGE RIVERA: - - - saying there's no common law  
2 claim? Why - - - why - - - why send it back?

3 MR. LARKIN: Well, Mark G. involved, basically,  
4 an attempt at a class action suit that - - -

5 JUDGE RIVERA: Yes.

6 MR. LARKIN: - - - there's, you know,  
7 constitutional claims, everything. And it says - - - the  
8 court said they're all intertwined and he couldn't decipher  
9 what was being alleged. I would think this court, even now  
10 today all these years later, would come to a similar  
11 conclusion, that they shouldn't be deciding, you know, the  
12 propriety of - - - of a pleading that hasn't been filed.  
13 That the procedural remedy in this - - -

14 JUDGE RIVERA: But it's a question of law. If  
15 the question is whether or not there's a common law duty,  
16 why wouldn't we answer that question? Why - - - why waste  
17 everyone's time and energy to send something back to be re-  
18 pled for a nonviable claim?

19 MR. LARKIN: Why? Because - - -

20 JUDGE RIVERA: You've got to have a legal  
21 argument, right?

22 MR. LARKIN: Well, I think - - - I think the - -  
23 - the main issues in that appeal were already decided by  
24 the time they reached the - - - the common law tort  
25 liability issue, which is that there is no private right of

1           action under the Social Services Law, and there is no  
2           constitutional rights of action under the Social Services  
3           Law. And if - - - I know I'm over time, but just one last  
4           point I wanted to make, which is that, we talked about how  
5           a child could have justifiable reliance, or an infant.  
6           These are sad situations, but they're no different than  
7           what you saw in Maldovan or Kircher, where - - - where a  
8           young lady was kidnapped.

9                         JUDGE TROUTMAN: But it is different from  
10           Maldovan. There was no custodial relationship.

11                        MR. LARKIN: Well, it's - - - I mean, its  
12           difference in the sense that in some factual scenarios,  
13           there can't be justifiable reliance because the child isn't  
14           able to communicate. But that's the only point I was  
15           making.

16                        JUDGE TROUTMAN: But she had - - - so in  
17           Maldovan, there was someone. There was a brother - - -

18                        MR. LARKIN: Right.

19                        JUDGE TROUTMAN: - - - who could act on her  
20           behalf.

21                        MR. LARKIN: Right. And - - - and for - - -

22                        JUDGE TROUTMAN: So the question is here, and - -  
23           - and it was left over in Maldovan - - - left open. What  
24           happens if there is no one who is capable of speaking for  
25           that child?

1 MR. LARKIN: Well, there - - - there are  
2 mandatory reporters. There's daycare people, there's, you  
3 know, medical providers, there's schools that could act on  
4 behalf of a - - - of a child. It's not that there's nobody  
5 in the - - - in the, you know, grand scheme of things.  
6 This child, as alleged in this complaint, was put into a  
7 situation, if what they're saying is true, where they were  
8 in the hands of an abuser, but that there's no allegation  
9 that was reported to the county. There's no allegation  
10 that they did an investigation and failed to act, or that  
11 it came in through some third-party who was acting on their  
12 behalf. So it is different in that sense.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. LARKIN: Thank you very much.

15 MR. YOUNG: Good afternoon, Your Honors. May it  
16 please the court. Philip Young here on behalf of the city  
17 as amicus curiae in support of Cayuga County. I want to  
18 directly go to a point that the Chief and Judge Halligan  
19 made early on. I think it's very important here to look at  
20 the difference between legal custody and physical custody.  
21 As Your Honor noted, in the physical custody context, what  
22 you have are classic common law duties of care. The child  
23 goes up the slide the wrong way; the parent doesn't  
24 exercise a duty of care in supervising that child. In the  
25 legal custody context where there is no physical custody at

1 all, all of these duties are prescribed by statute. They  
2 are - - - in the Social Services Law, there's a long,  
3 extensive list of obligations that the county or the  
4 municipality owes. The legal custody arises from section  
5 383, duties of care, to place the child and do all of these  
6 things that are supposed to be done under the Social  
7 Services Law.

8 JUDGE CANNATARO: Counsel, can I - - - I'm sorry  
9 to interrupt, but during my brief and ignominious career as  
10 a family court judge, I - - - I - - - I gave out custody to  
11 many individuals. And in some cases I split, quote,  
12 unquote, "legal custody and physical custody" between two  
13 different individuals. But that's not the situation here.  
14 It's - - - it's not as if a court gave physical custody of  
15 a child to the foster parents. It gave all the authority -  
16 - - all the decision-making authority to the state. And  
17 the state chose to place the child somewhere, which to me  
18 doesn't seem exactly the same as the kind of physical  
19 custody that I would award when - - - when that was a  
20 decision that I had to make. So I feel like you're sort of  
21 eliding the concept of possession and physical custody a  
22 little bit. Why is that not correct?

23 MR. YOUNG: Well, because physical custody is  
24 quite different. It's all about control. It's about  
25 control of the space.

1           JUDGE CANNATARO: But nobody gave a foster parent  
2 physical custody of the child. No - - - no court of law  
3 gave - - - has - - - there's no order, I think you can show  
4 me in this case, that says physical custody of child goes  
5 to foster parent A, right?

6           MR. YOUNG: I don't know that there is a precise  
7 order, but generally, when these removals happen, the - - -  
8 the legal custody is placed in the social services agency,  
9 and there's an understanding that the child would be placed  
10 in foster care.

11           JUDGE CANNATARO: And then the social services  
12 agency gets to decide who's going to take care of the  
13 child, i.e., who the foster family is going to be. But  
14 that's not the same as custody to me. Or am I just sort of  
15 misunderstanding the very nature of custody?

16           MR. YOUNG: No. I - - - I think physical custody  
17 is - - - is quite narrow. And it's - - - it's the school  
18 context involving students, it's the prison context, it's  
19 the institutionalization context. And that is different  
20 from the legal custody context that we have here. Sure,  
21 when the Social Services District has physical custody of  
22 the child, it has common law obligations that it owes to  
23 that child. But once it - - -

24           JUDGE TROUTMAN: But why isn't it different when  
25 foster parents, just because they have physical custody of

1 the child or possession of the child, still don't have the  
2 ability to take actions in any manner in which they choose?  
3 I.e., they couldn't just leave the state with the child if  
4 they chose. The - - - with respect to the parameters of  
5 their care, they're dictated through the Department of  
6 Social Services, correct?

7 MR. YOUNG: Absolutely. They have - - - they  
8 have some, certainly, authority over day-to-day obligations  
9 and things like that, but certainly, on a more fundamental  
10 level, like, I think issues about schooling and medical  
11 care and things like that are ultimately the obligation of  
12 the Social Services District, certainly. But those are  
13 obligations that are prescribed by statute.

14 CHIEF JUDGE WILSON: So let me take you then from  
15 there to Judge Halligan's prior question. County says,  
16 let's place this child with a known child sex offender.  
17 Now, that violates the statute, obviously, but there's no  
18 recourse directly under the statute. And your position is,  
19 there's no recourse at all, I take it?

20 MR. YOUNG: The - - - that's correct, Your Honor.  
21 There's recourse under the statute. There is a well-  
22 defined set of provisions that says that - - -

23 CHIEF JUDGE WILSON: Well - - - but - - - but - -  
24 - but the child can't sue under the statute.

25 MR. YOUNG: The child can't sue the - - -

1 CHIEF JUDGE WILSON: Nobody can sue - - -

2 MR. YOUNG: - - - Social Services District.

3 CHIEF JUDGE WILSON: Right. And the foster  
4 parents are typically not very wealthy. And perhaps the -  
5 - - the - - - so the negligence of the county actually is  
6 not something for which the foster parents could be liable  
7 anyway, right? That is, it cannot - - - it's not  
8 negligence in this case. It's almost an intentional tort,  
9 but - - - right?

10 MR. YOUNG: Well, certainly, any - - -

11 CHIEF JUDGE WILSON: I don't mean - - - by this  
12 case, I don't mean this case. I mean my hypothetical.

13 MR. YOUNG: Certainly. The - - - the child might  
14 have the ability to sue the foster parents depending on  
15 what types of injuries occurred.

16 CHIEF JUDGE WILSON: No. I was asking something  
17 a little bit different. There might be negligence or  
18 recklessness or something like that on the part of the  
19 county, which is the decision to place the child in this  
20 foster care relationship in the first place. Whatever  
21 negligence the foster parents might have is not that. It's  
22 some other negligence, right?

23 MR. YOUNG: Correct.

24 CHIEF JUDGE WILSON: So there's no recourse, in  
25 your view, for the county's negligence in that

1           circumstance?

2                   MR. YOUNG:   There is no recourse for the county's  
3           negligence in the sense that the child does not have a  
4           right to bring a lawsuit in state court.

5                   CHIEF JUDGE WILSON:   Can't sue under the statute,  
6           can't sue for tort, just out of luck?

7                   MR. YOUNG:   And that's because there's a complex  
8           and complete statutory scheme that is set up.

9                   CHIEF JUDGE WILSON:   Well, of course, there are  
10          places where negligence per se is based on the violation of  
11          a statute, though, in tort law.

12                   MR. YOUNG:   Absolutely.  But again, as - - - as  
13          Cayuga County noted, this court has been quite clear in  
14          Mark G. and then in McLean, that the - - - the provisions  
15          of the Social Services Law do not create a private cause of  
16          action, that the state legislature set up that system and  
17          provided for the enforcement mechanisms through fiscal  
18          penalty.

19                   JUDGE SINGAS:   Are there - - - failure to report,  
20          under the Social Services Law, aren't those claims that  
21          could be brought?

22                   MR. YOUNG:   Yes.  Under section 420, there is a  
23          narrow claim that can be brought for - - -

24                   JUDGE SINGAS:   If there's notice of some kind of  
25          abuse - - -

1 MR. YOUNG: Correct.

2 JUDGE SINGAS: - - - and so on.

3 MR. YOUNG: Correct. Exactly. And this court  
4 noted that in Mark G., and it noted that the legislature  
5 chose where to put the private cause of action, and - - -

6 JUDGE HALLIGAN: You - - - you argue in your  
7 brief that imposing liability here would be crushing on  
8 localities. And I understand the point that you're making,  
9 but what I'm wondering is this, given the posture here,  
10 obviously, I - - - I don't see that there would be any  
11 imposition of liability at this juncture were we to  
12 disagree with your position. That would have to be  
13 litigated, right? And - - - and so if we were to take the  
14 view that there was a special duty here, what kinds of  
15 proof do you think it would be reasonable to require to  
16 show reasonable foreseeability that might somehow address  
17 the liability risk that you're talking about. So for  
18 example, I - - - I would think, perhaps, that if, as in my  
19 hypothetical, there were convictions that the foster parent  
20 had that were relevant to the conduct here, if there were  
21 repeated complaints. But - - - but can the liability risk  
22 you're concerned about be cabined by the kinds of proof  
23 that would be required for negligence?

24 MR. YOUNG: I think it would be very difficult to  
25 - - - to cabin liability - - -

1 JUDGE HALLIGAN: Why is that?

2 MR. YOUNG: - - - in any way because of - - - I  
3 think, if you look at the - - - I don't know - - - the - -  
4 - the expansive scope of the - - - the type of complaint  
5 here that - - - that these plaintiffs are bringing forward,  
6 this is sort of every possible - - -

7 JUDGE HALLIGAN: Well, this is - - - this is on  
8 the pleading. I - - - I mean, though, in order to prevail  
9 on a negligence claim, right? Presumably one would have to  
10 show that - - - that there were facts that established that  
11 the harm was reasonably foreseeable. And so what I'm  
12 asking you is, particularly in light of the concern that  
13 you raise, what kinds of guidance or guidelines might be  
14 appropriate so that - - - that it's - - - it would be  
15 clear. And I understand you - - - you disagree with the  
16 premise, right? But - - - but the - - - what kind of - - -  
17 of - - - of guidance might ensure that there is only  
18 liability that is actually imposed and negligence that is  
19 actually found where - - - where the conduct warrants it?

20 MR. YOUNG: I haven't thought deeply about that  
21 question, Your Honor. I mean, certainly it all turns on  
22 the question of - - - of foreseeability. And I think, you  
23 know, certainly, municipalities would argue that you need  
24 very specific and clear evidence that it was - - - it was  
25 foreseeable that this particular foster parent would engage

1 in this - - - in this type of conduct. And certainly,  
2 municipalities would try to defend on that basis. And  
3 municipalities will also try to raise governmental immunity  
4 as an affirmative defense, certainly. But I also want to  
5 point this court to the Westchester County's brief, which  
6 does a very good job of noting that, in a lot of these  
7 cases, these things are being sent to trial very rapidly on  
8 almost no discovery and allowing the - - - the jury to make  
9 a lot of inferences based on very little evidence.

10 JUDGE CANNATARO: That's because there are CVA  
11 cases? Are you talking about the CVA group or - - - or - -  
12 -

13 MR. YOUNG: I - - - my understanding - - -

14 JUDGE CANNATARO: - - - something else?

15 MR. YOUNG: - - - is these are CVA cases. Yes,  
16 Your Honor. And certainly, as we've noted in our brief,  
17 that there's over 600 lawsuits against the city that are  
18 going on right now. And you know, this is - - - it's far  
19 different at the end of the day from some of the narrow  
20 cases like Maldovan or other cases like that that this  
21 court has been dealing with. There's a clear - - - clear,  
22 significant and substantial impact on municipalities here  
23 that this - - - that this court has, over and over again,  
24 recognized is an important factor when you are determining  
25 the scope of the special duty doctrine.

1 CHIEF JUDGE WILSON: Thank you.

2 MR. YOUNG: Thank you.

3 MR. HERMAN: Thank you. The - - - the - - - the  
4 idea that just because there's statutory requirements or a  
5 framework creating a custodial relationship doesn't  
6 preclude the right of a - - - of a victim of someone who's  
7 injured in a custodial relation from bringing suit. I  
8 mean, that's the situation we have with inmates. There is  
9 a very, you know, strong statutory framework, the criminal  
10 justice system, that leads to people being put in prisons.  
11 The same thing with schools. There's a statutory  
12 framework. So just because there's a statutory framework  
13 doesn't preclude, in this case, a child from having a right  
14 to be able to bring a claim where there is negligence and  
15 they are abused. What the - - - in all these - - -

16 JUDGE SINGAS: The criminal justice system is  
17 available in this circumstance as well, correct?

18 MR. HERMAN: Yes. I mean, there - - - there's no  
19 difference. I'm saying there's no real difference between  
20 a child losing their rights or protection in foster care or  
21 a child at school - - -

22 JUDGE GARCIA: I thought your adversary's point -  
23 - - I'm sorry, maybe I misunderstood - - - was in those  
24 cases there's physical custody, so it's a common law issue.

25 MR. HERMAN: Well, he's saying - - -



1 JUDGE GARCIA: But he - - - I'm sorry. But he's  
2 saying that this case, whether you have this statutory  
3 scheme, liability is governed not by the common law, but by  
4 the statutes. And we've said, no, you know.

5 MR. HERMAN: No. It - - - it doesn't preclude a  
6 common law right for negligence just because there's a  
7 statutory framework creating and ordering the - - - the - -  
8 - the custodial relationship. And this court has  
9 referenced in Pratt and some other cases - - -

10 JUDGE GARCIA: But it's - - - or it's making a  
11 legal custodian relationship.

12 MR. HERMAN: Correct.

13 JUDGE GARCIA: Is that the difference? I mean,  
14 it's not - - -

15 MR. HERMAN: There's no - - - the - - - the - - -

16 JUDGE GARCIA: - - - creating a physical custody  
17 relationship?

18 MR. HERMAN: Well, the - - - yeah, there is no  
19 difference. And - - - and of course, when they pick the  
20 child up, they are physically picking the child up. When  
21 they place the child, they physically - - - the county  
22 drops a child off and has the right to take the child out.

23 JUDGE GARCIA: So are you saying it's the  
24 equivalent of physical custody or that legal custody alone  
25 is enough?

1 MR. HERMAN: Legal custody in this situation  
2 alone is enough.

3 JUDGE TROUTMAN: What do you say with respect to  
4 the argument about the crushing nature of having these  
5 suits on the public fis?

6 MR. HERMAN: Yes. Yeah. I would say that's not  
7 well founded. First of all, there's not 600 foster care  
8 cases against the City of New York. That - - - he is  
9 including, I believe, school cases and other types of  
10 cases. So there are, I believe, only 2 or 300 total under  
11 the CVA, where the county or the government is the only  
12 defendant because many of these cases have other  
13 defendants. And - - - and we're not opening up the  
14 floodgates to cases for - - - under strict liability. And  
15 we're also talking about the future. What the government  
16 is asking for here in - - - is blanket - - - blanket  
17 immunity in all - - - even on the extreme examples that the  
18 - - - that Your Honors suggested, these extreme facts,  
19 where kids were put into homes of known predators, et  
20 cetera. What the government is asking for, blanket  
21 immunity for the past and going forward so that, in New  
22 York, any foster child who's put in foster care and their  
23 rights are violated, there is no due care. There's even  
24 horrific things that the government knows happening, but  
25 they are going to be shielded from liability. You know,

1 today is the day where I believe we have the right to stand  
2 up and the ability to protect our children in foster care,  
3 the most vulnerable population, you know, we can imagine in  
4 New York. And it would be unfair and not right to protect  
5 these children, not from - - - not strict liability, but  
6 from negligence cases where the government fails to  
7 exercise reasonable care in the protection of children.  
8 And that's what we're asking this court to do, to - - - to  
9 protect these children in the past and in the future. It's  
10 not opening of flood gates. It's just - - - it's a  
11 reasonable expectation these children had and that children  
12 should have tomorrow. The next child tomorrow who is put  
13 in foster care has the right to rely that the government is  
14 going to exercise reasonable care to protect them.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. HERMAN: Thank you.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Weisbrod-Moore v. Cayuga County, No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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