IN THE SUPREME COURT OF OHIO

CASE NO. 07 - 0056

On Appeal From The
Court of Appeals Eighth Judicial District
Cuyahoga County, Ohio
Court of Appeals Case No. CA-05-087476

JOHN K. O'TOOLE, Personal Representative and
Administrator for the Estate of Sydney Sawyer
Plaintiff-Appellee,
Vs.
WILLIAM DENIHAM, et al.,
Defendants-Appellants.

TRIAL COURT NO.: 450833

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT SOCIAL WORKER SUPERVISOR, TALLIS GEORGE-MUNRO

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WHY THIS APPEAL INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

The decision of the Eighth District Court of Appeals, reversing the Trial Court's summary judgment, deprives social worker supervisor Munro, and all social workers, of employee governmental immunity provided by the Ohio legislature in the enactment of R.C. 2944.03 (A)(6). The effect of the Appellate Court's decision directly impacts social workers who must make a decision to either initiate proceedings to remove custody of the child to the Department of Children and Family Services (Agency); or respect the fundamental rights of the parent who already exerts legal custody over the child.

The Court of Appeals decision in this matter has confused and misapplied the application of the statutory language that removes employee governmental immunity for acts or omissions made in a "wanton or reckless manner" (R.C. 2744.03 (A)(6)(b)). The Appellate Court made this erroneous legal conclusion based upon non-existent facts that rendered a finding of recklessness that was totally unsupported by the facts in this case. As a result the Appellate Court has misapplied the Ohio Supreme Court's definition of "recklessness." (*Cater Vs. City of Cleveland*, (1998) 83 Ohio St. 3d 24, 33, 1998-Ohio-421.) A clearer definition of the statutory language found in R.C. 2944.03(A)(6)(b) is needed concerning the issue of whether a governmental employee acts in a "wanton or reckless manner" when exercising professional judgment.

The opinion of the Eighth District Court of Appeals has also extended a duty of care to all social workers that has never before been extended by the Ohio Supreme Court. The Eighth Appellate District has erroneously stripped social worker employees of immunity for either:

1) Failing to report a report of suspected child abuse to local police, even though the agency has already initiated an investigation, or,
2) Violating "in loco parentis" ordinary care during the course of the investigation where the agency neither sought nor was given custody of the child under investigation.

In arriving at this new standard of care for duty owed to the child under investigation, the Appellate Court has again disregarded employee immunity given under statute in attempting to extend potential criminal liability to social worker employees under R.C. 2151.421 (A) (Persons required to report injury or neglect) and R.C. 2919.22(A) (Child endangering).

The result of the Eighth Appellate Court's decision will cause social worker employees to seek the unnecessary judicial removal of children under investigation in order to prevent exposure to personal liability. This will cause termination of lawful parental rights. Finally, the additional numbers of foster care children will strain further an already overburdened child welfare system.

STATEMENT OF THE CASE AND RELEVANT FACTS

This case arises from the complaint of wrongful death brought by the Estate of Sidney Sawyer in the Cuyahoga County Court of Common Pleas. The Estate alleges that Tallis George Munro, a Supervisor in the Department of Children and Family Services intake unit, as well as Kamesha Duncan, a social worker assigned to the investigation of the Sidney Sawyer case, are civilly liable for decisions made during the performance of their services in the Department of Children and Family Services.

The Court of Common Pleas for Cuyahoga County entered summary judgment for these defendants in its journal entry dated November 16th, 2005. The Court of Common Pleas found that these defendants (and all defendants herein) were immune

from liability citing *Marshall vs. Montgomery County Children Services Board*, 92 Ohio St. 3d 348, 2001-Ohio-209, as its controlling authority. The Eighth District Court of Appeals for Ohio has reversed that decision and remanded the action for trial. The Court of Appeals decision has stripped these governmental workers of civil liability immunity provided under the Ohio Political Subdivision Tort Liability Act (i.e. R.C. section 2744.03 (A)(6)). The Eighth District's Court of Appeals decision was journalized on November 27, 2006.

The underlying cause of action arises from the investigation of a charge of abuse that was received by the Department of Children and Family Services Hotline Intake worker on March 29th, 2000. A call of suspected physical abuse was transferred to one of the investigation units. Hotline referrals were randomly rotated among all investigative units. The unit selected was supervised by Appellant Munro. Munro assigned investigation of the case to social worker Kamesha Duncan.

The investigation was initiated within the required 24 hours of the referral call. During the course of the investigation both Duncan and Munro had decided that a request for emergency custody was not necessary. Instead, the social workers initiated a safety plan that included participation from the child's natural parent and legal guardian, LaShawn Sawyer.

Duncan and Munro retained investigative responsibility over this case for the next thirty days, as was department policy. At the conclusion of that period Munro was required either to close the investigation phase of the case; or refer the case to ongoing social services. During that thirty day period supervisor Munro, through investigating social worker Duncan, conducted the investigation of the matter. Prior to the conclusion

of the thirty-day period Sidney Sawyer (age 5) was pronounced dead as a result of blunt impact trauma to her body. The decedent's mother, LaShawn Sawyer, was convicted of her daughter's murder.

The Eighth District Court of Appeals found that the social worker defendants, Munro and Duncan, were reckless in exercising their decision that permitted the decedent to remain in the custody of the natural parent and legal guardian. The Eighth District Court of Appeals held that: 1) Supervisor Munro was reckless in assigning investigation of the matter to social worker Duncan, and 2) that all social workers were reckless in failing to remove the decedent from her mother's custody.

The Court of Appeals further held that the social workers owed a duty to report the suspected abuse to the local law enforcement department even though the department had received the complaint and had initiated its own investigation. And finally the Appellate Court held that the social worker defendants owed a duty of care consistent with a person "in loco parentis" when the Agency had never exercised temporary or permanent custody over the decedent during the course of the investigation.

In reversing the trial court's decision, the Eighth District Court of Appeals distinguished the Ohio Supreme Court's holding in *Marshall vs. Montgomery County Children Services Board,* 92 Ohio St. 3d 348, 2001-Ohio-209, where immunity was upheld in a child abuse investigation claim that had a worse factual model than the case presented here on appeal.

LAW AND ARGUMENT

PROPOSITION OF LAW I: THE APPELLATE COURT ERRED IN HOLDING THAT DEFENDANTS MUNRO AND DUNCAN ACTED IN A "WANTON OR RECKLESS MANNER" WHEN THE SOCIAL WORKER DEFENDANTS INVESTIGATED A COMPLAINT OF CHILD ABUSE AND MADE A PROFESSIONAL DECISION NOT TO PETITION THE JUVENILE COURT OF CUYAHOGA COUNTY FOR EMERGENCY CUSTODY.

The Ohio legislature has provided immunity from civil liability to those employees performing services to the public. Social workers such as the appellants herein, provide invaluable services on a daily basis to those children who are suspected victims of abuse. These social workers are required to make numerous decisions concerning the future welfare of children that come into daily contact with the agency. In addition, these decisions also directly impact fundamental parental rights.

Only in limited situations as enumerated in Ohio Revised Code section 2744.03 (A)(6) are governmental workers deprived of liability immunity for formulating decisions normally made in the performance of their duties. The Eighth District Court of Appeals held that these social workers should be deprived of that employment benefit. Specifically, the Eighth District Court of Appeals has ruled that either these social workers acted with "malicious purpose, bad faith, or in a wanton or reckless manner" or had violated a duty of care created by another statutory enactment.

ORC 2744.03 (A)(6) provides:

"In addition to any immunity or defense referred to in division (A)(7) of this section and circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies...

(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 opposed 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[1]."

It has never been argued that these social workers had acted with "malicious purpose" or in "bad faith." The only issue has always been whether or not these social workers had performed their duties and acted in a "wanton or reckless manner." The Eighth District Court of Appeals overlooked the entire language expressed by the legislature in the statute. Nowhere in the Court's analysis does there appear any reference to "wanton" as part of the definition. The failure to consider the effect of "wanton" in describing the governmental employees' actions reduces the analysis of intent to simple "recklessness."

The folly of analyzing these social workers' decisions in the light of a recklessness standard essentially eliminates the legal protection of governmental immunity altogether. Any case study that ends in a tragedy or poor result is exposed to a comparison with negligent conduct, and is therefore the subject of a factual debate. The legislature has not intended such a result; and governmental workers are entitled to greater protection.

The definition of "reckless", has been previously recited by the Ohio Supreme Court in *Cater vs. City of Cleveland*, (1998) 83 Ohio St. 3d 24, 697 N.E. 2d 610. The Ohio Supreme Court has essentially adopted the definition provided in 2 Restatement of the Law 2d, Torts (1965), 587 section 500. As recited "reckless" means that: "The

[1] The Eighth District Court of Appeals' opinion specifically refers to the above-amended revised code section 2744.03. As amended in 2002 subsection (A)(6)(c) substituted the word "civil liability" for "liability" in the statutory text.

conduct was committed knowing or having reason to know of facts which would lead a reasonable man to realize not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." (*Cater vs. City of Cleveland* (1998) 83 Ohio St. 3d 24, 33, 697 N.E. 2d 610, 618).

In its decision, the Eighth District Court of Appeals has erroneously constructed conclusions from facts not supported by the record. Specifically, the Court of Appeals in its opinion concluded that: "The agency already knew that someone had injured this child *and still returned this child to her mother, even though she had a long history of abusing her children*" (See Opinion attached at page 9) (Emphasis added).

That conclusion is totally erroneous and taints the entire opinion. There is nothing in the record to suggest that the decedent's natural mother had any history of violence; had any history with the agency; had any history of criminal activity; had any other history with any state child welfare agency. Apparently, the Eighth District Court of Appeals had confused the facts in the case now before this court with the operative facts determined in *Marshall vs. Montgomery County Children Services Board* (2001) 92 Ohio St. 3d 348, 750 N.E. 2nd 549. In addition, the Eighth District Court of Appeals wrongfully concluded that the agency had custody of the child in the first instance. There is nothing in the record to suggest that custody was ever removed from the decedent's natural parent and legal custodian, LaShawn Sawyer.

Should the Ohio Supreme Court accept jurisdiction of the matter this Honorable Court would easily determine that these factual conclusions were patently erroneous.

These same erroneous conclusions were the Appellate Courts' reasons for denying employee immunity.

Assume that the record in this matter is clear and that there was no previous history of violence in the record for the decedent's natural parent and legal custodian; and that the Agency never exerted emergency custody over the decedent. Then there would be no reason to deprive these social workers from the immunity protection afforded them by the legislature.

To permit the Appellate Courts' decision to stand virtually renders social workers, and the agency for which they work, as a guarantor of their decisions. Whether the social workers have determined that the suspected victim of abuse should be removed, or not removed, the social worker relinquishes the child's physical presence. The child either remains with his or her parent or custodian, or is placed in foster care. If every decision that does not produce desired results were subject to jury scrutiny, every social worker would be potentially placed in a position requiring them to answer for injuries created by persons outside of their control.

The intent of the legislature in the enactment of governmental immunity was to provide liability protection for those workers forced to make daily decisions in even the hardest cases. The Eighth Appellate District's erroneous conclusion of facts should not be permitted where to do so would subject the decisions of these social workers to a factual trial determination concerning the exercise of their professional judgment.

<u>PROPOSITION OF LAW II:</u> THE APPELLATE COURT ERRED IN HOLDING THAT SOCIAL WORKERS MUNRO AND DUNCAN WERE NOT IMMUNE FROM LIABILITY FOR FAILING TO REPORT SUSPECTED CHILD ABUSE TO POLICE AUTHORITIES; THEREBY CREATING A DUTY NOT CONTEMPLATED BY THE LEGISLATURE IN R.C. SECTION 2151.421 (A)(1)(a); OR FAILING TO PROVIDE "IN LOCO PARENTIS" DUTY OF CARE, THEREBY CREATING A DUTY NOT CONTEMPLATED BY THE LEGISLATURE IN R.C. SECTION 2919.22 (A).

The Eighth Appellate District expanded the reporting requirement of R.C. Section 2151.421 (A)(1)(a) by its decision. In reversing the trial court, the Eighth District Court of Appeals held that the investigating social worker is now also required to report the report of suspected abuse to local police.

R.C. section 2151.421 (A)(1)(a) provides:

"No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows or suspects that a child under 18 years of age or a mentally retarded, developmentally disabled, or physically impaired child under 21 years of age have suffered or faces a threat of suffering any physical or mental wound injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or suspicion to the public children services agency or a municipal or county peace officer in the county which the child resides upon which the abuse or neglect is occurring or has occurred."

The Court of Appeals' opinion ignores the obvious intent of the legislature in that *either* the public child services agency or the local police authority can be the recipient of the alleged abuse report. Extending cross reporting requirements to both of these agencies ignores the plain language of the statute. Cross reporting requirements would hinder the investigation process in creating needless redundancy.

Such redundancy in reporting requirements would cause wasteful administrative duplication and potentially wasteful duplicate investigation of the reported complaint. Two agencies investigating the same complaint could have an adverse or chilling effect on the initial stages of the investigation. Confusion would mount for both investigators

and witnesses that are simultaneously interviewed by both departments investigating the same report.

The Eighth Appellate District's statutory construction also ignores the obvious legislative intent for providing a reporting requirement in the first instance. The statute was intended to force those persons dealing with minor children to report any suspected abuse so that an investigation would be initiated. The record here is clear that not only was a report filed with the appropriate agency, but also that an investigation was launched in a timely manner.

The Eighth Appellate District strained to extend the reporting requirement under R.C. section 2151.421 (A)(1)(a) in order to deprive these social workers of immunity pursuant to R.C. section 2744.03 (A)(6)(c). This erroneous statutory construction leads to unfair results in this case as well as all future child abuse investigations.

Prior to this decision there had been no previous holding that this cross reporting was required. Unless a duty owed is clear, then the actor cannot be found to have acted in a "wanton or reckless manner" in disregarding the duty. This factor is further indicative that the social worker defendants should be protected by immunity.

Although not explicit, the Appellate Court decision can also be construed to create a duty for the social worker defendants through imposition of the "Child Endangering" statute (i.e. R.C. 2919.22 (A)). References to the "Child Endangering" statute as part of the decedent Estate's first assignment of error to the Eighth District Court of Appeals makes it at least arguable that this *criminal* statute now has application.

R.C. 2919.22 (A) provides in pertinent part:

"No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or mentally or

physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support."

The troubling result created by the Appellate Courts' decision is in holding that social workers (like these defendants) are considered to hold the same duty of care toward a child under an abuse investigation as would a school teacher, school officials, and school authorities in their relationship with a child (*Yates v. Mansfield Board of Education* (2004) 102 Ohio St. 30 265, 271, 808 NE 2d 861, 871).

"In loco parentis" assumes that a person of authority has continuous permanent or temporary physical control over the child. It further assumes a relationship of sufficient duration that both the custodian "in loco parentis," and the child, create a duty of care, responsibility and authority between themselves. These elements are completely absent from the present factual situation.

At no time was the decedent removed from or deprived from her natural parent's custody and control. At no time was the decedent's custody relinquished to the defendant social workers. A social workers investigation questioning is not of a sufficient nature, or duration, to create the "in loco parentis" relationship contemplated by R.C. 2919.22 (A).

The ramifications for allowing this aspect of the Appellate Court decision to stand has extreme debilitating consequences. Should the investigating social worker employees be considered as "in loco parentis" while investigating a complaint, every worker could not only be held civilly liable for his or her judgments (R.C. 2944.03 (A)(6)(c)), but could be held criminally accountable as a felon (R.C. 2919.22 (E)).

This absurd result would cause a complete shift in the focus of an investigation. The task of "investigating *suspected* child abuse" would change to "eliminating

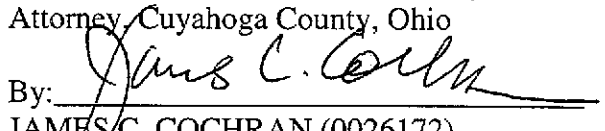
suspected social worker liability and culpability." In the process, parental rights as well as the long term welfare interests of the child would suffer the most.

CONCLUSION

Accordingly, the Appellant herein, Social service worker supervisor, Munro, respectfully asks this Court to accept jurisdiction over this case.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting
Attorney, Cuyahoga County, Ohio

By: 
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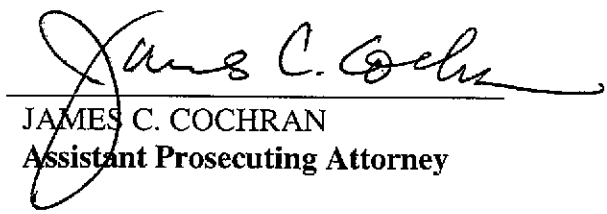
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 11th day of January 2007, to: David Ross and Michelle J. Sheehan, 1400 Midland Building, 101 Prospect Avenue, Cleveland, Ohio 44115; Matthew J. Lampke, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215; John W. Martin and Andy Petropouleas, 800 Rockefeller Building, 614 Superior Avenue, N.W., Cleveland, Ohio 44113; and William D. Beyer and Joan E. Pettinelli, Wuliger, Fadel & Beyer, 1340 Sumner Court, Cleveland, Ohio 44115.



JAMES C. COCHRAN
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NOV 2 7 2006

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87476

CA05087476
42575416

JOHN K. O'TOOLE, ADMINISTRATOR, ETC.

PLAINTIFF-APPELLANT

vs.

WILLIAM DENIHAN, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-450833

BEFORE: Calabrese, P.J., Kilbane, J., and Blackmon, J.

RELEASED: November 16, 2006

JOURNALIZED: NOV 2 7 2006

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FILED A... ...IZED
PER APP. R. 22(E)

NOV 27 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

NOV 16 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

ANTHONY O. CALABRESE, JR., P.J.:

Plaintiff-appellant, John O'Toole, personal representative and administrator for the estate of Sydney Sawyer, appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand to the lower court.

I.

According to the case, appellant brought this wrongful death and survival action as the personal representative and administrator for the estate of Sydney Sawyer ("Sydney") in the Cuyahoga County Court of Common Pleas. Appellant brought his claim against appellees, the Cuyahoga County Department of Children and Family Services ("DCFS"), its executive director, William Denihan ("Denihan"), supervisor Tallis George-Munro ("Munro"), social worker Kamesha Duncan ("Duncan"), and John Doe county policymakers and employees. The complaint asserted seven substantive claims for relief, including: Count 1 - failure to report suspected or known child abuse of Sydney to law enforcement; Count 2 - negligently failing to report suspected child abuse; Count 3 - recklessly creating a substantial risk to the health and safety of Sydney; Count 4- negligently performing job duties; Count 5 - breaching special duty of care; Count 6 - reckless implementation of a risk assessment protocol used for investigation of child abuse and to investigate Sydney's case; Count 7 -

recklessness in investigating the known or suspected child abuse of Sydney; and Count 8 - intentional or negligent conduct in the performance of duties. The complaint also challenged the constitutionality of R.C. Chapter 2744 to the extent that it may extend statutory immunity to appellees.[1] In compliance with R.C. 2721.12, a copy of the complaint was served upon the Ohio Attorney General on March 4, 2002.

On November 27, 2002, defendants DCFS, Denihan, and Duncan filed a motion for summary judgment asserting that they were immune from liability pursuant to R.C. Chapter 2744 on all claims. On February 13, 2003 and

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[1]R.C. 2744.02. Classification of functions of political subdivisions; liability; exceptions.

"(A) (1) ***, a political subdivision is 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 connection with a governmental or proprietary function. ***

(B) ***, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows: ***

(5) ***, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 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 a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to a political subdivision."

February 25, 2003, appellant filed briefs in opposition to the respective motions. The trial court denied the defendants' motions. The trial court provided the following:

> **"[t]he court finds genuine issues of material fact remain to be tried as to whether defendants have violated any duty imposed by law that would defeat sovereign immunity pursuant to R.C. 2744.02 and 2744.03, e.g., *Campbell v. Burton* (2001), 92 Ohio St.3d 336, at paragraphs 2 and 3 of the syllabus; see also, R.C. 2744.02(B)(5), 2744.03(A)(6)(c). The court reserves judgment on this issue until after all the evidence has been presented at trial. The motions are therefore denied."**[2]

On April 25, 2005, defendants DCFS, Denihan and Duncan filed a renewed motion for summary judgment, again asserting statutory immunity under R.C. 2744.02 and 2744.03.[3] On April 27, 2005, defendant Munro filed a motion for

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[2]See November 2003 order.

[3]R.C. 2744.03. Defenses or immunities of subdivision and employee.

"(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies: ***

(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

summary judgment also asserting immunity on all claims. Appellant filed its combined brief in opposition to defendants' motions for summary judgment on May 31, 2005. Appellant argued that the exceptions to immunity in R.C. 2744.03(A)(6)(c) and (b) (as to its employees), defeat immunity, and R.C. 2744.02 and 2744.03 are unconstitutional as applied to appellant's claims. By journal entry dated November 16, 2005, the trial court reversed its earlier ruling and granted defendants' motions for summary judgment in their entirety. The trial court provided the following:

> **"[t]he court finds that plaintiff has failed to present genuine issues of material fact for trial affirmatively refuting the binding case law of *Marshall v. Montgomery County Children Services Board*, 92 Ohio St.3d 348, 2001-Ohio-209. Thus, the motions are well-taken and granted."**

Appellant then appealed the trial court's decision to this court on December 14, 2005.

According to the facts, Sydney was pronounced dead at Rainbow Babies and Children's Hospital in Cleveland, Ohio on April 28, 2000. Sydney was a 4-year-old girl who had been physically abused and subsequently died from her injuries. The social workers at the hospital notified the police and the DCFS.

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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."

Deputy Cuyahoga County Coroner and Forensic Pathologist Joseph Felo, D.O., performed the autopsy. Dr. Felo determined the cause of death to be blunt impacts to the child's trunk, causing perforation of the small intestine and acute peritonitis. It is Dr. Felo's opinion, as to a reasonable degree of medical certainty, that the fatal injuries occurred on April 27, 2000.[4]

Appellee DCFS is the public children services agency within the Cuyahoga County Department of Human Services. DCFS is charged with investigating allegations of child abuse and neglect, and providing care, protection and support to abused and neglected children. Duncan began her employment as a social worker with DCFS on October 25, 1999. She had no prior experience as a social worker and was new to the field. Duncan was "in training" until January 2000, and the Sydney Sawyer case was one of her first assignments. Her direct supervisor was Munro who was responsible for supervising five to six social workers and who reported directly to the intake unit chief, Elsa Popchak. Popchak reported to deputy director Zuma Jones, who, in turn, reported to Denihan.

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[4]See testimony of Joseph Felo, D.O., October 6, 2000.

II.

Appellant's first assignment of error states the following: "The trial court erred in granting summary judgment in favor of appellees DCFS, Denihan, Munro and Duncan because it improperly applied *Marshall v. Montgomery County Children Services Board* (2001), 92 Ohio St.3d 348, 2001-Ohio-209, to appellant's claims for violation of the statutory duty to report known or suspected child abuse, child endangering, and recklessness."

Appellant's second assignment of error states the following: "The trial court erred in granting summary judgment on all of appellant's claims as Ohio Revised Code Chapter 2744, as applied, violates the Ohio Constitution."

III.

Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come but to one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356.

In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Medina, Ltd. of Texas* (1991), 59 Ohio St.3d 108. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." Id. at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record *** in a light most favorable to the nonmoving party ***. [T]he motion must be overruled if

reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741.

We find that genuine issues of material fact remain concerning the Cleveland Police Department records. Appellant asserts that the evidence in the record reflects that no form was ever faxed to the police in Sydney's case. Appellant declares that "there is no record of any such report being received by the Cleveland Police Department."[5] Appellant states that the hotline form in the Sawyer case clearly reflects that the police had not been contacted and specifically stated that a "call needs to be made" to the police. Appellant further states that, not only did Munro or Duncan fail to make the telephonic or personal report to the police required by R.C. 2151.421(C), but they failed to make any report whatsoever at any time prior to Sydney's death, nearly a month after they knew of her abuse.

In contrast, appellees argue that the undisputed facts establish that appellees *did report* Sydney's case referral to the police. Appellees point to Munro's testimony that the DCFS' case referral file indicates that the police were notified of Sydney's case referral. Munro testified that when a complaint

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[5]See appellant's brief, p. 37.

is received by the hotline, the hotline worker has a carbon copy form containing relevant complaint information that is automatically faxed to the Cleveland Police Department.

In addition to the above, we find that genuine issues of material fact remain concerning the investigation of Denihan and the DCFS. Appellees created a substantial risk to Sydney's health and safety by violation of their legal duties owed to her. Specifically, they were reckless in assigning an inexperienced worker to the intake unit without proper supervision; instituting structured decision making ("SDM"), a safety and risk assessment model, without worker demonstration of knowledge, skills and clinical judgment necessary to implement the new process; allowing Munro to continue in his supervisor position without demonstrating supervisory knowledge and skills without demonstration of the knowledge and skills to implement SDM; not providing independent medical examiners to determine the nature of the physical condition of children when abuse is suspected; not providing a quality controls system to ensure that in Priority 1 cases child safety has been determined; and not providing a mechanism to determine if SDM was being properly implemented.

Additional evidence of recklessness in the record includes the fact that the social worker returned the four-year-old child to the mother after observing

evidence of severe injuries; for example, bruising to the face, whip marks on the child's back, and burn marks on her palms.

The Ohio Supreme Court defined "reckless" as:

> **"[T]he conduct was committed knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."**

Cater v. City of Cleveland, 83 Ohio St.3d 24, 33, 1998-Ohio-421.

Moreover, we note that we find this case to be fact-specific, primarily due to the fact that the agency already knew that someone had injured this child and still returned the child to her mother, even though she had a long history of abusing her children.

In addition to the genuine issues of material fact remaining in the case at bar, we find *Marshall v. Montgomery County Children Services Board* to be distinguishable from the case at bar.

In *Marshall*, the mother, Rozanne Perkins, "had a history of abusing her children," and was dependent on alcohol and drugs. Perkins had a substantial history of abusing her children beginning in 1985. From 1985 to 1995 Perkins had four other children who were taken away from her. In addition, the Dayton Police Department arrested Perkins for domestic violence. She had attempted

to stab her boyfriend, the baby's father, while she was driving her car with her baby in the backseat. In the case at bar, however, the mother did not have a similar history of domestic violence, and the child was beaten to death by the boyfriend and not the mother. Moreover, the case at bar lacks the significant history of violence, neglect and abandonment to the children by the mother in *Marshall*. Accordingly, we find *Marshall* to be distinguishable from the case at bar.

Assuming arguendo that the facts in the case at bar were not distinguishable from *Marshall*, the case is still misapplied. *Marshall* only dealt with the failure to investigate child abuse claims. Appellant's claims are not based solely on negligence in the investigation of the abuse of Sydney. The lower court disregarded appellant's claims for appellees' failure to report the known or suspected abuse of Sydney to law enforcement, Count 1; recklessly creating a substantial risk to the health and safety of Sydney by violating their duties of care and protection owed to her, Counts 3 and 6; and the recklessness of Munro and Duncan in investigating the abuse of Sydney, Count 7.

The express issue in *Marshall* dealt specifically with whether R.C. 2151.421 imposes liability for a negligent failure to investigate for purposes of the exceptions to immunity in R.C. 2744.02(B)(5) as to a political subdivision and R.C. 2744.03(A)(6)(c) as to its employees. The Ohio Supreme Court found the

result troubling but was "confined to review the law based upon the issues presented in this appeal." Id. at 352. The Ohio Supreme Court was not presented with a claim that CSB employees *recklessly* failed to investigate. The Ohio Supreme Court's decision in *Marshall* does not govern appellant's claims for appellees' failure to report known or suspected child abuse to law enforcement, or for appellees' reckless creation of a substantial risk to the health or safety of Sydney.

Appellant argues in his first assignment of error that the trial court erroneously granted summary judgment. We find merit in appellant's argument.

The conflicting evidence regarding the Cleveland Police Department records demonstrates substantial dispute as to genuine issues of material fact. There are also genuine issues of material fact regarding Denihan and Duncan. Moreover, we find *Marshall* to be distinguishable from the case at bar.

Appellant's first assignment of error is sustained.

Based on the disposition of appellant's first assignment of error, appellant's remaining assignment of error is moot. App.R. 12 (A)(1)(c).

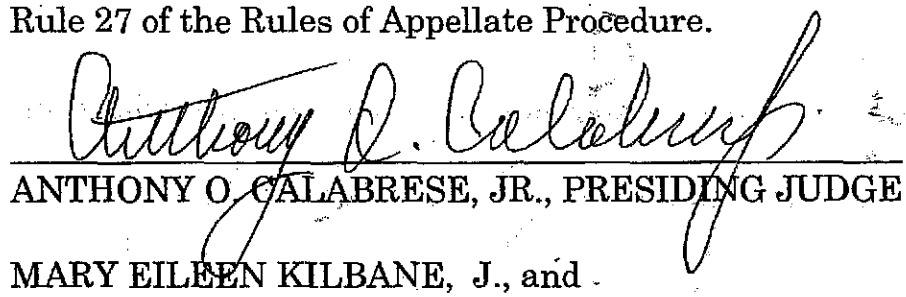
Judgment reversed and remanded.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



ANTHONY O. CALABRESE, JR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR.