

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-06-87476

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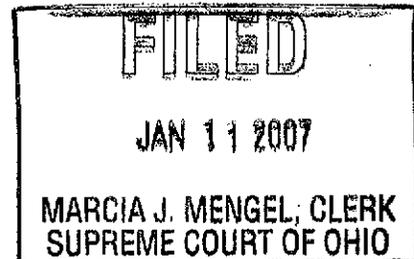
JOHN K. O'TOOLE, Personal Representative and  
Administrator for the Estate of Sydney Sawyer

*Plaintiff-Appellee,*

vs.

WILLIAM DENIHAN, et al.,

*Defendants-Appellants.*



TRIAL COURT NO.: CV450833

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS DEPARTMENT OF  
CHILDREN AND FAMILY SERVICES, DCFS EXECUTIVE DIRECTOR WILLIAM  
DENIHAN AND CASE WORKER KAMESHA DUNCAN

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I. **EXPLANATION OF WHY THIS CASE IS A MATTER OF PUBLIC OR GREAT GENERAL INTEREST**

The Eighth District Court of Appeals decision is in conflict with the Ohio Revised Code, established case law and creates unlawful liabilities against political subdivisions and their employees. Specifically the court's decision:

1. Requires every Ohio Department of Children and Family Services ("DCFS") and its employees to report all reports of suspected abuse they receive from third parties to the police or else be subject to fourth degree misdemeanor charges pursuant to R.C. §2151.99.

The Court of Appeal's ruling is in direct conflict with Ohio R.C. §2151.421 (A)(1)(a). R.C. §2151.421(A)(1)(a) provides that reports of alleged abuse shall be made to either a public children services agency or the police.

2. Mandates that all Ohio Department of Children and Family Services are "*in loco parentis*" to every child they investigate for potential abuse – even if DCFS does not assume physical or legal custody of the child during the investigation.

As a result, every Ohio DCFS is subject to Ohio's child endangering statute, R.C. §2919.22 and has a heightened duty to protect all children under investigation from any harm whatsoever, even if DCFS does not have legal custody or control of the child. Should anything happen to a child during the investigation, DCFS and its employees could be guilty of a third degree felony.

3. Waived governmental immunity for public children services agencies for discretionary policymaking decisions in violation of R.C. §2744.03(A).
4. Incorrectly determined DCFS Executive Director William Denihan and Case Worker Kamesha Duncan may be individually liable for the overall operation of DCFS and the procedures and protocols utilized by DCFS when investigating allegations of child abuse.

This case of first impression is a matter of public and great general interest because of the broad sweeping unlawful duties it imposes upon all public children services agencies throughout Ohio. Not only are the duties created for the first time by the Eighth District Court of Appeals in

direct conflict with Ohio Statutes, to impose such duties and criminal penalties on the public children services agencies and their employees could force the agencies to cease operations. Therefore, this Court needs to accept jurisdiction in this case to prevent the imposition of unlawful duties and criminal penalties on DCFS and its employees and the demise of all public children services agencies throughout Ohio.

## **II. STATEMENT OF THE CASE AND FACTS**

This case involves the governmental immunity of the Department of Children and Family Services (“DCFS”) and its employees for allegations of negligently investigating claims of child abuse. Specifically, this case involves an investigation of alleged abuse of four year old Sydney Sawyer. DCFS commenced its thirty day investigation on March 29, 2000 when it received information regarding questionable marks on Sydney Sawyer’s body from Sydney Sawyer’s day care facility. It was DCFS first notice of alleged abuse involving Sydney Sawyer.

Within an hour of receiving the call from the day care facility, DCFS Case Worker Kamesha Duncan, with the direction of her supervisor, Tallis George-Munro, met with Sydney Sawyer. As part of her investigation that day, Case Worker Duncan also met with Sydney Sawyer’s mother, Lashon Sawyer, interviewed at least six day care staff as well as Sydney Sawyer’s certified home care provider, Nashonda Cundiff, whom Sydney Sawyer stayed with from 3:30pm until her mother returned from work at 12:30 a.m. each day. With the cooperation of Sydney Sawyer’s mother, DCFS investigated and visited Sydney Sawyer’s home and developed a safety plan that allowed Sydney Sawyer to remain in her mother’s custody but required Lashon Sawyer to have Sydney Sawyer examined by a medical professional, remain in day care so that the day care staff could report any further questionable marks and cooperate with DCFS during its investigation.

Prior to the completion of DCFS' thirty day investigation, Sydney Sawyer died. Lashon Sawyer was ultimately convicted of causing her daughter's death.

On October 16, 2001, Appellee, John K. O'Toole, Personal Representative and Administrator for the Estate of Sydney Sawyer<sup>1</sup> filed a wrongful death complaint against Defendants-Appellants, DCFS, the Executive Director of DCFS William Denihan, DCFS Case Worker Kamesha Duncan and DCFS Supervisor Tallis George-Munro. Appellee alleged that DCFS and its employees negligently or recklessly investigated allegations of abuse. Appellee alleged multiple theories in an attempt to avoid this Court's determination in *Marshall v. Montgomery County Children Services Board*, 92 Ohio-St. 3d 848, 2001-Ohio-209, 750 N.E. 2d 549**Error! Bookmark not defined.** that DCFS and its employees are immune from liability for negligent investigation.

Appellee's Complaint alleged:

- Count I: All Defendants were negligent in failing to report suspected abuse.
- Count II: All Defendants negligently investigated suspected abuse.
- Count III: All Defendants breached their duty to provide for the safety of minor Sydney Sawyer (2919.22) as *in loco parentis* even though they were not acting with custody over the minor child.
- Count IV: All Defendants negligently performed their job duties.
- Count V: All Defendants breached a special duty of care to Sydney Sawyer.
- Count VI: Defendants William Denihan and DCFS were malicious, reckless and wanton in the exercise of their judgment while performing their duties in Sydney Sawyer's case.
- Count VII: Defendants William Denihan and Kamesha Duncan were malicious, reckless and wanton in the performance of their duties toward Sydney Sawyer's case.
- Count VIII: All Defendants intentionally/negligently caused Sydney Sawyer's wrongful death.
- Count IX: All Defendants intentionally/negligently caused Sydney Sawyer pain and suffering.

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<sup>1</sup> The Estate of Sydney Sawyer consists of her biological father Cedric Nash and paternal grandmother Gwen Hamilton.

On November 16, 2005 the trial court properly granted DCFS and its employees summary judgment on all Appellee's claims based upon *Marshall, supra*. Recognizing Appellee's negligent investigation claims were barred pursuant to *Marshall, supra*, on December 14, 2005 Appellee appealed only Counts 1, 3, 6 and 7 of Appellee's Complaint. The Court of Appeals improperly reversed and remanded this case with regard to Counts 1, 3, 6 and 7.

The Court of Appeals' reversal of Counts 1 and 3 of Appellee's Complaint creates unprecedented legal duties on DCFS in violation of the Ohio Revised Code and its employees in an attempt to create criminal liability and thus avoid governmental immunity. As further explained below, by reversing Count 1 of Appellee's Complaint, the Court of Appeals for the first time has created a legal duty on DCFS and its employees to report to the police allegations of child abuse reported to DCFS. Failure to report reports of abuse now subjects DCFS and its employees to a fourth degree misdemeanor and waives immunity for any consequences of DCFS failure to report. The Court of Appeals' ruling is in direct contradiction to Ohio Revised Code. §2151.421(A)(1)(a) which provides that DCFS and its employees do not have to report reports of abuse to the police. Rather, the police must report reports of abuse to DCFS pursuant to R.C. §2151.421(D)(1).

Almost as equally astonishing, by reversing Count 3 of Appellee's Complaint, the Court of Appeals determined as a matter of law that DCFS and its employees are "*in loco parentis*" to every child that DCFS receives a report of alleged abuse about -- whether or not DCFS has legal custody of the child. As "*in loco parentis*," DCFS and its employees are subject to child endangering laws set forth in R.C. §2919.22. Therefore DCFS and its employees are now liable for anything that happens to any child it is investigating--even if DCFS doesn't have custody or

control of the child. Should something happen to a child under investigation, DCFS and its employees could be guilty of a fourth degree felony!

Finally, the Court of Appeals determined an issue of fact exists as to whether DCFS Executive Director, William Denihan and the DCFS case worker and the DCFS supervisor assigned to Sydney Sawyer's case recklessly made discretionary decisions on how to operate DCFS and follow its policies and procedures. *O'Toole v. Denihan et al.*, 2006-Ohio-6022 at ¶16 ¶22. The Court of Appeals' decision is in direct conflict with R.C. §2744.03(A) which reinstates immunity for discretionary policymaking decisions and opens a Pandora's box in all future claims against any government agency and its employees for the policy and procedures utilized by the government agency. Therefore, the Court of Appeals' decision needs to be reversed.

### **III. ARGUMENT** **GOVERNMENTAL IMMUNITY OVERVIEW**

This case is an attempt to eliminate immunity for DCFS and its employees for their investigation of a report of abuse involving Sydney Sawyer.

The legislature in 1985 created the Political Subdivision Tort Liability Act as set forth in R.C. §2744 et seq. to protect political subdivisions from certain liabilities. See *Butler v. Jordan*, 92 Ohio St.3d 354, 2001-Ohio-204, 750 N.E.2d 554 (details the history of immunity and concludes the Cuyahoga Cty Dept of Human Services is immune from liability for failure to inspect/negligent certification of day care). To determine whether a political subdivision is immune from liability, this Court developed a three-tiered analysis for courts to follow. *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610. That analysis set forth in *Cater, supra* is as follows:

- Step 1. R.C. §2744.02(A)(1) provides that all political subdivisions are entitled to a blanket of immunity. R.C. §2744.02(A)(1) provides that political subdivision are not liable for injury, death or loss to a person or property

that occurred in relation to the performance of a governmental or proprietary function.

Step 2. The immunity set forth in R.C. §2744 is subject to five exceptions listed in R.C. §2744.02(B)(1)-(5). Thus, once immunity is established under R.C. §2744.02(A)(1), the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply<sup>2</sup>.

Step 3. If one of the exceptions to immunity apply, immunity can be reinstated in the third tier in the analysis if one of the defenses in R.C. §2744.03 applies. However the defenses are not to be considered if none of the exceptions in tier two apply.

*Cater, supra* at 28; *Ratcliff v. Darby* (Ohio App 4 Dist.), 2002-Ohio-6626 at ¶ 7; *Sobiski v. Cuyahoga County Dept. of Children and Family Services*, (Ohio 8<sup>th</sup> App), 2004-Ohio-6108 ¶19.

In this case, it is undisputed that Appellants are political subdivisions fulfilling a “governmental function”.<sup>3</sup> Therefore, Appellants fulfill the first tier and are entitled to immunity.

The only way governmental immunity is avoided in the second tier is if one of the five exceptions set forth in R.C. §2744.02(B)(1)-(5) apply. Appellee attempts to exploit R.C. §2744.02(B)(5) in this case. R.C. §2744.02(B)(5) provides that “a political subdivision is liable for injury, death or loss to a person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code . . .”.<sup>4</sup> Therefore, this appeal involves Appellee’s attempt to creatively impose legal duties on DCFS and its employees that now subject DCFS and its employees to criminal liabilities and therefore avoid DCFS’ governmental immunity. However, the new “duties” the Court of Appeals has imposed on DCFS violates the Ohio Revised Code, binding case law and requires reversal for the good of the public and the future existence of all public children services agencies in the State of Ohio.

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<sup>2</sup> R.C. § 2744.03 (A) provides the essentially same analysis for immunity for employees of political subdivisions.

<sup>3</sup> R.C. 2744.01(F) provides that a county is a political subdivision. R.C. 2744.01(C)(2)(m) provides that the operation of a county human services department is a “government function”. See *Jackson v. Butler Cty. Bd. Of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 608 N.E.2d 363; *Sobiski v. Cuyahoga County Dept. of Children and Family Services*, (Ohio 8<sup>th</sup> App), 2004-Ohio-6108.

<sup>4</sup> For purposes of this Memorandum in Support of Jurisdiction only, Appellants cite the version of R.C. 2744.02(B)(5) proposed by Appellee.

A. **FIRST PROPOSITION OF LAW**  
**DCFS AND ITS EMPLOYEES DO NOT HAVE A LEGAL DUTY TO**  
**REPORT REPORTED CLAIMS OF ABUSE TO THE POLICE**  
**PURSUANT TO R.C. §2151.421**

R.C. § 2151.421 (A) entitled “**Persons required to report injury or neglect; procedures on receipt of report**” requires certain individuals to report suspected child abuse or neglect. The purpose of R.C. §2151.421 (A) is to “involve agencies in protecting abused children” and require individuals that work with children or may encounter suspected child abuse to step forward and report their suspicions to the relevant governmental agency rather than attempt to avoid a situation or assume a passive role when they know or should know of potential abuse. *Yates v. Mansfield Board of Ed.*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E. 2d 861, Lundberg Stratton dissent at ¶ 53. R.C. §2151.421 (A)(1)(a) provides in relevant part:

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 eighteen years of age ... has suffered or faces a threat of suffering any physical condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides...(emphasis added).

The plain language of R.C. §2151.421 requires a report of abuse to be made to either the public children services agency or the police. The plain language does not require that once the alleged abuse is reported to a public children services agency, that they then have to report suspected abuse to itself and the police or else face criminal prosecution. Such an interpretation ignores the plain language of the statute which is in conflict with the statute. Courts cannot stretch statutes beyond their ordinary meaning in order to impose liability under R.C.

§2744.02(B)(5). *Layman v. Ohio Dept. of Human Services* (1997), 78 Ohio St. 3d 485, 678 N.E. 2d 1217; *Farra v. Dayton* (1989), 62 Ohio App. 3d 487, 576 N.E. 2d 807.

The liability provisions for failure to report suspected abuse make sense if children that are not already reported to a children services agency are independently discovered and suspected of being abused. Under such circumstances, social workers would be obligated to report the alleged abuse to the county children services agency or police. However, county social workers are not obligated to report abuse that has already been reported to them. To misconstrue the statute and impose such a burden exposes all county agencies and its employees to unforeseen criminal prosecution and penalties.

The effect of the Court of Appeals' decision, in addition to creating a heightened duty for DCFS and its employees that violates the plain language of the Ohio Revised Code and subjects the agency to criminal liability, also arguably waives DCFS and its employees' immunity from civil lawsuits that result from DCFS' failure to report reports of alleged abuse to the police. As previously discussed, Appellee contends that governmental immunity for political subdivisions such as DCFS as set forth in R.C. §2744 et seq. is waived for violation of any statute that imposes liability per R.C. §2744.02(B)(5). While Appellants contend that immunity is not waived if police are not notified of reports of abuse, the Court of Appeals' opinion arguably creates precedent that all public children services in Ohio are not immune from civil liability if an agency or its employee does not report reports of alleged abuse to the police. Thus the legal ramifications of this case span even more than criminal liability against every public children services agency in Ohio, it also exposes the agencies to civil liability if an agency fails to report a report to the police. Such exposures as a result of the Court of Appeals' opinion were not

intended by the legislature and could terminate the operation of children and family agencies in Ohio.

**B. SECOND PROPOSITION OF LAW**  
**DCFS AND IT EMPLOYEES ARE NOT “IN LOCO PARENTIS”**  
**TO CHILDREN THEY INVESTIGATE FOR ALLEGED**  
**ABUSE**

Ohio’s child endangering laws set forth in R.C. §2919.22 provides that parents or people in an “*in loco parentis*” relationship with a child owes a child a heightened duty of care to insure that the child is cared for and not harmed. R.C. §2919.22 provides:

(A) 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...shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.

Violation of R.C. §2919.22 is a third degree felony.

The term “*in loco parentis*” has been defined as “the relationship which a person assumes toward a child not his own, holding him out to the world as a member of his family toward whom he owes the discharge of parental duties.” *In re Estate of George* (App. 1959), 82 Ohio Law Abs. 452, 455. The key factors of an *in loco parentis* relationship have be delineated as “the intentional assumption of obligations incidental to the parental relationship, especially support and maintenance.” *Nova Univ., Inc. v. Wagner* (Fla. 1986), 491 So. 2d 1116, 1118, fn. 2. (emphasis added).

This Court in the leading case of *State of Ohio v. Noggle*, 67 Ohio St. 3d 31, 1993-Ohio-189, 615 N.E. 2d 1040 discussed the phrase “*in loco parentis*” in depth. In *Noggle*, a high school teacher engaged in a sexual relationship with a high school student. The prosecutor attempted to indict the teacher for violation of R.C.§2907.03(A)(5), Ohio’s sexual battery statute. R.C. §2907.03(A)(5) provides, in essence that a person in an “*in loco parentis*” relationship with

another shall not engage in sexual conduct with that person. The prosecution attempted to argue that an “*in loco parentis*” relationship existed between the high school teacher/coach and the student.

This Court rejected the argument that “teachers, coaches, scout leaders” etc. have an *in loco parentis* relationship with a child. This Court further held that the term “applies to the people the child goes home to.” *Id.* at p 33.

Three years later in *Evans v. Ohio State University* (1996), 112 Ohio App. 3d 724, 680 N.E. 2d 161 cert. denied (1996), 77 Ohio St. 3d 1494, a plaintiff attempted to argue that a 4-H Club had an “*in loco parentis*” relationship with a 4-H club student member and therefore, the 4-H Club should have protected the student from a sexual attack by an adult that helped at 4-H Club activities. The Court of Appeals rejected Plaintiff’s argument and held:

Thus, under the case law, the relationship of *in loco parentis* is established when a person assumes the responsibilities incident to parental status, including custody and support of the child; stated otherwise, the rights, duties and responsibilities are the same as those of the lawful parent. \* \* \*

*Id.* at 738 (emphasis added). Even the Eighth District Court of Appeals has defined an “*in loco parentis*” as a person “to one who is relied upon for support or applies to the person ‘the child goes home to.’” *City of Cleveland v. Kazmaier* (Ohio App 8<sup>th</sup> Dist.), 2004-Ohio-6420 at paragraph 12 quoting *State of Ohio v. Noggle* 67 Ohio St. 3d 31, 33, 1993-Ohio-189, 615 N.E. 2d 1040.

The Court of Appeals’ decision in this case erroneously concluded that DCFS and its employees owed a heightened duty to care and protect Sydney Sawyer as articulated in Count 3 of Appellee’s Complaint. *O’Toole v. Denihan*, 2006-Ohio-6022 at ¶ 22. Specifically, Count 3 of Appellee’s Complaint alleged that DCFS and its employees were “*In loco parentis*” to Sydney

Sawyer and owed her a heightened duty of care per R.C. §2919.22, the child endangering laws. Therefore, the result of the Court of Appeals decision is that all public children services agencies and their employees are “*in loco parentis*” to every child they investigate-----including children they do not have custody or control over. The Court of Appeals’ error is of public and great general interest because the consequence of the decision is that if a child is harmed in any manner while an agency is investigating allegations of abuse, but does not have legal custody or control of the child, the agency and its employees are subject to criminal felony charges for the injuries to the child.

In this case, the Court of Appeals adopted Appellee’s creative argument that DCFS and its employees were in an “*in loco parentis*” relationship with Sydney Sawyer and violated a duty of care set forth in R.C. §2919.22 in order to circumvent DCFS’ immunity set forth in R.C. §2744 *et seq.* However, DCFS and its employees were not “*in loco parentis*” to Sydney Sawyer as a matter of law. DCFS and its employees did not assume physical or legal custody of Sidney Sawyer nor did they provide any support or maintenance for Sidney Sawyer as required for an “*in loco parentis*” relationship. In fact, it is undisputed that DCFS did not remove Sydney Sawyer from her mother’s custody. Rather, DCFS investigated allegations of abuse and Sydney Sawyer’s mother complied with a safety plan to aid in Sydney Sawyer’s safety. Neither this Court nor any other appellate court has imposed liability on DCFS as an *in loco parentis* when the agency does not remove the child from the home; assume custody of the child; or has direct control or supervision of the child. In fact, Appellee’s arguments are just the opposite—Appellee is critical of DCFS for not removing Sydney Sawyer from her home and the control of her mother. As this is a case of first impression, Ohio needs this Court to provide guidance on whether DCFS and its employees are “*in loco parentis*” to every child they investigate for

alleged abuse and subject to felony charges should something happen to a child they are investigating.

C. **THIRD PROPOSITION OF LAW**  
**DCFS IS IMMUNE FOR DISCRETIONARY POLICYMAKING**  
**DECISIONS PURSUANT TO R.C. 2744.03(A)(3)**

As previously discussed, this Court in *Cater, supra* held that a political subdivision's immunity can only be waived if an exception to immunity in R.C. §2744.02(B)(1)-(5) exists. Even if the Court of Appeals erroneously determined that DCFS and its employees violated a duty to report in R.C. §2151.421 or are "*in loco parentis*" subject to R.C. §2919.22 and therefore immunity is waived pursuant to R.C. §2744.02(B)(5), this Court's decision in *Cater, supra* requires that a political subdivision is entitled to have immunity reinstated if one of the defenses in R.C. §2744.03(A) applies. In this case, the defenses contained in R.C. §2744.03 were ignored by the Court of Appeals and apply as a matter of law. Specifically, R.C. §2744.03(A)(3) provides that immunity is to be reinstated if the "action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policymaking, planning or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee."

In this case, the Court of Appeals determined that DCFS' Executive Director, William Denihan's decision making regarding the operation of DCFS and how DCFS investigates and trains employees was wanton and reckless. In fact, the Court of Appeals reversed the trial court's order granting summary judgment with regard to Count 6 of Appellee's complaint that alleged in relevant part:

53. Defendants Denihan, CCDCFS and John Doe Policymakers acted with malicious purpose, in bad faith and/or in a wanton or reckless manner in establishing, implementing and utilizing the programs and protocol for responding to, investigating, assessing and disposing of allegations of

child abuse against children residing within Cuyahoga County, specifically including, but not limited, to “Structured Decision Making.”

54. Defendants Denihan, CCDCFS and John Doe Policymakers acted with malicious purpose, in bad faith or in a wanton or reckless manner in utilizing such programs and protocols to respond to, investigate, assess and dispose of Sydney Sawyer’s case.
55. Defendants Denihan, CCDCFS and John Doe Policymakers acted with malicious purpose, in bad faith or in a wanton or reckless manner in utilizing such programs and protocols to respond to, investigate, assess and dispose of Sydney Sawyer’s case. (emphasis added).

However, Executive Director Denihan’s discretionary “policymaking, planning and enforcement powers by virtue of the duties and responsibilities of the office” of DCFS Executive Director were within his discretion and immunity for DCFS must be reinstated pursuant to R.C. § 2744.03(A)(3). This matter is of public and great general interest because by refusing to enforce R.C. § 2744.03(A), the Court of Appeals revokes political subdivisions’ immunity for discretionary acts subjecting political subdivisions to civil exposure for discretionary policymaking decisions that are necessary for the function of the agencies. The Court of Appeals failed to apply R.C. § 2744.03 (A) and this Court’s directives in *Cater, supra*.

**D. FOURTH PROPOSITION OF LAW**  
**POLITICAL SUBDIVISION EMPLOYEES ARE NOT PERSONALLY**  
**LIABLE FOR OPERATIONS OR PROCEDURES OF THE PUBLIC**  
**ENTITY**

R.C. §2744.03(A)(6) provides that political subdivision employees are immune from liability. Employees can only lose their immunity if one of three exceptions in R.C. §2744.03(A)(6)(a)-(c)<sup>5</sup> applies. R.C. §2744.03(A)(6)(b) provides that an employee is immune from liability if:

- (b) The employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

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<sup>5</sup> R.C. §2744.03(A)(6)(c) was previously discussed within Propositions of Law One and Two.

This Court has held that malicious purpose, bad faith and wanton or reckless actions are defined to be “more than bad judgment or negligence”. *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, 187 N.E.2d 45 para. two of syllabus; *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705, 708. “[I]n R.C. §2744.03(A)(6)(b), the word ‘recklessness’ is associated with the words ‘malicious purpose’ ‘bad faith’ and ‘wanton,’ all of which suggests conduct more egregious than simple carelessness”. *Fabrey v. McDonald Village Police Dept.* 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639.

In this case, the Court of Appeals held an issue of fact exists regarding whether DCFS Executive Director William Denihan acted recklessly in his operation of DCFS. Specifically, the Court of Appeals questioned DCFS Executive Director William Denihan establishing and utilizing programs and protocols for responding to, investigating, assessing and disposing of allegations of child abuse as set forth in Count 6 of Appellee’s Complaint. *O’Toole v. Denihan*, 2006-Ohio-6022, ¶16 and ¶25. As a result, the Court of Appeals remanded this case for a jury to determine if DCFS Executive Director William Denihan recklessly operated DCFS and if he did, was his operation of DCFS the proximate cause of Sydney Sawyer’s death. The only reference to Case Worker Kamesha Duncan’s alleged recklessness by the Court of Appeals was whether she should have removed Sydney Sawyer from her mother’s custody at her initial visit with Sydney Sawyer. See *O’Toole v. Denihan*, 2006-Ohio-6022, ¶17.

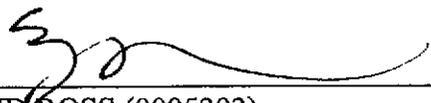
This case is a matter of public and great general interest because public agency employees are being held individually liable for the operations of the public agency. In this case DCFS’ executive director and case worker were not reckless as a matter of law. Rather the Court of Appeals reversed the trial court’s judgment and applied a negligent standard as to whether DCFS’ employees knew or should have known that their operation of DCFS and following its

procedures would have caused Sydney Sawyer's death. No evidence exists that DCFS Executive Director William Denihan and Case Worker Kamesha Duncan acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Courts in Ohio need guidance in this matter of first impression as to "malicious purpose, in bad faith, or in a wanton or reckless manner" for purposes for R.C. §2744.03 (A)(6)(b). Otherwise, employees of public agencies will continue to be deemed "reckless" and "liable" for their discretionary decisions in the performance of their duties, exposing them to further civil and criminal liabilities. Therefore, DCFS, its Executive Director William Denihan and Case Worker Kamesha Duncan request this Court to accept jurisdiction to correct the errors in this case.

### **III. CONCLUSION**

This case of first impression egregiously distorts and rewrites the Ohio Revised Code and the duties imposed upon Ohio public children services agencies and their employees. Not only is the opinion almost incomprehensible as written, but it exposes individual employees to liability for implementing a public agency's policies and procedures. Therefore Appellants request this Court to accept jurisdiction of this matter.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing document was sent by regular U.S. mail this 11<sup>th</sup> day of

January, 2007 to:

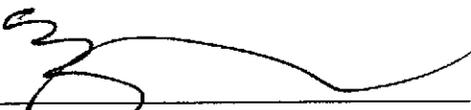
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\_\_\_\_\_  
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## **APPENDIX**

NOV 27 2006

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 87476

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**JOHN K. O'TOOLE, ADMINISTRATOR, ETC.**

PLAINTIFF-APPELLANT

vs.

**WILLIAM DENIHAN, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
REVERSED AND REMANDED**

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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 27 2006

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**APPENDIX A**

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FILED AND JOURNALIZED  
PER APP. R. 22(E)

NOV 27 2006

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GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] 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: [Signature] 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

0624 00884

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.<sup>1</sup> 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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<sup>1</sup>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.”<sup>2</sup>**

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.<sup>3</sup> On April 27, 2005, defendant Munro filed a motion for

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<sup>2</sup>See November 2003 order.

<sup>3</sup>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.<sup>4</sup>

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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<sup>4</sup>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."<sup>5</sup> 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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<sup>5</sup>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).

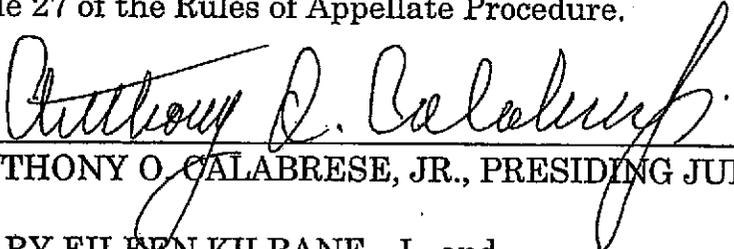
Judgment reversed and remanded.

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.

  
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ANTHONY O. CALABRESE, JR., PRESIDING JUDGE

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