

IN THE SUPREME COURT OF OHIO

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

Appellee,

v.

WILLIAM K. DENIHAN, et al.,

Appellants.

:
:
: Case No. 07-0056
:
: On Appeal from the Cuyahoga
: County Court of Appeals,
: Eighth Appellate District
:
: Court of Appeals
: Case No. CA-06-87476
:

APPELLEE'S MEMORANDUM IN RESPONSE

John W. Martin, Esq. (0015279)
Andy Petropouleas, Esq. (0070090)
John W. Martin Company & Associates, L.P.A.
800 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
216.771.3303 - telephone
216.771.3313 - fax

William D. Beyer, Esq. (0027880)
Joan E. Pettinelli, Esq. (0047171)
(COUNSEL OF RECORD)
Wuliger, Fadel & Beyer
1340 Sumner Avenue
Cleveland, Ohio 44115
216.781.7777 - telephone
216.781.0621 - fax

Counsel for Appellee John K. O'Toole

David Ross, Esq. (0005203)
Michelle J. Sheehan, Esq. (0062548)
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093

*Counsel for Appellants Cuyahoga County
Department of Children and Family Services,
William Denihan and Kamesha Duncan*

James C. Cochran, Esq. (0026172)
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

Counsel for Appellant Tallis George-Munro

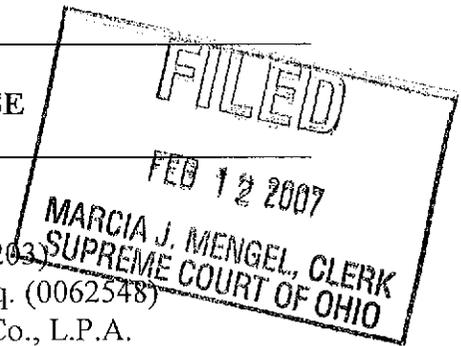


TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF FACTS 3

ARGUMENT 5

I. DCFS AND ITS EMPLOYEES ARE NOT IMMUNE FROM LIABILITY FOR FAILURE TO REPORT KNOWN OR SUSPECTED CHILD ABUSE TO THE POLICE 5

II. DCFS AND ITS EMPLOYEES ARE NOT IMMUNE FROM LIABILITY FOR RECKLESSLY CREATING A SUBSTANTIAL RISK TO THE HEALTH AND SAFETY OF SYDNEY SAWYER 8

III. DCFS IS NOT ENTITLED TO THIRD TIER REINSTATEMENT OF IMMUNITY FROM LIABILITY FOR ITS EXECUTIVE DIRECTOR'S RECKLESS CONDUCT¹¹ 11

IV. APPELLANTS ARE NOT IMMUNE FROM LIABILITY FOR RECKLESSLY INVESTIGATING CHILD ABUSE 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

<i>Brodie v. Summit Cty. Children Serv. Bd.</i> (1990), 51 Ohio St.3d 112	8
<i>Campbell v. Burton</i> , 2001-Ohio-206, 92 Ohio St.3d 336	1, 2, 8, 13, 14
<i>Cater v. City of Cleveland</i> , 1998-Ohio-421, 83 Ohio St.3d 24	11-13, 15
<i>Kirchner v. Crystal</i> , 1983 WL 4728 (8 th Dist. Ct. App. 9/22/83)	9
<i>Marchetti v. Kalish</i> (1990), 53 Ohio St.3d 95, 559 N.E.2d 699, 700	15
<i>Marshall v. Montgomery County Children Services Board</i> , 2001-Ohio-209	1, 2, 13
<i>O’Toole v. Denihan</i> , 2006-Ohio-6022 at ¶¶ 22-24 (8 th Dist. Ct. App.)	1, 10
<i>State of Ohio v. Elaine Thompson</i> . Huron County Court of Common Pleas Case No. 2006-0151	6
<i>State v. Brooks</i> , 2000 WL 337600 (8 th Dist. Ct. App. 3/30/00)	9
<i>State v. Caton</i> 137 Ohio App.3d 742, 739 N.E.2d 1176 (1 st Dist. Ct. App. 2000)	8, 9
<i>State v. Hebesh</i> , 85 Ohio App.3d 551, 620 N.E.2d 859 (3 rd Dist. Ct. App. 12/15/92)	9
<i>State v. Johnson</i> , 1997 WL 626598 (9 th Dist. Ct. App. 9/24/97)	9
<i>Yates v. Mansfield Board of Education</i> , 2004-Ohio-2491, 102 Ohio St.3d 205	2, 5, 7, 8

STATUTES

Ohio Revised Code 2151.421	1, 6, 8, 13
Ohio Revised Code 2151.421(A)	1
Ohio Revised Code 2151.421(F)(1)	6
Ohio Revised Code 2151.421(J)(3)	6
Ohio Revised Code 2151.99	1
Ohio Revised Code 2744.02	1

Ohio Revised Code 2744.02(B)(5)	1, 2, 5, 7, 8, 13, 14
Ohio Revised Code 2744.03	1, 11
Ohio Revised Code 2744.03(A)(3)	11
Ohio Revised Code 2744.03(A)(5)	12
Ohio Revised Code 2744.03(A)(6)	13
Ohio Revised Code 2744.03(A)(6)(b)	3, 14
Ohio Revised Code 2744.03(A)(6)(c)	1, 2, 5, 7, 8, 13
Ohio Revised Code 2744.07	14
Ohio Revised Code 2744.08	7
Ohio Revised Code 2901.23	7
Ohio Revised Code 2919.22	1, 2, 8, 9, 13
Ohio Revised Code 2919.22(A)	8
Ohio Revised Code Chapter 2744	15

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Appellees misinterpret and exaggerate the Eighth District's opinion in order to support their unfounded cry of wolf that the decision causes unforeseen and never before imposed duties, civil liabilities and criminal penalties upon public children services agencies and their employees. They wrongly and shamelessly claim that the decision bespeaks the imminent demise of supportive and protective child services in the State of Ohio. This is not a case of public or great general interest. It is a case of limited applicability as it was decided under the *former* versions of R.C. 2744.02 and 2744.03 and will not have the widespread effect on the operations of public children services agencies decried by the Appellants. Additionally, the Eighth District found 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..."

In reversing the trial court, the Court of Appeals correctly held that *Marshall v. Montgomery County Children Services Board*, 2001-Ohio-209, does not govern Appellee's claims against the Cuyahoga County Department of Children and Family Services ("DCFS") and its employees for breach of the statutory duty to immediately report the known or suspected child abuse of four year old Sydney Sawyer to law enforcement in violation of R.C. 2151.421(A) and R.C. 2151.99; for recklessly creating a substantial risk of harm to the health and safety of Sydney Sawyer in violation of R.C. 2919.22; or for the recklessness of the DCFS employees in investigating her abuse. *O'Toole v. Denihan*, 2006-Ohio-6022 at ¶¶ 22-24 (8th Dist. Ct. App.).

This case was correctly decided under the *former* versions of R.C. 2744.02(B)(5) and 2744.03(A)(6)(c) which both provided an exception to governmental immunity when "liability is expressly imposed by a section of the Revised Code." In *Campbell v. Burton*, 2001-Ohio-206, 92 Ohio St.3d 336, this Court held that for the purposes of this exception to immunity, R.C. 2151.421 through its penalty provision, R.C. 2151.99, expressly imposed liability on political subdivisions and

their employees for failure to report suspected child abuse. Effective April 9, 2003, R.C. 2744.02(B)(5) and 2744.03(A)(6)(c) were amended to require that “civil liability” be expressly imposed by statute for the immunity exception to apply. In *Yates v. Mansfield Board of Education*, 2004-Ohio-2491, 102 Ohio St.3d 205, this Court again held that a political subdivision - there a school board of education - may be held liable for failure to report the abuse of a student when another student is victimized by the same teacher years later. After noting the amendments, this Court applied the *former* version of R.C. 2744.02(B)(5), and the dissent expressly noted that the holding has limited applicability, i.e. to causes of action accruing before the amendments’ April 9, 2003 effective date. *Id.* at ¶ 63.

The argument that the decision in this case creates new or heightened duties owed by public children services agencies and their employees entirely disregards this Court’s holdings in *Campbell* and *Yates*. Rather than create new duties, the decision applies controlling precedent to administrators and employees of a public children services agency who are acting in their official or professional capacities. Contrary to Appellants’ claim, the Court of Appeals did not hold that they must report to the police *any and all* allegations of child abuse. The most the decision can be read to impose is a duty to report once *they* suspect or know of child abuse. Moreover, the appellate court did not expressly hold that they are required to make their report to the police. Rather, the Court of Appeals noted the substantial evidence that Munro and Duncan themselves knew of Sydney Sawyer’s abuse, yet failed to report it to anyone at anytime prior to her death.

The Court of Appeals also correctly held that *Marshall* does not govern Appellees claims for recklessly creating a substantial risk to Sydney’s health and safety. Indeed, liability is expressly imposed by R.C. 2919.22 for such conduct within the meaning of *former* R.C. 2744.02(B)(5) and 2744.03(A)(6)(c). Finally, the Court of Appeals properly held that *Marshall* does not govern

Appellee's claims against the individual employees for recklessness because 2744.03(A)(6)(b) provides an exception to the immunity of Denihan, Munro and Duncan for their recklessness in the handling of Sydney's case. Indeed, the decision properly distinguishes *Marshall*, noting that *Marshall* involved only claims for negligence, not recklessness.

STATEMENT OF FACTS

On the morning of April 28, 2000, the battered, 38 pound, 41 inch body of a four (4) year old little girl named Sydney Sawyer was pronounced dead. Social workers at the hospital immediately called the police and DCFS. Deputy County Coroner Joseph Felo, D.O. determined the cause of death to be blunt impacts to her trunk causing perforation of the small intestine and acute peritonitis. Dr. Felo found that the fatal injuries occurred on April 27, 2000 and noted numerous non-fatal injuries inflicted on Sydney in the days, weeks and months before her death.

Almost 30 days earlier, on March 29, 2000, a nurse at the daycare Sydney attended reported Sydney's suspected abuse to DCFS. Despite observing bruising to Sydney's face in the form of a closed fist mark, large circular burns in both her palms, whip marks on her back, and other injuries, Appellants Munro and Duncan failed to take any steps to protect the helpless four year old. Instead, they returned her to her abusive home, and failed to report the abuse to anyone else within DCFS or to any law enforcement agency. They did so despite the following facts:

- * Munro and Duncan observed severe injuries to Sydney and they recognized that Sydney was a victim of physical abuse;
- * Munro and Duncan believed and documented that Sydney's safety was of "immediate concern;"
- * Sydney's mother was uncooperative during the investigation and gave implausible and inconsistent explanations for the injuries;
- * The mother's live-in boyfriend refused to speak to Duncan and no further attempt was made to interview him;

- * No attempts were made to locate and interview other members of Sydney's family, including her biological father, her grandmother, neighbors or others having knowledge of Sydney;
- * The daycare staff immediately voiced their concerns about returning Sydney to her mother;
- * Munro and Duncan failed to obtain any medical information concerning Sydney's injuries or her past medical history;
- * No further contact was made with Sydney beyond the initial interview on March 29, 2000;
- * No further contact or even an attempt to contact Sydney's mother was made after the home visit, even after her mother claimed to take her out of state on a family vacation without any apparent resources to do so;
- * No further contact was made with the daycare until April 26, 2000 only to find that it was closed for Spring Break;
- * No attempt was made to monitor compliance with the illusory "safety plan."

As substantial expert evidence in the record demonstrated, the horrific events in this case were precipitated by the recklessness of DCFS and its Executive Director. Specifically, the Court of Appeals noted their recklessness in assigning an inexperienced social worker to the intake unit without proper supervision, instituting a new risk assessment protocol (SDM) without worker demonstration of knowledge, skills and clinical judgment necessary to implement it; allowing Munro to continue in his supervisor position without demonstrating supervisory 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 control system to ensure that child safety has been determined in Priority 1 cases, and not providing a mechanism to determine if SDM was being properly implemented.

On October 16, 2001, Appellee brought this action against DCFS, its Executive Director, William Denihan ("Denihan"), Munro and Duncan asserting seven (7) substantive claims for relief, including: failure to report suspected or known child abuse of Sydney Sawyer to law enforcement (Count 1); recklessly creating a substantial risk to the health and safety of Sydney Sawyer in

violation of their duties of care and protection (Counts 3 and 6); and recklessness in investigating the known or suspected child abuse of Sydney Sawyer (Count 7).

ARGUMENT

I. DCFS AND ITS EMPLOYEES ARE NOT IMMUNE FROM LIABILITY FOR FAILURE TO REPORT KNOWN OR SUSPECTED CHILD ABUSE TO THE POLICE

DCFS, Denihan and Duncan wrongly claim that the Court of Appeals opinion “arguably creates precedent that all public children services (sic) in Ohio are not immune from civil liability if an agency or its employee does not report *reports* of alleged abuse to the police.” (emphasis added). The opinion cannot be interpreted this way. It can only be read to hold, first, that a DCFS employee has a duty to report under R.C. 2151.421 when *he or she* personally knows of or suspects child abuse, and, second, that the employee and DCFS may be held civilly liable for failure to report under the exceptions to immunity in *former* R.C. 2744.02(B)(5) and R.C. 2744.03(A)(6)(c). Contrary to DCFS’ claim, the decision does not subject the agency to criminal penalties and does not impose any heightened duty on DCFS or its employees. Rather, it simply subjects DCFS administrators and employees to the same reporting requirement imposed on other persons in special relationships with children. The dual public policy reasons underlying the statutory duty to report are: 1) *providing protection to children at the earliest possible time*; and 2) *identification and prosecution of the offender as an necessary adjunct to that protection*. *Yates* at ¶¶ 24-25. Despite immediately recognizing the abuse to Sydney, Munro and Duncan not only failed to report it to the police, they failed to report it to any other person.

Appellants wrongly argue that they are not obligated to report abuse to the police. This argument defies the plain language of the statute which imposes a duty to report upon “administrators or employees of a ... public or private children services agency” “acting in” their respective “official or professional capacities.” Appellees further wrongly argue that because the

statute requires a report to “to the public children services agency or a municipal or county peace officer...” that they need not report to the police, but have the option to report to DCFS. This argument ignores the clear mandate of R.C. 2151.421 that child abuse investigations be conducted by DCFS in *cooperation and in coordination with law enforcement*. If DCFS and its employees were not required to report suspected child abuse to law enforcement, R.C. 2151.421(F)(1) would not further provide that DCFS’ investigation be carried out “in cooperation” with law enforcement. Nor would R.C. 2151.421(J)(3) require procedures for the “coordination” of investigations. There simply can be no cooperation or coordination between DCFS and law enforcement if DCFS does not report the suspected abuse to law enforcement.

DCFS administrators and employees are specifically identified in the statute as mandatory reporters, and once *they* know of or suspect child abuse, *they* are required to immediately report the abuse to the police, particularly where, as here, upon receiving a “Priority I Emergency” referral from a daycare nurse, they observe severe injuries to a four (4) year old child and the referral form indicates the police need to be called. Even if they had the option they claim, Munro and Duncan admittedly failed to report the known abuse to *anyone at anytime*.

The argument that the decision exposes DCFS employees to “unforeseen” criminal prosecution and penalties is without merit. The legislature was not concerned with protecting professionals who have special relationships with children and who fail to report their abuse. It wanted to ensure reporting of abuse by the imposition of criminal penalties upon those identified in the statute as mandatory reporters. Indeed, social workers have been subject to prosecution for their failure to report child abuse well before the decision in this case. *See, i.e. State of Ohio v. Elaine Thompson*. Huron County Court of Common Pleas Case No. 2006-0151. Further DCFS’ argument that *it* could be exposed to criminal prosecution is specious. The fact that a political subdivision may

be held civilly liable for its employee's failure to report, as this Court held in *Campbell* and *Yates*, while the employee is exposed to both civil and criminal liability does not make the agency itself subject to criminal prosecution.¹

Requiring DCFS' administrators and employees to report to the police when *they* know of or suspect abuse serves the legislature's intent to protect children from harm at the earliest possible time and to identify and prosecute the perpetrator. *See Yates* at ¶ 25. Indeed, they occupy a special relationship with a child victim coming to their attention, and they are, presumably, among those best trained to identify abuse and prevent further harm. Once *they* identify abuse, *they* have an immediate duty to report it to the police. Abused children are the most helpless, and often the most disadvantaged, victims in our society, and the legislature clearly intended to protect these innocent victims by requiring DCFS administrators and employees to report the abuse to law enforcement. The decision in this case recognized that genuine issues of material fact exist on the failure to report claim because Appellee presented significant evidence that Munro and Duncan failed to report their knowledge of Sydney's abuse to the police *or to anyone else*. To the extent that the decision can be read to mean that they have a duty to report that knowledge to the *police*, it does so correctly.

Moreover, because this case was decided under *former* R.C. 2744.02(B)(5) and 2744.03(A)(6)(c), the decision is of limited applicability. Although Appellants argue that the 2003 amendments reflect the legislature's original intent, this Court's majority opinion in *Yates* rejected this position by applying the former version of the statute to a cause of action accruing before the effective date of the amendments. Finally, DCFS' claim that the decision spells its financial ruin is belied by the fact that political subdivisions have had the ability to procure civil liability insurance for the acts and omissions of their employees since 1985. R.C. 2744.08. Thus, Appellants' greatly

¹ R.C. 2901.23 describes the circumstances under which an organization may be convicted of a criminal offense and defines "organization" to exclude governmental agencies.

exaggerated cry-of-wolf argument that such civil exposure could terminate the operation of public children services agencies in Ohio rings hollow.

II. DCFS AND ITS EMPLOYEES ARE NOT IMMUNE FROM LIABILITY FOR RECKLESSLY CREATING A SUBSTANTIAL RISK TO THE HEALTH AND SAFETY OF SYDNEY SAWYER

Appellee asserted claims against each of the Appellants for recklessly creating a substantial risk to the health and safety of Sydney Sawyer by violating their duties of care and protection owed to her in violation of R.C. 2919.22, which provides in part:

(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....

(emphasis added). A violation of this section resulting in serious physical harm is a third degree felony. Thus, R.C. 2919.22 expressly imposes liability within the meaning of *former* R.C. 2744.02(B)(5) and R.C. 2744.03(A)(6)(c). Due to the amendments, this holding will have no precedential effect on either future causes of action or those accruing within the past four (4) years.

In *State v. Caton* 137 Ohio App.3d 742, 750, 739 N.E.2d 1176 (1st Dist. Ct. App. 2000), the court emphasized that the “duty of care, protection, or support” in R.C. 2919.22(A) means a duty imposed by law. (citations omitted). In *Brodie v. Summit Cty. Children Serv. Bd.* (1990), 51 Ohio St.3d 112, this Court held that public children services agencies must protect children from abuse and eliminate the source of any such abuse. *Id.* The Court reiterated this holding in *Campbell*, by stating that the General Assembly enacted R.C. 2151.421 “to provide special protection to children from abuse and neglect.” 92 Ohio St.3d at 342. In 2004, this Court repeated the duty stating “we found that children services agencies must protect children from abuse and eliminate the source of any such abuse.” *Yates*, 102 Ohio St.3d. at 208, *citing, Brodie*, 51 Ohio St.3d at 119. It is beyond any reasonable debate that DCFS and its employees owed Sydney a legal duty of care and protection.

The Committee Comment to R.C. 2919.22, upon its enactment in 1973, provided:

This section is aimed at child neglect and abuse which causes, or poses a serious risk to the mental or physical health of the victim.

The first part of the section defines the offense of neglect as the violation of a duty of care, protection, or support of a child which results in a substantial risk to his health or safety.... In addition to the natural parents of a child, the first part of the section also covers guardians and custodians, *persons having temporary control of a child*, and *persons standing in the place of parents*.

(emphasis added). Among other persons, R.C. 2919.22 imposes criminal liability on: 1) those standing *in loco parentis*; and 2) those having custody or control of a child. The unambiguous statutory language makes it clear that one need not be *in loco parentis* in order to be subject to R.C. 2919.22. Further, the term *in loco parentis* does not require formality and whether a person stands *in loco parentis* is a factual question as the term does not signify a “formal investiture.”

... [persons] not *in loco parentis* to the child may, nevertheless still owe a legal duty of care and protection to the child if the child is in their custody or control.

Caton 137 Ohio App.3d at 750.² In *State v. Hebesh*, 85 Ohio App.3d 551, 556, 620 N.E.2d 859 (3rd Dist. Ct. App. 12/15/92), the Third District held that persons not *in loco parentis* may still be liable where they exercise custody or control over the child:

[e]ven assuming that the trier of fact determines that [defendant] was not *in loco parentis* with [the child], that does not mean that the trier of fact could not find, in the alternative, that at the time of the offenses [defendant] had custody or control over her ...

The Court of Appeals in this case did not hold that all public children services agencies stand *in loco parentis* to each and every child they investigate even if they do not exercise any custody or control over the child. In fact, the phrase “*in loco parentis*” appears nowhere in the decision. Rather,

² See also, *State v. Brooks*, 2000 WL 337600 (8th Dist. Ct. App.3/30/00)(“R.C.2919.22(A) applies not only to parents and guardians, but to anyone having temporary control of a child.”); *Kirchner v. Crystal*, 1983 WL 4728 (8th Dist. Ct. App. 9/22/83)(*in loco parentis* status may be temporary or intermittent); *State v. Johnson*, 1997 WL 626598 (9th Dist. Ct. App.9/24/97) (R.C. 2919.22 applies to anyone having temporary custody of a child).

the decision properly held that there were genuine issues of fact as to whether DCFS' agents stood *in loco parentis* to Sydney or exercised custody or control over her. In this case, at the very least, Appellants exercised "custody or control" over Sydney from the moment Duncan called the daycare and directed its staff to keep Sydney there rather than release her. When Duncan arrived at the daycare, she continued to exert that custody and control by announcing to the staff that she was "in charge." She directed them to leave the room when she interviewed Sydney and kept her at the daycare for at least 3 to 4 hours beyond her scheduled departure time. Sydney's mother was not permitted to take her home without Duncan's approval or without the safety plan, which Duncan "ordered." Munro told Duncan it was "okay to *return* Sydney to her mother with the safety plan" which imposed affirmative obligations on the mother to take Sydney to a physician for examination, to continue to have Sydney attend daycare and to permit Duncan to conduct a home visit. DCFS' custody or control over Sydney is readily apparent.

Under these circumstances, the Court of Appeals rightly concluded that a jury could reasonably find that Appellants exercised custody or control over Sydney. It twice commented on DCFS' custody or control of Sydney:

Additional evidence of recklessness in the record indicates 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.

* * *

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...*

O'Toole at ¶¶ 17 and 19. (emphasis added). Not only do Appellants ignore this language, they completely disregard the substantial evidence of their custody and control of Sydney in the record. The decision in this case cannot possibly be read to support Appellants' absurd proposition that they

would be held responsible if a child is harmed in any way during investigation of abuse allegations even if they lack custody or control. The fact that no court had awarded legal custody to DCFS is beside the point. Whether a person stands *in loco parentis* or has custody or control of a child is a factual question and does not require a “formal investiture.” In this case, there is ample evidence from which to find that DCFS and its agents exercised custody or control over Sydney and that they recklessly created a substantial risk of serious harm to her by returning her to the source of her abuse.

III. DCFS IS NOT ENTITLED TO THIRD TIER REINSTATEMENT OF IMMUNITY FROM LIABILITY FOR ITS EXECUTIVE DIRECTOR’S RECKLESS CONDUCT

DCFS wrongly argues it is entitled to reinstatement of immunity from liability for Denihan’s reckless conduct under the third tier of the analysis set forth in *Cater v. City of Cleveland*, 1998-Ohio-421, 83 Ohio St.3d 24, pursuant to R.C. 2744.03(A)(3) which provides:

[t]he political subdivision is immune 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 policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

DCFS complains that the Court of Appeals ignored this third tier defense. However, once an exception to immunity applies, under the third tier “immunity can be reinstated *if the political subdivision can successfully argue* that one of the defenses contained in R.C. 2744.03 applies.” *Cater*, 83 Ohio St.3d at 28 (emphasis added). In this case, DCFS failed to establish that the defense in R.C. 2744.03(A)(3) applies. DCFS does not even attempt to explain how the reckless conduct of Denihan was within his policymaking, planning or enforcement power discretion.

Although the decision to adopt SDM as the risk assessment tool to be used by DCFS may be a policy-making one, once that decision was made, the allocation, training and supervision of DCFS staff in its use are not discretionary policy-making, planning or enforcement decisions. Rather, they are decisions regarding “whether to acquire, or how to use materials, personnel and other resources”

under R.C. 2744.03(A)(5). Under that section, immunity is not reinstated where the exercise of discretion in those specific areas is reckless.

The SDM protocol was implemented on March 1, 2000 under Denihan's direction. As found by the Court of Appeals, Appellee's evidence demonstrated that Denihan and DCFS were reckless in assigning Duncan, an inexperienced worker to the intake unit without proper supervision; implementing SDM without demonstration of social worker and supervisor knowledge, skills and judgment needed to do so; not providing independent medical examiners to examine suspected child abuse victims; and not providing a mechanism to ensure that child safety has been determined in Priority 1 cases. Appellee's expert further concluded that Denihan was reckless by failing to provide clear direction on the obligation to contact law enforcement.

Any training DCFS provided in the use of the newly implemented SDM protocol was woefully inadequate and literally meaningless. There was absolutely no monitoring or supervision of the use of SDM to determine if it was being used and followed. Despite her inexperience, Duncan was assigned to the intake unit and was permitted to handle an "emergency" case. She lacked even a rudimentary understanding as to the procedures to be followed under SDM, and admittedly lacked the ability to recognize when a "safety factor" indicating danger to the child was present. Appellant Denihan knew that inexperienced social workers were assigned to the intake unit and was aware there was no process to monitor compliance with SDM procedures.

The reckless implementation of the SDM protocol without adequate training, supervision and monitoring can be analogized to the reckless conduct of the city in *Cater*, 83 Ohio St.3d 24. There, the city's failure to train its employees regarding the use of 911 services at a municipal swimming pool was "appalling," and presented a question for the jury to consider. *Id.* at 32-33. Even more appalling is the conduct in this case. DCFS under Denihan's control failed to train and supervise its

employees in investigating child abuse cases under SDM and failed to equip them to handle emergency Priority 1 cases and provide appropriate protective services.

IV. APPELLANTS ARE NOT IMMUNE FROM LIABILITY FOR RECKLESSLY INVESTIGATING CHILD ABUSE

Amicus Public Children Services Agency of Ohio (“*Amicus*”), wrongly argues that DCFS and its employees are immune from liability for recklessly investigating abuse under this Court’s decision in *Marshall*. However, the limited holding of *Marshall* was that R.C. 2151.421 did not expressly impose liability on political subdivisions and their employees for failure to investigate child abuse within the meaning of R.C. 2744.02(B)(5) and 2744.03(A)(6)(c). The Court of Appeals in the instant case properly distinguished *Marshall*. First, *Marshall* did not involve claims of recklessness in investigating child abuse; the case involved only negligence claims. Second, the limited issue before the Court in *Marshall* was whether R.C. 2151.421 expressly imposed liability for the failure to report; it did not consider whether R.C. 2919.22 expressly imposes liability for recklessly creating a substantial risk to the health or safety of a child to whom a duty of care and protection is owed.

Amicus’ argument that the individual DCFS employees are immune from liability for their reckless acts and omissions in the investigation is utterly without merit. *Amicus* claims that the Court of Appeals misapplied the three (3) step *Cater* analysis. *Amicus*, rather than the Court of Appeals, misunderstands the proper analysis. *Cater* held that R.C. 2744 provides a three-tiered analysis for determining whether a *political subdivision* is immune from liability. The immunity of a political subdivision’s *employees*, on the other hand, is governed by R.C. 2744.03(A)(6), which provides that:

... the *employee* is immune from liability *unless one of the following applies*:...

- (b) The employee’s acts or omissions were ... in a wanton or *reckless* manner;
- (c) Liability is expressly imposed upon the employee by a section of the Revised Code....

(emphasis added); *see also*, *Campbell*, 92 Ohio St.3d at 545-546 (immunity of the employees is subject to the exceptions in R.C. 2744.03(A)(6)(a)-(c)). The decision in the instant case correctly

holds that recklessness is an exception to the immunity of Denihan, Duncan and Munro under R.C. 2744.03(A)(6)(b).

Amicus further argues that it is unjust to find an agency immune for acts for which its employees could be liable. However, “a political subdivision may be held liable for failure to perform a duty expressly imposed on its employee...” *Campbell*, 92 Ohio St.3d at 343. *Amicus* contends that the employees would be left to defend themselves, presumably, for reckless conduct on the part of the employees under R.C. 2744.03(A)(6)(b), but for which the Revised Code does not expressly impose liability on the political subdivision under R.C. 2744.02(B)(5). Thus, *Amicus* would improperly ask this Court to legislate a barrier not provided for by statute and to remove the word “reckless” from R.C. 2744.03(A)(6)(b). *Amicus*’ seemingly altruistic attempt to protect its members’ employees from accountability for their reckless conduct is undercut by the fact that political subdivisions, including DCFs, must not only provide a defense to its employees, but must indemnify and hold them harmless for any civil judgment (excluding punitive damages) so long as the employee was acting in good faith and not outside the scope of employment. R.C. 2744.07.

Finally, Munro argues that he was entitled to immunity for his recklessness. He improperly asks this Court to altogether ignore the statutory exception to immunity for reckless conduct in R.C. 2744.03(A)(6)(b) because public social workers, he contends, are entitled to “greater protection” because they have to make tough decisions. Munro also asks the Court to at least limit the meaning of “recklessness” in R.C. 2744.03(A)(6)(b) when the employee is “exercising professional judgment.” He wrongly argues that the line between negligence and recklessness will otherwise always be a subject of debate. This Court has long defined “reckless” to mean that the 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.”

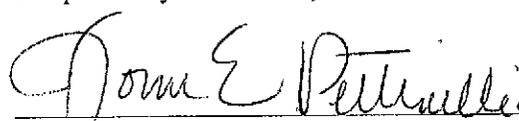
Cater, 83 Ohio St.3d at 33, *quoting*, *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 96, 559 N.E.2d 699, 700, fn.2, *quoting*, 2 Restatement of the Law 2d, Torts (1965) 587, Section 500. In enacting R.C. 2744.03, the legislature certainly intended this definition of recklessness as it had existed in the Restatement of the Law of Torts for at least twenty (20) years. Had the legislature intended any other meaning for purposes of R.C. Chapter 2744, it certainly would have provided it.

Finally, Munro contends that the Court of Appeals' finding that his conduct was sufficiently reckless to raise a jury question is "totally erroneous." However, it is not even a close call. The record contains compelling evidence, including expert evidence, of Munro's recklessness. The opinion specifically points to his knowledge of the nature and severity of the horrendous injuries to Sydney and his reckless decision to return Sydney to the source of abuse. Moreover, then County Commissioner Tim McCormack, who participated in the decision to terminate Munro's employment and who had for years taken a special interest in DCFS, described Munro's conduct as "egregious," "purposeful" and "conscious." In McCormack's view, the facts in Sydney's case cried out for immediate intervention. Her injuries "should have outraged and sickened any person," once more those responsible for her safety and protection, and *any* person should have responded to the obvious, immediate and serious threat to her safety.

CONCLUSION

For the foregoing reasons, this case does not involve matters of public or great general interest and the Court of Appeals properly reversed the trial court's grant of summary judgment. Appellee, therefore, requests that this Court decline jurisdiction.

Respectfully submitted,



Joan E. Pettinelli, Esq. (0047171)

Counsel for Appellee John K. O'Toole

CERTIFICATE OF SERVICE

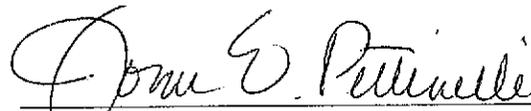
I certify that a copy of this Memorandum in Response was sent by ordinary U.S. mail, postage prepaid, on February 10, 2007 to the following:

David Ross, Esq.
Michelle J. Sheehan, Esq.
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
*Counsel for Appellants Cuyahoga County
Department of Children and Family Services,
William Denihan and Kamesha Duncan*

James C. Cochran, Esq.
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Counsel for Appellant Tallis George-Munro

J. Eric Holloway, Esq.
Isaac, Brant, Ledman and Teetor, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
*Counsel for Amicus Curiae Public Children
Services Association of Ohio*

Matthew J. Lampke, Deputy Attorney General
Ohio Attorney General
30 E. Broad Street 26th Floor
Columbus, OH 43215-3400
Counsel for Ohio Attorney General



Joan E. Pettinelli, Esq. (0047171)
Counsel for Appellee John K. O'Toole