

IN THE SUPREME COURT OF OHIO

CASE NO. \_\_\_\_\_

On Appeal From The  
Court of Appeals Eighth Judicial District  
Cuyahoga County, Ohio  
Court of Appeals Case No. CA-06-86620

07-0306

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CHARITA RANKIN, et al.  
*Plaintiffs-Appellees,*

vs.

CUYAHOGA COUNTY DEPARTMENT OF  
CHILDREN AND FAMILY SERVICES, et al.,  
*Defendants-Appellants.*

TRIAL COURT NO.: 527785

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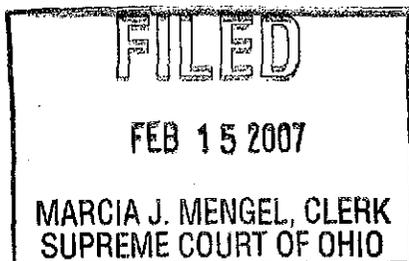
MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS  
CUYAHOGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY  
SERVICES, JAMES MCCAFFERTY AND GINA ZAZZARA

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**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
I. EXPLANATION OF WHY THIS APPEAL INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST.....	1
II. STATEMENT OF THE CASE AND RELEVANT FACTS .....	2
III. LAW AND ARGUMENT .....	5
A. FIRST PROPOSITION OF LAW .....	5
THE APPELLATE COURT ERRED IN HOLDING THAT DEFENDANT-APPELLANT CUYAHOGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES WAS NOT IMMUNE FROM LIABILITY PURSUANT TO OHIO REVISED CODE CHAPTER 2744.	
B. SECOND PROPOSITION OF LAW .....	8
THE APPELLATE COURT ERRED IN HOLDING THAT DEFENDANTS-APPELLANTS JAMES MCCAFFERTY AND GINA ZAZZARA WERE NOT IMMUNE FROM LIABILITY PURSUANT TO OHIO REVISED CODE CHAPTER 2744.	
C. THIRD PROPOSITION OF LAW.....	9
THE APPELLATE COURT ERRED IN HOLDING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANTS-APPELLANTS' MOTION FOR PROTECTIVE ORDER, AND BY CONSIDERING THE AFFIDAVITS OF APPELLANTS MCCAFFERTY AND ZAZZARA.	
IV. CONCLUSION.....	11
CERTIFICATE OF SERVICE .....	12

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Butler v. Jordan</i> (2001), 92 Ohio St.3d 354 .....	5-6
<i>Carter v. Cleveland</i> (1998). 83 Ohio St.3d 24.....	1, 5, 8
<i>Colbert v. Cleveland</i> (2003), 99 Ohio St.3d 215.....	5
<i>Colling v. Franklin Cty. Children Services</i> (1993), 89 Ohio App.3d 245 .....	5
<i>Howard v. Hamilton Cty. Dept. of Human Serv.</i> (1999), 136 Ohio App.3d 33.....	5
<i>Jackson v. Butler Cty. Bd. of Cty. Commrs.</i> (1991), 76 Ohio App.3d 448 .....	6
<i>Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.</i> (1994), 69 Ohio St.3d 521.....	7
<i>Marshall v. Montgomery County Children Services Board</i> (2001), 92 Ohio St.3d 348.....	5
<i>Poe v. Hamilton</i> , 56 Ohio App.3d 137 (1990).....	9
<i>State v. S.R.</i> (1992), 63 Ohio St.3d 590 .....	6
<i>State Automobile Mutual Ins. Co. v. Titanium Metals Corp.</i> 159 Ohio App.3d 338 (2004).....	7
<i>State Automobile Mutual Ins. Co. v. Titanium Metals Corp.</i> (2006), 108 Ohio St.3d 540.....	7
<i>State ex rel. Herman v. Klopfleisch</i> (1995), 72 Ohio St.3d 581 .....	6
<i>Thompson v. McNeil</i> (1990), 53 Ohio St.3d 102.....	8-9
<i>Wilson v. Stark Cty. Dept. of Human Serv.</i> (1994), 70 Ohio St.3d 450.....	5

**STATUTES**

**PAGE**

Ohio Civil Rule 56.....4, 10

O.R.C. 5101:2-34-38.....4, 9

R.C. 2151.421(H)(1).....4, 9

R.C. 2744.....1, 4-6, 8, 11

R.C. 2744.01(C)(1).....5

R.C. 2744.01(C)(1)(a).....5

R.C. 2744.01(C)(2)(m).....5

R.C. 2744.01(C)(2)(o).....5

R.C. 2744.01(F).....5

R.C. 2744.02(A)(1).....5

R.C. 2744.02(B).....5

R.C. 2744.02(B)(5).....6-7

R.C. 2744.03(A)(6)(b).....1, 8-9, 11

R.C. 5153.17.....4, 9

**I. 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 order granting summary judgment to Defendants-Appellants, deprives political subdivisions, all social workers, and other governmental employees of the immunities provided by the Ohio legislature in the enactment of Chapter 2744 – *Political Subdivision Tort Liability Act*. The effect of the Appellate Court's decision directly impacts governmental entities in the operation of "governmental functions," and social workers and other employees who act in connection with those governmental functions.

The Court of Appeals' decision relative to governmental immunity misapplied the common law "special relationship" exception to this immunity, which is no longer viable under the statutory framework of Chapter 2744 – *Political Subdivision Tort Liability Act*. The Court of Appeals' decision in this matter has confused and misapplied the statutory language that grants immunity to governmental entities for acts or omissions made in connection with a governmental function.

The Court of Appeals' decision improperly extends the exceptions to governmental employee immunity for acts or omissions made in connection with a governmental function to tangential acts, not directly involved in the alleged harm. As a result, the Appellate Court has misapplied the Ohio Supreme Court's definition of "recklessness." (*Cater v. City of Cleveland*, (1998) 83 Ohio St. 3d 24, 33, 1998-Ohio-421.) Thus, a clearer definition of the statutory language found in R.C. 2944.03(A)(6)(b) is needed concerning the issue of what constitutes "recklessness."

The Appellate Court's decision in finding that the trial court abused its discretion in granting Defendants-Appellants' motion for protective order regarding confidential records and information, without itself conducting a review of the subject records, and in considering affidavits in support of Appellants' motion for summary judgment, is also contrary to well settled law.

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

On April 14, 2004, Appellee, Charita Rankin, the mother and next friend of D.M.,<sup>1</sup> a minor, commenced this action in the Common Pleas Court of Cuyahoga County, Ohio against the Cuyahoga County Department of Children and Family Services (hereinafter "CCDCFS") and Andre Martin, the purported father of D.M. On July 14, 2004, Appellees, Charita Rankin and Estella Rankin filed a Second Amended Complaint, naming as additional Defendants James McCafferty, the Director of CCDCFS, and Gina Zazzara, a social worker with CCDCFS.

On May 2, 2005, Appellants, CCDCFS, James McCafferty, and Gina Zazzara filed a motion for summary judgment. On May 27, 2005, Appellees filed a brief in opposition to Appellants' motion for summary judgment. On June 9, 2005, Appellants filed a reply brief in support of their motion for summary judgment. On June 10, 2005, Appellees filed a sur reply brief.

On June 17, 2005, the Cuyahoga County Common Pleas Court entered an order granting judgment on behalf of Appellants, CCDCFS, James McCafferty, and Gina Zazzara. On June 28, 2005, Appellees filed an appeal to the Eighth District Court of Appeals. On December 21, 2006, the Eighth District Court of Appeals announced its decision, reversing the trial court's order

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<sup>1</sup> The minor child of Appellee Charita Rankin will be referred to herein as "D.M."

granting judgment in favor of the Appellants. On January 2, 2007, the Eighth District Court of Appeals' decision was journalized in accordance with App.R. 22(E).

Appellees alleged that on or about April 15, 2003, D.M. was committed to the temporary custody of Appellant, CCDCFS, pursuant to an order of the Juvenile Division of the Cuyahoga County Common Pleas Court. Appellees claimed that, pursuant to this Court Order, Defendant, Andre Martin was to have supervised visitations with D.M. at CCDCFS.

Appellees asserted that during the course of a July 23, 2003 visitation, Defendant, Andre Martin engaged in inappropriate sexual conduct with D.M. Appellees claimed that as a direct result of Defendant, Andre Martin's inappropriate sexual conduct, D.M. suffered physical injury and psychological harm. Appellees further alleged that Appellants, CCDCFS, McCafferty Zazzara were liable to Appellees for violating their duties to guard the safety of D.M. during this supervised visitation.

Appellees asserted these claims against Appellants McCafferty and Zazzara even though these Appellants were not involved in any respect with the visitation between Andre Martin and D.M. As Director of Appellant CCDCFS, the only connection Appellant McCafferty had to these events is that he caused CCDCFS to have in place a supervised visitation room, monitored by employees of CCDCFS, in order to comply with Court-ordered supervised visitations.

Likewise, Appellant Zazzara was not personally involved with the supervised visitation between D.M. and Andre Martin. Appellant Zazzara's duties at CCDCFS include investigating referrals of abuse and neglect, providing ongoing case management to children and families, home visits, completing safety, risk, and strengths and needs assessments, creating case plans based on the identified needs, and referring clients and children for services based on the case plans. Appellant Zazzara's duties do not include the supervised visitations that occur at

CCDCFS. Appellant Zazzara's only involvement with D.M. on the day of the incident was to transport D.M. to CCDCFS so that she could be involved with a supervised visitation with her father, Andre Martin. When Appellant Zazzara arrived at CCDCFS, she transferred D.M. to the care of another employee of CCDCFS, whose task was to supervise D.M.'s visit with her father, Andre Martin.

During the course of discovery, Appellees requested all of CCDCFS' records and information relating to Appellees, Andre Martin and this incident, and any records concerning CCDCFS' policies, procedures, guidelines and protocols regarding supervised visitations. Because CCDCFS' records are confidential under Ohio law, Appellant CCDCFS filed a motion for protective order and request for *in camera* inspection by the trial court. After conducting the requested *in camera* review and considering Appellees' arguments for the need for the records, the trial court concluded that Appellees failed to demonstrate that their need for these records outweighed the confidentiality considerations set forth in R.C. 5153.17, R.C. 2151.421(H)(1) and Section 5101:2-34-38 of the Ohio Administrative Code. Accordingly, the trial court further prevented Appellees from gaining knowledge regarding the contents of CCDCFS' records by way of interrogatories or the depositions of Appellants McCafferty and Zazzara.

In support of their motion for summary judgment, Appellants McCafferty and Zazzara submitted affidavits setting forth that they were not involved in the supervised visitation between D.M. and Andre Martin. At no time following the filing of Appellants' motion for summary judgment did Appellees request, pursuant to Ohio Civil Rule 56 (F), that the court permit the depositions of Appellants McCafferty or Zazzara, in light of their affidavits in support of their motion.

### III. LAW AND ARGUMENT

**PROPOSITION OF LAW I: THE APPELLATE COURT ERRED IN HOLDING THAT APPELLANT CUYAHOGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES WAS NOT IMMUNE FROM LIABILITY PURSUANT TO OHIO REVISED CODE CHAPTER 2744.**

Even assuming that Appellant CCDCFS were recognized as a “political subdivision” under Ohio law, the Court of Appeals erred in failing to affirm that, as a matter of law, Appellant CCDCFS is entitled to absolute immunity under R.C. Chapter 2744 for the acts alleged by Appellees.<sup>2</sup> It is well settled that the operation of Appellant CCDCFS is a “governmental function.” R.C. 2744.01 (C)(1); R.C. 2744.01 (C)(1)(a); R.C. 2744.01 (C)(2)(m) and (o); *Colbert v. Cleveland* (2003), 99 Ohio St.3d 215, 216; *Wilson v. Stark Cty. Dept. Of Human Serv.* (1994), 70 Ohio St.3d 450, 452; *Howard v. Hamilton Cty Dept. Of Human Serv.* (1999), 136 Ohio App.3d 33.

As such, if the acts performed or omissions committed are in connection with a “governmental function,” then (unless the exceptions to immunity set forth in R.C. 2477.02(B) apply), the political subdivision is entitled to complete immunity. R.C. 2744.02(A)(1); *Cater v. Cleveland* (1998), 83 Ohio St.3d 24,28; *Marshall v. Montgomery County Children Services Board* (2001), 92 Ohio St.3d 348. *See also, Colling v. Franklin Cty. Children Services* (1993), 89 Ohio App.3d 245 (drowning of child on an agency sponsored fishing trip for children in custody); *Accord, Butler v. Jordan* (2001), 92 Ohio St.3d 354 (statute did not expressly impose liability on a political subdivision for failure to inspect or for the negligent certification of a day

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<sup>2</sup> Appellant CCDCFS is not *sui juris*. What constitutes a “political subdivision” in Ohio is plainly and unambiguously set forth in R.C. 2744.01(F). Nowhere in R.C. 2744.01(F), or anywhere else in the *Political Subdivision Tort Liability Act* (R.C. Chapter 2744), are departments, units, agencies, or any other components of government included in the definition of a “political subdivision.”

care center). *See also, Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448 (social worker and board of county commissioners not liable for the death of a child in the custody of the county's human services department where the child was placed by the social worker in the custody of her natural father, who previously had neglected and abused the child and subsequently beat the child to death.).

The Court of Appeals' decision completely ignored firmly established Ohio law in effect at the time of this incident. Effective, April 9, 2003, the General Assembly amended the *Political Subdivision Tort Liability Act* (R.C. Chapter 2744), to specifically provide, in pertinent part,:

...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. . .*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 or be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision. R.C. 2744.02(B)(5).  
(Emphasis added).

Thus, there can be no question but that the exception contained in R.C. 2744.02(B)(5) to the blanket immunity afforded political subdivisions can *now only* be established "*when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code.*"

In construing a statute, a court's paramount concern is legislative intent. *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. *Id.* citing *State v. S.R.* (1992), 63 Ohio St. 3d 590, 594-595. If the meaning of a statute is unambiguous and definite, then it must be applied as written and no further interpretation is appropriate. *Id.*

citing *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.* (1994), 69 Ohio St.3d 521, 524-525. In other words, if the plain application of a statute is apparent on its face, no further application of the rules of statutory construction is necessary.

There is no dispute that the Appellees' claims against Appellant CCDCFS occurred in connection with a governmental function. There can also be no dispute but that nowhere in the Revised Code is "*civil liability is expressly imposed*" upon Appellant CCDCFS for the acts complained of by Appellees. The Court of Appeals' analysis is inconsistent with both the legislative intent of R.C. 2744.02(B)(5) and the plain meaning of the statute. Consequently, the Court of Appeals erred in failing to affirm that, as a matter of law, Appellant CCDCFS is immune from liability for the claims presented by Appellees.

Furthermore, the Court of Appeals erred in holding that the common law "special relationship" doctrine is still viable after the General Assembly's April 9, 2003 amendment to the *Political Subdivision Tort Liability Act*. The General Assembly did not include this common law exception to immunity when it amended the *Political Subdivision Tort Liability Act*. Moreover, the Court of Appeals' reliance on its decision in *State Automobile Mutual Ins. Co. v. Titanium Metals Corp.*, 2004-Ohio-6618, in holding that there existed genuine issues of material fact as to whether a "special relationship" exception to governmental immunity was applicable to these facts, is misplaced. Prior to the Court of Appeals' decision in this case, this Court had vacated the Court of Appeals' decision in *State Auto* because there was no final appealable order in the trial court that would have permitted the Court of Appeals to exercise its appellate jurisdiction. See *State Automobile Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199 (2006).

It is clear from a review of the Court of Appeals' decision that the Court erred in failing to affirm that, as a matter of law, Appellant CCDCFS is entitled to absolute immunity under R.C. Chapter 2744 for the acts alleged by Appellees.

**PROPOSITION OF LAW II: THE APPELLATE COURT ERRED IN HOLDING THAT APPELLANTS JAMES MCCAFFERTY AND GINA ZAZZARA WERE NOT IMMUNE FROM LIABILITY PURSUANT TO OHIO REVISED CODE CHAPTER 2744.**

The only evidence in the record is that Appellants, McCafferty and Zazzara were not involved in the supervised visitation between D.M. and Andre Martin. Yet the Court of Appeals held that "reasonable minds could conclude that these two individuals acted in a reckless manner in allowing these 'supervised' visits between Martin and D.M. to be conducted as they were." Opinion at p. 10.

R.C. 2744.03(A)(6)(b) provides, in pertinent part, that an employee of a political subdivision is immune from liability unless "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." The definition of "reckless" has been previously recited by this Court in *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24. This Court has essentially adopted the definition provided in *2 Restatement of the Law 2d, Torts* (1965), at 587, Section 500, "[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* at 33. *See also, Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105), quoting *2 Restatement of the Law 2d, Torts* (1965), at 587, Section 500.

This Court also noted that since the term "reckless" is often used interchangeably with "willful" and "wanton," its comments regarding recklessness apply equally to conduct characterized as willful or wanton. *Id.* at 104, fn. 1. The term "reckless" as used in R.C. 2744.03(A)(6)(b) means a perverse disregard of a known risk. *Poe v. Hamilton*, 56 Ohio App.3d 137, 138, (1990). "In R.C. 2744.03(A)(6)(b), the word 'reckless' is associated with the words 'malicious purpose,' 'bad faith,' and 'wanton,' all of which suggest conduct more egregious than simple carelessness." *Id.*

The Court of Appeals cites to nothing in the record, nor is there any evidence in the record, that would support its conclusion that questions of fact exist that Appellants McCafferty and Zazzara may have acted recklessly in connection with the supervised visit between Martin and D.M. Therefore, Appellants McCafferty and Zazzara were entitled to judgment as to Appellees' claims.

**PROPOSITION OF LAW III: THE APPELLATE COURT ERRED IN HOLDING, WITHOUT CONDUCTING A REVIEW OF THE SUBJECT RECORDS, THAT THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING APPELLANTS' MOTION FOR PROTECTIVE ORDER, AND BY CONSIDERING THE AFFIDAVITS OF APPELLANT MCCAFFERTY AND ZAZZARA.**

The trial court did not abuse its discretion in granting Appellant CCDCFS' motion for protective order for the reasons that the requested records are confidential under Ohio law, and Appellees failed to demonstrate that their need for these records outweighed the confidentiality considerations set forth in R.C. 5153.17, R.C. 2151.421(H)(1) and Section 5101:2-34-38 of the Ohio Administrative Code. For this reason, the trial court properly issued a protective order concerning the requested confidential documents, information, and testimony.

The Court of Appeals summarily held, without referencing that it conducted its own review of the subject records, that the trial court abused its discretion in granting Appellant CCDCFS' motion for protective order by simply concluding that "such materials are necessary and relevant to the pending action." Opinion at p. 13. Clearly, the Court of Appeals erred in substituting its judgment from that of the trial court, which did conduct an *in camera* review of Appellant CCDCFS' records.

Furthermore, the Court of Appeals erred in concluding that the trial court abused its discretion by considering the affidavits of Appellants McCafferty and Zazzara after its had ruled that their depositions may not be undertaken. The evidence contained in the affidavits of Appellants McCafferty and Zazzara established that they were not involved in the supervised visitation between Defendant Andre Martin and D.M. If Appellees determined that, in light of the information contained in these affidavits, they wished to renew their request to undertake the depositions of Appellants McCafferty and Zazzara, Ohio Civil Rule 56 (F) provided Appellees with this procedural remedy. Ohio Civil Rule 56 (F) provides:

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit or facts sufficient to justify the party's opposition, *the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or make such other order that is just.* (Emphasis added).

At no time following the filing of Appellants' motion for summary judgment did Appellees request, pursuant to Ohio Civil Rule 56 (F), that the court permit the depositions of Appellants McCafferty or Zazzara, in light of their affidavits in support of their motion. Having failed to do so, the Court of Appeals erred in holding that the trial court abused its discretion in relying on

these affidavits after having ruled that the depositions of Appellants McCafferty and Zazzara may not be undertaken.

#### IV. CONCLUSION

Appellants respectfully submit that this appeal involves a substantial constitutional question or issue of great public interest. The Court of Appeals decision deprives political subdivisions, all social workers, and other governmental employees of the immunities provided by the Ohio legislature in the enactment of Chapter 2744 – *Political Subdivision Tort Liability Act*. The Courts of Appeals misapplied the common law “special relationship” exception to governmental immunity, which is no longer viable under the statutory framework of Chapter 2744 – *Political Subdivision Tort Liability Act*.

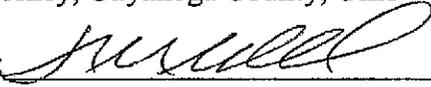
The Court of Appeals has also misapplied the Ohio Supreme Court’s definition of “recklessness.” Thus, a clearer definition of the statutory language found in R.C. 2944.03(A)(6)(b) is needed concerning the issue of what constitutes “recklessness.”

The Appellate Court’s decision in finding that the trial court abused its discretion in granting Defendants-Appellants’ motion for protective order regarding confidential records and information, without itself conducting a review of the subject records, and in considering affidavits in support of Appellants’ motion for summary judgment, is also contrary to well settled law.

Accordingly, the Appellants herein, respectfully request that this Honorable Court accept jurisdiction over this case.

Respectfully submitted,

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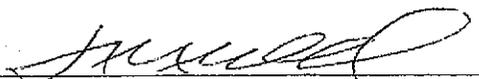
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 14th day of February 2007, to: Joel Levin and Christopher Vlasich, Levin & Associates Co., L.P.A., the Tower at Erieview, suite 1100, 1301 East 9th street, Cleveland, Ohio 44114, and James A. Gay, 3324 MLK, Jr., Drive, Cleveland, Ohio 44104, counsel for plaintiffs, and defendant, Andre Martin, #a454888, Richland Correctional Institution, 1001 Olivesburg Road, PO Box 8107, Mansfield, Ohio 44901.

  
SHAWN M. MALLAMAD  
Assistant Prosecuting Attorney

JAN - 2 2007

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 86620

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**CHERITA RANKIN, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**C.C.D.C.F.S., 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-527785

**BEFORE:** Celebrezze, P.J., Sweeney, J., and Calabrese, J.

**RELEASED:** December 21, 2006

**JOURNALIZED:** JAN - 2 2007

CA05086620

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

JAN - 2 2007

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

CA05086620 42957739  


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

DEC 21 2006

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

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).

VOL 627 P0207

NOTICE MAILED TO COURSE  
FOR ALL PARTIES-COSTS TAXED

FRANK D. CELEBREZZE, JR., P.J.:

Appellants, Cherita Rankin and Estella Rankin, appeal from the grant of summary judgment in favor of the Cuyahoga County Department of Children and Family Services ("DCFS"), its director, James McCafferty, and its employee, Gina Zazzara ("appellees"). After reviewing the record and the arguments of the parties, and for the reasons set forth below, we reverse and remand for further proceedings.

On April 14, 2004, Charita Rankin, the mother and next friend of minor-victim D.M.,<sup>1</sup> filed a civil complaint in the common pleas court against DCFS and D.M.'s father, Andre Martin. On July 14, 2004, an amended complaint was filed, which included Estella Rankin, D.M.'s grandmother and legal guardian, as a plaintiff, and added James McCafferty and Gina Zazzara as defendants. The cause of action stemmed from Andre Martin's sexual assault of D.M., who was three years old at the time, during a DCFS supervised visit at a DCFS facility.

In April 2003, D.M. was committed to the temporary custody of DCFS by order of the Juvenile Division of the Cuyahoga County Common Pleas Court. Pursuant to that order, Martin's contact with D.M. was limited to supervised visits at the Jane Edna Hunter Social Service Center, a county agency located

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<sup>1</sup>The minor-victim is referred to herein by her initials in accordance with this court's established policy regarding non-disclosure of identities of juveniles.

in Cleveland. During the time D.M. was in DCFS custody, DCFS was on notice of past accusations of sexual abuse by Martin against D.M. and Martin's history of domestic violence.

On July 23, 2003, Martin had a supervised visit with D.M. Despite prior warnings not to allow any of Martin's activities with D.M. to go unsupervised, during the course of this visitation, Martin was allowed to take D.M. into a private restroom where he sexually assaulted her. Afterwards, Martin took D.M. back to the visitation room and placed her on his lap. He then placed a jacket over her lap and placed his hand under her clothing and fondled her genitals. Although Martin was under surveillance at the time, at no time did anyone from DCFS remove D.M. from Martin or contact the police.

Martin eventually faced criminal charges for this incident and pleaded guilty to gross sexual imposition on October 21, 2003.<sup>2</sup>

Appellants thereafter filed their civil complaint against appellees, alleging that appellees breached the duty they owed to D.M. by failing to protect her from Martin's sexual abuse. On June 17, 2004, appellees filed a motion to dismiss the complaint, which the trial court later held to be moot. During the course of discovery, appellants requested the production of documents concerning certain

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<sup>2</sup>Cuyahoga County Court of Common Pleas - Case No. CR441511.

materials from DCFS. Appellees filed a motion for protective order and a request for an in camera inspection on November 30, 2004. Appellants filed a brief in opposition, but the trial court eventually denied appellants' discovery requests.

On May 2, 2005, appellees filed a motion for summary judgment arguing several reasons, including that DCFS was not sui juris and appellees were immune from liability pursuant to R.C. Chapter 2744. On June 17, 2005, the trial court granted summary judgment in favor of appellees.<sup>3</sup>

Appellants appeal, asserting three assignments of error. Because assignments of error I and II are substantially interrelated, we address them together.

"I. The trial court committed reversible error when it granted summary judgment to Defendant DCFS.

"II. The trial court committed reversible error when it granted summary judgment to Defendants Mr. McCafferty and Ms. Zazzara."

In their first two assignments of error, appellants contend that the trial court erred in granting summary judgment to appellees. Upon review of the record, we sustain appellants' assignments of error.

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<sup>3</sup>A default judgment was entered against Andre Martin on May 16, 2006, and no matter pertaining to Martin is at issue in this appeal.

### Summary Judgment

“Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains 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 to but 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.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

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, 106 S.Ct. 2548, 91 L.Ed. 2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. 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. (Emphasis in original.) 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 Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. 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, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

#### DCFS

Appellants' first assignment of error focuses on the trial court's error in granting summary judgment in favor of DCFS. In defending the trial court's ruling, appellees assert several arguments. DCFS states that it is not sui juris, arguing that it is not a "political subdivision," as defined in R.C. 2744.01, thus

it is not a legally recognized entity capable of being sued. DCFS further argues that it is statutorily immune from liability and that, even if it was found not to be immune, the evidence shows it has not violated any applicable law.

Viewing these arguments in a light most favorable to appellants, we hold that there are genuine issues of material fact pertaining to the liability of DCFS that must survive summary judgment.

In viewing R.C. Chapter 2744, it is apparent that DCFS is an entity that is capable of being sued given the circumstances of this case. "Under R.C. 2744.01(F), a county is a political subdivision, and the operation of a county human services department is a governmental function. R.C. 2744.01(C)(2)(m); *Jackson v. Butler County Bd. of County Commrs.* (1991), 76 Ohio App.3d 448, 602 N.E.2d 363." *Sobiski v. Cuyahoga County Dep't of Children & Family Servs.*, Cuyahoga App. No. 84086, 2004-Ohio-6108.

Furthermore, there is no prejudicial effect in naming DCFS, as opposed to Cuyahoga County. The county prosecutor's office would be the representing body in either case, and the party liable for any damages would not change. See *Fields v. Dailey* (1990), 68 Ohio App.3d 33. Thus, all interests are properly being protected, and the named party is a technicality without distinction. *Id.* Given these circumstances, we find that DCFS is an entity capable of being sued.

Summary judgment also should not have been granted on the theory that DCFS was immune from any liability in this case. Ohio statute provides an analysis to determine whether or not a political subdivision or its employees have immunity. See *Sobiski*, supra; see, also, *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421, 697 N.E.2d 610.

R.C. 2744.02(A)(1) confers on all political subdivisions a blanket immunity, which provides that they are not liable for injury, death or loss to persons or property that occurred in relation to the performance of a governmental or propriety function. *Id.*

There are exceptions to this blanket immunity, including what is known as the "special relationship" exception. Under the special relationship exception, "a political subdivision may be liable for damages if it can be shown that a 'special relationship' existed between the political subdivision and the injured party thereby imposing a 'special duty' under the law. See *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468. \*\*\* In order to demonstrate a special duty or relationship, it must be shown that there was (1) an assumption of an affirmative duty by a political subdivision; (2) knowledge on the part of the political subdivision or its agents that inaction could cause harm; (3) a direct contact between the political subdivision's agents and the injured party; and (4) that party's justifiable reliance on the political subdivision's affirmative

undertaking.” *State Auto. Mut. Ins. Co. v. Titanium Metal Corp.*, 159 Ohio App.3d 338, 343, 2004-Ohio-6618.

In the case before us, there are genuine issues of material fact as to whether appellant has met the requirements of the special relationship exception to defeat appellees’ claim of immunity. When DCFS gained custody of D.M., it took on the affirmative duty to provide that little girl with safety, particularly during supervised visits with her abusive father. After being sufficiently warned of what the father was capable of, DCFS was also on notice that its failure to protect D.M. could lead to injury. There was direct contact between D.M. and DCFS, and D.M. was clearly justified in relying on DCFS for reasonable protection. It would be error to grant summary judgment in this case on the basis of immunity.

Further, there is sufficient evidence for appellants to bring a cause of action to hold appellees liable for the harm done to D.M. Even with the limited evidence provided in the record after the trial court denied much of appellants’ request for discovery, there is still proof that the practices and procedures of DCFS allowed for the sexual abuse of a minor child while she was under the protection of DCFS.

Martin was regularly allowed to take D.M. into a private bathroom, even though DCFS was well aware of the dangers of such action. There was also

evidence that even when DCFS employees observed Martin touching D.M. inappropriately, they did nothing to stop it. In addition, there was evidence that the proper people were not present when needed. There is enough evidence present for this matter to survive summary judgment and to be presented to a finder of fact.

### McCafferty and Zazzara

Appellants' second assignment of error focuses on the trial court's error in granting summary judgment in favor of McCafferty and Zazzara. In defending the trial court's ruling, appellees argue that McCafferty and Zazzara were not involved with the supervised visit at issue, so they are immune from liability. In viewing the record and the applicable law, we hold that there are genuine issues of material fact pertaining to these appellees that must survive summary judgment.

Under R.C. 2744.03(A)(6), when a party puts forth evidence showing that an individual's actions "were with a malicious purpose, in bad faith, or [done] in a wanton or reckless manner," individual immunity no longer applies. *Shadoan v. Summit Cty. Children Servs. Bd.*, Summit App. No. 21486, 2003-Ohio-5775; *Cobb v. Mantua Twp. Bd. of Trustees*, Portage App. No. 2000-P-0127, 2001-Ohio-8722. "[A]n individual acts in a 'reckless' manner if he does an act or intentionally fails to do an act which it is his duty to the other to do, 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." *Jackson v. Butler Cty. Bd. of Cty. Commsrs.* (1991), 766 Ohio App.3d 448, 602 N.E.2d 363, at syllabus. Thus, recklessness is a perverse disregard for a known risk.

In this case, reasonable minds could conclude that these two individuals acted in a reckless manner in allowing these "supervised" visits between Martin and D.M. to be conducted as they were. McCafferty is the director of DCFS and Zazzara is a DCFS employee who was the social worker assigned to D.M.'s case. Both individuals knew Martin had a history of domestic violence and had allegedly molested D.M. in the past. In addition, Zazzara received direct notification from appellants prior to the July 23<sup>rd</sup> incident that Martin had been taking D.M. into the bathroom during his visits, which he was not supposed to do. Zazzara assured appellants that this behavior would no longer be permitted, but Martin continued to be allowed free access to D.M. during his "supervised" visits.

Because we find that there are genuine issues of material fact left for the trier of fact, appellants' first two assignments of error are sustained.

“III. The trial court committed reversible error when it failed to allow Plaintiffs to obtain documents requested from Defendants and refused to allow Plaintiffs to take the deposition of Mr. McCafferty and Ms. Zazzara.”

In their third assignment of error, appellants challenge discovery rulings made by the trial court. They specifically argue that the trial court erred in refusing to allow them to obtain certain documents from appellees and that the trial court erred in refusing to allow them to depose McCafferty and Zazzara. We agree.

Under Ohio law, it is well established that the trial court is vested with broad discretion when it comes to matters of discovery, and the “standard of review for a trial court’s discretion in a discovery matter is whether the court abused its discretion.” *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265, 664 N.E.2d 1272. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 50 OBR 481, 450 N.E.2d 1140. Absent a clear abuse of that discretion, the lower court’s decision should not be reversed. *Mobberly v. Hendricks* (1994), 98 Ohio App.3d 839, 845, 649 N.E.2d 1247. However, appellate courts will reverse a discovery order “when the trial court has erroneously denied or limited discovery.” 8 Wright, Miller & Marcus, *Federal Practice & Procedure* (2d Ed. 1994) 92, Section 2006. Thus, “an

appellate court will reverse the decision of a trial court that extinguishes a party's right to discovery if the trial court's decision is improvident and affects the discovering party's substantial rights." *Rossmann v. Rossmann* (1975), 47 Ohio App.2d 103, 110, 352 N.E.2d 149.

After an in camera inspection of the materials requested by appellants, the trial court found that the requested discovery was confidential and protected under Ohio law. The court held that appellants were not entitled to any of the DCFS documents, nor were they allowed any deposition testimony from McCafferty or Zazzara. While the trial court is afforded broad discretion in making such determinations, its ruling here is so overreaching that, when taken in its totality, we find it to be an abuse of discretion.

The confidentiality statutes pertinent are R.C. 5153.17 and R.C. 2151.421(H)(1). R.C. 5153.17 states:

"The public children services agency shall prepare and keep written records of investigations of family, children, and foster homes, and of the care, training, and treatment afforded children, and shall prepare and keep such other records as are required by the department of job and family services. Such records shall be confidential, but except as provided by division (B) of section 3107.17 of the Revised Code, shall be open to inspection by the agency, the director of job and family services, and the director of the county department of

job and family services, and by other persons upon the written permission of the executive director.”

Furthermore, R.C. 2151.421(H)(1), which is concerned with the reporting and investigation of cases of child abuse, states that any report made under that section is confidential; however, “[a]lthough the [DCFS’s] records are afforded confidentiality under R.C. 5153.17 and R.C. 2151.421(H)(1), this confidentiality is not absolute. See *Johnson v. Johnson* (1999), 134 Ohio App.3d 579, 583, 731 N.E.2d 1144; *Sharpe v. Sharpe* (1993), 85 Ohio App.3d 638, 620 N.E.2d 916.

The proper procedure for determining the availability of such records is for the trial court to conduct an in camera inspection to determine the following: 1) whether the records are necessary and relevant to the pending action; 2) whether good cause has been shown by the person seeking disclosure; and 3) whether their admission outweighs the confidentiality considerations set forth in R.C. 5153.17 and R.C. 2151.421(H)(1). *Johnson*, 134 Ohio App.3d at 585.” *Child Care Provider Certification Dept. v. Harris*, Cuyahoga App. No. 82966, 2003-Ohio-6500.

Appellants’ request for discovery included documents specifically concerning the incident of July 23, 2003 and generally concerning the practices and procedures of the agency regarding supervised visits. Clearly, such materials are necessary and relevant to the pending action. The question

remains whether appellants have shown "good cause" for disclosure and whether the admissions outweigh the confidentiality considerations articulated in Ohio law.

"In determining whether 'good cause' has been shown, the consideration is whether it is in the 'best interests' of the child, or the due process rights of the accused are implicated. See *Johnson*, 134 Ohio App.3d at 583; 1991 Ohio Atty.Gen.Ops. No. 91-003." *Harris*, supra.

It is clear appellants have shown good cause for the requested materials. The best interests of the minor victim involved in this case would be served in holding people and entities responsible for any deficiencies in her supervision.

Confidentiality considerations cannot destroy the discoverability of all the requested documents. Andre Martin's criminal proceedings and the discovery involved in that case lessen pertinent due process rights protections. Any further protections of DCFS employees who might be implicated with this discovery would not be affected by general disclosures of DCFS's practices and procedures concerning supervised visits. The lower court's denial of all requested documents amounted to an abuse of discretion.

In addition, to rely on affidavit testimony of McCafferty and Zazzara and yet not allow appellants any right to depose these individuals also amounts to an abuse of discretion. The scope of pretrial discovery is broad. *Grandview*

*Hosp. & Medical Center v. Gorman* (1990), 51 Ohio St.3d 94, 554 N.E.2d 1297.

Deposition testimony from these individuals was denied for fear that the information sought from those people would be confidential; however, nothing in the record illustrated exactly what appellants intended to ask during deposition. Not all information surrounding this litigation is confidential, and liberal discovery is the general rule. Any confidential information procured in the course of a deposition can be excluded at the appropriate time.

The total denial of pertinent discovery substantially affected appellants' rights and was an abuse of discretion. The trial court's discovery rulings must be more specific and narrowly tailored. This assignment of error is sustained.

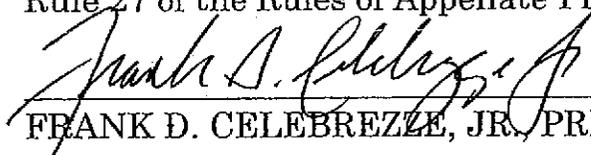
Judgment is reversed and the case is remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants 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.

  
FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

JAMES J. SWEENEY, J., and  
ANTHONY O. CALABRESE, JR., J., CONCUR