

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0306

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

CHERITA RANKIN, et al.
Plaintiffs-Appellees,

vs.

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

TRIAL COURT NO.: 527785

**MEMORANDUM CONTRA JURISDICTION
OF APPELLEES CHERITA RANKIN, ET. AL.**

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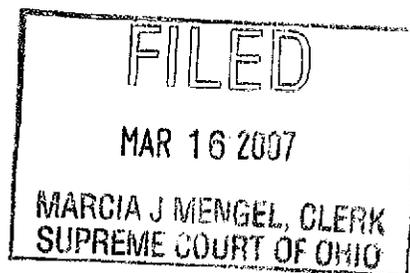


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I. **THIS CASE DOES NOT CONCERN A MATTER OF PUBLIC OR GREAT GENERAL INTEREST, NOR DOES IT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.**

This case involves Defendants/Appellants' egregious failures to protect a three-year old child from multiple sexual assaults at the hands of her father. These sexual assaults occurred while the child was in Appellants' custody, during a putative "supervised" visit. Pursuant to a Cuyahoga County trial court's order, the visits between the child and her father were to be supervised at all times, as the father had previously been accused of sexually assaulting the young girl. Appellants ignored a prior trial court's mandate of supervision, ignored multiple pleas from the girl's family to not permit the father to be alone with her, and allowed the sexual assaults to occur while the girl was in their exclusive custody.

Appellants now search for refuge in this Court, seeking to overturn the appellate court's finding that they acted both negligently and recklessly while allowing these sexual assaults to occur. The Court of Appeals held that the county facilitated the sexual assaults by ignoring the pleas of the child's grandmother, by ignoring the explicit court order mandating supervision, and by its own practices and procedures that allowed the child's father to sexually assault her on two separate occasions during the same "supervised" visit. The county was found to have violated both the special relationship exception to the public duty rule, as well as the girl's civil rights – that is, the Court of Appeals provided separate and distinct bases for Appellees to proceed on remand to the trial court. Thus, review before this Court is both unwarranted and unnecessary.

Further, Appellants seek review so they may challenge the long-held definition of "recklessness." This argument is, however, a red herring. Although Appellants disagree with the Court of Appeals decision – that a genuine issue of material exists whether the county employees

acted recklessly – no rationale is set forth in their memorandum for why the term needs to be altered or eliminated. No alternate definition is offered, nor is any direct challenge to the current definition presented. In reality, Appellants have no qualms with the definition of “recklessness.” They just believe that it should not apply to them.

Finally, Appellants argue that they should be allowed to present evidence in their motion for summary judgment via affidavit testimony, but they should not be forced to appear for deposition. That is, Appellants attached affidavits to their summary judgment motion of two county employees (both parties to the case), yet these same individuals refused to produce for deposition, despite being noticed for deposition on four separate occasions. Not only did the trial court fail to sanction Appellants, it rewarded them by granting their motion for summary judgment, refusing to strike their affidavits, and refusing to order the employees to have their deposition taken. The appellate court rightfully determined that this was improper.

A three-year old girl was sexually assaulted while in the custody of Appellants; they now seek to hide behind the cloak of immunity. As both this Court and the Ohio Legislature have determined, immunity for governmental agencies and employees is not, and has never been, absolute. Exceptions exist, whether through reckless conduct, the special relationship exception to the public duty rule, or through multiple violations of a young girl’s civil rights. Therefore, this Court should not accept this matter for review.

II. STATEMENT OF THE CASE

The collective failures of Defendants/Appellants, Cuyahoga County Department of Children and Family Services (“DCFS”), DCFS director James McCafferty, and DCFS employee

Gina Zazzara¹ allowed D.M.'s father to sexually assault her on separate occasions during the same "supervised" visit. Appellants abrogated their duty to protect a child from her father's sexual advances, resulting in multiple sexual assaults while in the putative protection of DCFS – despite explicit warnings from D.M.'s grandmother and guardian Estella Rankin² to Appellants and despite a court order mandating all visits between D.M. and Martin to be supervised.

On April 15, 2003, D.M. was committed to the temporary custody of DCFS pursuant to an order of the Juvenile Division of the Cuyahoga County Court of Common Pleas. Under the Juvenile Court Order, Martin was to only have supervised visits with D.M. at DCFS.

On July 23, 2003, DCFS's actions, policies, and practices, failed to prevent Martin from taking D.M. into the men's restroom where he sexually assaulted her. After leaving the restroom, Martin returned to the visitation room. Upon being seated, he placed D.M. on his lap and while holding a jacket over her lap, placed his hand under the child's clothing and fondled her genitals – in full view of DCFS employees. At no time during the supervised visit did anyone from DCFS remove D.M. from Martin or contact the police. Appellants knew that Martin had been previously accused of sexually assaulting D.M., and they knew that a court order required all visits between D.M. and Martin to be supervised. Further, Appellants had been specifically warned not to allow Martin to take D.M. into the bathroom alone.

During the motion for summary judgment phase of the litigation, McCafferty and Zazzara attached affidavits to Appellants' motion for summary judgment, claiming innocence of all

¹DCFS, McCafferty and Zazzara are collectively referred to herein as "Appellants."

²Cherita Rankin, individually and on behalf of D.M., and Estella Rankin are collectively referred to herein as "Appellees."

charges. Appellees noticed their depositions on four separate occasions to both uncover their knowledge of the sexual assaults, as well as the accuracy of the affidavits, but Appellants claimed that their testimony was privileged and refused to present the two individuals for deposition. The trial court countenanced these actions by not only refusing to strike their affidavits, but it also granted summary judgment to the employees based upon the representations made in their affidavits.

III. LAW AND ARGUMENT

Appellants' arguments, if promoted to truth, reach an astounding and disturbing conclusion: namely, there is no check, no review, no tribunal with authority over the lawless and indifferent conduct of Appellants in safeguarding our children. No special relationship exception to the public duty rule applies, violations of a child's civil rights are immaterial, and no explicit order of a trial court, specifically mandating that DCFS not to tender a three year-old to a sexual predator, has any force of law. None of these are enough, according to Appellants, to hold them liable. No gesture can be sufficiently obscene, no act sufficiently reckless, and no law sufficiently clear for Appellants to face the consequences of facilitating the multiple sexual assaults of a three year-old girl. There is no dispute that the following occurred here:

- Martin was allowed to take D.M. alone with him into the bathroom. This violated the supervision provision of the court order. One month prior to the assault on July 23, 2003, Rankin told Zazzara not to let Martin take D.M. alone with him into the bathroom. Zazzara promised that this would no longer occur;
- During the July 23, 2003 supervised visit, Martin took his daughter to a private restroom and sexually assaulted her, and continued to sexually assault D.M. directly in front of DCFS employees in the public visitation area. There was no DCFS supervision of the July 23, 2003 visit until after Martin brought his daughter alone into a private bathroom; and

- Even knowing that Martin violated the court order by taking his daughter into the bathroom alone to sexually assault her, and again sexually assaulting her in front of numerous DCFS employees, DCFS, nonetheless, failed to immediately contact the police and end the visit. D.M. was not immediately taken from her father, the police were not immediately contacted, and D.M. was not immediately brought to a hospital.

The Court of Appeals reversed and remanded this matter for a number of reasons.

Appellants were not entitled to immunity based upon the special relationship exception to the public duty rule and the multiple violations of D.M.'s civil rights. Further, reversal was appropriate due to the improper order from the trial court prohibiting Appellees from obtaining any written discovery, and the improper utilization of McCafferty and Zazzara's affidavits during summary judgment when these two individuals refused to appear for deposition. Each issue, standing alone, is sufficient for this matter to be remanded.

- A. The Appellate Court properly determined that it was reversible error to grant summary judgment to DCFS, as a genuine issue of material fact exists as to whether it was immune from liability.**

DCFS was not entitled to sovereign immunity for what it did to D.M. The Court of Appeals found two separate and distinct rationale for destroying DCFS's immunity: (1) the special exception to the public duty rule, and (2) the violations of D.M.'s civil rights through DCFS's practices and procedures. Appellees will address these rationale, in turn.

First, the statutory immunity R.C. 2744 provides is not absolute, and this Court has held that a municipality's sovereign immunity is destroyed when an individual establishes a "special relationship" with the governmental entity. *Yates v. Mansfield Board of Education* (2004), 102 Ohio St.3d 205. The appellate court held that a genuine issue of material fact exists as to whether a special relationship existed between D.M. and Appellants, destroying its immunity.

This Court's decision in *Yates*, supra, re-affirmed the notion that political subdivisions owe a special duty to their citizens not to harm them: "[T]he 'public duty' rule remains viable as applied to actions brought against political subdivisions pursuant to R.C. 2744." *Yates*, 102 Ohio St.3d 205 at ¶ 31. In order to destroy a political subdivision's immunity via the public duty rule/special relationship test, a plaintiff must establish the following:

- (1) an assumption of an affirmative duty by a political subdivision;
- (2) knowledge on the part of the political subdivision or its agent that its 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.

Sawicki v. Ottawa Hills (1988), 37 Ohio St. 3d 222. Appellees established a genuine issue of material fact as to whether DCFS was liable under the public duty rule/special relationship test:

(1) DCFS assumed an affirmative duty to provide a safe and supervised visit between D.M. and her father, pursuant to the trial court's supervision order; (2) DCFS knew that the failure to properly supervise this visit could lead to an injury to D.M.; (3) there was direct contact between DCFS and D.M.; and (4) D.M. and Appellees justifiably relied upon DCFS to supervise the visits. A special relationship existed between the parties, thereby destroying DCFS's alleged immunity. DCFS has never argued that the facts here preclude application of the public duty rule/special relationship test.

Second, in addition to abrogating any claim for immunity based upon the special relationship exception to the public duty rule, DCFS violated D.M.'s civil rights law when its

practices and procedures allowed Martin to sexually assault D.M. during a supervised visit. To demonstrate a federal civil rights violation, Appellees needed to establish that DCFS's "custom, policy or practice...caused the alleged Constitutional violation." DCFS has previously, admitted, however, that it is liable for the damages suffered by D.M. (and not afforded any immunity) if its policies were a "moving force" behind the violation. See, *Canton v. Harris* (1989), 489 U.S. 378, 389.

Remarkably, Appellants fail to address this issue in their memorandum. From the beginning of this matter, Appellees have asserted that DCFS violated D.M.'s civil rights through its policies, practices, and procedures, yet Appellants ignore this issue in their brief. The Court of Appeals, however, did not ignore this issue:

...[T]here is sufficient evidence for [D.M.] to bring a cause of action to hold [DCFS] liable for the harm done D.M. Even with the limited evidence provided in the record after the trial court denied much of D.M.'s 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.

Court of Appeals Opinion at p.8. (emphasis added.) As Appellants do not challenge the Court's decision remanding and reversing for this reason – that DCFS violated D.M.'s civil rights – both the remaining and preceding issues are moot.

B. The Court of Appeals properly determined that it was reversible error to grant summary judgment to McCafferty and Zazzara, as a genuine issue of material fact exists as to whether they acted recklessly.

DCFS director McCafferty and DCFS employee Zazzara were not entitled to immunity, as they acted recklessly with regard to D.M. Pursuant to 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” the defense of immunity is no longer available to the individual. *Shadoan v. Summit Cty Children Serve. Bd.* (9th Dist.), 2003 Ohio 5775; *Cobb v. Mantua Twp. Bd. of Trustees* (11th Dist.), 2001 Ohio 8722. One acts recklessly “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.* (12th Dist. 1991), 76 Ohio App.3d 448, 453; *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105. Recklessness occurs when a social worker relinquishes the supervision of children. *Colling v. Franklin Co. Children Servs.* (10th Dist. 1993), 89 Ohio App.3d 245.

The record establishes a genuine issue of material fact as to whether McCafferty and Zazzara acted recklessly by allowing Martin to sexually assault a three year-old in a county building. McCafferty has admitted that he was responsible for the administration of DCFS. The sexual assaults on July 23, 2003, were the result of a series of visits which went unsupervised, in direct violation of a court order. Prior to July 23, 2003, Rankin had informed DCFS that Martin frequently took D.M. into a private bathroom, alone. This violation was allowed to occur numerous times, and the Court of Appeals properly determined that a genuine issue of material fact existed as to whether it was reckless to maintain a supervision program that facilitated the violation of court orders and allowed a three-year old to be sexually assaulted during a supervised visit.

Further, Rankin specifically told Zazzara that Martin took D.M. into the bathroom, alone, during the supervised visits, and that she did not want this to occur. Zazzara told Rankin that the

private visits to the bathroom would stop; however, there is no indication that Zazzara did anything with this information, and the fact that Martin continued to freely violate the court order strongly suggests that Zazzara simply ignored Rankin's plea for help. Zazzara acted recklessly when she failed to present this information to those in charge of the visits; Appellants have never refuted the assertion that Zazzara simply ignored Rankin's cry for help, which directly led to the July 2003 sexual assault. After Rankin warned Zazzara about Martin's proclivity for taking liberties with his daughter, and after Zazzara stated that she would monitor the problem, a sexual assault occurred at DCFS's facilities in the exact same manner predicted by Rankin. If, as it appears happened, Zazzara did not take the appropriate steps to protect a helpless three year-old, then it is a jury question as to whether this was "reckless."

C. The Court of Appeals properly determined that it was reversible error to withhold all documentation requested by Appellees and to rely upon the affidavits of McCafferty and Zazzara while failing to require that they appear for deposition.

At the trial court, Appellees sought written discovery from Appellants, as well as the deposition testimony from McCafferty and Zazzara. The trial court determined that Appellees were not entitled to any deposition testimony from McCafferty and Zazzara, and that DCFS need not disclose a single requested document.

The scope of pretrial discovery is broad. *Grandview Hosp. & Medical Center v. Gorman* (1990), 51 Ohio St.3d 94. Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter of the lawsuit. *Id.* The discovery requests propounded by the Appellees were reasonably tailored to lead to the discovery of admissible evidence and, as such, were not unduly burdensome. The state and federal policies underlying the discovery

process command that these documents should have been released to Appellees. Ohio policy favors the fullest opportunity to complete discovery. *Rossman v. Rossman* (8th Dist. 1975), 47 Ohio App.2d 103, 110. In exercising its discretion in a matter pertaining to discovery, a trial court must balance the relevancy of the discovery requests, the requesting party's need for the discovery, and the hardship upon the party from whom the discovery was requested. *Stegawski v. Cleveland Anaesthesia Group, Inc.* (1987), 37 Ohio App.3d 78.

There are courts in Ohio that have authorized the disclosure of DCFS records under circumstances such as these. For example, in *Hughes v. Butler County Children Services Board* (12th Dist.), 2002 Ohio 184, the Butler County Children Services Board was compelled to disclose its confidential records in a civil action for slander, defamation, emotional distress, and loss of consortium, as the appellate court held that the balance weighed in favor of disclosure.

This Court recently ruled that not everything in a public children services agency's file is confidential. *State ex. rel. Beacon Journal Publ. Co. v. City of Akron* (2004), 104 Ohio St. 3d 399, 2004 Ohio 6557. In *Beacon Journal*, a newspaper sought copies of multiple incidents regarding the abuse and rape of children. The Supreme Court determined that certain portions of the files were confidential, while certain portions had to be disclosed to the newspaper. This Court held as follows:

While [public children services agency] investigative records are confidential pursuant to R.C. 2151.421(H)(1), it appears the legislature never intended to mandate absolute confidentiality or a total bar on disclosure in some circumstances. In other words, it does not follow that everything contained in the [public children services agency's file] must therefore be confidential. [Citations omitted].

Id. at ¶35.

Clearly, part of the file requested by Appellees contains documents from law enforcement agencies, as Martin allegedly assaulted D.M. previous to July 23, 2003 and this assault was investigated by police; the trial court refused to require Appellants produce these records. In addition, some records were divulged during the criminal prosecution of Martin; the trial court refused to require Appellants produce these records.

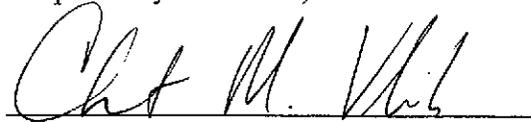
Further, the trial court refused to allow Appellees to take the depositions of McCafferty and Zazzara, and yet relied upon their affidavit testimony in granting their summary judgment. Appellees noticed their deposition on four separate occasion; McCafferty and Zazzara refused to appear, and yet the trial court allowed the individuals to attach affidavit testimony to their motion for summary judgment. In essence, Appellants were allowed to use all of the benefits of an affidavit, without answering any of the damaging questions extracted during a deposition. The Court of Appeals correctly determined that this was inappropriate, and accordingly reversed the trial court's decision.

IV. CONCLUSION

For the reasons set forth herein, this Court should deny review of this matter. The Court of Appeals reversed and remanded for a number of reasons, including DCFS's violation of D.M.'s civil rights, the special relationship exception to the public duty rule, the reckless actions of McCafferty and Zazzara, the prohibition on production of all record to Appellees, and the concomitant reliance on McCafferty and Zazzara's affidavit even though Appellants were not allowed to take their deposition.

* * *

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SERVICE

A copy of the foregoing Memorandum Contra Jurisdiction of Appellees Cherita Rankin, et. al., has been served by ordinary U. S. Mail on this 15th day of March, 2007, upon the following:

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