

IN THE SUPREME COURT OF OHIO

07-0740

DONALD THOMAS KRAYNAK, etc. )  
)  
Appellees )  
)  
vs. )  
)  
YOUNGSTOWN CITY SCHOOL )  
DISTRICT BOARD OF EDUCATION, )  
et al. )  
)  
Appellants )

On Appeal from the Mahoning County Court  
of Appeals, Seventh Appellate District

Court of Appeals Case No. 2005-MA-200

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT YOUNGSTOWN CITY SCHOOL DISTRICT  
BOARD OF EDUCATION

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EXPLANATION OF WHY THIS CASE IS A CASE  
OF PUBLIC OR GREAT GENERAL INTEREST

This cause presents three critical issues for the interpretation and application of R.C. 2151.421: (1) whether the statute in effect during the 1999-2000 school year applies a subjective standard or objective standard when examining whether a teacher suspects or should suspect child abuse; (2) whether a trial judge may properly aid a jury in interpreting the language of the statute; and (3) whether the public-duty rule/special duty theory of liability was abrogated by R.C. 2744.02. In this case, the Court of Appeals ruled that the version of R.C. 2151.421 effective in 1999-2000 required an objective standard and that the trial court improperly instructed the jury as to a subjective standard. The Court of Appeals also held that the public-duty rule is still viable in this case.

Although the statute was amended on August 3, 2006 to express an objective standard in the current version of the statute, this Court's guidance is needed to interpret the former version which was applicable to this case. By its very nature, an action under this statute involves the claim of a minor. The statute of limitations will not begin to accrue on actions arising prior to August 3, 2006 until the minor's eighteenth birthday. That means Ohio courts may be called upon to apply and interpret the former version of R.C. 2151.421 for the next eighteen years. Without this Court's guidance, this area of law will remain murky and debated for a very long time.

This is an underdeveloped area of law. As the Seventh District Court of Appeals noted in its opinion "There is no definitive case on point as to whether a teacher's suspicion is viewed using an entirely subjective standard or if it is based on an objective, reasonable person standard." *Kraynak v. Youngstown City School District Board of Education* (March 12, 2007), 7<sup>th</sup>

App. No. 05 MA 200, unreported, 2007-Ohio-1236, ¶17.

Ohio's Appellate Courts have grappled with the language of the former statute. In *Surdel v. Metrohealth Med. Ctr.* (1999), 135 Ohio App.3d 141, 150, the Court imposed the requirement of reasonableness on the condition indicating abuse, not on the reporter's suspicion. Yet in *Tracey v. Tinnerman*, 2<sup>nd</sup> Dist. No. 2003-CA-21, 2003-Ohio-6675, ¶11, the Court noted that "a school employee is required to report any reasonable suspicion of child abuse." Thus, the Second District focuses on the reporter's suspicion, not the condition. In the instant case, the Seventh District held that the trial court could not instruct the jury beyond the language of the statute itself and could not interpret the standard as subjective.

The people of Ohio need guidance from the Supreme Court to sort out these conflicting opinions and bring uniformity to the Appellate Courts.

The Appellate Court's decision further deprives the trial court of the power to aid jurors in understanding complex statutory language. A jury must be given a plain and distinct statement of the law as applicable to the case. *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. In fact, the trial court may offer explanation "calculated to prevent the jury from being misled or confused about how to apply the statute to the evidence presented in the case." *Smith v. Justarr, Inc.* (1995), 102 Ohio App.3d 506, 512. If the courts of appeals in this state cannot articulate a definitive meaning of the nature of suspicion expected by this statute, we should not expect jurors to do so without the Court's assistance.

Finally, there is confusion over whether Chapter 2744 of the Revised Code abrogates the public-duty rule in this case. As to this issue, the Appellate Court relied upon a footnote of this Supreme Court in *Yates v. Mansfield Bd. Of Edn.* (2004), 102 Ohio St.3d 205, which in turn cites

to a footnote in *Wallace v. Ohio Dept. Of Commerce, Division of State Fire Marshal* (2002), 96 Ohio St.3d 266, fn. 13. As discussed in further detail under Proposition of Law No. 3, Appellant contends that the Supreme Court's statement of dicta has been taken out of context and twisted into an erroneous assertion of law that is inconsistent with this Court's prior holdings. Currently, this Court's position on this issue is unresolved, permitting the lower courts to glean direction from footnotes. In addition, the Appellate Court's ruling creates a common law exception to statutory immunity for which the Revised Code does not provide. This precedent for courts to carve out common law exceptions to statutory law that were never approved by the legislature, should be overruled.

If allowed to stand, the Appellate Court's decision will (1) continue to cloud the interpretation of the statute, (2) rob juries of the ability to understand confusing statutory language, and (3) allow courts to create non-statutory exceptions to sovereign immunity. It is of profound public and great general interest for this Honorable Court to bring order to this chaotic area of law.

#### STATEMENT OF THE CASE AND FACTS

This case arises out of the level of information that the teacher, Helen Marino, knew about her student, Derek Kraynak, from daily interaction with him which did not reach a level of her knowing or suspecting any abuse of Plaintiff Derek Kraynak. The jury properly weighed the evidence and decided this issue of fact in favor of the Youngstown Schools, i.e. Helen Marino did not know or suspect that child abuse of Derek Kraynak occurred at home or anywhere. Appellee Kraynak not only had the opportunity to have the jury decide whether or not there was a violation

of the reporting statute, R.C. 2151.421, but also whether there was common law negligence. The jury decided favorably for Appellant on both causes of action, a verdict and judgment sustained by the evidence.

Derek Kraynak testified that he had been abused by his mother, Melissa Kraynak, since he was less than 3-years-old. He further testified that during that time, from approximately 1992 until his father, Appellee Donald T. Kraynak, took custody of him in 2000, he had continuously been abused by his mother. During this time period, Derek's parents were divorced and they had joint custody of him.

Initially, Derek alternated staying one month with his father and then one month with his mother. Once Derek reached school age, he spent Monday morning through Friday afternoon with his mother, and Friday afternoon through Monday morning with his father, Donald Kraynak.

Donald Kraynak and/or his parents spent those weekends with Derek, throughout the approximate seven years during which Derek claims he was abused, and continuing through the time he was in Helen Marino's gifted class at West Elementary School. During the approximate seven years of joint custody and visitation, neither Donald Kraynak nor his parents ever suspected any abuse of Derek.

Helen Marino was dismissed as a Defendant during the course of the trial. Mrs. Marino has been a teacher for over 22 years with the Appellee/Cross-Appellant Youngstown City School District. Mrs. Marino has a masters degree in teaching gifted and talented children, has pursued a supervisor's certificate, and has a masters degree plus 30 hours of post-degree study. Mrs. Marino enjoys teaching gifted children.

Mrs. Marino had received training and was aware of her obligations to report known

or suspected child abuse. Mrs. Marino had been in situations before where she had suspected child abuse and did make the call reporting it to the appropriate agency.

Helen Marino had approximately 70 students during the 1999-2000 school year which started on September 4, 1999. Mrs. Marino had Derek Kraynak in a language arts class that met four days per week for one hour and fifteen minutes per day. As part of the class, she used a creative writing journal for the children to write once or twice a week creatively about no particular topic. This creative writing journal was not graded and was only spot read by her since it was not used to teach the various aspects of the course but only to practice writing.

Helen Marino indicates that she would have read the creative writing journal of Derek Kraynak sometime in late September of 1999. In the approximate three weeks before she read the journal, she had observed Derek to be a happy-go-lucky, healthy and clean 4<sup>th</sup> grader who loved to talk, had a lot of energy, loved to read and had no physical or emotional signs of abuse. The journal was a creative writing journal in which Derek testified he wrote fictional stories. Mrs. Marino looked at all of the circumstances she knew about Derek at that point, having him in class five hours per week for three weeks or so and not observing any signs of physical or emotional abuse. Looking at all of the circumstances she had before her, she did not suspect or know of any child abuse in Derek's case.

Mrs. Marino testified that given her observations of Derek Kraynak, he did not have any of the signs of abuse or neglect.

Helen Marino did not read additional excerpts concerning any alleged abuse in the creative writing journal. Mrs. Marino did not learn from any of Derek Kraynak's other teachers during weekly sessions that there were any concerns about Derek. Mrs. Marino certainly took time

with Derek and even wrote a letter to Derek's grandmother about how well he was doing in school.

Helen Marino complied with the child abuse reporting statute, R.C. 2151.421, and was not negligent in failing to report Derek Kraynak to the authorities based upon the evidence at trial. Mrs. Marino viewed the creative writing journal in a perspective different from anyone else who testified. She is the only witness who observed Derek Kraynak in class for in excess of three weeks before reading excerpts from the journal. She assessed during those three weeks how he acted and how he appeared, all of which led her to not suspect child abuse and not to report. She had reported suspected child abuse of other students in the past and knew all she had to do was to make a call if she had a suspicion. She did not have a suspicion of child abuse in Derek Kraynak's case. Even after September of 1999, Mrs. Marino observed Derek to continue to do well in class.

The only evidence at trial of any direct abuse came through Derek Kraynak's testimony about his mother which could also be interpreted to be a mother having a difficult time and using some corporal punishment in disciplining her child. There was evidence at trial from Derek Kraynak, supported by his father, Donald Kraynak, that Derek was concerned at the end of the 1999-2000 school year that his mother was going to take him from Youngstown to Columbus and that is when he told his grandmother about his mother abusing him. Derek had wanted to live with his father and was greatly upset by the thought of being taken out of the area.

After a jury verdict in favor of the school district, the Appellees appealed to the Seventh District Court of Appeals. The Appellate Court found that the trial court erred in determining that R.C. 2151.421 contains a subjective standard and in allowing Appellant's expert to testify as to the subjective nature of the statute. The Appellate Court also overruled Appellant's cross-appeal and held that the public-duty rule was still viable in this context. The matter was

remanded to the trial court for a new trial.

The Appellate Court erred in three ways. First, it erroneously held that the trial judge could not instruct the jury that R.C. 2151.421 applied a subjective standard.

Second, the Appellate Court erroneously held that the trial court should not have provided a jury instruction beyond the text of the statute.

Third, the Appellate Court erroneously held that the public-duty rule applies to this case despite the statutory scheme for sovereign immunity in the Revised Code.

In support of their position on these issues, Appellant presents the following argument.

#### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: R.C. 2151.421 requires a subjective standard for determining whether a person suspected child abuse, thereby triggering a duty to report.**

The Appellate Court erroneously held that the trial court should have applied an objective standard to R.C. 2151.421 which would hold Ms. Marino to a standard of what an objective, reasonable teacher would have thought while reading the journal. The trial court had properly focused the inquiry on what Ms. Marino actually knew or suspected regarding whether Derek Kraynak was abused.

It is noteworthy that Kraynak's counsel did not object on the record at trial to instructing the jury on a subjective standard, but expressed other concerns not relevant to this issue.

(Transcript pp. 29-35)

In support of its decision, the Appellate Court cites to *Surdel v. Metrohealth Med. Ctr.* (1999), 135 Ohio App.3d 141. One of the issues in *Surdel* was whether immunity could only be provided under R.C. 2151.421 if the reporter's suspicions were "reasonable." *Id.* at 150. The Court's full analysis of this issue is as follows:

Surdel further argues that immunity will only be provided under R.C. 2151.421(G)(1)(a) only if the reporter's suspicions are "reasonable." Surdel bases this argument on the text of R.C. 2151.421(A)(1)(a), which requires that any knowledge or suspicion be immediately reported when there is "any physical or mental wound, injury, disability, or *condition of a nature that reasonably indicates* abuse or neglect of the child." (Emphasis added [by the *Surdel* court].) R.C. 2151.421(A)(1). We think *Surdel* misconstrues the statute.

The statute describes the kinds of indicators on which the reporter may rely. The qualifying language clarifies that the duty to report does not require absolute proof but rather is triggered when the condition reasonably indicates abuse or neglect. The statute's focus is on the condition not the reporter. And to the extent *Surdel* contends that R.C. 2151.421(G)(1)(a) does not confer immunity where the report results from the reporter's alleged unreasonable misdiagnosis, we rejected the same argument in *Criswell v. Brentwood Hosp., supra.*

*Id.*

Like the Plaintiff in *Surdel*, the Appellate Court in the instant case misconstrues both the statute and the *Surdel* opinion. *Surdel* does not state that the fact finder must evaluate a non-reporting teacher under the standard of what an objective reasonable teacher would suspect. *Surdel* simply states that one who does report abuse need not have a "reasonable" suspicion in order to have immunity, so long as the condition which forms the basis of the suspicion "reasonably indicates abuse." In other words, *Surdel* held that immunity extends to reporters who may have unreasonable suspicions. Accordingly, if a reporter's suspicions can be unreasonable, then it is nonsensical to

apply an objective standard to what a reasonable teacher would have suspected.

The applicable version of R.C. 2151.421 (A)(1)(a) states as follows:

No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and **knows or suspects** that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.

(Emphasis added).

As the *Surdel* Court points out, the only applicable requirement of reasonableness is that the condition (which the teacher actually knows or suspects) be of a nature that “reasonably indicates abuse.” Reasonableness applies to the condition, not to the suspicion.

This does not mean that the mere existence of a condition that reasonably indicates abuse automatically creates or should create knowledge or a suspicion in the teacher that the child is abused. Here, the only condition was the creative writing journal. It alone did not create a suspicion in Mrs. Marino under the circumstances. One cannot and should not be expected to report a suspicion one does not have.

Consider as an example a child who comes to school with a bruise around his eye. A bruise can be a reasonable indicator of abuse. It can also indicate that the child was hurt by some

accidental means. Different teachers could draw different conclusions from looking at the same bruise. Under the statute, if a teacher suspects, reasonably or unreasonably, that the bruise is a sign of abuse, that teacher has a duty to report it. Yet if another teacher sees the bruise and never suspects abuse, there is no statutory duty to report. Even “a student’s report of sexual abuse may or may not trigger the duty to report, depending upon the circumstances of a particular case.” *Yates, supra*, ¶ 50).

A reasonableness standard in the statute only comes into play when evaluating whether the condition is a reasonable indicator of abuse. *Surdel* at 150. To further illustrate, consider if a teacher reported a suspicion of abuse simply because a student wore a blue shirt to school. Wearing a blue shirt is not a reasonable indicator of abuse. Thus, reporting a suspicion of abuse in this example would be inappropriate. In other words, those teachers who hold a suspicion of abuse must suspect the child suffers from a condition that reasonably indicates abuse.

The Appellate Court indicates that courts should not look to future versions of a statute to determine legislative intent though it goes on to suggest that the amendment to R.C. 2151.421, makes it apparent the reporting duty is based on an objective reasonable person standard. This is not supported by a reading of the version of the statute in effect in the present case. In the present case, the statute in effect requires that the specific person in question know or suspect child abuse. The statute does not read “know or should have known” or “suspect or should have suspected.” Nor does the applicable statute read, as amended, “know or have reasonable cause to suspect.” The applicable statutory version asks whether the school employee knows of child abuse or suspects child abuse. The inquiry is a subjective one, and the trial court’s charge to that effect was appropriate.

The legislative intent, as reference by the Appellate Court, is actually gleaned from the legislative history of the bill amending this statute and establishes that a subjective intent applies to the former version of the statute applicable in the present case. The legislative history states:

**Operation of the act**

**Change of “suspicion” basis for making a mandatory or discretionary report.** The act changes the “suspicion” basis for the making of a child abuse or neglect report under the existing mandatory reporting provision or the existing discretionary reporting provision. Under the act, that basis is changed from requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question “suspects” that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect to, instead, requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question “has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position (for mandatory reporting) or in similar circumstances (for discretionary reporting) to suspect” that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect. The act does not change the existing “knowledge” basis for the making of a child abuse or neglect report under the existing mandatory reporting provision or the existing discretionary reporting provision. (R.C.2151.421(A)(1)(a) and (B).)

(Am. Sub. S.B. 17) The subjective standard is applied based on the language of the statute that was in effect as applicable in this case. Otherwise, there would have been no need to “change” to an objective, reasonable cause standard as noted in the legislative history.

Nonetheless, the mere existence of a condition (e.g. creative writing journal) that could reasonably indicate abuse does not mean that a teacher is charged with automatically knowing or suspecting that the child is abused. A fact-finder must view the evidence through the subjective eyes of the individual teacher to determine whether that teacher knew of or suspected abuse. That

was done in the trial court in this case and the verdict should have been affirmed. Accordingly, the Court of Appeals' decision was in error.

**Proposition of Law No. II: A trial judge may provide additional explanation of a statutory requirement to prevent a jury from being misled or confused.**

The trial court was clear that a subjective standard of suspicion should be used to determine liability under R.C. 2151.421. A jury cannot be expected to interpret a statute. That should be determined by the trial court as a matter of law. Thus, the trial court should be permitted to provide explanation of a statutory requirement to prevent a jury from being misled or confused. *Smith v. Justarr, Inc.* (1995), 102 Ohio App.3d 506, 512.

In the instant case, the trial court instructed the jury that R.C. 2151.421 required the jury to determine whether Mrs. Marino subjectively suspected that the child was being abused. Appellee made no objection to this jury instruction at trial.

As discussed in Proposition of Law No. I, application of the subjective standard to Mrs. Marino's suspicion was correct. The trial court's instruction prevented the jury from being misled or confused by the statutory language which imposes a reasonableness requirement to the physical or mental condition of the child, but not to the suspicion of the "... person ... who ... knows or suspects abuse." The Court of Appeals' decision deprives trial courts of the ability to clarify confusing statutory language. Without such ability, inconsistent jury verdicts may result. The Court of Appeals' decision must be reversed.

**Proposition of Law No. III: The public-duty rule has been abrogated by the**

**enactment of R.C. 2744.02.**

The trial court erred in permitting the common law negligence claim under the public-duty rule to proceed to the jury. Appellant had presented motions for directed verdict on the negligence claim which had been overruled by the Court. Appellant had further objected to the Court's charge to the jury on the common law negligence claim.

The Court of Appeals' ruling that the public-duty rule/special relationship exception is applicable to the present case is unfounded. The public-duty rule/special duty theory of liability has been abrogated by the enactment of R.C. 2744.02. *Amborski v. City of Toledo* (1990), 67 Ohio App.3d 47, 585 N.E.2d 974. The intent of the statute was to codify the concept of sovereign immunity. *Amborski, supra*. Also, see *Sudnik v. Crimi* (1997), 117 Ohio App.3d 394, 690 N.E.2d 925; *Colling v. Franklin Co. Children Services* (1993), 89 Ohio App.3d 245, 624 N.E.2d 230; *Smith v. Minnick* (1990), 68 Ohio App.3d 619, 589 N.E.2d 409; *Franklin v. Columbus* (1998), 130 Ohio App.3d 53, 719 N.E.2d 592; *Boggs v. Hughes* 1994 WL 28635 (Ohio App. 2 Dist.); *Zimmerman v. Co. of Summit, Ohio* 1997 WL 22588 (Ohio App. 9 Dist.); *Kendle v. Summit Co.* 1992 WL 80074 (Ohio App. 9 Dist.); *Hedrick v. City of Columbus* 1993 WL 104713 (Ohio App. 10 Dist.); *Iles v. Martin* 1992 WL 233237 (Ohio App. 11 Dist.).

The legislature was specific in Chapter 2744 setting forth the doctrine of sovereign immunity which supersedes the "public-duty" rule. *Soltész v. Dicamillo, DBA D & D Cement* 1996 WL 65871 (Ohio App. 8 Dist.). The case of *Yates v. Mansfield Bd. of Edn., supra*, does not revive the public-duty rule/special relationship exception. *Yates*, in a footnote, discusses that the case of *Wallace v. Ohio Dept. Of Commerce, Division of State Fire Marshal* 96 Ohio St.3d 266, 2002-Ohio-

4210, abolished the public-duty rule with regards to actions against the State brought pursuant to R.C. Chapter 2743, concerning claims against the State and the Court of Claims Act. *Yates*, in the footnote, discusses that *Wallace* did not render a ruling in regards to R.C. Chapter 2744. *Yates* cites footnote 13 from *Wallace*, which states:

Insofar as *Sawicki* [*v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468] dealt only with municipal liability, we have no occasion to overrule it or any of our decisions applying the public-duty rule to actions *not* brought under R.C. Chapter 2743. Various courts of appeals, however, have considered *Sawicki* (among other cases) to have been legislatively superseded by the General Assembly's enactment of R.C. Chapter 2744. See, e.g., *Sudnik v. Crimi* (1997), 117 Ohio App.3d 394, 397, 690 N.E.2d 925; *Franklin v. Columbus* (1998), 130 Ohio App.3d 53, 59-60, 719 N.E.2d 592; *Amborski v. Toledo* (1990), 67 Ohio App.3d 47, 51, 585 N.E.2d 974.

In fact, *Wallace* says that the Court does not have before it the issue of whether the public-duty rule has been abrogated by the enactment of R.C. Chapter 2744 and, therefore, is not ruling on it though does cite to the various Courts of Appeals cases that have considered the public-duty rule to have been superseded by the enactment of R.C. Chapter 2744. The logic followed in *Wallace*, if applied to Chapter 2744, shows that this Supreme Court followed the various Courts of Appeals' decisions cited by *Wallace* and ruled that the public-duty rule is superseded by R.C. Chapter 2744. *Wallace* states at 278:

As we have stated previously, the public-duty rule is neither "set forth" in R.C. Chapter 2743 nor a rule of law applicable to suits between private parties. It is inappropriate for the court to engraft the public-duty rule as an additional limitation on liability that the General Assembly has not provided. If the public-duty rule is to become a rule of substantive law applicable to suits in the Court of Claims, it is the General Assembly - - the ultimate arbiter of public policy - - that should make it so by way of legislation. It is not this court's role to apply a judicially created doctrine when faced with

statutory language that cuts *against* its applicability.

The logic in *Wallace* calls for the same ruling in regards to Chapter 2744 that does not set forth the public-duty rule.

Further, Appellee has no common law negligence and breach of standard of care claims since these basically are “educational malpractice” claims that have not been recognized in Ohio. *Malone v. Academy of Court Reporting* (1990), 64 Ohio App.3d 588, 582 N.E.2d 54; *Poe v. Hamilton* (1990), 56 Ohio App.3d 137, 565 N.E.2d 887.

*Poe* basically held that a teacher was immune from liability in an educational malpractice suit where a student failed to establish that the teacher acted maliciously, in bad faith or in a reckless and wanton manner. This premise has further been followed in *Lemmon v. University of Cincinnati* (2001), 112 Ohio Misc.2d 23, 750 N.E.2d 668.

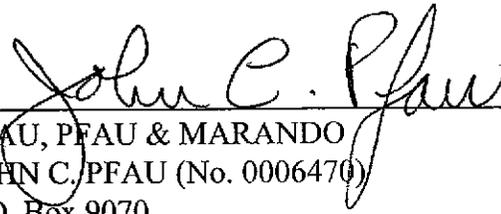
Even the Seventh District Court of Appeals has also followed this line of cases and held that an educational malpractice case does not present a viable claim in Ohio. See *Denson v. Steubenville Bd. of Edn.* 1986 WL 8239 (Ohio App. 7 Dist.).

As the preceding case law illustrates, the Court of Appeals erred in holding that the common law negligence claim could proceed to the jury.

#### CONCLUSION

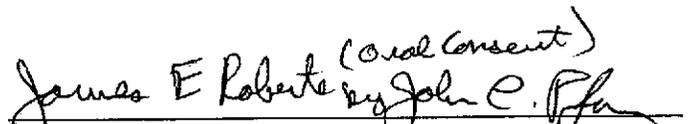
For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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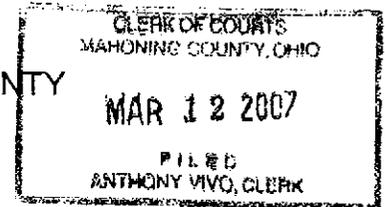
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EDUCATION

CERTIFICATE OF SERVICE

A copy of the foregoing brief has been forwarded by regular mail this 24th day of April, 2007, to JOEL LEVIN, The Tower at Erieview, 1301 East Ninth Street, Cleveland, Ohio 44114, attorney for Plaintiff.

  
\_\_\_\_\_  
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STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT



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 )  
 PLAINTIFF-APPELLANT )  
 CROSS-APPELLEE )  
 )  
 VS. )  
 )  
 YOUNGSTOWN CITY SCHOOL )  
 DISTRICT BOARD OF EDUCATION, )  
 et al. )  
 )  
 DEFENDANTS-APPELLEES )  
 CROSS-APPELLANTS )

CASE NO. 05 MA 200

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common  
Pleas of Mahoning County, Ohio  
Case No. 01CV1349

JUDGMENT:

Reversed and Remanded.

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JUDGES:

Hon. Cheryl L. Waite  
Hon. Joseph J. Vukovich  
Hon. W. Don Reader, Retired of the Fifth District Court of Appeals, sitting by  
assignment.

Dated: March 12, 2007

WAITE, J.

{¶1} Appellant, Donald T. Kraynak, individually, and as the parent and guardian of D.K., a minor, filed suit against Appellee, Youngstown City School Board of Education, and D.K.'s former teacher, Helen Marino, for their failure to report his abuse during the 1999-2000 school year. D.K. advised Marino in his journal that his mother abused him. Marino read at least one journal entry to this effect, but did not report the alleged abuse.

{¶2} Appellant dismissed the count against Marino personally, and the case proceeded to jury trial against the Youngstown City School District Board of Education based on Marino's agency with the school. Appellant presented two theories of liability: negligence based on the special relationship between teachers and students; and negligence per se based on a teacher's statutory duty to report suspected abuse. He also asserted a claim for loss of consortium.

{¶3} The jury returned a defense verdict; six of the eight jurors found in favor of Appellee. The jury specifically found that the preponderance of the evidence did not establish that Marino knew or suspected that D.K. suffered or faced abuse, thus she had no duty to report. The jury also concluded that Appellee was not negligent and that D.K.'s injuries were not directly and proximately caused by Marino's negligence or her failure to comply with the reporting statute. (Jury Interrogatories Nos. 1, 2, and 3.)

{¶14} Appellant filed a motion for judgment notwithstanding the verdict ("JNOV") or in the alternative, a new trial. The trial court overruled his requests on October 6, 2005, and Appellant timely appealed to this Court.

{¶15} Appellant raises four assignments of error on appeal. He alleges that the trial court erroneously denied his motion for JNOV; that the jury's verdict was against the manifest weight of the evidence; that the trial court erred in determining that R.C. §2151.421 is a subjective standard and in allowing Appellee's expert to testify as to the subjective nature of the statute.

{¶16} In its cross-appeal, Appellee argues that the trial court erred in presenting Appellant's negligence claim to the jury since this claim was abrogated by sovereign immunity.

{¶17} For the following reasons, we hereby sustain Appellant's third and fourth assignments of error and grant Appellant a new trial. We overrule Appellee's sole cross-assignment of error.

{¶18} We will address Appellant's third assignment of error first, since it concerns the law as provided to the jury. In this assignment of error, Appellant claims:

{¶19} "The Trial Court Committed Reversible Error When It Determined that R.C. 2151.421 Utilizes A Subjective, Rather Than Objective, Standard."

{¶10} R.C. §2151.421 places a duty on a school teacher, school employee, and school authority to report known or suspected child abuse. Further, a teacher's failure to report known or suspected abuse is imputed to the teacher's employer

pursuant to the doctrine of respondeat superior. *Grimm v. Summit Cty. Children Servs. Bd.*, 9th Dist. No. 22702, 2006-Ohio-2411, ¶30.

{¶11} A political subdivision is generally not liable for a plaintiff's injury, death, or loss pursuant to R.C. §2744.02. However, R.C. §2744.02(B) sets forth exceptions to the general rule. The applicable version of R.C. §2744.02(B)(5) in the instant case would allow a political subdivision to be found liable when liability is expressly imposed by a section of the Revised Code.

{¶12} The Ohio Supreme Court has also held that pursuant to this version of R.C. §2744.02(B)(5), a political subdivision may be held liable for a teacher's failure to perform a duty expressly imposed by R.C. §2151.421. *Campbell v. Burton* (2001), 92 Ohio St.3d 336, 750 N.E.2d 539, paragraph two of the syllabus. *Campbell* applied at the time the alleged failure to report occurred in the instant matter. Hence, Appellant sued the school district. Since *Campbell*, however, the legislature has amended R.C. §2744.02(B)(5) to permit a political subdivision to be sued under that statute only when the liability expressly imposed by a section of the Revised Code is civil. *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, fn. 3.

{¶13} This claimed error concerns whether the duty to report a suspicion of abuse pursuant to R.C. §2151.421 is viewed subjectively or by using the objective person standard. Appellant submitted proposed jury instructions in which he sought to have the trial court submit the statute itself to the jury. Despite Appellant's request, the trial court did not provide the actual statutory language to the jury. In addition,

the trial court judge advised the jury that R.C. §2151.421 employs a subjective standard, and thus it was to determine whether Marino, herself, suspected abuse and was not left to determine merely whether a "reasonable person" would so suspect.

{¶14} A party is usually entitled to the inclusion of his requested jury instruction if it is a correct statement of the law applicable to the case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 575 N.E.2d 828. This assignment of error concerns whether the jury instructions, as provided, correctly and completely stated the applicable law. Thus, appellate review of the trial court's refusal to provide Appellant's requested instruction is conducted de novo because this is purely a legal question. *Wood v. U.S. Bank*, 160 Ohio App.3d 831, 2005-Ohio-2341, 828 N.E.2d 1072, ¶20, citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 668 N.E.2d 889.

{¶15} R.C. §2151.421(A)(1)(a) states in pertinent part,

{¶16} "No \* \* \* [school teacher; school employee; school authority] who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age \* \* \* has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion[.]"

{¶17} There is no definitive case on point as to whether a teacher's suspicion is viewed using an entirely subjective standard or if it is based on an objective, reasonable person standard. Nonetheless it has been held that, "[w]here a jury

instruction is given in accordance with statutory language, a court should generally limit its instruction to such language." *Sheeler v. Ohio Bur. of Workers' Comp.* (1994), 99 Ohio App.3d 443, 451, 651 N.E.2d 7, citing *State v. Shue* (1994), 97 Ohio App.3d 459, 471, 646 N.E.2d 1156. Thus, the trial court judge should have simply presented the text of the statute in this case. He did not. Instead, the trial court judge advised the jury of the following in his instructions,

{¶18} "A teacher has a duty to report child abuse to the proper authorities when the teacher knows or suspects that a child under 18 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child.

{¶19} "The statute sets forth a subjective standard and you must determine whether defendant, Helen Marino, in her mind, knew or suspected [D.K.] suffered or faced a threat of suffering any physical or mental wound, injury, or disability, or condition of a nature that reasonably indicates abuse or neglect of [D.K.]" (Instructions of Law Tr., pp. 9-10.)

{¶20} Appellant directs this Court's attention to *Surdel v. Metrohealth Med. Ctr.* (1999), 135 Ohio App.3d 141, 733 N.E.2d 281, *appeal not allowed by* 87 Ohio St.3d 1491, 722 N.E.2d 525, in support of his argument that R.C. §2151.421 employs an objective person standard. *Surdel* held in part that R.C. §2151.421 grants immunity to those who report abuse even if their suspicion as to the abuse is unreasonable.

{¶21} The facts in *Surdel* are as follows: John and Laurie Surdel were separated, and Laurie suspected that John had been abusing their children. She contacted the county children's services agency, and John was eventually prosecuted for multiple counts of felonious sexual penetration. He was later acquitted of all charges. John subsequently filed tort claims against the investigating county agencies and the medical center that examined his children for physical signs of abuse. *Id.* at 143. The defendants sought and were granted summary judgment on the basis that they were immune from liability. John appealed claiming that immunity was inapplicable to any subsequent reporters of child abuse and that their diagnoses and opinions were not given in good faith or within an objective standard of reasonableness. *Id.* at 145.

{¶22} On appeal, the Eighth District Court of Appeals stressed the importance of encouraging reporting child abuse, and stated that mandatory reporters are entitled to immunity, "regardless of whether the report was made in good faith." *Id.* at 147. In addressing Surdel's claims that the reports of abuse in his case were not reasonable, the court stated,

{¶23} "Surdel further argues that immunity will be provided under R.C. 2151.421(G)(1)(a) only if the reporter's suspicions are 'reasonable.' Surdel bases this argument on the text of R.C. 2151.421 (A)(1)(a), which requires that any knowledge or suspicion be immediately reported when there is 'any physical or mental wound, injury, disability, or *condition of a nature that reasonably indicates*

abuse or neglect of the child.' (Emphasis added [by *Surdel* Court.]) \* \* \* We think *Surdel* misconstrues the statute.

{¶24} "The statute describes the kinds of indicators on which the reporter may rely. The qualifying language clarifies that *the duty to report* does not require absolute proof but rather *is triggered when the condition reasonably indicates abuse or neglect*. The statute's focus is on the condition, not the reporter." (Emphasis added.) *Id.* at 150.

{¶25} The fact that the legislature provides that any and all reporters of suspected abuse are entitled to immunity, even if the report was not made in good faith, appears to support Appellant's argument here.

{¶26} Appellant presented his argument based on *Surdel* to the trial court in his motion in limine, but the court rejected his objective suspicion argument. The trial court then instructed the jury to use the subjective standard.

{¶27} In *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, the Ohio Supreme Court concluded that a board of education may be held liable when its failure to report the abuse of a student results in the abuse of another student. During the 1996-1997 school year, Amanda, a ninth grade student at Mansfield Senior High School, advised certain school officials, including the principal, that on three separate occasions her coach and teacher inappropriately touched her and made sexual comments to her. The principal investigated the claims and concluded that Amanda was lying. Her allegations were never reported and she was suspended for harassing her teacher. *Id.* at ¶2-3.

{¶28} Three years later, the same teacher sexually abused another student named Ashley. Ashley's parents filed suit claiming that the school failed to report Amanda's allegations of abuse and that Ashley was injured as a result. Ashley's parents also made a claim based on the negligent retention of the teacher. Id. at ¶5.

{¶29} In considering the applicability of the reporting requirement found in R.C. §2151.421, the Ohio Supreme Court stressed that the legislature designed the statute to promote the early identification of child abuse, stating that it, "clearly encouraged reporting and specifically discouraged the failure to report by imposing a criminal penalty \* \* \* ." Id. at ¶23-24. It further stated that,

{¶30} "Because abused and neglected children lack the ability to ameliorate their own plight, R.C. 2151.421 imposes mandatory reporting duties on 'those with special relationships with children, such as doctors and teachers.' \* \* \* These persons, when acting in their official or professional capacity, hold unique positions in our society." Id. at ¶30.

{¶31} The *Yates* Court concluded that when school officials, "are informed that one of their schoolchildren has been sexually abused by one of their teachers, they should readily appreciate that all of their schoolchildren are in danger." Id. at ¶45. Thus, it concluded that a board of education can be held responsible for its failure to report abuse of a student that results in the subsequent abuse of another student by the same teacher. Id.

{¶32} Although it was not specified in *Yates*' holding, it is clear that the majority of the Supreme Court found that Amanda's statement to her principal that

she was being abused warranted reporting pursuant to R.C. §2151.421. (Justice O'Donnell stressed in his concurrence that whether the reporting statute was violated remained a question of fact for the jury to consider on remand. *Id.* at ¶¶50-51.)

{¶33} The Second District Court of Appeals, in considering the dismissal of a claim against a school official for her reporting of alleged child abuse, noted that, "a school employee, is required to report any reasonable suspicion of child abuse." *Tracy v. Tinnerman*, 2nd Dist. No. 2003-CA-21, 2003-Ohio-6675, ¶11.

{¶34} Appellee argues in response that the legislature has since amended R.C. §2151.421(A)(1)(a), making it clear that the duty to report suspected abuse is an objective person standard. Appellee argues that this amendment clarifying that the duty is objective can only be interpreted to mean the prior version must be viewed subjectively. While courts generally should not look to future versions of a statute in determining legislative intent, the fact that language was added to R.C. §2151.421 making it apparent that the reporting duty is based on an objectively reasonable person standard only bolsters Appellant's argument that the standard was always intended to be objective.

{¶35} Based on the foregoing, the trial court judge in Appellant's case erred in elaborating on the nature of the reporting duty found in R.C. §2151.421. There is absolutely no support, either in the statute itself or in caselaw, for such an interpretation. The trial court should have presented the text of the statute as written for the jury to consider in light of the evidence. Instead, he construed the standard as

subjective without authority to do so and added a layer of interpretation to the jury's deliberations not warranted by law.

{¶36} As will be seen in Appellant's additional assignments of error, the trial court's elaboration was pivotal and appears to have predetermined an outcome at trial prejudicial to Appellant. Thus, this assignment has merit and we hold that the trial court erred in his jury instruction in this matter.

{¶37} Appellant's fourth assignment of error is related to his third. In it, he claims:

{¶38} "The Trial Court Committed Reversible Error When It Allowed Defendant-Appellee/Cross-Appellant's Expert, Kathryn Mercer, Ph.D., JD, MSSA, To Testify As To The Subjective Nature of R.C. 2151.421."

{¶39} In this assignment Appellant takes issue with the trial court's decision to allow Appellee's expert witness, Kathryn Mercer, professor of law at Case Western Reserve Law School, to testify. Appellant filed a motion in limine in an effort to preclude Mercer from testifying, but was overruled.

{¶40} At trial, Mercer testified that she has taught public child welfare workers for approximately 15-20 days annually for 17 years. Her classes cover compliance with the Ohio abuse reporting law. Although she does not actually instruct teachers, Mercer explained that as far as reporting abuse, her training sessions would also apply to a teacher's duty to report, since both teachers and welfare workers are mandated reporters under the same statute. (Tr., pp. 490-491.)

{¶41} Mercer testified that, in her view, a mandatory reporter's knowledge or suspicion of abuse, "is a personal judgment that each person must reach based - - \* \* \* based upon their training, education, their knowledge of the abuse, neglect, and dependency statute, the knowledge of the information they're receiving, and the accuracy, the determination whether that information is accurate." (Tr., p. 498.)

{¶42} Mercer also explained that in determining whether knowledge or suspicion of abuse is present, a mandatory reporter should examine the totality of the circumstances including, "the child's demeanor, the child's behavior, whether there are visible signs of abuse, whether or not the child is truthful[.]" (Tr., p. 500.)

{¶43} Halfway through her testimony, Appellant again objected to Mercer's testimony, arguing that she was invading the province of the judge by explaining the law and that she was invading the province of the jury in reaching ultimate conclusions in weighing the evidence. Out of the presence of the jury, Mercer explained that she spends about one and one-half hours teaching the reporting statute to social workers. During that time, her students read the statute, talk about the statute, and then she allows them to ask questions about their duty to report. In her discussions, she has explained that the duty to report does not necessarily arise just because a child says they have been abused. For instance, she explained that a child may say he is abused because his mother did not allow him to watch television. Accordingly, she advises her social workers in training that they need to look at the situation in its entirety based on their beliefs and any indicators of abuse. (Tr., p. 507.) Thereafter, the judge decided that Mercer was allowed to continue to testify

before the jury about what she teaches, but that she could not give her opinion as to what Marino believed or suspected.

{¶44} Thereafter, and without reading the statute to the jury, Mercer actually told the jury what the mandatory reporting law "says," but her explanation of its content appears incorrect. Mercer stated that the reporting law,

{¶45} "says look at all the circumstances. So if a child - - I teach that if a child would say my parent has hit me with a ruler, the social worker must then assess all the circumstances; what's the age of the child, was it appropriately placed, where was that hit, did it cause a - - a serious disfigurement. The law actually requires, again, child endangering to be not just a bruise, but a serious disfigurement which is either temporary or permanent, and so we, you know, discuss what does that bruise look like, where was it placed, what was the context for which the child was being disciplined, is the child's report accurate, does the person believe the child. So all of that has to be taken into consideration rather than an automatic response upon hearing a particular fact." (Tr., pp. 520-521.)

{¶46} While the first half of Mercer's testimony may have been relevant since she explained her opinion and what she taught her students (although it is not at all clear on what basis she has formed these opinions and abundantly apparent she reads nonexistent conditions into the statute), her testimony went too far when she told the jury what the statute allegedly "says." Contrary to her testimony, R.C. §2151.421 does not state that a person must review the totality of the circumstances. Mercer claimed that "child endangering" requires "serious disfigurement" and "not just

a bruise.” However, R.C. §2151.421 does not once make mention of child endangering and certainly does not require the presence of serious disfigurement. The statute simply requires reporting of any known or suspected, actual or threatened, “physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child[.]” R.C. §2151.421.

{¶47} Thus, Mercer’s testimony wherein she claims to tell the jury, incorrectly, the requirements of statute was erroneous. Although she may have been allowed to testify as to what she teaches regarding the mandatory duty to report, with clarification that she describe on what basis her opinions are formed, she should have been prevented from editorializing about the alleged contents of the statute and testifying as to its contents. The statutory language in R.C. §2151.421 speaks for itself. Thus, Mercer’s testimony should have been strictly and severely limited.

{¶48} Based on the foregoing, the trial court abused its discretion in allowing Mercer to testify to this extent. This error combined with the trial court’s elaboration on the contents of the statute necessitate reversal of the jury’s verdict.

{¶49} Returning to Appellant’s first and second assignments of error, these state:

{¶50} “The Trial Court Committed Reversible Error When It Denied Plaintiff-Appellant/Cross-Appellee’s Motion For Judgment Notwithstanding The Verdict Or, In The Alternative, A New Trial, Under Civ. R. 50 and Civ. R. 59.

{¶51} “The Jury Committed Reversible Error When It Rendered A Verdict Against The Manifest Weight Of the Evidence.”

{¶52} Appellate courts review motions for judgment notwithstanding the verdict ("JNOV") de novo. *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 257, 741 N.E.2d 155. When considering a motion for JNOV, a trial court employs the same standard used in granting a motion for a directed verdict. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679, 693 N.E.2d 271. The evidence is construed most strongly in favor of the nonmovant, who is given the benefit of all reasonable inferences from the evidence. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68, 430 N.E.2d 935. A court must not weigh the credibility of the witnesses when reviewing such a motion. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 504 N.E.2d 19, syllabus.

{¶53} If the court finds that reasonable minds could not differ as to any determinative issue in the case, then the court must sustain the motion. *Id.* However, a motion for JNOV should be denied if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. Civ.R. 50(A)(4); *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334.

{¶54} Appellant argues that when considering all of the evidence, especially the defense representative's admissions, reasonable minds could only have found in favor of Appellant on both counts—negligence and negligence per se. This is true, Appellant argues, especially when we consider that Marino testified she read D.K.'s journal describing his abuse, and as a result, she altered her behavior toward him, deciding she needed to keep a closer eye on him.

{¶55} Appellant also relies on Superintendent McGee's and Principal Mastronarde's testimony in which they agreed that a child who reports abuse in his or her journal is enough to trigger a suspicion of abuse. Thus, Appellant believes he was entitled to JNOV.

{¶56} Appellant also argues that Appellee's totality of the circumstances argument was a red herring. He claims that a teacher would only need to consider the totality of the circumstances in looking at possible abuse if suspicion is present in the first place. Appellant claims that Marino would have had no need to discuss D.K. with his other teachers or to keep a closer eye on him if no suspicion existed.

{¶57} Civ.R. 59(A) lists the grounds on which a new trial may be granted. Appellant argued both at trial and on appeal that he is entitled a new trial pursuant to Civ.R. 59(A)(6). It states in part,

{¶58} "(A) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶59} \*\*\*

{¶60} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;"

{¶61} A trial court has discretion when ruling on a motion for a new trial, and a reviewing court should not disturb its decision absent an abuse of discretion. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321, 744 N.E.2d 759; *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350, 612 N.E.2d 1227. "The term 'abuse of

discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶62} When considering a motion for new trial on weight of the evidence grounds, the trial court must review the evidence presented at trial and consider the credibility of the witnesses and the evidence. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 92, 262 N.E.2d 685. A trial court may grant a new trial only if there is no substantial, credible evidence upon which the jury could have arrived at its verdict. *Sims v. Rosenblatt* (July 31, 2000), 5th Dist. No.1999CA00332.

{¶63} As discussed, a teacher, school board, or other employee of a political subdivision may be held civilly responsible for his or her failure to report known or suspected child abuse in compliance with R.C. §2151.421. *Campbell v. Burton* (2001), 92 Ohio St.3d 336, 750 N.E.2d 539, syllabus. *Campbell* was governed by a former version of R.C. §2744.02 but applies in the instant case since the alleged failure to report D.K.'s abuse occurred in the 1999-2000 school year.

{¶64} Again, R.C. §2151.421(A)(1)(a) states in pertinent part,

{¶65} "No \* \* \* [school teacher; school employee; school authority] who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age \* \* \* has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion[.]"

{¶166} The evidence presented at Appellant's trial reveals the following: D.K.'s fourth grade language arts teacher, Mrs. Marino, testified in Appellant's case-in-chief as if on cross-examination. She testified that before having D.K. in class, Marino was advised that his parents were going through a divorce and that he was very intelligent. Marino assigned journals as filler for her class. She allowed her students to write about whatever they chose, and she sometimes suggested topics. She told her students that she would read their journals, yet she testified that she only spot checked them. (Tr., pp. 14-16.)

{¶167} Marino did not recall what portions of D.K.'s journal that she actually read during his fourth grade year. She explained that she would leaf through a student's journal and read a few entries and make comments on them. However, the fact that she made comments on a certain entry did not mean that she had read all the prior entries in that particular journal. (Tr., pp. 21-22.)

{¶168} In one of D.K.'s early journal entries he asked: "Dear Mrs. Marino. I just wanted to know, do you read what we write everyday right exactly right [sic] after we write it?" She responded in writing, "[n]ot exactly after." (Tr., p. 23.)

{¶169} Marino confirmed that she did read D.K.'s September 20, 1999, entry in which he stated,

{¶170} "Dear Mrs. Marino. I have a problem at my mom's apartment. My mom abuses me for little things, like, once when we had to go to Mother Goose (which is my baby sister's school), my school clothes were in back and [F.] (which is also my half sister) got in back and I started to pound light on the window. My Mom told me

to get in the front and I did. The door was open and she hit me and said, shut the door cause other grown ups were talking outside, and I shut the door. Then she started hitting me and punching me, screaming at me, saying what she was going to do with your stuff? Then she grabbed the bag of my school supplies and threw them up to me and grabbed my school clothes and threw the school clothes with her hand behind them, and since her hand was behind the clothes and purposely punched me in the gut." (Tr., p. 24.)

{¶71} After the foregoing entry D.K. wrote in capital letters, "WARNING! BUT WHATEVER YOU DO, DON'T TELL MY MOM!!!" (Tr., p. 27.) Marino admitted to reading the foregoing entry, but she could not recall whether she talked with D.K. about it. She then stated that she thought she talked with him about it because she recalled that he, "didn't take this journal entry very seriously. He wasn't crying. He wasn't upset. He wasn't scared. \* \* \* He wasn't emotionally upset about it." (Tr., pp. 25-26.)

{¶72} Notwithstanding, Marino said that she talked with D.K.'s other teachers about him, but she never contacted children services and she never reported his alleged abuse. Instead, she responded in writing to D.K.'s entry stating, "[o]kay. Sometimes adults have personal problems that they need to talk to someone about. They sometimes lash out \* \* \* at innocent people without meaning to." (Tr., p. 28.)

{¶73} Thereafter, Marino admitted on cross-examination that D.K.'s use of capital letters indicated a, "possible fear of his mother." (Tr., p. 29.) Marino also

agreed that fear of a parent, screaming at a child, throwing things at a child, and punching a child in the stomach are also possible signs of abuse. (Tr., p. 29.)

{¶74} The Youngstown City School's child abuse policy and child abuse pamphlet from the school Assistant Superintendent were introduced during Marino's testimony. (Pl's Exh. 6 and 7.) She was fully aware of the school's policy. The policy was read in part to the jury,

{¶75} " 'When considering the reporting of suspected child abuse or neglect, it is important to remember these facts: First, the law protects those authorities who report what they in good faith believe to be child abuse or neglect. The person who reports the abuse is in no way responsible for the final decision concerning the child.

{¶76} "Number two, it is far better to report a suspected abuse and make an error in judgment than to let an actual case of abuse go undetected and unreported.'

{¶77} " \* \* \*

{¶78} "Now, number three. 'Any ability to help the abused or neglected child by the proper agencies usually will correlate directly with the timeliness of the reporting.' " (Tr., p. 33.)

{¶79} Marino had reported suspected child abuse twice before during her teaching career. She was incorrect about the abuse both times. She stated that she did not believe that D.K. was being truthful in his September 20th journal entry about his abuse. (Tr., pp. 34-36.)

{¶80} Further, it was brought out at trial that Marino stated in her discovery deposition that she did not believe that a child could be a victim of child abuse

without showing signs of physical abuse. Notwithstanding, after reading D.K.'s September 20, 1999, journal entry she decided to keep a closer eye on him. Yet Marino's idea of keeping a closer eye on D.K. did not involve reading his journal on a more regular basis. (Tr., pp. 37-38.)

{¶81} Marino wholly denied reading D.K.'s next journal entry, which stated, "[d]ear Mrs. Marino: In the letter about my mother, what you wrote back was not true. My mother has no problems about anything. She lies, says the 'f' word a lot in front of kids, calls us assholes. She beats me for anything. I say, and I'm scared to do anything or say anything. She also says I act like a girl." (Tr., pp. 38-39.)

{¶82} At trial Marino also denied reading another entry written in March, which stated,

{¶83} "Mrs. Marino. Happy birthday. I hope you have a nice birthday today. I hope nothing bugs you, gets on your nerves or upsets you. I want to tell you something. My mom really does abuse me. She beat me with the leather belt and left a big purple mark on my butt for almost a week. What should I do? [D.K.]" (Tr., pp. 41-42.)

{¶84} Marino also denied reading D.K.'s May 1, 2000, journal entry, which stated, "[d]ear Mrs. Marino. How come you don't answer my letters anymore? Can you start answering some of my letters or write comments about them? How come you answered my questions before and not now? [D.K.]" (Tr., p. 42.)

{¶85} Benjamin McGee was Superintendent of the Youngstown City Schools during the 1999-2000 school year. He testified at trial that if a student or child

advised him or a city teacher of abuse, that would be a reason to be concerned and suspicious. He also confirmed that the Youngstown City School policy was to err on the side of reporting if there was ever a doubt regarding abuse. (Tr., pp. 49-50.)

{¶86} McGee also established the school policy provided that a teacher has, "a moral responsibility and a legal obligation to conscientiously observe and report possible abuse and neglect that is encountered in the performance of professional duties." (Tr., p. 50.)

{¶87} Marilyn Mastronarde was the principal of West Elementary during D.K.'s fourth grade school year in 1999-2000. Mastronarde agreed that if a student reports they have been abused, hit, or punched, then a teacher would have a case of suspected child abuse. She also stated that teachers have an absolute duty to report suspected child abuse. (Tr., p. 63.)

{¶88} D.K.'s father Donald also testified. He explained that he was divorced from D.K.'s mother, Melissa, and they initially had shared parenting. Once he started school, D.K. lived with Melissa during the school week through his fourth grade year. D.K. stayed with Donald and his parents from Friday evenings through Monday mornings until Donald remarried.

{¶89} At the end of D.K.'s fourth grade year, he told his grandmother about his journal. Following the disclosure of his abuse, D.K. required professional help. He was given medication for depression and post-traumatic stress disorder. D.K. also suffered from terrible nightmares. Donald was given full custody of D.K. as a

result of the reports of abuse, and D.K.'s mother had limited supervised visitation with him. (Tr., pp. 68-70, 78, 79, 85.)

{¶90} Prior to reading D.K.'s journal, Donald had no suspicions that his son was being abused. He never saw physical signs of abuse. Donald also revealed that Melissa had been threatening to move D.K. to Columbus at the end of his fourth grade school year. (Tr., pp. 81, 90.)

{¶91} D.K. also testified at trial. He explained that his mother mistreated him by beating him with various objects and calling him names. He recalled abuse by his mother from the time he was about two or three years old. (Tr., p. 119.) He testified that he told his fourth grade teacher, Mrs. Marino, at West Elementary about the abuse in his journal, but that he never directly talked to her about it. When he tried to talk with her, she told him that she was busy. (Tr., p. 105.) D.K. said he wrote about the abuse in his journal because he did not think his mother would find out. Had he told his father or grandparents, he knew they would have confronted his mother. (Tr., p. 107.)

{¶92} D.K. explained that he trusted Marino and that she told his class that she would read their journals. He said that his mother would often threaten him not to tell anyone about the abuse. On one occasion, D.K. clogged the toilet, and in response, his mother punched him, pushed him to the ground and started punching and slapping him. As a result, D.K. had continual problems going to the bathroom because he did not want to get in trouble. (Tr., pp. 107, 110, 111.)

{¶93} At the end of D.K.'s fourth grade year, his mother began packing boxes for their move to Columbus. He said he was afraid that she would read his journal, so he told his grandmother about it. (Tr., p. 113.)

{¶94} Donald's mother, (D.K.'s grandmother) Sandra Kraynak, also testified. After Donald and Melissa's divorce, D.K. and Donald lived with her for quite some time. She and her husband helped take care of D.K. even after Donald remarried and moved out with his new wife. Toward the end of D.K.'s fourth grade year, Sandra noticed Franklin County plates on D.K.'s mother's car. Sandra mentioned it to her husband and D.K. became hysterical. He then told her about his mother's abuse and the journal, stating that he thought he would get help. (Tr., pp. 132-133.)

{¶95} The next day Sandra sent a note to school with D.K. asking Marino not to give D.K.'s journal to his mother. She also called the principal and went to pick up the journal. The next day, she and Donald pulled D.K. out of school early. He has lived with his father ever since. (Tr., pp. 134-135.)

{¶96} Sandra explained that she had seen bruises on D.K.'s arms and legs over the years, but he always explained them away. (Tr., p. 144.)

{¶97} Dr. Battista, D.K.'s main treating physician, died prior to trial. His discovery deposition was read into evidence. Battista was a certified educational school psychologist and had his doctorate as a counseling psychologist. He was also a school guidance counselor and had his master's degree in education. (Tr., pp. 174-175, 178.)

{¶198} Battista was contacted by Appellant's counsel to evaluate D.K. for purposes of this litigation. He was also contacted by D.K.'s father for help in dealing with the abuse. (Tr., p. 191.) Battista concluded in his report that D.K. was hoping that Mrs. Marino would help him. Contrary to D.K.'s testimony, Battista concluded that D.K. was unable to really verbalize his abuse until after his counseling. (Tr., pp. 221-224, 241.)

{¶199} Battista also testified that even if a teacher has no evidence of abuse, a teacher must report any abuse reported to them by a student so the allegation can be investigated by the proper authority. He explained,

{¶100} "Q So if somebody comes in and says, so and so's being abused, whether she believes it's credible or not, she's got to report it, is that your belief?"

{¶101} "Yes, must. Not just my belief, it's a must." (Tr., p. 228.)

{¶102} Battista concluded that Marino was neglectful and she had an absolute duty to report D.K.'s alleged abuse when she read his first journal entry in September of 1999. (Tr., pp. 241, 242, 255-256.)

{¶103} Professor Paul Zions also testified on Appellant's behalf. He has a master's degree in elementary education and a doctorate in educational psychology. (Tr., pp. 274-275.) Zions has published several books, including one on how to teach disturbed and abused students and one on how to deal with children with emotional problems. (Tr., pp. 277-278, 280.)

{¶104} In reviewing D.K.'s journal, Zions testified that the fact that D.K. wrote, "[m]y mom abuses me \* \* \*" was enough to trigger a suspicion of abuse

requiring a teacher to report. (Tr., p. 293.) Zions also concluded that the fact that D.K. wrote in all caps, "WARNING! BUT WHATEVER YOU DO DON'T TELL MY MOM" presented a suspicion of abuse because it shows a fear of his mother. (Tr., p. 294.) Zions felt that Marino's response that sometimes adults have problems was inadequate since it explained away her behavior. He opined that Marino failed her statutory duty to report. (Tr., pp. 294-296.)

{¶105} Zions was unaware that Marino had assigned this journal as a creative writing journal. Nonetheless, even in the creative writing context, he felt that D.K.'s journal necessitated the reporting of suspected abuse. (Tr., pp. 303, 307.) Zions stated on redirect,

{¶106} "A It doesn't matter to me on any level the purpose of the assignment.

{¶107} "Q Why not?

{¶108} "A It - - because of the student's responses. It doesn't matter if he wrote this on the back of a test, it doesn't matter if he wrote this when he was doing a book report on *Of Mice and Men*. It doesn't matter. When a student tells you that these things are happening, you have to report it, especially repeated times.

{¶109} " \* \* \*

{¶110} "A In my opinion, virtually everybody who reads this [D.K.'s journal entries], whether they are teaching or whether they're learning to be teachers, would say that there is a possibility, a possibility of child abuse going on here[.]" (Tr., pp. 321-322.)

{¶111} He further explained that D.K.'s potential motives for writing that he was abused are irrelevant. (Tr., p. 323.)

{¶112} Dr. Stanley Palumbo, a licensed psychologist, testified for the defense. Palumbo has his PhD and is a licensed clinical psychologist in Ohio. (Tr., p. 349.) Palumbo reviewed the materials regarding D.K. and interviewed him along with his father and stepmother. (Tr., pp. 352, 355.)

{¶113} Palumbo testified that the delay caused by Marino's failure to report the alleged abuse did not cause any "lasting effects." (Tr., p. 365.) He further stated that he really did not have an opinion as to whether the delay caused D.K. any permanent damage. In his last appointment with D.K., D.K.'s responses corresponded with those of an average child. (Tr., pp. 367, 408.)

{¶114} Marino testified on direct for the defense. She explained that she actually had D.K. in class for about one hour and fifteen minutes four days a week. She was not D.K.'s homeroom teacher. (Tr., pp. 418-419.) She testified that she assigned the journal for "creative and expressive purposes," and that it was used as filler for about ten minutes one to two times per week. She did not actually grade or make grammar corrections in the journals. (Tr., pp. 420, 422.)

{¶115} Marino explained that in looking for signs of abuse in a child, she generally looked at a student's behavior, physical signs of injury, emotional and physical well being, and a student's cleanliness. (Tr., pp. 423-424.) She explained that D.K. was a very likeable student who had good writing and reading abilities. She stated that throughout the year there were no signs she noticed of abuse by his

mother, indicating, "I would figure he might be crying or depressed and unhappy; in fact, I've watched [D.K.] on occasions with other children joking and laughing. He enjoyed that. He loved to talk to the other kids. High-spirited." (Tr., pp. 427-428)

{¶1116} Upon reading D.K.'s September 20, 1999, journal entry, Marino explained that she was not alarmed and did not feel the need to report because she knew D.K. for a few weeks in class, and she did not suspect abuse. (Tr., p. 435.) In going through signs of abuse listed in a school pamphlet, Marino explained that D.K. did not show any outward signs of abuse. (Tr., pp. 431-432.)

{¶1117} However, she then stated that she kept his journal entry in mind, and she, "looked at him in a more careful way than I would everybody else to make sure that maybe I didn't over- - overstep my boundaries of is this child abused or not." (Tr., p. 437.)

{¶1118} At one point, Marino even asked the other teachers if they had any concerns about D.K. in the classroom. His other teachers felt he was doing well. (Tr., pp. 439-440.) Yet Marino never showed his journal to any other teachers. She said she thereafter saw nothing concerning D.K. that led her to believe that he was being abused. (Tr., pp. 438, 465.)

{¶1119} On direct, Youngstown School Superintendent Benjamin McGee explained he believed the school's policy on reporting abuse took a subjective approach. (Tr., p. 475.) Thereafter, however, McGee agreed that if a student told him that he had been abused he, "would be concerned and suspect abuse." (Tr., pp.

481-482.) He also agreed that a teacher has a duty to report any suspicion of abuse, but he then said that a teacher should justify his or her suspicion. (Tr., pp. 482-483.)

{¶120} As addressed previously, Professor Kathryn Mercer from Case Western Reserve Law School also testified at trial. She explained that she teaches the duty to report suspected abuse to social workers in training. She teaches them that the duty to report is triggered by a subjective suspicion of abuse in looking at the totality of the circumstances. (Tr., p. 500.)

{¶121} After reviewing the evidence provided to this Court under the applicable standards for motions for a new trial and JNOV, we find there was evidence upon which reasonable minds could come to different conclusions on Marino's duty to report the abuse in this case. While Marino's admissions are troubling and it is difficult to see how the school officials could believe the district took a subjective belief approach to reporting in reviewing their own materials on the subject, much of this testimony hinges on credibility determinations, exclusively in the province of the trier of fact. Thus, based on the evidence and law provided, the jury's verdict was not clearly against the weight of the evidence. As such, we must hold that Appellant's first and second assignments of error lack merit and are overruled.

{¶122} However, the troubling aspects of the testimony serve to highlight the prejudice to Appellant caused by the erroneous jury instructions and the error in the testimony of Ms. Mercer. Based on our earlier conclusions, it is evident that the trial court erred in presenting the jury's instructions as to the law and in allowing an expert to testify about the contents of the reporting statute. When the record reflects that

this matter became a battle of evidence, both as to expert testimony and credibility, it is readily apparent that an instruction causing the jury to apply an erroneous standard and an expert who testifies incorrectly as to the substance of the law and makes ultimate conclusions as to fact and law can only serve to prejudice Appellant. Accordingly, the errors necessitate a new trial in this matter.

{¶123} Appellee's sole assignment of error in its cross-appeal asserts:

{¶124} "THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE GENERAL NEGLIGENCE CLAIMS AGAINST APPELLEE/CROSS-APPELLANT."

{¶125} Appellee argues that the trial court erred in allowing Appellant to present his claims based on common law negligence to the jury since the public-duty rule/special relationship theory of liability was abrogated by R.C. §2744.02.

{¶126} In *Sawicki v. Village of Ottawa Hills* (1998), 37 Ohio St.3d 222, 525 N.E.2d 468, the Ohio Supreme Court addressed the public duty rule as it relates to political subdivision immunity and its special duty exception. Quoting an earlier source the *Sawicki* Court explained,

{¶127} " \* \* \* [I]f the duty which the \* \* \* [law] imposes upon \* \* \* [a public official] is a duty to the public, [then] a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an

individual wrong, and may support an individual action for damages.' " (Citation omitted.) Id. at 230.

{¶128} The existence of a special relationship merely establishes a duty. Thereafter, a plaintiff must still establish the remaining negligence elements, i.e., breach of that duty, and a resulting injury proximately caused by the breach. Id. at 230. *Sawicki* adopted four elements needed to demonstrate a special duty or relationship:

{¶129} "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." *Sawicki*, at paragraph four of the syllabus.

{¶130} Appellee directs this Court's attention to several decisions in support of its contention that R.C. Chapter 2744 abrogated the special relationship exception. In *Sudnik v. Crimi* (1997), 117 Ohio App.3d 394, 397, 690 N.E.2d 925, the Eighth District Court of Appeals noted that, "[t]he public duty rule as it applies to municipalities, however, has been superseded by the enactment of the Political Subdivision Tort Liability Act, codified at R.C. Chapter 2744 *et seq.*"

{¶131} The Tenth District Court of Appeals in *Franklin v. Columbus* (1998), 130 Ohio App.3d 53, 59-60, 719 N.E. 2d 592, noted that R.C. §2744.01 *et seq.* became effective November 20, 1985, and that it provides its own framework for

analyzing liability of political subdivisions. Thus, “[g]iven the all-encompassing nature of the Act, this court has consistently and repeatedly held that its passage abrogated the common-law public duty rule and its corresponding special duty exception in the context of political subdivision liability.” *Id.* at 59.

{¶132} In *Amborski v. Toledo* (1990), 67 Ohio App.3d 47, 51, 585 N.E.2d 974, the Sixth District Court of Appeals stated, “[o]ur analysis of R.C. 2744.02 indicates that the intent of the statute was to codify the concept of sovereign immunity and, therefore, to abrogate the public duty/special duty theory of municipal liability.”

{¶133} Further, in *Barr v. Freed* (1997), 117 Ohio App.3d 228, 235, 690 N.E.2d 97, this Court concluded that “the adoption of R.C. Chapter 2744 abrogated the special-relationship theory of liability.”

{¶134} Regardless, Appellant directs our attention to the 2004 Ohio Supreme Court decision in *Yates v. Mansfield*, *supra*. In discussing whether the duty to report the abuse of one child can create a duty toward a subsequent victim of abuse by the same individual, *Yates* referenced the public duty doctrine. It concluded that the public duty doctrine cannot be used as a defense for an agency’s failure to comply with its statutory obligations. *Id.* at ¶32, citing *Brodie v. Summit Cty. Children Serv. Bd.* (1990), 51 Ohio St.3d 112, 554 N.E.2d 1301, paragraph two of the syllabus. In a footnote to that same paragraph, the Supreme Court in *Yates* explained the following,

{¶135} "*Brodie* \* \* \* arose out of events that occurred during that twilight period in the early 1980s when the doctrine of municipal immunity had been judicially abolished, R.C. Chapter 2744 \* \* \* was not yet effective, and the public-duty rule was clearly viable. Since then, we have held that while political subdivisions may be held liable for failure to comply with the reporting requirements of R.C. 2151.421, they are immune from liability for failure to comply with the investigative requirements of R.C. 2151.421. \* \* \* The court has also abolished the public-duty rule with regard to actions against the state brought pursuant to R.C. Chapter 2743, the Court of Claims Act. \* \* \* At present, the public-duty rule remains viable as applied to actions brought against political subdivisions pursuant to Chapter 2744. \* \* \*" *Id.* at fn. 2.

{¶136} Further, the Second District Court of Appeals has recently held that *Yates* confirmed the viability of the public duty rule/special relationship theory of liability in this context. *Cooke v. Montgomery Cty.*, 158 Ohio App.3d 139, 2004-Ohio-3780, 814 N.E.2d 505, ¶63.

{¶137} Based on *Yates*, we can only conclude that the Ohio Supreme Court has confirmed the viability of the public duty rule/special relationship exception as it applies to political subdivisions, at least in regards to R.C. §2151.421. Accordingly, Appellee's cross-assignment of error lacks merit and is overruled. The trial court was correct in allowing Appellant to present his claims based on negligence to the jury.

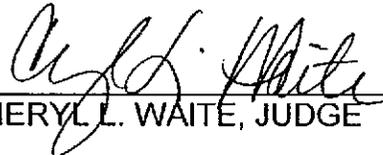
{¶138} In conclusion, we agree that the trial court erred in its subjective interpretation of the teacher's reporting requirement as found in R.C. §2151.421. We also hold that the trial court abused its discretion in allowing Mercer to testify about

the contents and interpretation of the statute. Based on these errors and the evidence before the jury, a new trial is warranted. Accordingly, we hereby reverse the jury's verdict and remand this case to the trial court for a new trial. On remand, the trial court must limit its jury instruction to the statute itself and strictly limit Mercer's testimony should it be offered again.

Vukovich, J., concurs.

Reader, J., concurs.

APPROVED:

  
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CHERYL L. WAITE, JUDGE

