

IN THE SUPREME COURT OF OHIO

WILLIAM DENIHAN, et al.,)
)
 Appellant,)
)
 vs.)
)
)
 JOHN K. O'TOOLE, Personal)
 Representative and Administrator of the)
 Estate of Sydney Sawyer,)
)
 Appellee.)

CASE NO. 2007-0056
On Appeal from the Court of Appeals Eighth Judicial District, Cuyahoga County, Ohio
Court of Appeals
Case No. 087476

APPELLANT SOCIAL WORKER SUPERVISOR TALLIS GEORGE MUNRO'S
MOTION FOR RECONSIDERATION TO ACCEPT JURISDICTION
FOR PROPOSITION OF LAW NO. 1

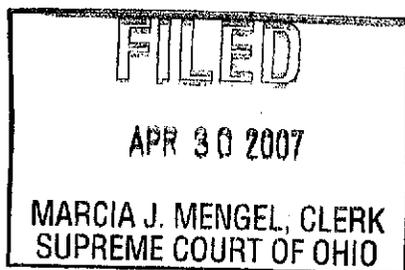
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APPELLANT SOCIAL WORKER SUPERVISOR TALLIS GEORGE MUNRO'S
MOTION FOR RECONSIDERATION TO ACCEPT
JURISDICTION FOR PROPOSITION OF LAW NO. 1

Appellant herein respectfully moves this Honorable Court to accept jurisdiction for Proposition of Law No. 1, pursuant to Supreme Court Rule XI §2(A)(1). This Court has already accepted jurisdiction concerning Appellant's second proposition of law. This Court declined jurisdiction on Appellant's first proposition of law although three Justices of the Supreme Court of Ohio would have extended discretionary appeal on this proposition of law as well. Attached to Appellant's motion herein, is the Supreme Court of Ohio's journal entry deciding Appellant's request for jurisdiction. (See Attached Exhibit 1).

Appellant's appeal herein concerns the issue of whether a Social Worker Supervisor of the Cuyahoga County Department of Children and Family Services should be afforded governmental immunity. In order to reach the decision whether governmental immunity has been improperly denied to this governmental worker, the Court must determine whether this employee acted or failed to act under circumstances where the legislature expressly imposed civil liability on the worker. (i.e. O.R.C. § 2744.03(A)(6)(c)). The Court of Appeals for the Eighth Appellate District has decided that two statutes have imposed liability on Appellant herein.

The statutes that have been accepted for review and will be under scrutiny by this Court are found in Revised Code §2151.421(A)(1)(a) (**Persons required to report injury or neglect; . . .**); and also Revised Code § 2919.22 (A) (**Endangering children**). Appellees herein claim that either of these statutes impose a duty on Appellant Social

Worker Supervisor Munro that would deprive him of governmental immunity under O.R.C. § 2744.03(A). Appellees herein claim that Appellant Munro's failure to report an incident under investigation by the agency to local police; and/or his failure to reach a decision utilizing emergency custody intervention that would have removed the decedent from her home; are duties imposed by statute that deprive him of immunity.

This Honorable Court, however, did not accept jurisdiction concerning the related matter of whether or not the social worker supervisor acted in a "wanton or reckless manner". In failing to address this issue, Appellant has lost immunity pursuant to Revised Code 2744.03(A)(6)(b) and will face a jury trial regardless of the outcome of this appeal. Appellant herein respectfully requests that this Court reconsider the denial of jurisdiction on Appellant's first proposition of law.

A decision concerning the applicability of statutory liability is rendered meaningless unless the statutory liability ruling is also considered in light of the issue that Appellant acted in a "wanton or reckless manner". These two issues are so intertwined as to require consideration together.

Appellant herein believes that this Court did not contemplate how denying jurisdiction in deciding subsection (A)(6)(b) of R.C. 2744.03 could affect the total immunity defense. For instance, should this Honorable Court find that both of the statutes that Appellee argues deprive the Appellant of immunity are interpreted to impose liability on Appellant herein, the effect of such a ruling is in fact a determination that Appellant acted in a "wanton or reckless manner". It is entirely conceivable that the trial court could make a determination that evidence used to establish conduct or omissions

that violated one or both of these statutes, could also be used to determine “wanton or reckless” conduct as a matter of law.

Should this Honorable Court determine that a duty is **not** imposed by either of these statutes, confusion of issues and potentially unintended consequences could also result. Even though statutory liability may be decided under subsection (A)(6)(c) of R.C. 2744.03, Appellee could still argue that evidence concerning the reporting requirement, and failure to seek emergency custody is still relevant for purposes of proving whether or not Appellant acted in a “wanton or reckless manner”. Such a result would deprive Appellant of any potential benefit from this appeal. If the issue of reckless or wanton conduct is not also decided, Appellant may still be subjected to the same evidence at trial which this Court could rule irrelevant with a favorable ruling on subsection (A)(6)(c).

This Honorable Court has consistently applied the Restatement Second of Torts, Section 500 as the definition of whether or not an employee of a governmental entity has acted in a “reckless” manner. However, certain important criteria that appear in that definition has **not** been made a part of Ohio’s requirements. Furthermore, this issue has not been addressed by the Supreme Court of Ohio.

The complete definition of “Reckless Disregard of Safety” found in the Restatement Second of Torts, Section 500 (1965) reads:

“The actor’s conduct is in reckless disregard of the safety of another if he does not 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.” (emphasis added)

This Court has not defined the standard for reckless duty under R.C. 2744.03(A).

When defining duty for a reckless standard something more than a case by case factual determination should be needed before a “duty” is owed. The threshold legal question should be whether the actor ignored a clearly defined obligation to do or not do some act.

In the context of Appellant’s case herein, there should at least be a clear showing that a known written statute, rule, or regulation had been encountered and ignored **before** the fact finder is permitted to determine whether the governmental employee’s acts or omissions: “were with malicious purpose, in bad faith, or in a wanton or reckless manner.” (R.C. § 2944.03(A)(6)(b)). Consequently, both sections 2944.03(A)(6)(b) and (c) must be considered together before defining whether a legal duty is owed.

In *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 610 (1998) the Supreme Court of Ohio adopted the Restatement Second of Torts, Section 500 and applied the “reckless” definition to the governmental immunity statute. Referring to the use of this standard as set forth in *Marchetti v. Kalish*, 53 Ohio St. 3rd 95, 96, 559 N.E.2d 699, 700 (1990) the Supreme Court of Ohio adopted the full definition of reckless as provided in the Restatement Second of Torts Section 500 to (*Id* at 53 Ohio St. 3d 96, 559 N.E.2d 700).

The *Cater* Court (*supra*) did **not** utilize the full definition found in the Restatement Second of Torts. Removing a separate analysis for “duty” in a reckless standard completely ignores an essential part of the reckless test. It virtually blurs the distinction between negligence and recklessness as a meaningless play of words.

CONCLUSION

It is respectfully requested that this Honorable Court reconsider its earlier decision and grant jurisdiction on Appellant's first proposition of law. Extending jurisdiction for both propositions of law will provide Ohio Courts with a clear understanding concerning the relationship between imposition of statutory liability under R.C. 2744.03(A)(6)(c) and the reckless standard found in Subsection (A)(6)(b). In addition, the Supreme Court of Ohio's decision on both propositions of law will fully resolve the application of the immunity defense statute for Appellant Supervisor Munro in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Appellant Social Worker Supervisor Tallis George Munro's Motion for Reconsideration to Accept Jurisdiction for Proposition of Law No. 1* was provided by ordinary U.S. mail, postage prepaid , on this 30th day of April, 2007 to the following:

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FILED

APR 18 2007

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

The Supreme Court of Ohio

John K. O'Toole, Administrator, etc.

Case No. 2007-0056

v.

ENTRY

William Denihan et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal of appellant George-Munro on Proposition of Law No. II. The Court declines jurisdiction to hear the appeal of appellants Department of Children and Family Services, Denihan, and Duncan. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Cuyahoga County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Cuyahoga County Court of Appeals; No. 87476)


THOMAS J. MOYER
Chief Justice

