

IN THE SUPREME COURT OF OHIO

CASE NO.: 2007-0056

On Appeal From The  
Court Of Appeals Eighth Judicial District  
Cuyahoga County, Ohio  
Court of Appeals Case No. CA-06-87476

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

*Plaintiff-Appellee,*

vs.

WILLIAM DENIHAN, et al.,

*Defendants-Appellants.*

TRIAL COURT NO.: CV450833

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MOTION FOR RECONSIDERATION OF APPELLANTS DCFS, DCFS EXECUTIVE  
DIRECTOR WILLIAM DENIHAN AND CASE WORKER KAMESHA DUNCAN

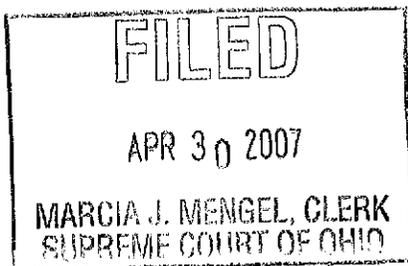
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On April 18, 2007 this Court accepted the discretionary appeal of Co-Defendant/Appellant Tallis George-Munro on Proposition of Law No.: II. By a narrow majority this Court chose not to accept the identical issue for review on behalf of Co-Defendants/Appellants Department of Children and Family Services (“DCFS”), DCFS Executive Director William Denihan and DCFS Case Worker Kamesha Duncan. However, as the legal issues set forth in Co-Appellant’s Proposition of Law II are identical to Appellants’ Propositions of Law I & II and will have the same legal consequences when applied to the Appellants at bar, DCFS, DCFS Executive Director William Denihan and DCFS Case Worker Kamesha Duncan respectfully request this Court to reconsider its order and accept Appellants’ Propositions of Law I and II. As Appellants’ Proposition of Law III is equally compelling and effects a political subdivision’s ability to create and enforce policies of the political subdivision, Appellants also request this Court to consider Proposition of Law No.: III. Finally, Appellants request this Court to reconsider Proposition of Law No.: IV and adopt comments a and f of the Restatement of Torts 2d which requires intent under the circumstances as an element of “recklessness.” The elements of “recklessness” need to be clarified by this Court to avoid political subdivision employees being held personally liable in hindsight for negligent acts.

PROPOSITIONS OF LAW I AND II: WHETHER DCFS EMPLOYEES MUST REPORT REPORTS OF CHILD ABUSE TO POLICE AND OWE A DUTY OF CARE AS “IN LOCO PARENTIS” TO CHILDREN NOT IN THEIR LEGAL CUSTODY?

By accepting Appellant Tallis George-Munro’s Proposition of Law No. II, the Court will review whether the Court of Appeals expanded the legislative duty in criminal statute R.C. § 2151.421(A)(1)(a) by requiring individual social workers to report reports of abuse to the police. The Court will also review whether the Court of Appeals expanded the legislative duty of “in

loco parentis” contained in criminal statute R.C. § 2919.22(E) to individual social workers, including social workers that do not have legal custody of a child. Propositions of Law II on behalf of Co-Appellant Tallis George-Munro is identical to Appellants’ Propositions of Law I and II and will have a direct legal effect on the duties owed by Appellants, especially DCFS Case Worker Kamesha Duncan, DCFS Executive Director William Denihan and DCFS itself.

In this case, Appellee alleges Appellant DCFS and its employees, William Denihan, Kamesha Duncan and Tallis George-Munro are not immune from liability because DCFS employees violated two criminal statutes and therefore liability is waived pursuant to R.C. § 2744.02 (B)(5). R.C. § 2744.02 essentially provides that a political subdivision is immune from liability unless one of five exceptions apply. Appellee alleges the fifth exception contained in R.C. § 2744.02 (B)(5) applies. The fifth exception provides a political subdivision’s immunity is waived if “...liability is expressly imposed upon the political subdivision by a section of the Revised Code...”<sup>1</sup>

In an attempt to create liability, Appellee alleges DCFS’ Supervisor Tallis George-Munro, DCFS Case Worker Kamesha Duncan and DCFS Executive Director William Denihan violated criminal statute R.C. § 2151.421(A)(1)(a) (reporting requirements of individuals for alleged abuse) and R.C. § 2929.22 (E) (duties owed by persons with legal custody of children). Both statutes are criminal statutes that allege a person is liable if the duty imposed in the statute is violated.

Specifically, R.C. § 2151.42 (A)(1)(a) provides:

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...has suffered or faces a threat of suffering ...abuse or neglect of the

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<sup>1</sup> For purposes of this Motion for Reconsideration, Appellants cite the version of R.C. § 2744.02 (B)(5) proposed by Appellee.

child, shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division...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...(Emphasis added).

R.C. § 2151.421 (A)(1)(b) identifies the individuals required to report alleged abuse and includes an “administrator or employee of a certified child care agency or other public or private children services agency.”

R.C. § 2919.22(E) provides that “no person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child...shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection or support...” Thus, Appellee alleges both statutes should be expanded to create a duty of care on DCFS’ Supervisor Tallis George-Munro, DCFS Case Worker Kamesha Duncan, DCFS Executive Director William Denihan and ultimately DCFS. Appellee further alleges that because DCFS’ supervisor, case worker and executive director did not comply with the alleged duties in the two statutes, DCFS is liable for its employees’ actions. See Appellee’s Complaint attached as Exhibit A. Therefore, if this Court reviews whether DCFS Supervisor Tallis George-Munro owes a duty to report reported abuse pursuant to R.C. § 2151.421(A)(1)(a) or owes a duty of “in loco parentis” for children not in his legal custody pursuant to R.C. § 2919.22(E), then the Court’s decision will be binding on the duties owed by DCFS Case Worker Kamesha Duncan, DCFS Executive Director William Denihan and ultimately DCFS. If DCFS Supervisor Tallis George-Munro does not owe a legal duty to Appellee pursuant to R.C. § 2151.421(A)(1)(a) and R.C. § 2919.22(E), then DCFS Case Worker Kamesha Duncan, DCFS Executive Director William Denihan and DCFS do not owe a legal duty to Appellee. Therefore Appellants, DCFS Case Worker Kamesha Duncan, DCFS Executive Director William Denihan and DCFS request this

Court to reconsider its decision and accept jurisdiction of the identical legal issues contained in Appellants' Propositions of Law I and II.

B. PROPOSITION OF LAW III: WHETHER A POLITICAL SUBDIVISION IS IMMUNE FOR THE ENFORCEMENT AND IMPLEMENTATION OF POLICIES AND PROCEDURES OF THE POLITICAL SUBDIVISION?

The plain language of the Ohio Revised Code dictates that a political subdivision is entitled to immunity even if one of the exceptions in R.C. § 2744.02 (B) exists if:

the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employer. R.C. § 2744.03(A)(3). (Emphasis added).

As argued in the courts below and noted in Appellee's memorandum in response, the Revised Code also requires DCFS' immunity reinstated if the damages resulted from an employee's discretionary use of resources pursuant to R.C. § 2744.03(A)(5).

In this case Appellee alleges DCFS is liable for recklessly "establishing, implementing and utilizing the programs and protocol for responding to, investigating, assessing and disposing of allegations of child abuse." See ¶ 54 of Count 6 of Appellee's Complaint. Specifically, Appellee criticizes DCFS' policies and procedures set forth in the SDM risk assessment protocol used to investigate child abuse and DCFS' enforcement and implementation of the policies. However Appellee effectively concedes in its memorandum in response that DCFS' adoption of the SDM protocol is a policy-making decision when it stated the "decision to adopt SDM as the risk assessment tool to be used by DCFS may be a policy-making one." See p. 11 of Appellee's Memorandum in Response; see also p. 9 of the Court of Appeals' Opinion. However Appellee

This Court has held that “the standard of showing wanton misconduct is, however, high.” *Fabrey v. McDonald Village Police Department*, 70 Ohio St. 3d 351, 356, 1994-Ohio-368, ¶s 12, 13. This Court in *Hawkins v. Ivy* (1977), 50 Ohio St. 2d 114, 363 N.E. 2d 367, syllabus, held that wanton misconduct was the failure to exercise any care whatsoever. This Court has also held that “mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition of perversity in the part of the tortfeasor.” *Roszman v. Sammett* (1971), 26 Ohio St. 2d 94, 97-97, 269 N.E. 2d 420, 422. “Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury.” *Id.* at 97, 269 N.E. 2d at 423.

This Court needs to address and interpret the elements of “recklessness” in the context of R.C. § 2744.03 (A)(6). Specifically, this Court needs to address whether a political subdivision employee must act with intent to create an unreasonable risk of harm under the circumstances in order for the employee to be personally liable.

This Court adopted the standard definition of “recklessness” contained in Section 500 of the Restatement of Torts 2d in 1990 when analyzing facts in the context of sporting events. *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 559 N.E.2d 699 (citing Comments f and g with approval at FN 3); *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705. The standard definition of “recklessness” includes:

the actor’s conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead to 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.  
*Marchetti, supra.*

Lower Courts in Ohio have analyzed the elements of “recklessness” in the context of R.C. § 2744.03 (A)(6) and recognized that Comment f to Section 500 of the Restatement of Torts 2d provides that for an act to be “reckless,” the act must be intended by the actor. Courts also recognize Comment a of Section 500 of the Restatement of Torts 2d that requires the “risk must itself be an unreasonable one under the circumstances”. *Thompson* at p. 105. Thus, lower courts have held “wanton or reckless’ misconduct under R.C. § 2744.03 (A)(6) may be viewed as the functional equivalent of ‘willful or wanton misconduct’. . .” *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 509, 605 N.E.2d 445; *Masters v. City of Lorain, Ohio* (May 14, 1998), Eighth App. No. 72891; *Wagner v. Heavlin* (2000), 136 Ohio App.3d 719, 732, 737 N.E.2d 989.

The current definition of the term recklessness fails to require language that the act must be “intended” by the actor “under the circumstances” as articulated in Comment f and a of Section 500 of 2 Restatement of Torts 2d (1965) and analyzed in *Thompson, supra* and *Brockman, supra*. Absent this court’s clarification of the elements of “recklessness,” political subdivision employees such as executive directors, supervisors and case workers’ actions will always be second guessed with hindsight and held to the functional equivalent of a negligent standard. Therefore, the individual DCFS employees in this case request this Court to reconsider Appellants’ Proposition of Law No. IV and clarify the terms “wanton or reckless” as contained in R.C. § 2744.03 (A)(6).

#### CONCLUSION

For the foregoing reasons, Appellants DCFS, DCFS Executive Director William Denihan and DCFS Case Worker Kamesha Duncan request this Court to reconsider their Memorandum in Support of Jurisdiction.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing document was sent by regular U.S. mail this 30 day of April,

2007 to:

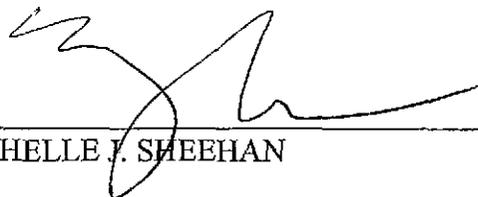
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