

IN THE SUPREME COURT OF OHIO

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

Appellee,

v.

WILLIAM K. DENIHAN, et al.,

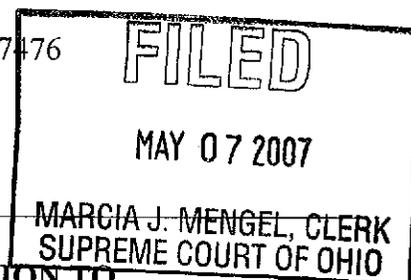
Appellants.

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: Case No. 07-0056
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: On Appeal from the Cuyahoga
: County Court of Appeals,
: Eighth Appellate District
:
:

: Court of Appeals

: Case No. CA-06-87476
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APPELLEE'S MEMORANDUM IN OPPOSITION TO
APPELLANTS' MOTIONS FOR RECONSIDERATION

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INTRODUCTION

On April 18, 2007, the Court declined to hear the appeal of the Department of Children and Family Services (“DCFS”), its Executive Director William Denihan (“Denihan”), and social worker Kamesha Duncan (“Duncan”)(herein collectively “DCFS Appellants”). The Court also declined to hear the appeal of Tallis George-Munro (“Munro”) on Proposition of Law I, but accepted George-Munro’s appeal on Proposition of Law No. II. DCFS Appellants have now moved the Court for reconsideration, essentially arguing that the Court’s decision is inconsistent, wrongly asserting that their Proposition Nos. I and II are “identical” to George-Munro Proposition No. II. DCFS further improperly reargues its position as to Proposition No. III, contending that it is immune from liability for recklessly implementing its risk assessment protocol and failing to train and supervise its employees in investigating child abuse cases. Finally, each of the individual Appellants improperly reargue and reframe their propositions with respect to Appellee’s claims for their recklessness. (DCFS Appellants Proposition Nos. IV and George-Munro Proposition I). They now ask the Court to redefine the meaning of “recklessness” so as to eliminate it as an exception to individual employee immunity. For the reasons set forth herein and in Appellee’s Memorandum in Response, none of the issues presented by the Appellants rise to matters of great public or general interest warranting the Court’s attention.

ARGUMENT

A. The Motion for Reconsideration of Appellants DCFS, Denihan & Duncan Should Be Denied

1. Propositions of Law I and II

The Court has accepted George-Munro’s appeal on Proposition of Law No. II:

The Appellate Court Erred in Holding That Defendants Munro and Duncan Were Not Immune From Liability for Failing to Report Suspected Child Abuse to Police Authorities, Thereby Creating a Duty Not Contemplated by the Legislature in R.C. Section 2151.421(A)(1)(a); or Failing to Provide “In Loco Parentis” Duty of Care,

Thereby Creating a Duty Not Contemplated by the Legislature in R.C. Section 2919.22(A).

DCFS Appellants seek reconsideration of the Court's determination not to hear their Propositions of Law I and II:

- I. DCFS and its Employees Do Not Have a Legal Duty to Report Reported Claims of Abuse to the Police Pursuant to R.C. 2151.421; and
- II. DCFS and its Employees Are Not "In Loco Parentis" to Children they Investigate for Alleged Abuse

DCFS Appellants wrongly complains that its Propositions I and II are "identical" to George-Munro's Proposition No. II, and presumptuously suggest that the Court's decision not to hear its propositions is inconsistent and illogical. Further, DCFS continues its attempt to expand the issues beyond the parameters of the appellate court's decision.

While Appellee disagrees that George-Munro Proposition II should be heard by the Court at all as a matter of public or great general interest, Appellee recognizes that it is the sole province of this Court to determine the issues it will hear. Moreover, it is the Court's exclusive prerogative to direct the manner in which such issues are framed. As litigants do not participate in the Court's conferences, nor in each jurist's thought process, Appellee will be not so bold as to presume the specific reasons that the Court has determined the issues it will decide. However, in addressing DCFS Appellants' complaint, Appellee notes that there are several factors which distinguish DCFS Appellants Propositions I and II from George-Munro's Proposition II.

Not only are the propositions dissimilar in wording, they are dissimilar in substance. DCFS Proposition I ultimately seeks a bright line determination that it and its employees do not have a legal duty in any circumstance to report allegations of child abuse, which are made to DCFS, to the police. Likewise DCFS Proposition II ultimately seeks a categorical determination that DCFS and its employees do not occupy an "*in loco parentis*" relationship with children who are the subject of their

child abuse investigations in any case unless DCFS already has legal custody of the child. On the other hand, George-Munro Proposition II seeks review of much narrower, fact specific issues - first, whether, as he contends the appellate court found, George-Munro had a duty under R.C. 2151.421 to report his knowledge of the abuse of Sydney Sawyer to the police; and second, whether Munro occupied an *in loco parentis* relationship with Sydney or had custody or control over her so as to trigger a duty of care and protection within the meaning of R.C. 2919.22. Importantly, the Court of Appeals' decision cannot be read as broadly as DCFS claims since this case was clearly decided under the former versions of R.C. 2744.02(B)(5) and 2744.03(A)(6)(c). As such, its application is limited only to claims accruing before the April 9, 2003 effective date of the amendments.

As is apparent from the court of appeals' opinion, its decision was focused on the reckless nature of the conduct of each of the Appellants, and as the court noted, this case is "fact specific." The issues raised by George-Munro are factually driven. Moreover, the fact pattern as to each of the Appellants in this case is different as is each individual Appellant's role, responsibilities, knowledge and experience. By way of example only, Duncan personally observed Sydney's injuries and exercised physical custody and control over her for several hours, whereas George-Munro saw photographs and spoke to several people concerning the nature and extent of Sydney's injuries. Duncan personally interviewed Sydney's mother, whereas Munro did not speak to her. DCFS Appellants' suggestion that the issues are identical as to each of George-Munro, Duncan, Denihan and DCFS is to suggest that the Court did not appreciate the jurisdictional memoranda files by the parties.

DCFS is correct in that it may be held liable for George-Munro's violation of statutory his duty to report under R.C. 2151.421 and for his creation of a substantial risk to the health and safety of Sydney Sawyer in violation of R.C. 2919.22. However, having conceded that George-Munro was

not acting outside the scope of his employment, DCFS' interest in the issue is only a derivative one and that interest is more than adequately represented by George-Munro's appeal on Proposition II.

2. Proposition III

For its third Proposition of Law, DCFS asked that the Court review whether:

DCFS Is Immune for Discretionary Policymaking Decisions Pursuant to R.C.
2744.03(A)(3)

DCFS' Memorandum in Support of Jurisdiction argued that the Court of Appeals ignored the defense contained in R.C. 2744.03(A)(3), and that immunity may be reinstated if the conduct of the employee giving rise to the claim was within the employee's discretion with respect to policymaking, planning or enforcement powers.

DCFS' motion for reconsideration improperly reargues its position by claiming third tier immunity for its reckless failure to train, supervise and monitor its employees in the use of its safety and risk assessment protocol and its reckless assignment of inexperienced social workers to the intake unit to handle Priority 1 emergency referrals. DCFS wrongly claims that such decisions fall within the "enforcement powers" defense under R.C. 2744.03(A)(3). In doing so, DCFS continues to ignore the Court's decision in *Cater v. City of Cleveland*, (1998), 83 Ohio St.3d 24, 697 N.E.2d 610 and the express statutory language in R.C. 2744.03(A)(5) that reckless exercises of "judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources" are not entitled to third tier immunity. Particularly appropriate to this case is the concurring opinion in *Cater* that "[i]t follows that where decisions as to these matters are made recklessly, the 'judgment or discretion' defense is not available to a political subdivision." *Id.* at 35.

In this case, there is compelling evidence of DCFS and Denihan's recklessness demonstrating genuine issues of material fact as to matters falling within R.C. 2744.03(A)(5). As noted in the Court of Appeals' decision:

Specifically, [Denihan and DCFS] were reckless in assigning an inexperienced worker to the intake unit without proper supervision; instituting structured decision making ("SDM"), a safety and risk assessment model, without worker demonstration of knowledge, skills and clinical judgment necessary to implement the new process; allowing Munro to continue in his supervisor position without demonstrating supervisory knowledge and skills to implement SDM; not providing independent medical examiners to determine the nature of the physical condition of children when abuse is suspected; not providing a quality controls system to ensure that in Priority 1 cases child safety has been determined; and not providing a mechanism to determine if SDM was being properly implemented.

O'Toole v. Denihan, et al., 2006-Ohio 6022 at ¶ 6.

An immense amount of power is given to public children service agencies such as DCFS. In many instances, it can remove a child from his or her home without prior judicial oversight. Similarly, as in this case, it can return a helpless abused child to the source of the abuse without judicial intervention, and as Appellants would contend, without even notifying law enforcement that a crime of violence has been committed against a four year old child. Despite the tremendous power and attendant responsibility it holds, DCFS urges the Court to grant it absolute immunity for its reckless operations, and its motion for reconsideration on Proposition of Law No. III should be denied.

3. DCFS Appellants' Proposition of Law No. IV

By a 6:1 vote, the Court declined to hear DCFS Appellants' Proposition of Law No. IV:

Political Subdivision Employees are Not Personally Liable for Operations or Procedures of the Public Entity

Therein, Appellants Denihan and Duncan wrongly argued that their conduct was not reckless as a matter of law and that the Court of Appeals applied a negligent standard of culpability. In their

motion for reconsideration, not only do Denihan and Duncan reargue their position, they now also argue that the Court needs to clarify the definition of “recklessness” in the context of R.C. 2744.03(A)(6)(b) to mean that the employee “must act with intent to create an unreasonable risk of harm under the circumstances” and rely on Comments f and a of 2 Restatement of the Law 2d, Torts (1965), Section 500. This position is in direct conflict with *Brockman v. Bell*, (1992), 78 Ohio St.3d 508, 605 N.E.2d 445, cited by DCFS Appellants. There, the court of appeals stated:

Comment *f* to Section 500 compares recklessness with intentional misconduct, providing that “[w]hile an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it.

Id. at 516.

Appellee respectfully submits that there is no distinction between the standard of recklessness applied by the Court of Appeals in this matter and the standard applied in both *Cater* and *Thompson v. McNeill*, (1990) 53 Ohio St.3d 102, 559 N.E.2d 705. This Court need not clarify the obvious and should not accept Denihan and Duncan’s invitation to equate recklessness with intent to harm.

B. The Motion for Reconsideration of Appellant George-Munro Should Be Denied

Appellant George-Munro asks the Court to reconsider its decision not to entertain his appeal on Proposition of Law No. I:

The Appellate Court Erred in Holding That Defendants Munro and Duncan Acted in a “Wanton or Reckless Manner” When the Defendants Investigated a Complaint of Child Abuse and Made a Professional Decision Not to Petition the Juvenile Court of Cuyahoga County for Emergency Custody

Appellant George-Munro complains that he will face a jury trial regardless of the outcome of this appeal and that the issues are so intertwined as to require consideration together. However, any one of the exceptions contained in R.C. 2744.03(A)(6) may be utilized to defeat immunity of a political subdivision employee. There are two (2) exceptions which apply to Appellant George-Munro. First, R.C. 2744.03(A)(6)(c) provides an exception where a section of the Revised Code expressly imposes

liability. As the Court is aware, Appellee submits that R.C. 2151.421 (along with its penalty provision, R.C. 2151.421.99) and R.C. 2919.22 (Child Endangering) expressly impose liability in this case. Further, this Court has held that the standard of mental culpability under R.C. 2919.22, although not stated on the face of the statute, is one of recklessness. *State v. McGee*, (1997) 79 Ohio St.3d 193, 195, 680 N.E.2d 975, 977. Second, R.C. 2744.03(A)(6)(b) provides an exception where the employee's conduct is wanton or reckless. Simply because the evidence as to the claims against George-Munro will overlap does not mean that the exceptions to immunity in subsections (b) and (c) must co-exist in all cases. Indeed, a political subdivision employee may be found to have engaged in reckless conduct, although not violating a section of the Revised Code which imposes liability.

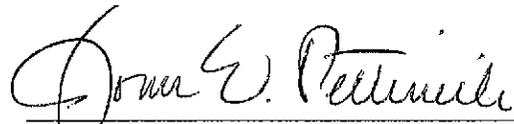
George-Munro further wrongly suggests that the Court should adopt an even narrower definition of recklessness than that argued by the DCFS Appellants. Appellant George-Munro incredibly contends that whether conduct amounts to recklessness should not be a factual determination on a case by case basis. Rather, he suggests that the Court should require a showing that "a known written statute, rule or regulation has been encountered and ignored before the finder of fact is permitted to determine" that the conduct is reckless. However, to do so would eliminate the separate and distinct exception to individual immunity for an employee's wanton and reckless conduct from language of the statute. Further, such a narrow interpretation of recklessness would only serve to condone outrageous conduct which the actor knows would create an unreasonable and substantial risk of harm, but which is not expressly prohibited by statute, rule or regulation. Finally, even were the Court to deviate from its well-established definition of recklessness to such an extreme degree, Appellant George-Munro would fare no better. In fact, the evidence before the trial and appellate courts in this case included George-Munro's violation of not only R.C. 2151.421 and R.C. 2919.22, but multiple rules and regulations, both of the Ohio Administrative Code and DCFS policy,

regarding his own training and in connection with his handling of the investigation of Sydney's abuse.

CONCLUSION

For the foregoing reasons, none of the propositions of law raised by the Appellants are meritorious, and they do not involve matters of public or great general interest warranting the Court's consideration. Appellee, therefore, respectfully requests that the motions for reconsideration be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Joan E. Pettinelli". The signature is written in black ink and is positioned above a horizontal line.

Joan E. Pettinelli, Esq. (0047171)

Counsel for Appellee John K. O'Toole

CERTIFICATE OF SERVICE

I certify that a copy of Appellee's Memorandum in Opposition to Appellants' Motions For

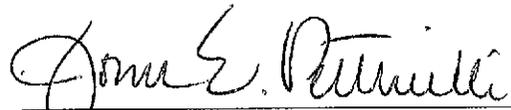
Reconsideration was sent by U.S. mail, postage prepaid, on May 7, 2007 to the following:

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