

Case No. 2007-740

IN THE SUPREME COURT OF OHIO

DONALD THOMAS KRAYNAK, etc.,

Appellee,

vs.

YOUNGSTOWN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,

Appellants.

On Appeal From The
Court of Appeals Seventh Appellate District
Mahoning County, Ohio
Court of Appeals Case No. 2005-MA-200

**MEMORANDUM IN RESPONSE TO JURISDICTION OF
APPELLEE, DONALD T. KRAYNAK**

John C. Pfau (S. Ct. #0006470)
PFAU, PFAU & MARANDO
P.O. Box 9070
Youngstown, Ohio 44513
(330) 702-9700
(330) 702-9704 - Fax No.

James E. Roberts (S. Ct. #0000982)
ROTH, BLAIR, ROBERTS, STRASFELD & LODGE
100 Federal Plaza East, Suite 600
Youngstown, Ohio 44503
(330) 744-5211
(330) 744-3184 - Fax No.

*Attorneys for Appellants,
Youngstown City School District Board of Education*

Joel Levin (S. Ct. #0010671)
Christopher M. Vlasich (S. Ct. #0075546)
Aparesh Paul (S. Ct. #0077119)
LEVIN & ASSOCIATES CO., L.P.A.
1301 East 9th Street
Suite 1100, Tower at Erieview
Cleveland, Ohio 44114
(216) 928-0600
(216) 928-0016 - Fax No.

*Attorneys for Appellee,
Donald T. Kraynak*

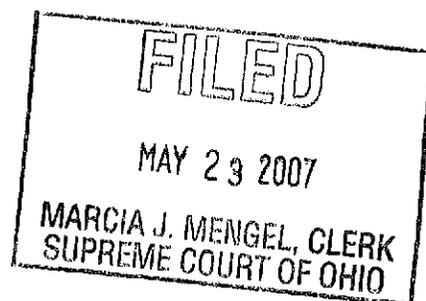


TABLE OF CONTENTS

	<u>Page</u>
I. EXPLANATION OF WHY THIS COURT SHOULD NOT HEAR THIS CASE	1
II. STATEMENT OF THE FACTS	3
A. Introduction	3
B. D.K.'s Journal	4
C. Trial Testimony Regarding RC 2151.421	6
III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	7
<u>Proposition of Law No. 1:</u> RC 2151.42 requires an objective standard for determining whether a person suspected child abuse, thereby triggering a duty to report	7
<u>Proposition of Law No. 2:</u> A trial judge may provide additional explanation of a statutory requirement to prevent a jury from being misled	10
<u>Proposition of Law No. 3:</u> The enactment of R.C. 2744.02 did not abrogate the public duty rule	11
IV. CONCLUSION	11
SERVICE	

I. EXPLANATION OF WHY THIS COURT SHOULD NOT HEAR THIS CASE

This suit arises as a result of the stunning silence that a tortured child faced when he repeatedly conveyed details of his abuse to his grade school teacher and the harm resulting after she ignored his cries for help. A teacher turned a deaf ear on a child who sought help from the only place he could find it. The trial court instructed the jury incorrectly on RC 2151.421, allowed a witness to usurp his role as the arbiter of the law and ignored the fact that “[c]hild abuse is a pervasive and devastating force in our society.” *Yates v. Mansfield Bd. of Educ.* (2004), 02 Ohio 3d. 205, ¶12. The Seventh District’s decision was a victory for abused children throughout Ohio. Appellant now seeks to strip the abused of that victory.

This case is not, as Appellant claims, about the “murky” interpretation of the Ohio Revised Code. Appellant’s protestations aside, RC 2151.421 is so “murky” that each case Appellant cites confirms that RC 2151.421 contains an objective standard (what would a reasonable teacher think), rather than a subjective standard (what was in the teacher’s mind at any given point in time). It is from this unwavering line of cases that Appellant claims the law is “murky.” In reality, Appellant does not seek guidance to interpret RC 2151.421. What it seeks is no less than the mercy of this Court, to facilitate the theft of some semblance of recovery from a beaten, abused, and ultimately ignored child.

Amending the public duty rule will not change the need for a retrial in this case. This Court is already reviewing the public duty rule in *Rankin v. CCDCFS*, Supreme Court No. 2007-0306, and it need not accept this matter to review that already-pending issue. Further, the Court of Appeals found reversible error on two separate and distinct counts, each sufficient to require reversal, and neither of which concerned the public duty rule.

First, the Court of Appeals held that it was reversible error for the trial judge to instruct the jury using the wrong standard as to the mental state (objective vs. subjective) required to find liability under RC 2151.421. The trial court's decision forced Appellee to establish the exact state of the teacher's mind while she deliberated on the child's cries for help, a difficult and statutorily unnecessary task.

Second, the Court of Appeals held that it was reversible error for the trial judge to allow a witness to taint the jury by testifying as to the meaning and understanding of the law, and thus commandeering powers solely divested to the trial judge. Remarkably, Appellant here does not seek reversal of this second, independent rationale for reversal. Although the Court of Appeals determined that it was improper for the trial judge to abdicate his responsibility as the referee and allow a witness to testify as to the law's interpretation and its ultimate conclusion, Appellant failed to appeal this decision. What Appellant did appeal -- set forth as Proposition 2 both here and in Appellant's brief -- is a moot point. The proposition that "a trial court can interpret the law" is not at issue here and was not an assignment of error from either party at the Court of Appeals. Simply put, this is an immaterial assignment of error.

Astoundingly, the witness who improperly testified regarding the law, Prof. Mercer, and whose name is featured prominently in the Court of Appeals decision (Opinion at ¶¶38-48), is missing entirely from Appellant's Memorandum of Jurisdiction. Although her testimony formed independent grounds for reversal (Opinion at ¶¶47-48), the brief is devoid of her name. Even were this Court to reverse based upon Appellant's Proposition 1, the Seventh District's decision to reverse based upon Prof. Mercer's testimony would still stand. The competing memoranda of jurisdiction are merely academic.

Appellant argues that the law concerning RC 2151.421 is “murky.” It is not. Appellant argues that the trial court should have been able to instruct the jury on the law. This issue has never been in dispute. Finally, Appellant fails to appeal the appellate court’s decision to reverse based upon the improper testimony of a witness, in and of itself proper grounds for reversal. Thus, even were this Court to accept this matter for review to modify the public duty rule (which it is already doing in *Rankin*, supra), the result here would be the same – returning this matter to the trial court. Therefore, rather than issue an advisory opinion, this Court should reject jurisdiction and allow Appellee to pursue his claim in the trial court.

II. STATEMENT OF THE FACTS

A. Introduction

In 2001, Plaintiff-Appellee Donald Thomas Kraynak, Individually and as the Natural Parent and Guardian of D.K., a minor (collectively, “Kraynak”), filed a Complaint against Defendant-Appellant Youngstown City School District Board of Education (“the Board”). Kraynak filed a claim against the Board for the failures of its teacher, Helen Marino (“Ms. Marino”), to report D.K.’s pleas for help to the authorities. That failure violated RC 2151.421's mandate requiring a teacher to report known or suspected child abuse.

During the 1999-2000 school year, minor D.K. – then in 4th grade – unambiguously disclosed to Ms. Marino his abuse, numerous times, orally and through a school journal that she required him to keep. In this journal, D.K. repeatedly told Ms. Marino that his mother physically and mentally abused him. Ms. Marino chose to disbelieve D.K.’s reports of this abuse. Ms. Marino’s failure to report the known or suspected child abuse of D.K. violated the Board’s policies, the reporting mandates of the Revised Code and common law negligence.

B. D.K.'s Journal

In September 1999, D.K. was a student in Ms. Marino's class. Prior to having him as a student in her class, Ms. Marino had never met D.K. and knew very little about him. At the beginning of the 4th grade school year, Ms. Marino assigned the students journals. They could write about a topic Ms. Marino suggested or create their own topic.

Ms. Marino told the students that she would read through their journals; although she did not read the whole of each students' journals, she did, in fact, read significant portions of D.K.'s journal. Further, contrary to the Board's Memorandum (p. 5), she may have read the entirety of D.K.'s journal. Not only did Ms. Marino read some (or all) of D.K.'s journal, but she wrote comments in the journal. The following is D.K.'s September 20, 1999, journal entry:

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...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 and punching me, screaming at me, saying what was she 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.

Ms. Marino admitted that she read this journal entry; however, she never talked to D.K. or to any of his teachers about this entry.

At the time, Ms. Marino had only known D.K. for approximately two weeks; yet, despite barely knowing D.K. and having no reason to believe he was untruthful, Ms. Marino determined that D.K. was lying. This, despite the fact that Ms. Marino admitted at trial that she was unqualified to disregard a child telling her that he had been abused.

Although Ms. Marino testified that she did not believe D.K. was truthful in his September 20, 1999, entry, her comments to D.K. demonstrated that this was false; she wrote the following response to the September 20, 1999, entry:

Sometimes adults have personal problems that they need to talk to someone about. They sometimes lash out at innocent people without meaning to.

Ms. Marino admitted that the purpose of the journal was for the students to learn “to communicate.” Although D.K. communicated his abuse to Ms. Marino, she never reported the abuse to the authorities.

Ms. Marino testified that rather than report D.K.’s abuse, she allegedly kept a “closer eye” on him when he was in her class. Remarkably, however, Ms. Marino acted in a manner wholly inconsistent with keeping a “closer eye” on D.K. Ms. Marino testified that after she read about D.K.’s abuse in his journal (the place where D.K. felt safe disclosing his horrific suffering), and after she told D.K. she would read his entries, she may have stopped reading the journal altogether. Ms. Marino testified at trial as follows:

- Q. The question is: Did [you] stop reading the journal after D.K. told [you] in the journal that he was being abused?
A. Yes, I stopped reading it.

Thus, Ms. Marino’s trial defense was predicated upon the “head in the sand” excuse. Ms. Marino’s subsequent testimony, however, called into question what entries she did, in fact, read.¹ Clearly, Ms. Marino read at least some entries detailing D.K.’s abuse, and possibly she read all of them.

¹Ms. Marino was caught in a “Catch-22.” If she read all of the journal entries, why not report the abuse? But why would she stop reading the entries of a child begging for help? Ms. Marino chose to pick the lesser of two evils: confuse the jury with multiple stories.

Throughout the school year, D.K. repeatedly communicated to Ms. Marino in his journal that his mother scared him, beat him with a number of objects, and that he did not want Ms. Marino to tell his mother that Ms. Marino knew of the abuse. In fact, at trial D.K. testified that he told Ms. Marino of the abuse, a fact Ms. Marino did not deny. She testified that she could not remember whether this occurred. D.K. wrote the following entry in March 2000, after it was clear that Ms. Marino had not reported the abuse to the authorities:

I want to tell you something. My mom really does abuse me. She beat me with a leather belt and left a big purple mark on my butt for about a week. What should I do? D.K.

WARNING: DON'T SHOW OR TELL MY MOM WHAT I WROTE OR I'LL GET THE WOODEN SPOON OR METAL BATON.

Ms. Marino may have read this entry; at trial, she simply could not remember what entries she read. Ms. Marino never reported D.K.'s abuse to the authorities.

C. Trial Testimony Regarding RC 2151.421

At trial, Kraynak introduced overwhelming evidence of the breaches of the duties imposed upon a teacher under RC 2151.421 and Ohio common law, as well as breaches of the Board's own policies. The trial judge, however, determined that RC 2151.421 contained a subjective, rather than objective, standard and Prof. Mercer further testified as to the subjective nature of RC 2151.421. Prof. Mercer testified that the Board was only liable if Ms. Marino subjectively believed that D.K. was being abused at home and, moreover, that Ms. Marino clearly did not believe the abuse occurred.

In addition, Prof. Mercer testified that a teacher should look to the "totality of circumstances" prior to reporting child abuse; however, she admitted that the statute does not

contain such language:

- Q. Show me in this [statute] where it says look at all the circumstances?
A. The statute does not have that language.

Prof. Mercer simply inserted the term “totality of the circumstances” into the statute. Of course, as the Seventh District noted, “[c]ontrary to [Prof. Mercer’s] testimony, R.C. 2151.421 does not state that a person must review the totality of the circumstances.” (Opinion at ¶46). Further, she (falsely) testified that, among other things, abuse equates to “serious disfigurement.” (Opinion at ¶46). Thus, the Court of Appeals held:

Although [Prof. Mercer] may have been allowed to testify as to what she teaches regarding the mandatory duty to report, with clarification that she described 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.

Based on the foregoing, the trial court abused its discretion in allowing Mercer to testify to this extent.

(Opinion at ¶46.) The Board failed to appeal the Court of Appeals decision regarding this assignment of error and, thus, is now bound by the Seventh District’s decision.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: RC 2151.42 requires an objective standard for determining whether a person suspected child abuse, thereby triggering a duty to report.

The trial court determined that RC 2151.421 contains a subjective, rather than objective, determination; that is, Kraynak’s burden at trial was to prove what Ms. Marino subjectively thought, in her mind, as she read the journal, rather than what an objective, reasonable teacher

would have thought. Thus, the court determined that the Board was only liable if Ms. Marino subjectively believed that D.K. was being abused at home – regardless of the evidence she saw, regardless of what she admittedly read or was told, and regardless of the evidence presented at trial. The Eighth and Second Districts, however, determined that the statute contains an objective “reasonableness” standard, not a subjective one, as viewed in light of the abused child, not the reporter/teacher. See, *Surdel v. Metrohealth Med. Ctr.* (8th Dist. 1999), 135 Ohio App.3d 141, *cert. denied by* 87 Ohio St. 3d 1491; *Tracy v. Tinnerman* (2nd Dist.), 2003 Ohio 6675.

In *Surdel*, *supra*, the appellant-father claimed that individuals who reported that he abused his children did not do so “in good faith.” *Id.* at 144, 149-150. The Eighth District held that it did not matter what the reporter subjectively believed; rather:

...RC 2151.421(A)(1)(a)...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...”

The qualifying language [of R.C. 421.2151] 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.

Id. at 150 (citations omitted). Hence, “reasonable” indications of abuse trigger the duty to report, and one must focus on the “condition” (here, D.K. and his unambiguous cries for help) rather than the reporter’s subjective beliefs. Thus, one should apply an objective standard.

In *Tracy*, *supra*, a teacher reported to the authorities that a child was being abused. The Second District noted that “[A] school employee is required to report any reasonable suspicion of abuse.” *Id.* at ¶11. Contrary to the Board’s Memorandum claiming a “murky” treatment of RC

2151.421, it fails to cite a single case that interprets R.C. 2151.421 as containing a subjective standard.

Based upon the trial court's ruling on RC 2151.421, Kraynak was required to prove that Ms. Marino subjectively believed that D.K.'s mother abused him, rather than proving (as RC 2151.421 mandated) what a reasonable teacher would have done under the circumstances. Kraynak had the burden of proving to the jury that Ms. Marino subjectively "knew" that D.K. suffered abuse at the hands of his mother; this standard proved insurmountable. The statute does not require such a burden and therefore it was reversible error to require Kraynak to meet a subjective standard, rather than an objective "reasonableness" standard.

Further, under the Board's reading of RC 2151.421, Ms. Marino's "head in the sand" manner of teaching – whereby she allegedly stopped reading D.K.'s journal because it contained allegations of physical abuse – was perfectly reasonable.² If she did not know, with one hundred percent certainty, that D.K.'s mother cursed at him, punched him, and thrashed him with a belt, a wooden spoon, or whatever else she could grab, then liability would not attach. It is only through the Board's tortured reading of RC 2151.421 that Ms. Marino's hiding from D.K.'s cries for help makes sense.

Finally, the Board cites the updated version of RC 2151.421 to prove that the earlier statute contained a subjective standard. This is mere speculation. While the present statute clearly contains an objective standard, it does not confirm that the previous statute contained a

²Why would a teacher act in such a reprehensible fashion? If Ms. Marino is to be believed, one reason is because she thought D.K. was a liar. Further, she made two previous "false claims" of abuse and this likely led to her reluctance to contact authorities, lest she make a third false claim. She waited to see physical signs of the abuse (broken arm, black eye), rather than listening to the unambiguous pleas of her student. Of course, that violated RC 2151.421.

subjective standard; in fact, the Board has failed to cite any legislative testimony or documents indicating as such.

Proposition of Law No. 2: A trial judge may provide additional explanation of a statutory requirement to prevent a jury from being misled.

This Proposition of Law is irrelevant. The Seventh District did not forbid a trial judge from explaining the standard set forth in RC 2151.421. In fact, it held the opposite. The appellate court found reversible error because a witness, not the court, told the jury the standard to apply. Further, she instructed the jury incorrectly, she editorialized on the meaning and understanding of the law, and she inserted language into the statute that does not exist.

Contrary to the Board's Memorandum, there is no dispute between the parties as to whether a trial judge may instruct the jury on the law. Kraynak's appeal and the Court of Appeals decision focus not on the trial judge's authority, but on the authority of a witness to testify as to the law. The Board's Memorandum simply ignores ¶¶38-48 of the Seventh District's decision. Pursuant to that opinion, the trial judge abandoned to Prof. Mercer his role as the arbiter of the law. The appellate court held that Prof. Mercer editorialized (incorrectly) on the statute, included wording into the statute that did not exist, and her testimony should have been "strictly and severely limited." (Opinion at ¶¶46-48).

Simply put, the trial court abdicated its role of judge to Prof. Mercer by allowing her to testify haphazardly and indiscriminately about the putative meaning of RC 2151.421: "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 Kraynak.” (Opinion at ¶122.) Of course, the Board failed to appeal this independent ground for reversal.

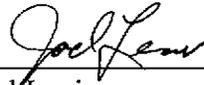
Proposition of Law No. 3: The enactment of R.C. 2744.02 did not abrogate the public duty rule.

The public duty rule does not control the outcome of this case. It was not the basis upon which the Court of Appeals reversed, as the trial court and the Court of Appeals both allowed the negligence claim (based upon the special relationship exception to the public duty rule) to proceed. Reversal on this ground would not affect the Court of Appeals decision to return this matter to the trial court. The Board simply seeks an advisory opinion on this issue of law. This Court, however, is already addressing the public duty rule and RC 2744 in the matter of *Rankin v. CCDCFS*, Supreme Court of Ohio No. 2007-0306. The parties here will be bound by the *Rankin* decision were this matter to return to the trial court.

IV. CONCLUSION

For the reasons set forth herein, this Court should not accept this matter for review. The Court of Appeals found that the trial judge gave the wrong jury instruction on the mental state required under RC 2151.421. It further held that Prof. Mercer was allowed to run rough-shod over the actual language of RC 2151.421, mis-interpreting the statute while adding and subtracting language as she pleased. Both grounds are independently sufficient to affirm the Court of Appeals decision. The Board, however, failed to include as a proposition of error the Seventh District’s decision to reverse based upon Prof. Mercer’s testimony.

Respectfully submitted,



Joel Levin (0010671)

Christopher M. Vlasich (0075546)

Aparesh Paul (S. Ct. #0077119)

LEVIN & ASSOCIATES CO., L.P.A.

1301 East 9th Street

Suite 1100, Tower at Erieview

Cleveland, Ohio 44114

(216) 928-0600

(216) 928-0016 - Fax

*Attorneys for Appellee,
Donald Kraynak*

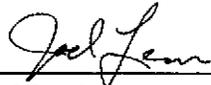
SERVICE

A copy of the foregoing Memorandum in Response to Jurisdiction of Appellee has been served by facsimile and ordinary U. S. Mail on this 22nd day of May, 2007, upon the following:

John C. Pfau
PFAU, PFAU & MARANDO
P.O. Box 9070
Youngstown, Ohio 44513

*Attorneys for Appellant,
Youngstown City School District
Board of Education*

James E. Roberts
ROTH, BLAIR, ROBERTS, STRASFELD & LODGE
100 Federal Plaza East, Suite 600
Youngstown, Ohio 44503



Joel Levin (0010671)

One of the Attorneys for Appellee

Donald Kraynak