

IN THE SUPREME COURT OF OHIO
CASE NO. 07-0306

On Appeal From The Court of Appeals
Eighth Judicial District
Cuyahoga County, Ohio
Case No. CA-06-86620

CHERITA RANKIN, et al.
Plaintiffs-Appellees

vs.

CUYAHOGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, et al.,
Defendants-Appellants

Trial Court No. 527785

AMICI CURIAE COUNTY COMMISSIONERS ASSOCIATION OF OHIO AND
COUNTY RISK SHARING AUTHORITY'S
BRIEF OF IN SUPPORT OF APPELLANTS CUYAHOGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, JAMES McCAFFERTY AND GINA ZAZZARA

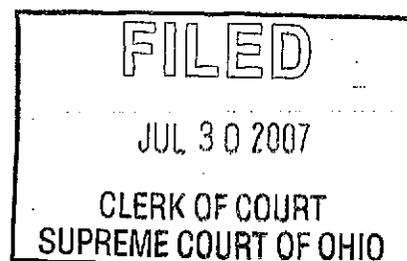
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TABLE OF CONTENTS

I. STATEMENT OF INTEREST OF AMICI CURIAE 1

II. STATEMENT OF THE CASE AND FACTS 2

III. LAW AND ARGUMENT 2

 Proposition of Law One: There is no special relationship exception to Chapter 2744 immunity. 2

 A. The court of appeals erred by creating a common law “special relationship” exception to political subdivision immunity. 2

 1. Section 2744.02 of the Revised Code does not authorize a “sixth exception” to immunity for a “special relationship.” 3

 2. The special relationship exception to the public duty defense does not constitute an exception to Chapter 2744 immunity. 6

 3. The judicial creation of a sixth exception to statutory immunity is an improper overlapping of judicial and legislative authority. 13

 Proposition of Law Two: A political subdivision employee’s act or omission must be conscious and intentional to establish an exception to immunity for reckless conduct under R.C. § 2744.03(A)(6)(b)..... 14

IV. CONCLUSION..... 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

Anderson v. Ohio Department of Insurance (1991), 58 Ohio St.3d 215, 569 N.E.2d 1042 11

Bernardini v. Conneaut Area City School Dist. Bd. of Edn. (1979), 58 Ohio St.2d 1 4

Cater v. City of Cleveland (1998), 83 Ohio St.3d 24 3, 12

Drake v. Rogers (1861), 13 Ohio St. 21 13

Elston v. Howland Local Schools (2007), 113 Ohio St.3d 314..... 4

Fabrey v. McDonald Police Dept. (1994), 70 Ohio St.3d 351..... 15

Fairview v. Giffey (1905), 73 Ohio St. 183 14

Franks v. Lopez (1994), 69 Ohio St.3d 345, 502 Ohio 1994..... 12

M.B. v. Elyria City Bd. of Educ. (9th Dist. 2006), 2006 WL 2528567 2006-Ohio-4533 5, 11, 12

Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75 7, 8

Rankin v. CCDCF (8th Dist. 2006), 2006 WL 3743728, 2006-Ohio-6759..... 3, 4, 6, 10, 17

Sarmiento v. Grange Mut. Cas. Co. (2005), 106 Ohio St.3d 403..... 4

Sawicki v. Ottawa Hills (1988), 37 Ohio St.3d 222, 525 N.E.2d 468..... 4, 7, 8, 9, 11

South Euclid v. Jemison (1986), 28 Ohio St.3d 157..... 13

South v. Maryland (1855), 59 U.S. (18 How.) 396 7, 8

State Auto. Mut. Ins. v. Titanium Metals Corp. (8th Dist. 2004), 159 Ohio App.3d 338 4

State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Ed. (1942), 139 Ohio St. 427 5

State ex rel. Bowman v. Allen Cry. Bd. of Commrs. (1931), 124 Ohio St. 174, 177 N.E. 271 5

<u>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</u> (1999), 86 Ohio St.3d 451	5
<u>State ex rel. Greenlund v. Fulton</u> (1919), 99 Ohio St. 168, 124 N.E. 172	14
<u>Thompson v. McNeill</u> (1990), 53 Ohio St.3d 102	15
<u>Wallace v. Ohio Department of Commerce, Division of State Fire Marshal</u> (2002), 96 Ohio St.3d 266, 773 N.E.2d 1018, 2002-Ohio-4210	8
<u>Wilson v. Stark Ctr. Dept. of Hum Serv.</u> (1994), 70 Ohio St.3d 450	2
<u>Yates v. Mansfield Board of Education</u> (2004), 102 Ohio St.3d 205	7, 8
 Statutes	
R.C. § 2744.01 et seq	1
R.C. § 2744.02	9, 11
R.C. § 2744.02(A).....	3, 13
R.C. § 2744.02(B).....	13
R.C. § 2744.02(B)(1-5).....	1, 3, 9, 11
R.C. § 2744.03	3, 12
R.C. § 2744.03(A)(6).....	2
R.C. § 2744.03(A)(6)(b)	14
 Other Authorities	
RESTATEMENT OF THE LAW 2D TORTS (1965) at 587, Section 500.....	15

I. STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Curiae County Commissioners Association of Ohio (CCAO) represents Ohio's 87 boards of county commissioners and the Summit County Executive and Council. CCAO promotes best practices in county government administration and management; advocates on behalf of counties at the state and federal level; provides training and technical assistance programs, and, provides cost saving service programs for all of Ohio's 88 counties.

Amicus Curiae the County Risk Sharing Authority (CORSA) is a public entity risk pool providing broad property and liability coverage as well as comprehensive risk-management services. As of this filing, CORSA has 62 Ohio member counties and 15 multi-county facilities. CORSA represents counties, boards of county commissioners and other elected officials throughout Ohio. CORSA is responsible for providing a defense for lawsuits filed in state and federal court for its member counties.

Counties have an interest, as Ohio political subdivisions, in seeing the Political Subdivision Tort Liability Act (R.C. § 2744.01 et seq.) interpreted properly. The decision of the court of appeals improperly creates an exception to Chapter 2744 immunity affecting CCAO's members who are engaged in every governmental activity from law enforcement to premises maintenance. The appellate court's decision also injects uncertainty regarding clear Chapter 2744 immunity.

The court of appeals created an exception to Chapter 2744 immunity that is not contained in the statute. This judicially created common-law exception to R.C. § 2744.02(B)(1-5) expands the liability of political subdivisions in a dramatic and unpredictable way that is in derogation of the statute. If allowed to stand, the lower appellate court's judicial creation is inimical to separation of powers doctrine that goes to the heart of the state governmental system. The

court's decision also is contrary to "the manifest statutory purpose of R.C. Chapter 2744 [which] is the preservation of the fiscal integrity of political subdivisions." Wilson v. Stark Ctr. Dept. of Hum Serv. (1994), 70 Ohio St.3d 450, 453.

The appellate court's decision also expands the exception to employees' immunity regarding employees who act or fail to act "in a wanton or reckless manner." R.C. § 2744.03(A)(6). This case extends personal liability to those without direct involvement in the conduct complained of and without consciously disregarding a substantial risk. That cursory finding has dramatic practical consequences for those persons and subjects them to potentially ruinous personal liability.

Amici Curiae respectfully submit this brief to emphasize the legal error of the Eighth District Court of Appeals' decision and specifically address the court's improper overlaying of the special relationship exception to the public duty defense with Chapter 2744 immunity. Amici Curiae also submit this brief to emphasize the necessary requirement that a political subdivision employee's act or omission must be conscious and intentional to establish an exception to immunity for reckless conduct under R.C. § 2744.03(A)(6)(b).

II. STATEMENT OF THE CASE AND FACTS

Amici Curiae County Commissioners Association of Ohio and the County Risk Sharing Authority adopt the Appellants' statement of the case and facts.

III. LAW AND ARGUMENT

PROPOSITION OF LAW ONE: THERE IS NO SPECIAL RELATIONSHIP EXCEPTION TO CHAPTER 2744 IMMUNITY.

- A. **The court of appeals erred by creating a common law "special relationship" exception to political subdivision immunity.**

A political subdivision is presumptively immune and may lose its immunity under R.C. § 2744.02(A), only if one of the R.C. § 2744.02(B)(1-5) exceptions apply. Cater v. City of Cleveland (1998), 83 Ohio St.3d 24. Even then, a political subdivision can regain immunity under the well-established three-tiered statutory analysis. Id.; see R.C. § 2744.03.

Here, the appellate court did not identify an exception to immunity under R.C. § 2744.02(B)(1-5) or engage in a statutory analysis of the exceptions. Rather, the court created a common-law “special relationship exception” to political subdivision immunity. Rankin v. CCDCEFC (8th Dist. 2006), 2006 WL 3743728 *3, 2006-Ohio-6759 at ¶ 22. As the DCFS demonstrated in its brief, a cursory review of the R.C. § 2744.02(B)(1-5) exceptions reveals that no such exception exists. The court improperly merged the so-called special relationship exception to the public duty defense with the issue of political subdivision immunity under Chapter 2744. In doing so, the appellate court overstepped its judicial authority and improperly entered the Legislature’s sole province. This prohibited overlapping damages Ohio’s system of government by violating the separation of powers doctrine inherent in that system.

1. Section 2744.02 of the Revised Code does not authorize a “sixth exception” to immunity for a “special relationship.”

The lower court properly recognized the broad immunity provided to political subdivisions like DCFC under Chapter 2744. Rankin v. CCDCEFC (8th Dist. 2006), 2006 WL 3743728 *3, 2006-Ohio-6759 at ¶ 22. But, the court prejudicially erred when it created a common-law exception to R.C. § 2744.02 immunity.

Eschewing the analysis of the statutory exceptions contained in R.C. § 2744.02(B)(1-5), the lower appellate court improperly created an exception contained nowhere in the statute:

There are exceptions to this blanket immunity, including what is known as the “special relationship” exception. Under the special relationship exception, “a

political subdivision may be liable for damages if it can be shown that a 'special relationship' existed between the political subdivision and the injured party thereby imposing a 'special duty' under the law. See *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468.

Rankin (8th Dist. 2006), at *3, 2006-Ohio-6759 at ¶ 22. The court's citation to *Sawicki* provides no basis for this judicially created exception to R.C. § 2744.02(B)(1-5). The *Sawicki* court did not address the interrelationship between the public duty rule, the special duty exception, and Chapter 2744. In fact, the *Sawicki* "case arose out of events which occurred during a time when [the Supreme Court of Ohio] had, in a series of divided opinions, judicially abrogated the application of the doctrine of sovereign immunity as a defense for municipal corporations." *Sawicki, supra* at 225. The appellate court also supported its erroneous belief that a special relationship exception existed by citing a case that this Court had previously vacated. *Id. citing State Auto. Mut. Ins. v. Titanium Metals Corp.* (8th Dist. 2004), 159 Ohio App.3d 338, *vacated by* 108 Ohio St.3d 540, 2006-Ohio-1713, at ¶ 12. The law is axiomatic that a vacated case cannot be proper or persuasive authority.

Well-established statutory interpretation rules prohibit a court from creating an exception that does not exist in Chapter 2744. A court's duty is to construe statutes in a manner to "ascertain and give effect to the legislative intent." *Elston v. Howland Local Schools* (2007), 113 Ohio St.3d 314. The judicial branch of government "cannot extend the statute beyond that which is written, for '[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.'" *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St.3d 403, 408-09, *citing Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4. To do so would enlarge the scope of the statute beyond that which the General Assembly enacted.

The appellate court may have disagreed with the principles of political subdivision immunity. Or, the court may have believed those principles should not apply to the tragic facts of this case. Or, the appellate court may have simply misinterpreted the relationship between Chapter 2744 immunity and the special relationship exception to the public duty defense. Despite the reason, the Legislature did not create a sixth exception to immunity and the lower court erred by judicially creating such exception. This Court has made clear that the “wisdom of legislation is beyond the purview of the courts.” State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 455. The lower appellate court effectively made a policy choice and judicially created an exception to avoid the statutory required result of immunity to DCFS. All arguments going to the soundness of legislative policy choices, however, are directed to their proper place, which is outside the door of this courthouse. Even this Court “has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government.” State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Ed. (1942), 139 Ohio St. 427, 438. The only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom. State ex rel. Bowman v. Allen Cry. Bd. of Commrs. (1931), 124 Ohio St. 174, 196, 177 N.E. 271, 278.

The Ninth District has squarely addressed this issue, correctly holding that the special exception to the public duty rule cannot be used offensively as a common law exception to immunity. “The immunity provisions of R.C. Chapter 2744 are unequivocal; its exceptions are few and specific. Appellants have cited no portion of the statute that expressly provides an exception to immunity for any common law doctrine.” M.B. v. Elyria City Bd. of Educ. (9th Dist. 2006), 2006 WL 2528567 at *3 2006-Ohio-4533.

The negative impact of this new exception on counties would be so pervasive that its enormity goes beyond any particular hypothetical example. The special relationship exception would circumvent otherwise clear immunity. There is little doubt that this novel common law exception would be standard in almost every tort action where there was some contact between the government and a citizen. The appellate court, by allowing the plaintiffs to avoid immunity in this manner, effectively eviscerated immunity for potentially hundreds of current and future defendants that should enjoy immunity at its earliest possible juncture. Many of the CCAO's member counties have children's services departments, similar to Cuyahoga County Department of Children and Family Services (DCFS) here. But, CCAO's interest in this litigation is far more expansive. The decision extends far beyond its members that provide children's services or this particular governmental function. It would apply to every instance where an employee of a county had contact with a member of the public.

2. The special relationship exception to the public duty defense does not constitute an exception to Chapter 2744 immunity.

Relying on an exception to the public duty defense and not statutory political subdivision immunity, the appellate court erroneously reversed the common pleas court's grant of summary judgment and determined that the plaintiff should be able to "bring a cause of action to hold appellees liable for the harm done to D.M." Rankin (8th Dist. 2006), at *3, 2006-Ohio-6759 at ¶ 24. The appellate court's error is tied to a basic misunderstanding of the distinct nature of the public duty defense and statutory political subdivision immunity.

The public duty defense, when applicable, establishes non-liability based on the lack of a legal duty. In stark contrast, the immunity defenses under Chapter 2744 establish non-liability based on immunity, despite the existence or nonexistence of a duty or even liability otherwise.

The lower appellate court erred when it improperly merged the immunity and public duty defenses.

Here, as an initial matter, the defendants did not raise the public duty defense. Yet, the lower appellate court applied an exception to the public duty defense when a special relationship exists.

Where sovereign immunity is otherwise applicable under Chapter 2744, the special relationship exception to the public duty rule is not an independent exception to the immunities set forth in Chapter 2744. The issue of duty is an essential element to a negligence tort claim. “To establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom.” Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75. (Citations omitted.)

The public duty defense directly addresses the duty element of negligence. Yates v. Mansfield Board of Education (2004), 102 Ohio St.3d 205, 212, Fn. 2. The defense originated as a common-law doctrine in the 19th century and was first recognized by the United States Supreme Court in South v. Maryland (1855), 59 U.S. (18 How.) 396. Sawicki v. Village of Ottawa Hills (1988), 37 Ohio St.3d 222, 229.

The public duty defense provides that political subdivisions and their employees cannot be held liable to an individual for breach of a duty owed to the general public. This Court articulated the rule as follows:

[I]f the duty which the official authority imposes upon an officer is a duty to the public, 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.

Id. at 230, citing South, *supra* at 403.

The defense is not absolute and there is a “special relationship” exception to the rule. To establish that narrow exception, a plaintiff must establish each of four elements: “(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, *supra* at 231-232.

If the elements of the special duty test are met, then the breach of the duty by the public official can be deemed to have caused an individual injury compensable in a civil action, as opposed to a public injury for which no compensation to the individual claimant is provided. The special duty exception creates a duty to a specific member of the public thereby creating an actionable duty, which would otherwise not exist by virtue of the public duty rule.

In creating an actionable duty, the public duty rule goes to the first element of a negligence claim: Duty. Menifee, *supra*. This special duty exception **does not** relate to immunity or lack of immunity, but rather only creates a duty that can be the foundation of a claim to which the presence or absence of immunity would then be applied and evaluated. Because a number of the courts of Ohio had found that the sovereign immunity statute abrogated the public duty rule, and the special duty exception, there is little case law construing the interrelationship between the public duty rule and sovereign immunity. Since this Court’s opinions Yates v. Mansfield Board of Education (2004), 102 Ohio St.3d 205, 2004-Ohio-2491 and Wallace v. Ohio Department of Commerce, Division of State Fire Marshal (2002), 96 Ohio St.3d 266, 773 N.E.2d 1018, 2002-Ohio-4210, as an expression of this Court’s intention that the public duty rule

remains viable, “as applied to actions brought against political subdivision, pursuant to R.C. Chapter 2744,” courts have again begun to recognize the public duty rule and the special duty exception, bringing into question the interrelationship with the sovereign immunity statute.

This Court’s opinion in Sawicki did not address the interrelationship between the public duty rule, the special duty exception, and Chapter 2744 of the Ohio Revised Code. As noted by this Court in Sawicki, *supra*, the effective date of Chapter 2744 of the Ohio Revised Code:

...was November 20, 1985, which is well after the events which occurred in the case before us. More particularly, it should be observed that this case arose out of events which occurred during a time when this court had, in a series of divided opinions, judicially abrogated the application of the doctrine of sovereign immunity as a defense for municipal corporations. [Citations omitted.] Accordingly, the municipality of Ottawa Hills had no blanket immunity for its actions performed within the time frame delineated above.

Sawicki, *supra* at 225. The Sawicki Court found that the public duty rule and the special duty exception survived the abrogation of sovereign immunity. Sawicki, *supra*.

Here, the court of appeals correctly found that sovereign immunity is applicable to the case at bar. Then, the court without specifically analyzing the exceptions to immunity contained in R.C. § 2744.02(B)(1-5), concluded that “there are exception to this blanket immunity, including what is known as the ‘special relationship’ exception.” The court of appeals then erroneously analyzed the special duty exception to the public duty rule finding the special duty exception as an independent basis of liability that could circumvent the immunity available under R.C. § 2744.02. The court of appeals did not address the interrelationship between the special duty exception and Chapter 2744 immunity.

The court then analyzed the special duty exception finding a special duty. The court of appeals concluded:

{¶ 23} In the case before us, there are genuine issues of material fact as to whether appellant has met the requirements of the special relationship exception to defeat appellees' claim of immunity. When DCFS gained custody of D.M., it took on the affirmative duty to provide that little girl with safety, particularly during supervised visits with her abusive father. After being sufficiently warned of what the father was capable of, DCFS was also on notice that its failure to protect D.M. could lead to injury. There was direct contact between D.M. and DCFS, and D.M. was clearly justified in relying on DCFS for reasonable protection. It would be error to grant summary judgment in this case on the basis of immunity.

Rankin (8th Dist. 2006), at *4, 2006-Ohio-6759 at ¶ 23.

Again, the public duty defense, and the special duty exception to that defense, relate to the duty element of a negligence claim. Here, the Defendants did not assert the public duty defense in their motion for summary judgment, but rather relied solely on sovereign immunity. Even assuming *arguendo* that a special duty existed, such a finding would establish only a duty and the analysis would then proceed to determine whether the duty was breached and whether that breach was actionable and whether damages proximately resulted therefrom. Whether an alleged breach is actionable brings into play the immunities set forth in Chapter 2744 of the Ohio Revised Code.

The Ninth District Court of Appeals squarely addressed the distinct nature of the public duty defense (and its special relationship exception) and the issue of immunity:

{¶ 10} Neither the public-duty rule nor the special relationship exception, in itself, will provide a sufficient basis for an independent cause of action, as appellees suggest. In general, a defendant government entity asserts the public duty rule in its defense against a negligence claim to negate the duty element. See *Franklin v. Columbus* (1998), 130 Ohio App.3d 53, 58. Only in response to a public-duty rule defense can a plaintiff assert the special relationship exception, and the only function of that exception is to establish that a duty exists in spite of the public duty rule. See *id.* Appellees' reliance on the special relationship exception as a separate cause of action, where the public-duty rule has not been asserted as a defense, is therefore mistaken.

{¶ 11} Even if the public duty rule could be used as a cause of action, that common law rule would not supersede the immunity statute. A court may not apply a judicially created doctrine where a statute “cuts against its applicability.” (Emphasis sic.) *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2003-Ohio-4210, at ¶ 33. The immunity provisions of R.C. Chapter 2744 are unequivocal; its exceptions are few and specific. Appellants have cited no portion of the statute that expressly provides an exception to immunity for any common law doctrine.

This Court also cited to language from *Sawicki, supra*, to this effect in *Anderson v. Ohio*

Department of Insurance (1991), 58 Ohio St.3d 215, 569 N.E.2d 1042:

Rather than being an absolute defense, as was sovereign immunity, the public duty rule comported with the principals of negligence, and was applicable to the determination of the extent to which a statute may encompass the duty upon which negligence is premised. If a special relationship is demonstrated, then a duty is established, and inquiry will continue into the remaining negligence elements.... (Citations omitted.)

Anderson, supra at p. 218 quoting *Sawicki, supra* at p. 230.

Under *Sawicki, Anderson* and *M.B., supra*, once a special duty is established, the analysis continues into the remaining negligence elements. Assuming arguendo a special duty, the question becomes whether that duty was breached and whether that breach is actionable. If the breach is actionable, inquiry would continue as to whether damages proximately resulted. *Menifee, supra*.

While the special duty exception may be viable to create a duty that would otherwise not exist under the public duty rule, it does not constitute an exception to the immunity available to the public entity pursuant to R.C. § 2744.02.

As this Court has held, and has been held repeatedly by the courts of appeals of Ohio, R.C. § 2744.02 provides a general or blanket immunity to the political subdivision when it is engaged in a governmental function subject to the exceptions set forth in R.C. § 2744.02(B). If

one of the exceptions applies, immunity or additional defenses may be asserted under R.C. § 2744.03. *See generally* Franks v. Lopez (1994), 69 Ohio St.3d 345, 502 Ohio 1994 at 348-349.

There is no statutory authority, and no case law authority, for the special duty exception to be an exception to the immunity set forth in Chapter 2744 of the Ohio Revised Code or for the special duty exception to set forth a basis for liability, which is exempt from the application of Chapter 2744 of the Ohio Revised Code.

As this Court noted in Cater v. City of Cleveland (1998), 83 Ohio St.3d 24, 679 N.E.2d 610, 1998 Ohio-421 the political subdivision tort liability act contained in Chapter 2744 sets forth a three tiered analysis for determining whether a political subdivision is immune from liability.

First, R.C. 2744.02(A) sets forth a general rule of immunity, that political subdivisions are not liable in damages for the personal injuries or death of a person....

The immunity afforded a political subdivision in R.C. 2744.02(A)(1) is not absolute, but is, by its express terms subject to the five exceptions to immunity listed in former R.C. 2744.02(B). Citation omitted. Thus, once immunity is established under R.C. 2744.02(A)(1), the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply. ... Finally, under the third tier of analysis, immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies.

Cater, *supra* at 614-15.

Ohio Courts interpreting the R.C. § 2744 and this Court's previous jurisprudence have been clear that the statute delineates the complete universe of exceptions to immunity. "The immunity provisions of R.C. Chapter 2744 are unequivocal; its exceptions are few and specific. Appellants have cited no portion of the statute that expressly provides an exception to immunity for any common law doctrine." *See, e.g., M.B. v. Elyria City Bd. of Educ.* (9th Dist. 2006), 2006 WL 2528567 at *3 2006-Ohio-4533.

Here, the court of appeals determined that DCFS was entitled to “blanket immunity” under R.C. § 2744.02(A)(1). Nevertheless, the court found DCFS could be liable by virtue of the special duty exception of the public duty rule. The court of appeals has engrafted a sixth exception into R.C. § 2744.02(B) in derogation of the statute. As previously noted, the special duty exception to the public duty rule is not an exception under R.C. § 2744.02(B), rather at best it creates a duty that would not otherwise exist, establishing the first element of a negligence cause of action.

3. The judicial creation of a sixth exception to statutory immunity is an improper overlapping of judicial and legislative authority.

The court of appeals decision is inimical to the separation of powers doctrine that goes to the heart of Ohio’s governmental system.

A “special relationship” exception neither exists in the express language of the statute, nor can be fairly inferred from the language of the statute. The Legislature’s role in establishing public policy for the state is reinforced by the Ohio Constitution art. II, § 1 (1912), which provides that “the Legislative power of the state shall be vested in a General Assembly ...” If allowed to stand, court’s creation of the exceptions to this immunity would override this constitutional mandate by authorizing overlapping authority.

This Court has long recognized the importance of the doctrine of separation of powers. Drake v. Rogers (1861), 13 Ohio St. 21, 29-30. Although the Ohio Constitution does not contain a provision expressly creating the separation of powers doctrine, this Court has recognized the doctrine to be “implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” South Euclid v. Jemison (1986), 28 Ohio St.3d 157, 159. The doctrine of

separation of powers is implied in the Ohio Constitution because "... each of the three grand divisions of the government, must be protected from encroachments by the others, so far that its integrity and independence may be preserved." *Id. citing Fairview v. Giffie* (1905), 73 Ohio St. 183.

The lower court's creation of an additional exception to statutory immunity is destructive to the separation of powers doctrine that this Court has long held in the highest regard. This Court has asserted, "Probably our chief contribution to the science of government is the principle of the complete separation of the three departments of government, executive, legislative and judicial. No feature of the American system has excited greater admiration. *State ex. rel. Greenlund v. Fulton* (1919), 99 Ohio St. 168, 187, 124 N.E. 172, 177. In accord with the bedrock principles of separations of powers and constitutional mandates, this Court must overrule the appellate court's decision.

PROPOSITION OF LAW TWO: A POLITICAL SUBDIVISION EMPLOYEE'S ACT OR OMISSION MUST BE CONSCIOUS AND INTENTIONAL TO ESTABLISH AN EXCEPTION TO IMMUNITY FOR RECKLESS CONDUCT UNDER R.C. § 2744.03(A)(6)(B).

In the absence of evidence demonstrating a conscious decision to act or conscious decision to not act, an employee of a political subdivision cannot be reckless under the exception for immunity under R.C. § 2744.03(A)(6)(b).

An employee of a political subdivision is immune from liability unless "the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

R.C. § 2744.03(A)(6). This Court has defined recklessness as follows:

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 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.]

Thompson v. McNeill (1990), 53 Ohio St.3d 102, 104-05, citing 2 RESTATEMENT OF THE LAW 2D TORTS (1965) at 587, Section 500.

This Court has repeatedly expressed the vital distinction between negligence and recklessness in a variety of ways, always emphasizing that the standard for reckless misconduct is high. See Fabrey v. McDonald Police Dept. (1994), 70 Ohio St.3d 351, 356. Mere negligence is not converted into this high level of culpability absent a disposition to perversity. Id.; see Thompson v. McNeill (1990), 53 Ohio St.3d 102, 104, 559 N.E.2d 705 (Ohio courts recognize that the term “wanton” is frequently used interchangeably with the term “reckless.”) Despite clarification, the trial and intermediary appellate courts of Ohio frequently render uncertain decisions and need guidance in cases such as this.

This Court should expressly adopt Comment b of Section 500 of the Restatement to clarify the distinction between recklessness and negligence by emphasizing the conscious disregard aspect of recklessness. Section 500 of The Restatement, Comment B provides:

Conduct cannot be in reckless disregard of the safety of others **unless the act or omission is itself intended**, notwithstanding that the actor knows of facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others. [Emphasis added.]

RESTATEMENT OF THE LAW 2D TORTS (1965), Section 500, Comment B.

This Court should also expressly adopt comments f and g of Section 500 to further clarify the recklessness standard for the bar and lower courts of Ohio. Although citing “with approval” Comments f and g, this Court did so when the previous Rules for Reporting Opinions were in effect. Marchetti v. Kalish (1990), 53 Ohio St.3d 95. Comments f and g – as well as comment b – were not syllabus law and only dicta. Now, and since May 1, 2002, the law stated in a

Supreme Court of Ohio opinion is contained within its syllabus and its text, including footnotes.

R. 1 of the Rules for Reporting Opinions. Those comments provide needed guidance with regard to the mental state of tortious conduct, specifically with regard to the element of conscious choice of action that is a hallmark of recklessness:

f. Intentional misconduct and recklessness contrasted. Reckless misconduct differs from intentional wrongdoing in a very important particular. While **an act to be reckless must be intended by the actor**, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

g. Negligence and recklessness contrasted. Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that **reckless misconduct requires a conscious choice of a course of action**, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind. [Emphasis added.]

Marchetti v. Kalish (1990), 53 Ohio St.3d 95, 100 at fn. 3, *citing* Comments f and g to Section 500 of the Restatement of Torts 2d.

The quantum of risk is the important factor in distinguishing between negligence and recklessness, as indicated above. But, *Amici Curiae* respectfully assert that the appellate court erred in more fundamental way. The appellate court did not appreciate that with no evidence of a conscious course of action, recklessness cannot be established.

Here, there is no evidence of a conscious disregard of that risk or an intentional failure to act in light of that risk. With regard to caseworker Ms. Zazzara, the Appellees candidly admitted that “Plaintiffs do not know if Ms. Zazzara took any action to prevent Mr. Martin from taking [D.M.] into the men’s bathroom, or whether she simply ignored Estella Rankin. Plaintiffs do not yet know what actions Ms. Zazzara took ...” (Pl.s’ Br. in Opposition to Summ. J. at 19.) Similarly, the appellate court identified no evidence that Director James McCafferty had any knowledge of this particular case or any direct involvement. Under these circumstances, the reckless exception cannot be established as a matter of law.

The trial court also prohibited the Plaintiff from taking the depositions of caseworker Zazzara and Director McCafferty. The appellate court reversed the lower court’s discovery decision, finding that the court abused its discretion by failing to allow these depositions. Rankin (8th Dist. 2006), at *7, 2006-Ohio-6759 at ¶ 43. That ruling is not before this Court for review. Based on its discovery ruling, the appellate court could have remanded the case for further proceedings so that the plaintiffs could try to demonstrate the high level of culpability required to establish “reckless conduct” -- a showing that the plaintiffs did not make. Rather, the appellate court’s decision is overly expansive and destructive to the important distinction between negligence and recklessness as a matter of law -- a distinction on which individual immunity turns. This Court’s adoption of comments b, f and g of the Restatement will clarify that distinction.

The appellate court disregarded a vital distinction between negligence and recklessness that protects governmental employees engaged in governmental functions from personal liability. The appellate court fatally blurred the legal distinction between negligence and recklessness by glossing over the conscious-choice-of-action requirement. The import of this blurring is

dramatic. If an employee is determined to be reckless as opposed to merely negligent, that employee is subjected to personal liability – and, in some cases, ruinous personal liability for those employees and their families.

The appellate court failed to demonstrate that the Director consciously disregarded a known risk. The Director was not even aware of this particular case. McCafferty, who is the director of DCFS, cannot be stripped of immunity based on the appellate court's statement that "these two individuals acted in a reckless manner in allowing these 'supervised' visits between Martin and D.M. to be conducted as they were." The finding also makes the Director or a Supervisor of a government employee unable to successfully assert immunity because the mere conduct of a subordinate no matter how far removed from his supervision or whether there is no evidence that the employee consciously disregarded a risk.

The employee immunities protect against potentially devastating personal liability. The immunity has the latent if not direct effect of allowing public employers to attract and retain qualified personnel. Under the appellate court's decision, negligence is all that is required to establish the possibility of personal liability, even in the absence of any direct involvement.

The eighth district imposed upon a director or administrator a duty of constant protection of the hundreds of children in the County's care at similar facilities or some sort of County custody. This purported duty is impossible to satisfy and strips the highest officials of departments of immunity making them personally liable for the actions or inactions of others in their department.

A sine qua non of recklessness is a conscious decision. While it is possible that when no evidence exists demonstrating a conscious decision to act or a conscious decision to fail to act, a person may be determined to be negligent. See Marchetti (1990), 53 Ohio St.3d at fn. 3, *citing*

Comment g to Section 500 of the Restatement of Torts 2d. But, with regard to recklessness, that is not true. Id. Recklessness, unlike negligence, requires a conscious choice of a course of action, with knowledge or a reason to know that it will create serious danger to others. Negligence may also consist of an intentional act done with knowledge that it creates a risk of danger to others, but the consciousness of the risk is not a requirement to establish mere negligence. Recklessness must include not only substantially higher risk, but also – and fundamentally – a conscious decision to act or conscious decision to not act. (Id.)

IV. CONCLUSION

Amici Curiae on behalf of County Commissioners Association of Ohio and the County Risk Sharing Authority respectfully ask this Court to reverse the intermediate appellate court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Amicus Brief in Support of Appellants Cuyahoga County Department of Children and Family Services, James McCafferty and Gina Zazzara was served July 27, 2007 by depositing same in first-class United States mail, postage prepaid, to the following:

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