

IN THE SUPREME COURT OF OHIO

CHERITA RANKIN, ET AL. ) Case No. 2007-0306  
)  
Plaintiffs/Appellees, )  
) On Appeal from the  
) Cuyahoga County Court of Appeals,  
vs. ) Eighth Appellate District  
)  
)  
CUYAHOGA COUNTY DEPARTMENT ) Court of Appeals Case No. 86620  
OF CHILDREN AND FAMILY )  
SERVICES, ET AL. )  
)  
)  
Defendants/Appellants. )  
)

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APPELLANTS' MERIT BRIEF

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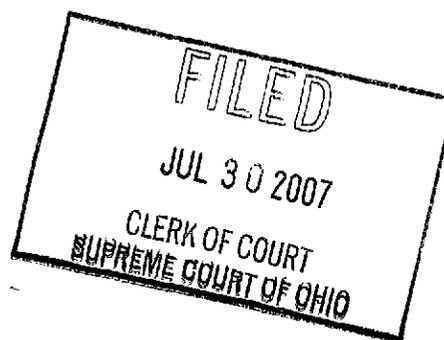
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## STATEMENT OF THE FACTS

This is a discretionary appeal that asks this Court to correct the erroneous legal analysis employed by the Court of Appeals that subjects Ohio public children services agencies and their employees to civil liability for the criminal misconduct of a third party. Defendants/appellants Cuyahoga County Department of Children and Family Services, department director James McCafferty, and social worker Gina Zazzara respectfully submit that the Court of Appeals did not apply Ohio law correctly when it reversed the trial court's order that granted summary judgment in favor of these appellants. This appeal provides the Court with the opportunity to set aside the appellate court's flawed analysis and provide appropriate standards that will govern such claims.

This case concerns D.M., a minor (D.O.B. 4/13/00), who is the daughter of appellee Cherita Rankin and Andre Martin. The facts drawn from the record below reflect that as of April 2003 D.M. was residing with appellee Estella Rankin, her maternal grandmother. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit D, pg. 2.) On or about April 8, 2003, the Cuyahoga County Department of Children and Family Services (hereafter "CCDCFS") and the Cleveland Heights police department received referrals of possible abuse or neglect of D.M. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit D, pg. 1; id. at Exhibit E.) A medical examination of the child and an investigation by CCDCFS was unable to substantiate sexual abuse. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit D, pp. 15-16.)

In the course of that investigation, D.M. was committed to the temporary custody of CCDCFS on or about April 15, 2003 pursuant to an order of the Juvenile Division of the

Cuyahoga County Court of Common Pleas. (7/14/04 Plaintiffs' Second Amended Complaint at para. 1.) The Juvenile Court's order, which was journalized on April 23, 2003, reflected that the CCDCFS complaint alleging D.M. was neglected was amended to allege that she was dependent. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit A.) The Juvenile Court further ordered that Andre Martin was to have supervised visits with D.M. at the visiting center located in the Jane Edna Hunter Social Services Center, with visits to be scheduled on or before April 25, 2003. (7/14/04 Plaintiffs' Second Amended Complaint at para. 2; 5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit A.) The Juvenile Court prohibited Andre Martin from going to Cherita Rankin's residence until further order of the court. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit A.)

CCDCFS social worker Gina Zazzara was the ongoing social worker assigned to this matter. (5/2/05 Defendants' Motion for Summary Judgment, Affidavit of Gina Zazzara at para. 4.) Zazzara's job duties included investigating referrals of abuse and neglect; providing ongoing case management to children and families; home visits; completing safety, risk, and strengths and needs assessments; creating case plans based on identified needs; and referring clients and children for services based on the case plans. (5/2/05 Defendants' Motion for Summary Judgment, Affidavit of Gina Zazzara at para. 2.) Zazzara's job duties did not include the supervised visitations that occurred at the agency. (5/2/05 Defendants' Motion for Summary Judgment, Affidavit of Gina Zazzara at para. 3.)

In June 2003, D.M. reportedly told maternal grandmother Estella Rankin that her father, Andre Martin, during supervised visits, took D.M. to the bathroom where they were alone and unsupervised. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary

Judgment at Exhibit F, para. 2.) On June 18, 2003 and June 25, 2003, Estella Rankin contacted Gina Zazzara and informed her that Andre Martin was taking D.M. into the bathroom unsupervised that that Estella Rankin did not want that to occur. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit F, para. 3.) Zazzara informed Estella Rankin that Andre Martin would no longer be allowed to bring D.M. into the bathroom in an unsupervised capacity. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit F, para. 4.) According to Estella Rankin, Andre Martin continued to take D.M. into the bathroom unsupervised. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit F, para. 5.)

Because Estella Rankin was unable to bring D.M. to a July 23, 2003 scheduled visitation with Andre Martin, Gina Zazzara transported D.M. that day to the Jane Edna Hunter Social Services Center. (5/2/05 Defendants' Motion for Summary Judgment, Affidavit of Gina Zazzara at paras. 5-6.) Zazzara delivered D.M. to the care of another CCDCFS employee whose job was to supervise D.M.'s visit with Andre Martin. (5/2/05 Defendants' Motion for Summary Judgment, Affidavit of Gina Zazzara at para. 7.) Zazzara was not responsible for supervising the visit and was not present during the visit. (5/2/05 Defendants' Motion for Summary Judgment, Affidavit of Gina Zazzara at paras. 8-9.)

During the course of that July 23, 2003 visitation, Andre Martin was observed taking D.M. into the men's restroom. (7/14/04 Plaintiffs' Second Amended Complaint at para. 4.) After Martin returned with D.M. to the visitation area, he placed D.M. on his lap and, with her jacket over her lap, placed his hand under the child's skirt and fondled her genitals. (7/14/04 Plaintiffs' Second Amended Complaint at para. 3.) Gina Zazzara learned about these incidents when she returned to pick up D.M. to transport her back to the home of Estella Rankin at the

conclusion of the visitation. (5/2/05 Defendants' Motion for Summary Judgment, Affidavit of Gina Zazzara at para. 10.)

One month later, on August 29, 2003, Andre Martin was indicted in Cuyahoga County Common Pleas Court Case No. 441511. (7/14/04 Plaintiffs' Second Amended Complaint at para. 5.) Martin was charged on multiple counts including rape, kidnapping, gross sexual imposition, and child endangering. After pleading guilty in October 2003 to one count of gross sexual imposition, Martin was sentenced to a three-year term of incarceration. (7/14/04 Plaintiffs' Second Amended Complaint at para. 6.)

On April 14, 2004, Appellee, Cherita Rankin, as mother and next friend of D.M., filed a two-count civil complaint alleging state law claims against CCDCFS and Andre Martin. (4/14/04 Complaint). On June 23, 2004, Cherita Rankin and new-party plaintiff Estella Rankin filed their first amended complaint, adding CCDCFS director James McCafferty and CCDCFS social worker Gina Zazzara as new-party defendants and asserting an additional claim for relief under federal law. (6/23/04 Plaintiffs' First Amended Complaint.) On July 14, 2004, Appellees, Cherita Rankin and Estella Rankin filed their Second Amended Complaint advancing four (4) claims for relief. (7/14/04 Plaintiffs' Second Amended Complaint.)

As is relevant to this appeal, Count I of the second amended complaint asserted a state law tort claim against Andre Martin and appellants James McCafferty and Gina Zazzara arising out of Martin's criminal conduct, alleging in particular that McCafferty and Zazzara failed "to provide a safe and secure environment for [D.M.]" (7/14/04 Plaintiffs' Second Amended Complaint at para. 9.) Count II of the second amended complaint asserted a state law tort claim against appellant CCDCFS, alleging that the agency "knew or should have known from records in the agency's possession that \*\*\* Andre Martin had a history and propensity to engage in

domestic violence and was alleged to be a substance abuser” and that the agency “willfully and recklessly ignored its responsibility to provide a safe and secure setting as directed by the [Juvenile] Court, and negligently failed to keep \*\*\* Andre Martin properly under surveillance.” (7/14/04 Plaintiffs’ Second Amended Complaint at paras. 11-16.) Count III, asserting a federal civil rights claim against CCDCFS, alleged that the agency “negligently subjected or caused to be subjected [D.M.] to sexual molestation, contrary [sic] her rights, privileges, or immunities secured by the Constitution and laws.” (7/14/04 Plaintiffs’ Second Amended Complaint at para. 20.) Count IV asserted a state law tort claim alleging that the defendants’ “reckless and wanton conduct” proximately caused damages to D.M. (7/14/04 Plaintiffs’ Second Amended Complaint at para. 26.)

Answering the second amended complaint, the appellants denied the appellees’ substantive allegations and asserted a cross-claim against Andre Martin. (10/13/04 Defendants’ Answer and Cross-Claim.) After reviewing objections to the appellees’ discovery requests and examining the requested documents in camera, the trial court ultimately granted a protective order as to the appellees’ improper discovery requests. (4/5/05 Journal Entry.)

On May 2, 2005, appellants CCDCFS, McCafferty, and Zazzara filed their motion for summary judgment, asserting that they were not civilly liable for Andre Martin’s criminal acts. (5/2/05 Defendants’ Motion for Summary Judgment.) On May 27, 2005, the appellees filed their brief in opposition to the motion for summary judgment. (5/27/05 Plaintiffs’ Brief in Opposition to Defendants’ Motion for Summary Judgment.) On June 9, 2005, the appellants filed a reply brief in support of their motion for summary judgment. (6/9/05 Defendants’ Reply Brief.) On June 10, 2005, the appellees filed a surreply brief opposing summary judgment. (6/10/05 Plaintiffs’ Surreply Brief.)

On June 17, 2005, the trial court granted the appellants' motion for summary judgment.

On June 28, 2005, the appellees filed their notice of appeal to the Eighth District Court of Appeals.<sup>1</sup>

On January 2, 2007, the Eighth District Court of Appeals reversed the trial court's order granting summary judgment in favor of the appellants. See *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, Cuyahoga App. No. 86620, 2006-Ohio-6759. Departing from the three-tiered analysis applicable to such claims, this Court of Appeals decision holds that the "special relationship" exception to Ohio's "public duty rule" is an exception that subjects political subdivisions to liability notwithstanding R.C. 2744.02(A)(1) and R.C. 2944.02(B). *Id.* at ¶¶ 20-25. The Court of Appeals further denied R.C. 2744.03(A)(6) immunity to individual employees McCafferty and Zazzara, concluding that reasonable minds could find they "acted in a reckless manner in allowing these 'supervised' visits between Martin and D.M. to be conducted as they were." *Id.* at ¶28. The Court of Appeals additionally ruled that the trial court abused its discretion in its discovery rulings.

On February 15, 2007, the appellants filed their notice of appeal in the Supreme Court of Ohio. On May 16, 2007, the Supreme Court of Ohio allowed the appellants' discretionary appeal on Propositions of Law Nos. I and II.

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<sup>1</sup> Because it was unclear to the Court of Appeals whether the trial court had ruled on the appellees' claims against Andre Martin or on the appellants' cross-claim against Andre Martin, the Court of Appeals temporarily remanded the case to the trial court on February 13, 2006 to clarify the disposition of those claims. The trial court subsequently granted the appellees' motion for a default judgment against Martin and the appellants voluntarily dismissed their cross-claim without prejudice. (5/16/06 Default Judgment Journal Entry; 6/19/06 Notice of Voluntary Dismissal of Cross-Claim.)

## **ARGUMENT:**

### **FIRST PROPOSITION OF LAW ACCEPTED FOR REVIEW:**

The appellate court erred in holding that defendant-appellant Cuyahoga County Department of Children and Family Services was not immune from liability pursuant to Ohio Revised Code Chapter 2744.

### **PROPOSED SYLLABUS:**

**A political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with its operation of a public children services agency except as provided in R.C. 2744.02(B). The “special relationship” exception to the public duty rule is not an exception under R.C. 2744.02(B). R.C. 2744.02(A)(1), R.C. 2744.02(B), applied.**

The tort liability of Ohio’s political subdivisions is governed by Chapter 2744 of the Ohio Revised Code. By that law, the Ohio General Assembly has established for Ohio policy that political subdivisions generally shall not be liable in tort under R.C. 2744.02(A)(1) except under specific circumstances that the legislature set forth under R.C. 2744.02(B)(1) through (5). In disregard of this Ohio law, however, the Court of Appeals in this case ruled that the “special relationship” exception to the public duty rule, though not an exception set forth under R.C. 2744.02(B)(1) through (5), nevertheless was a stand-alone exception that subjects Ohio political subdivisions to liability despite R.C. 2744.02(A)(1).

The Court of Appeals committed fundamental error in this ruling. Because appellant CCDCFS was engaged in the governmental function of operating a public children services agency, it is generally not subject to tort liability under R.C. 2744.02(A)(1) unless one of the exceptions described under R.C. 2744.02(B)(1) through (5) applies. None of those exceptions were applicable here, and the special relationship exception to the public duty rule does not supersede or otherwise subject an Ohio political subdivision to tort liability when R.C. 2744.02(A)(1) controls. Because the Court of Appeals erroneously applied a common law

doctrine in violation of Ohio's statutory scheme, the judgment of the Court of Appeals should be reversed.

**A. An Ohio political subdivision's tort liability is governed by Chapter 2744. of the Ohio Revised Code.**

Since 1985, the tort liability of Ohio's political subdivisions has been subject to the Ohio Political Subdivision Tort Liability Act, codified at Chapter 2744 of the Ohio Revised Code. That act provides the parameters for political subdivision tort liability when the political subdivision is engaged in governmental or proprietary functions. Proper application of that body of law begins with the question of whether the political subdivision was engaged in a governmental or a proprietary function. Thus in this case, the first question to be answered is whether appellant CCDCFS was engaged in a governmental or a proprietary function. As the following discussion will show, the operation of this public children services agency is a governmental function under Ohio law.

**1. A county's operation of a public children services agency is a "governmental function" of a political subdivision under R.C. 2744.01(C).**

It does not appear that this Court has ever said explicitly that a county's operation of a public children services agency is a "governmental function" under R.C. 2744.01(C). In *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 1994-Ohio-394, 639 N.E.2d 105, the Court held that a county's human services department was engaged in a governmental function when it provided adoptive child services. More recently in *Marshall v. Montgomery Cty. Children Serv. Bd.*, 92 Ohio St.3d 348, 2001-Ohio-209, 750 N.E.2d 549, the certified question asked the Court to determine, for purposes of the immunity exceptions in R.C. 2744.02(B)(5) and R.C. 2744.03(A)(6)(c), whether R.C. 2151.421 expressly imposed liability on political subdivisions and their employees for failure to investigate child abuse. *Id.* at 351, 2001-Ohio-

209, 750 N.E.2d 549. Although the *Marshall* court's negative answer may have implicitly recognized that the Montgomery County Children Services Board was engaged in a governmental function as it relates to child abuse reports and investigations, the Court's opinion did not say so explicitly. Ohio law nevertheless confirms this to be so.

Pursuant to R.C. 2744.01(C)(1), a "governmental function" means a function of a political subdivision that is specified in R.C. 2744.02(C)(2) or that satisfies any of the following:

- (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
- (b) A function that is for the common good of all citizens of the state;
- (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

R.C. 2744.01(C)(1).

Under R.C. 2744.01(C)(2), "governmental functions" include the operation of a job and family services department or agency. See R.C. 2744.01(C)(2)(m). When R.C. 2744.01(C)(2)(m) previously included the operation of a *human* services department as a governmental function, court decisions applying that provision recognized that a county's operation of such agencies was a governmental function. See *Wilson v. Stark Cty. Dept. of Human Servs*, 70 Ohio St.3d 450, 452, 1994-Ohio-394, 639 N.E.2d 105 (departments of human services are instrumentalities through which political subdivisions carry out governmental functions); *Howard v. Hamilton Cty. Dept. of Human Services* (1999), 136 Ohio App.3d 33, 735 N.E.2d 944; *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 602 N.E.2d 363. Effective January 1, 2002, Substitute Senate Bill 24 amended R.C. 2744.01 to, among other things, substitute "job and family" for "human" in R.C. 2744.01(C)(2)(m). Court

decisions applying this amended provision now confirm that a county's operation of a job and family services department is a governmental function. See *Sobiski v. Cuyahoga Cty. Dept. of Children and Family Servs.*, Cuyahoga App. No. 84086, 2004-Ohio-6108, at ¶ 18; *Eischen v. Stark Cty. Bd. of Commrs.*, Stark App. No. 2002 CA 00090, 2002-Ohio-7005, at ¶ 14.

Governmental functions also include the operation of children's agencies. See R.C. 2744.01(C)(2)(o). See *Watters v. Ross Cty. Children Servs.* (Feb. 18, 2000), Pickaway App. No. 99 CA 9/99 CA 12 (operation of children services agency is governmental function under R.C. 2744.01(C)(2)(o)).

Governmental functions also include any function that the General Assembly mandates a political subdivision perform. See R.C. 2744.01(C)(2)(w). See *Howard v. Hamilton Cty. Dept. of Human Services* (1999), 136 Ohio App.3d 33, 735 N.E.2d 944 (administration of type-B family day care program was governmental function mandated by General Assembly under R.C. 2744.01(C)(2)(w)).

In the matter at hand, appellant CCDCFS is a public children services agency under Ohio law. R.C. 5153.02 requires each county to have a public children services agency. See R.C. 5153.02. As used in the Revised Code, "public children services agency" means an entity specified in R.C. 5153.02 that has assumed the powers and duties of the children services function prescribed by R.C. Chapter 5153 for a county. See R.C. 5153.01(A). The public children services agency may be a county children services board, a county department of job and family services, or a private or government entity designated under R.C. 307.981. See R.C. 5153.02.<sup>2</sup>

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<sup>2</sup> See, also, R.C. 329.01 (requiring each county to have a department of job and family services).

R.C. 5153.16 prescribes the powers and duties of a public children services agency and states the following, in relevant part:

(A) Except as provided in section 2151.422 of the Revised Code, in accordance with rules adopted under section 5153.166 of the revised code, and on behalf of children in the county whom the public children services agency considers to be in need of public care or protective services, the public children services agency shall do all of the following:

(1) Make an investigation concerning any child alleged to be an abused, neglected, or dependent child;

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(3) Accept custody of children committed to the public children services agency by a court exercising juvenile jurisdiction;

(4) Provide such care as the public children services agency considers to be in the best interests of any child adjudicated to be an abused, neglected, or dependent child the agency finds to be in need of public care or service;

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(12) Cooperate with, make its services available to, and act as the agent of persons, courts, the department of job and family services, the department of health, and other organizations within and outside the state, in matters relating to the welfare of children, except that the public children services agency shall not be required to provide supervision of or other services related to the exercise of parenting time rights granted pursuant to section 3109.051 or 3109.12 of the Revised Code or companionship or visitation rights granted pursuant to section 3109.051, 3109.11, or 3109.12 of the Revised Code unless a juvenile court, pursuant to Chapter 2151. of the Revised Code, or a common pleas court, pursuant to division (E)(6) of section 3113.31 of the Revised Code, requires the provision of supervision or other services related to the exercise of the parenting time rights or companionship or visitation rights;

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R.C. 5153.16.

Inasmuch as Ohio law requires each county to have a public children services agency, appellant's operation of its public children services agency is a governmental function of a political subdivision under R.C. 2744.01(C)(2)(m), (o), and/or (w). Even if alternatively

considered under the general provisions of R.C. 2744.01(C)(1), the operation of such an agency readily meets the standard for a governmental function under that provision. It is therefore apparent that a county's operation of a public children services agency is a governmental function of a political subdivision under R.C. 2744.01(C).

2. **Except as provided in R.C. 2744.02(B), a county is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a county's operation of a public children services agency.**

The Court of Appeals appears to have acknowledged at least implicitly that the operation of Cuyahoga County's Department of Children and Family Services was a governmental function. See *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, Cuyahoga App. No. 86620, 2006-Ohio-6759, at ¶ 18. But the Court of Appeals failed to apply the appropriate legal analysis under R.C. Chapter 2744 to determine the potential tort liability for engaging in this governmental function. Had the appellate court done so, it should have determined that appellant CCDCFS was not liable here pursuant to R.C. 2744.02(A)(1).

As the Court's decisions have now made clear, determining whether an Ohio political subdivision may be held liable in tort is subject to a three-tiered analysis under Ohio Revised Code Chapter 2744. See *Elston v. Howland Loc. Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, at ¶ 10; *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, at ¶ 14; *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, at ¶ 7; *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556, 2000-Ohio-486, 733 N.E.2d 1141; *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421, 697 N.E.2d 610.

The first analytical tier provides that a political subdivision generally is not liable in damages in a civil action for injury, death, or loss to persons or property in connection with the performance of a governmental or proprietary function. R.C. 2744.02(A)(1) states:

For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

R.C. 2744.02(A)(1). Although R.C. 2744.02(A)(1) is frequently understood to grant “immunity” to political subdivisions, the statute technically does not confer an immunity that excuses tort liability but rather denies liability generally.

The second analytical tier requires a court to consider whether there is any applicable exception under R.C. 2744.02(B) that imposes liability on the political subdivision. At all times relevant to this case, R.C. 2744.02(B) provided that liability could arise for the following:

- Injury, death, or loss to person or property caused by the negligent operation of non-emergency motor vehicles, R.C. 2744.02(B)(1);
- Injury, death, or loss to person or property caused by the negligent performance of proprietary functions, R.C. 2744.02(B)(2);
- Injury, death, or loss to person or property caused by the negligent failure to keep public roads in repair and free from obstruction, R.C. 2744.02(B)(3);
- Injury, death, or loss to person or property caused by employee negligence that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings used in connection with the performance of a governmental function, R.C. 2744.02(B)(4); or
- Injury, death, or loss to person or property when liability is expressly imposed on the political subdivision by a provision of the Revised Code, R.C. 2744.02(B)(5).

R.C. 2744.02(B).

If there exists a basis for political subdivision tort liability under any of the exceptions provided under R.C. 2744.02(B), the third and final analytical tier requires a court to determine whether any of the defenses and immunities provided under R.C. 2744.03 is applicable to the case. Unlike R.C. 2744.02(A)(1), which does not by its terms speak to whether the political

subdivision is “immune” from liability, R.C. 2744.03(A)(1), (2), (3), (4), (5), and (7) do expressly describe those circumstances in which “[t]he political subdivision is immune from liability.”

Had the Court of Appeals applied this three-tiered statutory analysis to the facts of the instant case, it should have found at the first tier that pursuant to R.C. 2744.02(A)(1), Cuyahoga County’s operation of a public children services agency was a “governmental function” of a political subdivision under R.C. 2744.01(C) for which appellant CCDCFS was not liable as a matter of law except as provided under R.C. 2744.02(B).

Under the second tier, CCDCFS could be subject to liability if any of the five (5) exceptions provided under R.C. 2744.02(B) authorize the imposition of liability. But none of the exceptions enumerated under R.C. 2744.02(B) are applicable to the appellees’ allegations in this case. The Court of Appeals’ opinion assuredly does not identify any exception under R.C. 2744.02(B) that authorizes the imposition of civil liability in this case.

For their part, the appellees did not identify in the appellate court proceedings any exception under R.C. 2744.02(B) upon which political subdivision liability could be based, insisting instead that the “special relationship” exception to the public duty rule made it unnecessary for the appellees to pass the second analytical tier. (9/26/05 Brief of Plaintiffs/Appellants at p. 16.) While the appellants will address the “special relationship” exception to the public duty rule in the following section, the appellees did not in any case identify in the appellate court proceedings any exception under R.C. 2744.02(B)(1) through (5)

that could provide proper grounds to impose tort liability upon appellant CCDCFS under the circumstances of this case.<sup>3</sup>

To the extent that neither the appellees nor the Court of Appeals could identify at the second analytical tier any legal basis for political subdivision liability under R.C. 2744.02(B), it was unnecessary to further consider at the third analytical tier the immunities and defenses available under R.C. 2744.03. The three-tiered analysis in this case, when properly applied, establishes that appellant CCDCFS could not be tortiously liable under the circumstances of this case pursuant to R.C. 2744.02(A)(1). The Court of Appeals accordingly erred when it failed to apply the appropriate legal analysis under R.C. Chapter 2744 before reversing the trial court's award of summary judgment in favor of appellant CCDCFS.

**B. The “special relationship” exception to Ohio’s public duty rule does not supercede the statutory framework for determining an Ohio political subdivision’s tort liability under Chapter 2744. of the Ohio Revised Code.**

The Court of Appeals held in this case that the “special relationship” exception to the public duty rule provided grounds to impose tort liability and thus reverse the summary judgment rendered in favor of appellant CCDCFS. The Court of Appeals’ ruling is erroneous, however, because the special duty exception to the public duty rule does not supercede the statutory

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<sup>3</sup> The appellees did argue in the trial court that liability was expressly imposed on CCDCFS under R.C. 2744.02(B)(5) for the agency’s supposed failure to immediately report knowledge or suspicion of Martin’s child abuse pursuant to R.C. 2151.421. (5/27/05 Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Judgment at pp. 10-11, 14-16.) But R.C. 2151.421 requires that reports be made “to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.” R.C. 2151.421(A)(1)(a). The appellants’ response in the trial court was that CCDCFS *is* the public children services agency to which reports are to be made, and nothing in R.C. 2151.421 requires recipient agencies to re-report to other recipient agencies, nor did R.C. 2151.421, as amended effective April 9, 2003, expressly impose civil liability. (6/9/05 Defendants’ Reply Brief at pp. 4-7.) And to the extent that Andre Martin was indicted little more than one month after the incident occurred, appellees could hardly say that there was any failure to report or investigate promptly. At any rate, the appellees did not advance their statutory argument concerning R.C. 2744.02(B)(5) and R.C. 2151.421 in the Court of Appeals.

framework for determining political subdivision tort liability under R.C. Chapter 2744. Because the Court of Appeals committed fundamental error in its analysis of this issue, the judgment of the Court of Appeals should be reversed.

Quoting from its decision in *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 159 Ohio App.3d 338, 2004-Ohio-6618, 823 N.E.2d 934, the appellate court's opinion below states:

R.C. 2744.02(A)(1) confers on all political subdivisions a blanket immunity, which provides that they are not liable for injury, death or loss to persons or property that occurred in relation to the performance of a governmental or proprietary function. *Id.*

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 law.

*Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, Cuyahoga App. No. 86620, 2006-Ohio-6759, at ¶¶ 21-22 (internal punctuation omitted). The appellate court's decision reflects a fundamental misapplication of the public duty rule's "special relationship" exception to the circumstances of this case.

The Supreme Court of Ohio first addressed the public duty rule and the "special relationship" exception to that rule in *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468. In that case, victims of a criminal attack brought a civil action against the Village of Ottawa Hills for the negligent failure of the village's police department to respond to telephone calls for police assistance.<sup>4</sup> Considering the case in light of public duty rule, the *Sawicki* court held: "When a duty which the law imposes upon a public official is a duty to the

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<sup>4</sup> Because that case arose out of events that occurred after the Supreme Court of Ohio had abrogated the judicially created doctrine of sovereign immunity but before the November 20, 1985 effective date of the Political Subdivision Tort Liability Act of 1985, the provisions of R.C. Chapter 2744 did not apply to that case. *Id.* at 225, 525 N.E.2d 468.

public, a failure to perform it, or an inadequate or erroneous performance, is generally a public and not an individual injury.” *Id.*, syllabus at paragraph two. While a public duty thus does not impose any duty owed to a particular person, a duty may be established if there is a special relationship between the public officer and the particular person. The *Sawicki* court accordingly said:

In order to demonstrate a special duty or relationship, the following elements must be shown to exist: (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*, syllabus at paragraph four. The *Sawicki* court further held: “The public duty rule, and the special duty exception, comprise a doctrine which is independent of, and accordingly survived the abrogation of, sovereign immunity.” *Id.*, syllabus at paragraph three. The *Sawicki* court ultimately held that the Village of Ottawa Hills was not liable pursuant to the public duty rule or the special relationship exception.

It should be noted that in *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, the Supreme Court of Ohio abolished the public duty rule with regard to actions brought against the State of Ohio because it was incompatible with the express language of R.C. 2743.02(A)(1) “requiring that the state’s liability in the Court of Claims be determined in accordance with the same rules of law applicable to suits between private parties.” *Id.*, syllabus at paragraph one.

The Ohio Supreme Court has more recently noted that “the public-duty rule remains viable as applied to actions brought against political subdivisions pursuant to R.C. Chapter 2744.” *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, at

¶ 32, fn. 2. The statutory scheme under R.C. Chapter 2744 does not contain an express statement comparable to that of R.C. 2743.02(A)(1). It is illuminating to note, moreover, that the *Yates* court did *not* apply the special relationship exception to the public duty rule. The *Yates* court in fact applied the three-tiered 2744 analysis when it held that a board of education could be liable under former R.C. 2744.02(B)(5) for its failure to report a teacher’s sexual abuse of a minor student in violation of R.C. 2151.421 that proximately results in the sexual abuse of another minor student by the same teacher. *Id.* at syllabus.

In any event, the Court of Appeals’ ruling here declaring the public duty rule’s “special relationship” exception to be a liability-imposing exception under R.C. 2744.02 is fundamentally flawed for several reasons.

To begin, there was no reason to even consider the public duty rule or its special relationship exception below because appellant CCDCFS’s motion for summary judgment did not assert the public duty rule as grounds for summary judgment. The appellees’ reliance upon the public duty rule’s special relationship exception thus was not even responsive to the contention that appellant was not liable pursuant to R.C. 2744.02.

Beyond that, the appellees’ reliance upon the special relationship exception and, more importantly, the Court of Appeals’ decision accepting it, was erroneous because that argument conceptually mixes apples with oranges.

In particular, the special relationship exception to the public duty rule concerns only whether the defendant owed a legal *duty* to the plaintiff. This is but one element necessary to establish a claim for negligence.

By contrast, the three-tiered analysis under Chapter 2744 begins with the general rule that a political subdivision is not liable for acts or omissions in connection with governmental or

proprietary functions, regardless of whether any duty was owed. It then proceeds to the second analytical tier to ascertain whether there does exist some legal basis for liability under R.C. 2744.02(B)(1) through (5). The “special relationship” exception to the public duty rule plainly is not one of the exceptions provided under R.C. 2744.02(B)(1) through (5). Nor is it relevant to the third analytical tier under which other immunities and defenses are available. Thus for purposes of analysis under R.C. 2744.02, the existence of a duty is legally immaterial.

But the Eighth District Court of Appeals’ decision here stands for the proposition that the public duty rule’s special relationship exception provides independent grounds to impose political subdivision tort liability and defeats the general rule of non-liability under R.C. 2744.02(A)(1). The appellate court’s ruling is contrary to Ohio law. It is moreover contrary to a recent decision by the Ninth District Court of Appeals, whose analysis is particularly instructive here.

In *M.B. v. Elyria City Bd. of Edn.*, Lorain App. No. 05 CA 008831, 2006-Ohio-4533, parents and their minor children filed a lawsuit against the Elyria City School District and a kindergarten teacher alleging various state law causes of action, including a claim based on the common law public duty doctrine. The plaintiffs argued that the public duty rule superseded Chapter 2744 so long as the plaintiffs could demonstrate a “special relationship” with the defendant. *Id.* at ¶ 8. Rejecting this contention, the Ninth District Court of Appeals, in language that has particular resonance here, said the following:

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. 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. 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.

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. 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.

Id. at ¶¶ 10-11 (citations omitted; emphasis in original).

Thus while the public duty rule and its special relationship exception may be issues in a case against a political subdivision, this common law doctrine does not displace the analysis necessary to determine whether the political subdivision is subject to liability under R.C. 2744.02. Nor could the Court of Appeals lawfully create a new uncodified exception to R.C. 2744.02. As one Ohio court has said,

The General Assembly's enactment of R.C. 2744.02(A)(1) reflects a policy choice on the part of the state of Ohio to extend to its political subdivisions the full benefits of sovereign immunity from tort claims. Likewise, the exceptions to immunity in R.C. 2744.02(B) and the exceptions and defenses in R.C. 2744.03 reflect policy choices on the state's part to submit itself to judicial relief on tort claims only with respect to the particular circumstances identified therein. Because those exceptions and defenses are in derogation of a general grant of immunity, they must be construed narrowly if the balances which have been struck by the state's policy choices are to be maintained.

*Doe v. Dayton City School Dist. Bd. of Edn.* (1999), 137 Ohio App.3d 165, 169, 738 N.E.2d 390.

The special relationship exception to the public duty rule is not a stand-alone exception under R.C. 2744.02(B)(1) through (5). The Court of Appeals' decision in this case is fundamentally inconsistent with the legislature's language in that it erroneously treats the public duty rule's special relationship exception as if it were an exception under R.C. 2744.02(B)(1) through (5). As a review of the text of R.C. 2744.02 and the decision in *M.B. v. Elyria City Bd. of Edn.* separately confirm, it is not.

For its part, the Eighth District Court of Appeals relied exclusively here on its previous decision in *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 159 Ohio App.3d 338, 2004-Ohio-6618, 823 N.E.2d 934, for the proposition that the special relationship exception could impose liability on a political subdivision consistent with R.C. 2744.02. See *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, Cuyahoga App. No. 86620, 2006-Ohio-6759, at ¶ 22. But on April 19, 2006, over eight (8) months before the January 2, 2007 *Rankin* ruling was issued in this case, the Supreme Court of Ohio vacated the Court of Appeals' *State Auto* decision and remanded the case because there was no final appealable order that would have permitted the Court of Appeals to exercise its appellate jurisdiction in the case. See *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199. The practical effect of the Ohio Supreme Court's ruling in that case was to set aside the appellate court's decision and remand the case to the point at which the error occurred. See *State ex rel. Stevenson v. Murray* (1982), 69 Ohio St.2d 112, 113, 431 N.E.2d 324.

Thus the appellate court's vacated decision in *State Auto* ought not be considered as persuasive authority. See *M.B. v. Elyria City Bd. of Edn.*, *supra*, at ¶ 12, fn. 1 (*State Auto* "cannot be relied upon for precedent" in light of Ohio Supreme Court's decision vacating judgment on jurisdictional grounds). Beyond that, its conclusion is fundamentally flawed for the substantive reasons discussed in *M.B. v. Elyria City Bd. of Edn.*, *supra*.

The Eighth District Court of Appeals' ruling in this case is contrary to Ohio law. The undisputed facts of this case show that appellant CCDCFS is a public children services agency that was engaged in a governmental function under R.C. 2744.01(C). Pursuant to R.C. 2744.02(A)(1), CCDCFS could not be liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with this

governmental function except as provided in R.C. 2744.02(B). No exception under R.C. 2744.02(B)(1) through (5) applied in this case, and the special relationship exception to the public duty rule did not constitute an independent non-statutory exception. Because the Court of Appeals erred in reversing the summary judgment rendered in favor of appellant CCDCFS, the judgment should be reversed and the judgment of the trial court should be reinstated.

SECOND PROPOSITION OF LAW ACCEPTED FOR REVIEW:

The appellate court erred in holding that defendants-appellants James McCafferty and Gina Zazzara were not immune from liability pursuant to Ohio Revised Code Chapter 2744.

**PROPOSED SYLLABUS:**

**An employee of a public children services agency is immune from liability where the employee's acts or omissions are not contrary to a clear standard of conduct and in conscious disregard of a known risk. R.C. 2744.03(A)(6)(b), construed and applied.**

The injury to D.M. in this case was caused by the criminal conduct of Andre Martin. Appellant James McCafferty, who is the CCDCFS Director, had no involvement whatsoever in that incident. Appellant Gina Zazzara, who is the CCDCFS social worker assigned to this family, had no involvement in that incident other than to transport D.M. to and from the visitation center. Yet with no basis to find that these appellants acted contrary to any clearly defined standard of conduct and in conscious disregard of a known risk, the Court of Appeals summarily declared that “reasonable minds could conclude 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.” *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, Cuyahoga App. No. 86620, 2006-Ohio-6759, at ¶ 28.

Appellants respectfully submit that the Court of Appeals erred in determining that the conduct of these employees could be considered “reckless” under Ohio law. They did not act

contrary to any clear standard of conduct. They did not act in conscious disregard of the risk that Andre Martin would commit a sexual assault during a court-ordered supervised visitation. Regardless of whether the facts of this case are viewed in light of specific standards that the appellants will propose herein for this Court's consideration or strictly in terms of the proper definition of "reckless," nothing in this case suggests that James McCafferty and Gina Zazzara acted with the kind of conscious disregard and disposition to perversity that may distinguish negligence from recklessness. Appellants respectfully request that this Court reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court that granted these employees immunity pursuant to R.C. 2744.03(A)(6).

**A. Under R.C. 2744.03(A)(6), an employee of a political subdivision is generally immune from civil tort liability unless a specific statutory exception applies.**

For the employees of a political subdivision, the analysis of their personal tort immunity is determined not by the three-tiered analysis used to determine the political subdivision's tort liability under R.C. 2744.02 and 2744.03 but rather by the terms of R.C. 2744.03(A)(6). See *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, at ¶ 17.

R.C. 2744.03(A)(6) provides:

In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employees, because that section provides for a criminal

penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the terms “shall” in a provision pertaining to an employee.

In the instant case, the Court of Appeals reversed the summary judgment rendered in favor of appellants McCafferty and Zazzara after determining that issues of fact existed as to whether these employees’ acts or omissions were in a reckless manner so as to deny them immunity under R.C. 2744.03(A)(6)(b).<sup>5</sup> The question now before this Court is whether the Court of Appeals erred in determining that the conduct of McCafferty and Zazzara could be considered “reckless” so as to deny them immunity under R.C. 2744.03(A)(6)(b).

While the Supreme Court of Ohio has considered the application of R.C. 2744.03(A)(6)(c) on several occasions, it appears that the Court has addressed R.C. 2744.03(A)(6)(b) only once, in *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 1994-Ohio-368, 639 N.E.2d 31. In that case, the court first upheld the constitutionality of R.C. 2744.02(B)(4). The court then affirmed the lower court determinations that the political subdivision was not liable pursuant to R.C. 2744.02 and the police chief was immune because the evidence did not meet the high standard necessary to deny employee immunity under R.C. 2744.03(A)(6)(b). It does not appear that the Supreme Court of Ohio has construed or applied R.C. 2744.03(A)(6)(b) since *Fabrey*.<sup>6</sup>

Since *Fabrey* (and even before it), the Ohio courts have generally considered whether immunity should be denied to an employee under R.C. 2744.03(A)(6)(b) by using legal

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<sup>5</sup> The appellees did not contend, and the Court of Appeals did not find, that the acts or omissions of McCafferty and Zazzara were manifestly outside the scope of their official responsibilities or that liability was expressly imposed upon these employees by a section of the Revised Code, so neither R.C. 2744.03(A)(6)(a) nor 2744.03(A)(6)(c) are at issue in this case.

<sup>6</sup> In *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, 733 N.E.2d 1141, the court vacated as premature but did not otherwise address substantively the lower courts’ determination that the employee was immune because there was no evidence to deny immunity under R.C. 2744.03(A)(6)(b). *Id.* at 562, 2000-Ohio-486, 733 N.E.2d 1141.

definitions to ascertain whether the employee acted “with malicious purpose, in bad faith, or in a wanton or reckless manner.”

Under this formulation, “malicious purpose” is said to connote “the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified.” *Cook v. Hubbard Exempted Village Bd. of Edn.* (1996), 116 Ohio App.3d 564, 569, 688 N.E.2d 1058 (quoting *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453-454, 602 N.E.2d 363). “[I]n order for a malicious purpose to exist, there must be ill will or enmity of some sort.” *Grimm v. Summit Cty. Children Servs. Bd.*, Summit App. No. 22702, 2006-Ohio-2411, at ¶ 73 (quoting *Shadoan v. Summit Cty. Children Servs. Bd.*, Summit App. No. 21486, 2003-Ohio-5775, at ¶ 12).

“Bad faith” means “more than bad judgment or negligence” and involves “a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.” *Cook v. Hubbard Exempted Village Bd. of Edn.*, supra, 116 Ohio App.3d at 569, 688 N.E.2d 1058 (quoting *Jackson v. Butler Cty. Bd. of Cty. Commrs.*, supra, 76 Ohio App.3d at 454, 602 N.E.2d 363).

“Wanton” misconduct is “the failure to exercise any care whatsoever.” *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d at 356, 1994-Ohio-368, 639 N.E.2d 31 (citing *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 363 N.E.2d 367, syllabus). The *Fabrey* court added:

In *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 55 O.O.2d 165, 166, 269 N.E.2d 420, 422, we stated, “mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.” 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, 55 O.O.2d at 166, 269 N.E.2d at 423.

*Fabrey*, 70 Ohio St.3d at 356, 1994-Ohio-368, 639 N.E.2d 31.

Explaining “reckless” conduct, the court in *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705, used the standard enunciated in 2 Restatement of the Law 2d, Torts (1965), at 587, Section 500:

The actor’s conduct is in reckless disregard of the safety of another 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.

*Thompson v. McNeill*, 53 Ohio St.3d at 104-105, 559 N.E.2d 705. See, also, *Marchetti v. Kalish* (1990), 53 Ohio St.2d 95, 96, 559 N.E.2d 699, fn. 2.<sup>7</sup>

The *Thompson* court noted that the term “reckless” is often used interchangeably with “willful” and “wanton” and that the court’s comments regarding reckless “apply to conduct characterized as willful and wanton as well.” *Thompson*, 53 Ohio St.3d at 104, 559 N.E.2d 705, fn. 1. See, also, *McGuire v. Lovell*, 85 Ohio St.3d 1216, 1219, 1999-Ohio-296, 709 N.E.2d 841 (Moyer, C.J., dissenting) (“In the context of immunity, reckless conduct has been viewed as interchangeable with wanton conduct. This, however, does not diminish the level of misconduct requires to meet either standard.”)

As even a casual survey of court decisions will confirm, Ohio courts that have considered whether or not a political subdivision employee is immune under R.C. 2744.03(A)(6) generally begin with a review of the relevant definitions and end with a conclusory finding by the court. While the decisions will recite factual allegations, they frequently provide little or no analysis that explains where negligence ends and recklessness begins. And because the line separating

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<sup>7</sup> Under Ohio’s criminal code, “a person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances, when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.” R.C. 2901.22(C).

negligence from recklessness can be a fine one, the mere allegation that the employee acted recklessly may be sufficient to deny the employee immunity, even though the employee had no direct involvement whatsoever in the incident upon which the claim is based.

The instant case is not atypical. The Court of Appeals ruled that because “reasonable minds” could find that appellants McCafferty and Zazzara acted recklessly, they must stand trial even though they did not do anything contrary to a clear standard of conduct and in conscious disregard of a known risk. While appellants respectfully submit that the Court of Appeals erred in its analysis and conclusion, this case may be an opportunity for the Court to consider this issue from a new perspective. Appellants believe that when proper legal standards are applied to their conduct, the Court should hold that there was no basis to find that these employees acted recklessly and that the judgment of the trial court should be reinstated.

**B. An employee of a public children services agency should be immune from liability where the employee’s acts or omissions are not contrary to a clear standard of conduct and in conscious disregard of a known risk.**

The Court of Appeals did not reverse the summary judgment awarded to McCafferty and Zazzara for any factual disputes suggesting that these employees acted with “malicious purpose” or in “bad faith” or in a “wanton” manner. Nor did the appellees so contend in the courts below.

The only reason that the Court of Appeals reversed the summary judgment awarded to these employees was the appellate court’s belief that reasonable minds could find that McCafferty and Zazzara acted in a reckless manner by “allowing these ‘supervised’ visits between Martin and D.M. to be conducted as they were.” *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, Cuyahoga App. No. 86620, 2006-Ohio-6759, at ¶ 28.

While appellants will specifically address in Section C below the reasons why the conduct of McCafferty and Zazzara could not constitute “reckless” conduct as properly defined

under Ohio law, appellants respectfully suggest this case provides the Court with an opportunity to go beyond mere legal definitions in order to articulate meaningful standards that may help to distinguish negligence, for which individual employee immunity attaches, from reckless conduct, for which there is no immunity. To be sure, “[d]etermining the point at which behavior rises from the merely negligent to the level of reckless behavior is in every instance problematic.” *Cater v. Cleveland*, 83 Ohio St.3d 24, 35, 1998-Ohio-421, 697 N.E.2d 610 (Moyer, C.J., concurring). Though legal definitions can be helpful to explain the meaning of legal terms, they may not necessarily establish practical standards of conduct. Fitting facts into a particular legal definition can frequently be a subjective exercise. Articulating relevant considerations may better help courts to focus their analyses and enhance the consistency and predictability of the decisional process.

Of no less importance, articulating definite standards of conduct may be of particular value to employees of political subdivisions like these appellants, who face individual civil liability only because their job duties require them to extend protective services in varied and uncertain circumstances involving children who may already be at risk. It is indeed “well recognized that a political subdivision acts through its employees.” *Elston v. Howland Loc. Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, at ¶ 19. Because that is so, it would seem reasonable to establish meaningful markers that will provide fair notice of the legal consequences flowing from an employee’s alleged acts or omissions. Regardless of whether an employee really can appreciate that it is reckless to “do[] an act or intentionally fail[] 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,” as the Court of Appeals here said in reliance upon the common legal definition, there may also be value in establishing some clear and simple lines of demarcation that may better help to distinguish right from wrong.

To that end, appellants respectfully submit that this Court’s decision in *Fabrey v. McDonald Village Police Dept.*, supra, is particularly instructive. While many Ohio case decisions have directed their attention primarily to the *Fabrey* opinion’s definitional discussion of “wanton” and “reckless” conduct, less attention appears to have been given to another passage of the *Fabrey* opinion that ultimately informed the Court’s decision in that case. Appellants believe that several useful principles may be gleaned from a close examination of that opinion.

In particular, the *Fabrey* court explicitly approved and adopted the following analysis rendered by the court of appeals:

Appellant argues that Chief Tyree acted in a willful and wanton manner by knowingly failing to comply with the minimum jail standards promulgated by the state Department of Rehabilitation and Correction.

\*\*\* There is no prohibition, in the standards, against permitting prisoners who do not present a threat to themselves or others to have smoking materials. Furthermore, appellee Tyree set forth the departmental policy on smoking in his deposition. Appellant has submitted no evidence as to how Riddle [the arrestee] obtained the lighter. Appellants do not allege that Chief Tyree gave the ignition device to Riddle (arguably such behavior could be considered willful and wanton conduct, given Riddle’s unstable condition at the time of incarceration). In the absence of this type of behavior, rather than mere allegations that Chief Tyree committed acts that could be considered *negligent* per se, the trial court correctly determined that summary judgment was appropriate on this issue.

*Fabrey*, 70 Ohio St.3d at 356, 1994-Ohio-368, 639 N.E.2d 31 (emphasis in original). The Supreme Court of Ohio concluded with these observations:

Although appellants argue that Tyree’s failure to maintain certain safety devices in violation of the standards caused Fabrey’s injuries, a review of the record reveals that Tyree’s conduct, while arguably negligent, does not rise to the level of wanton misconduct. Tyree apparently did not anticipate that a prisoner, while locked in a cell, would intentionally set fire to his own mattress. The General

Assembly has declared that Tyree's mere negligence in his official duties should not give rise to personal liability. This was properly within its authority.

*Fabrey*, 70 Ohio St.3d at 357, 1994-Ohio-368, 639 N.E.2d 31.

Several practical principles emerge from this discussion that would appear to be relevant in virtually any case in which there is an issue as to whether the employee's conduct was merely negligent or whether the conduct was wanton or reckless.

As a start to this discussion, the *Fabrey* opinion appears to explore whether the employee, namely the police chief, engaged in any conduct that directly caused the injury. The opinion observes: "Appellants do not allege that Chief Tyree gave the ignition device to Riddle (arguably such behavior could be considered willful and wanton conduct, given Riddle's unstable condition at the time of incarceration)." *Id.*, 70 Ohio St.3d at 356, 1994-Ohio-368, 639 N.E.2d 31. In *Fabrey*, the plaintiffs' injury was caused by a third party, namely Riddle. The police chief had no direct involvement in the incident. Nor did the police chief engage in any conduct that independently increased a preexisting risk.

The *Fabrey* opinion further appears to have considered whether the conduct of the employee was contrary to a clear standard of conduct at the time. Addressing the contention that Chief Tyree acted in a willful and wanton manner by knowingly failing to comply with the minimum jail standards promulgated by the Ohio Department of Rehabilitation and Correction, the opinion notes: "There is no prohibition, in the standards, against permitting prisoners who do not present a threat to themselves or others to have smoking materials." *Id.*, 70 Ohio St.3d at 356, 1994-Ohio-368, 639 N.E.2d 31. The *Fabrey* court thus considered whether Ohio law clearly proscribed the employee's conduct. Certainly provisions in the Ohio Revised and Administrative Codes that clearly proscribe conduct would provide at least an objective way to

assess whether the employee's conduct was clearly wrong at the time. That the police chief's conduct was not contrary to law was at least instructive.

Beyond the absence of any explicit legal prohibitions, the plaintiffs in *Fabrey* did not allege the "type of behavior" that was contrary to a definite standard of conduct but rather appear to have alleged more generally that the police chief did not provide adequate safety. Allegations of such an indefinite nature would appear intrinsically to sound in negligence. In *Tighe v. Diamond* (1948), 149 Ohio St. 520, 80 N.E.2d 122, the court stated:

Negligence implies a failure to comply with an indefinite rule of conduct in the circumstances of any particular case. It does not involve intent or a conscious purpose to do a wrongful act or to omit the performance of a duty.

*Id.* at 526, 80 N.E.2d 122. Thus while a failure to comply with an indefinite standard of conduct may reflect a negligent lapse in judgment, the deliberate failure to comply with a definite standard of conduct affording little or no discretion may reflect conduct that is wanton or reckless.

Finally the *Fabrey* opinion appears to have considered whether the police chief acted in conscious disregard of a known risk. The court's opinion states: "Tyree apparently did not anticipate that a prisoner, while locked in a cell, would intentionally set fire to his own mattress." *Id.*, 70 Ohio St.3d at 357, 1994-Ohio-368, 639 N.E.2d 31. Because of the practical difficulty inherent in predicting human behavior, recklessness necessarily contemplates conduct undertaken in conscious and perverse disregard of a known particularized risk. It entails the inevitability of foresight, not the clarity of hindsight.

The *Fabrey* opinion thus appears to provide some general principles that, though not expressly stated in the opinion, can serve as a useful construct in which to analyze whether an

employee's conduct was so reckless as to deny the employee immunity under R.C. 2744.03(A)(6)(b). Application of these principles to the facts of the instant case is illuminating.

To begin, it is clear in this case that appellants McCafferty and Zazzara did not engage in any conduct that directly caused the injury upon which the appellees' claims were based. The tortious injury here was caused by Andre Martin's criminal conduct. Neither McCafferty nor Zazzara were even present at the time. Nor do the appellees suggest that McCafferty or Zazzara engaged in any affirmative act that independently increased any preexisting risk to D.M.

Moreover, there is no suggestion in this case that McCafferty and Zazzara acted in a manner that was contrary to a clear standard of conduct. There is no allegation that they engaged in any conduct that was clearly proscribed by Ohio law. Nor is there any suggestion that their conduct was contrary to any definite standard of behavior. McCafferty had no role other than to oversee the operations of this public children services agency and there is no allegation here that he did anything that was clearly wrong. Zazzara transported D.M. to and from the visitation. Nothing in this case suggests that her conduct was contrary to some clearly prescribed standard of behavior. There are moreover practical limitations upon a social worker's ability predict and protect for, as one court has said, "a social homeworker cannot be everywhere at all times and everything to everybody." *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 455, 602 N.E.2d 363. Notwithstanding Zazzara's assignment to this family, nothing in this case suggests that she did anything that was clearly wrong. Given the appellees' utter inability to articulate any conduct by these employees that was clearly wrong, it was not unreasonable for the trial court to restrict the appellees' improper discovery requests.

Apart from the absence of any conduct by McCafferty and Zazzara that was contrary to a clear and definite standard of conduct, nothing in this case suggests that these individuals acted

in conscious disregard of a known risk. As has been noted, McCafferty had no involvement with this matter at all and in any case did not act in conscious and perverse disregard of the risk that Andre Martin would sexually molest D.M. in an open area during a court-ordered visitation.

Nor could there be any basis to find that Zazzara consciously and perversely disregarded such a risk. Contrary to the appellate court's comment that both McCafferty and Zazzara "knew Martin had a history of domestic violence and had allegedly molested D.M. in the past," a medical examination and an investigation did not substantiate sexual abuse. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit D, pp. 15-16.) The juvenile court ordered that Martin was to be permitted supervised visitation with D.M. Nothing in this case suggests that Zazzara left D.M. with the CCDCFS employee responsible for supervising family visitations conscious of any risk that Andre Martin would sexually molest D.M. as she sat on Martin's lap in an open visitation area.

When this case is considered not from the perspective of whether these employees could have done something differently but from the more direct perspective of whether they acted in a manner that was contrary to a clear standard of conduct and in conscious disregard of a known risk, the facts here cannot support the Court of Appeals' determination that their conduct could be reckless. These employees did not act contrary to a clear and definite standard of behavior and in conscious disregard of the risk that Andre Martin would sexually assault D.M. It was error for the appellate court to make these individual employees insurers for the criminal misconduct of Andre Martin. The judgment of the Court of Appeals should accordingly be reversed.

C. **McCafferty and Zazzara did not act in a reckless manner.**

Even if the Court considers this case in light of the definition and standards currently used to decide whether conduct is “reckless,” the conduct of appellants McCafferty and Zazzara cannot satisfy that high standard as a matter of law. Because these appellants did not perversely disregard a known risk, they did not act in a reckless manner. The judgment of the Court of Appeals should accordingly be reversed.

Appellants have previously set forth the definitions that Ohio courts typically use to explain conduct that is undertaken with “malicious purpose,” in “bad faith,” or in a “wanton” or “reckless” manner. Reviewing these terms in the specific context of R.C. 2744.03(A)(6)(b), Ohio case decisions establish:

In R.C. 2744.03(A)(6)(b), the word “reckless” is associated with the words “malicious purpose,” “bad faith,” and “wanton,” all of which suggest conduct more egregious than simple carelessness. Looking at the use of the word “reckless” in the instant context, [the employee] must have “perversely disregarded a known risk” in order to lose \*\*\* immunity.

*Poe v. Hamilton* (1990), 56 Ohio App.3d 137, 138, 565 N.E.2d 887. Accord *Lipscomb v. Lewis* (1993), 85 Ohio App.3d 97, 102, 619 N.E.2d 102; *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 454, 602 N.E.2d 363.

In *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 559 N.E.2d 699, this Court cited with approval the following analysis from 2 Restatement of the Law 2d, Torts (1965) 587, Section 500, Comment (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.

Id. at 100, 559 N.E.2d 699, fn. 3.

Applying these standards to the facts of the instant case, there simply exists nothing in the record that could form a basis for the Court of Appeals' assertion that a question of fact existed concerning whether Director James McCafferty and social worker Gina Zazzara acted recklessly relative to the subject supervised visitation. Even considering their conduct in the light most favorable to appellees, there is nothing to suggest that they perversely disregarded a known risk such that their conduct could be characterized as "reckless."

In particular, CCDCFS Director James McCafferty is responsible for the administration of CCDCFS, including the budget, program planning, and personnel, but he is not involved directly overseeing the day-to-day operation of CCDCFS. (5/2/05 Defendants' Motion for Summary Judgment, Affidavit of James McCafferty.) Nothing in this record suggests that McCafferty did anything in perverse disregard to a known risk in this case.

Social worker Gina Zazzara's duties do not include the supervised visitations that occur at CCDCFS, and at no time was Ms. Zazzara responsible to supervise D.M.'s visit with Andre Martin. ((5/2/05 Defendants' Motion for Summary Judgment, Affidavit of Gina Zazzara). At the time of the incident, Ms. Zazzara's involvement was only to transport D.M. to the visitation center because appellee Estella Rankin was unable to bring D.M. to the visit. (Id.) When Ms. Zazzara arrived at CCDCFS, she transferred D.M. to the care of another employee of CCDCFS, whose task was to supervise D.M.'s visit with her father, Andre Martin. (Id.) And even if Ms.

Rankin complained previously that Martin had taken D.M. to the bathroom without supervision, that still does not show that Zazzara perversely disregarded a known risk that Martin would sexually molest D.M.

There is no dispute that James McCafferty and Gina Zazzara were not present during the supervised visitation of D.M. and Defendant, Andre Martin. The Court of Appeals' opinion does not explain how, even using its own standard, any conduct by McCafferty or Zazzara showed that they "did an act or intentionally failed to do an act that was their duty to the other to do, knowing or having reason to know of facts which would lead a reasonable person to realize, not only that their conduct created an unreasonable risk of physical harm to another, but also that such risk was substantially greater than that which was necessary to make their conduct negligent." Ohio courts have never held that governmental employees involved tangentially in an occurrence that results in harm may be found to have acted recklessly. There were no legitimate grounds for the Court of Appeals to find that appellants McCafferty and Zazzara acted recklessly under these circumstances.

By any reasonable definition of the term, these appellants did not act in a reckless manner that caused the injury claimed in this case. The Court of Appeals erred in concluding that reasonable minds could find these employees acted recklessly. Appellants respectfully urge this Court to reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

CONCLUSION

Appellants Cuyahoga County Department of Children and Family Services (CCDCFS), James McCafferty, and Gina Zazzara respectfully request that this Court reverse the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney  
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By:



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A true copy of the foregoing Appellants' Merit Brief was served this 30th day of July 2007 by regular U.S. Mail, postage prepaid, upon:

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Pro se Defendant



SHAWN M. MALLAMAD \*  
Assistant Prosecuting Attorney  
\* Counsel of Record

# **APPENDIX**

IN THE SUPREME COURT OF OHIO

07-0306

CHERITA RANKIN, et al. )  
)  
)  
Appellees, )  
)  
)  
v. )  
)  
)  
CUYAHOGA COUNTY )  
DEPARTMENT OF CHILDREN )  
AND FAMILY SERVICES, et al. )  
)  
)  
Appellants. )

CASE NO. \_\_\_\_\_  
  
On Appeal from the Court of  
Appeals Eighth Judicial District,  
Cuyahoga County, Ohio  
  
Court of Appeals Case No.:  
86620

NOTICE OF APPEAL OF APPELLANTS  
CUYAHOGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,  
JAMES MCCAFFERTY AND GINA ZAZZARA

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**FILED**  
  
FEB 15 2007  
  
MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

Notice of Appeal of Appellants  
Cuyahoga County Department of Children and Family Services,  
James McCafferty and Gina Zazzara

Appellants Cuyahoga County Department of Children and Family Services, James Mccafferty and Gina Zazzara hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Judicial District, entered in Case No. 86620, journalized on January 2, 2007.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting  
Attorney, Cuyahoga County, Ohio

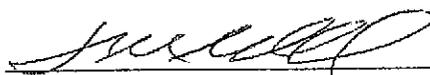
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice of Appeal has been mailed this 14<sup>th</sup> day of February 2007, to: Joel Levin and Christopher Vlasich, Levin & Associates Co., L.P.A., the Tower at Erieview, suite 1100, 1301 East 9th street, Cleveland, Ohio 44114, and James A. Gay, 3324 MLK, Jr., Drive, Cleveland, Ohio 44104, counsel for Appellants, and defendant, Andre Martin, #a454888, Richland Correctional Institution, 1001 Olivesburg Road, PO Box 8107, Mansfield, Ohio 44901.



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SHAWN M. MALLAMAD  
Assistant Prosecuting Attorney

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 86620

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**CHERITA RANKIN, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**C.C.D.C.F.S., ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-527785

**BEFORE:** Celebrezze, P.J., Sweeney, J., and Calabrese, J.

**RELEASED:** December 21, 2006

**JOURNALIZED:** JAN - 2 2007

CA05086620

43126425



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FILED JAN 2 2007  
PER APP. R. 22(E)

JAN - 2 2007

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BY: *[Signature]* DEP.

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ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED

DEC 21 2006

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY: *[Signature]* DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

VOL 627 #0207

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

FRANK D. CELEBREZZE, JR., P.J.:

Appellants, Cherita Rankin and Estella Rankin, appeal from the grant of summary judgment in favor of the Cuyahoga County Department of Children and Family Services ("DCFS"), its director, James McCafferty, and its employee, Gina Zazzara ("appellees"). After reviewing the record and the arguments of the parties, and for the reasons set forth below, we reverse and remand for further proceedings.

On April 14, 2004, Charita Rankin, the mother and next friend of minor-victim D.M.,<sup>1</sup> filed a civil complaint in the common pleas court against DCFS and D.M.'s father, Andre Martin. On July 14, 2004, an amended complaint was filed, which included Estella Rankin, D.M.'s grandmother and legal guardian, as a plaintiff, and added James McCafferty and Gina Zazzara as defendants. The cause of action stemmed from Andre Martin's sexual assault of D.M., who was three years old at the time, during a DCFS supervised visit at a DCFS facility.

In April 2003, D.M. was committed to the temporary custody of DCFS by order of the Juvenile Division of the Cuyahoga County Common Pleas Court. Pursuant to that order, Martin's contact with D.M. was limited to supervised visits at the Jane Edna Hunter Social Service Center, a county agency located

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<sup>1</sup>The minor-victim is referred to herein by her initials in accordance with this court's established policy regarding non-disclosure of identities of juveniles.

in Cleveland. During the time D.M. was in DCFS custody, DCFS was on notice of past accusations of sexual abuse by Martin against D.M. and Martin's history of domestic violence.

On July 23, 2003, Martin had a supervised visit with D.M. Despite prior warnings not to allow any of Martin's activities with D.M. to go unsupervised, during the course of this visitation, Martin was allowed to take D.M. into a private restroom where he sexually assaulted her. Afterwards, Martin took D.M. back to the visitation room and placed her on his lap. He then placed a jacket over her lap and placed his hand under her clothing and fondled her genitals. Although Martin was under surveillance at the time, at no time did anyone from DCFS remove D.M. from Martin or contact the police.

Martin eventually faced criminal charges for this incident and pleaded guilty to gross sexual imposition on October 21, 2003.<sup>2</sup>

Appellants thereafter filed their civil complaint against appellees, alleging that appellees breached the duty they owed to D.M. by failing to protect her from Martin's sexual abuse. On June 17, 2004, appellees filed a motion to dismiss the complaint, which the trial court later held to be moot. During the course of discovery, appellants requested the production of documents concerning certain

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<sup>2</sup>Cuyahoga County Court of Common Pleas - Case No. CR441511.

materials from DCFS. Appellees filed a motion for protective order and a request for an in camera inspection on November 30, 2004. Appellants filed a brief in opposition, but the trial court eventually denied appellants' discovery requests.

On May 2, 2005, appellees filed a motion for summary judgment arguing several reasons, including that DCFS was not sui juris and appellees were immune from liability pursuant to R.C. Chapter 2744. On June 17, 2005, the trial court granted summary judgment in favor of appellees.<sup>3</sup>

Appellants appeal, asserting three assignments of error. Because assignments of error I and II are substantially interrelated, we address them together.

"I. The trial court committed reversible error when it granted summary judgment to Defendant DCFS.

"II. The trial court committed reversible error when it granted summary judgment to Defendants Mr. McCafferty and Ms. Zazzara."

In their first two assignments of error, appellants contend that the trial court erred in granting summary judgment to appellees. Upon review of the record, we sustain appellants' assignments of error.

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<sup>3</sup>A default judgment was entered against Andre Martin on May 16, 2006, and no matter pertaining to Martin is at issue in this appeal.

### Summary Judgment

“Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed. 2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, “\*\*\* the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and

*identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim.*" Id. at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record \*\*\* in a light most favorable to the nonmoving party \*\*\*. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

### DCFS

Appellants' first assignment of error focuses on the trial court's error in granting summary judgment in favor of DCFS. In defending the trial court's ruling, appellees assert several arguments. DCFS states that it is not sui juris, arguing that it is not a "political subdivision," as defined in R.C. 2744.01, thus

it is not a legally recognized entity capable of being sued. DCFS further argues that it is statutorily immune from liability and that, even if it was found not to be immune, the evidence shows it has not violated any applicable law.

Viewing these arguments in a light most favorable to appellants, we hold that there are genuine issues of material fact pertaining to the liability of DCFS that must survive summary judgment.

In viewing R.C. Chapter 2744, it is apparent that DCFS is an entity that is capable of being sued given the circumstances of this case. "Under R.C. 2744.01(F), a county is a political subdivision, and the operation of a county human services department is a governmental function. R.C. 2744.01(C)(2)(m); *Jackson v. Butler County Bd. of County Commrs.* (1991), 76 Ohio App.3d 448, 602 N.E.2d 363." *Sobiski v. Cuyahoga County Dep't of Children & Family Servs.*, Cuyahoga App. No. 84086, 2004-Ohio-6108.

Furthermore, there is no prejudicial effect in naming DCFS, as opposed to Cuyahoga County. The county prosecutor's office would be the representing body in either case, and the party liable for any damages would not change. See *Fields v. Dailey* (1990), 68 Ohio App.3d 33. Thus, all interests are properly being protected, and the named party is a technicality without distinction. *Id.* Given these circumstances, we find that DCFS is an entity capable of being sued.

Summary judgment also should not have been granted on the theory that DCFS was immune from any liability in this case. Ohio statute provides an analysis to determine whether or not a political subdivision or its employees have immunity. See *Sobiski*, supra; see, also, *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421, 697 N.E.2d 610.

R.C. 2744.02(A)(1) confers on all political subdivisions a blanket immunity, which provides that they are not liable for injury, death or loss to persons or property that occurred in relation to the performance of a governmental or propriety function. *Id.*

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. \*\*\* In order to demonstrate a special duty or relationship, it must be shown that there was (1) an assumption of an affirmative duty by a political subdivision; (2) knowledge on the part of the political subdivision or its agents that inaction could cause harm; (3) a direct contact between the political subdivision's agents and the injured party; and (4) that party's justifiable reliance on the political subdivision's affirmative

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undertaking.” *State Auto. Mut. Ins. Co. v. Titanium Metal Corp.*, 159 Ohio App.3d 338, 343, 2004-Ohio-6618.

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.

Further, there is sufficient evidence for appellants to bring a cause of action to hold appellees liable for the harm done to D.M. Even with the limited evidence provided in the record after the trial court denied much of appellants’ request for discovery, there is still proof that the practices and procedures of DCFS allowed for the sexual abuse of a minor child while she was under the protection of DCFS.

Martin was regularly allowed to take D.M. into a private bathroom, even though DCFS was well aware of the dangers of such action. There was also

evidence that even when DCFS employees observed Martin touching D.M. inappropriately, they did nothing to stop it. In addition, there was evidence that the proper people were not present when needed. There is enough evidence present for this matter to survive summary judgment and to be presented to a finder of fact.

### **McCafferty and Zazzara**

Appellants' second assignment of error focuses on the trial court's error in granting summary judgment in favor of McCafferty and Zazzara. In defending the trial court's ruling, appellees argue that McCafferty and Zazzara were not involved with the supervised visit at issue, so they are immune from liability. In viewing the record and the applicable law, we hold that there are genuine issues of material fact pertaining to these appellees that must survive summary judgment.

Under R.C. 2744.03(A)(6), when a party puts forth evidence showing that an individual's actions "were with a malicious purpose, in bad faith, or [done] in a wanton or reckless manner," individual immunity no longer applies. *Shadoan v. Summit Cty. Children Servs. Bd.*, Summit App. No. 21486, 2003-Ohio-5775; *Cobb v. Mantua Twp. Bd. of Trustees*, Portage App. No. 2000-P-0127, 2001-Ohio-8722. "[A]n individual acts in a 'reckless' manner 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.” *Jackson v. Butler Cty. Bd. of Cty. Commsrs.* (1991), 766 Ohio App.3d 448, 602 N.E.2d 363, at syllabus. Thus, recklessness is a perverse disregard for a known risk.

In this case, reasonable minds could conclude 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. McCafferty is the director of DCFS and Zazzara is a DCFS employee who was the social worker assigned to D.M.’s case. Both individuals knew Martin had a history of domestic violence and had allegedly molested D.M. in the past. In addition, Zazzara received direct notification from appellants prior to the July 23<sup>rd</sup> incident that Martin had been taking D.M. into the bathroom during his visits, which he was not supposed to do. Zazzara assured appellants that this behavior would no longer be permitted, but Martin continued to be allowed free access to D.M. during his “supervised” visits.

Because we find that there are genuine issues of material fact left for the trier of fact, appellants' first two assignments of error are sustained.

“III. The trial court committed reversible error when it failed to allow Plaintiffs to obtain documents requested from Defendants and refused to allow Plaintiffs to take the deposition of Mr. McCafferty and Ms. Zazzara.”

In their third assignment of error, appellants challenge discovery rulings made by the trial court. They specifically argue that the trial court erred in refusing to allow them to obtain certain documents from appellees and that the trial court erred in refusing to allow them to depose McCafferty and Zazzara. We agree.

Under Ohio law, it is well established that the trial court is vested with broad discretion when it comes to matters of discovery, and the “standard of review for a trial court’s discretion in a discovery matter is whether the court abused its discretion.” *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265, 664 N.E.2d 1272. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 50 OBR 481, 450 N.E.2d 1140. Absent a clear abuse of that discretion, the lower court’s decision should not be reversed. *Mobberly v. Hendricks* (1994), 98 Ohio App.3d 839, 845, 649 N.E.2d 1247. However, appellate courts will reverse a discovery order “when the trial court has erroneously denied or limited discovery.” 8 Wright, Miller & Marcus, *Federal Practice & Procedure* (2d Ed. 1994) 92, Section 2006. Thus, “an

appellate court will reverse the decision of a trial court that extinguishes a party's right to discovery if the trial court's decision is improvident and affects the discovering party's substantial rights." *Rossman v. Rossman* (1975), 47 Ohio App.2d 103, 110, 352 N.E.2d 149.

After an in camera inspection of the materials requested by appellants, the trial court found that the requested discovery was confidential and protected under Ohio law. The court held that appellants were not entitled to any of the DCFS documents, nor were they allowed any deposition testimony from McCafferty or Zazzara. While the trial court is afforded broad discretion in making such determinations, its ruling here is so overreaching that, when taken in its totality, we find it to be an abuse of discretion.

The confidentiality statutes pertinent are R.C. 5153.17 and R.C. 2151.421(H)(1). R.C. 5153.17 states:

"The public children services agency shall prepare and keep written records of investigations of family, children, and foster homes, and of the care, training, and treatment afforded children, and shall prepare and keep such other records as are required by the department of job and family services. Such records shall be confidential, but except as provided by division (B) of section 3107.17 of the Revised Code, shall be open to inspection by the agency, the director of job and family services, and the director of the county department of

job and family services, and by other persons upon the written permission of the executive director.”

Furthermore, R.C. 2151.421(H)(1), which is concerned with the reporting and investigation of cases of child abuse, states that any report made under that section is confidential; however, “[a]lthough the [DCFS’s] records are afforded confidentiality under R.C. 5153.17 and R.C. 2151.421(H)(1), this confidentiality is not absolute. See *Johnson v. Johnson* (1999), 134 Ohio App.3d 579, 583, 731 N.E.2d 1144; *Sharpe v. Sharpe* (1993), 85 Ohio App.3d 638, 620 N.E.2d 916.

The proper procedure for determining the availability of such records is for the trial court to conduct an in camera inspection to determine the following: 1) whether the records are necessary and relevant to the pending action; 2) whether good cause has been shown by the person seeking disclosure; and 3) whether their admission outweighs the confidentiality considerations set forth in R.C. 5153.17 and R.C. 2151.421(H)(1). *Johnson*, 134 Ohio App.3d at 585.” *Child Care Provider Certification Dept. v. Harris*, Cuyahoga App. No. 82966, 2003-Ohio-6500.

Appellants’ request for discovery included documents specifically concerning the incident of July 23, 2003 and generally concerning the practices and procedures of the agency regarding supervised visits. Clearly, such materials are necessary and relevant to the pending action. The question

remains whether appellants have shown "good cause" for disclosure and whether the admissions outweigh the confidentiality considerations articulated in Ohio law.

"In determining whether 'good cause' has been shown, the consideration is whether it is in the 'best interests' of the child, or the due process rights of the accused are implicated. See *Johnson*, 134 Ohio App.3d at 583; 1991 Ohio Atty.Gen.Ops. No. 91-003." *Harris*, supra.

It is clear appellants have shown good cause for the requested materials. The best interests of the minor victim involved in this case would be served in holding people and entities responsible for any deficiencies in her supervision.

Confidentiality considerations cannot destroy the discoverability of all the requested documents. Andre Martin's criminal proceedings and the discovery involved in that case lessen pertinent due process rights protections. Any further protections of DCFS employees who might be implicated with this discovery would not be affected by general disclosures of DCFS's practices and procedures concerning supervised visits. The lower court's denial of all requested documents amounted to an abuse of discretion.

In addition, to rely on affidavit testimony of McCafferty and Zazzara and yet not allow appellants any right to depose these individuals also amounts to an abuse of discretion. The scope of pretrial discovery is broad. *Grandview*

*Hosp. & Medical Center v. Gorman* (1990), 51 Ohio St.3d 94, 554 N.E.2d 1297.

Deposition testimony from these individuals was denied for fear that the information sought from those people would be confidential; however, nothing in the record illustrated exactly what appellants intended to ask during deposition. Not all information surrounding this litigation is confidential, and liberal discovery is the general rule. Any confidential information procured in the course of a deposition can be excluded at the appropriate time.

The total denial of pertinent discovery substantially affected appellants' rights and was an abuse of discretion. The trial court's discovery rulings must be more specific and narrowly tailored. This assignment of error is sustained.

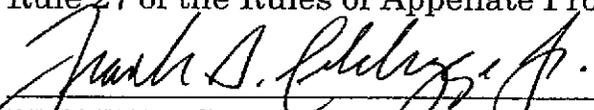
Judgment is reversed and the case is remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

JAMES J. SWEENEY, J., and  
ANTHONY O. CALABRESE, JR., J., CONCUR

**307.981 Designation of child support enforcement agency, job and family services department, or public children services agency**

(A)(1) As used in the Revised Code:

(a) "County family services agency" means all of the following:

(i) A child support enforcement agency;

(ii) A county department of job and family services;

(iii) A public children services agency.

(b) "Family services duty" means a duty state law requires or allows a county family services agency to assume, including financial and general administrative duties. "Family services duty" does not include a duty funded by the United States department of labor.

(2) As used in sections 307.981 to 307.989 of the Revised Code, "private entity" means an entity other than a government entity.

(B) To the extent permitted by federal law, including, when applicable, subpart F of 5 C.F.R. part 900, and subject to any limitations established by the Revised Code, including division (H) of this section, a board of county commissioners may designate any private or government entity within this state to serve as any of the following:

(1) A child support enforcement agency;

(2) A county department of job and family services;

(3) A public children services agency;

(4) A county department of job and family services and one other of those county family services agencies;

(5) All three of those county family services agencies.

(C) To the extent permitted by federal law, including, when applicable, subpart F of 5 C.F.R. part 900, and subject to any limitations of the Revised Code, including division (H) of this section, a board of county commissioners may change the designation it makes under division (B) of this section by designating another private or government entity.

(D) If a designation under division (B) or (C) of this section constitutes a change from the designation in a fiscal agreement between the director of job and family services and the board, the director may require that the director and board amend the fiscal agreement and that the board provide the director written assurances that the newly designated private or government entity will meet or exceed all requirements of the family services duties the entity is to assume.

(E) Not less than sixty days before a board of county commissioners designates an entity under division (B) or (C) of this section, the board shall notify the director of job and family services and publish notice in a newspaper of general circulation in the county of the board's intention to make the designation and reasons for the designation.

(F) A board of county commissioners shall enter into a written contract with each entity it designates under division (B) or (C) of this section specifying the entity's responsibilities and standards the entity is required to meet.

(G) This section does not require a board of county commissioners to abolish the child support enforcement agency, county department of job and family services, or public children services agency serving the county on October 1, 1997, and designate a different private or government entity to serve as the county's child support enforcement agency, county department of job and family services, or public children services agency.

(H) If a county children services board appointed under section 5153.03 of the Revised Code serves as a public children services agency for a county, the board of county commissioners may not redesignate the public children services agency unless the board of county commissioners does all of the following:

(1) Notifies the county children services board of its intent to redesignate the public children services agency. In its notification, the board of county commissioners shall provide the county children services board a written explanation of the administrative,

fiscal, or performance considerations causing the board of county commissioners to seek to redesignate the public children services agency.

(2) Provides the county children services board an opportunity to comment on the proposed redesignation before the redesignation occurs;

(3) If the county children services board, not more than sixty days after receiving the notice under division (H)(1) of this section, notifies the board of county commissioners that the county children services board has voted to oppose the redesignation, votes unanimously to proceed with the redesignation.

(2003 H 95, eff. 9-26-03; 1999 H 470, eff. 3-14-00; 1997 H 408, eff. 10-1-97)

**329.01 County department of job and family services; director, assistants, bonds**

In each county there shall be a county department of job and family services which, when so established, shall be governed by this chapter. The department shall consist of a county director of job and family services appointed by the board of county commissioners, and such assistants and other employees as are necessary for the efficient performance of the functions of the county department. Before entering upon the discharge of the director's official duties, the director shall give a bond, conditioned for the faithful performance of those official duties, in such sum as fixed by the board. The director may require any assistant or employee under the director's jurisdiction to give a bond in such sum as determined by the board. All bonds given under this section shall be with a surety or bonding company authorized to do business in this state, conditioned for the faithful performance of the duties of such director, assistant, or employee. The expense or premium for any bond required by this section shall be paid from the appropriation for administrative expenses of the department. Such bond shall be deposited with the county treasurer and kept in the treasurer's office.

As used in the Revised Code:

(A) "County department of job and family services" means the county department of job and family services established under this section, including an entity designated a county department of job and family services under section 307.981 of the Revised Code.

(B) "County director of job and family services" means the county director of job and family services appointed under this section.

(1999 H 471, eff. 7-1-00; 1997 H 408, eff. 10-1-97; 1984 H 401, eff. 7-20-84; 1981 S 114; 127 v 786; 1953 H 1; GC 2511-1)

**2743.02 Waiver of immunity of state; personal immunity not available to state; state immunity for performance of public duty; hospitals of political subdivisions; collateral recovery; indemnification of personnel; actions against state personnel; third-party complaints and counterclaims**

(A)(1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(3)(a) Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state.

(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship can be established between the state and an injured party. A special relationship under this division is demonstrated if all of the following elements exist:

(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

(iii) Some form of direct contact between the state's agents and the injured party;

(iv) The injured party's justifiable reliance on the state's affirmative undertaking.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined in section 2305.113 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of the indemnified person's duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if such hospital requests the superintendent to do so, the superintendent shall recommend, a specific amount for any period that, in the superintendent's opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under

the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for two thousand five hundred dollars or less, that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

(G) Whenever a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or omission complained of, subject to the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671, et seq., then the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section.

(H) If an inmate of a state correctional institution has a claim against the state for the loss of or damage to property and the amount claimed does not exceed three hundred dollars, before commencing an action against the state in the court of claims, the inmate shall file a claim for the loss or damage under the rules adopted by the director of rehabilitation and correction pursuant to this division. The inmate shall file the claim within the time allowed for commencement of a civil action under section 2743.16 of the Revised Code. If the state admits or compromises the claim, the director shall make payment from a fund designated by the director for that purpose. If the state denies the claim or does not compromise the claim at least sixty days prior to expiration of the time allowed for commencement of a civil action based upon the loss or damage under section 2743.16 of the Revised Code, the inmate may commence an action in the court of claims under this

chapter to recover damages for the loss or damage.

The director of rehabilitation and correction shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this division.

(2005 H 25, eff. 11-3-05; 2004 H 316, eff. 3-31-05; 2003 H 95, eff. 9-26-03; 2002 S 281, eff. 4-11-03; 2002 S 115, eff. 3-19-03; 1994 S 172, eff. 9-29-94; 1989 H 111, eff. 7-1-89; 1987 H 267; 1985 H 176, § 6; 1980 S 76, § 1, 3, 4; 1977 H 149; 1976 H 82, H 1192; 1975 H 682; 1974 H 800)

## 2744.01 Definitions

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and

rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section

3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A.

20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301. 58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based

correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly,

the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

(2006 H 162, eff. 10-12-06; 2004 S 222, eff. 4-27-05; 2002 S 106, eff. 4-9-03; 2001 S 108, § 2.03, eff. 1-1-02; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 24, § 3, eff. 1-1-02; 2001 S 24, § 1, eff. 10-26-01; 2000 S 179, § 3, eff. 1-1-02; 1999 H 205, eff. 9-24-99; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 [FN1]; 1995 H 192, eff. 11-21-95; 1994 H 384, eff. 11-11-94; 1993 H 152, eff. 7-1-93; 1992 H 723, H 210; 1990 H 656; 1988 S 367, H 815; 1987 H 295; 1986 H 205, § 1, 3; 1985 H 176)

## **2744.02 Political subdivision not liable for injury, death, or loss; exceptions**

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section

4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

(2002 S 106, eff. 4-9-03; 2001 S 108, § 2.01, eff. 7-6-01; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 [FN1]; 1994 S 221, eff. 9-28-94; 1989 H 381, eff. 7-1-89; 1985 H 176)

### **2744.03 Defenses and immunities**

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability 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 employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious

purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

(2002 S 106, eff. 4-9-03; 2001 S 108, § 2.03, eff. 1-1-02; 2001 S 108, § 2.01, eff. 7-6-01; 2000 S 179, § 3, eff. 1-1-02; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 [FN1]; 1994 S 221, eff. 9-28-94; 1986 S 297, eff. 4-30-86; 1985 H 176)

## 2901.22 Culpable mental states

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

(1972 H 511, eff. 1-1-74)

### **5153.01 Definitions**

(A) As used in the Revised Code, "public children services agency" means an entity specified in section 5153.02 of the Revised Code that has assumed the powers and duties of the children services function prescribed by this chapter for a county.

(B) As used in this chapter:

(1) "Certified foster home" means a foster home, as defined in section 5103.02 of the Revised Code, certified under section 5103.03 of the Revised Code.

(2) "Certified organization" means any organization holding a certificate issued pursuant to section 5103.03 of the Revised Code that is in full force and effect.

(3) "Child" means any person under eighteen years of age or a mentally or physically handicapped person, as defined by rule adopted by the director of job and family services, under twenty-one years of age.

(4) "Executive director" means the person charged with the responsibility of administering the powers and duties of a public children services agency appointed pursuant to section 5153.10 of the Revised Code.

(5) "Organization" means any public, semipublic, or private institution, including maternity homes and day nurseries, and any private association, society, or agency, located or operating in this state, incorporated or unincorporated, having among its functions the furnishing of protective services or care for children or the placement of children in certified foster homes or elsewhere.

(6) "PCSA caseworker" means an individual employed by a public children services agency as a caseworker.

(7) "PCSA caseworker supervisor" means an individual employed by a public children services agency to supervise PCSA caseworkers.

(2006 S 238, eff. 9-21-06; 2000 H 332, eff. 1-1-01; 2000 H 448, eff. 10-5-00; 1999 H 471, eff. 7-1-00; 1997 H 408, eff. 10-1-97; 1996 H 274, eff. 8-8-96; 1993 H 152, eff. 7-1-93; 1991 H 82; 1987 H 231; 1986 H 428; 1969 S 49; 127 v 1012)

**5153.02 County to have public children services agency; eligible entities**

Each county shall have a public children services agency. Any of the following may be the public children services agency:

(A) A county children services board;

(B) A county department of job and family services;

(C) A private or government entity designated under section 307.981 of the Revised Code.

(1999 H 471, eff. 7-1-00; 1997 H 408, eff. 10-1-97)

### **5153.16 Powers and duties of public children services agency**

(A) Except as provided in section 2151.422 of the Revised Code, in accordance with rules adopted under section 5153.166 of the Revised Code, and on behalf of children in the county whom the public children services agency considers to be in need of public care or protective services, the public children services agency shall do all of the following:

(1) Make an investigation concerning any child alleged to be an abused, neglected, or dependent child;

(2) Enter into agreements with the parent, guardian, or other person having legal custody of any child, or with the department of job and family services, department of mental health, department of mental retardation and developmental disabilities, other department, any certified organization within or outside the county, or any agency or institution outside the state, having legal custody of any child, with respect to the custody, care, or placement of any child, or with respect to any matter, in the interests of the child, provided the permanent custody of a child shall not be transferred by a parent to the public children services agency without the consent of the juvenile court;

(3) Accept custody of children committed to the public children services agency by a court exercising juvenile jurisdiction;

(4) Provide such care as the public children services agency considers to be in the best interests of any child adjudicated to be an abused, neglected, or dependent child the agency finds to be in need of public care or service;

(5) Provide social services to any unmarried girl adjudicated to be an abused, neglected, or dependent child who is pregnant with or has been delivered of a child;

(6) Make available to the bureau for children with medical handicaps of the department of health at its request any information concerning a crippled child found to be in need of treatment under sections 3701.021 to 3701.028 of the Revised Code who is receiving services from the public children services agency;

(7) Provide temporary emergency care for any child considered by the public children services agency to be in need of such care, without agreement or commitment;

(8) Find certified foster homes, within or outside the county, for the care of children, including handicapped children from other counties attending special schools in the county;

(9) Subject to the approval of the board of county commissioners and the state department of job and family services, establish and operate a training school or enter into an agreement with any municipal corporation or other political subdivision of the county respecting the operation, acquisition, or maintenance of any children's home, training school, or other institution for the care of children maintained by such municipal corporation or political subdivision;

(10) Acquire and operate a county children's home, establish, maintain, and operate a receiving home for the temporary care of children, or procure certified foster homes for this purpose;

(11) Enter into an agreement with the trustees of any district children's home, respecting the operation of the district children's home in cooperation with the other county boards in the district;

(12) Cooperate with, make its services available to, and act as the agent of persons, courts, the department of job and family services, the department of health, and other organizations within and outside the state, in matters relating to the welfare of children, except that the public children services agency shall not be required to provide supervision of or other services related to the exercise of parenting time rights granted pursuant to section 3109.051 or 3109.12 of the Revised Code or companionship or visitation rights granted pursuant to section 3109.051, 3109.11, or 3109.12 of the Revised Code unless a juvenile court, pursuant to Chapter 2151. of the Revised Code, or a common pleas court, pursuant to division (E)(6) of section 3113.31 of the Revised Code, requires the provision of supervision or other services related to the exercise of the parenting time rights or companionship or visitation rights;

(13) Make investigations at the request of any superintendent of schools in the county or the principal of any school concerning the application of any child adjudicated to be an abused, neglected, or dependent child for release from school, where such service is not provided through a school attendance department;

(14) Administer funds provided under Title IV-E of the "Social Security Act," 94 Stat. 501 (1980), 42 U.S.C.A. 671, as amended, in accordance with rules adopted under section 5101.141 of the Revised Code;

(15) In addition to administering Title IV-E adoption assistance funds, enter into agreements to make adoption assistance payments under section 5153.163 of the Revised Code;

(16) Implement a system of safety and risk assessment, in accordance with rules adopted by the director of job and family services, to assist the public children services agency in determining the risk of abuse or neglect to a child;

(17) Enter into a plan of cooperation with the board of county commissioners under section 307.983 of the Revised Code and comply with each fiscal agreement the board enters into under section 307.98 of the Revised Code that include family services duties of public children services agencies and contracts the board enters into under sections 307.981 and 307.982 of the Revised Code that affect the public children services agency;

(18) Make reasonable efforts to prevent the removal of an alleged or adjudicated abused, neglected, or dependent child from the child's home, eliminate the continued removal of the child from the child's home, or make it possible for the child to return home safely, except that reasonable efforts of that nature are not required when a court has made a determination under division (A)(2) of section 2151.419 of the Revised Code;

(19) Make reasonable efforts to place the child in a timely manner in accordance with the permanency plan approved under division (E) of section 2151.417 of the Revised Code and to complete whatever steps are necessary to finalize the permanent placement of the child;

(20) Administer a Title IV-A program identified under division (A)(4)(c) or (f) of section 5101.80 of the Revised Code that the department of job and family services provides for the public children services agency to administer under the department's supervision pursuant to section 5101.801 of the Revised Code;

(21) Administer the kinship permanency incentive program created under section 5101.802 of the Revised Code under the supervision of the director of job and family services;

(22) Provide independent living services pursuant to sections 2151.81 to 2151.84 of the Revised Code.

(B) The public children services agency shall use the system implemented pursuant to division (A)(16) of this section in connection with an investigation undertaken pursuant to division (F)(1) of section 2151.421 of the Revised Code to assess both of the following:

(1) The ongoing safety of the child;

(2) The appropriateness of the intensity and duration of the services provided to meet child and family needs throughout the duration of a case.

(C) Except as provided in section 2151.422 of the Revised Code, in accordance with rules of the director of job and family services, and on behalf of children in the county whom the public children services agency considers to be in need of public care or protective services, the public children services agency may do the following:

(1) Provide or find, with other child serving systems, specialized foster care for the care of children in a specialized foster home, as defined in section 5103.02 of the Revised Code, certified under section 5103.03 of the Revised Code;

(2)(a) Except as limited by divisions (C)(2)(b) and (c) of this section, contract with the following for the purpose of assisting the agency with its duties:

(i) County departments of job and family services;

(ii) Boards of alcohol, drug addiction, and mental health services;

(iii) County boards of mental retardation and developmental disabilities;

(iv) Regional councils of political subdivisions established under Chapter 167. of the Revised Code;

(v) Private and government providers of services;

(vi) Managed care organizations and prepaid health plans.

(b) A public children services agency contract under division (C)(2)(a) of this section regarding the agency's duties under section 2151.421 of the Revised Code may not provide for the entity under contract with the agency to perform any service not authorized by the department's rules.

(c) Only a county children services board appointed under section 5153.03 of the Revised Code that is a public children services agency may contract under division (C)(2)(a) of this section. If an entity specified in division (B) or (C) of section 5153.02 of the Revised Code is the public children services agency for a county, the board of county commissioners may enter into contracts pursuant to section 307.982 of the Revised Code regarding the agency's duties.

(2006 S 238, eff. 9-21-06; 2005 H 66, eff. 9-29-05; 2003 H 95, eff. 9-26-03; 2002 H 38, eff. 11-1-02; 2001 H 94, eff. 9-5-01; 2000 S 180, eff. 3-22-01; 2000 H 332, eff. 1-1-01; 2000 H 448, eff. 10-5-00; 1999 H 471, eff. 7-1-00; 1998 H 484, eff. 3-18-99; 1997 H 352, eff. 10-1-97; 1997 H 408, eff. 10-1-97; 1997 H 215, eff. 6-30-97; 1996 H 274, eff. 8-8-96; 1993 H 152, eff. 7-1-93; 1992 H 478; 1991 H 298; 1986 H 428; 1984 H 37; 1980 H 900, H 378; 1978 H 523; 1974 H 1138; 1972 H 494; 1971 H 913; 1969 S 49; 127 v 1012)