

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0056

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

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

Plaintiff-Appellee,

vs.

WILLIAM DENIHAN, et al.,

Defendants-Appellants.

TRIAL COURT NO.: 450833

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AMICUS BRIEF OF PUBLIC CHILDREN SERVICES ASSOCIATION OF OHIO

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I. STATEMENT OF THE FACTS

For the purposes of this Memorandum, the Public Children Services Association of Ohio (hereinafter "PCSAO") incorporates, in its entirety, the Statement of the Facts as set forth by, Appellants Department of Children and Family Services (hereinafter "DCFS"), DCFS Executive Director William Denihan and Case Worker Kamesha Duncan, and Supervisor Tallis George Munro.

PCSAO is a proactive coalition of Public Children Services Agencies that promotes the development of sound public policy and program excellence for safe children, stable families, and supportive communities. In the pursuit of accomplishing its vision for children, families and communities, it is imperative that Children Services Agencies throughout Ohio be able to operate without facing the devastating risk of civil and criminal liability for performing their essential job functions.

Each year, public children services employees place themselves in harm's way on tens of thousands of occasions as they fulfill their duties to the children of Ohio. These employees are often faced with hostile parents, guardians and family members as the employees conduct their investigations into suspected child abuse and neglect. These parents, guardians and family members are often uncooperative if not entirely antagonistic to the investigation process. Nonetheless, public children service employees continue their investigations to protect the safety and lives of children of Ohio while having to maintain a respect and balance with parental rights.

Recent data reflect that, in 2003, public children services employees conducted 87,158 investigations into child abuse and neglect in the State of Ohio.¹ The following reflects the number of investigations conducted in the respective counties in 2003:

¹ See <http://www.pcsao.org/factbook/ohio%202005.pdf>

- Cuyahoga 15,809;
- Franklin 8,577;
- Hamilton 6,546;
- Montgomery 3,490;
- Lucas 4,634;
- Summit 4,710.²

Public children service agencies are supported primarily through local property tax levies or county general funds, with limited and diminishing federal funds and minimal state support. The budgets for these agencies are forecast based upon existing duties and anticipated costs of providing services. Any change in these duties or in the financial exposure of the agencies could prove catastrophic to their operations and services they provide.

In this case, the Eighth District Court of Appeals decision imposes duties upon public children services agencies that are beyond the scope of the governing statute – R.C. 2151.421. Specifically, the Court of Appeals decision imposes a duty on public children services agencies to report cases of suspected abuse to a municipal or county peace officer and, correspondingly, the agency is subject to the criminal penalties set forth in R.C. 2151.99. See *O'Toole v. Denihan*, 8th Dist. No. 87476, 2006-Ohio-6022, at ¶14. However, R.C. 2151.421 imposes no such duty upon a public children services agency to report suspected abuse to law enforcement officials.

The Court of Appeals further committed error by concluding that all public children services agencies and their employees are *in loco parentis* to every child they investigate. Appellee alleges in his Complaint that all Defendants breached their duty to provide for the safety of a minor, pursuant to R.C. 2919.22, as *in loco parentis*. Complaint at ¶ 3. However, the Court of Appeals failed to address Appellants' arguments that an *in loco parentis* duty does not apply to children services agencies and their employees during the course of an investigation.

² See <http://www.pcsao.org/factbook2005.htm>. Go to the county profiles to select individual county statistics.

Accordingly, having reversed the trial court's decision in its entirety, the Court of Appeals implicitly adopts the proposition that children services agencies and their employees are *in loco parentis* of all children they investigate. This conclusion is erroneous and is potentially devastating to children services agencies as it exposes them to criminal penalties, pursuant to R.C. 2919.22, for statutorily non-existent duties.

Finally, the Court of Appeals decision concluded that this Court's decision in *Marshall v. Montgomery County Children Services Board* (2001), 92 Ohio St.3d 848, 2001-Ohio-209, was distinguishable from the case at bar as it relates to the immunities provided by R.C. Chapter 2744. Specifically, the Court of Appeals held that "genuine issues of material fact remain concerning the investigation of Denihan and DCFS" with regard to the allegations of recklessness in the investigation process." *O'Toole v. Denihan, et al.* 2006-Ohio-6022, at ¶16. (Emphasis added.) However, this Court held in *Marshall, supra*, that "R.C. 4121.421 does not expressly impose liability for failure to investigate reports of child abuse." *Marshall v. Montgomery County Children Services Board*, 92 Ohio St.3d 348, 2001-Ohio-209, syllabus. Accordingly, the Court of Appeals erred by reversing the Trial Court's grant of summary judgment on the issue of statutory immunity for DCFS, but that impact of that error did not end with the named Parties to this dispute.

The Court of Appeals' decision impacts each and every public children services agency in this state. Every year, thousands of investigations are initiated into suspected abuse or neglect of children throughout Ohio. Under the Court of Appeals' rule, children services agencies in Cuyahoga County and throughout Ohio now would face exposure to liability merely because a paper file was created in the office with no time to have conducted the first interview, let alone decide whether to remove a child from a dangerous situation.

On a practical level, the instant rule also creates increased burdens for the individual worker at public children services agencies. Despite such increased burdens, the rule creates no corresponding increase in either compensation or overall job satisfaction for such workers. While such concerns typically do not guide the dedicated worker at a children services agency, such a rule would tend to drive out some workers who know the law has imposed upon them too great of a duty, knowing that they have their own individual obligations to care for their own families through the typically unheralded salaries earned at a children services agency. With fewer workers, those who remain would face even greater challenges in pursuing the public goal of ensuring the well being of children and families throughout the state.

The Court of Appeals' decision creates duties that exist nowhere in statute and expose public children services agencies and their employees to civil and criminal penalties that were not intended by the Legislature. Moreover, the Court of Appeals decision undermines the immunities provided by statute. As a result of the foregoing, public children services agencies throughout the State of Ohio will be subject to catastrophic risks of both civil and criminal exposure for duties that never before existed at common law or in statute. Accordingly, this Court must reverse the decision of the Court of Appeals to ensure the future operation of public children services agencies in Ohio.

II. ARGUMENT

PROPOSITION OF LAW NO 1:

THE APPELLATE COURT ERRED IN HOLDING THAT THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES' EMPLOYEES ACTED IN A "WANTON OR RECKLESS MANNER" WHEN THE EMPLOYEES INVESTIGATED A COMPLAINT OF CHILD ABUSE AND MADE A PROFESSIONAL DECISION NOT TO PETITION THE JUVENILE COURT OF CUYAHOGA COUNTY FOR EMERGENCY CUSTODY.

In 1985, the legislature created the Political Subdivision Tort Liability Act to protect political subdivisions and its employees from certain liabilities. See *Butler v. Jordan*, 92 Ohio St. 3d 354, 2001-Ohio-204 (detailing the history of sovereign immunity). The Political Subdivision Tort Liability Act is set forth in R.C. 2744 et seq.

R.C. 2744.03(A)(6) provides that employees of a political subdivision are totally immune from liability but for three exceptions. The exceptions to individual immunity are set forth in R.C. 2744.03(A)(6)(a-c). One of the exceptions is if an employee acts with "malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b). R.C. 2744.03(A)(6)(b) provides:

In addition to any immunity or defense referred to in division (A)(7) of this section and 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 * * *

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

Whether an employee acts with "malicious purpose," "bad faith" or in a "wanton manner" has been analyzed at length by this Court. This Court has defined "malicious purpose" as "indulging or exercise of malice, harboring ill will or enmity." *Teramano v. Teramano*

(1996), 6 Ohio St. 2d 117, 118, 216 N.E. 2d 375. "Malice" has been defined as the "willful and intentional design to do injury, or intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified." *Jackson v. Butler Cty. Bd. of Commrs.* (1991), 76 Ohio App. 3d 448, 453-454; see also *Bush v. Kelley's Inc.* (1969), 18 Ohio St. 2d 89, 247 N.E. 2d 745. "Bad faith" is equally egregious and connotes conscious wrongdoing. It has been defined as follows:

* * * [B]ad faith although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports dishonest purpose, moral obliquity, conscious wrongdoing, breach of 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
* * *

Slater v. Motorist Mut. Ins. Co., (1962), 174 Ohio St. 148, 187 N.E. 2d 45, paragraph two of syllabus. This Court always has equated the foregoing terms with an "intent" to create an unreasonable risk of harm under the circumstances.

Because of the heightened duty requirement to establish acts or omissions were with "malicious purpose," "bad faith" and in a "wanton manner" in order to avoid employee immunity, Appellee has never contended that the political subdivision employees acted with "malicious purpose," "bad faith" or in a "wanton manner." Rather, Appellee has seized upon the term "recklessness" and attempts to use the term out of context in an attempt to blur the distinction between recklessness and negligence, thereby negating defenses afforded by the Political Subdivision Immunity Act.

HISTORY OF THE TERM "RECKLESSNESS"

This Court initially adopted the standard definition of "recklessness" contained in Section 500 of the Restatement of Torts 2d in 1990 when analyzing facts in the context of sporting events. *Marchetti v. Kalish* (1990), 53 Ohio St. 3d 95, 559 N.E. 2d 699 (citing Comments f and

g with approval at FN 3); *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E. 2d 705.

The complete definition of “recklessness” adopted by this Court in 1990 provides:

The actor’s conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of acts 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 to make his conduct negligent.

Marchetti, supra.

See also *Carter v. City of Cleveland* (1998), 83 Ohio St. 3d 24, 697 N.E. 2d 610 (“recklessness” definition applied in the context of R.C. 2744.03(A)(6)).

This Court has held that since the term “reckless” is often used interchangeably with “willful” and “wanton,” its comments regarding recklessness apply equally to conduct characterized as willful or wanton. *Thompson, supra* at 104, fn 1.

A month after the adoption of Section 500 of the Restatement of Torts 2d, state appellate courts began analyzing the term “recklessness” in the context of a political subdivision employee’s immunity. In *Poe v. Hamilton* (1990), 56 Ohio App. 3d 137, 565 N.E. 2d 887, the Twelfth District Court of Appeals recognized that to terminate immunity for a political subdivision employee that acted “reckless” pursuant to R.C. 2744.03(A)(6)(c), “the word ‘reckless’ is associated with the words ‘malicious purpose,’ ‘bad faith’ and ‘wanton,’ all of which suggest conduct more egregious than simple carelessness.” *Id.* at 889. Therefore, the court in *Poe* concluded that in the context of statutory immunity, an employee “must have ‘perversely disregarded a known risk’ in order to lose immunity “for acting reckless.” *Id.*

Every appellate court in Ohio since has adopted the same definition of “recklessness” with regard to immunity for political subdivision employees. *Cole v. Crowthers* (Oct. 12, 1994), Ohio App. 1 Dist. (an individual acts in a “reckless” or “willful and wanton” manner if he or she

perversely disregards a known risk); *Pope v. Trotwood-Madison City School Dist. Bd. of Edn.*, 2nd Dist. No. 20072, 2004-Ohio-1314 (recognizing that courts have defined “recklessness” as a perverse disregard for a known risk); *Aughney v. Henry County Dept. of Human Services* (Dec. 1, 1998), 3rd Dist. No. 7-98-03 (wanton or reckless conduct has been described as acting in perverse disregard of a known risk); *Winegar v. Greenfield Police Dept.*, 4th Dist. No. 00CA18, 2002-Ohio-2173 (an individual acts in a “reckless” or “willful and wanton” manner if he or she perversely disregards a known risk); *Kaderly v. Blumer* (October 15, 1996), 5th Dist. No. 1996CA22 (employees actions did not rise to the level of perverse disregard of the known consequences); *Vbarra v. Vidra*, 6th Dist. No. WD-04-061, 2005-Ohio-2497 (R.C. 2744.03(A)(6)(b) intends to hold culpable those who have a perverse disregard of a known risk); *Angelot v. Youngstown Bd. of Education* (Sept. 18, 1998), 7th Dist. No. 96CA90 (recklessness in the context of the sovereign immunity defense means a perverse disregard of a known risk, which suggests conduct more egregious than simple carelessness); *Rankin v. CCDCFS*, 8th Dist. No. 86620, 2006-Ohio-6759 (recklessness is a perverse disregard for a known risk); *Shadoan v. Summit Cty. Children Serv. Bd.*, 9th Dist. No. 21486, 2003-Ohio-5775, ¶15 (a plaintiff must establish a political subdivision employee “failed to exercise any care whatsoever or acted with the intent, purpose or design to injure”); *Byrd v. Kirby*, 10th Dist. No. 04AP-451, 2005-Ohio-1261 (recklessness for purposes of R.C. 2744.03(A)(6)(b) is defined as perverse disregard of a known risk); *Vasquez v. Windham*, 11th Dist. No. 2005-P-68, 2006-Ohio-6342, ¶40 (“recklessness involves a ‘perverse disregard of a known risk’”); *Rush v. Carlisle Local School Board* (May 23, 1994), 12th Dist. No. CA93-11-89 (“we have held on numerous occasions that to act recklessly is to act with a perverse disregard of a known risk”).

Even the Sixth Circuit Court of Appeals and some of the Ohio federal district courts have held that “under Ohio law, wanton and reckless conduct is defined as perversely disregarding a known risk.” *Krantz v. City of Toledo Police Dept.* (C.A. 6, Sept. 20, 2006), 197 Fed. Appx. 446; *Johari v. City of Columbus Police Dept.* (S.D. Ohio 2002), 186 F. Supp. 2d 821 (reckless conduct is more egregious than “simple carelessness” citing *Poe v. Hamilton* (1990), 56 Ohio App. 3d 137, 565 N.E. 2d 887)).

While issues regarding malice, bad faith and wanton or reckless behavior are generally issues of fact, the standard for showing such conduct is high. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St. 3d 351, 356, 639 N.E. 2d 31. Thus, summary judgment is appropriate in instances where an employee’s actions demonstrate that they did not intend to cause any harm or exhibited a perverse disregard of a known risk. *Fox v. Daly* (Sept. 26, 1997), 11th Dist No. 96-T-5453; *Poe*, supra; See also *Sobiski v. Cuyahoga County Dept. of Children and Family Services*, 8th Dist. No. 84086, 2004-Ohio-6108 (employees did not act with malice as a matter of law).

In *Jackson v. Butler Cty. Board of Commrs.*, (1991), 76 Ohio App. 3d 448, 602 N.E. 2d 363, a child’s estate brought a wrongful death action against county commissioners, Butler County Department of Human Services (“BCDHS”) and certain employees of the BCDHS. The trial court granted defendants’ motion for immunity. The Court of Appeals affirmed and held that the conduct of the defendants’ employees neither amounted to perverse disregard of known risks nor rose to the level of maliciousness, bad faith, or recklessness, so as to preclude application of statutory immunity.

In *Jackson*, the BCDHS had removed a three year old girl from her mother’s custody because both animal and human feces were throughout the home and the child was not cared for. BCDHS and its employees placed the girl in the natural father’s custody despite the BCDHS’

employees' documented concerns that the father was "immature, inadequate and borderline mentally retarded man who had been on welfare" since dropping out of high school. The BCDHS also warned that the father was belligerent, had passive-aggressive expressions of anger and only recommended custody subject to "protective services" to prevent the children from being abused. Despite this knowledge, BCDHS only saw the girl once in almost a month and a half and canceled at least two home visits. After the month and a half of no personal visits with the child, the three year old girl was beaten to death by her father and found with bruises that were 14 to 30 days old.

In *Jackson*, however, the court concluded that BCDHS' employee's actions did not amount to recklessness and they were immune from liability. The court noted that:

a social home worker **cannot be everywhere at all times and everything to everybody.** *** The fact that Tiffany died and [her death] could have been prevented with more vigilance on behalf of [BCDHS] **does not equate with negligence, let alone recklessness. The department is not an insurer of its clients.**

Id. at 368 (Emphasis added).

Appellee's Complaint alleges DCFS employees acted with malice, bad faith and in a wanton or reckless manner in their investigation of abuse of Sydney Sawyer. However, Appellee never has argued that DCFS employees were "malicious" or acted in "bad faith." Therefore, the issue becomes whether DCFS social workers were negligent or did their actions rise to the level of "wanton and reckless." The undisputed facts establish that DCFS social workers were not wanton or reckless as a matter of law.

The law requires the court to examine the facts at the time judgment decisions were made and not to apply hindsight. In this case, DCFS employees immediately investigated the allegations of abuse concerning Sydney Sawyer, and Supervisor Munro assisted caseworker Duncan and evaluated the information presented to him at that time.

Supervisor Munro examined the facts and photographs as they were reported. Extensive interviews were conducted of Sydney Sawyer, her primary caregiver, Lashon Sawyer, all relevant employees at the day care center, and Sydney Sawyer's babysitter, Nashonda Cundiff. While the Eighth District Court of Appeals' opinion erroneously held that "the agency already knew that someone had injured this child and still returned the child to her mother even though she had a long history of abusing her children," the Court of Appeals' opinion is factually wrong. It is undisputed that DCFS had a background check performed and confirmed that no prior complaints of abuse had ever been made concerning Sydney Sawyer or her mother. (Munro Depo at pg. 115).

Sydney Sawyer's home was examined, and a safety plan was developed. That plan required Sydney Sawyer to be examined by a medical professional, required Sydney Sawyer to remain in day care and be supervised by the day care staff and weekly face to face interviews conducted.

Sydney Sawyer's mother participated in this plan. Her mother was fully cooperative and complied with all requests by DCFS employees. Her mother had no criminal record, evidence of drug addiction or mental psychosis. Rather, her mother was working a steady job and providing income for a household for Sydney Sawyer and was able to explain the origin of Sydney Sawyer's apparent injuries.

The investigation included medical review. Medical examiners reported both that Sydney Sawyer's x-rays were normal and that they did not suspect abuse. While Supervisor Munro requested follow up face to face meetings with Sydney Sawyer, a pre-approved trip out of town for a family funeral and day care closing for Easter break in part prevented follow up meetings. These actions do not denote recklessness.

While Appellee seeks to view the facts with hindsight and a heightened duty, Appellee's allegations are ultimately critical of the investigation performed by county employees. Even if Appellee's criticisms establish, arguably, negligent conduct, no evidence exists that the employees intended Sydney Sawyer to be injured or acted with perverse disregard for her safety. To hold otherwise subjects every social worker to allegations that essentially amount to negligence but are cloaked by the term "recklessness," again, rendering void the protections afforded by the Political Subdivision Immunity Act.

The intent of the legislature in enacting political subdivision immunity, in part, was to provide liability protection for those workers forced to make daily decisions in even the hardest cases. The Eighth Appellate District's erroneous conclusion subjects the decisions of these social workers to a factual trial determination concerning the exercise of their professional judgment when in fact they are accused of mere negligence. Therefore, Amicus Curiae Public Children Services Association of Ohio requests this Court to adopt the definition of "recklessness" used by every appellate court in Ohio with regard to whether an employee is entitled to immunity: an employee is entitled to immunity unless he/she acts with a perverse disregard of a known risk.

PROPOSITION OF LAW NO 2:

THE APPELLATE COURT ERRED IN HOLDING THAT THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES' EMPLOYEES WERE NOT IMMUNE FROM LIABILITY FOR FAILING TO REPORT SUSPECTED CHILD ABUSE TO POLICE AUTHORITIES, THEREBY CREATING A DUTY NOT CONTEMPLATED BY THE LEGISLATURE IN R.C. SECTION 2151.421(A)(1)(a); OR FAILING TO PROVIDE "IN LOCO PARENTIS" DUTY OF CARE, THEREBY CREATING A DUTY NOT CONTEMPLATED BY THE LEGISLATURE IN R.C. SECTION 2919.22 (A).

A. FOR THE PURPOSES OF THE IMMUNITY EXCEPTION IN R.C. 2744.03(A)(6)(c), DOES R.C. 2151.421 EXPRESSLY IMPOSE LIABILITY ON POLITICAL SUBDIVISION EMPLOYEES FOR FAILURE TO REPORT REPORTS OF CHILD ABUSE?

1. **Statutory Immunity in Ohio**

Under Ohio law, political subdivisions and their officials are immune from liability for acts or omissions connected with the exercise of governmental or proprietary functions. *Colbert v. Cleveland* (2003), 99 Ohio St.3d 215, 216. Ohio Revised Code 2744 et seq. addresses and outlines those immunities, exceptions to the immunities and defenses to the exceptions which are available to state political subdivisions and their officials. In determining the application of these statutory immunities, exceptions and defenses to any particular set of facts, a three-tier analysis is employed. *Id.*

The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental or proprietary function. *Id.*; see also *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28. However, because political subdivision immunity is not absolute, the second tier of analysis requires the court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. *Id.* Finally, *if* an exception from R.C. 2744.02(B) imposes liability on the political subdivision, then the third tier of analysis requires the court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability. *Id.* In addition, R.C. 2744.03(A)(6) provides defenses and exceptions to immunity for individual employees of political subdivisions. The availability of statutory immunity is a *purely legal issue* and as such is properly determined by a court prior to trial. *Nease v. Med. College Hosp.* (1992), 64 Ohio St.3d 396, 400. (Emphasis added.)

2. Appellants Had No Duty to Report Suspected Child Abuse.

In this case, DCFS is entitled to immunity pursuant to the first tier of the immunity analysis. Specifically, R.C. 2744.01(F) provides that a county is a political subdivision, and R.C. 2744.01(C)(2)(M) provides that the operation of a county human services department is a governmental function. See *Jackson v. Butler County Bd. of Commrs.* (1991), 76 Ohio App.3d 448; *Sobiski v. Cuyahoga County Dept. of Children and Family Services*, 2004-Ohio-6108. As such, DCFS and its employees are generally immune from liability pursuant to the first tier of the statutory immunity analysis and the Court must proceed to the second tier in the analysis.

The second tier requires the Court to consider whether one of the five exceptions listed in R.C. 2744.02(B)(1)-(5) apply. R.C. 2744.02(B)(5) is the only section arguably applicable and disputed in this case. It provides that a political subdivision may be liable for injury or death or loss to a person “when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code.” However, the statute makes clear that “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.” R.C. 2744.02(B)(5).³

Here, Appellee argues that the immunity granted to DCFS by the trial court is improper because R.C. 2151.421(A) creates a duty for a public children services agency to report suspicions of child abuse or neglect to local police. R.C. 2151.421(A)(1)(a) states in pertinent part:

No person described in division (A)(1)(b) of this section who . . . knows or suspects that a child under eighteen . . . has suffered or faces a threat of suffering any physical or mental wound . . . shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division. . . [T]he person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides. . .

³ For the purposes of this appeal, it is presumed that the present version of R.C. 2744.02(B)(5) applies.

R.C. 2151.421(A)(1)(a) (Emphasis Added). Within section (A)(1)(b), the statute creates a duty for an “administrator or employee of a certified child care agency or other public or private children services agency” to report to the public children services agency or a municipal or county peace officer. R.C. 2151.421(A)(1)(b).

In construing a statute, a court’s paramount concern is the legislative intent. *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. *Id.* citing *State v. S.R.* (1992), 63 Ohio St.3d 590, 594-595. If the meaning of a statute is unambiguous and definite, then it must be applied as written and no further interpretation is appropriate. *Id.* citing *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.* (1994), 69 Ohio St.3d 521, 524-525. In other words, if the plain application of a statute is apparent on its face, no further application of the rules of statutory construction is necessary.

However, the Court of Appeals held that genuine issues of material fact existed as to whether Appellants made any telephonic or personal report to the police as required by R.C. 2151.421(C). *O’Toole v. Denihan, et al.* 2006-Ohio-6022, at ¶¶ 14-15. Yet, the statute plainly states that people required to report may report to either children services or the police. There is no requirement within the reporting statute which requires individuals to report to both children services and the police, and, correspondingly, there is no duty required of a children services agency to report to the police, as the children services agency is already aware of the suspected abuse. The Court of Appeals interpreted R.C. 2151.421(A) beyond its plain meaning to require employees of DCFS to report child abuse to both children services and the police.

The Court of Appeals analysis is inconsistent with both the legislative intent of R.C. 2151.421 and the plain meaning of the statute. The General Assembly enacted R.C. 2151.421 to

provide special protection to children from abuse and neglect. *Campbell v. Burton* (2001), 92 Ohio St.3d 336, 342. To accomplish this goal, the General Assembly provided multiple sources for people to report; either children services or the police. The plain language of the statute makes clear that reporting to either children services or the police will satisfy the statutory duty to report.

It is undisputed that DCFS was aware of the report of child abuse of Sydney Sawyer. Because DCFS had already obtained the report of abuse, the Appellants were under no additional obligation, pursuant to R.C. 2151.421(A), to report to the police. In addition, no reasonable interpretation of R.C. 2151.421(A) could require employees of a children services agency to report suspected child abuse of which the public children services agency is already aware. For this reason, R.C. 2151.421(A) cannot be read to require the employees of a children services agency to report suspected child abuse to local police.

The Court of Appeals in this case incorrectly determined that a public children services agency employee is required to report reports of child abuse already reported to the agency. Such statutory construction ignores the obvious legislative intent for providing a reporting requirement in the first instance. The statute was intended to force those persons dealing with minor children to report any suspected abuse so that an investigation could be initiated. *Brodie v. Summit County Children Serv. Bd.* (1990), 51 Ohio St. 3d 112, 119, 554 N.E. 2d 1301, 1308. It is undisputed that not only was a report filed with the appropriate agency, but an investigation was launched in a timely manner.

The Court of Appeals' conclusion that "genuine issue of material fact remain" concerning whether the daycare center's report of alleged abuse of Sydney Sawyer to DCFS was reported to the police by Supervisor Munro and Case Worker Duncan creates a duty to report and personal liability for DCFS employees where no such duty existed previously. Appellee is

simply attempting to avoid the plain language of the statute and create liability for individual employees in order to avoid immunity. Therefore, Appellant requests this Court to determine that R.C. 2151.421 does not expressly impose liability on political subdivision employees for failure to report previously reported reports of child abuse, and as such, the second tier of analysis for political subdivision immunity does not create an exception to immunity under R.C. 2744.02(B)(5), and Appellants DCFS, Denihan, Munro and Duncan are immune from liability pursuant to R.C. 2744 *et seq.*

B. FOR PURPOSES OF THE IMMUNITY EXCEPTION IN R.C. 2744.03(A)(6)(c) DOES R.C. 2919.22 EXPRESSLY IMPOSE A DUTY OF CARE AND ULTIMATELY LIABILITY ON POLITICAL SUBDIVISION EMPLOYEES?

R.C. 2744.03(A)(6)(c) provides that a political subdivision employee is immune from liability unless “liability is expressly imposed upon the employee by a section of the Revised Code.” The issue for this Court is whether DCFS employees 1) owe an *in loco parentis* duty to children not in their legal custody and 2) whether R.C. 2919.22 “expressly” imposes liability on political subdivision employees.

1. DCFS Employees Do Not Owe An “In Loco Parentis” Duty Of Care Pursuant To R.C. 2919.

Ohio’s child endangering laws set forth in R.C. 2919.22 provides that parents or people in an “*in loco parentis*” relationship with a child owe a child a heightened duty of care to insure that the child is cared for and not harmed. R.C. 2919.22 provides:

(A) No person, who is the parent, guardian custodian, person having custody or control, or person *in loco parentis* of a child under eighteen years of age *** shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.

Violation of R.C. 2919.22 is a third degree felony.

The term “*in loco parentis*” has been defined as “the relationship which a person assumes toward a child not his own, holding him out to the world as a member of his family toward whom he owes the discharge of parental duties”; further, “a person standing in loco parentis to a child is one who had put himself in the situation of a lawful parent assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption.” *In re Estate of George* (App. 1959), 82 Ohio Law Abs. 452, 455. The key factors of an *in loco parentis* relationship have be delineated as “the intentional assumption of obligations incidental to the parental relationship, especially support and maintenance.” *Nova Univ., Inc. v. Wagner* (Fla. 1986), 491 So. 2d 1116, 1118, fn. 2. (Emphasis added).

This Court in the leading case of *State of Ohio v. Noggle* (1993), 67 Ohio St. 3d 31, 615 N.E. 2d 1040, discussed the phrase “*in loco parentis*” in depth. In *Noggle*, a high school teacher engaged in a sexual relationship with a high school student. The prosecutor attempted to indict the teacher for violation of R.C. 2907.03(A)(5), Ohio’s sexual battery statute. Revised Code 2907.03 (A)(5) provides, in essence, that a person in an “*in loco parentis*” relationship with another, shall not engage in sexual conduct with that person. The prosecution attempted to argue that an “*in loco parentis*” relationship existed between the high school teacher/coach and the student.

This Court **rejected** the argument that “teachers, coaches, scout leaders” etc. have an *in loco parentis* relationship with a child. This Court further held that the term “applies to the people the child goes home to.” *Id.* at 33.

Three years later in *Evans v. Ohio State University* (1996), 112 Ohio App. 3d 724, 680 N.E. 2d 161, motion to certify record overruled (1996), 77 Ohio St. 3d 1494, a plaintiff attempted to argue that a 4-H Club had an “*in loco parentis*” relationship with a 4-H club student

member requiring the 4-H Club to have protected the student from a sexual attack by an adult that helped at 4-H Club activities. The Court of Appeals rejected Plaintiff's argument and held:

Thus, under the case law, the relationship of *in loco parentis* is established when a person assumes the responsibilities incident to parental status, including custody and support of the child; stated otherwise, the rights, duties and responsibilities are the same as those of the lawful parent. Based upon case authority, and a review of the evidence regarding the nature of the 4-H organization, we are unable to accept plaintiffs' contention that 4-H assumes the type of parental rights, duties or responsibilities over its members, including matters of custody, support and maintenance, that the term *in loco parentis* contemplates, and we hold that the Court of Claims did not err in failing to find that defendant stood in the relations of *in loco parentis* with the injured plaintiff.

Id. at 738 (emphasis added). Even the Eighth District Court of Appeals has defined an "*in loco parentis*" as a person "to one who is relied upon for support or applies to the person 'the child goes home to.'" *City of Cleveland v. Kazmaier*, 8th Dist. No. 84290, 2004-Ohio-6420 at ¶ 12, quoting *State v. Noggle* (1993), 67 Ohio St. 3d 31, 33, 615 N.E. 2d 1040,

The Court of Appeals' decision in this case erroneously concluded that all public children services agencies and their employees are "*in loco parentis*" to every child they investigate, including children they do not have custody or control over. The Court of Appeals' error is of public and great general interest because of the absurd consequence its decision creates. If a child is harmed while an agency is investigating allegations of abuse, but does not have legal custody or control of the child, ***the agency and its employees are subject to criminal felony charges for the injuries to the child.***

When a house burns, we call the fire department. When a robber sticks a gun in a shopper's face, we call the police. When a child cries from abuse or physical neglect, we call children services agencies. The firefighter and the police officer take reports of a need to

respond to a call of duty and face no liability due to a legal construct that a special relationship developed between the responder and the caller. Likewise, no special duty should exist between a public children services agency or an employee of such an agency and a child over whom no explicit special relationship has been established.

In this case, the Court of Appeals erroneously adopted Appellee's creative argument that DCFS and its employees were in an "*in loco parentis*." relationship with Sydney Sawyer and thereby violated a duty of care set forth in R.C. 2919.22. This order was crafted only to circumvent DCFS' immunity set forth in R.C. 2477 *et seq.* The ramification for allowing this aspect of the Appellate Court's decision to stand has extreme debilitating consequences. Should the investigating social worker employees be considered as "*in loco parentis*" while investigating a complaint, every worker could not only be held civilly liable for his or her judgments (R.C. 2944.03 (A)(6)(c)), but could be held criminally accountable as a felon (R.C. 2919.22 (E)).

This absurd result would cause a complete shift in the focus of an investigation. The task of "investigating *suspected* child abuse" would change to "eliminating suspected social worker liability and culpability." In this process, parental rights as well as the long term welfare interest of the child would suffer the most

2. **R.C. 2919.22 Does Not "Expressly" Impose Liability On Political Subdivision Employees.**

Two months ago, this Court reaffirmed in *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 2007-Ohio-1946, 865 N.E. 2d 9, that a political subdivision employee only loses immunity pursuant to R.C. 2744.03(A)(6)(c) if a statute "expressly imposes liability" on the employee. In *Cramer*, this Court analyzed the Patients Bill of Rights set forth in R.C. 3721.13 *et al* and whether it expressly imposed liability on political subdivision employees. R.C. 3721.17 (I)(1)

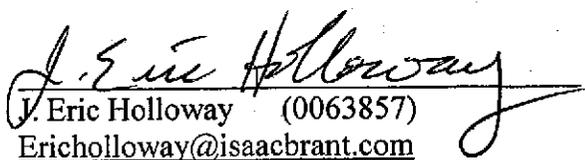
provides “any resident whose rights under sections 3721.10 to 3721.7 of the Revised Code are violated has a cause of action against **any person** or home committing the violation.” (Emphasis added). This Court held that the statutory reference to the term “person” in R.C. 3721.17(I)(1) “was too general to expressly impose liability on an employee of a political subdivision.” *Id.* at ¶32.

In this case, R.C. 2919.22 does not expressly impose liability on employees of a political subdivision. R.C. 2919.22 only imposes liability on “the parent, guardian, custodian, person having custody or control or person in loco parentis of a child.” There is no express statement that the employees of a public children services agency will be individually liable for violating R.C. 2919.22. Therefore, PCSAO requests this Court to hold that R.C. 2919.22 does not expressly impose liability on the employee of a county children services agency within the meaning of R.C. 2744.03(A)(6)(a).

III. CONCLUSION

This decision in this case, *sub judice*, imposes duties upon public children services agencies and its employees that do not exist at common law or in statute. As a result, public children service agencies and their employees, throughout the State of Ohio, are exposed to civil and criminal penalties never expressed or contemplated. Accordingly, public children service agencies are placed in jeopardy which could impair the valuable services that they provide. This Court must review the duties and liabilities that are in direct conflict with the Ohio Revised Code to ensure the future operation of public children services agencies in Ohio. For the foregoing reasons, Amicus Curiae Public Children Services Association of Ohio requests this Court to reverse the Court of Appeals’ opinion and affirm the trial court.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail this 9th day of August, 2007 to:

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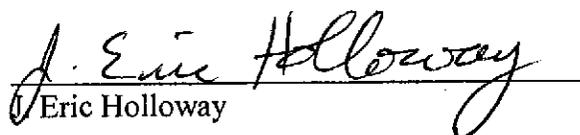
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