

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.: CV450833

MERIT BRIEF OF APPELLANTS DEPARTMENT OF CHILDREN AND FAMILY
SERVICES, DCFS EXECUTIVE DIRECTOR WILLIAM DENIHAN
AND DCFS CASE WORKER KAMESHA DUNCAN

David Ross (0005203)
Michelle J. Sheehan (0062548)
REMINGER & REMINGER CO., L.P.G.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
*Counsel for Defendants-Appellants, DCFS,
William Denihan, Kamesha Duncan*

John W. Martin
John W. Martin Co., L.P.G.A.
800 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113

William D. Beyer
Joan E. Pettinelli
Wuliger, Fadel & Beyer
1340 Sumner Court
Cleveland, Ohio 44115
Counsel for Plaintiff-Appellee

James C. Cochran
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
*Counsel for Defendant-Appellant Tallis
George Munro*

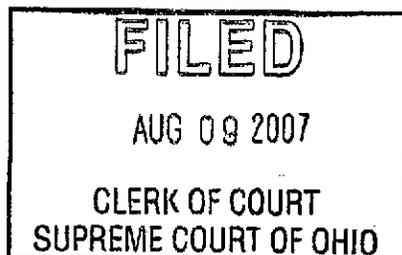


TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

I. STATEMENT OF THE FACTS 1

II. LEGAL ARGUMENT 15

PROPOSITION OF LAW NO. I: 16

DCFS AND ITS EMPLOYEES DO NOT HAVE A LEGAL DUTY TO REPORT
REPORTED CLAIMS OF ABUSE TO THE POLICE PURSUANT TO R.C. § 2151.421.
..... 16

PROPOSITION OF LAW II:..... 21

DCFS AND ITS EMPLOYEES ARE NOT “IN LOCO PARENTIS” TO CHILDREN
THEY INVESTIGATE FOR ALLEGED ABUSE. 21

PROPOSITION OF LAW NO. III: 26

DCFS IS IMMUNE FOR DISCRETIONARY POLICY MAKING DECISIONS
PURSUANT TO R.C. §2744.03 (A). 26

CONCLUSION..... 31

CERTIFICATE OF SERVICE 32

APPENDIX

Appx. Page

1. Judgment Entry of the Ohio Supreme Court granting jurisdiction on Propositions of Law I, II and III dated June 20, 20071

2. Notice of Appeal to the Ohio Supreme Court dated January 11, 2007.....2

3. Opinion and Judgment Entry of the Eighth District Court of Appeals dated November 27, 2006.....5

4. Judgment Entry of the Cuyahoga County Court of Common Pleas dated November 16, 2005.....21

CONSTITUTIONAL PROVISIONS; STATUTES

R. C. § 2744.01.....23

R. C. § 2744.02.....27

R. C. § 2744.03.....30

R. C. § 2151.421.....	32
R. C. § 2919.22.....	35

TABLE OF AUTHORITIES

CASES

Bennison v. Stillpass Transit Co. (1966), 5 Ohio St. 2d 122, 214 N.E. 2d 213..... 20

City of Cleveland v. Kazmaier (Ohio App 8th Dist.), 2004-Ohio-6420 23

Cramer v. Auglaize Acres, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9..... 25

Elston v. Howland Local Schools, 113 Ohio St. 3d 314, 2007-Ohio-2007, 865 N.E. 2d 845 28, 29

Evans v. Ohio State University (1996), 112 Ohio App. 3d 724, 680 N.E. 2d 161 cert. denied
(1996), 77 Ohio St. 3d 1494..... 23

Farra v. Dayton (1989), 62 Ohio App. 3d 487, 576 N.E. 2d 807..... 18

In re Estate of George (App. 1959), 82 Ohio Law Abs. 452, 455..... 22

Layman v. Ohio Dept. of Human Services (1997), 78 Ohio St. 3d 485, 678 N.E. 2d 1217..... 18

Littleton v. Good Samaritan Hosp. And Health Ctr. (1988), 39 Ohio St. 3d 86, 92, 529 N.E. 2d
449..... 20

Marcum v. Talawanda City Schools (1996), 108 Ohio App.3d 412, 670 N.E.2d 1067 29

Marshall v. Montgomery County Children Services Board, 92 Ohio St.3d 348, 2001-Ohio-209,
750 N.E.2d 549 1, 15

Nova Univ., Inc. v. Wagner (Fla. 1986), 491 So. 2d 1116, 1118, fn. 2 22

O’Toole v. Denihan, (Ohio App. 8th Dist.), 2006-Ohio-6022..... 24

Ratcliff v. Darby (Ohio App 4th Dist.), 2002-Ohio-6626..... 26

State of Ohio v. Noggle, 67 Ohio St. 3d 31, 1993-Ohio-189, 615 N.E. 2d 1040..... 22, 23

Yates v. Mansfield Board of Ed., 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E. 25 861 17

STATUTES

R.C. § 2151.421 (A)..... 17, 19

R.C. § 2151.421 (D)(1)..... 18

R.C. § 2151.421 (F) 18

R.C. §2744 passim

R.C. § 2744.02 16

R. C. § 2744.02(B)..... passim

R.C. §2744.02(B)(1)-(5) 26, 27

R.C. § 2744.03(A)..... passim

R.C. § 2907.03(A)(5)..... 22

R.C. § 2919.22 passim

R. C. § 3721.13 25

R. C. § 3721.17(D)(1)..... 25

I. STATEMENT OF THE FACTS

A. INTRODUCTION

This case is about Appellee's criticisms of the Cuyahoga County Department of Children and Family Services ("DCFS") and its employees' investigation of alleged abuse of four-year-old Sydney Sawyer. However, this Court in *Marshall v. Montgomery County Children Services Board*, 92 Ohio St.3d 348, 2001-Ohio-209, 750 N.E.2d 549 definitively held that DCFS and its employees are immune from liability for claims of negligent investigation. Therefore, Appellee attempts to distort and expand statutory language so as to impose new legal duties on DCFS and its employees in an attempt to avoid immunity. Specifically, Appellee alleges DCFS and its employees violated R.C. § 2151.421 by failing to report allegations of abuse that were previously reported to DCFS. Appellee also alleges DCFS and its employees violated the child endangering statute set forth in R.C. § 2919.22 by 1) imposing "*in loco parentis*" duties on social workers, and 2) therefore holding DCFS and its social workers personally liable for any harm whatsoever a child's legal parent or guardian imposes. Not only did DCFS and its employees not violate R.C. § 2151.421 or R.C. § 2919.22, but even if this Court determines the statutes were violated and immunity is waived, DCFS' immunity is reinstated pursuant to R.C. § 2744.03(A) for the discretionary policy making decisions at issue.

B. DCFS

Appellant, the Cuyahoga County Department of Children and Family Services ("DCFS") is a governmental agency. One of the functions of DCFS is to receive and investigate allegations of child abuse. (Popchak Depo. at pg. 15.) Notices of alleged abuse are directed to the DCFS Intake Department. (Popchak Depo. at pg. 18). Intake Department C receives allegations of physical and sexual abuse. (Popchak Depo. at pg. 18). Elsa Popchak has been the senior

supervisor of Intake C from August 1997 to the present. (Popchak Depo. at pg. 15-16). From March – April 2000, Senior Supervisor Popchak reported to her supervisor Zuma Jones. Ms. Jones ultimately reported to Appellant Executive Director William Denihan. (Popchak Depo. at pgs. 22-23).

In March 2000, Senior Supervisor Popchak had six supervisors that reported to her: three in the Intake Sex Abuse Department and three in the Regular Intake Department. (Popchak Depo. at pgs. 32-33). Co-Appellant, Tallis George Munro, was one of the supervisors in the Regular Intake Department C. (Popchak Depo. at pgs. 32-33). Supervisor George Munro began working for DCFS as a social worker in 1990. (George Munro Depo. at pg. 9). He obtained a Bachelor of Arts Degree in psychology and early child development and Masters Degree in non-profit organizations. (George Munro Depo. at p 6). He was promoted to Supervisor of Intake Department C in 1998. (George Munro Depo. at pg. 11).

Each intake supervisor is randomly assigned social workers based upon the number of available full time employees as detailed in a “structured chart.” (Popchak Depo. at pgs. 51-54). In late 1999 and early 2000, Supervisor George Munro only had four of the available case worker positions in his unit filled. (Popchak Depo. at pgs. 55-56, 59). During that time frame, several case workers had transferred out of Supervisor George Munro’s unit to be promoted to different departments. (Popchak Depo. at pg. 57).

One of the four case workers assigned to Supervisor George Munro’s unit was twenty four year old Appellant Kamesha Duncan. (Popchak Depo. at pg. 58; Duncan Depo. at pg. 7). Case Worker Duncan began working for DCFS on October 25, 1999 after she graduated from Youngstown State University. (Duncan Depo. at pg. 8). Once hired by DCFS, Case Worker Duncan underwent two and a half months training for her position as a case worker or until

January 2000. (Duncan Depo. at pgs. 10-12). Her training included training in the family risk assessment protocol ("FRAM") utilized by DCFS to essentially assess risk factors. (Duncan Depo. at pgs. 13-14). Her training also included training on the structured decision making model ("SDM") that ultimately replaced the FRAM protocol in March 2000. (Duncan Depo. at pgs. 14-19; George Munro Depo. at pg. 21). Per DCFS policy, upon completion of her training, Case Worker Duncan was a "probationary" employee for six months while she had hands on experience in Intake Department C. (Duncan Depo. at pg. 11). Case Worker Duncan's responsibilities were to investigate claims of alleged abuse over a period of thirty days from the date she received the assignment. (Duncan Depo. at pg. 10). At the end of the thirty day period, Case Worker Duncan either closed the case or transferred it to another department. (Duncan Depo. at pg. 10).

C. DCFS PROTOCOLS

Prior to March 2000, DCFS social workers utilized the Family Risk Assessment Protocol ("FRAM") to evaluate their investigations of alleged abuse. In March 2000, DCFS changed the case management system utilized by social workers to the Structured Decisions Making Model ("SDM"). (George Munro Depo. at pgs. 34-37). The SDM protocol was designed to aid social workers in 1) assessing the risk that a child was presently in danger of abuse and 2) determining at the end of the thirty day investigation if the case referral should be closed or referred to another agency for further handling.

SDM required a social worker to complete two forms during their investigation: the Safety Assessment Plan and the Risk Assessment Form. The Safety Assessment Plan was to be determined or completed within 24 hours of contact with the child; the Risk Assessment form was completed in 30 days at the conclusion of the investigation. (George Munro Depo. at pgs.

34-37; SDM Policy and Procedure Manual attached to Popchak deposition as Exhibit U). The Safety Assessment and Risk Assessment had different purposes. The Safety Assessment “assesses the child’s present danger and the interventions currently needed to protect the child. In contrast, the Risk Assessment looks at the likelihood of future maltreatment.” (Popchak Depo. at pg.127, Exhibit U to Popchak’s deposition, SDM Policy and Procedure Manual at pg. 31). Senior Supervisor Popchak, Supervisor George Munro and Case Worker Duncan were trained on the new SDM protocols as of March 1, 2000. (George Munro Depo. at pgs. 21-29; Popchak Depo. at pgs. 112-119; Duncan Depo. at pgs. 14-19). In fact, training regarding the new SDM protocol began in the agency in October or November 1999. (Popchak Depo. at pg. 112).

D. PRIORITY ONE REFERRALS

When a case referral is received from the DCFS’ hotline, a hotline worker receives the initial information to be investigated. (Duncan Depo. at pgs. 27-28). Based upon the information received, the hotline worker rates the cases as a priority one, priority two or priority three referral. (George Munro Depo. at pg. 29; Duncan Depo. at pg. 30). The hotline worker also faxes a copy of a priority one report to the Cleveland Police Department. (Duncan Depo. at pg. 29). Each case referral is randomly assigned to an intake supervisor on a rotational basis. (George Munro Depo. at pg. 29). Supervisor George Munro typically received two to eight new case referrals a day that he would then assign to a case worker. (George Munro at pg. 29). He also received a priority one referral approximately each day. (George Munro Depo. at pg. 29). In March of 2000, Supervisor George Munro had a total of approximately 150 case referrals being handled in his unit. (George Munro Depo. at pg. 41). Supervisor George Munro met with his supervisor once a week to discuss the open case referrals assigned to his unit. (George

Munro Depo. at pgs. 44-45). He also frequently met with his case workers to discuss open cases. (George Munro Depo. at pgs. 177-178).

How quickly DCFS is required to respond to a case referral depends on whether the referral is rated as a priority one, two or three. DCFS responded to priority one referrals within an hour; priority two referrals within 24 hours and priority three referrals within 72 hours. (George Munro Depo. at pg. 33).

Once a case worker receives a priority one referral and meets with the reporting source and child, a case worker completes a safety assessment form. The safety assessment “provides structured information concerning the danger of immediate harm/maltreatment to a child(ren). This information guides the decision about whether the child may remain in the home (or be returned to the home) with no intervention, may remain in the home (or be returned) with safety interventions in place, or must be protectively placed (or remain in placement).” (SDM manual at pg. 31 attached to Popchak deposition as Exhibit 4). If the child appears to be in a conditionally safe environment, DCFS does not remove the child from the home but continues its thirty day investigation of the allegations of abuse. At the end of thirty days, a case referral is either closed or the child is referred to another agency.

E. INVESTIGATION OF SYDNEY SAWYER

On Wednesday March 29, 2000, Case Worker Kamesha Duncan was on call for priority one referrals that day. (George Munro Depo. at pg. 47). Case Worker Duncan had handled priority one referrals in the past and was trained on how to handle priority one referrals. (George Munro Depo. at pg. 51; Duncan Depo. at pgs. 49-50). At approximately 10:40 a.m., the DCFS hotline received a case referral for Sydney Sawyer from Leslie Jacobs, the social worker at the Ministerial Day Care Center where Sydney Sawyer was enrolled. (George Munro Depo. at pg.

51; Duncan Depo. at pg. 51). Within minutes, the case was assigned to Supervisor George Munro. (Duncan Depo. at pg. 42). Supervisor George Munro discussed the case referral with Case Worker Duncan, explained the allegations, issues to address in her investigation and instructed her to photograph Sydney Sawyer. (Duncan Depo. at pg. 43).

By 11:30 a.m., Case Worker Duncan arrived at the Ministerial Day Care Center and began interviewing Sydney Sawyer and the staff at the day care center. (Duncan Depo. at pgs. 50-51). When Case Worker Duncan interviewed Sydney Sawyer, she noted that Sydney appeared clean and clothed in a jean jumper, shirt and shoes. (Duncan Depo. at pg. 51). At that time, Case Worker Duncan noticed a mark on Sydney Sawyer's left ear and left side of her face. Sydney Sawyer informed her that she got the marks on her face from falling down and on her ear from an ear infection. (Duncan Depo. at pg. 56). Case Worker Duncan testified that based on her examination she did not suspect that the marks were caused by a fist mark at that time. (Duncan Depo. at pgs. 51-52). Case Worker Duncan also examined a linear mark on Sydney Sawyer's back about the length of her finger. While Sydney Sawyer did not know how she got the mark on her back, Case Worker Duncan did not believe at that time that the mark was caused by physical abuse. (Duncan Depo. at pgs. 52-55, 59). Sydney Sawyer's palms also appeared to be peeling from burns that Sydney Sawyer claimed she received from the hot water at her home while she was brushing her teeth. (Duncan Depo. at pgs. 56-60). Therefore, in an abundance of caution, the Ministerial Day Care Center school nurse completely undressed Sydney Sawyer in Case Worker Duncan's presence and examined Sydney Sawyer's entire body for any other marks. Neither Case Worker Duncan nor the school nurse noticed any other marks or anything unusual on Sydney Sawyer's body at that time. (Duncan Depo. at pgs. 61-63).

Case Worker Duncan photographed everything that she thought was a possible injury to Sydney Sawyer. (Duncan Depo. at pg. 53). She also continued to interview Sydney Sawyer in detail as to her family, home, living arrangements and how she is treated at home. (Duncan Depo. at pgs. 64-66). Sydney Sawyer did not appear to be afraid of anyone at home and she denied anyone hitting her. (Duncan Depo. at pgs. 65-66; Investigation and Assessment Form attached to George Munro's deposition as Exhibit B). Case Worker Duncan testified:

- Q. Okay, In talking to Sydney, were you alarmed or was there anything that made you think that maybe her father was abusing her or maybe the mother was abusing her?
- A. No.

(Duncan Depo. at pg. 69).

After interviewing Sydney Sawyer, Case Worker Duncan also performed an in depth investigation of the staff at the Ministerial Day Care Center including:

1. Shirley Lawrence, the director of the day care;
2. Leslie Jacobs, the social worker at the day care;
3. Sydney Sawyer's teacher at the day care;
4. Sydney Sawyer's teacher's assistant;
5. Angela Spring, a family service worker at the day care;
6. Maudine D'Arman, the nurse at the day care.

(Duncan Depo. at pgs. 71-73, 77).

Case Worker Duncan also asked the staff at the Ministerial Day Care for the contact information for Sydney Sawyer's mother, home care provider, grandparents, father and emergency contact information. (Duncan Depo. at pg. 74). However, the day care only had contact information for Sydney Sawyer's mother and home care provider. (Duncan. Depo. at pg. 75).

That same day, Case Worker Duncan interviewed Sydney Sawyer's certified home care provider, Nashonda Cundiff. Nashonda Cundiff cared for Sydney Sawyer from approximately

3:00 p.m. until her mother arrived at 12:30 a.m. when she finished her last shift at work. Ms. Cundiff informed Case Worker Duncan that she was unaware of any marks or injuries to Sydney Sawyer's body. (Duncan Depo. at pgs. 79-80).

Case Worker Duncan also interviewed Sydney Sawyer's mother Lashon Sawyer in person that day at length. (Duncan Depo. at pg. 82). Ms. Sawyer informed her that Sydney Sawyer had an ear infection and it caused the marks on her ear; that Sydney had hurt her head when she fell off her bed playing with toys on the floor and had scratches on her back because Sydney had eczema and scratched her back. (Duncan Depo. at pg. 82). Ms. Sawyer also told her that the water in their apartment was hot and burned Sydney's hands. Ms. Sawyer confessed that she had asked the landlord to turn down the water temperature as a result. (Duncan Depo. at pg. 121). Case Worker Duncan also asked about Sydney's natural father but was told that Ms. Sawyer had been abused by Sydney's natural father and Sydney did not see her natural father. (Duncan Depo. at pg. 91). Ms. Sawyer also reported that Sydney's grandparents were deceased. (Duncan Depo. at pg. 92). Ms. Sawyer willingly signed a medical authorization for Case Worker Duncan to obtain Sydney's medical records from the Neon Clinic. (Duncan Depo. at pg. 94). Based upon Ms. Sawyer's forthcoming explanations, Case Worker Duncan could not affirmatively determine if Sydney's marks were caused by abuse. (Duncan Depo. at pgs. 83-87).

Case Worker Duncan repeatedly consulted Supervisor George Munro while at the day care center regarding her investigation. (Duncan Depo. at pg. 96). Case Worker Duncan called Supervisor George Munro on at least three occasions to insure she had investigated the allegations properly and make sure she interviewed all potential witnesses that day. (George Munro Depo. at pg. 59; Duncan Depo. at pgs. 113-115). In fact Supervisor George Munro

specifically spoke with the Director of the Ministerial Day Care about Sydney's injuries to obtain a more detailed account of the marks on Sydney's face. (George Munro Depo. at pgs. 52-53).

Upon completing her initial investigation and assessment form, Case Worker Duncan began to complete the Safety Assessment Plan per SDM protocol. (Duncan Depo. at pg. 95, Safety Assessment Plan attached to George Munro's deposition as Exhibit E). The Safety Assessment Plan is an assessment to determine if the child is in a conditionally safe environment. (Duncan Depo. at pgs. 96-97). The Safety Assessment Plan contains fifteen questions to assess the risk of safety for the child.

The Safety Assessment plan provides that "*If one or more safety factors are present, it does not automatically follow that a child must be placed.* In many cases, it will be possible for a temporary plan to be initiated that will mitigate the safety factors sufficiently so that the child may remain in the home while the investigation continues. Consider the relative severity of the safety factor(s), the caregiver(s), ability and willingness to work toward solutions, availability of resources, and the vulnerability of the child(ren)." (Safety Assessment Plan at pg. 33 attached to George Munro's deposition as Exhibit E).

Case Worker Duncan admits that she did not fully write out the Safety Plan on March 29, 2000 but she discussed the safety factors with Supervisor George Munro. (Duncan Depo. at pgs. 95-97, George Munro Depo. at pgs. 60-62). Of the fifteen factors, Case Worker Duncan did not believe substantial risk factors existed or that Sydney Sawyer would not be safe in her mother's care. (Duncan Depo. at pgs. 99-100). Therefore, Case Worker Duncan and her Supervisor, George Munro developed a three step safety plan to help insure Sydney Sawyer would be safe during DCFS' continued investigation rather than place her into the foster care system. The three step plan required 1) that Ms. Sawyer would have Sydney Sawyer examined by a medical

professional; 2) Case Worker Duncan will visit the Sawyer home and 3) Sydney Sawyer must remain in day care so that the day care staff can report any further questionable marks on her body. Specifically, the plan required:

A. Number one is, "Mother will report results of medical visit to social worker, stating that Mom did take the child to the scheduled appointment. Mom will make appointment with social worker to visit the home."

"Mom will allow the child to remain in day care to complete her current enrollment."

"Day care staff will report any marks or bruises on the child to social worker, any questionable or unexplained marks."

(Duncan Depo. at pg. 97).

Supervisor George Munro also spoke directly to Lashon Sawyer to confirm that she signed the safety plan. He testified, "I wanted to confirm that she called the medical clinic, and what the understanding was regarding what the agency expected of her to do regarding taking her daughter to the medical clinic for evaluation." (George Munro Depo. at pg. 63). Case Worker Duncan, Lashon Sawyer and the day care center nurse, Maudine D'Arman signed the safety plan. (George Munro Depo. at pg. 65).

Before Case Worker Duncan left the day care center, she insured that an appointment was made for Sydney Sawyer to be examined and x-rayed at the Neon Clinic two days later on Friday, March 31, 2006. (Duncan Depo. at pg. 119, Investigation and Assessment Form attached hereto to George Munro's deposition as Exhibit B). Case Worker Duncan phoned Lashon Sawyer regarding Sydney's scheduled doctor's appointment and Lashon Sawyer willingly agreed to take Sydney to be examined. (George Munro Depo. at pg. 119; Investigation and Assessment Form attached to George Munro's deposition as Exhibit B).

Meanwhile, while Supervisor George Munro was waiting for Case Worker Duncan to call him on March 29, 2000 as to the status of the investigation, Supervisor George Munro researched Sydney Sawyer's biological mother, Lashon Sawyer and biological father Cedric Nash via the county's data base. (George Munro Depo. at pg. 115). Supervisor George Munro discovered that neither individuals had any previous referrals for child abuse. (George Munro Depo. at pgs. 116-117). He also discovered that the information provided by Lashon Sawyer regarding her address, information regarding ADC and her registration and vouchers for day care were consistent with the information in the data base. He also learned that Cedric Nash had not paid child support. (George Munro Depo. at pg. 116).

When Case Worker Duncan returned to DCFS on March 29, 2000, she met with her Supervisor George Munro and showed him the photographs of Sydney Sawyer and the results of her initial investigation. (Duncan Depo. at pgs. 118-119). Supervisor George Munro determined that the information to date did not warrant removing Sydney Sawyer from her mother's custody. (George Munro Depo. at pgs. 78-79, 166). Therefore, he told Case Worker Duncan to obtain Sydney Sawyer's medical records and visit Lashon Sawyer's home. (Duncan Depo. at pg. 119). Therefore, the next day, on March 30, 2000, Case Worker Duncan went to Lashon Sawyer's house to inspect the home.

When Case Worker Duncan arrived at Lashon Sawyer's home on March 30, 2000, Lashon Sawyer was forthcoming and allowed Case Worker Duncan to examine every room in the home. (Duncan Depo. at pg. 120). Lashon Sawyer lived in the downstairs unit of a two family home. (Duncan Depo. at pg. 120). The home had a bed for Sydney Sawyer and Case Worker Duncan did not notice any thing unusual about the home. (Duncan Depo. at pgs. 120-121). Duncan tested the water in the bathroom and discovered that it did get hot enough to burn

her. (Duncan Depo. at pg. 121). Case Worker Duncan also met Lashon Sawyer's boyfriend Patrick Frazier that day. Mr. Frazier did not participate in the interview. Lashon Sawyer told Case Worker Duncan that Patrick Frazier "doesn't know anything about this" and "he doesn't live here." (Duncan Depo. at pgs. 121-122; George Munro Depo. at pg. 93). Later that day, Lashon Sawyer took Sydney Sawyer to the Neon Clinic for a check up. (George Munro Depo. at pg. 119).

On Friday March 31, 2000, Supervisor George Munro reviewed the status of Case Worker Duncan's investigation and her Investigation and Assessment form. (George Munro Depo. at pgs. 64-66). Based upon the investigation to date, while he had some concerns about the marks on her face, Supervisor George Munro thought the explanations for Sydney Sawyer's marks on her ears, back and palms were plausible. (George Munro Depo. at pgs. 93-106, 128). He also believed that "the safety plan was sufficient to protect the child, given that the mother appeared to be cooperating with the agency." (George Munro Depo. at pg. 174). Case Worker Duncan's investigation notes also confirm that the Neon Clinic informed her that Sydney Sawyer arrived and was examined at her scheduled appointment but Sydney couldn't be x-rayed until next week. (George Munro Depo. at pgs. 80, 120). Case Worker Duncan also faxed a medical release to the Neon Clinic for Sydney Sawyer's medical records. (Duncan Depo. at pgs. 123-124). Three days later, on Monday, April 3, 2000, Case Worker Duncan called the Neon Clinic regarding Sydney Sawyer's medical records. (Duncan Depo. at pg. 124; Investigation and Assessment Form attached to George Munro's deposition as Exhibit B).

The next day, on April 4, 2000, Lashon Sawyer called Case Worker Duncan and asked if she could take Sydney to a family funeral out of town. (Duncan Depo. at pg. 127; Investigation and Assessment Form attached to George Munro's deposition as Exhibit B; George Munro

Depo. at pgs. 81, 120). Case Worker Duncan kept Lashon Sawyer on hold while she obtained permission from Supervisor George Munro. (George Munro Depo. at pg. 120). Because DCFS did not have custody of Sydney Sawyer or a protective order, Supervisor George Munro had to allow the Sawyers to go to the funeral. (George Munro Depo. at pg. 120). Therefore Case Worker Duncan obtained the contact information of where the Sawyers were going and when they would return. (Duncan Depo. at pgs. 128-129). On April 11, 2000 Lashon Sawyer called Case Worker Duncan and informed her that "they were back in town and that she and Sydney were okay." (George Munro Depo. at pg. 86).

On April 11, 2000, Case Worker Duncan contacted the Neon Clinic again to obtain Sydney Sawyer's medical records. At that time she had to fax medical releases to the Neon Clinic for a second and third time. (Duncan Depo. at pgs. 123-125; Investigation and Assessment Form attached to George Munro's deposition as Exhibit B). The Neon Clinic is believed to have faxed the medical records on April 11, 2000 to DCFS but Case worker Duncan did not receive them. (George Munro Depo. at pg. 118).

Instead, on April 11, 2000 Case Worker Duncan spoke with Dr. Smoot at the Neon Clinic regarding obtaining Sydney Sawyer's medical records of her examination and her difficulty getting the records from the clinic's medical records department. (Duncan Depo. at pgs. 123-125; Investigation and Assessment Form attached to George Munro's deposition as Exhibit B). Dr. Smoot confirmed at that time that he examined the marks on Sydney Sawyer and he could not confirm any allegations of abuse. (George Munro Depo. at pg. 180). Case Worker Duncan also received confirmation from the Neon Clinic that Sydney's x-rays did not indicate any fractures. (George Munro Depo. at pgs. 179-180).

The following week, Case Worker Duncan took personal time off of work. (Popchak Depo. at pg. 130; George Munro Depo. at pgs. 82-83). Prior to taking time off, Case Worker Duncan intended to follow up with Sydney Sawyer but she did not make contact. (George Munro Depo. at pgs. 83-84). Therefore, when she returned, she followed up with Sydney Sawyer at the day care center on April 26, 2000. (Duncan Depo. at pg. 131). When she arrived, the day care center informed her they were closed for spring break and none of the children were at the day care center. (Duncan Depo. at pg. 132). Case Worker Duncan testified that she could not recall if the day care center was able to provide her with additional information regarding Sydney Sawyer. (Duncan Depo. at pgs. 132-133). The next day, Case Worker Duncan had to respond to another case referral. (Duncan Depo. at pg. 162). On April 28, 2000 Sydney Sawyer died. (George Munro Depo. at pg. 195).

Upon learning of Sydney Sawyer's death, DCFS initiated a complete review of the Sawyer case referral investigation and how it was handled. Even with hindsight, agency officials did not reprimand or discipline Case Worker Duncan. (Duncan Depo. at pg. 153). As the SDM Risk Assessment had to be completed at the end of DCFS' investigation, Supervisor George Munro and Case Worker Duncan completed the SDM reports. (George Munro Depo. at pg. 69). At that time, Supervisor George Munro confirmed that the original police information form was sent to the Cleveland Police Department and only the carbon copy remained in the file. (George Munro Depo. at pgs. 135-137). The referral was traditionally sent to the police only in case DCFS required police assistance with an investigation. Otherwise, DCFS conducted all investigations regarding alleged child abuse.

II. LEGAL ARGUMENT

All of Appellee's claims seek essentially the same thing: to avoid DCFS and its employees' immunity for their investigation of alleged abuse of Sydney Sawyer.

Appellee¹ initially filed a nine count complaint against DCFS, its executive director, supervisor and case worker attempting to criticize how the agency and its employees handled one investigation out of the thousands of investigations it handles each year. Recognizing this Court's binding decision in *Marshall v. Montgomery County Children Services Board*, 92 Ohio St.3d 348, 2001-Ohio-209, 750 NE 2d 549, bars Appellee's claims for negligent investigation, Appellee only appealed Counts 1, 3, 6 and 7 of Appellee's Complaint to the Eighth District Court of Appeals. Counts 1 and 3 of the Appellee's Complaint allege DCFS and its employees violated R.C. § 2151.421 (the reporting statute) and R.C. § 2919.22 (the child endangering law). Counts 6 and 7 allege DCFS and its employees acted reckless in either establishing/implementing the overall structural decision making protocol utilized by DCFS since 2000 to investigate allegations of abuse or with hindsight, Appellee is critical of additional actions Appellee contends DCFS employees should have done during the investigation. Whether individual DCFS employees acted "reckless" has been accepted for review and addressed by Co-Defendant George Munro. The instant appeal surrounds whether DCFS and its employees violated the statutes at issue, and if so, the grave consequences and liabilities for government social service agencies and its employees in the future.

¹ Appellee, the Estate of Sydney Sawyer consists of her biological father, Cedric Nash, and paternal grandmother, Gwen Hamilton.

PROPOSITION OF LAW NO. I:

DCFS AND ITS EMPLOYEES DO NOT HAVE A LEGAL DUTY TO REPORT REPORTED CLAIMS OF ABUSE TO THE POLICE PURSUANT TO R.C. § 2151.421.

A. GOVERNMENTAL IMMUNITY

R.C. § 2744 et. seq. recognizes the potential liabilities government agencies are exposed to on a daily basis. Therefore, R.C. § 2744 et seq. provides a blanket of immunity for political subdivisions such as DCFS and its employees. R.C. § 2744.02(A)(1) provides:

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 government or proprietary function.

R.C. § 2744.03(A)(6) provides immunity to individual employees and provides in relevant part

“... the employee is immune from liability unless one of the following applies:”

Recognizing that immunity may not always be absolute, R.C. § 2744.02 and R.C. § 2744.03 list a few exceptions as to when a political subdivision or its employees' acts will not fall under the blanket of immunity. Two of the exceptions are delineated in R.C. § 2744.02(A)(5) and R.C. § 2744.03(A)(6)(c). R.C. § 2744.02(A)(5)² and R.C. § 2744.03(A)(6)(c) both provide in relevant part that immunity is waived if “liability is expressly imposed upon” a political subdivision or the employee “by a section of the Revised Code.” Thus a political subdivision or its employee will only lose its immunity if they violate a statute that “expressly imposes” liability upon the entity or its employee. To avoid immunity, Appellee alleges DCFS and its executive director, supervisor and case worker violated R.C. § 2151.421 (the reporting statute) and R.C. § 2919.22 (child endangering law).

² For purposes of this Merit Brief only, Appellants cite the version of R.C. 2744.02(B)(5) proposed by Appellee.

B. WHETHER A POLITICAL SUBDIVISION OR ITS EMPLOYEES VIOLATE R.C. § 22151.421 BY FAILING TO REPORT ALREADY REPORTED ALLEGATIONS OF ABUSE?

R.C. § 2151.421(A) entitled “Persons required to report injury or neglect; procedures on receipt of report” requires certain individuals to report suspected child abuse or neglect. The purpose of R.C. § 2151.421 (A) is to “involve agencies in protecting abused children” and require individuals that work with children or may encounter suspected child abuse to step forward and report their suspicions to the relevant governmental agency rather than attempt to avoid a situation or assume a passive role when they know or should know of potential abuse. *Yates v. Mansfield Board of Ed.*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E. 2d 861, Lundberg Stratton dissent at ¶ 53. R.C. § 2151.421 (A)(1)(a) provides in relevant part:

No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age ... has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the 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... (Emphasis added).

The plain language of R.C. § 2151.421 requires a report of abuse to be made to either the public children services or the police. The plain language does not require that once the alleged abuse is reported to a public children service agency, the public children services agency has a heightened duty than all other individuals identified in the statute to report suspected abuse to itself and the police or else face criminal prosecution. Such an interpretation is nonsensical and misconstrues the legislative intent and the plain language of the statute. Courts cannot stretch

statutes beyond their ordinary meaning in order to impose liability under R.C. § 2744.02(B)(5). *Layman v. Ohio Dept. of Human Services* (1997), 78 Ohio St. 3d 485, 678 N.E. 2d 1217; *Farra v. Dayton* (1989), 62 Ohio App. 3d 487, 576 N.E. 2d 807.

If the legislature wanted to impose liability on the children services agency and its employees that receive reports, it could have stated in R.C. § 2151.421(A) that upon receipt of a report, the receiving agency shall notify the local police department. However, the legislature did not intend to impose liability on a children services agency, its employees or the police that receive reports of abuse. To avoid imposing liability on such entities, the legislature created R.C. § 2151.421 (D)(1) which requires the police to report all complaints of child abuse it receives to DCFS without imposing criminal liability. More importantly, R.C. § 2151.421 (F)(1) specifically requires public children services agencies that receive reports of abuse to “submit a report of its investigation” of abuse “to law enforcement.” However it is undisputed that R.C. § 2151.421 (F) does not impose any liability on children services agencies for failure to comply with Section (F) pursuant to *Marshall v Montgomery County Children Services Board*, 92 Ohio St. 3d 348, 353, 2001-Ohio-209, 750 N.E. 2d 549. In fact, the Ohio Supreme Court in *Marshall, supra* held that “it is clear” that a children services agency has a “duty pursuant to R.C. § 2151.421 (F) to investigate reports of known or suspected child abuse.” *Id.* at 352. It is also clear that pursuant to R.C. § 2151.421 (F) a children services agency has a duty to report its completed investigation of suspected abuse to a law enforcement agency – however a children services agency and its agents are not subject to liability under R.C. § 2151.421 (F). *Marshall, supra.*

The liability provisions for failure to report suspected abuse make sense if children that are not already reported to a children services agency are independently discovered and

suspected of being abused. Under such circumstances, social workers would be obligated to report the alleged abuse to the county children services agency or police. However, county social workers are not obligated to report abuse that has already been reported to them. To misconstrue the statute and impose such a burden would expose all county agencies and its agents to unforeseen criminal prosecution and penalties.

If Appellee insists on such an absurd construction of the statute, then the Court is restricted to review the actual language in R.C. § 2151.421. R.C. § 2151.421 provides that at most a child care agency or other children services agency shall report knowledge of child abuse “to the public children services agency or a municipal or county peace officer in the county in which the child resides...” R.C. § 2151.421 (A)(1)(a). Thus, the statute allows a children services agency to report a report of abuse to themselves so that that agency can investigate the report or to report it to the police. In this case, DCFS was aware of the allegations of abuse within its own agency and were investigating the allegations in compliance with R.C. § 2151.421. The next question is whether DCFS properly investigated the allegations. The Ohio Supreme Court in *Marshall, supra*, unequivocally dictates that Appellants are immune from liability for their investigation.

The effect of the Court of Appeals’ decision, in addition to creating a heightened duty for DCFS and its employees that violates the plain language of the Ohio Revised Code and subjects the agency to criminal liability, also waives DCFS and its employees’ immunity from civil lawsuits that result from DCFS’ failure to report reports of alleged abuse to the police. As previously discussed, Appellee contends that governmental immunity for political subdivisions such as DCFS as set forth in R.C. § 2744 et seq. is waived for violation of any statute that imposes liability per R.C. § 2744.02(B)(5). While Appellants contend that immunity is not

waived if police are not notified of reports of abuse, the Court of Appeals' opinion arguably creates precedent that all public children services in Ohio are not immune from civil liability if an agency or its employee does not report reports of alleged abuse to the police. Thus the legal ramifications of this case span even more than criminal liability against every public children services agency in Ohio, it also exposes the agencies to civil liability if an agency fails to report a report to the police. Such exposures as a result of the Court of Appeals' opinion were not intended by the legislature and could terminate the operation of children and family agencies in Ohio.

Finally, to maintain a wrongful death action on a theory of negligence, a Plaintiff must show "(1) the existence of a duty owing to Plaintiff's decedent, (2) a breach of that duty, and (3) proximate causation between the breach of duty and the death". *Littleton v. Good Samaritan Hosp. And Health Ctr.* (1988), 39 Ohio St. 3d 86, 92, 529 N.E. 2d 449 citing *Bennison v. Stillpass Transit Co.* (1966), 5 Ohio St. 2d 122, 214 N.E. 2d 213 paragraph one of the syllabus. If Appellee insists that R.C. § 2151.421 expressly imposes liability on DCFS for failure to report child abuse within the meaning of R.C. § 2744.02 (B)(5), then Appellee must also establish Appellants' failure to report was the proximate cause of Sydney Sawyer's death. *Yates, supra* at syllabus ("a board of education may be held liable when its failure to report the sexual abuse of a minor...proximately results" in damages). However, as a matter of law, the undisputed facts cannot establish that had DCFS reported the allegations of abuse to the police, Sydney Sawyer would still be alive. Appellee's expert only discusses Appellants' failure to investigate—not report to the police. Thus as a matter of law, no evidence exists that Appellants could be the proximate cause of Sydney Sawyer's injuries. However, as Appellants did not violate R.C. §

2151.421, nor were they the proximate cause of Sydney Sawyer's injuries as a matter of law, Appellants request this Court to reverse the Court of Appeals' order in this case.

C. THE UNDISPUTED FACTS ESTABLISH THAT APPELLANTS DID REPORT SYDNEY SAWYER'S CASE REFERRAL TO THE POLICE.

Appellee asserts that "there is no record of any such report being received by the Cleveland Police Department" and implies that therefore the police never received notice of the alleged abuse of Sydney Sawyer. While Appellants were not required to notify the police as previously argued, Supervisor George Munro testified that the DCFS' case referral file indicates that the police were notified of Sydney Sawyer's case referral. Supervisor George-Munro testified that when a complaint is received by the hotline, the hotline worker has a carbon copy form containing relevant complaint information that is automatically faxed to the Cleveland Police Department. (George Munro at pg. 136). In fact, Supervisor George-Munro testified that on May 1, 2003 he examined the Sydney Sawyer case referral file and the carbon copies of the police referral were in the file and the original was faxed to the police department. (George Munro at pg. 137). Therefore, while DCFS and its employees are not required to report hot line referrals to the Cleveland Police, DCFS did in fact report the hotline referral to the police in case police intervention would be required at a later date. Accordingly, DCFS, Executive Director William Denihan and Case Worker Duncan request this Court to reverse the Court of Appeals' order in this matter.

PROPOSITION OF LAW II:

DCFS AND ITS EMPLOYEES ARE NOT "IN LOCO PARENTIS" TO CHILDREN THEY INVESTIGATE FOR ALLEGED ABUSE.

A. WHETHER R.C. § 2919.22 IMPOSES A DUTY OF CARE ON POLITICAL SUBDIVISIONS AND ITS EMPLOYEES FOR PURPOSES OF THE IMMUNITY EXCEPTIONS IN R.C. § 2744.02(B)

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 owes 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 been 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*, 67 Ohio St. 3d 31, 1993-Ohio-189, 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 sexual battery statute. R.C. § 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 p 33.

Three years later, in *Evans v. Ohio State University* (1996), 112 Ohio App. 3d 724, 680 N.E. 2d 161 cert. denied (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 and therefore, the 4-H Club should 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).

The Eighth District Court of Appeals has also 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* (Ohio App 8th Dist.), 2004-Ohio-6420 at paragraph 12 quoting *State of Ohio v. Noggle*, 67 Ohio St. 3d 31, 33, 1993-Ohio-189, 615 N.E. 2d 1040.

The Court of Appeals' decision in this case erroneously concluded that DCFS and its employees owed a heightened duty to care and protect Sydney Sawyer as articulated in Count 3 of Appellee's Complaint. *O'Toole v. Denihan*, (Ohio App. 8th Dist.), 2006-Ohio-6022 at ¶ 22. Specifically, Count 3 of Appellee's Complaint alleged that DCFS and its employees were "*in loco parentis*" to Sydney Sawyer and owed her a heightened duty of care per R.C. §2919.22, the child endangering laws.

The Court of Appeals adopted Appellee's creative argument that DCFS and its employees were in an "*in loco parentis*" relationship with Sydney Sawyer and violated a duty of care set forth in R.C. §2919.22 in order to circumvent DCFS' immunity set forth in R.C. §2744 *et seq.* However, DCFS and its employees were not "*in loco parentis*" to Sydney Sawyer as a matter of law. DCFS and its employees did not assume physical or legal custody of Sydney Sawyer nor did they provide any support or maintenance for Sydney Sawyer as required for an "*in loco parentis*" relationship. In fact, it is undisputed that DCFS did not remove Sydney Sawyer from her mother's custody. Had Appellee wanted "custody and control," they would have needed a court order granting it. Rather, DCFS investigated allegations of abuse and Sydney Sawyer's mother complied with a safety plan to aid in Sydney Sawyer's safety. Neither this Court nor any other appellate court has imposed liability on DCFS as an *in loco parentis* when the agency does not remove the child from the home; assume custody of the child; or has direct control or supervision of the child. In fact, Appellee's arguments are just the opposite—Appellee is critical of DCFS for not removing Sydney Sawyer from her home and the control of her mother.

This is a case of first impression. The result of the Court of Appeals' decision is 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 the consequence of the decision is that if a child is harmed in any manner 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. Because of the significant ramifications of the Court of Appeals' Opinion, DCFS, its executive director and case worker request this Court to reverse the Court of Appeals' Opinion.

B. WHETHER R.C. § 2919.22 “EXPRESSLY” IMPOSES LIABILITY ON POLITICAL SUBDIVISIONS AND ITS EMPLOYEES?

The plain language of the immunity exceptions at issue require that in order for immunity to be waived, liability must be “expressly imposed” by a section of the Revised Code. R. C. § 2744.02(B)(5); R.C. § 2744.03(A)(6)(c). This Court recently recognized and reaffirmed this statutory language requirement in *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9. In *Cramer* this Court reviewed R. C. § 3721.13 and whether the statute “expressly imposed” liability on a political subdivision or its employees. R. C. § 3721.17(I)(1) provides:

Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation.

This Court determined that the reference to “any 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 DCFS or DCFS' executive director, or case worker. 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. * * *

R.C. § 2919.22 does not provide that a political subdivision such as DCFS or the employee of a political subdivision such as a DCFS' executive director or case worker, will be liable for violating R. C. § 2919.22. Therefore, Appellees request this Court to hold that for purposes of immunity, R. C. § 2919.22 does not "expressly impose" liability on DCFS or its executive director, William Denihan, or Case Worker Kamesha Duncan and reverse the Eighth District Court of Appeals' Opinion.

PROPOSITION OF LAW NO. III:

**DCFS IS IMMUNE FOR DISCRETIONARY POLICY MAKING DECISIONS
PURSUANT TO R.C. §2744.03 (A).**

To determine whether a political subdivision is immune from liability, this Court developed a three-tiered analysis for courts to follow. *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610. That analysis set forth in *Cater, supra* is as follows:

- Step 1. R.C. §2744.02(A)(1) provides that all political subdivisions are entitled to a blanket of immunity. R.C. §2744.02(A)(1) provides that political subdivision are not liable for injury, death or loss to a person or property that occurred in relation to the performance of a governmental or proprietary function.
- Step 2. The immunity set forth in R.C. §2744 is subject to five exceptions listed in R.C. §2744.02(B)(1)-(5) Thus, once immunity is established under R.C. §2744.02(A)(1), the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply³.
- Step 3. If one of the exceptions to immunity apply, immunity can be reinstated in the third tier in the analysis if one of the defenses in R.C. §2744.03 applies. However the defenses are not to be considered if none of the exceptions in tier two apply.

Cater, supra at 28; *Ratcliff v. Darby* (Ohio App 4th Dist.), 2002-Ohio-6626 at ¶ 7; *Sobiski v. Cuyahoga County Dept. of Children and Family Services*, (Ohio 8th App), 2004-Ohio-6108 ¶19.

³ R.C. § 2744.03 (A) provides the essentially same analysis for immunity for employees of political subdivisions.

In this case, it is undisputed that DCFS is a political subdivision fulfilling a “governmental function”.⁴ Therefore, Appellants fulfill the first tier and are entitled to immunity.

The only way governmental immunity is avoided in the second tier is if one of the five exceptions set forth in R.C. §2744.02(B)(1)-(5) apply. As previously discussed, Appellee attempts to exploit R.C. §2744.02(B)(5) in this case. R.C. §2744.02(B)(5) provides that “a political subdivision is liable for injury, death or loss to a person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code . . .”.

Even if the Court of Appeals erroneously determined that DCFS and its employees violated a duty to report in R.C. §2151.421 or assumed custody or control of Sydney Sawyer so as to become *in loco parentis* subject to R.C. §2919.22 and therefore immunity is waived pursuant to R.C. §2744.02(B)(5), this Court’s decision in *Cater, supra* requires that a political subdivision is entitled to have immunity reinstated if one of the defenses in R.C. §2744.03(A) applies. In this case, the defenses contained in R.C. §2744.03 were ignored by the Court of Appeals and apply as a matter of law.

R.C. §2744.03(A) provides that if a political subdivision is liable for one of the exceptions contained in R.C. §2744.02(B)(1-5), then immunity may be reinstated to the political subdivision if the act or failure to act “by the employee involved that gave rise to the liability” was within the discretion of the employee. Specifically, R.C. §2744.03(A) provides in relevant part:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover

⁴ R.C. 2744.01(F) provides that a county is a political subdivision. R.C. 2744.01(C)(2)(m) provides that the operation of a county human services department is a “government function”. See *Jackson v. Butler Cty. Bd. Of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 608 N.E.2d 363; *Sobiski v. Cuyahoga County Dept. of Children and Family Services*, (Ohio 8th App), 2004-Ohio-6108.

damages for injury, death or loss to person or property allegedly caused by an act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

* * *

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave raise 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 of the employee.

* * *

(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 wanton or reckless manner. .
(emphasis added).

The defenses and immunity set forth in R.C. §2744.03(A) are not an independent basis to form liability against a political subdivision. Rather the defenses contained in R.C. §2744.03(A) are only to be addressed if an exception to immunity exists in R.C. §2744.02(B)(1-5).

This Court in *Elston v. Howland Local Schools*, 113 Ohio St. 3d 314, 2007-Ohio-2007, 865 N.E. 2d 845 recently analyzed the immunity defenses contained in R.C. § 2744.03. When determining whether Howland Schools was liable for discretionary decisions made by the high school baseball coach as to how to use school resources, this Court held immunity was reinstated pursuant to R.C. § 2744.03(A)(5) because the injury complained of resulted from an individual employee's "exercise of judgment or discretion in determining how to use equipment or facilities." *Id.* at ¶3. However, this Court also acknowledged that the school was not entitled to have immunity reinstated pursuant to R.C. §2744.03(A)(3) because a high school coach's

position did not involve “policy-making, planning or enforcement powers” nor “the exercise of a high degree of official judgment or discretion.” *Id.* at ¶30.

This Court in *Elston* noted the difference between the two immunity defenses in R.C. §2744.03(A)(3) and (5) and held that a political subdivision cannot be sued for “an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion” pursuant to R.C. §2744.03(A)(3). *Elston* at ¶ 28. However, once policy decisions have been made to engage in certain activities or functions, a political subdivision is not entitled to have immunity reinstated if how to use resources were “exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.” *Elston* at ¶ 28. See also *Marcum v. Talawanda City Schools* (1996), 108 Ohio App.3d 412, 670 N.E.2d 1067 (School officials “acted well within the scope of the policymaking, planning and enforcement powers attendant to their offices” and the school was immune pursuant to R. C. § 2744.03(A)(3)).

Count 6 of the Appellee’s Complaint alleges that DCFS and its Executive Director William Denihan recklessly established policies and procedures set forth in the SDM Risk Assessment protocol that DCFS used to investigate child abuse. Specifically, Appellee alleges that DCFS was reckless “in establishing, implementing and utilizing the programs and protocols for responding to, investigating, assessing and disposing of allegations of child abuse.” See ¶53 of the Appellee’s Complaint.

While an independent cause of action for “recklessness” does not exist as an exception to immunity against a political subdivision, should this Court determine DCFS violated a statute and therefore immunity is waived, immunity should be reinstated as a political subdivision is

immune for discretionary “policymaking, planning and enforcement decisions.” R.C. §2744.03(A)(3).

Executive Director William Denihan was responsible for the “overall operations of the Department of Children and Family Services in all aspects for Cuyahoga County.” (Denihan Depo. at p. 9). He held the highest degree of official judgment or discretion for the operations of DCFS. Executive Director Denihan authorized the “policies and procedures” for DCFS. (Denihan Depo. at p. 9). The deputy directors implemented and oversaw the policies and procedures. (Denihan Depo. at p. 9). In fact, DCFS retained a consultant to train supervisors and social workers in the new SDM policies and procedures used to assess reports of child abuse. (Denihan Depo. at p. 10-11). DCFS unit chiefs or unit supervisors then monitored the implementation of the SDM training. (Denihan Depo. at p. 15).

Appellee criticizes DCFS’ policies and procedures set forth in the SDM risk assessment protocol used to investigate child abuse and DCFS’ enforcement and implementation of the policies. However, R.C. § 2744.03(A)(3) requires that immunity is reinstated if the alleged liability was “within the discretion of the employer with respect to policy-making, planning or enforcement policies by virtue of the duties and responsibilities of the office of the employee.” Thus the statute clearly provides immunity to be reinstated to DCFS for the policy making, planning and enforcement powers of DCFS Executive Director William Denihan including any training to enforce the policies. To hold otherwise would expose all political subdivisions to criticisms and liability for basic policymaking decisions that are necessary for the operation of the agencies.

DCFS is also entitled to have immunity reinstated for any alleged criticisms as to how “personnel, facilities and other resources” were used in the investigation of Sydney Sawyer.

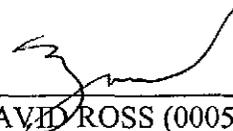
R.C. §2744.03(A)(5). While R.C. §2744.03(A)(5) reinstates immunity if the “judgment or discretion was not exercised with malicious purpose, in bad faith or in wanton or reckless manner” as addressed in co-appellee’s brief and incorporated herein, DCFS employees’ conduct did not rise to the level of malicious purpose, bad faith or wanton or reckless conduct that is required to not have immunity reinstated.

Therefore, if this Court determines that DCFS or its employees violated R.C. §2151.421 (the reporting statute) or R.C. § 2919.22 (the child endangering statute), then DCFS is entitled to have immunity reinstated pursuant to R.C. § 2744.03(A).

CONCLUSION

The Eighth District Court of Appeals’ decision erroneously expands legislation to impose duties on individual social workers and public children services agencies. As DCFS, DCFS Executive Director William Denihan and DCFS Case Worker Kamesha Duncan do not owe a duty to report reported allegations of abuse or owe an “*in loco parentis*” relationship to every child they investigate, Appellants are entitled to immunity and request this Court to reverse the Court of Appeals’ Order in this case. Should this Court expand the statutory duties contained in R. C. § 2151.421 or R. C. § 2919.22, then immunity should be reinstated pursuant to R. C. § 2744.03(A).

Respectfully submitted,



DAVID ROSS (0005203)
MICHELLE J. SHEEHAN ESQ. (0062548)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
*Counsel for Defendants-Appellees DCFS,
William Denihan, Kamesha Duncan*

CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail this 9th day of

August, 2007 to:

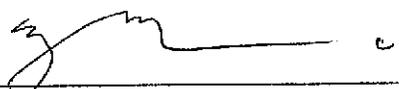
John W. Martin
John W. Martin Co., L.P.G.A.
800 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113

Counsel for Plaintiff-Appellee

William D. Beyer
Joan E. Pettinelli
Wuliger, Fadel & Beyer
1340 Sumner Court
Cleveland, Ohio 44115

James C. Cochran
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

*Counsel for Defendant-Appellant Tallis
George Munro*



MICHELLE J. SHEEHAN

APPENDIX

The Supreme Court of Ohio

CASE ANNOUNCEMENTS AND ADMINISTRATIVE ACTIONS

June 20, 2007

[Cite as *06/20/2007 Case Announcements #2*, 2007-Ohio-3063.]

RECONSIDERATION OF PRIOR DECISIONS

[This is a correction of an entry that was announced
this day at 2007-Ohio-2904.]

2007-0056. O'Toole v. Denihan.

Cuyahoga App. No. 87476, 2006-Ohio-6022. Reported at 113 Ohio St.3d 1465, 2007-Ohio-1722, 864 N.E.2d 652. On motions for reconsideration of Tallis George-Munro and Department of Children and Family Services, William Denihan, and Kamesha Duncan.

Motion of Tallis George-Munro is granted, and that appeal is accepted on Proposition of Law No. I.

Pfeifer, O'Donnell and Lanzinger, JJ., dissent.

Motion of Department of Children and Family Services, William Denihan, and Kamesha Duncan is granted in part, and that appeal is accepted on Proposition of Law Nos. I, II, and III.

Moyer, C.J., Lundberg Stratton and O'Connor, JJ., would also accept that appeal on Proposition of Law No. IV.

Pfeifer and O'Donnell, JJ., dissent.

It is further ordered that the briefing schedule in this appeal is to begin de novo. Appellants shall file their briefs within 40 days of the date of this entry and the parties shall otherwise proceed in accordance with S.Ct.Prac.R. VI.

CASE NO. _____

In the Supreme Court of Ohio

ON APPEAL FROM THE
COURT OF APPEALS EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-05-087476

07-0056

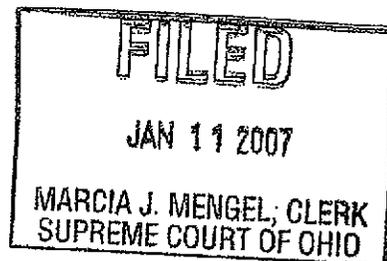
JOHN K. O'TOOLE, Personal Representative and
Administrator for the Estate of Sydney Sawyer

Plaintiff-Appellee,

vs.

WILLIAM DENIHAN, et al.,

Defendants-Appellants.



APPELLANTS' NOTICE OF APPEAL

David Ross (0005203)
Michelle J. Sheehan Esq. (0062548)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
*Counsel for Defendants-Appellants, DCFS,
William Denihan, Kamesha Duncan*

John W. Martin
John W. Martin Co., L.P.A.
800 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113

William D. Beyer
Joan E. Pettinelli
Wuliger, Fadel & Beyer
1340 Sumner Court
Cleveland, Ohio 44115
Counsel for Plaintiff-Appellee

James C. Cochran
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
*Counsel for Defendant-Appellant Tallis
George Munro*

Now comes Appellants, Department of Children and Family Services, William Denihan, Kamesha Duncan by and through undersigned counsel, and hereby gives notice of its appeal to the Ohio Supreme Court of the Eighth District Court of Appeals decision in *O'Toole v. Denihan, et al.*, Eighth District No. CA-05-087476, 2006-Ohio-6022, entered November 16, 2006 and journalized on November 27, 2006. Appellants submit that the case involves issues of public or great general interest.

Respectfully submitted:



David Ross (0005203)
Michelle J. Sheehan Esq. (0062548)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
*Counsel for Defendants-Appellants, Department of
Children and Family Services, William Denihan,
Kamesha Duncan*

CERTIFICATE OF SERVICE

A copy of the foregoing *Notice of Appeal* was sent by regular U.S. mail this 11th day of

January, 2007 to:

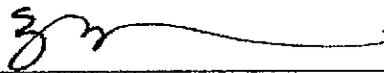
John W. Martin
John W. Martin Co., L.P.A.
800 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113

Counsel for Plaintiff-Appellee

William D. Beyer
Joan E. Pettinelli
Wuliger, Fadel & Beyer
1340 Sumner Court
Cleveland, Ohio 44115

JAMES COCHRAN
Justice Center
Cuyahoga County Prosecutor's Office
1200 Ontario Street
Cleveland, Ohio 44113

*Counsel for Defendant-Appellant Tallis
George- Munro*



MICHELLE J. SHEEHAN

NOV 27 2006

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87476

JOHN K. O'TOOLE, ADMINISTRATOR, ETC.

PLAINTIFF-APPELLANT

vs.

WILLIAM DENIHAN, ET AL.

DEFENDANTS-APPELLEES

CA05087476
42575416

**JUDGMENT:
REVERSED AND REMANDED**

§ Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-450833

BEFORE: Calabrese, P.J., Kilbane, J., and Blackmon, J.

RELEASED: November 16, 2006

JOURNALIZED: NOV 27 2006

0624 0882

DEC 01 2006

ATTORNEYS FOR APPELLANT

For John K. O'Toole, Administrator of the estate of Sydney Sawyer

John W. Martin
Andy Petropouleas
John W. Martin Co., LPA
614 Superior Avenue
800 Rockefeller Building
Cleveland, Ohio 44113

William D. Beyer
Joan E. Pettinelli
Wuliger, Fadel & Beyer
1340 Sumner Court
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEES

For William Denihan, et al.

David Ross
Michelle J. Sheehan
Reminger & Reminger Co., LPA
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

0624 0883

For Tallis George-Munro

William D. Mason
Cuyahoga County Prosecutor
By: James C. Cochran
Assistant County Prosecutor
1200 Ontario Street
8th Floor Justice Center
Cleveland, Ohio 44113

For Public Children Services Association of Ohio, Amicus Curiae

J. Eric Holloway
Isaac, Brant, Ledman & Teetor LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742

FILED AND JOURNALIZED
PER APP. R. 22(E)

NOV 27 2006

For Ohio Attorney General

Jim Petro
Ohio Attorney General
By: Matthew J. Lampke
Deputy Attorney General
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3428

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

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

NOV 16 2006

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

CA05087476

42385692



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).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

0624 00884

ANTHONY O. CALABRESE, JR., P.J.:

Plaintiff-appellant, John O'Toole, personal representative and administrator for the estate of Sydney Sawyer, appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand to the lower court.

I.

According to the case, appellant brought this wrongful death and survival action as the personal representative and administrator for the estate of Sydney Sawyer ("Sydney") in the Cuyahoga County Court of Common Pleas. Appellant brought his claim against appellees, the Cuyahoga County Department of Children and Family Services ("DCFS"), its executive director, William Denihan ("Denihan"), supervisor Tallis George-Munro ("Munro"), social worker Kamesha Duncan ("Duncan"), and John Doe county policymakers and employees. The complaint asserted seven substantive claims for relief, including: Count 1 - failure to report suspected or known child abuse of Sydney to law enforcement; Count 2 - negligently failing to report suspected child abuse; Count 3 - recklessly creating a substantial risk to the health and safety of Sydney; Count 4 - negligently performing job duties; Count 5 - breaching special duty of care; Count 6 - reckless implementation of a risk assessment protocol used for investigation of child abuse and to investigate Sydney's case; Count 7 -

0624 0885

recklessness in investigating the known or suspected child abuse of Sydney; and Count 8 - intentional or negligent conduct in the performance of duties. The complaint also challenged the constitutionality of R.C. Chapter 2744 to the extent that it may extend statutory immunity to appellees.¹ In compliance with R.C. 2721.12, a copy of the complaint was served upon the Ohio Attorney General on March 4, 2002.

On November 27, 2002, defendants DCFS, Denihan, and Duncan filed a motion for summary judgment asserting that they were immune from liability pursuant to R.C. Chapter 2744 on all claims. On February 13, 2003 and

¹R.C. 2744.02. Classification of functions of political subdivisions; liability; exceptions.

“(A) (1) ***, 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. ***

(B) ***, 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: ***

(5) ***, 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.”

February 25, 2003, appellant filed briefs in opposition to the respective motions. The trial court denied the defendants' motions. The trial court provided the following:

"[t]he court finds genuine issues of material fact remain to be tried as to whether defendants have violated any duty imposed by law that would defeat sovereign immunity pursuant to R.C. 2744.02 and 2744.03, e.g., *Campbell v. Burton* (2001), 92 Ohio St.3d 336, at paragraphs 2 and 3 of the syllabus; see also, R.C. 2744.02(B)(5), 2744.03(A)(6)(c). The court reserves judgment on this issue until after all the evidence has been presented at trial. The motions are therefore denied."²

On April 25, 2005, defendants DCFS, Denihan and Duncan filed a renewed motion for summary judgment, again asserting statutory immunity under R.C. 2744.02 and 2744.03.³ On April 27, 2005, defendant Munro filed a motion for

²See November 2003 order.

³R.C. 2744.03. Defenses or immunities of subdivision and employee.

"(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:

(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: ***

(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

NO 624 00887

summary judgment also asserting immunity on all claims. Appellant filed its combined brief in opposition to defendants' motions for summary judgment on May 31, 2005. Appellant argued that the exceptions to immunity in R.C. 2744.03(A)(6)(c) and (b) (as to its employees), defeat immunity, and R.C. 2744.02 and 2744.03 are unconstitutional as applied to appellant's claims. By journal entry dated November 16, 2005, the trial court reversed its earlier ruling and granted defendants' motions for summary judgment in their entirety. The trial court provided the following:

“[t]he court finds that plaintiff has failed to present genuine issues of material fact for trial affirmatively refuting the binding case law of *Marshall v. Montgomery County Children Services Board*, 92 Ohio St.3d 348, 2001-Ohio-209. Thus, the motions are well-taken and granted.”

Appellant then appealed the trial court's decision to this court on December 14, 2005.

According to the facts, Sydney was pronounced dead at Rainbow Babies and Children's Hospital in Cleveland, Ohio on April 28, 2000. Sydney was a 4-year-old girl who had been physically abused and subsequently died from her injuries. The social workers at the hospital notified the police and the DCFS.

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.”

Deputy Cuyahoga County Coroner and Forensic Pathologist Joseph Felo, D.O., performed the autopsy. Dr. Felo determined the cause of death to be blunt impacts to the child's trunk, causing perforation of the small intestine and acute peritonitis. It is Dr. Felo's opinion, as to a reasonable degree of medical certainty, that the fatal injuries occurred on April 27, 2000.⁴

Appellee DCFS is the public children services agency within the Cuyahoga County Department of Human Services. DCFS is charged with investigating allegations of child abuse and neglect, and providing care, protection and support to abused and neglected children. Duncan began her employment as a social worker with DCFS on October 25, 1999. She had no prior experience as a social worker and was new to the field. Duncan was "in training" until January 2000, and the Sydney Sawyer case was one of her first assignments. Her direct supervisor was Munro who was responsible for supervising five to six social workers and who reported directly to the intake unit chief, Elsa Popchak. Popchak reported to deputy director Zuma Jones, who, in turn, reported to Denihan.

⁴See testimony of Joseph Felo, D.O., October 6, 2000.

II.

Appellant's first assignment of error states the following: "The trial court erred in granting summary judgment in favor of appellees DCFS, Denihan, Munro and Duncan because it improperly applied *Marshall v. Montgomery County Children Services Board* (2001), 92 Ohio St.3d 348, 2001-Ohio-209, to appellant's claims for violation of the statutory duty to report known or suspected child abuse, child endangering, and recklessness."

Appellant's second assignment of error states the following: "The trial court erred in granting summary judgment on all of appellant's claims as Ohio Revised Code Chapter 2744, as applied, violates the Ohio Constitution."

III.

Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain 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 but to 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. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

624 00890

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; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356.

In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Medina, Ltd. of Texas* (1991), 59 Ohio St.3d 108. 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. 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 Bd. of Commrs.* (1993), 87 Ohio App.3d 704. 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; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741.

We find that genuine issues of material fact remain concerning the Cleveland Police Department records. Appellant asserts that the evidence in the record reflects that no form was ever faxed to the police in Sydney's case. Appellant declares that "there is no record of any such report being received by the Cleveland Police Department."⁵ Appellant states that the hotline form in the Sawyer case clearly reflects that the police had not been contacted and specifically stated that a "call needs to be made" to the police. Appellant further states that, not only did Munro or Duncan fail to make the telephonic or personal report to the police required by R.C. 2151.421(C), but they failed to make any report whatsoever at any time prior to Sydney's death, nearly a month after they knew of her abuse.

In contrast, appellees argue that the undisputed facts establish that appellees *did report* Sydney's case referral to the police. Appellees point to Munro's testimony that the DCFS' case referral file indicates that the police were notified of Sydney's case referral. Munro testified that when a complaint

⁵See appellant's brief, p. 37.

is received by the hotline, the hotline worker has a carbon copy form containing relevant complaint information that is automatically faxed to the Cleveland Police Department.

In addition to the above, we find that genuine issues of material fact remain concerning the investigation of Denihan and the DCFS. Appellees created a substantial risk to Sydney's health and safety by violation of their legal duties owed to her. Specifically, they were reckless in assigning an inexperienced worker to the intake unit without proper supervision; instituting structured decision making ("SDM"), a safety and risk assessment model, without worker demonstration of knowledge, skills and clinical judgment necessary to implement the new process; allowing Munro to continue in his supervisor position without demonstrating supervisory knowledge and skills without demonstration of the knowledge and skills to implement SDM; not providing independent medical examiners to determine the nature of the physical condition of children when abuse is suspected; not providing a quality controls system to ensure that in Priority 1 cases child safety has been determined; and not providing a mechanism to determine if SDM was being properly implemented.

Additional evidence of recklessness in the record includes the fact that the social worker returned the four-year-old child to the mother after observing

FILE 624 #0893

evidence of severe injuries; for example, bruising to the face, whip marks on the child's back, and burn marks on her palms.

The Ohio Supreme Court defined "reckless" as:

"[T]he conduct was committed 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."

Cater v. City of Cleveland, 83 Ohio St.3d 24, 33, 1998-Ohio-421.

Moreover, we note that we find this case to be fact-specific, primarily due to the fact 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.

In addition to the genuine issues of material fact remaining in the case at bar, we find *Marshall v. Montgomery County Children Services Board* to be distinguishable from the case at bar.

In *Marshall*, the mother, Rozanne Perkins, "had a history of abusing her children," and was dependent on alcohol and drugs. Perkins had a substantial history of abusing her children beginning in 1985. From 1985 to 1995 Perkins had four other children who were taken away from her. In addition, the Dayton Police Department arrested Perkins for domestic violence. She had attempted

to stab her boyfriend, the baby's father, while she was driving her car with her baby in the backseat. In the case at bar, however, the mother did not have a similar history of domestic violence, and the child was beaten to death by the boyfriend and not the mother. Moreover, the case at bar lacks the significant history of violence, neglect and abandonment to the children by the mother in *Marshall*. Accordingly, we find *Marshall* to be distinguishable from the case at bar.

Assuming arguendo that the facts in the case at bar were not distinguishable from *Marshall*, the case is still misapplied. *Marshall* only dealt with the failure to investigate child abuse claims. Appellant's claims are not based solely on negligence in the investigation of the abuse of Sydney. The lower court disregarded appellant's claims for appellees' failure to report the known or suspected abuse of Sydney to law enforcement, Count 1; recklessly creating a substantial risk to the health and safety of Sydney by violating their duties of care and protection owed to her, Counts 3 and 6; and the recklessness of Munro and Duncan in investigating the abuse of Sydney, Count 7.

The express issue in *Marshall* dealt specifically with whether R.C. 2151.421 imposes liability for a negligent failure to investigate for purposes of the exceptions to immunity in R.C. 2744.02(B)(5) as to a political subdivision and R.C. 2744.03(A)(6)(c) as to its employees. The Ohio Supreme Court found the

W0624 00895

result troubling but was "confined to review the law based upon the issues presented in this appeal." *Id.* at 352. The Ohio Supreme Court was not presented with a claim that CSB employees *recklessly* failed to investigate. The Ohio Supreme Court's decision in *Marshall* does not govern appellant's claims for appellees' failure to report known or suspected child abuse to law enforcement, or for appellees' reckless creation of a substantial risk to the health or safety of Sydney.

Appellant argues in his first assignment of error that the trial court erroneously granted summary judgment. We find merit in appellant's argument.

The conflicting evidence regarding the Cleveland Police Department records demonstrates substantial dispute as to genuine issues of material fact. There are also genuine issues of material fact regarding Denihan and Duncan. Moreover, we find *Marshall* to be distinguishable from the case at bar.

Appellant's first assignment of error is sustained.

Based on the disposition of appellant's first assignment of error, appellant's remaining assignment of error is moot. App.R. 12 (A)(1)(c).

0624 0896

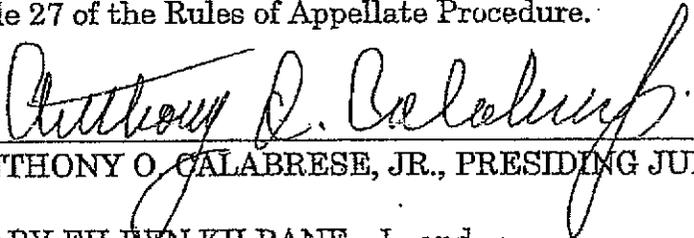
Judgment reversed and remanded.

It is ordered that appellant 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.



ANTHONY O. CALABRESE, JR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR

36546250

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDP
N.I.

JOHN K PERSONAL O TOOLE REPRESENTATIVE
AND ADMR ET
Plaintiff

Case No: CV-01-450833

Judge: DANIEL GAUL

F

WILLIAM IN HIS DENIHAN OFFICIAL CAPACITY
ETC ET AL
Defendant

JOURNAL ENTRY

96 DISP. OTHER - FINAL

AFTER A REVIEW OF DEFTS' THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES OF CUYAHOGA COUNTY'S, ITS DIRECTOR, WILLIAM DENIHAN'S AND THE DEPT.'S CASEWORKER, KAMESHA DUNCAN'S MOTION FOR SUMMARY JUDGMENT, AND DEFT GEORGE TALLIS MONROE'S, MOTION FOR SUMMARY JUDGMENT. PLTF'S BRIEF IN OPPOSITION AND DEFTS' REPLY BRIEF, THE COURT FINDS THAT PLTF HAS FAILED TO PRESENT GENUINE ISSUES OF MATERIAL FACT FOR TRIAL AFFIRMATIVELY REFUTING THE BINDING CASE LAW OF MARSHALL V. MONTGOMERY COUNTY OF CHILDREN SERVICES BOARD, 92 OHIO ST. 3D 348, 2001-OHIO-209. THUS, THE MOTIONS ARE WELL-TAKEN AND GRANTED. FINAL.

COURT COST ASSESSED TO THE PLAINTIFF(S).

[Signature] / 11/16/05
Judge Signature Date

RECEIVED FOR FILING

NOV 16 2005

GERALD E. FUERST, CLERK
By *[Signature]* Deputy

- 96
11/14/2005

VOL 3442 PGO 183

Page 1 of 1

THE STATE OF OHIO }
Cuyahoga County } SS. I, GERALD E. FUERST, CLERK OF
THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND COPIED FROM THE ORIGINAL.
NOW ON FILE IN MY OFFICE 11-16-05
WITNESS MY HAND AND SEAL OF SAID COURT THIS 20
DAY OF *July* A.D. 20 *07*
GERALD E. FUERST, Clerk
[Signature] Deputy

CONSTITUTIONAL PROVISIONS; STATUTES

R.C. § 2744.01

Baldwin's Ohio Revised Code Annotated Currentness
 Title XXVII. Courts--General Provisions--Special Remedies
 Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)
 →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 on 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, and community school established under Chapter 3314. of the Revised Code.

(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.

(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)

[FN1] See Notes of Decisions, State ex rel. Ohio Academy of Trial Lawyers v. Sheward (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of Kammeyer v City of Sharonville, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

UNCODIFIED LAW

2002 S 106, § 3, eff. 4-9-03, reads:

Sections 723.01, 1533.18, 2744.01, 2744.02, 2744.03, 2744.04, 2744.05, 2744.06, 2744.07, 4582.27, 5511.01, 5591.36, and 5591.37 of the Revised Code, as amended by this act, apply only to causes of action that accrue on or after the effective date of this act. Any cause of action that accrues prior to the effective date of this act is governed by the law in effect when the cause of action accrued.

2001 S 24, § 6, eff. 10-26-01, reads:

Section **2744.01** of the Revised Code was amended by Am. Sub. H.B. 350 of the 121st General Assembly and was amended by acts subsequent to its amendment by Am. Sub. H.B. 350. This act amends section **2744.01** of the Revised Code to remove substantive matter inserted by, and to revive substantive matter removed by, Am. Sub. H.B. 350 of the 121st General Assembly. This act retains in section **2744.01** of the Revised Code amendments that were made

Next Part

R.C. § 2744.02

Baldwin's Ohio Revised Code Annotated Currentness

Title XXVIII. Courts--General Provisions--Special Remedies

Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)

→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)

[FN1] See Notes of Decisions, State ex rel. Ohio Academy of Trial Lawyers v. Sheward (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2002 S 106 deleted "upon the public roads, highways, or streets" after "by their employees" in division (B)(1); rewrote divisions (B)(3) to (B)(5); and added new division (C). Prior to amendment divisions (B)(3) to (B)(5) read:

"(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 failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, 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 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 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. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued."

Amendment Note: 1997 H 215 added the reference to section 3314.07 in division (B)(2).

Amendment Note: 1996 H 350 deleted ", highways, or streets" after "public roads" in the first paragraph in division (B)(1); rewrote division (B)(3); inserted ", and is due to physical defects within or on the grounds of," in division (B)(4); rewrote the second sentence in division (B)(5); added division (C); and made other nonsubstantive changes. Prior to amendment, division (B)(3) and the second sentence in division (B)(5) read, respectively:

"(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such 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."

"Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued."

Amendment Note: 1994 S 221 added "Except as otherwise provided in section 3746.24 of the Revised Code," at the beginning of divisions (B)(2), (B)(3), and (B)(4).

Next Part

R.C. § 2744.03

Baldwin's Ohio Revised Code Annotated Currentness
 Title XXVII. Courts--General Provisions--Special Remedies
 Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)
 →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)

[FN1] See Notes of Decisions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of Kammeyer v City of Sharonville, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

UNCODIFIED LAW

2002 S 106, § 3: See Uncodified Law under 2744.01.

2001 S 108, § 1 and 3: See Uncodified Law under 2744.01.

1986 S 297, § 3: See Uncodified Law under 2744.02.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2002 S 106 substituted "Civil liability" for "liability" and added the second sentence to division (A)(6)(c); and made other nonsubstantive changes.

Amendment Note: 2000 S 179, § 3, eff. 1-1-02, substituted "2152.19 or 2152.20" for "2151.355" in division (A)(4).

Amendment Note: 1997 H 215 added the reference to section 3314.07 in division (A)(6).

Amendment Note: 1996 H 350 added the second sentence in division (A)(6)(c); and made changes to reflect gender neutral language.

Amendment Note: 1994 S 221 inserted "or section 3746.24 of the Revised Code" in division (A)(6).

CROSS REFERENCES

Clerk of court, improper refusal of filings, immunity, 2701.20
 County recorder, improper refusal to record instrument, immunity, 317.33
 Domestic violence arrest policies, enforcement of protection orders, immunity of peace officers, 2935.032
 Domestic violence shelters, qualified immunity, 2305.239
 Domestic violence, warrantless arrest or detention or seizure of deadly weapon, civil immunity, 2935.03
 Emergency response intrastate mutual aid compact; defenses to and immunities from civil liability, 5502.41
 Enforcement of writ of execution; immunity from civil liability, 1923.14
 Highway use tax, civil immunity for peace officers, 5728.15
 Immunity from liability; confidentiality of records; disclosure of information to journalists; reports; illegal release of confidential concealed handgun license records, 2923.129
 Public assistance recipient information, immunity for release of, 5101.28

LIBRARY REFERENCES

Counties ◀146, 214.
Municipal Corporations ◀723, 747, 1023.
Officers and Public Employees ◀116.
Schools ◀89.
 Westlaw Topic Nos. 104, 268, 283, 345.

R.C. § 2151.421

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

Chapter 2151. Juvenile Courts--General Provisions (Refs & Annos)

General Provisions

➔ **2151.421 Persons required to report injury or neglect; procedures on receipt of report**

(A)(1)(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fall to immediately report that knowledge or suspicion to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the 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 or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; superintendent, board member, or employee of a county board of mental retardation; investigative agent contracted with by a county board of mental retardation; or employee of the department of mental retardation and developmental disabilities.

(2) An attorney or a physician is not required to make a report pursuant to division (A)(1) of this section concerning any communication the attorney or physician receives from a client or patient in an attorney-client or physician-patient relationship, if, in accordance with division (A) or (B) of section 2317.02 of the Revised Code, the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding, except that the client or patient is deemed to have waived any testimonial privilege under division (A) or (B) of section 2317.02 of the Revised Code with respect to that communication and the attorney or physician shall make a report pursuant to division (A)(1) of this section with respect to that communication, if all of the following apply:

(a) The client or patient, at the time of the communication, is either a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age.

(b) The attorney or physician knows or suspects, as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient.

(c) The attorney-client or physician-patient relationship does not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with section 2151.85 of the Revised Code.

(B) Anyone, who knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child may report or cause reports to be made of that knowledge or suspicion to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the public children services agency or to a municipal or county peace officer. In the circumstances described in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the entity specified in that section.

(C) Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in

person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

- (1) The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known;
- (2) The child's age and the nature and extent of the child's known or suspected injuries, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect;
- (3) Any other information that might be helpful in establishing the cause of the known or suspected injury, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect.

Any person, who is required by division (A) of this section to report known or suspected child abuse or child neglect, may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

(D) As used in this division, "children's advocacy center" and "sexual abuse of a child" have the same meanings as in section 2151.425 of the Revised Code.

(1) When a municipal or county peace officer receives a report concerning the possible abuse or neglect of a child or the possible threat of abuse or neglect of a child, upon receipt of the report, the municipal or county peace officer who receives the report shall refer the report to the appropriate public children services agency.

(2) When a public children services agency receives a report pursuant to this division or division (A) or (B) of this section, upon receipt of the report, the public children services agency shall do both of the following:

(a) Comply with section 2151.422 of the Revised Code;

(b) If the county served by the agency is also served by a children's advocacy center and the report alleges sexual abuse of a child or another type of abuse of a child that is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, comply regarding the report with the protocol and procedures for referrals and investigations, with the coordinating activities, and with the authority or responsibility for performing or providing functions, activities, and services stipulated in the interagency agreement entered into under section 2151.428 of the Revised Code relative to that center.

(E) No township, municipal, or county peace officer shall remove a child about whom a report is made pursuant to this section from the child's parents, stepparents, or guardian or any other persons having custody of the child without consultation with the public children services agency, unless, in the judgment of the officer, and, if the report was made by physician, the physician, immediate removal is considered essential to protect the child from further abuse or neglect. The agency that must be consulted shall be the agency conducting the investigation of the report as determined pursuant to section 2151.422 of the Revised Code.

(F)(1) Except as provided in section 2151.422 of the Revised Code or in an interagency agreement entered into under section 2151.428 of the Revised Code that applies to the particular report, the public children services agency shall investigate, within twenty-four hours, each report of known or suspected child abuse or child neglect and of a known or suspected threat of child abuse or child neglect that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (J) of this section. A representative of the public children services agency shall, at the time of initial contact with the person subject to the investigation, inform the person of the specific complaints or allegations made against the person. The information shall be given in a manner that is consistent with division (H)(1) of this section and protects the rights of the person making the report under this section.

A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to a central registry which the department

of job and family services shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.

(2) The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.

(G)(1)(a) Except as provided in division (H)(3) of this section, anyone or any hospital, institution, school, health department, or agency participating in the making of reports under division (A) of this section, anyone or any hospital, institution, school, health department, or agency participating in good faith in the making of reports under division (B) of this section, and anyone participating in good faith in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of the making of the reports or the participation in the judicial proceeding.

(b) Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause of the injuries, abuse, or neglect in any judicial proceeding resulting from a report submitted pursuant to this section.

(2) In any civil or criminal action or proceeding in which it is alleged and proved that participation in the making of a report under this section was not in good faith or participation in a judicial proceeding resulting from a report made under this section was not in good faith, the court shall award the prevailing party reasonable attorney's fees and costs and, if a civil action or proceeding is voluntarily dismissed, may award reasonable attorney's fees and costs to the party against whom the civil action or proceeding is brought.

(H)(1) Except as provided in divisions (H)(4) and (M) of this section, a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report. In a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure.

(2) No person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.

(3) A person who knowingly makes or causes another person to make a false report under division (B) of this section that alleges that any person has committed an act or omission that resulted in a child being an abused child or a neglected child is guilty of a violation of section 2921.14 of the Revised Code.

(4) If a report is made pursuant to division (A) or (B) of this section and the child who is the subject of the report dies for any reason at any time after the report is made, but before the child attains eighteen years of age, the public children services agency or municipal or county peace officer to which the report was made or referred, on the request of the child fatality review board, shall submit a summary sheet of information providing a summary of the report to the review board of the county in which the deceased child resided at the time of death. On the request of the review board, the agency or peace officer may, at its discretion, make the report available to the review board. If the county served by the public children services agency is also served by a children's advocacy center and the report of alleged sexual abuse of a child or another type of abuse of a child is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, the agency or center shall perform the duties and functions specified in this division in accordance with the interagency agreement entered into under section 2151.428 of the Revised Code relative to that advocacy center.

(5) A public children services agency shall advise a person alleged to have inflicted abuse or neglect on a child who is the subject of a report made pursuant to this section, including a report alleging sexual abuse of a child or another type of abuse of a child referred to a children's advocacy center pursuant to an interagency agreement entered into under section 2151.428 of the Revised Code, in writing of the disposition of the investigation. The agency shall not provide to the person any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports.

(I) Any report that is required by this section, other than a report that is made to the state highway patrol as described in section 5120.173 of the Revised Code, shall result in protective services and emergency supportive services being made available by the public children services agency on behalf of the children about whom the report is made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The agency required to provide the services shall be the agency conducting the investigation of the report pursuant to section

R.C. § 2919:22

Baldwin's Ohio Revised Code Annotated Currentness
 Title XXIX. Crimes--Procedure (Refs & Annos)
 * Chapter 2919. Offenses Against The Family (Refs & Annos)
 * Nonsupport; Child Endangering; Related Offenses
 ➔ **2919.22 Endangering children**

<Note: See also following version of this section, eff. 5-17-06.>

(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 or a mentally or physically handicapped child under twenty-one 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. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

(1) Abuse the child;

(2) Torture or cruelly abuse the child;

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

(4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;

(5) Entice, coerce, permit, encourage, compel, hire, employ, use, or allow the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that the offender knows or reasonably should know is obscene, is sexually oriented matter, or is nudity-oriented matter;

(6) Allow the child to be on the same parcel of real property and within one hundred feet of, or, in the case of more than one housing unit on the same parcel of real property, in the same housing unit and within one hundred feet of, any act in violation of section 2925.04 or 2925.041 of the Revised Code when the person knows that the act is occurring, whether or not any person is prosecuted for or convicted of the violation of section 2925.04 or 2925.041 of the Revised Code that is the basis of the violation of this division.

(C)(1) No person shall operate a vehicle, streetcar, or trackless trolley within this state in violation of division (A) of section 4511.19 of the Revised Code when one or more children under eighteen years of age are in the vehicle, streetcar, or trackless trolley. Notwithstanding any other provision of law, a person may be convicted at the same trial or proceeding of a violation of this division and a violation of division (A) of section 4511.19 of the Revised Code that constitutes the basis of the charge of the violation of this division. For purposes of sections 4511.191 to 4511.197 of the Revised Code and all related provisions of law, a person arrested for a violation of this division shall be considered to be under arrest for operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them or for operating a vehicle with a prohibited concentration of alcohol in the whole blood, blood serum or plasma, breath, or urine.

(2) As used in division (C)(1) of this section, "vehicle," "streetcar," and "trackless trolley" have the same meanings as in section 4511.01 of the Revised Code.

(D)(1) Division (B)(5) of this section does not apply to any material or performance that is produced, presented, or disseminated for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian,

member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under division (B)(5) of this section.

(3) In a prosecution under division (B)(5) of this section, the trier of fact may infer that an actor, model, or participant in the material or performance involved is a juvenile if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the actor, model, or participant as a juvenile.

(4) As used in this division and division (B)(5) of this section:

(a) "Material," "performance," "obscene," and "sexual activity" have the same meanings as in section 2907.01 of the Revised Code.

(b) "Nudity-oriented matter" means any material or performance that shows a minor in a state of nudity and that, taken as a whole by the average person applying contemporary community standards, appeals to prurient interest.

(c) "Sexually oriented matter" means any material or performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(E)(1) Whoever violates this section is guilty of endangering children.

(2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following:

(a) Except as otherwise provided in division (E)(2)(b), (c), or (d) of this section, a misdemeanor of the first degree;

(b) If the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(2)(c) or (d) of this section, a felony of the fourth degree;

(c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree;

(d) If the violation is a violation of division (B)(1) of this section and results in serious physical harm to the child involved, a felony of the second degree.

(3) If the offender violates division (B)(2), (3), (4), or (6) of this section, except as otherwise provided in this division, endangering children is a felony of the third degree. If the violation results in serious physical harm to the child involved, or if the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, endangering children is a felony of the second degree.

(4) If the offender violates division (B)(5) of this section, endangering children is a felony of the second degree.

(5) If the offender violates division (C) of this section, the offender shall be punished as follows:

(a) Except as otherwise provided in division (E)(5)(b) or (c) of this section, endangering children in violation of division (C) of this section is a misdemeanor of the first degree.

(b) If the violation results in serious physical harm to the child involved or the offender previously has been convicted of an offense under this section or any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(5)(c) of this section, endangering children in violation of division (C) of this section is a felony of the fifth degree.

(c) If the violation results in serious physical harm to the child involved and if the offender previously has been convicted of a violation of division (C) of this section, section 2903.06 or 2903.08 of the Revised Code, section 2903.07 of the Revised Code as it existed prior to March 23, 2000, or section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, endangering children in violation of division (C) of this section is a felony of the fourth degree.

(d) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction it imposes upon the offender pursuant to division (E)(5)(a), (b), or (c) of this section or pursuant to any other provision of law and in addition to any suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege under Chapter 4506., 4509., 4510., or 4511. of the Revised Code or under any other provision of law, the court also may impose upon the offender a class seven suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code.

(e) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction imposed upon the offender pursuant to division (E)(5)(a), (b), (c), or (d) of this section or pursuant to any other provision of law for the violation of division (C) of this section, if as part of the same trial or proceeding the offender also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the offender also shall be sentenced in accordance with section 4511.19 of the Revised Code for that violation of division (A) of section 4511.19 of the Revised Code.

(F)(1)(a) A court may require an offender to perform not more than two hundred hours of supervised community service work under the authority of an agency, subdivision, or charitable organization. The requirement shall be part of the community control sanction or sentence of the offender, and the court shall impose the community service in accordance with and subject to divisions (F)(1)(a) and (b) of this section. The court may require an offender whom it requires to perform supervised community service work as part of the offender's community control sanction or sentence to pay the court a reasonable fee to cover the costs of the offender's participation in the work, including, but not limited to, the costs of procuring a policy or policies of liability insurance to cover the period during which the offender will perform the work. If the court requires the offender to perform supervised community service work as part of the offender's community control sanction or sentence, the court shall do so in accordance with the following limitations and criteria:

(i) The court shall require that the community service work be performed after completion of the term of imprisonment or jail term imposed upon the offender for the violation of division (C) of this section, if applicable.

(ii) The supervised community service work shall be subject to the limitations set forth in divisions (B)(1), (2), and (3) of section 2951.02 of the Revised Code.

(iii) The community service work shall be supervised in the manner described in division (B)(4) of section 2951.02 of the Revised Code by an official or person with the qualifications described in that division. The official or person periodically shall report in writing to the court concerning the conduct of the offender in performing the work.

(iv) The court shall inform the offender in writing that if the offender does not adequately perform, as determined by the court, all of the required community service work, the court may order that the offender be committed to a jail or workhouse for a period of time that does not exceed the term of imprisonment that the court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under the sentence or term that was imposed upon the offender for that violation and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code, and that, if the court orders that the offender be so committed, the court is authorized, but not required, to grant the offender credit upon the period of the commitment for the community service work that the offender adequately performed.

(b) If a court, pursuant to division (F)(1)(a) of this section, orders an offender to perform community service work as part of the offender's community control sanction or sentence and if the offender does not adequately perform all of the required community service work, as determined by the court, the court may order that the offender be committed to a jail or workhouse for a period of time that does not exceed the term of imprisonment that the court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under the sentence or term that was imposed upon the offender for that violation and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code. The court may order that a person committed pursuant to this division shall receive hour-for-hour credit upon the period of the commitment for the community service work that the offender adequately performed. No commitment pursuant to this division shall exceed the period of the term of imprisonment that the sentencing court could have imposed upon the offender for the violation

of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under that sentence or term and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code.

(2) Division (F)(1) of this section does not limit or affect the authority of the court to suspend the sentence imposed upon a misdemeanor offender and place the offender under a community control sanction pursuant to section 2929.25 of the Revised Code, to require a misdemeanor or felony offender to perform supervised community service work in accordance with division (B) of section 2951.02 of the Revised Code, or to place a felony offender under a community control sanction.

(G)(1) If a court suspends an offender's driver's or commercial driver's license or permit or nonresident operating privilege under division (E)(5)(d) of this section, the period of the suspension shall be consecutive to, and commence after, the period of suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege that is imposed under Chapter 4506., 4509., 4510., or 4511. of the Revised Code or under any other provision of law in relation to the violation of division (C) of this section that is the basis of the suspension under division (E)(5)(d) of this section or in relation to the violation of division (A) of section 4511.19 of the Revised Code that is the basis for that violation of division (C) of this section.

(2) An offender is not entitled to request, and the court shall not grant to the offender, limited driving privileges if the offender's license, permit, or privilege has been suspended under division (E)(5)(d) of this section and the offender, within the preceding six years, has been convicted of or pleaded guilty to three or more violations of one or more of the following:

(a) Division (C) of this section;

(b) Any equivalent offense, as defined in section 4511.181 of the Revised Code.

(H)(1) If a person violates division (C) of this section and if, at the time of the violation, there were two or more children under eighteen years of age in the motor vehicle involved in the violation, the offender may be convicted of a violation of division (C) of this section for each of the children, but the court may sentence the offender for only one of the violations.

(2)(a) If a person is convicted of or pleads guilty to a violation of division (C) of this section but the person is not also convicted of and does not also plead guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, both of the following apply:

(i) For purposes of the provisions of section 4511.19 of the Revised Code that set forth the penalties and sanctions for a violation of division (A) of section 4511.19 of the Revised Code, the conviction of or plea of guilty to the violation of division (C) of this section shall not constitute a violation of division (A) of section 4511.19 of the Revised Code;

(ii) For purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code and that is not described in division (H)(2)(a)(i) of this section, the conviction of or plea of guilty to the violation of division (C) of this section shall constitute a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(b) If a person is convicted of or pleads guilty to a violation of division (C) of this section and the person also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the conviction of or plea of guilty to the violation of division (C) of this section shall not constitute, for purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code, a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(I) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code;

(2) "Limited driving privileges" has the same meaning as in section 4501.01 of the Revised Code.

(2004 S 58, eff. 8-11-04; 2002 H 490, eff. 1-1-04; 2002 S 123, eff. 1-1-04; 2000 S 180, eff. 3-22-01; 1999 S 107, eff. 3-23-00; 1999 H 162, eff. 8-25-99; 1997 S 60, eff. 10-21-97; 1996 S 269, § 8, eff. 5-15-97; 1996 S 269, § 1, eff. 7-1-96; 1996 H 353, § 4, eff. 5-15-97; 1996 H 353, § 1, eff. 9-17-96; 1995 H 167, eff. 5-15-97; 1995 S 2, eff. 7-1-96; 1994 H 236, eff. 9-29-94; 1988 H 51, eff. 3-17-89; 1985 H 349; 1984 S 321, H 44; 1977 S 243; 1972 H 511)

<Note: See also following version of this section, eff. 5-17-06.>

R.C. § 2919.22, OH ST § 2919.22

Current through 2006 File 96 of the 126th GA (2005-2006), apv. by 5/1/06,
and filed with the Secretary of State by 5/1/06.

Copr. © 2006 Thomson/West.

END OF DOCUMENT

(C) 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.