IN THE SUPREME COURT OF OHIO

JOHN K. O'TOOLE, Personal Representative and Administrator for the Estate of Sydney Sawyer,	:	Case No. 07-0056
Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. CA-06-87476
v.	:	
WILLIAM K. DENIHAN, et al.,	:	
Appellants.	:	

FILED
OCT 01 2007
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLEE'S MERIT BRIEF

John W. Martin, Esq. (0015279)
Andy Petropouleas, Esq. (0070090)
John W. Martin Company & Associates, L.P.A.
800 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
216.771.3303 - telephone
216.771.3313 - fax

William D. Beyer, Esq. (0027880)
Joan E. Pettinelli, Esq. (0047171)
(COUNSEL OF RECORD)
Wuliger, Fadel & Beyer
1340 Sumner Avenue
Cleveland, Ohio 44115
216.781.7777 - telephone
216.781.0621 - fax
e-file@wfblaw.com

Counsel for Appellee John K. O'Toole

David Ross, Esq. (0005203)
(COUNSEL OF RECORD)
Michelle J. Sheehan, Esq. (0062548)
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093

Counsel for Appellants Cuyahoga County Department of Children and Family Services, William Denihan and Kamesha Duncan

James C. Cochran, Esq. (0026172)
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

Counsel for Appellant Tallis George-Munro

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. STATEMENT OF FACTS 1

A. Background and Parties 2

B. The Structured Decision Making (SDM) Model 5

C. DCFS Policies and Procedures 5

1. Priority 1 Referrals of Child Abuse 5

2. Investigation and Documentation 6

3. Staffings and Safety Plans 6

4. Medical Examinations and Police Notification 7

D. The Sydney Sawyer Case - Priority 1 Emergency Referral 8

1. The March 29, 2000 Interview 9

2. The March 30, 2000 Home Visit 15

3. The March 31, 2000 Conference 15

4. The Claimed Out of State Trip 16

5. No Further Investigation or Contact 16

E. Sydney's Death 18

1. Munro's Completion of the Case File In Violation of DCFS Policy 19

2. Munro's Termination 19

F. The Expert Evidence 20

II. ARGUMENT 22

A. Analysis of Statutory Immunity Defenses 22

B. DCFS and Its Employees Are Not Immune From Liability for Failure to Report Their Knowledge or Suspicion of Child Abuse 24

1. R.C. 2151.421 Imposes a Duty Upon DCFS Administrators and Employees to Report Their Knowledge or Suspicion of Child Abuse 25

2. DCFS Administrators and Employees Have a Duty to Report to Law Enforcement 27

3. DCFS Employees Failed to Report Their Knowledge or Suspicion of Sydney Sawyer's Abuse 32

4. Appellants' Failure to Report Sydney's Sawyer's Abuse Proximately Resulted in Her Injuries and Death 33

C. Appellants Are Not Immune From Liability for Recklessly Creating a Substantial Risk to the Health and Safety of Sydney Sawyer 35

1. DCFS and Its Employees Owed Sydney Sawyer a Duty of Care and Protection 35

2. R.C. 2919.22 Applies to Persons Not Only *In Loco Parentis* to a Child, But Also Those Having Custody or Control Over the Child 36

3. R.C. 2919.22 "Expressly Imposes" Liability on DCFS and Its Employees 39

4. Munro Created a Substantial Risk of Harm To Sydney's Health and Safety 39

D. Substantial Evidence of Recklessness Defeats Munro's Immunity Under R.C. 2744.03(A)(6)(b) 40

E. DCFS Is Not Entitled to Reinstatement of Immunity Under R.C. 2744.03(A) 44

F. R.C. Chapter 2744, If Applied, Violates Appellee's Right to a Remedy Under Article I, Section 16 of the Ohio Constitution 47

G. R.C. Chapter 2744, If Applied, Violates Appellee's Right to a Jury Trial Under Article I, Section 5 of the Ohio Constitution 49

III. CONCLUSION 50

CERTIFICATE OF SERVICE 51

TABLE OF AUTHORITIES

CASES:

Bonacorsi v. Wheeling & Lake Erie Ry. Co., (2002), 95 Ohio St.3d 314, 2002-Ohio-2220. 22

Brodie v. Summit Cty. Children Serv. Bd. (1990), 51 Ohio St.3d 112, 554 N.E.2d 1301, 1308 35

Butler v. Jordan, (2001) 92 Ohio St.3d 354, 2001-Ohio-204 . . . . . 37, 47-49

Campbell v. Burton, (2001) 92 Ohio St. 3d 336, 2001-Ohio-206 . . . . . 24-25, 30-31, 35

Cater v. Cleveland (1998) 83 Ohio St.3d 24, 697 N.E.2d 610 . . . . . 22-23, 41, 46-47

Cramer v. Auglaize Acres, (2007) 113 Ohio St.3d 266, 2007-Ohio-1946 . . . . . 23, 39

Elston v. Howland Local Schools, (2007) 113 Ohio St.3d 314, 2007-Ohio-2070 45

Fabrey v. McDonald Village Police Department, (1994) 70 Ohio St.3d 351, 1994-Ohio-368 . . . . . 42, 44

Ferrando v. Auto-Owners Mut. Ins. Co., (2002), 98 Ohio St.3d 186, 781 N.E.2d 927 22

Garrett v. Sandusky, (1994) 68 Ohio St.3d 139, 624 N.E.2d 704 48-49

Gersper v. Ashtabula Co. Children Services Bd., (1991), 59 Ohio St.3d 127, 570 N.E.2d 1120 27

Glandon v. Greater Cleveland Regional Transit Authority (1996), 75 Ohio St.3d 312, 1996-Ohio-137 49

Hall v. Bd. of Edn., Fort Frye Loc. School Dist. Bd. of Edn., 111 Ohio App.3d 690, 694-695, 676 N.E.2d 1241 (4th Dist. Ct. App. 1996) 22

Marchetti v. Kalish (1990), 53 Ohio St.3d 95, 559 N.E.2d 699 41

Marcum v. Talawanda City Schools, 108 Ohio App.3d 412, 670 N.E.2d 1067 (12th Dist. Ct. App. 1996) 45

Marshall v. Montgomery County Children Services Board, (2001), 92 Ohio St.3d 348, 2001-Ohio-209 25

Osborne v. Lyles (1992), 63 Ohio St.3d 326, 587 N.E.2d 825 22

Shover v. Cordis Corp., (1991), 61 Ohio St.3d 213, *overruled on other grounds, Collins v. Sotka*, (1998), 81 Ohio St.3d 506. . . . . 33, 40

State v. Brooks, 200 WL 337600 (8th Dist. Ct. App. 3/30/00), *appeal not allowed*, 93 Ohio St.3d 1498, 758 N.E.2d 1149 (2001) 37

State v. Caton, (2000) 137 Ohio App.3d 742, 739 N.E.2d 1176 (1st Dist. Ct. App.) 36

State v. Hairston, (2004) 101 Ohio St.3d 308, 2004-Ohio-969 26

State v. Hebesh, 85 Ohio App.3d 551, 620 N.E.2d 859 (3rd Dist. Ct. App. 1992) 36

State v. Johnson, 1997 WL 626598 (9th Dist. Ct. App. 9/24/97), *appeal not allowed*, 81 Ohio St.3d 1427, 689 N.E.2d 48 (1998) 37

State v. Jordan, 1997 WL 711303 (8th Dist. Ct. App. 11/13/97), *appeal not allowed,* 81 Ohio St.3d 1467, 690 N.E.2d 1287 (1998) 37

State v. Kirk, 1994 WL 97231 (10th Dist. Ct. App. 3/24/94) 37

State v. McGee, (1997) 79 Ohio St.3d 193, 195, 680 N.E.2d 975, 977 40

State v. Noggle, (1993) 67 Ohio St.3d 31, 1993-Ohio-189 (1993) 36

State v. Stout, 2006 WL 3350770, 2006-Ohio-6989 (3rd Dist. Ct. App. 11/20/06)(slip copy) . . 36

Strother v. Hutchinson, (1981) 67 Ohio St.2d 282, 287, 423 N.E.2d 467 34

Tomasik v. Tomasik, (2006) 111 Ohio St.3d 481, 2006-Ohio-6109 26

Yates v. Mansfield Board of Ed., (2004) 102 Ohio St.3d 205, 2004-Ohio-2491 . . . 23, 30-31, 35

CONSTITUTIONAL PROVISIONS:

Ohio Constitution, Article I, Section 5 49-50

Ohio Constitution, Article I, Section 16 . . . . . 47-48, 50

STATUTES

Ohio Revised Code Chapter 2744 . . . . . 41, 47-50

Ohio Revised Code § 2151.421 . . . . . 23-32, 35, 50

Ohio Revised Code § 2151.421(A) 23-29, 32, 50

Ohio Revised Code § 2151.421(A)(1)(a) 24-27

Ohio Revised Code § 2151.421(A)(1)(b) 24-27

Ohio Revised Code § 2151.421(C) 24

Ohio Revised Code § 2151.421(F) 25

Ohio Revised Code § 2151.421(F)(1) 27-28

Ohio Revised Code § 2151.421(J) 28

Ohio Revised Code § 2151.421(J)(2) 29

Ohio Revised Code § 2151.421(J)(3) 28

Ohio Revised Code § 2151.99 . . . . . 25, 50

Ohio Revised Code § 2744.01(C)(2)(u) 48

Ohio Revised Code § 2744.02(A)(1) 22

Ohio Revised Code § 2744.02(B) 22-23, 47, 50

Ohio Revised Code § 2744.02(B)(5) 23, 47, 50

Ohio Revised Code § 2744.03 . . . . . 23, 40-41, 44-47, 50

Ohio Revised Code § 2744.03(A) 44

Ohio Revised Code § 2744.03(A)(3) 44-46, 50

Ohio Revised Code § 2744.03(A)(5) 44-47, 50

Ohio Revised Code § 2744.03(A)(6) 23-24, 40-41, 45, 50

Ohio Revised Code § 2744.03(A)(6)(b) 23-24, 40-41, 45, 50

Ohio Revised Code § 2744.03(A)(6)(c) 23, 40, 50

Ohio Revised Code § 2907.03(A)(5) 36-37

Ohio Revised Code § 2919.22 . . . . . 23, 35-37, 39-40

Ohio Revised Code § 2919.22(A) 37

Ohio Revised Code § 3721.17(I)(1) 39

OHIO LEGISLATIVE ACTS:

131 House Journal of the 106th General Assembly of Ohio, 132. 29-30

Am. H.B. No. 218, 131 Ohio Laws, Part I, 32 29-30

Am. H.B. No. 765, 130 Ohio Laws, 625-626. 29-30

Am. Sub. H.B. No. 85, 136 Ohio Laws, Part I, 2004-12 29-30

S.B. 106, 2002 Ohio Laws File 239 (eff. April 9, 2003) 23

OHIO ADMINISTRATIVE CODE:

Ohio Administrative Code § 5101:2-34-32 (G)(1) 43

Ohio Administrative Code § 5101:2-34-32(C) 42-43

Ohio Administrative Code § 5101:2-34-32(I) 43

Ohio Administrative Code § 5101:2-34-37 43

I. STATEMENT OF FACTS

On the morning of April 28, 2000, the battered, 38 pound body of four (4) year old Sydney Sawyer was pronounced dead at Rainbow Babies and Children's Hospital. Social workers at the hospital immediately called the police and the Cuyahoga County Department of Children and Family Services ("DCFS"). Deputy Coroner Joseph Felo, D.O., who performed the autopsy, determined the cause of death to be blunt impacts to Sydney's trunk causing perforation of the small intestine and acute peritonitis. In Dr. Felo's opinion, the fatal injuries occurred on April 27, 2000. Dr. Felo also noted numerous non-fatal injuries inflicted on Sydney in the days, weeks and months before her death.

Almost 30 days earlier, on March 29, 2000, a nurse at the daycare Sydney attended made a mandatory report to DCFS of suspected abuse to Sydney. The investigation was handled by social worker Kamesha Duncan ("Duncan") and her supervisor, Tallis George-Munro ("Munro"). Despite observing bruising to Sydney's face in the form of a closed fist mark, large circular burns in both her palms and whip marks on her back, they disregarded the substantial risk to her safety. Rather than protect the helpless four year old, after a single meeting with her, they chose to return her to her abusive home where she remained, unmonitored, until her death. Although they believed Sydney's injuries were from physical abuse, both Duncan and Munro failed to report the abuse to anyone else within DCFS or to any law enforcement agency despite the following facts:

* Munro and Duncan observed severe injuries to Sydney, including bruising on her face, healing burns on her palms and whip marks on her back and they recognized that Sydney was a victim of abuse;

* Munro and Duncan believed and documented in the case file that Sydney's safety was of "immediate concern;"

* Sydney's mother was uncooperative during the investigation and gave implausible and inconsistent explanations for the injuries;

* The daycare staff immediately voiced their concerns to Duncan about returning Sydney to her mother;

* The mother's live-in boyfriend refused to speak to Duncan and no further attempt was made to interview him;

* No attempts were made to locate and interview other members of Sydney's family, including her biological father, neighbors or others having information about Sydney;

* Munro and Duncan failed to obtain any medical information concerning Sydney's serious injuries or her past medical history;

* No further contact was made with Sydney beyond the initial interview on March 29, 2000;

* No further contact or even an attempt to contact Sydney's mother was made after the home visit, even after her mother claimed to take her out of state on a family vacation yet having no resources to do so;

* No further contact was made with the daycare until April 26, 2000 only to find that it was closed for Spring Break; and

* No attempt was made to monitor compliance with the "safety plan."

The horrific events in this case were precipitated by the recklessness of DCFS in assigning an inexperienced social worker to the intake unit without proper supervision, instituting a new safety and risk assessment tool without training and supervision necessary to implement it; allowing Munro to continue in his supervisor position without supervisory knowledge and skills; not providing independent medical examiners to determine the nature of the physical condition of children when abuse is suspected; not providing a quality control system to ensure that child safety has been determined; and not providing a mechanism to determine if SDM was being properly implemented.

A. Background and Parties

Appellant DCFS is the public children services agency within the Cuyahoga County Department of Human Services and is charged with investigating allegations of child abuse and neglect, and providing care, protection and support to abused and neglected children. Appellant Duncan was employed as a social worker with DCFS beginning October 25, 1999 shortly after she received her bachelor's degree. (Duncan Depo. 7-8, 11-13). She had no prior experience as a social

work and little to no other professional work experience. (Popchak Depo. 60-62). She was assigned to the Intake Unit of DCFS, where her responsibilities were to investigate allegations of child abuse and neglect. Duncan was still "in-training"and did not recall having a Priority 1 case under SDM before. At the time, Duncan was a probationary employee, had not been trained to identify abuse, and "was not completely familiar with the policies and procedures" in the Intake Department; she was "just learning." (Duncan Depo. 10-18, 47-48, 50).

Appellee Munro was Duncan's direct supervisor. (Duncan Depo. 11-17). He previously worked as a DCFS social worker from 1990 to 1995. He returned to DCFS in May, 1996 as a social worker, and in May, 1998, he was promoted to a supervise social workers in the Intake Unit. (Munro Depo. 9-11). Munro reported directly to Intake Unit Chief Elsa Popchak. (Munro Depo. 14). Popchak reported to Deputy Director Zuma Jones, who reported to Defendant-Appellee Denihan, the Executive Director. It was well known within DCFS that Munro "had a predisposition to almost never separate a child from the household." (McCormack Depo. 70). Further, Munro never completed the required supervisory training, but did receive repeated training on identifying child abuse. (Munro Depo. 21, 28, 236).

Intake Unit Chief Popchak acknowledged that she did not review and monitor the cases in her unit and would only become involved if a supervisor brought a case to her attention. She did not document the status of cases, and would only review monthly statistics, which contained no substantive case information. Popchak was responsible for training and advising her subordinates as to the requirements of Ohio Revised Code and Administrative Code. (Popchak Depo. 15-21).

Appellee Denihan was the Executive Director of DCFS from December 1999 to June 2001. As Executive Director, Denihan was charged with "administer[ing] the work of [DCFS]...." although he had no education or training in social work. Denihan "was responsible for the overall

operations of DCFS in all aspects." (Denihan Depo. 6-7, 9). He gave final authorization for all personnel actions, including the placement of social workers within DCFS, and he was aware of the assignment of inexperienced social workers to the Intake Unit. (Denihan Depo 9-12). Denihan oversaw the training of social workers and supervisors in the newly adopted protocol to assess the safety of an alleged abused child, but only had superficial knowledge of that training. He had overall responsibility for the implementation of the new protocol, but could not recall any process to monitor and review its use. (Denihan Depo. 10-15). Deputy Director Zuma Jones, who oversaw the Intake Department and reported directly to Denihan, did not take any role in the implementation of the new protocol other than to ensure that staff took the training. Nor did Jones monitor any of the Intake Unit cases. (Jones Depo. 11-13).

In September, 1999, Munro knew that his social workers were not: 1) accurately assessing the caregiver's willingness to protect the child; 2) documenting the abuse and neglect (and would judge the allegation unsubstantiated); and 3) making the necessary contacts. (Popchak Depo. 88; Munro Depo. 230-232). All but one of the social workers in Munro's group either left the agency or transferred out of Munro's command. At least three of them left due to Munro's demanding management style. (Munro Depo. 231-234). Despite being directed to do so, Munro did not complete the required supervisory training at the time of Sydney Sawyer's death. (Munro Depo. 19, 236 & Ex. L thereto). At the time, Popchak was aware that all but one of the social workers in Munro's group were young, inexperienced, probationary social workers and "needed a lot of hands-on assistance from" Munro. (Popchak Depo. 110-111). None of them had "any noteworthy experience." (Munro Depo. 235).

B. The Structured Decision Making (SDM) Model

Since 1992, DCFS had utilized the Family Risk Assessment Model ("FRAM") for assessing the safety of a child alleged to have been abused and in assessing future risk to the child. In 1999, DCFS decided to change to a safety and risk assessment model known as Structured Decision Making ("SDM"). SDM represented a "big change" in the status quo of the intake operations. Munro admittedly did not fully understand the rationale of the safety assessment and risk assessment forms under SDM. (Munro Depo. 24-26). DCFS did not implement any process to determine whether its employees understood or were properly using SDM. (Munro Depo. 27-28). SDM became effective on March 1, 2000, and all new cases were to be investigated utilizing SDM protocol and forms. (Munro Depo. 23; Popchak Depo. 120). However, DCFS still did nothing to either test the social employees' understanding of SDM and the forms to be used. Nor did DCFS do anything to determine if they were appropriately using the SDM protocol and tools. (Munro Depo. 27-28; Popchak Depo. 195; Jones Depo. 11-13; Denihan Depo. 12-15). In fact, Munro was not instructed to and did not review the safety and risk assessments which were to be prepared by the social workers to ensure that they were being correctly completed. (Munro Depo. pp 249).

C. DCFS Policies and Procedures

1. Priority 1 Referrals of Child Abuse

When DCFS receives a report of child abuse, a Hotline Referral Form is generated by the Hotline social worker and indicates the priority level. Both Munro and Duncan knew that a "Priority 1 Referral," the most serious code that could be assigned, denoted an emergency situation which requires face to face contact with the child abuse victim within one (1) hour of DCFS' receipt of the referral. (Munro Depo. 33-34). There were no DCFS guidelines or policies as to what type of cases could be assigned to a probationary employee such as Duncan. Munro assigned a Priority 1 case to

the social worker on emergency duty that day, without regard to the facts, case complexity, or the social worker's experience or caseload. (Munro Depo. 41, 49-50, 54).

2. Investigation and Documentation

Intake social workers were required to complete all investigations within thirty (30) days, including an "Investigation and Assessment" (commonly called an "I&A") documenting the social worker's contact in the case; a "Safety Assessment;" and a "Risk Assessment." (Munro Depo. 34-38). At the end of the 30 day period, the social worker was to present the finished work to his or her supervisor, but was not required to present anything in writing while the case was open. (Munro Depo. 40). Munro knew that DCFS policy required a social worker to take with her and complete a "Safety Assessment" form, which was used "to make a determination if the child is safe in his/her environment, so that intervention in one form or another can take place." (Munro Depo. 34-36; Popchak Depo. 122). The Safety Assessment lists 15 "safety factors" which identify behaviors or conditions associated with a child being in "immediate danger of serious harm." (Munro Depo. 154-155 & Ex. E thereto). DCFS policy required the Safety Assessment to be completed "before leaving a child in the home or returning a child to the home during the investigation." (Duncan Depo. Ex. 1, SDM Policy and Procedures Manual, p. 32). Popchak knew that social workers often did not complete the Safety Assessment as required. (Popchak Depo. 122, 196-199). Duncan knew that she was required to complete a Safety Assessment, but did not know when it had to be done. Although Duncan knew that a "safety item" was an indicator of danger that the child was in harm's way, she was unable to recognize when those indicators were present. (Duncan Depo. 40, 98-99).

3. Staffings and Safety Plans

A "staffing" is a meeting called within DCFS to allow the social worker to utilize the collective knowledge and experience of a group of professionals in determining how to proceed to

best protect the child. It is most often used in a high-risk, emergency situation where it may be necessary to take custody of the child. A staffing is required in many instances including any child abuse situation involving an unknown perpetrator. (Popchak Depo. 194).

A safety plan is a last ditch effort short of taking emergency custody of a child and is generally formulated in a staffing. All safety plans require the social worker to monitor the plan and must indicate how compliance with the safety plan is to be followed. This will include periodic home visits by the social worker and participation by a third party who has first hand knowledge about the child on a daily basis. (Popchak Depo. 159-162). Since 1995, DCFS policy required that any safety plan developed outside of a staffing be reviewed and signed by the Unit Chief, in this case, Popchak. Munro knew, prior to the implementation of SDM, that there were instances in which he was required to obtain Popchak's signature on a safety plan. However, Munro claimed it was unclear as to whether a safety plan required the Unit Chief's approval. (Munro Depo. 166-169).

4. Medical Examinations and Police Notification

Even where a social worker observed signs of physical abuse and injury to a child, DCFS did not utilize independent physicians or medical examiners designated by DCFS to examine the child.

Whenever it received a referral, it was the practice of the DCFS Hotline to fax the information to the Cleveland Police Department Sex Crimes Unit. Popchak testified that the fax notification was required in every case in order to comply with the State of Ohio's reporting requirements and DCFS' Memorandum of Understanding pursuant to the Ohio statute. (Popchak Depo. 130-140). It was Munro's understanding that the fax notification form was included in the packet of materials given to the social worker by the Hotline, and it was the social worker's responsibility to ensure that it had been sent to the police. (Munro Depo. 135-137).

D. The Sydney Sawyer Case - Priority 1 Emergency Referral

On or about March 16, 2000, four (4) year old Sydney Sawyer began attending daycare at Ministerial Headstart Daycare. ("the Daycare"). She was scheduled to attend each weekday morning until 11:30 a.m. when she was to go to a home care provider. The Daycare's records on Sydney contained the names and contact information for several of Sydney's family members, including her father and her paternal grandmother. On the morning of March 29, 2000, staff members at the Daycare, including its family service worker Angela Spring ("Spring"), observed signs of physical abuse to Sydney, including "bruises on her face, scald marks on both palms and whip marks on her back." (Supp. 1-2, Spring Affidavit, Plaintiff's Brief Ex. 1).[1] Lesley Jacobs ("Jacobs"), a nurse at the Daycare, observed "bruises on her face, scratches behind her ears, scald marks on both palms and red and blue bruises on her back." (Supp. 3-4, Jacobs Affidavit, Plaintiff's Brief Ex. 2). Both women believed that the injuries from physical abuse, and Jacobs called the DCFS Hotline. (Supp. 3-4, Jacobs Affidavit, Plaintiff's Brief, Ex. 2).

The Hotline Referral Form ("Hotline Form") prepared by the DCFS social worker who took the call from Jacobs states that the referral is a "Priority 1," that the "Priority Rationale" is "4 YR. OLD CHILD WITH NUMEROUS INJURIES," and that the referral is an "Emergency." The Hotline call was received at 10:38 a.m. and the Hotline Form states in part:

> Leslie Jacobs, nurse at Ministerial Day Care, phoned in a case of abuse. Caller states that this A.M. Sydney Sawyer, age 4, showed up at day care with red marks on her face. Caller states that right side of her face is red and purplish in color. Sydney states that she fell off the couch. Caller states that Sydney also has burns on both of her hands. She states that she burned her hands while she was brushing her teeth. She also has bruises on her back, which she has no explanation for. Caller states that Sydney stories are not consistent with the injuries. Call states that Sydney attends day

---

[1] References to "Plaintiff's Brief Ex. __" are references to the exhibits attached to Plaintiff's Combined Brief in Opposition to Defendants' Motions for Summary Judgment filed on May 31, 2005 in the trial court.

care until 11:30 A.M. She then goes over to a day care provider home. The day care provider is Nashonda Cundiff.

Caller will keep Sydney at day care.

(Supp. 5-6, Hotline Form, Plaintiff's Brief Ex. 3; Munro Depo. Ex. A). The Hotline Form also states that, as to "Police Contact," a "*Call needs to be Made.*" (emphasis added). Further, in the section entitled "Police Contacted," the Hotline Form provides a space for the "Date/Time," but no date or time was ever entered.

1. The March 29, 2000 Interview

Sydney's Priority 1 referral was assigned to Munro, who reviewed it and, in turn, assigned Duncan, a probationary employee, possibly her first Priority 1 case under SDM. (Munro Depo. 30, 48-49 and Ex. A thereto; Duncan Depo. 46, 48-49). Duncan understood it was designated Priority 1 due to Sydney's age, the fact that she had marks on her head and other marks on her body, and that the Daycare staff did not believe Sydney's explanations for the injuries. (Duncan Depo. 47). After reviewing the referral, Munro instructed Duncan to go interview Sydney separately from her mother. He gave her his Polaroid camera to take photos of Sydney and told her to call him after the interview. He did not go with her. (Munro Depo. 48-49).

Prior to going to the Daycare, Duncan called and spoke to Jacobs at 11:30 a.m. Knowing that Sydney was scheduled to leave the Daycare at that time, Duncan directed Jacobs to keep Sydney there. (Duncan Depo. 79-80 and Ex. 5 thereto). Upon arriving at the Daycare, Duncan first spoke to the Director who told her that Sydney was a new student, that they did not know much about her, that they had seen marks on her, and that they had asked Sydney about them. (Duncan Depo. 50). Duncan's I&A reflects that she made face to face contact with Sydney at "12:30 a.m," which was not within the one (1) hour time limit. (Duncan Depo. Ex. 5).

Duncan took control of Sydney by announcing to the Daycare staff that she "was in charge of the investigation," and asked Jacobs to go out and purchase film for the camera. (Supp. 1-2, Spring Affidavit, Plaintiff's Brief Ex.1; Supp. 3-4, Jacobs Affidavit, Plaintiff's Brief Ex. 2). Duncan interviewed Sydney and upon examining her, "observed signs of physical abuse upon her." (Duncan Depo. 51). Duncan observed several injuries to Sydney's face including a large circular mark on the left side of her face and her left ear; a linear mark behind her left ear, a smaller red mark inside her left ear; red linear marks at least 3-4" on her back; circular burn injuries in the palms of her hands with the skin peeling off (Duncan Depo. 52-60). Duncan photographed the marks she observed, but did not document the injuries to Sydney's hands and back on the I&A. (Duncan Depo. 52-54 & Ex. 5 thereto, Supp. 7-19). At the time, Duncan "suspected" that the injuries to Sydney's hands and back were from physical abuse. (Duncan Depo. 55-56). Duncan learned Sydney told Jacobs that the marks on her face were from falling off of a sofa, but that Sydney did not know where it happened and she received the burns on her hands while brushing her teeth. (Duncan Depo. 71-72 & Ex. 5 thereto).

Duncan directed the Daycare staff to leave the room when she interviewed Sydney. (Supp. 3-4, Jacobs Affidavit, Plaintiff's Brief Ex. 2). Sydney told Duncan she got the injuries to her face from falling down, but Sydney could not say where or how she fell. Duncan did not question Sydney about telling Jacobs that she had fallen off a sofa. (Duncan Depo. 59, 71-72). Sydney also told Duncan that she received the burns to her hands while brushing her teeth, which Duncan did not believe. (Duncan Depo. 56, 70). Finally, Sydney did not have explanations for some of the injuries and said she did not know how she got the injuries on her back. Duncan did not believe Sydney's rendition of how she was injured and thought that she was "lying to cover something up." (Duncan Depo. 59, 70). Duncan also wrote in the I&A that "the marks do not look like she fell down." (Duncan Depo. Ex. 5). Duncan asked Sydney about her family. Sydney said that she lives with her

"mommy" and "daddy" and identified "Lashon" as her mother and "Patrick" as her father. (Duncan Depo. 64). Thus, Duncan was on notice that an adult male lived in her home. Sydney also said the following in response to Duncan's question about what her mother said about the bruises on her face:

> When she looked at my face I didn't want her to see it. I want it to stop hurting.... My mommy was hollaring at me. She asked me how did I get it. He said he did not know.

As to the passage "he said he did not know," Duncan may have asked Sydney if her mother asked Patrick about the mark on Sydney's face. (Duncan Depo. 65-68).

Duncan had her first contact with Sydney's mother, Lashon Sawyer when LaShon arrived at the Daycare at 2:15 p.m. Lashon was "very hostile," "wanted to hurry up and get the investigation over," and to take her daughter home. (Duncan Depo. 45-46; Supp. 22-23, 26-27, 37, Duncan Tr. Testimony, *State v. Sawyer*, Cuyahoga Case No. CR-391947, pp. 12-13, 19-20, 54, Plaintiff's Brief Ex. 5). When Duncan asked her about Sydney's injuries, Lashon "responded in a lot of different ways." (Duncan Depo. 82). As to the injuries on Sydney's face, Lashon said she saw them that morning and that Sydney had fallen off a bed. Although Sydney had told Jacobs that she fell off a sofa and was unable to explain to Duncan where or how she fell, Duncan did not challenge Lashon's explanation for the injuries to Sydney's face. (Duncan Depo. 82-84). As to the marks on Sydney's ear, Lashon said that Sydney had an ear infection. Lashon first told Duncan that she had taken Sydney to the doctor for the ear infection, but then admitted that she did not really take Sydney to a doctor, claiming it was "only drainage." (Duncan Depo. 84-87). As to the burns on Sydney's hands, Lashon told Duncan that Sydney got them from brushing her teeth, but again, Duncan did not believe they were accidental given their nature and location in the palms of her hands. As to the injuries on Sydney's back, Lashon told Duncan that Sydney had eczema and scratched her back at night while sleeping. Again, Duncan did not believe the explanation. (Duncan Depo. 82-85).

At first, Lashon lied about who lived in the home, telling Duncan that she and Sydney lived alone. Lashon then admitted that her boyfriend, Patrick Frazier, often slept over and had access to Sydney. Duncan knew that Lashon was lying since Sydney had already told Duncan that Patrick lived with her. Duncan, however, took no steps to contact Patrick Frazier and did not ask Lashon for his address or phone number. (Duncan Depo. 87-89).

Although Duncan claims she asked Lashon for the name of Sydney's father, she did not recall getting his address or phone number and did not document any such information in the I&A. DCFS policy required that Duncan obtain the other parent's contact information, yet she made no attempt to do so. Duncan asked about other relatives and Lashon said that Sydney's grandparents were deceased and that Sydney visits Lashon's sister, but not very often. Duncan did not take any steps to confirm any of the information Lashon gave her about Sydney's family. (Duncan Depo. 92).

Duncan did not ask the Daycare for contact information on Sydney's father, other relatives, or other emergency contact numbers, and never asked to see the Daycare's file on Sydney. (Duncan Depo. 74-75). Had she done so, she would have easily learned: the name and phone number of Sydney's father and paternal grandmother, among other relatives; that Lashon lied to her concerning Sydney's relatives; and that Lashon had wrongly listed her boyfriend, Patrick Frazier (along with his phone number), as Sydney's "uncle" (Supp. 39-40; Daycare Records, Plaintiff's Brief Ex. 4). Had Duncan made contact with Cedric Nash, Sydney's father, she would have learned that he saw a "knot" on Sydney's head and that Sydney told her father that Patrick hit her. (Nash Depo. 18-30).

Duncan also briefly spoke to Nashonda Cundiff, the home care provider, but only by telephone from the Daycare. Cundiff told Duncan that she did not notice any marks on Sydney, that Sydney had not complained about any marks or bruises, and that no incident had occurred at her home. Duncan learned that Cundiff picked Sydney up from Daycare on weekdays. Sydney slept at

Cundiff's until Lashon picked her up at 12:30 a.m.. Duncan did not ask Cundiff if she knew anything about Sydney's family or whether she had any contact information for them. (Duncan Depo. 77-81).

Although Duncan spoke with Munro from the Daycare by telephone on March 29, 2000, Munro did not document any of the calls. (Munro Depo. 59-60; Duncan Depo. 115). In speaking with Munro, Duncan "was not able to adequately describe" the injuries to Sydney's face. Rather than going to the Daycare himself, Munro asked to speak to someone else. Because Jacobs, the nurse, was not in the room at the time, Munro spoke to the Daycare Director "to get a more detailed account" of the injuries. (Munro Depo. 52-53). Munro claimed that he and Duncan went through the Safety Assessment over the telephone while Duncan was at the Daycare, and he believed that Duncan had the form in front of her at the time. (Munro Depo. 61-62). However, contrary to DCFS policy, Duncan had not even taken the form with her. (Duncan Depo. 112). Munro and Duncan determined that Safety Item Number 4 was present:

> Caregiver(s)' explanation for the injury to the child is questionable or inconsistent with type of injury, and the *nature of the injury suggests that the child's safety may be of immediate concern.*

(Munro Depo. 62; Duncan Depo. 112; Supp. 50, Safety Assessment, Duncan Depo Ex. 7(emphasis added).

Rather than seek temporary emergency custody of Sydney, or request a staffing to discuss any of a myriad of other options available to protect Sydney, Munro told Duncan to prepare a safety plan and that it was "okay to return Sydney to Lashon with the safety plan." (Duncan Depo. 118). Duncan understood that the purpose of a safety plan was to provide a safe environment for the child or at least make it conditionally safe. Otherwise, Duncan "cannot return a child." " (Duncan Depo. 97). Duncan prepared the following safety plan in a pathetic attempt to make Sydney's home situation "conditionally safe:"

1. Mother will report results of medical visit to SW, stating that Mom did take the child the scheduled appointment. Mom will make appointment with SW to visit her home.

2. Mom will allow child to remain in daycare to complete her current enrollment.

3. Daycare staff will report any marks or bruises on the child to SW, any questionable or unexplainable marks.

(Duncan Depo. 97 & Ex. H thereto, Supp. 55, Safety Plan)(herein "the Safety Plan"). Munro now claims that Duncan agreed that Sydney need not be removed. However, Duncan did not recommend Sydney be removed from the home, but not because she did not feel it was necessary, rather because:

> ... we were still in the middle of an investigation. There were still things we needed to do before we make a determination on whether or not she needed to be removed or whether or not we would remove her from the home.

(Supp. 33, Duncan Tr. Testimony, 12/4/00, p. 45, Plaintiff's Brief Ex. 5). At Munro's direction, Duncan "ordered" Lashon to do what was on the Safety Plan. (Supp. 41, Duncan Tr. Testimony, 12/4/00, p. 41, Plaintiff's Brief Ex. 5). Lashon authorized Duncan to obtained Sydney's medical records. Although Duncan knew Sydney's regular pediatrician was located at University Hospital, Lashon said she would take Sydney to the Neon Clinic for a medical exam. (Duncan Depo. 93-94).

Munro did not review the Safety Plan and did not recall seeing it until after Sydney's death. In violation of DCFS policy, Munro did not sign the Safety Plan nor did he seek Popchak's approval and signature as required. (Munro Depo. 64-65, 165-166, 169; Supp. 55, Safety Plan). In fact, Munro did not even make Popchak aware of the case, much less the Safety Plan, and neither Duncan nor Munro discussed the case with anyone else at DCFS. Had Munro sought Popchak's signature to the Safety Plan, she would not have approved it and would have directed him to have a staffing. (Popchak Depo. 158-159, 162-163). The obvious defects with the Safety Plan were that it did not require Duncan to monitor Sydney, through periodic home visits, or otherwise, and did not include

a component showing how it would be followed. (Popchak Depo. 160-161). The Daycare employees vigorously expressed concerns to Duncan about allowing Sydney to go home with her mother. (Supp. 1-2, Spring Affidavit, Plaintiff's Brief Ex. 1; Supp. 3-4, Jacobs Affidavit, Plaintiff's Brief Ex. 2).

2. The March 30, 2000 Home Visit

On the next day, March 30, 2000, Duncan made a home visit to Lashon Sawyer. When she arrived in the morning, Sydney was not present. Lashon's boyfriend, Patrick Frazier ("Frazier"), was present but refused to speak to Duncan. There was little food in the refrigerator and the home was not clean. After Duncan tested the water finding it to become hot enough to burn her, Lashon told Duncan she had asked the landlord to turn down the water temperature, but Duncan did not ask for the landlord's name or phone number. (Duncan Depo. 120-121 & Ex. 5 thereto).

3. The March 31, 2000 Conference

On March 31, 2000, Duncan and Munro met and discussed the Sawyer case. Munro looked at the photos of Sydney and looked at the I&A describing the only interviews Duncan would ever take in the case. (Munro Depo. 64). It was "important" to Munro that Frazier was present, but uncooperative, during the home visit. (Munro Depo. 75, 93-94). Munro was also aware that Frazier spent the night in Sydney's home, yet, Munro never instructed Duncan to interview him. (Munro Depo. 93-94; Duncan Depo. 123). Had they done even a background check on Frazier, they would have learned he had been investigated in 1997 for robbery, a crime of violence.

Munro also knew that Lashon made inconsistent statements to Duncan and that she did not adequately explain the marks on Sydney's body. Munro was "very concerned" about the injuries to Sydney's face as depicted in the photos and noted dark patches on the right side of her face to the right of her eye by her cheekbone and below her cheek by her jaw. On the left side, Munro saw marks above her cheekbone and on her cheek. (Munro Depo. 97-98, 100-103 & Exs. C and D

thereto). At the time, he believed them to be "marks from a fist to the child's face." (Munro Depo. 104). In fact, Munro later stated in a memo to Director Denihan:

> *I immediately recognized one photo in particular showing a pattern bruise to the right side of her face. The shape and pattern of the bruise indicated to me that the child was hit on the side of the face with a closed fist.* At that time I did not instruct the social worker to request an emergency staffing.

(Munro Depo. 158 & Ex. G thereto, Supp. 56, Munro Memo dated April 28, 2000)(emphasis added). Munro was also aware of the burns on Sydney's hands and the whip marks on her back, and he was not satisfied with the explanation as to how the injuries occurred. Despite theses facts, Munro never went to see Sydney, nor did he take any other action to protect her. (Munro Depo. 105-107).

4. The Claimed Out of State Trip

On March 31, 2000, the day after the home visit, Lashon left a phone message for Duncan stating that she was taking Sydney to Atlanta or Alabama to visit relatives. (Duncan Depo. Ex. 5; Supp. 32, Duncan Tr. Testimony 12/4/00, p. 44, Plaintiff's Brief Ex. 5). Duncan told Munro about the message. (Duncan Depo. 29; Munro Depo. 120). Although Duncan believes she left a message for Lashon asking her for the relative's address and phone number, she did not receive the information in order to document it on the I&A. (Duncan Depo. 127-129 & Exhibit 5 thereto; Supp. 7-19, I&A). The fact that Lashon claimed to be leaving the state with Sydney immediately upon initiation of the investigation raised even more "red flags" with both Duncan and Munro. Indeed, they knew that Lashon did not have a car or the financial ability to take such a trip. Yet, they did nothing to confirm the trip, Duncan did not see Sydney before the trip, and Munro did not instruct her to do so. (Munro Depo. 182-183; Duncan Depo. 128-129).

5. No Further Investigation or Contact

Duncan did not have any further contact with Sydney after March 29, 2000. Munro never had any contact whatsoever with Sydney. Neither Duncan nor Munro ever attempted to contact Lashon

again. They never attempted to contact Sydney's father, any other relatives, neighbors or others with knowledge about Sydney. Neither Duncan nor Munro completed the Safety Assessment which gives guidance in whether to remove a child from a home. It was not until after Sydney's death that Munro, in violation of DCFS policy, on May 1, 2000 completed the Safety Assessment.

Both Munro and Duncan admit that they never contacted the police at any point in time, either verbally or in writing, even though the Hotline Referral Form stated that a call "needs to be made" to the police. Munro testified that he did not contact the police at any time prior to Sydney's death, and that the social worker was responsible for sending the fax notice to the police. (Munro Depo. 135-137, 164). Duncan testified that she never contacted the police and did not realize it was her responsibility to do so. (Duncan Depo. 116, 150). Although Munro claims to have seen a notification form when he completed Sydney's case file on May 1, 2000 after her death, he did not testify that the form had been completed, and he only assumed Duncan followed policy by sending it to the police. (Munro Depo. 135-137). Further, Popchak testified that she did not recall seeing any such form when reviewing the file upon Sydney's death. (Popchak Depo. 135-136). No such police notification form was ever produced in discovery, and the Cleveland Police Department had no records regarding Sydney Sawyer prior to the homicide investigation of her death. (Supp. 57-58, Affidavit of Cleveland Division of Police Records Custodian, Plaintiff's Brief Ex. 6).

No physician was designated by Appellants to provide an independent medical examination of Sydney, and neither Duncan nor Munro spoke with the physician who examined Sydney. Although Munro claims Duncan told him she talked to the doctor, when asked if she contacted Sydney's doctors, Duncan testified that she "attempted to." Munro and Duncan did not even obtain the medical records from the March 30, 2000 medical exam until after Sydney's death, and they

never requested any of Sydney's past medical records despite having a release for them. (Duncan Depo. 94, 123-125; Munro Depo. 76, 118-120, 170, 180).

Sometime in mid-April, approximately two weeks before Sydney's death, Duncan took three (3) days off work. She asked Munro for "mental leave," and Popchak approved it (Munro Depo. 82-84). Duncan testified that when she took this time off, none of her cases, including Sydney's, were assigned to another social worker. (Duncan Depo. 130-131).

Duncan had no further contact with the Daycare until April 26, 2000 when she went there only to learn that the Daycare was closed for spring break. (Supp. 31, Duncan Tr. Testimony, 12/4/00, p. 43, Plaintiff's Brief Ex. 5; Duncan Depo. 131-133). Had she inquired, she would have learned that, in violation of the Safety Plan, Sydney had stopped going to Daycare. (Supp. 36, Duncan Tr. Testimony, 12/4/00, p. 52, Plaintiff's Brief Ex. 5; Supp. 46-48, Daycare Records, Plaintiff's Brief Ex. 4). Rather than call Lashon, visit Sydney at home, make contact with the home care provider, advise anyone within DCFS, request an emergency staffing, contact the police, or do anything else after learning that Sydney was not at the Daycare, *Duncan and Munro did nothing.* (Duncan Depo. 132-134; Munro at 84, 161). *Duncan never saw Sydney after March 29, 2000.*

E. Sydney's Death

On the morning of April 28, 2000, Sydney Sawyer was pronounced dead at Rainbow Babies and Children's Hospital of Cleveland. Social workers at the hospital immediately contacted *the police and DCFS.* The official cause of death was from blunt impacts to her trunk causing perforation of the small intestine and acute peritonitis. The fatal injuries were delivered on April 27, 2000. (Tr. Testimony of Joseph Felo, D.O., 10/6/00, pp. 682, 668, 688, Plaintiff's Brief Ex. 7). Numerous non-fatal injuries had been inflicted on Sydney in the days, weeks and months before her death. (Tr. Testimony of Joseph Felo, D.O. 10/6/00, Plaintiff's Brief Ex. 7; Supp. at 59-60, Report

of John P. Conomy, M.D. dated 2/24/05, Plaintiff's Brief Ex. 8). Lashon Sawyer was convicted of murder; Patrick Frazier was convicted of involuntarily manslaughter in the commission of child endangering.

1. Munro's Completion of the Case File In Violation of DCFS Policy

On May 1, 2000, Duncan, Munro, Popchak, Jones and Denihan held a meeting concerning the handling of Sydney's case. DCFS policy required that the case file be immediately turned over to the Special Investigations Unit of DCFS. (Popchak Depo. 145; Jones Depo. 26-27). However, shortly before or after the meeting, Deputy Director Jones told Munro to complete the forms which had not been completed: the Safety Assessment and the Risk Assessment. Munro did so and testified that he completed the forms with Duncan. (Munro Depo. 124-125, 189, 198 & Exs. E and F thereto). Duncan testified that Munro asked her for the file, but she denied completing the forms with Munro and denied any knowledge that Munro had completed them. (Duncan Depo. 146, 150).

2. Munro's Termination

The Cuyahoga County Commissioners terminated Munro's employment for his "Gross Neglect of Duty and Misfeasance" in Sydney's case. (Denihan Depo. Ex. 1). The Order of Removal adopted by the Commissioners provided, in part:

> In view of the clear risk factors involved in this case, 1. photos of abuse - bruises on right side of her face, bruises on her back, and burns on both hands, 2. statement from F/child victim's mother indicating that she had no knowledge of the cause of the observed signs of injury, appropriate action should have been taken to ensure the safety of the F/child victim. Pursuant to agency policies and procedures, you should have sought an Ex Parte Order based on the evident risk factors or scheduled a staffing to ensure the safety of the F/child victim. You failed to follow agency policies and procedures, and failed to identify the seriousness of the evidence of child abuse which had been reported to you and therefore failed to take appropriate action to protect the child from further harm by leaving the child in the custody of her mother.

(Supp. 61-65, Order of Removal, Denihan Depo. Ex. 1). Commissioner McCormack, who took a special interest in DCFS, based his decision to terminate Munro on what he considered to be "egregious actions" which were "purposeful and conscious" in nature. McCormack publicly stated that "had []Munro called an emergency meeting, other specialists could have studied the case and saved the child from danger" and that "failure to provide a group review of the evidence was a contributing factor to the ultimate loss of the child." (McCormack Depo. 42-45, 66-68).

F. The Expert Evidence

Appellant offered the expert opinion of Eloise Anderson who was the Director of the California Department of Social Services from 1992 to 1998 where she was responsible for the administration of child support enforcement, foster care, adoptions, child abuse prevention, child care and other services by the State of California. In Ms. Anderson's opinion, the reckless actions and omissions of the Appellants caused a substantial risk to the health and safety of Sydney Sawyer. (Supp. 66-81, Anderson Affidavit, Plaintiff's Brief Ex. 9). In Ms. Anderson's opinion, DCFS acted in a reckless manner in: assigning an inexperienced worker to the intake unit without proper supervision; instituting SDM without worker demonstration of knowledge, skills and clinical judgment necessary to implement the new process; allowing Munro to continue in his position without demonstrating supervisory knowledge and skills or 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 control system to ensure that child safety has been determined in Priority 1 cases; not providing a mechanism to determine SDM was being properly implemented; and not providing clear direction on when to contact law enforcement. (Supp. 74-75, Anderson Affidavit, Plaintiff's Brief Ex. 9).

Ms. Anderson concludes that numerous actions and omissions of Munro, including the following, were reckless: he was not willing or able to prepare staff for the change from FRAM to SDM, guiding and supporting them through the change and in the use of the SDM tools; he failed to instruct Duncan regarding the appropriate use and completion of the SDM Safety Assessment to determine if there is immediate danger of harm and whether there is a need for protective intervention or placement; his instructions to Duncan failed to support the necessary integration of SDM with clinical judgment based on clinical experience which Duncan lacked; he failed to call for a staffing which would have utilized collective clinical experience and judgment allowing for the safety concerns of the Sawyer case to have been magnified and identified; he failed to review the completed SDM tools and to support Duncan to learn appropriate completion of a case; he failed to recognize Duncan's lack of investigatory knowledge and skills; he failed to oversee Duncan in determining the location of Sydney's family, interviewing neighbors and the cohabiting male; he failed to advise and oversee Duncan regarding the danger to Sydney from a cohabiting male who is not the biological father; he failed to utilize his clinical judgment in his assessment of Sydney's injuries and in reassessing her safety once he was aware of the cohabiting male; and, significantly, he failed to contact law enforcement leaving Sydney unprotected. (Supp. 77-78, Anderson Affidavit, Plaintiff's Brief Ex. 9).

In Ms. Anderson expert opinion, Duncan's conduct was reckless in the following respects: she failed to interview Sydney in an age appropriate manner; she failed to complete the Safety Assessment and failed to reassess it in light of the new safety issues with which she was presented; she failed to determine that Sydney needed immediate medical treatment and/or hospitalization; she failed to determine if Sydney was afraid to return home; she failed to collect information from caregivers and other sources and failed to locate other relatives who had information as to her home

environment; she failed to interview and investigate the cohabiting male who was not Sydney's biological father; she did not have the skills necessary to interview a young child or a non-cooperating caretaker; she failed to follow SDM procedures despite her lack of experience, knowledge and skills; she failed to determine the Daycare's days and times of operation; she failed to determine if there was an ongoing history or pattern of abuse to Sydney; she failed to follow-up with medical examiners to confirm the nature of the injuries; and she failed to determine if Sydney's mother was failing to protect her. (Supp. 79, Anderson Affidavit, Plaintiff's Brief Ex. 9).

II. ARGUMENT

A. Analysis of Statutory Immunity Defenses

A trial court's grant of summary judgment is subject to *de novo* review. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, (2002), 95 Ohio St.3d 314, 2002-Ohio-2220. Summary judgment is appropriate only when strongly construing the evidence in favor of the non-moving party, with all doubts resolved in his favor, reasonable minds can only come to a conclusion adverse to that party. *Ferrando v. Auto-Owners Mut. Ins. Co.*, (2002), 98 Ohio St.3d 186, 781 N.E.2d 927; *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 587 N.E.2d 825. In the context of summary judgment, a party raising an immunity defense must present evidence tending to prove the underlying facts upon which the defense is based. *Hall v. Bd. of Edn., Fort Frye Loc. School Dist. Bd. of Edn.*, 111 Ohio App.3d 690, 694-695, 676 N.E.2d 1241 (4th Dist. Ct. App. 1996).

In *Cater v. Cleveland* (1998) 83 Ohio St.3d 24, 697 N.E.2d 610, this Court announced a three-tiered analysis to examine a political subdivision's claimed immunity. The first step is analysis of R.C. 2744.02(A)(1) which provides a political subdivision with a cloak of immunity for governmental functions. The second step is analysis of R.C. 2744.02(B), which sets forth five (5) exceptions to immunity. If any of the exceptions to immunity in R.C. 2744.02(B) apply and no

defense in that subsection protects the political subdivision from liability, then under the third tier, the court determines whether the political subdivision may assert any of the defenses in R.C. 2744.03 to reinstate immunity. *Cater*, 83 Ohio St.3d at 28. In this case, the exception contained in R.C. 2744.02(B)(5) applies to DCFS and provides in part:

> ... a political subdivision is liable for injury, death or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code....

For individual employees of a political subdivision, the immunity analysis is different. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, ¶17, 2007-Ohio-1946. The employee is immune unless one of the three (3) exceptions in R.C. 2744.03(A)(6) applies. *Id.* Here, 2744.03(A)(6) provides two (2) exceptions to immunity because:

> (b) The employee's acts or omissions were ... in a wanton or reckless manner;
>
> (c) Liability is expressly imposed upon the employee by a section of the Revised Code....

The exception to immunity for both political subdivisions and its employees where liability is expressly imposed by the Revised Code directly applies to this case. Liability is "expressly imposed" by two (2) separate sections of the Revised Code, to wit, R.C. 2151.421(A)(failure to report suspected child abuse) and R.C. 2919.22 (child endangering).[2] Additionally, R.C.

---

[2] R.C. 2744.02(B)(5) and 2744.03(A)(6)(c) were amended effective April 9, 2003 to provide an exception to immunity only when "civil" liability is imposed. Pursuant to the clear language of the act, the amendments do not apply in this case. Rather, they 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." 2002 Ohio Laws File 239 (S.B. 106, Section 3, eff. April 9, 2003); see also *Yates v. Mansfield Board of Ed.*, 102 Ohio St.3d 205, ¶ 8, n. 1, 2004-Ohio-2491 (former version of R.C. 2744.02(B)(5) applied to a cause of action which accrued in February, 2000 after expressly recognizing that the statute had been amended.); *Cramer*, 113 Ohio St.3d 266, 2007-Ohio-1946 (former version of R.C. 2744.02(B)(5) analyzed where cause of action accrued in January, 2002). The causes of action in instant case accrued on April 28, 2000, nearly three (3) years before the act's effective date. Despite the Court of Appeals' quotation of the statute as amended in 2003,

2744.03(A)(6)(b) provides an exception to the immunity of DCFS' employees for their reckless conduct.[3] The applicable law and the overwhelming evidence support the Court of Appeals' decision that Appellants are not immune from liability as a matter of law and there are genuine issues of material fact for trial.

B. DCFS and Its Employees Are Not Immune From Liability for Failure to Report Their Knowledge or Suspicion of Child Abuse

In this case, R.C. 2151.421(A) expressly imposes liability on DCFS and its employees for failing to report known or suspected child abuse. Revised Code 2151.421 provides in part:

> (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 ... 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 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.
>
> (b) Division (A)(1)(a) of this section applies to any person who is an ... *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; ....

(emphasis added). R.C. 2151.421(C) further requires that the report made pursuant to division (A) be made "forthwith by telephone or in person." In *Campbell v. Burton*, (2001) 92 Ohio St. 3d 336, 2001-Ohio-206, the plaintiff brought suit against a city school board of education, the school superintendent and the junior high school peer mediation coordinator alleging violation of the

---

Appellants concede that the former version applies.

[3] The individual liability of Denihan and Duncan for recklessness under R.C. 2744.03(A)(6)(b) is not before the Court. Jurisdiction was declined on their individual liability under R.C. 2744.03(A)(6)(b) which was argued at Proposition IV of the Memorandum in Support of Jurisdiction of Appellants DCFS, Denihan and Duncan on January 11, 2007.

statutory duty to report known or suspected child abuse. The Court held that the defendants were not immune from liability as a matter of law because:

> R.C. 2151.421, through its penalty statute, R.C. 2151.99, expressly imposes liability, within the meaning of R.C. 2744.02(B)(5) and 2744.02(A)(6)(c) on political subdivisions *and* their employees for failure to report suspected child abuse.

92 Ohio St.3d at 339. (emphasis added). Thus, in *Campbell*, this Court held that R.C. 2151.421 not only expressly imposes liability on individual political subdivision employees, but also expressly imposes liability on the political subdivision itself for its employees' failure to report suspected child abuse. The Court explained that:

> [t]he General Assembly enacted R.C. 2151.421 to provide special protection to children from abuse and neglect. In order to achieve this goal, the General Assembly had to encourage those with special relationships with children, such as doctors and social workers, to report known or suspected child abuse...

Campbell, 92 Ohio St.3d at 342 (footnote omitted).

1. R.C. 2151.421 Imposes a Duty Upon DCFS Administrators and Employees to Report Their Knowledge or Suspicion of Child Abuse

Appellants concede that R.C. 2151.421 and 2151.99 expressly impose liability for failure to report known or suspected child abuse. Instead, they wrongly argue that the Court of Appeals held that every DCFS employee who receives a report of child abuse is required to cross-report that information to law enforcement. The Court of Appeals did not so hold. Rather, it properly held that this Court's decision in *Marshall v. Montgomery County Children Services Board*, (2001), 92 Ohio St.3d 348, 2001-Ohio-209, does not govern Appellee's claims for failure to report the known or suspected abuse of Sydney. *Marshall* did not involve the reporting duty, and the limited holding of *Marshall* was that R.C. 2151.421(F) does not expressly impose liability for a negligent failure to investigate child abuse.

Appellee submits that R.C. 2151.421(A)(1)(a) and (b) impose a duty on DCFS administrators and employees, who are acting in their official or professional capacities and know of or suspect child abuse, to *immediately* report that knowledge or suspicion to law enforcement. Contrary to Appellant's assertion, Appellee does not contend that *every* report made to DCFS must be reported to the police. Rather, Appellee submits that the duty is triggered once the DCFS employee knows or suspects abuse, i.e. the employee substantiates an allegation of abuse.

> "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it." *Slinghuff v. Weaver* (1902), 66 Ohio St.3d 621, 64 N.E.2d 574, paragraph one of the syllabus. This court may engage in statutory interpretation when the statute under review is ambiguous. *Id.*
>
> "But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction." *Id.* at paragraph two of the syllabus.

State v. Hairston, (2004) 101 Ohio St.3d 308, 2004-Ohio-969; *Tomasik v. Tomasik*, (2006) 111 Ohio St.3d 481, 2006-Ohio-6109.

The plain and unambiguous language of R.C. 2151.421(A)(1)(a) and (b) imposes a reporting duty on "administrators or employees of a ... public or private children services agency" "acting in" their respective "official or professional capacities." DCFS administrators and employees are specifically identified in the statute as mandatory reporters, and once *they* know of or suspect child abuse, *they* are required to *immediately* report that knowledge or suspicion. Appellants wrongly contend that DCFS administrators and employees only have a duty to report when a child is "independently discovered" and suspected of being abused, not when a report has already been made to DCFS concerning that child. In essence, they claim that liability can only attach to a DCFS

administrator or employee who independently discovers, but fails to report, the abuse of a child victim who has not already been reported to DCFS. This argument is belied by the plain language of the statute that administrators and employees of a public children services agency have a duty to report known or suspected abuse. If the legislature did not intend to impose a reporting duty on DCFS administrators and employees, R.C. 2151.421(A)(1)(b) would not specify "administrators or employees of ... public ... children service agencies" who are "acting in an official or professional capacity"as mandatory reporters under subsection (A)(1)(a).

2. DCFS Administrators and Employees Have a Duty to Report to Law Enforcement

The ambiguity arises concerning the entity to whom they are required to report. That is, are DCFS administrators and employees required to report to the police their knowledge or suspicion of abuse to a child who has been referred to them from a mandatory reporter, or are they somehow exempted from the otherwise clear language of the statute? Appellee submits that implicit in the language of R.C. 2151.421(A) is the requirement that, once the DCFS employees substantiate a claim of abuse, they must make a personal or telephonic report of their knowledge or suspicion to the police. The clear mandate is that child abuse investigations are to be conducted by DCFS in cooperation and in coordination with law enforcement. Only if DCFS is required to notify the police can the statutory mandate of cooperation between DCFS and law enforcement take place.

This construction is supported by and consistent with other subsections of R.C. 2151.421. The report under R.C. 2151.421(A)(1)(a) triggers the duty of DCFS under R.C. 2151.421(F)(1) to investigate allegations of child abuse. This Court has already recognized that the investigation must be conducted in cooperation with law enforcement. *Gersper v. Ashtabula Co. Children Services Bd.*, (1991), 59 Ohio St.3d 127, 570 N.E.2d 1120. Indeed, R.C. 2151.421(F)(1) provides that:

> 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.

(emphasis added). Further, R.C. 2151.421(J) requires the public children services agency to prepare a memorandum of understanding with specified parties, including the county peace officer, all chief municipal peace officers in the county, and the prosecuting attorney of the county. The memorandum of understanding must contain, among other things, "the roles and responsibilities for handling emergency and non-emergency cases of abuse and neglect" and "[s]tandards and procedures to be used in handling and *coordinating* investigations." R.C. 2151.421(J)(3)(emphasis added).

If DCFS administrators and employees were not required to report suspected child abuse to law enforcement, R.C. 2151.421(F)(1) would not further provide that DCFS' investigation is to be carried out "in cooperation" with law enforcement. Nor would R.C. 2151.421(J)(3) require procedures for the "coordination" of investigations. There simply can be no cooperation or coordination between DCFS and law enforcement if DCFS does not report the known or suspected abuse to law enforcement. Moreover, it would not require that the investigation be carried out in accordance with the required memorandum of understanding with local law enforcement. When read as a whole, R.C. 2151.421 does not give DCFS administrators and employees who are acting in their official or professional capacities the option to report known or suspected child abuse to law enforcement - reporting to the police is required. Even if they had the option to fulfill the statutory mandate by merely reporting to their superiors at DCFS, the overwhelming and undisputed evidence indicates that Munro and Duncan failed to report Sydney's abuse to *anyone*.

Munro contends that to require a public children services agency to report suspected abuse to the police would cause a single referral to generate countless investigations. This argument similarly ignores the statutory mandate that child abuse investigations are to be conducted in

cooperation and coordination with the police in accordance with the memorandum of understanding as to the respective roles and responsibilities of each agency. As expressly stated in the statute, the memorandum of understanding is to provide the normal operating procedure to be employed and is to attempt to avoid multiple interview of a child who is the subject of a mandatory report. R.C. 2151.421(J)(2). Contrary to Munro's contention, reporting to law enforcement only serves the legislature's clearly expressed intent to streamline the investigatory process.

A review of the evolution of R.C. 2151.421 also supports finding a duty on the part of DCFS employees to report their knowledge or suspicion of child abuse to law enforcement. As originally enacted in 1963, R.C. 2151.421 required physicians to report evidence of non-accidental injury or neglect to a municipal or county peace officer "forthwith" by telephone or in person, to be followed by a written report. Am. H.B. No. 765, 130 Ohio Laws, 625-626. The statute was amended in 1965 to require law enforcement officers to refer any reports of child abuse to the appropriate county welfare department and required that department to investigate "in cooperation with the law enforcement agency which shall have the primary responsibility for such investigations." Am. H.B. No. 218, 131 Ohio Laws, Part I, 32. Thus, the legislature began to involve child welfare agencies in the investigatory process. The Ohio Senate added the provision requiring the welfare department to cooperate with law enforcement. 131 House Journal of the 106th General Assembly of Ohio, 132, 1741. The House unanimously concurred with the additional provision. *Id.* at 1758. Given the added provision, the clear intent was to retain a significant role for law enforcement agencies.

In 1975, R.C. 2151.421 was amended to add "administrator[s] or employee[s] of a ... public or private children services agency" as mandatory reporters. Am. Sub. H.B. No. 85, 136 Ohio Laws, Part I, 2004-12. The statute was also amended to permit reports of abuse to the "children services board ... or a municipal or county peace officer..." Am. Sub. H.B. No. 85. The statute continued to

require cooperation with law enforcement to determine the circumstances surrounding the injury and the person(s) responsible. Thus, with each amendment, the legislature clearly intended for law enforcement agencies to continue their prominent role in the investigation of child abuse reports.

The fact that the provision requiring DCFS to cooperate with law enforcement has remained in place for over forty (40) years underscores the legislature's intent to have both public children services agencies and law enforcement involved in the investigation of child abuse. The legislature could have removed the role of law enforcement entirely, but it has wisely seen fit not to do so. To suggest that R.C. 2151.421 does not require a public children services agency to report known or suspected child to law enforcement abuse runs counter to the intent of the lawmakers who enacted R.C. 2151.421 and those who have revisited the statute multiple times since then.

This legislative intent was recognized by this Court's decision in *Campbell* and its more recent decision in *Yates v. Mansfield Board of Education*, (2004) 102 Ohio St.3d 205, 2004-Ohio-249. Although *Yates* involved a school board's duty to report sexual abuse of a child-student by a teacher who later abuses another student, the rationale of *Yates* clearly applies to this case, and imposes a duty upon DCFS and its employees to immediately report known or suspected child abuse to law enforcement.

> It is also clear that the General Assembly enacted R.C. 2151.421 as a mechanism for identifying and protecting abused and neglected children at the earliest possible time. In so doing, the General Assembly did not intend to withhold protection until such time as a child is actually injured. To the contrary, R.C. 2151.421(A)(1)(a) requires designated persons to "*immediately* report" their "knowledge or *suspicion*" that a child "has suffered *or faces a threat of suffering*" any injury indicative of abuse or neglect. Thus, the General Assembly clearly intended to reach potential victims of child abuse, as well as children who have already suffered abuse, in hopes that these children might be protected before they suffer any actual injury or damage.
>
> ... it is clear that the General Assembly considered identification and/or prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection, especially in the institutional setting. Thus, R.C. 2151.421(F)(1) and

> (2) provide that children services agencies shall investigate each report of known or suspected child abuse in cooperation with law enforcement to determine, among other things, "the cause of the injuries ... and the person or persons responsible"....

Yates, 102 Ohio St.3d at 209.

In *Yates*, the Court determined that an important part of the purpose in imposing a duty to report child abuse is identification and prosecution of the offender in order to provide protection to an abused child. To suggest that DCFS and its employees did not have a duty to report Sydney's obvious abuse to law enforcement contravenes this Court's rationale in *Yates*. As did the school board employees in *Campbell* and *Yates*, Appellants in this case had a special relationship with Sydney and were required to report her known abuse to law enforcement.

> Because abused and neglected children lack the ability to ameliorate their own plight, R.C. 2151.421 imposes mandatory reporting duties on "those with special relationships with children ..." *Campbell*, supra, 92 Ohio St.3d at 342, 750 N.E.2d 529. See also, R.C. 2151.421(A)(1)(b). These persons, when acting in their official or professional capacity, hold unique positions in our society. They are not only the most likely and qualified persons to encounter and identify abused and neglected children, but they are often directly responsible for the care, custody or control of these children in one form or another.

Yates at 210-211 (emphasis in original).

Even DCFS recognized it had a duty to report the known or suspected child abuse of Sydney to the police. Intake Unit Chief Popchak testified that Ohio law requires DCFS to report every case of known or suspected child abuse to law enforcement - in fact, that was the very purpose of the notification form being faxed to the Cleveland Police Department by the Hotline social worker. Moreover, the Hotline Referral Form used by DCFS in this case indicates that DCFS knew it was required to verbally report Sydney's abuse to the police. It contains a space for the "Date/Time" police are contacted and, as to "Police Contact," the Hotline Form specifically states in Sydney Sawyer's case that a "*Call needs to be Made.*" Thus, DCFS' own documentation and practice reflects that it was required to call the police in Sydney's case.

Appellee further submits that, while the legislature intended that the investigations be conducted by DCFS, it did not leave it to the discretion of DCFS as to when the police should be notified. Requiring children services agency administrators and employees to report to the police when *they* know of or suspect abuse serves the legislature's intent to protect the child from harm at the earliest possible time and to identify and prosecute the perpetrator. Indeed, they are persons who occupy a special relationship with a child victim coming to their attention, and they are, presumably, among those best trained to identify abuse. Once *they* identify known or suspected abuse, *they* have an *immediate* duty to report it to the police. Abused children are the most helpless and often the most disadvantaged victims in our society. The Ohio General Assembly clearly intended to protect these innocent children by requiring child service agency administrators and employees to immediately report their abuse to law enforcement who could then best serve the purposes of identifying and prosecuting the offender as a necessary corollary to protecting the child.

Amicus argues that R.C. 2151.421 was intended to force those persons dealing with minor children to report any suspected abuse so that an investigation could be initiated. Appellee agrees - an investigation in cooperation with law enforcement. However, as do the Appellants, *Amicus* ignores the dual purposes of the reporting statute - to protect the child at the earliest possible time and to identify and prosecute the offender. Holding DCFS, its administrators and employees accountable for failing to comply with the law requiring them to report known or suspected child abuse to the police only serves those dual purposes and forces investigations to be coordinated with the police as required by the statute.

3. DCFS Employees Failed to Report Their Knowledge or Suspicion of Sydney Sawyer's Abuse

Appellants incredibly argue that the police were notified of Sydney's case by misstating Munro's testimony and claiming that a police referral form was faxed to the police. In reality, Munro

testified that he merely saw police a referral form while completing Sydney's case file after Sydney's death (in violation of DCFS policy). He offered no testimony that the form was completed nor that it had been faxed. Rather he simply presumed that Duncan faxed it to the police. However, Duncan offered no such testimony, and no such form was ever produced in discovery. Further, Popchak testified that she did not recall seeing any such form when reviewing the file upon Sydney's death.

Importantly, despite the fact that the Hotline Referral Form expressly stated that "Call needs to be Made" to the police, the police were never contacted. Munro testified that he never talked to any law enforcement officials prior to Sydney's death, and Duncan testified that she did not contact the police nor did she realize it was her responsibility to do so. As further evidence that no report was ever made to the police, the Cleveland Police Department had no report concerning Sydney Sawyer prior to her death. Construing the evidence most favorably in favor of Appellee, a jury question clearly exists as to whether Appellants failed to report Sydney Sawyer's obvious abuse to the police.

Moreover, even if the Court were to find that DCFS employees are not required to report to the *police*, but to *DCFS*, Munro clearly failed to report his knowledge or suspicion of Sydney's abuse to *anyone*. Had he done so, the record is clear that Unit Chief Popchak would have required compliance with DCFS policy to hold a staffing to determine how to best protect Sydney.

4. Appellants' Failure to Report Sydney's Sawyer's Abuse Proximately Resulted in Her Injuries and Death

Appellants DCFS, Denihan and Duncan also improperly and wrongly argue, for the first time on appeal, that the facts cannot establish that, had DCFS reported the abuse to the police, Sydney would still be alive. A litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal. *Shover v. Cordis Corp.*, (1991), 61 Ohio St.3d 213, 220, *overruled on other grounds, Collins v. Sotka*, (1998), 81 Ohio St.3d 506. Appellants failed to develop any such

argument in the trial court in the summary judgment proceedings, and this Court should disregard Appellants' attempt to do so now.

Proximate cause is established where an act or omission is wrongful and produces a result which would not have taken place, and where the injury is the natural and probable consequence:

> ... that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow...

Strother v. Hutchinson, (1981) 67 Ohio St.2d 282, 287, 423 N.E.2d 467. Moreover, the issue of proximate cause is ordinarily a question of fact for the determination of the jury. *Id.* at 471.

Here, there is more than sufficient evidence in the record from which reasonable minds could find that Appellants' conduct was the proximate cause of Sydney's death. Appellee's expert report directly addressed the failure to report her abuse and finds that DCFS was reckless in not providing clear policy direction for when to contact law enforcement and that Munro was reckless in failing to contact law enforcement leaving Sydney unprotected, despite the face that he believed her safety was "of immediate concern." Appellee's expert further concludes that the Appellants' reckless actions and omissions caused a substantial risk of harm to Sydney. Additionally, even Commissioner McCormack testified that Munro's failure to "provide a group review of the evidence was a contributing factor to the ultimate loss of the child." Finally, the expert medical evidence indicates that Sydney suffered numerous inflicted injuries all over her body from the time her abuse was first reported to DCFS throughout the days and weeks prior to her death.

Appellants' argument, without basis, denigrates the noble function of law enforcement to protect the citizens of our community, particularly those such as Sydney Sawyer, who are truly the most vulnerable. Moreover, it unjustifiably attacks the very competence of law enforcement and wrongly implies that the police would have taken no action nor offered any direction or assistance

in the face of the same compelling evidence of abuse and risk to Sydney which was presented to DCFS from the outset. From the ample evidence in the record, a jury could reasonably find that, had a report been made to the police, the vicious abuse of Sydney would not have continued, much less escalated to the fatal blows resulting in her death.

C. Appellants Are Not Immune From Liability for Recklessly Creating a Substantial Risk to the Health and Safety of Sydney Sawyer

Another section of the Revised Code also expressly imposes liability, and therefore, operates as an exception to immunity as to DCFS and its employees. Revised Code 2919.22, entitled "Endangering Children," 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....

1. DCFS and Its Employees Owed Sydney Sawyer a Duty of Care and Protection

In *Brodie v. Summit Cty. Children Serv. Bd.* (1990), 51 Ohio St.3d 112, 119, 554 N.E.2d 1301, 1308, this Court held that public children services agencies must protect children from abuse and eliminate the source of any such abuse. The Court reiterated this holding in *Campbell*, by explicitly stating that the General Assembly enacted R.C. 2151.421 "to provide special protection to children from abuse and neglect." 92 Ohio St.3d at 342. In the *Yates* decision in 2004, the Court again relied on its decision in *Brodie* and stated that "we found that children services agencies must protect children from abuse and eliminate the source of any such abuse." 102 Ohio St.3d. at 208, *citing*, *Brodie*, 51 Ohio St.3d at 119. It is beyond any reasonable debate that a public children services agency owes a legal duty of care and protection to an abused child.

2. R.C. 2919.22 Applies to Persons Not Only *In Loco Parentis* to a Child, But Also Those Having Custody or Control Over the Child

The Committee Comment to R.C. 2919.22, upon its enactment in 1973, states in part:

> .... In addition to the natural parents of a child, the first part of the section also covers guardians and custodians, *persons having temporary control of a child*, and persons standing in the place of parents.

(emphasis added). Thus, R.C. 2919.22 imposes criminal liability on, among others, two (2) classes of persons: 1) those standing *in loco parentis*; and 2) those having custody or control of a child. In *State v. Caton*, 137 Ohio App.3d 742, 750, 739 N.E.2d 1176 (1st Dist. Ct. App. 2000) the court held:

> ... [persons] not in loco parentis to the child may, nevertheless *still owe a legal duty of care and protection* to the child *if the child is in their custody or control.*

(emphasis added). In *State v. Hebesh*, 85 Ohio App.3d 551, 620 N.E.2d 859 (3rd Dist. Ct. App. 1992), the Third District Court of Appeals agreed that the issue is a question of fact and that persons not *in loco parentis* may still be liable where they exercise *custody or control* over the child:

> [e]ven assuming that the trier of fact determines that [defendant] was not in loco parents with [the child], that does not mean that the trier of fact could not find, in the alternative, that at the time of the offenses [defendant] had custody or control over her ...

Id. at 556.

Appellants' reliance on *State v. Noggle*, 67 Ohio St.3d 31, 1993-Ohio-189 (1993) is misplaced. Appellants fail to recognize that a person can be subject R.C. 2919.22 by either being *in loco parentis* or having custody or control. In *Noggle*, the Court interpreted the meaning of *in loco parentis* in R.C. 2907.03(A)(5) which, unlike R.C. 2919.22, does not apply to persons "having custody or control." *State v. Stout*, 2006 WL 3350770, 2006-Ohio-6989 (3rd Dist. Ct. App. 11/20/06)

(slip copy)(copy in Appendix)("Also, unlike R.C. 2907.03(A)(5), R.C. 2919.22(A) includes 'person[s] having custody or control' over the other person as potential offenders of endangering children.' 'Custody and control' as used in R.C. 2919.22(A) has been defined as more than a casual relationship but something less than being in loco parentis."). R.C. 2919.22 has often been interpreted to cover persons having custody or control of a child on a temporary and/or intermittent basis, such as teachers, day care workers and babysitters. Indeed, the daycare provider in *Butler v. Jordan*, 92 Ohio St.3d 354, 2001-Ohio-204, was convicted of child endangering in violation of R.C. 2919.22. *State v. Jordan*, 1997 WL 711303 (8th Dist. Ct. App. 11/13/97), *appeal not allowed,* 81 Ohio St.3d 1467, 690 N.E.2d 1287 (1998)(copy in Appendix).[4]

DCFS, Denihan and Duncan incorrectly argue that the appellate court held that DCFS and its employees stand *in loco parentis* to every child they investigate. The Court of Appeals did no such thing. Indeed, the phrase "in loco parentis" appears nowhere in the decision. Rather, the Court of Appeals correctly determined that *Marshall* does not govern Appellee's claim that DCFS and its employees created a substantial risk to the health and safety of Sydney by violating their duties of care and protection owed to her. The appellate court implicitly, but properly, found that there are genuine issues of fact for trial as to whether DCFS employees exercised custody or control over her.

At the very least, Appellants exercised "custody or control" over Sydney from the moment Duncan called the Daycare and directed its staff to keep Sydney there rather than release her. When

---

[4] *See also, State v. Brooks*, 200 WL 337600 (8th Dist. Ct. App. 3/30/00), *appeal not allowed*, 93 Ohio St.3d 1498, 758 N.E.2d 1149 (2001)(copy in Appendix)("R.C. 2919.22(A) applies not only to parents and guardians, but to anyone having temporary control of a child."); *State v. Johnson*, 1997 WL 626598 (9th Dist. Ct. App. 9/24/97), *appeal not allowed*, 81 Ohio St.3d 1427, 689 N.E.2d 48 (1998)(copy in Appendix)(R.C. 2919.22 applies to anyone having temporary control of a child); *State v. Kirk*, 1994 WL 97231 (10th Dist. Ct. App. 3/24/94)(copy in Appendix)("The statute does not focus only on those individuals having a legal relationship to the child, such as a parent or guardian, but also includes a 'person having ... control' of a child...").

Duncan arrived at the Daycare at 12:30, she continued to exert that custody and control by announcing to the staff that she was "in charge." She proceeded to interview Sydney in the absence of her mother and directed the Daycare staff to leave the room. She caused Sydney to become undressed to examine her injuries. Duncan kept Sydney at the Daycare for at least 3 to 4 hours beyond her scheduled departure time. Sydney's mother was not permitted to take her home without the Safety Plan, which Duncan "ordered." Quite apparent to all, Sydney was not free to leave and Duncan exercised physical custody and control over her.

Ultimately, Munro told Duncan it was "okay to *return* Sydney to her mother with the "Safety Plan"by which Duncan "ordered" Sydney's mother to take Sydney to a physician for examination, to continue to have Sydney attend daycare and to permit Duncan to conduct a home visit. By its terms, the Safety Plan was to apply for 30 days. DCFS' continued control over Sydney is readily apparent given the restrictions imposed on the parental rights of Lashon Sawyer. Additionally, Munro's claim that Lashon asked for permission to take Sydney out of state during the investigation also supports the Appellants' exercise of control over Sydney. If true, this assertion indicates that Sydney's mother believed DCFS controlled her ability to take Sydney out of state.

Under these circumstances, the Court of Appeals rightly concluded that a jury could reasonably find that Appellants exercised custody or control over Sydney. It twice commented on Appellants' custody or control of Sydney in discussing Appellants' recklessness in "returning" Sydney to her mother after observing severe injuries known to have been inflicted. The decision in this case cannot possibly be read to support Appellants' unfounded proposition that they would liable if a child is harmed in any way during an investigation even if they lack custody or control. Moreover, Appellants' argument that did not have custody or control because no court had ordered Sydney into DCFS' legal custody should be flatly rejected.

3. R.C. 2919.22 "Expressly Imposes" Liability on DCFS and Its Employees

Appellants, relying on this Court's recent decision in *Cramer*, wrongly argue that R.C. 2919.22 does not "expressly impose" liability on DCFS, or its employees. In *Cramer*, this Court held that R.C. 3721.17(I)(1), which provides a cause of action to any resident whose rights under the Ohio Nursing Home Patient's Bill of Rights against "any person or home committing the violation" expressly imposed liability on the county nursing home in that case, but not its employees. The Court found that, unlike the term "home," the term "person" was not defined in the Patient's Bill of Rights. *Cramer* at ¶¶30-32.

R.C. 2919.22 cannot be analogized to R.C. 3721.17(I)(1) as R.C. 2919.22 specifically identifies categories of persons to be held accountable for child endangering. They include "parents," "guardians," persons "having custody or control" and persons standing "*in loco parentis*." R.C. 2919.22 clearly applies to categories of persons who would be in a position to exert authority over the child, and the inclusion of these categories of persons is far more specific than the language "any person" without further description as found in R.C. 3721.17(I)(1). Moreover, the absurdity of Appellants' position that R.C. 2919.22 does not expressly apply to DCFS employees becomes clear when considering that the very mission of DCFS is to provide care and protective services to abused and neglected children. To find that DCFS' employees cannot not be subject to a statute proscribing child endangering would stand R.C. 2919.22 on its head.

4. Munro Created a Substantial Risk of Harm To Sydney's Health and Safety

Appellant Munro also wrongly contends that he did not create a substantial risk of harm to Sydney; instead he contends Lashon Sawyer created it. Munro's argument dishonors the duty of care and protection imposed by law upon DCFS and its employees. Moreover, Munro asks the Court to disregard the fact that Munro knew Sydney had suffered serious physical injuries in her home and

that he created the risk by returning Sydney to her abusive home without protection. Further, this Court has held that the standard of culpability under R.C. 2919.22, although not stated on the face of the statute, is one of recklessness. *State v. McGee*, (1997) 79 Ohio St.3d 193, 195, 680 N.E.2d 975, 977. As there is substantial evidence in the record that Munro's conduct was reckless as discussed *infra*, R.C. 2744.03(A)(6)(c) provides an exception to immunity because R.C. 2919.22 expressly imposes liability. Munro further wrongly argues that the effect of the Court of Appeals' decision will paralyze public children service agency social workers for fear of "ruinous personal liability." Instead, holding these professionals accountable for their reckless conduct in endangering the very children to whom they owe a duty of care and protection will only work to ensure the quality and diligence of social workers in Ohio county public children service agencies.

D. Substantial Evidence of Recklessness Defeats Munro's Immunity Under R.C. 2744.03(A)(6)(b)

Ohio Revised Code 2744.03(A)(6)(b) provides an exception to immunity where the employee's conduct is wanton or reckless. Appellant Munro wrongly contends that whether conduct amounts to recklessness should not be a factual determination on a case by case basis. Rather, he suggests that the Court should require a showing that an employee's "discretionary acts or omissions" were "contrary to a clear standard of conduct and in conscious disregard of a known risk." Munro would require evidence that "a known written statute, rule or regulation has been encountered and ignored before the finder of fact is permitted to determine" that the conduct is reckless. Contrary to the great weight of the evidence in the record, Munro incredibly argues that his conduct was consistent with the rules and regulations applicable to child abuse investigations. In the first instance, these arguments should not even be considered by this Court. Munro never raised these arguments in either the trial court or the appellate court and has waived the right to make them now before this Court. *Shover*, 61 Ohio St.3d at 220.

This Court has long defined "reckless" to mean that the 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, 83 Ohio St.3d at 33, *quoting*, *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 96, 559 N.E.2d 699, 700, fn.2, *quoting*, 2 Restatement of the Law 2d, Torts (1965) 587, Section 500. In enacting R.C. 2744.03(A)(6)(b), the legislature certainly intended this definition of recklessness as it had existed in the Restatement of the Law of Torts for at least twenty (20) years. Had the legislature intended any other meaning for purposes of R.C. Chapter 2744, it certainly would have provided it.

Munro wrongly contends that the Court of Appeals ruled that the mere allegation that an employee acted recklessly is sufficient to deny immunity even if the employee did nothing contrary to a clear standard of conduct and in conscious disregard of a known risk. Rather, the Court of Appeals properly utilized the definition of "reckless" as stated *Cater* and rightly concluded that the evidence demonstrates a genuine issue of material fact for trial concerning Munro's recklessness. The record contains compelling evidence, including expert evidence, of Munro's recklessness. The appellate court opinion specifically points to his knowledge of the nature and severity of the horrendous injuries to Sydney and his reckless decision to return Sydney to the source of abuse. The record is absolutely clear that Munro recognized that Sydney had suffered serious injuries from abuse and that he recognized that her safety was of "immediate concern."

Munro's contention that he did not seek court ordered custody of Sydney because "the information did not suggest that Sydney was in imminent risk of harm," is directly contradicted by the Safety Assessment and other evidence in the record. Moreover, Munro's claims that the "medical records were reviewed" and that he relied on the medical examination by the Neon Clinic and reviewed medical records are contradicted by substantial evidence. The facts are that the medical

records were not even received prior to Sydney's death and neither Munro nor Duncan ever talked to the physician concerning the injuries.

Munro relies on *Fabrey v. McDonald Village Police Department*, (1994) 70 Ohio St.3d 351, 1994-Ohio-368, to support his argument that a heightened definition of recklessness - violation of a rule, regulation or policy in conscious disregard of a known risk - should apply. In *Fabrey*, a police officer brought suit against McDonald Village and its police chief when he was injured while rescuing a prisoner who had set fire to the mattress in his cell. In considering the individual liability of the police chief, the Court stated that "the issue of wanton misconduct is normally a jury question." *Id.* at 356. The Court adopted the analysis of the court of appeals, which found the evidence insufficient to establish that the police chief's conduct was willful and wanton on several bases: 1) the minimum jail standards promulgated by the Ohio Department of Rehabilitation and Correction did not prohibit smoking materials; 2) there was no violation of department policy on smoking; and 3) there was no evidence he gave the lighter to the inmate. *Id.* at 356. After adopting that analysis, the Court found that the police chief's conduct was not wanton and specifically noted that "[the police chief] apparently did not anticipate that a prisoner, while locked in a cell, would intentionally set fire to his own mattress." *Id.* at 357.

Even if the Court were to depart from its longstanding definition of recklessness, *Fabrey* does not support Munro's position. In this case, there is compelling evidence that Munro violated both provisions of the Ohio Administrative Code and DCFS policy regarding child abuse investigations. These acts are not discretionary, and Munro's conduct reflects his disregard of the law, administrative rules and departmental policy on multiple levels. Not only did Munro fail to contact the police as required, Munro failed to comply with provisions of the Ohio Administrative Code. Sydney's case was an "emergency," which meant there was imminent risk to the child's safety.

O.A.C. 5101:2-34-32(C). At minimum, Munro violated the requirement of "face to face interviews with all adults residing in the home of the alleged child victim..." O.A.C. 5101:2-34-32 (G)(1). Additionally, Munro violated O.A.C. 5101:2-34-32(I) which provided that, any time the agency determines a child to be "at imminent risk of harm," the PCSA shall: 1) immediately enact a safety plan in accordance with O.A.C.5101:2-34-37; 2) contact law enforcement; or 3) remove the child. Munro did not present the Safety Plan to Unit Chief Popchak for her required approval. Munro never saw it, much less signed it, as was required. Had Popchak seen it, she would not have approved it.

The Order terminating Munro's employment reflects several violations of DCFS policy:

> *Pursuant to agency policy and procedures*, you should have sought an Ex Parte Order based on the evident risk factors or scheduled a staffing to ensure the safety of the F/child victim. *You failed to following agency policies and procedures* .... You wrote in your 4/28/00, memo to Director Denihan "I immediately recognized one photo in particular as showing a pattern bruise to the right side of her face. The shape and pattern of the bruise indicated to me that the child was hit in the side of her face with a closed fist. At that time I did not instruct the social worker to request an emergency staffing." Throughout the PDC, you maintained that you failed to take appropriate action to protect the safety of this child.... You acknowledged: 1. Your failure to ensure the completion of an appropriate, risk reducing safety plan, 2. Your failure to provide your worker with sound advice on assessing the risk factors even when you were presented with photos documenting physical abuse by an unknown perpetrator and 3. Your failure to secure an Ex Parte Order or schedule a staffing to protect the safety of the four year old F/child victim.

(Supp. at 61-65)(emphasis added). Munro's violation of DCFS policies is further supported by Unit Chief Popchak's testimony that, in a situation as here where the perpetrator is unknown, a staffing was required by DCFS policy (Popchak Depo. 178-179, 183-187, 193-195). Moreover, then County Commissioner McCormack, who participated in the decision to terminate Munro's employment and who had for years taken a special interest in DCFS, described Munro's conduct as "egregious," "purposeful" and "conscious." (McCormack Depo. 42-43). In McCormack's view, the facts in Sydney's case cried out for immediate intervention. Her injuries should have outraged and "sickened" any person, once more those responsible for her safety and protection. (McCormack

Depo. 83-84). Any person should have responded to the obvious, immediate and serious threat to her safety.

To accept Munro's argument would be to eliminate the exception to immunity for an employee's reckless conduct from the language of the statute. Further, the narrow interpretation of recklessness advocated by Munro would only serve to condone outrageous conduct which the actor knows creates an unreasonable and substantial risk of harm. Finally, even were the Court to deviate from its longstanding definition of recklessness to such an extreme degree, Appellant Munro would fare no better. In fact, the evidence before the trial and appellate courts in this case included Munro's numerous violations of rules and regulations, both of the Ohio Administrative Code and DCFS policy in his own training and in his handling of the investigation of Sydney's abuse. Finally, Appellant Munro cannot be likened to the police chief in *Fabrey* whom this Court found "apparently did not anticipate" that the inmate would set to his mattress in a locked cell. Indeed, Munro clearly anticipated future abuse to Sydney and chose to perversely disregard that substantial risk. Thus, even aside from the expert evidence of Munro's recklessness, there is substantial evidence from which a jury may reasonably determine that Munro's conduct rises to the level of recklessness.

E. DCFS Is Not Entitled to Reinstatement of Immunity Under R.C. 2744.03(A)

DCFS now argues that, even if its employees violated the duty to report or R.C. 2919.22, it should be immune under R.C. 2744.03(A)(3) and 2744.03(A)(5). This argument should not even be considered for DCFS' failure to properly raise it.[5] Even if considered on the merits, DCFS' claim

---

[5] DCFS' Memorandum in Support of Jurisdiction argued that the appellate court ignored the defense contained in R.C. 2744.03(A)(3). DCFS' Merit Brief, however, improperly expands this argument to additionally argue that "DCFS is also entitled to have immunity reinstated" under R.C. 2744.03(A)(5). DCFS should not be permitted to argue either defense. DCFS raised neither defense in the trial court except in its reply brief on its renewed motion for summary judgment.

that immunity should be reinstated should be rejected. DCFS begins by wrongly contending that Appellee is critical of the policies and procedures set forth in the SDM protocol. DCFS continues that any training to enforce the policies falls within Denihan's discretionary policy-making, planning or enforcement powers. However, DCFS misunderstands or misstates Appellee's argument. Appellee is not critical of the SDM protocol itself. Rather it was Denihan's reckless failure to train, allocate and supervise DCFS employees in the use of the new implemented SDM protocol, his reckless failure to provide employees with clear direction on when to contact police, and his reckless failure to utilize independent medical examiners to determine the nature and cause of injuries to child victims, all of which created a substantial risk of harm.[6]

DCFS points to the Court's recent decision in *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 320-321, 2007-Ohio-2070 in support of its argument. In *Elston*, the Court stated that the focus of R.C. 2744.03(A)(3) "is that the employee be engaged in policy-making, planning or enforcement," and that before recognizing the entity's immunity, the Court must consider carefully the duties and responsibilities of the employee whose action is at issue. With approval, the Court in *Elston* cited *Marcum v. Talawanda City Schools*, 108 Ohio App.3d 412, 670 N.E.2d 1067 (12th Dist. Ct. App. 1996). In *Marcum*, a case involving an assault on a sixth-grader, the court held that a teacher's decision to leave her students unattended for a period of time was within the scope of her discretion to determine the level of supervision necessary to ensure the safety of the children in her care. Significantly, the court in *Marcum* analyzed the conduct of the teacher under R.C. 2744.03(A)(5), not 2744.03(A)(3).

---

[6] This Court has declined to accept jurisdiction on Denihan's individual liability for his reckless conduct under R.C. 2744.03(A)(6)(b) as set forth in Proposition of Law No. IV of Appellant DCFS, Denihan and Duncan's Memorandum in Support of Jurisdiction.

DCFS further ignores this Court's decision in *Cater*, and the express statutory language in R.C. 2744.03(A)(5) that reckless exercises of "judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources" are not entitled to third tier immunity. In *Cater*, the Court analyzed the city's failure to train its employees in the use of the phone system and the fact that it had no policy or training in place regarding 911 calls in its operation of a municipal swimming pool under R.C. 2744.03(A)(5). The Court found that the city's lack of training on the use of 911 was appalling and presented a question of fact for the jury on the issue of recklessness:

> The seriousness of these omissions is highlighted by the fact that more than one hundred swimmers, mostly children unaccompanied by adults, frequented the city pool that day. However, something as basic and important as dialing 911 was not within the city employees' grasp. Not only did two of the senior lifeguards create a dangerous situation by leaving the pool area during an open swim session, but the city, in its admitted failure to train its employees on the use of 911, left them without the knowledge necessary to handle the emergency as it arose.

Id. at 31.

Significantly, the policy-making decision to adopt SDM as a risk assessment protocol was made even before Denihan took the position of executive director. Denihan's actions in failing to train, supervise and monitor DCFS employees in the use of the SDM risk assessment protocol and when to contact police, allowing Munro to remain in a supervisory position, assigning inexperienced social workers to the intake unit to handle Priority 1 emergency referrals, and failing to utilize independent medical examiners, even if "discretionary," do not fall within "policy making, planning or enforcement powers" so as to provide a defense under R.C. 2744.03(A)(3). Rather, as in *Cater*, each is a decision as to "whether to acquire, or how to use ... personnel and other resources..." As such, R.C. 2744.03(A)(3) does not apply, and R.C. 2744.03(A)(5) does not provide a defense because Denihan's conduct was reckless.

Particularly appropriate to this case is Chief Justice Moyer's concurring view in *Cater* that "a jury viewing *all* of the facts in their totality might well conclude that the city had acted recklessly...." 83 Ohio St.3d at 35-36. Just as in *Cater*, the reckless failure of DCFS to provide training and supervision to its employees on critical and basic concepts such as police notification and the use of the very tool used to assess a child's safety and risk of harm left its employees unequipped to handle Sydney's emergency case. Because there is compelling evidence of recklessness, R.C. 2744.03(A)(5) does not provide DCFS with a defense to liability.

F. R.C. Chapter 2744, If Applied, Violates Appellee's Right to a Remedy Under Article I, Section 16 of the Ohio Constitution

This Court in *Butler v. Jordan*, (2001), 92 Ohio St. 3d 354, 2001-Ohio-204, considered R.C. 2744 unconstitutional. In *Butler*, a parent brought claims for negligence and/or recklessness in inspecting and certifying a type-B family day-care arising from the death of her 8 month old baby at the hands of Geraldine Jordan, the day care's primary caregiver. The Court in *Butler* held that the statute imposing a duty to inspect and certify such a day care, did not expressly impose liability on the county within the meaning of R.C. 2744.02(B)(5). While the Court in that case was not properly presented with the issue, a majority of the Supreme Court clearly believes that R.C. Chapter 2744 is constitutionally infirm.

The Court in *Butler* went to great length to describe and chronicle in detail the faulty justification for immunity for political subdivisions and the constitutional shortcomings of R.C. Chapter 2744. Justice Douglas, writing the majority opinion in *Butler* comments:

> The tragedy of this case is that appellant is able to shuck its clear duties and responsibilities, as are other political subdivisions, on the sole basis of the doctrine of sovereign immunity. What is this doctrine that permits the government to injure its citizens with impunity? How can a government be immune from liability for an act for which that same government would impose liability upon one of its citizens? The answer is that 'government', whoever that may be, has accorded itself the right

> to negligently injure its citizens with immunity, all in disregard of constitutional protection reserved by its citizens to themselves.

Id. 358. R.C. Chapter 2744 categorically denies a remedy to any individual who happens to sustain an injury at the hands of a political subdivision in circumstances falling outside one of the narrowly delineated exceptions to immunity.

The unconstitutionality of R.C. Chapter 2744 has also been addressed in other cases by this Court. Justice Pfeifer's concurring opinion in *Garrett v. Sandusky*, (1994) 68 Ohio St.3d 139, 141, 624 N.E.2d 704 finds that R.C. 2744.01(C)(2)(u) violates Section 16, Article I of the Ohio Constitution, which provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
>
> Suits may be brought against the state, in courts and in such manner, as may be provided by law.

The Constitutional Convention of 1912 amended this section to include the last sentence. Justice Pfeifer recognized that R.C. 2744 unconstitutionally "attempts to define the extent to which political subdivisions can be sued rather than defining the manner and courts where actions could be brought." *Id.* at 142. He concludes that, in light of the original intent of the constitutional delegates, "the remaining vestiges of local governmental immunity should be abolished." *Id.*

> The actual wording of the amendment expresses the intent of the delegates who enacted it. The General Assembly is responsible for determining the appropriate "courts" in which suits against the state are to be filed, and it must design the "manner," or procedures, for plaintiffs to follow in these courts. *Nowhere in the provision does it say that the General Assembly shall determine what causes of action can be brought against the state. Thus, the true intent of the amendment to Section 16, Article I was to abolish sovereign immunity in its entirety.*
>
> This true meaning has been ignored by Ohio case law, but should be acknowledged today. Governmental immunity, including municipal immunity, is contrary to the clear meaning and mandate of the Ohio Constitution.

Id. at 142-144. (emphasis added). To the extent that R.C. Chapter 2744 denies Appellee a remedy against any of the Appellants, it is unconstitutional.

G. R.C. Chapter 2744, If Applied, Violates Appellee's Right to a Jury Trial Under Article I, Section 5 of the Ohio Constitution

R.C. Chapter 2744 additionally violates the right to trial by jury under to Article I, Section 5 of the Ohio Constitution which states:

> The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

Justice Douglas' dissent in *Glandon v. Greater Cleveland Regional Transit Authority* (1996), 75 Ohio St.3d 312, 323-43, 1996-Ohio-137 notes that any limitation on the jury's right to determine damages necessarily means that the right to a jury trial is not "inviolate." *Id.* at 332. Not all cases are guaranteed a jury trial, but the guarantee does extend to causes of action where the right existed at common law at the time the Ohio Constitution was adopted. *Id.* Justice Douglas further noted that, since the "right to trial by jury in a suit against a political subdivision of the state did exist prior to 1851, it follows that the right is constitutionally protected." *Id.* at 337.

The majority in *Butler* also indicated that negligence actions evolved from the common law, and the right to trial by jury existed in such actions against a political subdivision at the time the Ohio Constitution was adopted. 92 Ohio St.3d at 372. Therefore, R.C. Chapter 2744 cannot be applied to excuse the wrongful conduct of a political subdivision because to do so would violate the Appellee's right to trial by jury. *Id.* Article I, Section 5 of the Ohio Constitution requires that any portions of R.C. Chapter 2744 preventing a jury trial or determination of damages be held unconstitutional.

III. CONCLUSION

Ohio Revised Code sections 2151.421 and 2151.99 expressly impose liability upon Appellants for the failure to report the child abuse of Sydney Sawyer to law enforcement. Further, R.C. 2919.22 expressly imposes liability, within the meaning of R.C. 2744.02(B)(5) and 2744.03(A)(6)(c) upon Appellants for creating a substantial risk to the health or safety to Sydney Sawyer. DCFS is not entitled to reinstatement of immunity through the defenses in either R.C. 2744.03(A)(3) or 2744.03(A)(5). Further, under R.C. 2744.03(A)(6)(b), the individual DCFS Appellants are not immune from liability as their actions and omissions in this case were reckless. Finally, if any of the immunity provisions apply to preclude or limit any of Appellee's claims or recovery, application of R.C. Chapter 2744 violates Appellee's rights to a remedy and to a jury trial under Article I, Sections 16 and 5 of the Ohio Constitution. For the foregoing reasons, Appellee respectfully requests that the Court affirm the judgment of the Court of Appeals and remand this case for trial on all claims.

Respectfully submitted,

John W. Martin, Esq. (0015279)
Andy Petropouleas, Esq. (0070090)
William D. Beyer, Esq. (0027880)
Joan E. Pettinelli, Esq. (0047171)

Counsel for Appellee John K. O'Toole

CERTIFICATE OF SERVICE

I certify that a copy of Appellee's Merit Brief was sent by U.S. mail, postage prepaid, on October 1, 2007 to the following:

David Ross, Esq.
Michelle J. Sheehan, Esq.
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, Ohio 44115-1093
Counsel for Appellants Cuyahoga County Department of Children and Family Services, William Denihan and Kamesha Duncan

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

J. Eric Holloway, Esq.
Isaac, Brant, Ledman and Teetor, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
Counsel for Amicus Curiae Public Children Services Association of Ohio

Matthew J. Lampke, Deputy Attorney General
Ohio Attorney General
30 E. Broad Street 26th Floor
Columbus, OH 43215-3400
Counsel for Ohio Attorney General

Joan E. Pettinelli, Esq. (0047171)
Counsel for Appellee John K. O'Toole