

IN THE SUPREME COURT OF OHIO

CHERITA RANKIN, ET AL.)
)
 Plaintiffs/Appellees,)
)
 vs.)
)
 CUYAHOGA COUNTY DEPARTMENT)
 OF CHILDREN AND FAMILY)
 SERVICES, ET AL.)
)
 Defendants/Appellants.)
)

Case No. 2007-0306
On Appeal from the
Cuyahoga County Court of Appeals,
Eighth Appellate District
Court of Appeals Case No. 86620

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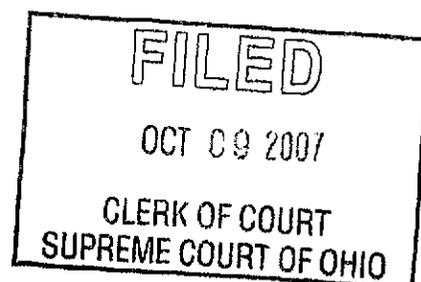


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REPLY

Before answering the Appellees' legal arguments, the appellants must first take vigorous issue with certain factual assertions contained in the Appellees' Merit Brief.

In particular, the Appellees assert *without citation to the record* that that the appellants "admit that their inaction led to multiple sexual assaults of a small child." See Appellees' Merit Brief at p. 1. The appellants made no such admission. Andre Martin furtively assaulted his three-year old daughter while she sat on his lap with her coat covering her lap during a court-ordered visitation session. (7/14/04 Plaintiffs' Second Amended Complaint at para. 3.)

The Appellees then say *without citation to the record* that that the appellants "admit that they violated a Cuyahoga County Court of Common Pleas order requiring all visits between the child and her father to be supervised, as the father had previously been accused of sexually assaulting his three-year old daughter." See Appellees' Merit Brief at p. 1. The appellants again made no such admission. The Appellees' own evidence reflected that a medical examination and CCDCFS investigation following the April 2003 referral was unable to substantiate sexual abuse of D.M. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit D, pp. 15-16.) Nor did the appellants admit that they violated a court order requiring supervised visitation.

Continuing, the Appellees assert *without citation to the record* that that the appellants "admit that, while under their watch, the young girl was sexually molested by her father once in a private bathroom, and then again in plain view of numerous Appellants' employees." See Appellees' Merit Brief at p. 1. The appellants again made no such admission. The Appellees' own evidence reflected that when a staff person informed the visitation supervisor during the July 23, 2003 incident that Mr. Martin had taken the child into a restroom without approval, the

supervisor personally escorted the father and child back to the visitation area. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit H, p. 21.) Martin said he accompanied his daughter only out of concern for her personal hygiene. (Id.)

The Appellees say that "governmental employees are allowed to present a sexual predator with his victim, not once, but twice, in direct violation of both a court order and the laws of the State of Ohio." See Appellees' Merit Brief at p. 2. This is false in several respects. As has been noted, the initial sexual abuse allegation could not be substantiated. The Juvenile Court thereafter ordered Martin to have visitation with his daughter. Martin was not declared a sexual predator until after his conviction for this incident. And the appellants did not act in direct violation of a court order or the laws of Ohio.

The Appellees say "Mr. Martin's visits were to be supervised due to his proclivity for improperly toughing his daughter." See Appellees' Merit Brief at p. 4. First, as has been noted, the initial sexual abuse report could not be substantiated. Second, it is inconceivable to think that the Juvenile Court would have ordered *any* visitation if there were any reason to believe that Martin had any "proclivity for improperly toughing his daughter."

The Appellees say that Martin fondled his daughter "in full view of DCFS employees." See Appellees' Merit Brief at p. 5. As has been noted, the Appellees' own evidence confirmed that Martin placed a coat over the child's lap that prevented observation of his actions.

While the record thus does not substantiate the Appellees' factual assertions, those allegations still do not provide grounds to impose liability against the appellants in this case.

ARGUMENT

The Appellees' Merit Brief devotes considerable time and the first section of its argument, identified there as "Proposition of Law No. 1," arguing that the Political Subdivision Tort Liability Act of 1985, R.C. 2744.01 *et seq.*, violates Article I, Section 16 of the Ohio Constitution. This proposition is not properly before this Court, however, because it was not accepted for review and indeed was not ever raised by the Appellees at any point during the course of this litigation.

The Appellees' second and third propositions of law correspond respectively to the appellants' first and second propositions of law.

For this Reply Brief, the appellants will first respond to the new proposition of law advanced by the Appellees as their "Proposition of Law No. 1." The appellants will then reply to the Appellees' second and third propositions that relate respectively to the appellants' first and second propositions of law.

RESPONSE TO APPELLEES' PROPOSITION OF LAW NO. 1:

The Supreme Court of Ohio accepted this discretionary appeal on Proposition of Law Nos. I and II of the appellants. See *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 113 Ohio St.3d 1512, 2007-Ohio-2208, 866 N.E.2d 511 (Table). The Appellees' Merit Brief now purports to assert a third proposition of law, which they identify as "Proposition of Law No. 1," challenging for the first time the constitutionality of Chapter 2744 of the Ohio Revised Code. For any number of reasons, the Appellees' first proposition of law should be rejected.

First, the Supreme Court of Ohio did not accept this discretionary appeal to determine whether R.C. Chapter 2744 violates Article I, Section 16 of the Ohio Constitution. The Court accepted the *appellants'* discretionary appeal, agreeing to consider only Proposition of Law Nos.

I and II advanced by the appellants. The *Appellees'* jurisdictional memorandum did not ask the Court to consider whether R.C. Chapter 2744 violates Article I, Section 16 of the Ohio Constitution. Indeed, the Appellees' jurisdictional memorandum declared to the contrary that "[t]his case does not concern a matter of public or great general interest, nor does it involve a substantial constitutional question." See "Memorandum Contra Jurisdiction of Appellees Cherita Rankin, et al." at p. 1. The Supreme Court of Ohio need not address a constitutional question that is not properly before the Court.

Second, the Appellees never raised this contention in any of the courts below. The Appellees did not question the constitutionality of R.C. Chapter 2744 at any point in the summary judgment motion practice before the trial court or at any point in the proceedings before the Court of Appeals. The Appellees' Merit Brief in this case does not contain any citations to any portion of this record to show that they ever raised this issue before now. As a consequence, neither the trial nor the appellate court had any occasion to address this issue.

"A party who fails to raise an argument in the court below waives his or her right to raise it here." *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 1993-Ohio-49, 611 N.E.2d 830. See *Zakany v. Zakany* (1984), 9 Ohio St.3d 192, 193, 459 N.E.2d 870 (proposition of law that was not assigned as error in the court below or briefed by either party "is not properly before us for consideration now."); *Luli v. Sun Products Corp.* (1979), 60 Ohio St.2d 144, 149-150, 398 N.E.2d 553 (proposition of law that was "neither raised nor passed upon in the lower court will not be ruled upon by the Supreme Court.") Because the Appellees failed to contest the constitutionality of R.C. Chapter 2744 at any time before they filed their Merit Brief in this case, that issue is not properly before this Court.

Third, the Appellees never requested a declaratory judgment as to the constitutionality of R.C. Chapter 2744 by asserting such a claim in their pleadings and serving the Attorney General of Ohio. See *Cicco v. Stockmaster*, 89 Ohio St.3d 95, 2000-Ohio-434, 728 N.E.2d 1066, at syllabus; *Malloy v. City of Westlake* (1977), 52 Ohio St.2d 103, 370 N.E.2d 457, at syllabus. The Appellees cannot now request a declaratory judgment from this Court.

Fourth, the Supreme Court of Ohio, on at least two separate occasions, has previously upheld the constitutionality of R.C. Chapter 2744 against the contention that the law violated Article I, Section 16 of the Ohio Constitution.

Specifically, in *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 1994-Ohio-368, 639 N.E.2d 31, the court rejected the contention that there was a fundamental right to sue political subdivisions for damages, holding that the General Assembly had the power to define the contours of political subdivision liability and that R.C. 2744.02(B)(4) in particular did not violate Article I, Section 16 of the Ohio Constitution. *Fabrey*, syllabus at paragraph three; *id.*, 70 Ohio St.3d at 354-355, 1994-Ohio-368, 639 N.E.2d 31.

Subsequently in *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 1995-Ohio-295, 653 N.E.2d 1186, the Supreme Court of Ohio again upheld the constitutionality of R.C. Chapter 2744, saying the following:

It may well be argued that any grant of immunity necessarily impairs some individual's right to seek redress in a court of law, and thus treats some persons harshly. All too frequently, decisionmaking requires difficult balancing of competing interests and equities. The Ohio Constitution specifies that suits may be brought against the state "as provided by law." This language can only mean that the legislature may enact statutes to limit suits if it does so in a rational manner calculated to advance a legitimate state interest. In *Menefee [v. Queen City Metro.]* (1990), 49 Ohio St.3d 27, 550 N.E.2d 181], we approved the use of limited classifications devised to respond to reasonable concerns. This case also presents limited immunity granted in specific situations of high public interest.

Id. at 669, 1995-Ohio-295, 653 N.E.2d 1186. The court specifically upheld the constitutionality of R.C. 2744.02(B)(1). Id. at syllabus.

These decisions upholding the constitutionality of R.C. Chapter 2744 remain the law of Ohio. The Appellees' Merit Brief does not even acknowledge these decisions, let alone attempt to satisfy the test necessary to overrule a prior decision of the Supreme Court of Ohio. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, syllabus at paragraph one. The Appellees' Merit Brief instead cites only to individual opinions that have expressed dissenting views about R.C. Chapter 2744. But "deference to an established majority opinion, despite a jurist's disagreement with the opinion, is part of the court's rich tradition of adherence to stare decisis." *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, 863 N.E.2d 591, at ¶ 27.

The argument contained in the Appellees' Proposition of Law is not properly before this Court. The appellants respectfully urge the Court to reject that legal proposition.

REPLY IN SUPPORT OF APPELLANTS' FIRST PROPOSITION OF LAW:

The Appellees' Merit Brief does not contest that appellant CCDCFS is a public children services agency that was engaged in a governmental function. The Appellees' Merit Brief also does not contest that under the three-tiered analysis applicable to political subdivisions, CCDCFS generally is not liable pursuant to R.C. 2744.02(A)(1) and that the Appellees have not asserted any grounds that could impose liability on CCDCFS under R.C. 2744.02(B)(1) through (5). Indeed, the Appellees' Merit Brief does not even mention "three-tiered analysis."

The Appellees nevertheless ask the Court to now recognize *two* (2) new exceptions to R.C. 2744.02(A)(1) that are not found anywhere in R.C. 2744.02(B)(1) through (5). For the

reasons that follow, the Appellees' argument is contrary to the law of Ohio and should be rejected.

The Appellees initially ask the Court to "create an exception to sovereign immunity, stripping immunity from a political subdivision if it violates a court order, proximately causing harm to a private citizen." See Appellees' Merit Brief at p. 14. This contention is not well taken for several reasons.

First, this issue is not properly before this Court because it was never raised in the courts below. The Appellees did not argue in their summary judgment motion practice before the trial court or in their appellate briefing before the Court of Appeals that a political subdivision's alleged violation of a court order is an exception to the general rule of R.C. 2744.02(A)(1). Because this question was not presented to or passed upon by either of the courts below, it should be considered waived. See *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 1993-Ohio-49, 611 N.E.2d 830.

Second, the Appellees are really asking the Court to disregard R.C. 2744.02 as it is written and to create a new exception beyond that which the General Assembly established under R.C. 2744.02(B)(1) through (5). The Appellees' request is contrary to fundamental Ohio law.

In *Weaver v. State* (1929), 120 Ohio St. 44, 165 N.E. 573, the Supreme Court of Ohio said this:

Whatever the reasons of the Legislature in passing the act may have been, ours is a government of laws, and courts must take the law as they find it; and, if a change is to be made, the same must be made by the Legislature and not by the courts. "To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative." *Ogden v. Blackledge*, 2 Cranch (6 U.S.), 277, 2 L. Ed. 276.

Id. at 46, 165 N.E. 573. In *State ex rel. Harness v. Roney* (1910), 82 Ohio St. 376, 92 N.E. 486, the Supreme Court of Ohio declared: "The province of construction is to ascertain and give

effect to the intention of the Legislature, but its intention must be derived from the legislation, and may not be invented by the court.” *Id.*, syllabus at paragraph one. And in *State ex rel. Clinger v. White* (1944), 143 Ohio St. 175, 54 N.E.2d 308, the court reiterated that “it is not the function or province of the courts to question the wisdom or propriety of legislative action or by judicial construction to repeal, amend or supplement legislation duly enacted.” *Id.* at 180-181, 54 N.E.2d 308.

To the extent that the Appellees now ask the Court to “create” a new exception beyond those established by the General Assembly under R.C. 2744.02(B)(1) through (5), the Appellees’ argument is contrary to fundamental Ohio law and should be rejected.

The Appellees alternatively maintain that the “public duty” rule and its “special relationship” exception survived the enactment of R.C. Chapter 2744 and that a violation of the “special relationship” exception “voids a political subdivision’s claim of immunity.” See Appellees’ Merit Brief at p. 14. This argument, too, is fundamentally flawed.

Contrary to the Appellees’ assertion on p. 14 of their Merit Brief, the Court’s decision in *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, did *not* note “that a governmental entity’s sovereign immunity is destroyed when an individual establishes a ‘special relationship’ with the governmental entity.” The *Yates* court discussed but did not apply either the public duty rule or its special relationship exception in that case. As the Appellants noted at pp. 17-18 of their Merit Brief, the *Yates* court in fact applied the three-tiered 2744 analysis when it held that the board of education could be liable under former R.C. 2744.02(B)(5) for its failure to report a teacher’s sexual abuse of a minor student in violation of R.C. 2151.421 that proximately resulted in the sexual abuse of another minor student by the same teacher. *Id.* at syllabus.

Yates did not establish that the special relationship exception to the public duty rule superseded the three-tiered analysis under R.C. 2744. If that were the case, the *Yates* court assuredly would not have had to apply the three-tiered analysis at all. While the *Yates* opinion indicates that the public duty rule “remains viable as applied to actions brought against political subdivisions pursuant to R.C. Chapter 2744,” see *id.* at ¶ 32, fn. 2, the fact that the public duty rule may coexist with R.C. Chapter 2744 does not mean that it supplants R.C. Chapter 2744. Footnote two to *Yates* at best suggests that public duty rule and its special relationship exception may be used if R.C. 2744.02(B)(1) through (5) *permits* a cause of action to be brought. But when none of the statutory exceptions under R.C. 2744.02(B)(1) through (5) are applicable, then R.C. 2744.02(A)(1) *precludes* the cause of action.

In this case, the Appellees’ Merit Brief concedes at least tacitly that there was no basis for political subdivision liability against CCDCFS under R.C. 2744.02(B)(1) through (5). As a result, CCDCFS could not be liable as a matter of law pursuant to R.C. 2744.02(A)(1).

The Appellees additionally rely on *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 159 Ohio App.3d 338, 2004-Ohio-6618, 823 N.E.2d 934, but the Supreme Court of Ohio vacated that decision in *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199. The appellate court’s opinion would not appear to have any precedential value after its decision was vacated by this Court.

While the Appellees say that Andre Martin “had previously sexually assaulted his daughter,” see Appellees’ Merit Brief at p. 16, the record in truth reflects that a medical examination and CCDCFS investigation following the April 2003 referral was unable to substantiate sexual abuse. (5/27/05 Plaintiffs’ Brief in Opposition to Defendants’ Motion for Summary Judgment at Exhibit D, pp. 15-16.) After the CCDCFS complaint alleging D.M. was

neglected was amended to allege that she was dependent, the Juvenile Court ordered that Mr. Martin was to have supervised visitation with his daughter. (7/14/04 Plaintiffs' Second Amended Complaint at para. 2; 5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit A.) Andre Martin's furtive criminal conduct does not make CCDCFS liable under R.C. 2744.02(B)(1) through (5).

Appellant respectfully urges the Court to reverse the appellate court's judgment that failed to analyze this case properly under R.C. Chapter 2744 and to hold that the special relationship exception to the public duty rule does not supersede the statutory framework for determining political subdivision liability under R.C. Chapter 2744.

REPLY IN SUPPORT OF APPELLANTS' SECOND PROPOSITION OF LAW:

In *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, the Court recognized that an early determination of whether a political subdivision is immune is beneficial to the parties because it may save the time, effort, and expense of unnecessary protracted litigation. *Id.* at ¶¶ 25-26. An early determination of whether an employee of a political subdivision is immune is likewise beneficial to the parties. All too often, however, political subdivision employees like Mr. McCafferty and Ms. Zazzara are sued individually because, as the Appellees candidly acknowledge, "plaintiffs are blocked from seeking recovery from the [political subdivision] itself." See Appellees' Merit Brief at p. 12. And by simply alleging that the individual employee acted "recklessly," the individual employee is effectively deprived of any immunity benefit ostensibly conferred by R.C. 2744.03(A)(6). The appellants respectfully urge the Court to provide meaningful guidance by which an employee's conduct may be judged.

Toward that end, the appellants' Merit Brief proposed that an employee of a public children services agency should be immune from liability where the employee's acts or omissions are not contrary to a clear standard of conduct and in conscious disregard of a known risk. Application of such a standard would bring some measure of objective consistency into the analysis so as to permit an early determination of whether there is any legal basis to find that the employee acted recklessly. Just as a political subdivision's potential for civil liability may be susceptible to consideration from the pleadings alone, so too should an individual employee's potential liability be readily apparent if the legislative balance struck under R.C. Chapter 2744 is to be maintained.

For their part, the Appellees do not address the appellants' proposed standard other than to say that "[t]he bar is already set extraordinarily high" because "[r]ecklessness is already a difficult standard to meet." See Appellees' Merit Brief at pp. 20-21. But the Appellees still do not identify the specific conduct of either Mr. McCafferty or Ms. Zazzara that should subject them to individual civil liability for Andre Martin's criminal conduct. As noted previously, the appellate court's suggestion that Mr. McCafferty or Ms. Zazzara knew that Mr. Martin had molested D.M. in the past is unsupported by the record. Even if Estella Rankin complained previously that Mr. Martin should not be allowed to take D.M. into the bathroom, the Appellees' own evidence reflected that when a staff person informed the visitation supervisor during the July 23, 2003 incident that Mr. Martin had taken the child into a restroom without approval, the supervisor personally escorted the father and child back to the visitation area. (5/27/05 Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at Exhibit H, p. 21.) Martin said he accompanied his daughter only out of concern for her personal hygiene. (Id.)

In any event, the Appellees have never identified the specific conduct of Mr. McCafferty or Ms. Zazzara that deprived them of the immunity conferred by R.C. 2744.03(A)(6)(b). Nor can the Appellees fairly complain about the trial court's discovery rulings. While that issue was not accepted for consideration in this discretionary appeal, the appellants respectfully submit that the determination of whether a political subdivision and/or its employees are subject to civil liability under R.C. 2744 really presents a threshold question of law. Without having first established some proper legal basis for civil liability, protracted discovery prematurely and unnecessarily consumes the parties' resources in a manner that frustrates the legislative intent to obtain immunity determinations early in the proceedings. The trial court's regulation of discovery in this case was wholly consistent with that legislative intent.

In any event, nothing in this case suggests that Mr. McCafferty or Ms. Zazzara did anything in perverse disregard of a known risk that Mr. Martin would engage in improper conduct towards his daughter. They did not act contrary to any clearly established standard of conduct. They did not act in conscious disregard of a known risk. By any measure, these individual employees did not act in such a manner to deny them of the legal immunity conferred by R.C. 2744.03(A)(6). The appellants respectfully urge this Court to reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

CONCLUSION

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

Respectfully submitted,

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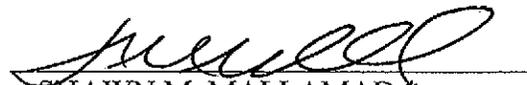
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