

IN THE SUPREME COURT OF OHIO

CASE NO.: 2007-0056

On Appeal from the
Court of Appeals Eighth Judicial District
Cuyahoga County, Ohio
Court of Appeals Case No. CA-06-87476

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

vs.

WILLIAM DENIHAN, et al.,
Defendants-Appellants.

TRIAL COURT NO.: CV450833

REPLY BRIEF OF
DEFENDANT-APPELLANT TALLIS GEORGE MUNRO

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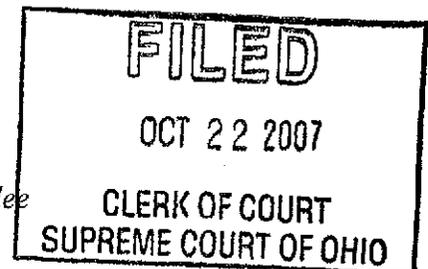


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REPLY

STATEMENT OF FACTS

Appellee's brief is replete with factual inaccuracies; conclusions unsupported by evidence and mischaracterization of testimony on the record. Because of this, it is necessary to bring to the Court's attention what actually was described by the witnesses during deposition. Because of the page limitations imposed on Appellant's reply brief, Munro can only address a limited number of the more important inaccuracies, which if left uncorrected, might permit Appellee to mislead the Court.

"She had no prior experience as a social work[sic] and little to no other professional work experience." (Popchak Depo at pgs. 60-62)
(Appellee brief at pgs. 2-3)

Duncan testified that she had received training in the investigation of abuse cases. Duncan testified that she had received 2-1/2 months of training involving all aspects of child abuse investigations. (Duncan Depo at pgs. 11-12). Munro testified that he believed that Duncan had previous experience with 6 to 8 Priority One Referrals prior to her investigation of the Sydney Sawyer case. (Duncan Depo at pg. 51). (Duncan Depo at pgs. 13-16).

"Munro admittedly did not understand the rationale of the Safety Assessment and Risk Assessment Forms under SDM. (Munro Depo at pgs. 24-26)." (Appellee brief at pg. 5.)

Even though the question was put to Munro, it was never answered. Before the question was answered a discussion was then held among the attorneys to clarify which exhibits were being used by the witness and whether the forms referred to the SDM protocol or the FRAM protocol. After the attorneys were able to determine what exhibits were being used, the question was left unanswered, and never proffered again.

“DCF policy required the safety assessment to be completed “before leaving the child in the home or returning a child to the home during the investigation” (Duncan Depo Exhibit 1, SDM Policy and Procedures Manual, pg. 32). (Appellee brief at pg. 6.)

According to Unit Supervisor Popchak, the safety assessment **form** was to have been completed within 48 hours of the start of the investigation. (See Popchak Depo at pg. 122). Regardless of when the form was required to be completed, the safety and assessment **evaluation** was completed during the initial investigation. Munro testified that questions concerning the safety and assessment form were completed between himself and the field social worker while Duncan was at the daycare center. (Munro Depo at pgs. 134-140; 112-117). Duncan also acknowledged that the investigation and assessment form was completed at the daycare center, and the safety plan was probably completed on March 29th, (i.e., the date the investigation was initiated). (Duncan Depo at pgs. 95-96).

“Duncan did not believe Sydney’s rendition of how she was injured and thought that she was “lying to cover something up”.” (Appellee brief at pg. 10.)

In fact, Duncan observed the marks on Sydney Sawyer’s body. There were explanations given that were acceptable to Duncan. There were others of which she was suspicious of abuse. However, at no time did Duncan conclude that Sydney had been physically abused. Duncan did not suspect that the marks on the left side of Sydney’s face were the result of a punch mark. (Duncan Depo at pgs. 51-52). Duncan did not believe that the marks located on Sydney’s back were a result of physical abuse. (Duncan Depo at pg. 55). Duncan was suspicious of the burns marks on the palmar surface of Sydney Sawyer’s hands. (Duncan Depo at pgs. 56-58). Duncan was finally questioned concerning her overall opinion as to whether abuse had been **substantiated**:

“Q: Now in just observing Sydney, based on everything you observed, was there any doubt in your mind as to whether or not her injuries or at least some of them were inflicted by someone else.

A: Yes.

Q: There was doubt in your mind?

A: Yes.

Q: You weren't sure that these injuries were the result of abuse?

A: No, I wasn't” (Duncan Depo at pgs. 63-64)

“Duncan, however, took no steps to contact Patrick Frazier and did not ask LaShon for his address or phone number.” (Duncan Depo at pgs. 87-89)

Duncan physically met with Patrick Frazier on March 30th, the day following the initiation of the investigation. Duncan was at LaShon Sawyer's home visiting the premises and encountered Frazier. (Duncan Depo at pgs. 119-120.)

“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 the time I did not instruct the social worker to request an emergency staffing.” (Appellee brief at pg. 16.)

Munro made these statements after being notified of Sydney Sawyer's death while under emotional stress. This comment was made in response to the “fatal review” initiated by the agency after Sydney's death. The comment was not based upon Munro's initial observations and opinions that he developed at the onset of the investigation. Munro's initial clinical opinion was that physical abuse had not been substantiated. (Munro Depo at pgs. 104-107). Munro relied upon information provided by the field social worker, Duncan; and information provided by the daycare center workers. Munro

did not believe that abuse was indicated for any of the depicted marks on Sydney's body except for the area to her face.

“Neither Duncan nor Munro completed the safety assessment which gives guidance in whether to remove a child from a home”. (Appellee brief at pg. 17.)

The safety assessment was completed by both Munro and Duncan during a telephone call on the first day of the investigation. It was the information learned from Duncan's investigation that allowed Munro to formulate a safety risk assessment in advance of developing a safety plan. Munro believed that Duncan was completing the safety assessment form as they were going over the questions on the telephone. What was important is that Munro utilized Duncan's responses to the form's questions in adapting the safety plan. (Munro Depo at pgs. 166-169).

“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.” (Appellee brief at pg. 17.)

The NEON Clinic was a medical care facility who had treated Sydney Sawyer before the investigation was initiated. Part of the safety plan required LaShon Sawyer to have Sydney Sawyer examined by NEON Clinic physicians. Munro had requested this examination in order to obtain a forensic explanation concerning the marks that were depicted on Sydney's body. (Munro Depo at pgs. 119-120; 130-131.) The information learned from the two (2) examinations conducted at the NEON Clinic was made available to Munro through Duncan who said that she who had contacted and questioned the physician. (Munro Depo at pgs. 179-181.)

ARGUMENT

This case is before the Court for consideration of Propositions of Law Nos. I and II of appellant Tallis George Munro. See *O'Toole v. Denihan*, 113 Ohio St.3d 1465, 2007-Ohio-1722, 864 N.E.2d 652 (Table); *O'Toole v. Denihan*, 114 Ohio St.3d 1429, 2007-Ohio-3063, 868 N.E.2d 681 (Table). The case is also before the Court for consideration of Propositions of Law Nos. I, II, and III of appellants Department of Children and Family Services, William Denihan, and Kamesha Duncan. See *O'Toole v. Denihan*, 114 Ohio St.3d 1429, 2007-Ohio-3063, 868 N.E.2d 681 (Table).

Appellant Munro's Merit Brief was organized to discuss the propositions of law that the Court accepted for review.

The Merit Brief of Appellee John K. O'Toole addresses Munro's legal propositions but is not organized in a manner that specifically responds to Munro's propositions of law. Appellee's Merit Brief additionally raises constitutional questions that the lower courts did not determine; that the Appellee did not ask this Court to consider; and this Court did not accept for consideration.

For purposes of this Reply Brief, appellant Munro will first respond to the Appellee's arguments as they relate respectively to Munro's first and second propositions of law. Appellant Munro will then respond to Appellee's constitutional contentions.

REPLY IN SUPPORT OF APPELLANT MUNRO'S FIRST PROPOSITION OF LAW:

Appellant Munro's first proposition of law contends that without some showing that his acts or omissions were contrary to a clear standard of conduct and in conscious disregard of a known risk, it cannot fairly be said that he acted recklessly so as to be denied the benefit of immunity under R.C. 2744.03(A)(6)(b). See "Brief of Defendant-

Appellant Tallis George Munro” at pp. 11-29. In response, Appellee asserts that “substantial evidence of recklessness defeats Munro’s immunity under R.C. 2744.03(A)(6)(b).” See Appellee’s Merit Brief at pp. 40-44.

Yet for all the criticism Appellee levels against Munro (and that is unfounded, for reasons that will be discussed hereafter), Appellee still cannot show this Court either of the following: (1) that there existed some clear rule of conduct governing these circumstances that Munro failed to observe; and (2) that Munro violated that standard of conduct in conscious disregard of a known risk. If an employee’s conduct is to be characterized as “reckless,” it is only fair that the standard of expected conduct be objectively clear and consciously disregarded. Because Munro did not violate a clearly established standard of behavior with conscious appreciation of the risk, the Court of Appeals erred in reversing the summary judgment rendered in Munro’s favor. The appellate court’s judgment should accordingly be reversed.

Contrary to Appellee’s perfunctory suggestion that Munro waived this issue, Munro has maintained from the inception of this case that he did not act in a reckless manner, just as Appellee has maintained that Munro did act in a reckless manner. Indeed, Appellee went so far as to hire a California administrator just to say in her “expert” opinion that Munro (and the other appellants) acted recklessly. This issue plainly has been a central issue throughout the course of this litigation. That this disputed issue has been developed through legal briefing for this Court’s consideration can hardly be construed as a waiver of the issue.

As to the merits, Appellee again resorts to a generic definition of “reckless” without ever discussing with particularity the specific standard of conduct that governed

and indeed controlled Munro's actions in this case. Appellant Munro's Merit Brief in this case discussed in detail the provisions of the Ohio Revised Code and Ohio Administrative Code that governed his conduct of this investigation. See "Brief of Defendant-Appellant Tallis George Munro" at pp. 18-24. Munro's conduct was consistent with R.C. 5153.16, id. at Appx. pp. A-51 through A-55, and with Ohio Adm. Code 5101:2-34-32, id. at Appx. pp. A-57 through A-58.

In response, Appellee says:

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.

See Appellee's Merit Brief at p. 42. Appellee's argument itself fails on multiple levels.

First, Appellee cannot identify any provision of the Ohio Administrative Code that Munro violated.

Appellee initially asserts that Munro failed to contact the police "as required." See Appellee's Merit Brief at p. 42. That issue is specifically addressed and refuted within Munro's Second Proposition of Law.

Appellee says "Sydney's case was an 'emergency.'" See Appellee's Merit Brief at p. 42. Ohio Adm. Code 5101:2-34-32(C) states:

The PCSA shall consider the report an emergency when it is determined that there is imminent risk to the child's safety or there is insufficient information to determine whether or not the child is safe at the time of the report.

In this case, it was not determined that there was imminent risk to Sydney's safety nor was there insufficient information to determine her safety. Appellee's characterization of this as an "emergency" is thus without substantiation.

Appellee then says Munro violated the requirement of face-to-face interviews under Ohio Adm. Code 5101:2-34-32(G)(1). See Appellee's Merit Brief at p. 43. Munro did not violate that provision because Duncan immediately met face-to-face with LaShon Sawyer at the Daycare and later at the Sawyer home. Duncan additionally spoke with Patrick Frazier, who stayed in the residence at times, and with LaShondra Cundrif, who babysat Sydney at the Sawyer residence. Nothing in the Code requires supervisors up the chain to duplicate the work of the assigned caseworker.

Appellee next says Munro violated Ohio Adm. Code 5101:2-34-32(I) by not enacting a safety plan. See Appellee's Merit Brief at p. 43. Munro did not violate that provision because Sydney was not determined to be "at imminent risk of harm" and Munro developed a case management plan consistent with R.C. 5153.16(A)(18). Nor does Appellee identify any code provision that required Munro's supervisor to approve the case management plan.

In short, Appellee cannot identify any clearly established duty governing Munro's behavior in this case. Munro in fact acted consistent with the code provisions governing this investigation. By any fair measure, it cannot be said that Munro acted in reckless disregard to clearly defined rules of behavior.

Second, even assuming Munro failed to adhere to his employer's internal policies and procedures, that still is not a violation of *Ohio law*. And contrary to Appellee's assertion, Popchak did not testify that "a staffing was required" but rather said only that "a staffing would have been a better course of action than just having a safety plan." (Popchak Depo. at 183.) Nor can a former county commissioner's personal opinion dictate whether an employee acted in violation of *Ohio law*.

Third, Appellee provides no citation or authority whatsoever to support his contention that Munro's acts were not discretionary. To the contrary, Ohio Adm. Code 5101:2-34-32(I) gave the PCSA discretion to select and/or combine among three (3) courses of action even after the PCSA determined that the child is in imminent risk of harm. Appellee does not identify any instance in which Munro's conduct was essentially ministerial and not discretionary such that there was only one clear course of conduct for him to pursue. The record instead makes clear that Munro at all times had to make discretionary judgment calls based on the best information available at that time. Nothing in this case suggests that he acted contrary to any clearly prescribed standard of conduct.

Contrary to Appellee's assertion, Munro does not rely on *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 1994-Ohio-368, 639 N.E.2d 31, for some "heightened definition of recklessness." See Appellee's Merit Brief at p. 42. Munro instead seeks meaningful standards to ascertain objectively when reckless conduct occurs, for which *Fabrey* offers a helpful construct.

Besides failing to show that Munro failed to observe a clear duty of care, Appellee likewise has not shown that Munro acted in conscious disregard of a known risk. Appellee disingenuously disputes that "medical records were reviewed," see Appellee's Merit Brief at p. 41. The testimony was that after LaShon Sawyer scheduled Sydney for a medical examination at the Neon Clinic in accordance with Duncan's direction, Duncan subsequently spoke with a clinic physician who plainly reviewed Sydney's medical records before telling Duncan that abuse was not indicated. (Munro Depo. at 179-180.) Regardless of whether a photograph showed a bruise indicating the

child was hit on the side of the face with a closed fist, repeated medical examinations did not indicate abuse.

The record for this case cannot sustain the Court of Appeals' determination that Munro acted recklessly so as to be denied immunity under R.C. 2744.03(A)(6)(b). The record here instead demonstrates that when appropriate standards are applied, Munro's acts or omissions were not contrary to a clear standard of conduct and in conscious disregard of a known risk. Appellant respectfully requests that this Court reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

REPLY IN SUPPORT OF APPELLANT MUNRO'S SECOND PROPOSITION OF LAW:

- A. **R.C. 2151.421 does not expressly impose liability upon an employee of a public children services agency for not cross-reporting information that the public children services agency received for investigation pursuant to R.C. 2151.421(A) or (B).**

Munro's second proposition of law argued in part that R.C. 2151.421 did not require Munro to cross-report information that DCFS had received for investigation to another law enforcement agency prior to completion of the DCFS investigation and did not expressly impose liability upon Munro for not cross-reporting that information while the referral was under investigation. See "Brief of Defendant-Appellant Tallis George Munro" at pp. 33-45. In response, Appellee asserts that DCFS employees are not immune from liability for failing to immediately report a referral they are investigating to another investigating agency. See "Appellee's Merit Brief" at pp. 24-35. For the reasons that follow, the Appellee's arguments are without merit.

Before addressing those arguments, appellant Munro must first correct a typographical oversight contained in his opening merit brief. On p. 34, the brief quoted R.C. 2151.421(A)(1) as it existed when Appellee's action accrued on April 27, 2000, but,

in quoting R.C. 2151.421(A)(1)(b), the brief inadvertently omitted the words “administrator or” before the clause “employee of a certified child care agency or other public or private children services agency.” Inasmuch as appellant Munro indisputably was an “employee of a *** public *** children services agency,” the inadvertent omission of the words “administrator or” should have no substantive affect as to Munro. To ensure accuracy, R.C. 2151.421(A)(1)(b) provided as follows during the relevant period of time:

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist, practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; **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; or a person rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion.

See 147 Ohio Laws, Part III, 4686, 4697.

For his part, Appellee begins his argument by citing *Campbell v. Burton*, 92 Ohio St.3d 336, 2001-Ohio-206, 750 N.E.2d 539, but Appellee’s brief substantively alters the Court’s opinion when it recites the following quotation:

[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).

See Appellee’s Merit Brief at p. 25 (emphasis added). In point of fact, however, this Court’s opinion actually reads as follows:

The 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 *teachers*, to report known or suspected child abuse.

Campbell v. Burton, 92 Ohio St.3d at 342, 2001-Ohio-206, 750 N.E.2d 539 (emphasis added). If Appellee's brief means to suggest that the Court's decision in *Campbell v. Burton* expressly recognized a social worker's duty to report under R.C. 2151.421, the Appellee's brief is misleading because *Campbell v. Burton* did not even concern "social workers" or any other administrator or employee of a PCSA.

Appellee nevertheless insists that R.C. 2151.421 requires PCSA employees to report immediately to law enforcement any knowledge or suspicion of child abuse so that the law enforcement agency may simultaneously conduct its own investigation. According to Appellee,

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.

See Appellee's Merit Brief at p. 27. Appellee apparently reasons that had Munro or other DCFS employees cross-reported the referral to the police department, a simultaneous police department investigation might have made an initial assessment different from that which Munro and Duncan reached and that the outcome might have been different. Putting aside the layers of speculation upon which this claim rests, Appellee's argument fundamentally misunderstands the operation of R.C. 2151.421.

In particular, Appellee does not dispute that R.C. 2151.421(A)(1)(a) expressly provides for mandatory reports to be made "to the public children services agency *or* a municipal or county peace officer in the county in which the child resides or in which the

abuse or neglect is occurring or has occurred.” R.C. 2151.421(A)(1)(a) (Emphasis added).

At the time Appellee’s action accrued, R.C. 2151.421 provided that any report that was received by the municipal or county peace officer would be referred to the PCSA for investigation. R.C. 2151.421(D)(1) specifically stated:

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

See 147 Ohio Laws, Part III, 4686, 4698.¹

R.C. 2151.421(F)(1) expressly directed the PCSA to investigate such reports, providing at that time as follows:

Except as provided in section 2151.422 of the Revised Code, **the public children services agency shall investigate, within twenty-four hours, each report of known or suspected child abuse or child neglect and of a known or suspected threat of child abuse or child neglect that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (J) of this section.** A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to a central registry which the state department of human services shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. **The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.** (Emphasis added.)

¹ R.C. 2151.421(D)(1) was subsequently amended but its current version is not substantively different.

See 147 Ohio Laws, Part III, 4686, 4698-4699.²

Thus R.C. 2151.421 expressly sought to avoid duplicative investigations by providing that any law enforcement agency that received a report “shall refer the report to the appropriate public children services agency.” R.C. 2151.421(D)(1). Under R.C. 2151.421(F)(1), “the public children services agency shall investigate” each report referred to the PCSA and “shall submit a report of its investigation, in writing, to the law enforcement agency.”

Despite this sensible division of responsibility, Appellee argues that PCSA employees must cross-report the referrals they receive immediately to a law enforcement agency. Yet no real purpose would be served by requiring the PCSA to make a report to a law enforcement agency pursuant to R.C. 2151.421(A)(1)(a), for that same law enforcement agency would just have to refer the report right back to the PCSA for investigation by the PCSA pursuant to R.C. 2151.421(D)(1). R.C. 2151.421(F)(1) further directs that the PCSA “shall investigate” each referral and “shall submit a report of its investigation, in writing, to the law enforcement agency.” R.C. 2151.421 does not require the PCSA to give the law enforcement agency progress reports as to the status of the PCSA investigation. Appellee’s contention that that the PCSA must cross-report the referrals it receives is not supported by law or simple common sense.

Appellee insists that the inclusion of PCSA employees in R.C. 2151.421(A)(1)(b) must mean that they have to report any knowledge or suspicion to law enforcement. But as Munro argued in his opening brief, a PCSA employee who independently learns of

² R.C. 2151.421(F)(1) was subsequently amended but those changes are not material here.

possible abuse or neglect must report the new matter to a PCSA or law enforcement agency. There is no duty, however, to cross-report referrals that are the very subject of the PCSA investigation.

In a new twist, Appellee now says that not *every* report made to DCFS must be reported to the police but that “the duty is triggered once the DCFS employee knows or suspects abuse, i.e. the employee substantiates an allegation of abuse.” See Appellee’s Merit Brief at p. 26. This contention, too, is without merit.

First, R.C. 2151.421(A)(1)(a) and (b) do not by their terms condition the duty to report upon whether the reporter, be it social worker or otherwise, has “substantiated” an allegation of abuse. To the contrary, the duty to report under R.C. 2151.421(A)(1)(a) is “triggered” when a person described in R.C. 2151.421(A)(1)(b)

knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child ***.

R.C. 2151.421(A)(1)(a). R.C. 2151.421(A)(1)(a) does not require proof positive that abuse occurred before reporting the matter to a PCSA or law enforcement agency. Nor is Appellee’s argument even consistent with the policy of protecting children if the condition reasonably indicates abuse or neglect.

Second, there would have been no duty to report here by Appellee’s reasoning because it is undisputed that the employee did not substantiate an allegation of abuse.

Contrary to Appellee’s assertion, Intake Unit Chief Popchak did not testify “that Ohio law requires DCFS to report every case of known or suspected child abuse to law enforcement.” See Appellee’s Merit Brief at p. 31. Popchak testified that DCFS practice

was to contact law enforcement if there was serious physical injury requiring hospitalization, children at home alone, or worker safety concerns. (Popchak Depo. at 131.) But regardless of whether or not a telephone call was made to the Cleveland police in this case, Munro was not required to make a report pursuant to R.C. 2151.421(A)(1)(a).

The Court of Appeals accordingly erred in denying Munro of immunity under R.C. 2744.03(A)(6)(c) based on R.C. 2151.421.

B. R.C. 2919.22 does not expressly impose liability upon an employee of a public children services agency who supervised the investigation of information that the public children services agency received pursuant to R.C. 2151.421(A) or (B).

Munro's second proposition of law additionally contests the appellate court's finding that Munro created a substantial risk to Sydney Sawyer's health, implicitly violating R.C. 2919.22, entitled "Endangering Children." See "Brief of Defendant-Appellant Tallis George Munro" at pp. 45-49. For his part, Appellee maintains that R.C. 2919.22 expressly imposes civil liability on Munro so as to deny Munro of immunity pursuant to R.C. 2744.03(A)(6)(c). See Appellee's Merit Brief at pp. 35-40. Appellee's arguments again are not well taken.

It should first be noted that Appellee's argument here appears to have shifted. In the Court of Appeals, Appellee contended that Munro (and the DCFS appellants) "stood in loco parentis to Sydney Sawyer and/or exercised custody of or control over of [sic] her." See "Appellant's Brief," filed 3/15/06, at p. 39. Because Appellee's Merit Brief here does not argue that Munro was in loco parentis to Sydney, Appellee tacitly concedes that issue, arguing now that "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.” See Appellee’s Merit Brief at p. 36. Appellee’s revised contention still lacks merit.

First, and contrary to Appellee’s assertion, nothing in the Court of Appeals’ decision remotely suggests that the appellate court found any “genuine issues of fact for trial as to whether DCFS employees exercised custody or control over [Sydney].” See Appellee’s Merit Brief at p. 37. The appellate court’s opinion said only that the appellants “created a substantial risk to Sydney’s health and safety by violation of their legal duties owed to her,” without identifying the particular legal duties owed by Munro or any of the other appellants. See *O’Toole v. Denihan*, Cuyahoga App. No. 87476, 2006-Ohio-6022, at ¶ 16. While the appellate court’s opinion implies that the court relied on R.C. 2919.22(A) as argued by Appellee, the court did not expressly cite that statute, let alone rule that there was a factual dispute over whether Munro or any of these appellants assumed “custody or control” over Sydney Sawyer.

Second, Appellee’s argument is again contrary to law and common sense. The fact that public children services agencies serve to protect children from abuse and neglect does not mean that those agencies necessarily assume “custody or control” over every child who is the subject of a referral. It assuredly does not mean that individual PCSA *employees* assume personal “custody or control” over the child. Surely a PCSA employee does not take on such personal responsibility just by answering a Hotline referral and telling the referent to keep the child while the PCSA employee responds to investigate the referral *as required by law*. If that were the case, at what point, if ever, would the PCSA employee’s personal responsibility for the future well being of that child

end? Neither the Appellee nor the Court of Appeals' decision in this case provides any basis in law or logic for this astounding extension of personal civil liability.

There is no basis to say in this case that appellant Munro had "custody or control" over Sydney Sawyer at any time. Sydney remained at all times in the lawful custody of her mother. Munro's status as Duncan's supervisor surely did not require Munro himself to have face-to-face contact with Sydney or anyone else, and indeed he was never even in Sydney's presence to exert any "custody or control" over her. Munro assuredly did not *create* any substantial risk to Sydney's health or safety. Nor did Munro violate any cognizable duty of care, protection, or support. Contrary to Appellee's assertion that Munro knew Sydney had suffered serious physical injuries in her home, Munro testified that the explanations given by Sydney and her mother to Duncan were plausible except for the facial injury for which neither offered an explanation. (Munro Depo. at 105-106.) In any case, there are no tenable grounds to say that Munro ever had "custody or control" over Sydney, nor are there grounds to hold here that R.C. 2919.22 expressly imposed civil liability on Munro just because Munro supervised Duncan.

The Court of Appeals accordingly erred in denying Munro of immunity under R.C. 2744.03(A)(6)(c) based on R.C. 2919.22.

RESPONSE TO APPELLEE'S CONSTITUTIONAL CONTENTIONS:

Appellee argues that R.C. Chapter 2744 violates Article I, Section 16 of the Ohio Constitution and Article I, Section 5 of the Ohio Constitution. See Appellee's Merit Brief at pp. 47-49. These contentions should be rejected for several reasons.

First, these contentions are not properly before the Court. The Court of Appeals did not address these constitutional questions. Appellee's jurisdictional memorandum in

this case did not present any issue for the Supreme Court of Ohio concerning the constitutionality of R.C. Chapter 2744. Indeed, Appellee flatly asserted that “this is not a case of public or great general interest.” See “Appellee’s Memorandum in Response,” filed 2/12/07, at p. 1. The Supreme Court of Ohio’s orders accepting the appellants’ discretionary appeals did not accept this case to consider the constitutionality of R.C. Chapter 2744. Appellant Munro respectfully submits that these issues are not properly before this Court.

Second, Appellee wrongly declares that “[t]his Court *** considered R.C. 2744 unconstitutional” in *Butler v. Jordan*, 92 Ohio St.3d 354, 2001-Ohio-204, 750 N.E.2d 554. See Appellee’s Merit Brief at p. 47. Appellee’s assertions are false.

This Court did *not* consider R.C. 2744 unconstitutional in *Butler v. Jordan*. The Court held that because no section of the Ohio Revised Code expressly imposed political subdivision liability pursuant to R.C. 2744.02(B)(5), the trial court correctly dismissed the lawsuit against the political subdivision. All seven (7) members of the Court concurred with both paragraphs of the syllabus and with the judgment only.

Third, the Supreme Court of Ohio, on at least two (2) 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. 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. Appellee's 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.

Fourth, Appellee's contention that R.C. Chapter violates a right under Article I, Section 5 to have a jury award damages is at least premature since there has been no determination that Appellee is entitled to any damages. The Supreme Court of Ohio does not "indulge in advisory opinions." *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, at ¶ 18.

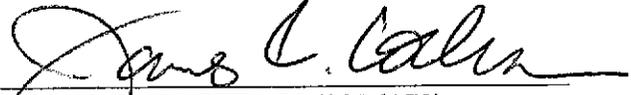
Appellant Munro respectfully urges the Court to decline to address Appellee's constitutional challenges as not properly presented or, in the alternative, to reject them as contrary to the Court's prior rulings in *Fabrey v. McDonald Village Police Dept.*, and *Fahnbulleh v. Strahan*.

CONCLUSION

Appellant Tallis George Munro respectfully requests that the judgment of the Court of Appeals be reversed and that the trial court judgment granting Munro's motion for summary judgment be reinstated.

Respectfully submitted,

WILLIAM D. MASON,
Cuyahoga County Prosecutor

A handwritten signature in black ink, appearing to read "James C. Cochran", written over a horizontal line.

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CERTIFICATE OF SERVICE

A true copy of the Reply Brief of Defendant-Appellant Tallis George

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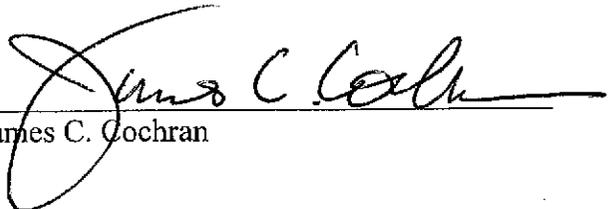
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