

IN THE SUPREME COURT OF OHIO

CASE NO.: 07-0056

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

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

Plaintiff-Appellee,

vs.

WILLIAM DENIHAN, et al.,

Defendants-Appellants.

TRIAL COURT NO.: CV450833

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

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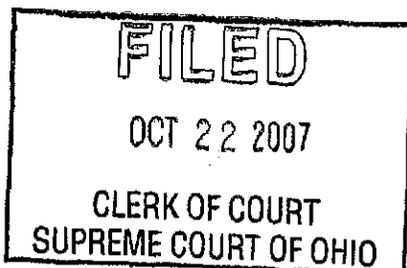


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REPLY BRIEF

INTRODUCTION

Appellee's rendition of the facts is not only inconsistent with the sworn testimony, but utilizes hindsight to criticize the investigation of the Department of Children and Family Services ("DCFS") and its employees. Because this Court has ruled that DCFS and its employees are immune from allegations of negligent investigation pursuant to *Marshall v. Montgomery County Children Services Board*, 92 Ohio St.3d 348, 2001-Ohio-209, 750 N.E.2d 549, Appellee now seeks to manipulate statutory language to subject social workers to criminal liability for their investigations to avoid immunity in this case. Fortunately, the plain language of the statutes at issue do not impose the exalted duties urged by Appellee. Accordingly, Appellants request this Court to apply the law as written and reverse the newly created duties and liabilities imposed on Cuyahoga County social workers by the Eighth District Court of Appeals' decision.

I. STATEMENT OF THE FACTS

Appellants dispute Appellee's misstatement of the facts. For example, Appellee alleges:

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). P. 3 of Appellee's Merit Brief.

However, the undisputed testimony was that Case Worker Kamesha Duncan started at DCFS on October 25, 1999; she had been trained two and a half months and assigned to the Intake Department in January 2000. Duncan Depo. at pgs 11-12. While Case Worker Duncan couldn't recall at the time of her deposition other priority one referrals she handled prior to the

Sydney Sawyer case, her Supervisor Tallis George Munro recalled that she had handled six to eight priority one referrals prior to the Sydney Sawyer case. Munro Depo. pg. 51. With regard to training, Case Worker Duncan specifically testified:

Q. Okay. Now, what kind of - - did you receive training from the county specifically as to identifying abuse - -

A. Yes.

Q. - - and signs of abuse?

A. Yes.

Duncan pgs. 14-15.

Despite Appellee's mischaracterizations that Case Worker Duncan determined Sydney Sawyer was abused but let her stay with her abuser, the actual testimony reflects that Case Worker Duncan was never able to determine if Sydney Sawyer was abused at the time of her investigation. Case Worker Duncan repeatedly testified that at the time of her investigation, she "couldn't say" if Sydney Sawyer was abused. Duncan Depo. pg. 83 Case Worker Duncan testified:

Q. Okay. The larger mark on her face, did you suspect what had caused that mark?

A. No.

Q. You had no suspicion as to what it was?

A. No.

Q. You didn't think that was a punch mark -

A. No.

Duncan Depo at pgs. 51-52. Rather at the time of her investigation, Case Worker Duncan determined:

- Neither Lashon Sawyer or Sydney Sawyer had any previous involvement with DCFS;
- Lashon Sawyer voluntarily complied with all agency requirements including:
 - Having Sydney Sawyer examined by a physician;
 - Having her house inspected during a home visit;
 - Notifying DCFS of any changes in Sydney Sawyer's schedule such as an out of state funeral;
 - Kept Sydney Sawyer enrolled in daycare as reflected in the attendance records; Appellee's Supp. P. 46-48, Daycare Records;
- Case Worker Duncan received the hot line referral between 10:00 and 11:00 a.m., made immediate contact and interviewed the entire day care staff, Sydney Sawyer's day care provider, had the school nurse undress Sydney Sawyer and examine her entire body;
- Interviewed Sydney Sawyer and determined Sydney Sawyer was clean and cared for and did not express any fear of her mother or home environment;
- Lashon Sawyer had no criminal history or evidence of alcohol or substance abuse;
- Lashon Sawyer was employed and worked evenings in order to provide for her daughter;
- Case Worker Duncan spoke to Sydney Sawyer's physician after he examined her and was informed that the doctor could not determine if the marks on Sydney Sawyer were the result of abuse.

Duncan at pgs. 50-125; Munro at pgs. 50-180.

However for purposes of Appellants' appeal, the factual issues are not before the Court so much as the following legal issues which have been accepted for this Court to determine:

- (1) Whether DCFS and its employees owe a statutory obligation to report reported allegations of abuse to the police or face criminal penalties?
- (2) Whether DCFS and its employees become "in loco parentis" to the children they investigate in the course and scope of their employment and are subject to criminal penalties for any harm that results during their 30 day investigation period?

- (3) Whether the Executive Director of DCFS is personally liable for the policies and procedures of the agency?

II. LEGAL ARGUMENT

PROPOSITION OF LAW NO. I:

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

A. GOVERNMENT IMMUNITY

The parties agree that political subdivisions such as DCFS and its employees are entitled to a blanket of immunity unless one of the exceptions contained in R.C. § 2744.02 or R.C. § 2744.03 apply. As Appellee further noted, the exceptions to immunity contained in R.C. § 2744.02(B)(5) and R.C. § 2744.03(A)(6)(C) were amended on April 9, 2003 to reflect the true intent of the legislature; that an exception to immunity only applies when “civil” liability is imposed. Appellants argued in its motion for summary judgment and the court of appeals agreed that the revised statutory language requiring violation of a statute that imposes “civil liability” applies to the case at bar. See Appellants’ Renewed Motion for Summary Judgment; Reply Brief and Eighth District Court of Appeals brief. See also *Sobeski v. Cuyahoga County Department of Children and Family Services* (Ohio 8 App. Dist.), 2004-Ohio-6108; *State Automobile Ins. v. Titanium Metals Corp. Co.* 159 Ohio App. 3d 338, 2004-Ohio-6618 reversed on other grounds 108 Ohio St. 3d 240, 2006-Ohio-1713, 844 N.E. 2d 1199. In fact the Court of Appeals specifically cited the revised statutory sections at ¶2 and ¶4 of its opinion. Appellee did not appeal the Court of Appeals’ determination as to the applicable statutory provisions at issue in this case. Thus, the Court of Appeals determination has become the law of the case and is not before this Court. *State Automobile Ins. v. Titanium Metal, supra* at ¶9.

B. WHETHER DCFS AND ITS EMPLOYEES ARE REQUIRED TO REPORT REPORTED CLAIMS OF ABUSE?

R.C. § 2151.421 (A)(1)(a) provides that “no person” who “knows or suspects that a child ... has suffered or faces a threat of suffering any physical or mental wound ...shall fail to immediately report that knowledge or suspicion...to the public children services agency or municipal or county peace officer.”

R.C. § 2151.421(F) further requires DCFS and its employees to investigate reports they receive of alleged abuse. R.C. § 2151.422(B) specifically requires a public children services agency to conduct an investigation of the allegations of suspected abuse over the course of thirty days. At the end of the investigation, the public children services agency shall submit a written report of its investigation to law enforcement. R.C. § 2151.421(F). If an allegation of suspected abuse is made to the police, R.C. §2151.421(D)(1) provides that the police “shall refer the report to the appropriate public children services agency.”

A public children services agency acts through its employees *Elston v. Howland Local Schools*, 113 Ohio St. 3d 314, 2007-Ohio-2070, 865 N.E. 2d 845 at ¶19. Thus, a DCFS employee investigates allegations of suspected abuse on behalf of DCFS. R. C. § 2151.421 does not create a heightened burden on DCFS employees to report reported allegations of suspected abuse or require DCFS employees to file a report with the police once they “substantiate an allegation of abuse.” P. 26 of Appellee’s Merit Brief. Such a construction is nonsensical and expands the duties defined in the statute.

The purpose of the reporting statute contained in R.C. § 2151.421 is to attempt to protect children by initiating an investigation of allegations of suspected abuse. Specifically, it requires individuals that work closely with children in a professional capacity to have a duty to report suspected abuse or else be subject to criminal liability. Steven Singley, *Failure to Report*

Suspected Child Abuse: Civil Liability of Mandated Reporters, 19 J. Juv. L 236, (1998); Laura Huber Martin, *Case Worker Liability for the Negligent Handling of Child Abuse Reports*, 60 U. Cin. Law Rev. 191 (1991). The statute is not intended nor does it require that DCFS and its employees report reports they receive to the police or else be charged criminally. Rather the statute clearly provides that DCFS and its employee shall submit their written findings to the police upon completion of the investigation.

While DCFS and its employees may work with the police during the investigation, R.C. § 2151.421 does not require reported reports of suspected abuse be made only to the police. Rather the statute clearly provides that reports of abuse can be made to “the public children services agency or a municipal or county peace officer.” R.C. § 2151.421(A)(1)(a) (emphasis added) Appellee attempts to change the statutory language to create an ambiguity where one does not exist in an attempt to impose criminal and civil liability on DCFS and its employees. In fact, even if the police receive a report of suspected abuse, the statute requires the police to report the report to DCFS. R.C. § 2151.421 (D)(1). A reciprocal burden was not drafted or intended by the legislature. Rather, after DCFS completes its investigation, the statute requires DCFS to provide a copy of its investigation to law enforcement agencies so that further criminal prosecution if necessary can proceed. R.C. § 2151.421 (F)(1). DCFS’ internal operating procedures regarding contacting law enforcement may have a heightened duty than statutory obligations but does not create criminal liability for its employees.

Appellants have always maintained that Appellants’ alleged failure to report to the police was not the proximate cause of Sydney Sawyer’s death. As argued before the trial court and the court of appeals, it is well settled that a Plaintiff must establish in a wrongful death action “(1) the existence of a duty owing to Plaintiff’s decedent, (2) breach of that duty and (3) proximate

causation between the breach of duty and the death.” *Littleton v. Good Samaritan Hosp. and Health Ctr.* (1988), 38 Ohio St. 3d 86, 92, 529 N.E. 2d 449 citing *Bennison v. Stillpass Transit Co.* (1966), 5 Ohio St. 2d 122, 214 N.E. 2d 213 para. one of the syllabus; *Yates v. Mansfield Board of Ed.*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E. 2d 861 at syllabus (“a board of education may be held liable when its failure to report the sexual abuse of a minor...proximately results” in damages). A jury cannot be left to speculate as to proximate causation. *Keaton v. Gordon Biersch Brewery Restaurant Group, Inc.* (Ohio App. 10 Dist.), 2006-Ohio-2438. (“Where no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the jury [to decide] and, as a matter of law, judgment must be given for the defendant” citing *Sullivan v. the Heritage Lounge* (Ohio App. 10 Dist.) 2005-Ohio-4675).

In this case, assuming the Cleveland Police did not receive the hot line report, no evidence exists that the police could have done anything until DCFS completed its investigation and submitted its report to the police. Rather the reporting statute requires the police to notify DCFS of any reports it receives. Appellee’s expert is not qualified and does not address what actions the police would have taken had they received the hot line report regarding Sydney Sawyer. As no evidence exists, a jury would have to guess and speculate as to whether faxing a piece of paper would have prevented Sydney Sawyer’s mother from harming her child almost thirty days later. Therefore, While Appellants do not have a duty to report reported allegations of suspected abuse to the police, if the court imposes such a duty and the corresponding criminal penalties, Appellants were properly granted summary judgment as an allegation of failure to report was not the proximate cause of Sydney Sawyer’s injuries. Thus Appellant’s request this Court to reverse the Eighth District Court of Appeals’ decision in this regard as well.

PROPOSITION OF LAW NO. II:

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

- A. WHETHER R.C. § 2919.22 IMPOSES A DUTY OF CARE ON POLITICAL SUBDIVISIONS AND ITS EMPLOYEES FOR PURPOSES OF THE IMMUNITY EXCEPTIONS IN R.C. § 2744.02 and R.C. § 2744.03?

R.C. § 2919.22 “is aimed at child neglect and abuse which causes or poses a serious risk to the mental or physical health of the safety of the victim.” 1974 Committee Comment, 2 R.C. § 2919.22. See also *State v. Kamel* (1984), 12 Ohio St. 3d 306, 308 (the child endangering statute is concerned with neglect.) The committee notes also reference the intended individuals that owe a legal duty to not neglect or abuse children as the parents of the child “guardians and custodians, persons having temporary control of a child and persons standing in the place of parents.” Id. R.C. § 2919.22(E)(2)(c) provides that if a child is physically harmed, the criminal penalty is a third degree felony.

Appellee alleged in its complaint and has always maintained that DCFS and its employees breached an express duty to Sydney Sawyer as “in loco parentis” pursuant to R.C. § 2919.22. Appellee now alleges DCFS and its employees had “temporary” control of Sydney Sawyer when they fulfilled their statutory obligation to interview Sydney Sawyer and develop a safety plan. Therefore, Appellee proposes that DCFS and its employees should be subject to criminal penalties pursuant to the child endangering laws for any harm that bestows on any child they interview and investigate for alleged abuse. No basis in law or fact exists for Appellee’s liberal interpretation of the child endangering laws.

The flaw in Appellee’s argument is that R.C. § 2919.22 requires an individual to have “custody or control” over a child at the time the child is injured. Appellee cites a handful of criminal cases for the proposition that the child endangering laws set forth in R.C. § 2919.22

apply to any person "having custody or [temporary] control" of a child. The cases cited by Appellee are not on point. The few cases cited involve the State of Ohio prosecuting a parent, guardian or baby sitter that had direct control over a child and was typically responsible for directly inflicting harm on a child. While courts may rule that a person that harms a child while possessing temporary custody or control can be criminally liable, no courts have ever ruled that a public children services agency is subject to felony charges during its investigation for any harm that a another person with custody or control inflicts on a child.

In this case, Appellee seeks to impose the criminal child endangering laws on DCFS and its employees because when Appellant Case Worker Duncan met with Sydney Sawyer and interviewed the employees at her daycare center, Case Worker Duncan allegedly said "I am in charge." While Appellants deny having "temporary control" based upon one statement, assuming the statement was made, Appellee fails to acknowledge the obvious: DCFS and its employees did not have legal custody or control over Sydney Sawyer let alone temporary custody or control during their entire 30 day investigation. In fact, DCFS employees acknowledged that DCFS had no authority to prevent Lashon Sawyer from taking Sydney Sawyer out of state for a family funeral during their investigation. Munro pg. 120. Whether Lashon Sawyer perceived DCFS had temporary control or not is irrelevant. Any person could state they are "in charge" but it does not equate with "custody or control" required for criminal liability pursuant to R.C. §2919.22. Actual custody or control is required.

DCFS and its employees are required by statute to investigate allegations of suspected abuse. They are required to interview the alleged victim and perform their investigation. They do not retain legal custody or control over a child subjecting them to felony charges for any harm a parent inflicts on their child during the 30 day investigation. Appellee's contention to hold that

a public children services agency and its employees have “control” over a child during an entire investigation pursuant to R.C.§2919.22 has the effect of subjecting individual social workers to criminal sanctions for every case they investigate. Criminal sanctions for social workers investigating abuse was not the intent of R.C.§2919.22. Thus the statute should not be manipulated and misconstrued in this case.

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

As previously argued, the plain language of the immunity exceptions at issue require that in order for immunity to be waived, liability must be “expressly imposed” by a section of the revised code. R.C.§2744.02(B)(5); R.C.§2744.03(A)(6)(c). This Court’s recent decision in *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 865 N.E. 2d 9 2007-Ohio-1946 is directly on point. As this Court noted in *Cramer*, a statute must expressly “impose liability on an employee of a political subdivision.” *Id.* at ¶32. Had the legislature wanted to expressly impose liability on DCFS and its social workers, it could have specifically identified them in the class of individuals subject to R.C.§2919.22. Absent specific statutory language, liability cannot be expressly imposed on public children services agencies and its social workers. The child endangering statute contained in R.C.§2919.22 does not “expressly impose” liability on DCFS, its Executive Director William Denihan or Case Worker Kamesha Duncan. Thus Appellants request this Court to reverse the Eighth District Court of Appeals’ decision.

PROPOSITION OF LAW NO. III:

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

It is undisputed that if this Court determines that DCFS and its employees violated the reporting statute contained in R.C. § 2151.421 or the child endangering statute contained in R.C.

§ 2919.22 and therefore do not have immunity for those statutory violations, immunity shall be reinstated if one of the defenses contained in R.C. § 2744.03(A) apply.¹

Appellee is critical of the policy decisions of DCFS Executive Director William Denihan.

Specifically, Appellee is critical of DCFS Executive Director's:

- (1) policy on training, allocating and supervising employees on the new SDM protocol;
- (2) policy on when to contact the police;
- (3) policy on using independent medical examiners.

Page 45 of Appellee's Merit Brief. The sworn testimony of William Denihan established that he did not "oversee the actual training of social workers." Rather, he authorized the policies of the office and the deputy directors implemented the policies. William Denihan testified:

- Q. Okay, what were your duties and responsibilities with the agency?
- A. I was responsible for the overall operations of the Department of Children and Family Services and all aspects for Cuyahoga County.
- Q. Were you involved with placing, where social workers were placed within the department?
- A. To the extent I would approve the initial hiring, the initial assignments as recommended by the Deputy Directors and the Personnel Department.
- Q. Okay. So in essence, some of your underlings would make the hires, review the resumes, and you would just kind of rubberstamp it?
- A. I had the final say. There were 1200 employees, and I was the appointing authority and I had the final authorization for all personnel action.
- Q. Okay. Were you involved with implementing policies and procedures?

¹ All defenses contained in R.C. § 2744.03(A) were argued in the courts below and are within this court's jurisdiction.

A. I was involved in the - - in the authorization of policies and procedures.

That was really left to the three Deputy Directors, and the implementation and the oversight of the policies and procedures, who reported to me.

* * *

Q. What is your understanding, though, of what the SDM training entailed?

A. We had a consultant that was hired whose name - - I believe it was a he - - escapes me who was responsible for the training modulars for the supervisors and the social workers.

It was already in place.

Q. Had training already begun prior to your arrival?

A. Yes.

* * *

Q. ...once this outside consulting firm did their training, was there anything that was done in the early days of SDM's inception to monitor how the social workers and supervisors were actually carrying out SDM?

A. I am going to answer the question this way: the changes I made did not have a direct relation to the implementation of SDM.

It had everything to do with the entire agency, of which SDM was a very, very small but important part. I hope that answers your question.

Q. Are you aware of anyone else's efforts or anything else that was - - any check that was put into place to monitor SDM in its early days?

Maybe having - - the supervisors who were called unit chiefs having more hands on?

A. I recall that on not just SDM but all programs had to have a monitoring, reporting; some review process of not only the training but implementation and

impact to the chiefs, which was - - there were, I believe, 15 chiefs.

And what that monitoring and review process was, I don't recall today; but I knew that they had something. I don't recall what it was.

* * *

Denihan at pgs. 9-15.

While Appellee attempts to characterize its criticisms of the Executive Director's actions as implementation instead of policy making decisions, the actual testimony of William Denihan establishes that he did not implement the training policies, rather he oversaw the overall policies of DCFS. William Denihan's actions involved the "policymaking", "planning" and "enforcement powers" by virtue of his duties and responsibilities of his office as the Executive Director of the Department of Family and Children Services. However, whether his actions are reviewed pursuant to R.C. § 2744.03 (A)(3) or (5), DCFS is entitled to have immunity reinstated for its Executive Director's operation of DCFS.

APPELLEE'S CONSTITUTIONAL ISSUES

Appellee did not file a Notice of Cross-Appeal pursuant to Rule 3(C) of the Rules of Appellate Procedure regarding the constitutional issues raised in its brief. Therefore, the constitutionality of sovereign immunity may be "considered only for the purpose of preventing a reversal of the judgment under review." *Parton v. Weilnau* (1959), 169 Ohio St. 145, 170-171; *Cicco v. Stockmaster* (1989), Ohio St. 3d 95, 2000-Ohio-4347, 28 N.E. 2d 1066. In other words, Appellee cannot assert its constitutionality arguments "as a sword to destroy or modify the judgment" at issue. *Id.* at 171; see also *Duracoat Corp. v. Goodyear Tire and Rubber Co.* (1983), 2 Ohio St. 3d 160, 443 N.E. 2d 184; *Jackson v. Columbus* (Ohio App. 10 Dist.), 2006-Ohio-5209.

Should this Court properly determine that Appellants did not violate the reporting statute or child endangering statute, the Court should continue to uphold the constitutionality of sovereign immunity pursuant to R.C. 2744 et seq.

A. WHETHER R.C. § 2744.02 AND R.C. § 2744.03 VIOLATE A RIGHT TO A REMEDY PURSUANT TO ARTICLE 1 SECTION 16 OF THE OHIO CONSTITUTION?

Appellant alleges R.C. § 2744 is unconstitutional as it violates a right to remedy under Article 1 Section 16 of the Ohio Constitution. This issue has been considered by this Court on numerous occasions and this Court has never determined R.C. § 2744 unconstitutional. While one justice in particular may have raised issues regarding the constitutionality of R.C. § 2744 in dicta, this Court in neither *Butler v. Jordan* (2001), 92 Ohio St. 3d 354, 2001-Ohio-204 or any subsequent case law has ever determined sovereign immunity is unconstitutional for failure to provide a remedy despite the dicta in *Butler*. See *Shadoan v. Summit County Children's Services Board*, (Ohio App. 9 Dist.) 2003-Ohio-5775 at ¶7; *Perales v. City of Toledo* (April 23, 1999), 6th App. No. L-98-1397; *Lewis v. City of Cleveland* (1993), 89 Ohio App. 3d 136, 623 N.E. 2d 1233. As no basis exists for striking a legislative statute that has existed for years and does in fact provide a remedy, Appellants request this Court to uphold the constitutionality of R.C. § 2744 et seq.

B. WHETHER R.C. § 2744.02 AND R.C. § 2744.03 VIOLATE ARTICLE I, SECTION 5 OF THE OHIO CONSTITUTION?

As the Ohio Supreme Court noted in *Glendon v. Greater Regional Transit Authority*, 75 Ohio St. 3d 312, 1996-Ohio-137, 662 N.E. 2d 287 (dissent of Douglas, J.) not all cases are guaranteed a jury trial. A right to a jury trial may only be guaranteed in those causes of action where the right existed at common law at the time the Ohio Constitution was adopted. *Id.* However, the Ohio Supreme Court in *Haverlack v. Portage Homes* (1982), 2 Ohio St. 3d 26, 30,

442 N.E. 2d 749 at 30 acknowledged that immunity for municipalities was judicially created and implicitly recognized prior to the adoption of the Ohio Constitution. Thus a right to jury trial is mandated in cases against municipalities. Therefore Appellee's immunity does not violate Section 5, Article 1 of the Ohio Constitution.

CONCLUSION

This case involves statutory construction. Specifically whether the reporting statute and child endangering laws apply to DCFS employees in the course and scope of their employment. As neither statute applies or was intended to apply and create criminal liability for the social workers working to protect the interest of children, Appellants request this Court to reverse the judicial laws created by the Eighth District Court of Appeals' opinion and enforce the laws as written.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail this 22 day of

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