Case No. 2007-740

IN THE SUPREME COURT OF OHIO

DONALD THOMAS KRAYNAK, etc.,

Appellee,

vs.

YOUNGSTOWN CITY SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,

Appellants.

On Appeal From The
Court of Appeals Seventh Appellate District
Mahoning County, Ohio
Court of Appeals Case No. 2005-MA-200

APPELLEE DONALD T. KRAYNAK'S MERIT BRIEF

John C. Pfau (S. Ct. #0006470)
PFAU, PFAU & MARANDO
P.O. Box 9070
Youngstown, Ohio 44513
(330) 702-9700
(330) 702-9704 - Fax No.

James E. Roberts (S. Ct. #0000982)
ROTH, BLAIR, ROBERTS, STRASFELD & LODGE
100 Federal Plaza East, Suite 600
Youngstown, Ohio 44503
(330) 744-5211
(330) 744-3184 - Fax No.

Attorneys for Appellants,
Youngstown City School District
Board of Education

Joel Levin (S. Ct. #0010671)
Christopher M. Vlasich (S. Ct. #0075546)
Aparesh Paul (S. Ct. #0077119)
LEVIN & ASSOCIATES CO., L.P.A.
1301 East 9th Street
Suite 1100, Tower at Erieview
Cleveland, Ohio 44114
(216) 928-0600
(216) 928-0016 - Fax No.

Attorneys for Appellee,
Donald T. Kraynak

FILED
NOV 30 2007
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF THE FACTS 2

III. ARGUMENT 4

Proposition of Law No. 1: RC 2151.42 contains an objective standard for determining whether a person suspected child abuse, thereby triggering a duty to report 4

CONCLUSION 9

SERVICE

TABLE OF AUTHORITIES

Cases | Page

Beach v. Chollet (1928),
31 Ohio App. 8 7

Brodie v. Summit Cty. Children Services Bd. (1990),
51 Ohio St. 3d 112 6

Campbell v. Burton 2001 Ohio 206,
92 Ohio St. 3d 336 6

Grimm v. Summit Cty. Children Serv. Bd. (9th Dist.),
2006 Ohio 2411 5

Surdel v. Metrohealth Med. Ctr. (8th Dist. 1999),
135 Ohio App.3d 141 5

Tracy v. Tinnerman (2nd Dist.),
2003 Ohio 6675 5

Other Authorities

R.C. 2151.421 1,4,5,6,7,8,9

I. INTRODUCTION

This suit arises as a result of the stunning silence that a tortured child faced when he repeatedly conveyed details of his abuse to his grade school teacher and the harm resulting after she ignored his cries for help. Former Defendant Helen Marino ("Ms. Marino")[1] and Defendant-Appellant the Youngstown City School District Board of Education (the "Board") failed to report the abuse unambiguously presented to Ms. Marino by a student, minor D.K. As a result, the Board was liable to Plaintiff-Appellee Donald Kraynak -- acting individually and on D.K.'s behalf (collectively, "Kraynak") -- under R.C. 2151.421, Ohio's statute concerning the reporting of child abuse.

The trial court incorrectly instructed the jury on RC 2151.421, requiring Kraynak to establish Ms. Marino's subjective mind-set as she read D.K.'s journal entries detailing the abuse he suffered at the hands of his mother. On appeal, the Seventh District remedied the trial court's error, affirming that R.C. 2151.421 contains an objective standard (*What would a reasonable teacher think?*), not a subjective standard (*What did Ms. Marino believe in her mind while she read D.K.'s journal?*).

Finally, this Court only accepted review of the standard contained in R.C. 2151.421 and did not accept for review the Board's Proposition of Law No. II regarding Professor Kathryn L. Mercer's ("Prof. Mercer") trial testimony, where she usurped the trial court's role as arbiter of the law. This Court did not accept the issue for review, although it was independent grounds for reversal at the Seventh District. Thus, even were this Court to determine that R.C. 2151.421 contains a subjective standard, Kraynak is entitled to a remand of this matter.

---

[1]At trial, Plaintiff-Appellee dismissed Ms. Marino as a party.

II. STATEMENT OF THE FACTS

In September 1999, D.K. was a student in Ms. Marino's class. Prior to having him as a student in her class, Ms. Marino had never met D.K. and knew very little about him. (Tr. at p. 13.) While D.K. was a student in Ms. Marino's class in 1999-2000, he was being beaten at home by his mother, Melissa Kraynak. D.K.'s mother would frequently strike D.K. with belts, spoons, clothes hangers, or baton and she would slap and punch him. (Tr. at p. 104.) D.K. tried to discuss the abuse with Ms. Marino, but she brushed him off. (Tr. at p. 105.) D.K. then began detailing his abuse in his journal, which Ms. Marino assigned the students and told them that she would read. (Tr. at p. 16.) D.K. specifically testified that he trusted Ms. Marino and detailed his abuse in the journal so she could help him. (Tr. at p. 107.) This, Ms. Marino failed to do.

Contrary to the Board's attempt to minimize the horror that D.K. suffered, implying that this abuse was nothing but good strict parenting and that D.K. may have fabricated the abuse story to avoid moving to Columbus with his mother (Appellant's Merit Brief at p. 3), not only was D.K. immediately removed from the custody of his mother upon discovery of the abuse, but his mother has had no contact with D.K. since his removal from her custody. (Tr. at p. 104.) Further, at trial Melissa Kraynak admitted that she would strike her children (Tr. at p. 342)

At the time D.K. first reported his abuse to Ms. Marino, he had been a student in her class for less than two weeks and she had seen him in class less than ten times, as Ms. Marino only saw D.K. four days a week for approximately one hour per day. (Tr. at pp.27, 417-418.) Yet when D.K. disclosed his abuse at this early point in the school year, Ms. Marino chose to ignore the plea for help. Ms. Marino believed that D.K. was not being truthful about the abuse he suffered at the hands of his mother (Tr. at p. 35) and she simply ignored the journal entries.

Throughout the school year, D.K. repeatedly communicated to Ms. Marino in his journal that his mother scared him, beat him with a number of objects, and that he did not want Ms. Marino to tell his mother that Ms. Marino knew of the abuse. In fact, D.K. may have told Ms. Marino of the abuse, and she did not deny that this may have occurred. (Tr. at p. 25.)

According to the briefs filed by the Board both here and the Seventh District, the Board's defense of the indefensible is best summarized as follows: as D.K. appeared to look like most other students, Ms. Marino ignored all written indications, no matter how clear or direct, that contradicted her already-formed belief that D.K. was a "normal" child.

The most disturbing element of Ms. Marino's defense is that once she read one or two of D.K.'s journal entries detailing his abuse, she testified that she decided to stop reading the journal, lest she read more about his abuse. (Tr. at pp.45, 483-484.) Ms. Marino testified as follows:

> Q. You led the students to believe you would read their journals, correct?
> A. Yes.
>
> * * *
>
> Q. You told [D.K.] you would be reading [his journal]?
> A. Yes.
>
> * * *
>
> Q. ...Did [you] stop reading the journal after D.K. told [you] in the journal that he was being abused?
> A. Yes, I stopped reading it.

(Tr. at pp.16, 23, 45.) Ms. Marino told D.K. that she would read his journal and after she discovered the abuse, she made the conscious decision to stop reading the journal. Of course, as terrible as Ms. Marino's testimony sounds, it may be even worse in reality. While Ms. Marino

first testified that she did not read the whole of each students' journals, she may have actually read the entirety of D.K.'s journal. (Tr. at pp. 444-445.) That is, contrary to the Board's Merit Brief (p.2), Ms. Marino may have read D.K.'s complete journal. Tellingly, Ms. Marino was confused as to which story to present to the jury. She either stopped reading D.K.'s journal immediately after she learned of his abuse (Tr. at p.45), or she read all the entries detailing D.K.'s unending abuse. (Tr. at pp.444-445.) Ms. Marino admittedly read some of the entries detailing the abuse, and she testified that each of the instances described in the journal alone may have been a sign of abuse. (Tr. at p.29.) Yet she did nothing.

D.K. wrote the following entry in March 2000, after it was clear that Ms. Marino had not reported the abuse to the authorities:

> I want to tell you something. My mom really does abuse me. She beat me with a leather belt and left a big purple mark on my butt for about a week. What should I do? D.K.
>
> WARNING: DON'T SHOW OR TELL MY MOM WHAT I WROTE OR I'LL GET THE WOODEN SPOON OR METAL BATON.

Ms. Marino may have read this entry. (Tr. at pp. 444-445.) Ms. Marino never reported D.K.'s abuse to the authorities.

III. ARGUMENT

Proposition of Law No. 1: RC 2151.42 contains an objective standard for determining whether a person suspected child abuse, thereby triggering a duty to report.

The Seventh District, in accord with the Second, Eighth, and Ninth Districts, determined that the trial court simply mis-applied RC 2151.421, holding that Kraynak should have been required to establish what a reasonable teacher would have done when presented with D.K.'s

journal, not what Ms. Marino subjectively believed when she read it. The Second, Eighth, and Ninth Districts previously held that the statute contains an objective "reasonableness" standard, not a subjective one. See, *Surdel v. Metrohealth Med. Ctr.* (8th Dist. 1999), 135 Ohio App.3d 141, *cert. denied by* 87 Ohio St. 3d 1491; *Tracy v. Tinnerman* (2nd Dist.), 2003 Ohio 6675; *Grimm v. Summit Cty. Children Serv. Bd.* (9th Dist.), 2006 Ohio 2411.

In *Surdel*, supra, the appellant-father claimed that individuals who reported that he abused his children did not do so "in good faith." *Id.* at 144, 149-150. The Eighth District held that it did not matter what the reporter subjectively believed; rather:

> ...RC 2151.421(A)(1)(a)...requires that any knowledge or suspicion be immediately reported when there is "any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child..."
>
> The qualifying language [of R.C. 421.2151] clarifies that the duty to report does not require absolute proof but rather is triggered when the condition reasonably indicates abuse or neglect. The statute's focus is on the condition, not the reporter.

Id. at 150 (citations omitted). Hence, "reasonable" indications of abuse trigger the duty to report, and one must focus on the "condition" (here, D.K. and his unambiguous cries for help) rather than the reporter's subjective beliefs. Thus, one should apply an objective standard.

In *Tracy*, supra, a teacher reported to the authorities that a child was being abused. The Second District held that "[A] school employee is required to report any reasonable suspicion of abuse." *Id.* at ¶11. Clearly, the Second District believes that R.C. 2151.421 contains a subjective standard. See, *Grimm*, supra, at ¶19 ("The [California] statute arguably required a report only when the physician actually observed the physical injury and formed the subjective opinion that the injuries were intentionally inflicted. The [California] statute at issue was subsequently

amended and clarified to mandate reporting, as in Ohio, in cases where abuse was known or suspected.")

Due to the trial court's ruling, Kraynak's burden at trial was to prove what Ms. Marino subjectively thought, in her mind, as she read the journal, rather than what an objective, reasonable teacher would have thought. The trial court held that the Board was only liable if Ms. Marino subjectively believed that D.K. was being abused at home -- regardless of the evidence she saw, regardless of what she read, knew, or was told.

It is important to remember the purpose behind RC 2151.421. It was enacted to proactively prevent child abuse and to reactively exterminate it immediately when discovered by a responsible adult, such as a doctor, teacher, or lawyer. See, *Brodie v. Summit Cty. Children Services Bd.* (1990), 51 Ohio St. 3d 112. In fact, the General Assembly was so concerned with reducing child abuse that the statute imposes criminal penalties on certain individuals when they fail to report suspected child abuse. See, RC 2151.421; *Campbell v. Burton*, 92 Ohio St. 3d 336, 2001 Ohio 206 (superceded on other grounds by RC 2744.02).

At the time of Ms. Marino's failures to act, RC 2151.421 expressly imposed liability on a teacher for failing to report suspected child abuse. See, RC 2151.421(A)(1)(b); *Campbell*, supra. In *Campbell*, this Court stated, "[i]n many instances, only the state and its political subdivisions can protect children from abuse." *Id.* at 341. Moreover, "it is clear that the concern of the General Assembly in enacting RC 2151.421 was not political subdivisions or their employees, but the protection of children from abuse and neglect." *Id.* It is inconsistent to believe that Ohio's General Assembly sought to protect children through RC 2151.421, but not when the teacher willingly and purposely averted her eyes from the tragedy happening directly before her.

Yet, this is precisely the result the trial court encouraged with its ruling and the result the Board requests from this Court.

Under the Board's reading of RC 2151.421, Ms. Marino's "head in the sand" manner of teaching -- whereby she allegedly stopped reading D.K.'s journal because it contained allegations of physical abuse -- was perfectly reasonable. If she did not know with absolute certainty that D.K.'s mother punched him, and thrashed him with a belt, a wooden spoon, or whatever else she could grab, then liability would not attach. It is only through the Board's tortured reading of RC 2151.421 that Ms. Marino's hiding from D.K.'s cries for help makes sense.

Defendant relies upon the updated version of the statute to prove that the statute previously contained a subjective standard but now contains an objective standard. (Merit Brief at pp.6-7). This is mere speculation. Admittedly, the language added to R.C. 2151.421 makes it abundantly clear that the statute now contains an objective standard with regard to suspicion of child abuse. It does not, however, confirm that the previous statute solely contained a subjective standard; the Board has failed to cite any legislative materials indicating as such.

Moreover, the objective-versus-subjective debate the parties have engaged in may be mis-placed. The recently-amended RC 2151.421 contains both an objective and subjective standard. Now, if an official or professional knows (*subjective standard*) or has a reasonable cause to suspect (*objective standard*) that a child faces the threat of suffering child abuse, reporting is mandatory. If a person has a reasonable suspicion that a child faces the threat of child abuse, she must report it. If a person actually knows of the threat (through observing the abuse, for example), she must also report; it would be nonsensical to require a lower standard for the person with actual knowledge or the abuse. See, *Beach v. Chollet* (1928), 31 Ohio App. 8.

Thus, the General Assembly clarified RC 2151.421 to affirm that people with either subjective suspicions or objective knowledge must report the abuse. This is not a new standard, only a clarification of the former statute. The "knowledge" standard has always been one of subjective belief, while the "suspicion" standard has always been one of objective belief. In keeping with the purpose of the statute, it is only reasonable to believe that the legislature always intended for the broadest protections possible for the children of Ohio.

Finally, at trial Prof. Mercer testified that a teacher should look to the "totality of circumstances" prior to reporting child abuse; however, she admitted that the statute does not contain such language:

> Q. Show me in this [statute] where it says look at all the circumstances?
> A. The statute does not have that language.

(Tr. at p. 522.) Prof. Mercer simply inserted the term "totality of the circumstances" into the statute. Of course, as the Seventh District noted, "[c]ontrary to [Prof. Mercer's] testimony, R.C. 2151.421 does not state that a person must review the totality of the circumstances." (Opinion at ¶46). Further, she (falsely) testified that, among other things, abuse equates to "serious disfigurement." (Opinion at ¶46). Thus, the Seventh District Court of Appeals held:

> Although [Prof. Mercer] may have been allowed to testify as to what she teaches regarding the mandatory duty to report, with clarification that she described on what basis her opinions are formed, she should have been prevented from editorializing about the alleged contents of the statute and testifying as to its contents. The statutory language in R.C. §2151.421 speaks for itself. Thus, Mercer's testimony should have been strictly and severely limited.
>
> Based on the foregoing, the trial court abused its discretion in allowing Mercer to testify to this extent.

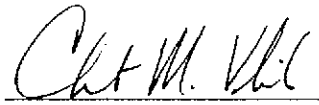
(Opinion at ¶46.) This Court refused to accept for review the Seventh District's reversal based on Prof. Mercer's testimony. As a result, even were this Court to determine that R.C. 2151.421 contains a subjective, rather than objective, standard, remand is the appropriate result.

IV CONCLUSION

RC 2151.421 has always contained on objective standard. When a teacher is presented with information that would lead a reasonable teacher to believe that a student is being abused, she cannot ignore that information and hope that the child is simply lying (which is precisely what occurred here), but she must report it. Period. The Board's request, asking this Court to deem former RC 2151.421's standard to solely be one of subjective belief, allows for situations such as the one D.K. incurred. He told his teacher, through a written journal, that he was being abused. His teacher ignored him, and now seeks shelter behind the claim that she simply did not know. Of course, she may not have known about the abuse because she made it her business not to know. She never talked to D.K. about the problems, she never talked to D.K.'s parents, she allegedly stopped reading the journal, and she decided that "out of sight, out of mind" was the best policy for D.K. It is inconceivable that her intentional act of ignoring a small child's cries for help could be ignored, but that is precisely the result the Board seeks from this Court.

Further, even were this Court to reverse the Seventh District's decision and deem the standard in RC 2151.421 a subjective one, there still remains the Seventh District's ruling on Prof. Mercer's improper testimony. That testimony served as independent grounds for the Seventh District to order remand and is not at issue here. Even if this Court reverses the Seventh District's decision on the Board's Proposition No. I, this matter should still be remanded back to the trial court for further proceedings.

Respectfully submitted,



Joel Levin (0010671)
Christopher M. Vlasich (0075546)
Aparesh Paul (0077119)
LEVIN & ASSOCIATES CO., L.P.A.
1301 East 9th Street
Suite 1100, Tower at Erieview
Cleveland, Ohio 44114
(216) 928-0600
(216) 928-0016 - Fax

Attorneys for Appellee, Donald Kraynak

SERVICE

A copy of the foregoing Appellee Donald T. Kraynak's Merit Brief has been served by facsimile and ordinary U. S. Mail on this 29th day of November, 2007, upon the following:

John C. Pfau
PFAU, PFAU & MARANDO
P.O. Box 9070
Youngstown, Ohio 44513

Attorneys for Appellant,
Youngstown City School District
Board of Education

James E. Roberts
ROTH, BLAIR, ROBERTS, STRASFELD & LODGE
100 Federal Plaza East, Suite 600
Youngstown, Ohio 44503

Christopher M. Vlasich (0075546)
Attorney for Appellee Donald Kraynak