

IN THE SUPREME COURT OF OHIO

07-0740

DONALD THOMAS KRAYNAK, etc.)
)
 Appellees)
)
 vs.)
)
 YOUNGSTOWN CITY SCHOOL)
 DISTRICT BOARD OF EDUCATION,)
 et al.)
)
 Appellants)

On Appeal from the Mahoning County Court
of Appeals, Seventh Appellate District

Court of Appeals Case No. 2005-MA-200

REPLY BRIEF OF APPELLANT
YOUNGSTOWN CITY SCHOOL DISTRICT BOARD OF EDUCATION

PFAU, PFAU & MARANDO
JOHN C. PFAU (No. 0006470)
(COUNSEL OF RECORD)
P.O. Box 9070
Youngstown, Ohio 44513
Telephone: (330) 702-9700
Fax: (330) 702-9704
E-Mail: ppm@ppmlegal.com
ATTORNEYS FOR APPELLANT
YOUNGSTOWN CITY SCHOOL
DISTRICT BOARD OF EDUCATION

LEVIN & ASSOCIATES CO., L.P.A.
JOEL LEVIN (No. 0010671)
(COUNSEL OF RECORD)
1301 East 9th Street
Suite 1100, Tower at Erieview
Cleveland, Ohio 44114
Telephone: (216) 928-0600
Fax: (216) 928-0016
ATTORNEYS FOR APPELLEES
KRAYNAK

JAMES E. ROBERTS (No. 0000982)
(COUNSEL OF RECORD)
100 Federal Plaza East, Suite 600
Youngstown, Ohio 44503
Telephone: (330) 744-5211
Fax: (330) 744-3184
E-Mail: Troberts@Roth-Blair.com
ATTORNEY FOR APPELLANT
YOUNGSTOWN CITY SCHOOL
DISTRICT BOARD OF EDUCATION

FILED
DEC 20 2007
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	3
CONCLUSION	7
PROOF OF SERVICE	8

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>Grimm v. Summit County Children Services Board</i> (May 17, 2006), 2006-Ohio-2411	4
<i>Landros vs. Flood</i> (1976), 17 Cal.3d 399	4
<i>Surdel v. Metrohealth Med. Ctr.</i> (1999), 135 Ohio App.3d 141	3, 5
<i>Tracy v. Tinnerman</i> (Dec. 12, 2003), 2003-Ohio-6675	3, 4
 <u>STATUTES:</u>	
R.C. 2151.421 (former)	3, 4, 5, 6, 7
R.C. 2151.421(A)(1)(a) (former)	4
 <u>OTHER AUTHORITIES:</u>	
Am. Sub. S.B. 17 (Final Analysis)	4-5

STATEMENT OF FACTS

Helen Marino indicates that she would have read a portion of the creative writing journal of Derek Kraynak sometime in late September of 1999. (Tr. p. 434) In the approximate three weeks before she read a portion of the journal, she had observed Derek to be a happy-go-lucky, healthy and clean 4th grader who loved to talk, had a lot of energy, loved to read and had no physical or emotional signs of abuse. (Tr. pp. 434-435) The journal was a creative writing journal in which Derek testified that he wrote fictional stories. (Tr. p. 124) Mrs. Marino looked at all of the circumstances she knew about Derek at that point, having him in class five hours per week for three weeks or so, and not observing any signs of physical or emotional abuse. Looking at all of the circumstances she had before her, she did not suspect or know of any child abuse in Derek's case. (Tr. p. 435)

Mrs. Marino testified that given her observations of Derek Kraynak, he did not have any of the signs of abuse or neglect. (Tr. pp. 429-430)

Helen Marino did not recall reading additional excerpts concerning any alleged abuse in the creative writing journal. Mrs. Marino did not learn from any of Derek Kraynak's other teachers during weekly sessions that there were any concerns about Derek. (Tr. pp. 439-440) Mrs. Marino certainly took time with Derek and even wrote a letter to Derek's grandmother about how well he was doing in school. (Defendant's Exhibit 1)

In fact, Mrs. Marino had observed Derek throughout the entire school year and noted him to progress well and not show any signs of abuse. (Tr. pp. 427-428)

The creative writing assignment was not meant to be read by Mrs. Marino in her mind but rather, just a creative filler writing experience for the children when they did not have other

things to do in class. It was not used to teach the children grammar and other requirements of the class which were done in other assignments. Basically, Mrs. Marino initially read the journal though has no recollection of reading any specific portions of it thereafter. (Tr. pp. 434, 440) Looking at all of the circumstances Mrs. Marino had before her, she did not suspect or know of any child abuse in Derek's case and believed through her observations that he blossomed during the course of the year.

ARGUMENT

I. Case law from the Second, Eighth, and Ninth District Courts of Appeals does not support Appellees' position.

Appellees suggest that three Ohio appellate districts agree with the Seventh District's erroneous interpretation of former R.C. 2151.421. However, none of the cases cited by Appellees reach this issue, especially under the circumstances of the instant case.

As discussed extensively in Appellant's Merit Brief, *Surdel v. Metrohealth Med. Ctr.* (1999), 135 Ohio App.3d 141 actually runs counter to Appellees' argument. In *Surdel*, the Eighth District extends statutory immunity to reporters with unreasonable suspicions so long as the suspicion is based on a condition that "reasonably indicates abuse." The reasonableness requirement of former R.C. 2151.421 attaches to the condition, not the suspicion itself. *Id.* at 150.

If the statute at issue in this case applies an objective standard, that means the reporter's suspicion must be that of a reasonable person. However, *Surdel*, interpreting the same version of the statute, found that a suspicion can be unreasonable (and therefore not what a reasonable person would suspect). Accordingly, an objective standard cannot be read into the statute.

The Second District's decision in *Tracy v. Tinnerman* (Dec. 12, 2003), 2nd App. No. 2003-CA-21, unreported, 2003-Ohio-6675, ¶11 states that a "school employee is required to report any reasonable suspicion of abuse." However, that is not what the statute says. Former R.C. 2151.421 places no reasonableness requirement on the reporter's suspicion, only on the condition. *Surdel, supra*. The express language of the statute places the duty to report on one who "knows or

suspects” that a child has been abused. Former R.C. 2151.421(A)(1)(a). The *Tracy* court inserts the word “reasonable” on its own and misinterprets the statute. To further muddy the waters, Appellees state on page 5 of their brief, “Clearly the Second District believes that R.C. 2151.421 contains a subjective standard.”

Appellees’ citation to *Grimm v. Summit County Children Services Board* (May 17, 2006), 9th App. No. 22702, unreported, 2006-Ohio-2411 is likewise inapplicable to the instant case. The *Grimm* court commented on a California reporting statute that only imposed a duty to report on doctors who “actually observed her injuries and formed the opinion they were intentionally inflicted on her.” *Landros v. Flood*, 17 Cal.3d 399, 415, 551 P.2d 389, 397-398 (1976). In other words, California law at that time only imposed a duty on physicians with actual knowledge of abuse. However, as the Ninth District observed, the law was amended to extend the duty to reporters with suspicions of abuse, which was similar to former R.C. 2151.421. This observation is not an endorsement of an objective standard in the statute. It simply notes that people with suspicions of abuse must report.

II. Legislative History Supports Finding a Subjective Standard.

Contrary to Appellees’ assertions, Appellant School Board has cited legislative materials supporting its argument that former R.C. 2151.421 requires a subjective standard for a reporter’s suspicion. Am. Sub. S.B. 17 (Final Analysis) states:

The act changes the “suspicion” basis for the making of a child abuse or neglect report under the existing mandatory reporting provision or the existing discretionary reporting provision. Under the act, ***that basis is changed from requiring*** (for mandatory reporting) or authorizing (for discretionary reporting) ***the making of a report if the person in question “suspects”*** that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability,

or other condition of a nature that reasonably indicates abuse or neglect to, instead, requiring (for mandatory reporting) or authorizing (for discretionary reporting) the making of a report if the person in question “has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position (for mandatory reporting) or in similar circumstances (for discretionary reporting) to suspect” that a child has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect. The act does not change the existing “knowledge” basis for the making of a child abuse or neglect report under the existing mandatory reporting provision or the existing discretionary reporting provision. (R.C.2151.421(A)(1)(a) and (B).)

(Am. Sub. S.B. 17 (Final Analysis), emphasis added). The legislative history for the current version of R.C. 2151.421 states that it “changed” the basis, not “clarified” as Appellees argue. A change is not a clarification, but something altogether different.

Under the new version, an objective “reasonable suspicion” standard is introduced. This means that not only must the condition be a reasonable indicator of abuse, as in *Surdel*, but the suspicion of the reporter must also be reasonable. Thus, the new statute may possibly eliminate the protection *Surdel* extended to reporters with unreasonable suspicions.

It only stands to reason that the new version could not be “changed” to contain an objective reasonable person standard unless such a standard did not exist in the former version. The above cited legislative history makes clear that a subjective standard applied to suspicions held by reporters under the former R.C. 2151.421. This subjective standard was applied by the trial court in the instant case and the jury properly found that Mrs. Marino did not know or suspect that abuse occurred.

There is no need to speculate on what the legislature intended. The legislative comments cited above leave no question that a subjective standard applies in evaluating the

reporter's suspicion under former R.C. 2151.421.

Appellees seem confused by the standards set in both the former and current R.C. 2151.421. On page 7 of their brief, Appellees argue that the current statute contains a subjective standard for a reporter who actually knows of abuse and an objective standard for a reporter who suspects abuse. According to Appellees, "it would be nonsensical to require a lower standard for the person with actual knowledge of the abuse." Appellees' Merit Brief, p. 7. Yet that is exactly what Appellees do by suggesting that a reporter with actual knowledge be held only to a subjective standard, which is a lower standard than an objective reasonable standard.

Appellees continue on page 8 of their brief: "Thus the General Assembly clarified R.C. 2151.421 to affirm that people with either subjective suspicions or objective knowledge must report abuse." Now Appellees state that the knowledge requirement is objective and the suspicion requirement is subjective. Two sentences later, Appellees state: "The 'knowledge' standard has always been one of subjective belief, while the 'suspicion' standard has always been one of objective belief."

In two consecutive paragraphs, Appellees have confused the standards three times. This Honorable Court should not let itself be distracted by this confusing analysis. Instead, the focus must be on the express language of former R.C. 2151.421 and the legislative history accompanying its amendment.

On a side note, Appellees try to place significance on Professor Mercer's statement that a teacher should look to the "totality of the circumstances" prior to reporting child abuse. Appellees' Merit Brief, p. 8. However, Appellees' own expert, Robert Battisti, Ph.D., testified prior to Mercer that a reporter is entitled to look at the totality of the circumstances before determining

whether he or she has a suspicion of child abuse. (Tr. 246-248) Appellees had already placed this issue into evidence, through their own expert Battisti's testimony, before Mercer had even testified.

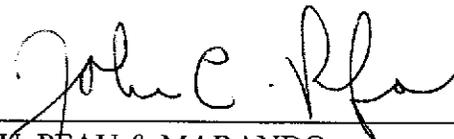
A change in the standard was contemplated by the legislature. Former R.C.2151.421 contained a subjective standard with respect to a reporter's suspicion. The amendment changed the standard to an objective one. The standard regarding actual knowledge was left unchanged.

There can be only one conclusion from these legislative remarks: the standard applicable in the instant case is a subjective one.

CONCLUSION

Appellant Youngstown City School District Board of Education respectfully requests the Court to sustain Appellant's Proposition Of Law No. 1 and reverse the decision of the Appellate Court and reinstate the judgment in favor of Appellant.

Respectfully submitted,



PFAU, PFAU & MARANDO
JOHN C. PFAU (No. 0006470)
P.O. Box 9070
Youngstown, Ohio 44513
Telephone: (330) 702-9700
Fax: (330) 702-9704
E-Mail: ppm@ppmlegal.com

-and-



ROTH, BLAIR, ROBERTS, STRASFELD & LODGE
JAMES E. ROBERTS (No. 0000982)
100 Federal Plaza East, Suite 600
Youngstown, Ohio 44503
Telephone: (330) 744-5211
Fax: (330) 744-3184
E-Mail: Troberts@Roth-Blair.com

ATTORNEYS FOR APPELLANT YOUNGSTOWN
CITY SCHOOL DISTRICT BOARD OF
EDUCATION

PROOF OF SERVICE

A copy of the foregoing brief has been forwarded by regular mail this 19th day of December, 2007, to JOEL LEVIN, The Tower at Erieview, 1301 East Ninth Street, Cleveland, Ohio 44114, attorney for Plaintiff.



PFAU, PFAU & MARANDO
JOHN C. PFAU