

IN THE SUPREME COURT OF OHIO

ORIGINAL

Stephen Lindsey, Administrator  
of the Estate of Caleb Lindsey

Appellant

vs.

Summit County Children Services Board,  
*et al.*,

Appellees.

09-1247

On Appeal From The Summit  
County Court of Appeals,  
Ninth Judicial District

Court of Appeals  
Case No. 24352

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT STEPHEN LINDSEY

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## **EXPLANATION OF WHY THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST**

The right of the citizens of the United States and of Ohio involved in civil litigation to a trial by jury is inviolate. That is, the right to have a jury determine disputed issues of fact in a civil dispute is protected by the Constitutions of Ohio and the United States. Article 1, Section 5 of the Constitution of the State of Ohio is unequivocally clear: The right to trial by jury shall be inviolate . . . This right is modified in civil cases only to permit the rendering of a verdict by a concurrence of not less than three fourths of the jury.

The United States Constitution, Amendment VII, is equally clear with regard to matters wherein the “value in controversy exceeds twenty dollars”: The right of a trial by jury shall be preserved . . . The only question for a trial court in ruling on a request for judgment without the benefit of a jury is whether there is a genuine issue of material fact. If there is no such genuine issue, a judgment can be entered without a trial by jury. If, however, there is a material, factual dispute in issue, the litigants have an inviolate right to a trial by jury. The case, sub judice, raises a substantial constitutional question of public and great general interest because the ruling of the trial court and the appellate court, if left standing, undermines this fundamental constitutional right; the undermining of this important right is a matter of public and great general interest.

The single question before this Court is whether there was sufficient factual presentation for a jury to determine whether those facts supported a finding that Appellees acted in reckless disregard of the safety of a deceased child, Caleb Lindsey, son of Appellant Stephen Lindsey. The issue is not whether facts conclusively support a finding of reckless conduct, not whether a trial or appellate judge would conclusively determine that there had been a reckless disregard for the safety of Caleb but whether there has been a sufficient factual showing to let the issue of recklessness be determined in a trial by jury. This Court has held that the issue of malicious, willful, reckless or wanton misconduct is normally a jury question. *Fabrey v. McDonald Village*

*Police Dep't.* (1994), 70 Ohio St. 3d 351, 356; *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210, 214. Mr. Lindsey has presented facts set forth in the pleadings, affidavits, depositions and responses to written discovery which require that a jury answer the question of whether the conduct of the Appellees amounted to a reckless disregard for the safety of Caleb Lindsey. To allow a ruling that takes this function from the jury under the facts presented to the Trial Court is to deny the fundamental and inviolate right to a jury to Mr. Lindsey and an incalculable number of future litigants.

A trial by jury can only be denied with great caution, In *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1, 2, the Supreme Court held that “Summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion.”

In the present case, Appellant established that Appellees investigated a case in which it was clear that Caleb, 16 months old, had been abused. The facts also establish that the abuser was unknown, although all potential abusers had been ruled out except one, and that the one remaining potential abuser was a man the Appellees failed to investigate despite the fact that they were undisputedly aware of his existence and presence in the family’s home when Caleb was abused. This man then abused Caleb again, this time by beating him to death. Even a cursory investigation would have revealed that this man, Gerald Barham, had a felony criminal record including grand theft, preparation of drugs, possession of drugs (cocaine) and a sex offense involving a minor, which led to his classification as a Tier III registered sex offender.

By failing to identify a perpetrator and failing to investigate an obviously potential perpetrator, the Appellants closed the case without forming a belief as to what had happened,

thus, blindly leaving a potentially dangerous but unknown likely perpetrator in proximity to Caleb Lindsey. Both the Trial Court and the Dissent in the Court of Appeals recognize that the failure to identify the likely perpetrator and to investigate a likely perpetrator could easily allow a jury to find that Appellees met the standard of reckless, wanton and willful behavior.

As, unquestionably, reasonable minds could find that this conduct was not merely negligent but reckless, the denial of a jury trial raises a substantial constitutional question and is of great public and general interest because a denial in the present circumstance renders hollow the constitutional proclamation that a trial by jury is inviolate.

### **STATEMENT OF THE CASE**

This case comes before the Court as a result of the violent beating death of two year old Caleb Lindsey by Gerald Barham, the boyfriend of Caleb's mother. It was the second time that Mr. Barham assaulted Caleb. The first assault was reported to Appellees to investigate. They closed the case without forming a belief as to what happened, blindly leaving a dangerous and likely perpetrator in proximity to Caleb. Mr. Barham assaulted again, resulting in Caleb's death.

This was a re-filed case in the Summit County Court of Common Pleas. In the previous case, the Trial Court, under a predecessor Judge, denied a previous request for summary judgment. After the ruling, it was made aware that Ninth District Court of Appeals, in May of 2006, had come to a different determination regarding the liability of the agency, the Summit County Children Services Board ("CSB"), (*not the employees of the agency*) in *Grimm v. Summit County Children Services Board, et al.*, 2006 Ohio 2411; 2006 Ohio App. LEXIS 2304. Thereafter, the parties agreed to a voluntary dismissal while the issues, with regard to agency liability in *Grimm*, were appealed to this Court, which declined to take jurisdiction. The only new law or facts presented to the Trial Court in the second motion for summary judgment after

the case was refiled was the 9<sup>th</sup> District Court of Appeals decision in *Grimm*. The *Grimm* Court recognized that whether an individual is liable is based upon the circumstances of each case.

The Trial Court in the re-filed case, however, relied on an incorrect finding of fact, regarding a fact not placed in issue by the Motion for Summary Judgment, and granted Appellees' motion for summary judgment on all counts on July 1, 2008. The Trial Court incorrectly concluded that Appellees determined that the Caleb's mother was responsible for the initial abuse against Caleb. This was the only basis for granting summary judgment. In fact, the Trial Court concluded that if Appellees had not determined that mother was the perpetrator of abuse, they would have "closed the case without forming a belief as to what happened, blindly leaving a potentially dangerous but unknown likely perpetrator in proximately to" Caleb.

On May 27, 2009, the Court of Appeals issued its Decision and Journal Entry ("Decision") affirming the Trial Court. The Court found the Trial Court improperly granted summary judgment on an incorrect finding of fact not placed in issue by Appellees. However, the Court of Appeals, in a two to one ruling, affirmed the decision on different grounds. The Court found that "no genuine issue of material fact exists as to whether the Employees knew Barham's identity at the time of the investigation of the March incident. It is clear that they did not." 5/27/09 Decision, p. 10. The Decision contained a Dissent that clearly and articulately detailed why the majority had taken an issue of disputed fact away from the jury and improperly granted summary judgment. It is from this decision that Appellant now appeals.

### **STATEMENT OF THE FACTS**

**INTRODUCTION:** Caleb Lindsey was born on November 19, 2000 to his parents Crystal Jones ("Crystal")<sup>1</sup> and Stephen Lindsey<sup>2</sup>. At all times relevant to the instant matter, Crystal and Mr.

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<sup>1</sup> At the times relevant to the instant matter and in most of the supporting exhibits and documentation, Crystal Jones was still using the last name of Lindsey so for sake of clarity she will be referred to as Crystal.

<sup>2</sup> Mr. Lindsey is the administrator of Caleb Lindsey's estate. He is employed at Waddell Manufacturing and has been for a number of years.

Lindsey were still married but had been separated and were living apart. Additionally, during that time, Mr. Lindsey had custody of Caleb and allowed Crystal visitation privileges. Mr. Lindsey permitted Crystal to have visitation because he felt it was important that Caleb get to know his mother. Crystal continued to enjoy overnight visitation privileges until March 26, 2002 at which time Mr. Lindsey unilaterally suspended in-home visitation.

**THE FIRST ASSAULT ON CALEB:** On March 26, 2002, Caleb Lindsey, 16 months old, was violently assaulted on his face. He was hit so hard that the handprint of the perpetrator remained on his face through his treatment at Akron Children's Medical Center ("ACMC"). Mr. Gerald Barham, Crystal's boyfriend, is the person who violently struck Caleb.<sup>3</sup>

On March 26, 2002, Mr. Lindsey picked up Caleb from Crystal's home to take him to daycare. Mr. Lindsey noticed a mark on Caleb's face. After taking Caleb to daycare, Mr. Lindsey discovered that the mark was actually the imprint of a hand and immediately took Caleb to ACMC. ACMC made a referral of suspected physical abuse of Caleb to Appellee CSB.

**THE FAILED AND INADEQUATE INVESTIGATION:** Appellee CSB employee Patricia Westfall was assigned to conduct an investigation because the medical records confirmed that Caleb had been assaulted on the face. She was aware that Caleb had been struck so hard that the handprint of the perpetrator of the assault was still on Caleb's face when he was examined.

As noted by the Dissent, notwithstanding the severity of the assault, Appellee Westfall did not have a face-to-face interview with Caleb's parents or anyone involved for two and a half months. On March 27, 2002, Crystal called Appellee Westfall to note that she was concerned about Caleb's injury. After that phone conversation, despite the fact that the abuse to Caleb was clear, despite the fact that Appellee Westfall's then supervisor, Mark Cernoia, instructed her to contact Caleb's Dad to make sure the child was safe and find out what he was doing to protect

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<sup>3</sup> Initially it was obvious that Mr. Barham perpetrated the assault. The fact was verified by Mr. Barham in a confession to detectives and in a letter from Mr. Barham to Crystal after Mr. Barham was sent to prison for killing Caleb.

the child, the effort undertaken by Appellee Westfall for the next two months was limited to five phone calls to numbers for Caleb's mother and father. These phones did not have the capacity for leaving messages. Eventually, Appellee Westfall sent letters asking Mr. Lindsey and Crystal to contact her. They did so immediately. A meeting was set up with Caleb's parents for June 17, 2002, over two and a half months after Caleb assaulted. During this time, Appellee CSB did not run a single background check and conducted no investigation into the allegation of abuse of Caleb or the individuals who were present when the abuse occurred.

On June 17, 2002, Ms. Westfall met with Mr. Lindsey, Crystal and Caleb's maternal grandmother, Melanie Jones. Contrary to the findings of the Trial Court, it was determined at that meeting that it was unlikely that either parent or the grandparents had inflicted the injury to Caleb. The only other person who had contact with Caleb at the time of the assault was Crystal's boyfriend, Gerald Barham. Ms. Westfall was clearly made aware of this fact at the meeting. Both the Trial Court and the Court of Appeals found that she was so aware. Additionally, at the time of the meeting, Crystal was six months pregnant with Mr. Barham's child.

Further, during this meeting, there was great evasion on the part of Crystal regarding her boyfriend. As noted by the Dissent, it is undisputed that Appellees did not know the identity of Crystal's boyfriend. "However, the real question is **why** the CSB employees did not know of the identity of the boyfriend and the risk of harm attendant to the failure to fully investigate his identity in the face of not knowing who perpetrated the abuse." Decision, p. 16-17. When Crystal was asked to identify the boyfriend, she refused. Further cause for alarm existed when Appellee Westfall asked if the boyfriend might have perpetrated the abuse. She received no response to this question. The Dissent noted that this was "a fact that could reasonably be seen as a serious warning sign that there was a potential risk regarding the boyfriend." Id. at 17. Appellee Westfall then reported to Appellee Bodey, her supervisor, that the identification of the

boyfriend was not forthcoming and Appellee Bodey noted that no one wanted to give information about the boyfriend. Appellees simply failed to investigate this obvious red flag. Appellee Westfall testified that she was aware that mothers cover up inappropriate care by their boyfriends and that she advises people of this fact. In fact, she testified that there had been a recent increase in injuries to children perpetrated by individuals other than the mother or father. The only individual that provided any information was Mr. Lindsey. When asked, Appellant indicated that he had only heard his nickname and then provided that nickname.

Appellees Westfall and Bodey were clearly aware that it was likely that Gerald Barham was a constant presence in the Jones' home. In addition to the fact that Ms. Jones was 6 months pregnant with Mr. Barham's child, a Risk Assessment Matrix prepared by Appellee Westfall indicated that Mr. Barham resided in the home where Caleb frequently visited overnight. Appellees Westfall and Bodey believed that the boyfriend was likely residing in the home at which Caleb visited and was there when the abuse occurred, yet they never spoke to him, inquired of his background or ran any criminal history checks. In the Closing Summary of the Risk Assessment Matrix, CSB again referenced the presence of Mr. Barham in Caleb's life by stating: "Mother is involved with boyfriend."

Ms. Westfall requested that only Mr. Lindsey and Crystal complete criminal background checks and sign certain releases for information and both parents complied. Moreover, Ms. Westfall advised Mr. Lindsey, who had suspended in-home visitation with the mother pending the investigation, that he could resume letting Caleb's mother have overnight visitation privileges. Ms. Westfall did not, in any way, suggest that this resumption should terminate if Caleb's mother moved to another location, that the maternal grandmother must be present during the visits and she in no way suggested there should be no contact with the boyfriend.

Despite the fact that it was apparent that neither the parents nor grandparents perpetrated the substantiated abuse, Ms. Westfall did not request a law enforcement background check or a release from Crystal's boyfriend. Instead, Ms. Westfall concluded her meeting notes with positive remarks about both parents and a decision that she would meet with her supervisor to close the file, which Appellee Bodey approved.

Appellees CSB, Ms. Westfall and Mr. Bodey failed to rule out the only remaining possible perpetrator of the assault: Crystal's boyfriend. They did not do the simple, standard criminal background check that would have led to the discovery that Mr. Barham's previous criminal history included the fact that he was a registered Tier III sex offender. His previous offenses included grand theft, preparation of drugs, possession of drugs (cocaine) and a sex offense involving a minor, which is the offense that led to his classification as a sex offender.

Appellee Westfall clearly thought it of concern and felt the need to continually note the boyfriend's presence in the family's life, yet neither she nor anyone else from Appellee CSB investigated him. Appellee CSB had no further contact with anyone involved until the night Caleb Lindsey was murdered. The file was simply closed without ever attempting to ascertain who struck Caleb so hard that a handprint was left on his face. Thus, they closed the case without forming a belief as to what happened, blindly leaving a potentially dangerous but unknown likely perpetrator in proximity to Caleb.

**THE MURDER:** On December 27, 2002, Caleb Lindsey was brutally and violently beaten by Gerald Barham. Young Caleb died the next day because of the beating. Mr. Barham confessed to the murder and was sentenced to life in prison.

**THE RULING ON THE MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE EMPLOYEES:** The basis upon which the Trial Court granted Appellees' motion for summary judgment was it's determination that Defendant Westfall had come to the "adverse

conclusion” that the mother of Caleb Lindsey “was the likely perpetrator of the March assault.” The Court, however, went on to recognize that in the absence of the “adverse conclusion” that the mother was the likely perpetrator, the Appellees would have “closed the case without forming a belief as to what happened, blindly leaving a potentially dangerous but unknown likely perpetrator in proximity to Caleb.” The implication being that had the Appellees blindly left a dangerous but unknown likely perpetrator in proximity to Caleb, there would be a genuine issue of a material fact that might support a conclusion by the trier of fact that the Appellee Employees behavior did meet the requisite standard of recklessness. In fact, that is exactly what happened: The Appellee Employees closed the case without forming a belief as to what happened, recklessly leaving a potentially dangerous but unknown likely perpetrator in proximity to Caleb.

**I. PROPOSITION OF LAW NO. 1: WHEN SUBSTANTIAL FACTS ARE PRESENTED AS TO WHETHER EMPLOYEES OF A POLITICAL SUBDIVISION ACTED IN RECKLESS DISREGARD FOR THE SAFETY OF ANOTHER, A LITIGANT IS ENTITLED TO A TRIAL BY JURY**

In the motion for Summary Judgment, the Appellee Employees admitted that they were not entitled to immunity if their conduct was malicious, willful, or in reckless disregard of a known and obvious harm. They are absolutely correct on this issue. In his opposition, Appellant produced sufficient evidence to require that the trier of fact determine whether the action of the Appellee Employees evinced a “conscious disregard for a great and obvious harm to one they had a duty to protect.” Appellee Employees failed to exert any care whatsoever in attempting to determine who abused Caleb in March of 2002 or in investigating the one adult to whom he was exposed who had not been ruled out as a potential perpetrator of abuse.

Pursuant to ORC § 2744.03(A)(6), employees of political subdivisions are not immune from liability for acts or omissions connected with governmental functions if the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. In *Rankin Rankin v. Cuyahoga County Department of Children and Family Services* (2008), 118

Ohio St.3d 392, this Court restated previous articulations of the reckless standard and sent the case back to the trial court for a more thorough explanation of its initial ruling. *Rankin* does not change the reckless standard. In *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, this Court employed the recklessness standard in 2 Restatement of the Law 2d, Torts (1965), at 587, Section 500: “The actor's conduct is in reckless disregard of the safety of others if...such risk is substantially greater than that which is necessary to make his conduct negligent.” Further, wanton misconduct “exhibits a reckless disregard of consequences; it does not embrace intent to injury.” 58 O Jur 3d, Insurance § 868.

Initially, it is important to note that it is only in extraordinary circumstances that a question such as this is taken from the trier of fact. The issue of malicious, willful, reckless or wanton misconduct is normally a jury question. *Grimm v. Summit County Children Servs. Bd.*, 2006 Ohio 2411; 2006 Ohio App. LEXIS 2304, \*\*37; *Fabrey v. McDonald Village Police Dep't.* (1994), 70 Ohio St. 3d 351, 356; *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210, 214. Courts have been cautious in granting summary judgment in cases involving immunity and questions of reckless and wanton behavior. See *Fisher v. Harden*, 2005 Ohio 4965, 2005 Ohio App. LEXIS 4498 (5<sup>th</sup> Dist.) (because a reasonable person could find that the officer's conduct rose to the level of wanton and willful misconduct, the trial court was reversed; *Webb v. Edwards*, 2005 Ohio 6379, 2005 Ohio App. LEXIS 5716, \*31 (4<sup>th</sup> Dist.) (summary judgment was improper despite the fact that the county employees had no intention to harm anyone because the county employees' knowledge of facts that could lead them to know that a danger existed should have prevented summary judgment from being granted.)

The facts in the present case leave no doubt that there is a genuine dispute with regard to a material fact. The material fact in question is whether the actions of Appellees Employees constituted reckless conduct and/or evinced a reckless disregard for a known and obvious harm

to Caleb. It is undisputed that Gerald Barham violently assaulted Caleb Lindsey in March of 2002. It is undisputed that, even before he confessed to that assault, he was the most likely perpetrator of that assault. It is undisputed that Appellee Employees closed their file without making any attempt to determine the perpetrator of the abuse. It is also undisputed that Appellee Employees did nothing to investigate Mr. Barham or his past. There is also no dispute that had Appellee Employees conducted even the most rudimentary investigation, it would have revealed that Mr. Barham was a registered sex offender for a crime involving a minor and had a sordid criminal past. That information would have mandated that Caleb Lindsey be protected from Gerald Barham. It is also clear from the record that, had Appellant been advised of Mr. Barham's criminal past, he would never have allowed Caleb to be left with Mr. Barham. But for the reckless conduct of the Appellee Employees, Caleb Lindsey would be alive today.

The Court of Appeals based its decision on the fact that Appellees were not provided with Mr. Barham's identity and, therefore, they were not "aware of Barham's presence in Mother's home." Decision, p. 8. As noted by the Dissent, it is true that Appellees did not know Mr. Barham's identity. Decision, p. 16. However, there was more than sufficient evidence that Appellees were aware of the boyfriend's presence in the home. It is undisputed that they were told at that first meeting that a boyfriend was involved with the family. Crystal was six months pregnant with Mr. Barham's child. Further, Appellee Westfall's Risk Assessment Matrix indicated that Mr. Barham resided in the home where Caleb visited overnight. In the Closing Summary of the Risk Assessment Matrix, it again stated "Mother is involved with boyfriend."

Instead of being evidence supporting the motion for summary judgment, the failure of the mother and grandmother to provide the name of the boyfriend is further evidence of Appellees' reckless behavior. As clearly articulated by the Dissent, the fact that they were not forthcoming about his identification and did not respond when asked if he could have perpetrated the initial

abuse are indicators that he was a potential risk to Caleb. This is especially egregious in light of Appellee Westfall's testimony that she was aware that mothers cover up inappropriate care by their boyfriends, that she advises people of this fact and that there had been a recent increase in injuries to children perpetrated by individuals other than the mother or father.

Moreover, as noted by the Dissent, "[t]he implicit suggestion that the CSB employees were helplessly unable to at a minimum obtain the name of the mother's boyfriend is simply not credible especially in light of the father's concern for C.L.'s safety and the parties' cooperation with CSB." Decision, p. 17. Yet, this is the sole basis for the Decision to take this matter out of the hands of a jury.

Because Appellees were unaware of the identity of Mr. Barham, the Court of Appeals concluded that the decision not to investigate the boyfriend did not show a perverse disregard for a known risk. Decision, p. 10. The Court concluded that without his identity, Appellees had no reason to believe that the boyfriend was a threat to Caleb and, therefore, that there was no disregard of a known risk. This, however, is clearly an issue of disputed fact. Most notably, it is disputed between the majority and the dissent and two Trial Court judges<sup>4</sup>. The fact that the parents and the grandparents had been ruled out as perpetrators left only the boyfriend as the potential abuser. The Dissent further notes that the failure to provide the identification of the boyfriend, as well as a response to the question of whether he could have been the abuser, is more evidence of the Appellees' reckless and wanton conduct. In fact, two separate Trial Court judges and the Dissent, as well as Appellant's expert, all agree that the failure to determine the perpetrator of the abuse and to leave Caleb in proximity to the potential risk of the boyfriend, the only person who had contact with Caleb that was not ruled out as an abuser, could easily lead a

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<sup>4</sup> It is clear that the second Trial Court Judge only granted summary judgment on the mistaken belief that Crystal had been determined to be the abuser. The language of his opinion makes it clear that he believed that the failure to close the case without identifying an abuser would have been reckless.

jury to conclude that Appellee Employees were not just negligent but were, in fact, acting in reckless disregard to the safety of another.

The facts alone compel the conclusion that there is a genuine issue as to whether the Appellee Employees were wanton and reckless. Appellant, however, also had these facts reviewed by an expert in forensic child abuse investigations. The affidavit of Appellant's expert, Dr. Ann Wolbert Burgess, demonstrated that there were substantial issues of disputed fact that were material to the resolution of this case. In her affidavit, Dr. Burgess concluded that *CSB failed to rule out the only remaining possible perpetrator of the assault: Crystal's boyfriend: Mr. Barham*. Dr. Burgess stated that CSB workers had a duty and an obligation to determine the name of this individual and to do a background check. The failure to do so was to ignore an obvious risk. Had CSB done so, they would have learned that his name was Gerald Barham, that he was a registered sex offender and that he had a violent criminal record. The Court of Appeals disregarded Dr. Burgess' affidavit because it contained some legal conclusions. Decision, p. 11. While the affidavit may have contained some legal conclusions, it also contained facts, noted above, that should have been considered. *See State ex rel. Columbia Reserve, Ltd. v. Lorain County Bd. of Education* 2006), 111 Ohio St. 3d 167, 171 (nothing that legal conclusions [such as reckless behavior] can be ignored while other factual matters are considered).

Appellant presented sufficient evidence to create a jury question as to the overall determination of whether the Appellee Employees acted in a reckless manner. Accordingly, summary judgment should have been denied and Mr. Lindsey's right to a trial by jury preserved.

**II. PROPOSITION OF LAW NO. 2: THE TRIAL COURT ERRED IN GRANTING SUMMIT COUNTY CHILDREN'S SERVICES BOARD'S MOTION FOR SUMMARY JUDGMENT**

Under *Marshall v. Montgomery Co. Children Serv. Bd.* (2001), 92 Ohio St.3d 348, Appellees would only be entitled to immunity negligence claims. Appellant has provided

evidence alleging Appellees' conduct was in reckless disregard for the rights, health, and welfare of Caleb. "Pursuant to ORC § 2744.03(A)(6), if a party puts forth evidence showing that a political subdivision's actions "were with malicious purpose, in bad faith, or [done] in a wanton or reckless manner[.]" the defense of immunity would no longer be available to the subdivision. *Shadoan v. SCCSB, et al.*, 2003 Ohio 5775; 2003 Ohio App. LEXIS 5142, \*11.

The Political Subdivision Tort Liability Act (PSTLA) provides exceptions to sovereign immunity for such conduct. R.C. §2744.03(A)(5) and (6)(b) provides that a political subdivision's judgment or discretion, exercised with "malicious purpose, in bad faith, or in a wanton or reckless manner," is excepted from immunity as are the acts or omissions of a political subdivision employee, committed "in bad faith, or in a wanton or reckless manner."

ORC §2151.421 required Appellees to follow up and investigate any referrals of suspected abuse and to take action to prevent further abuse because they have a common law duty to protect children who are victims of abuse from further, continued abuse. As discussed above, Appellee CSB does not enjoy immunity for its actions when their failure to protect is reckless and amounts to a conscious disregard for a great and obvious harm. Looking at the facts in a light most favorable to Mr. Lindsey, the undisputed facts permit this matter to go to the jury.

### **III. PROPOSITION OF LAW NO. 3: THE POLITICAL SUBDIVISION TORT LIABILITY ACT (PSTLA) IS UNCONSTITUTIONAL**

While *Marshall v. Montgomery Co. Children Serv. Bd.*(2001), 92 Ohio St.3d 348, determined that immunity under R.C. §2744.01 *et sec.* is available to a CSB and its employees in an action alleging negligent failure to investigate a report of abuse, the *Marshall* Court did not address the issue of whether the PSTLA is constitutional. It is not. O.R.C. §2744.01 *et seq.* violates Ohioans' right to: (1) remedy as guaranteed by Article I, Section 16 of the Ohio Constitution; (2) jury trial as guaranteed by Article I, Section 5 of the Ohio Constitution; (3) due

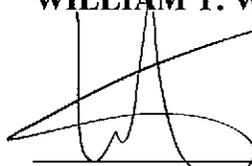
process as guaranteed by Article I, Section 16 of the Ohio Constitution; and (4) equal protection of the law as guaranteed by Article I, Section 2 of the Ohio Constitution.

The *Marshall* decision effectively strips these fundamental rights from parties damaged by the negligence of CSB or its employees in failing to investigate abuse reports and failing to protect a child from further abuse. By precluding victims' of CSB's conduct from exercising fundamental rights, the PSTLA must be subjected to strict scrutiny. Understanding the disparity the *Marshall* decision created is very simple; one need look no further than a case decided on the same day as *Marshall*. In *Campbell v. Burton* (2001), 92 Ohio St.3d 336, the Supreme Court held that the child abuse reporting statute **did** impose liability on a board of education and its teachers for failure to report suspected child abuse. A board of education is a political subdivision and its teacher are employees of a political subdivision. Both the claims in *Marshall* and *Campbell* involved claims against a political subdivision and its employees. The alleged negligence of the two is substantially similar; both involved failure to carry out duties mandated under the child abuse reporting statute. There is no reasonable basis to distinguish between these two classes.

### CONCLUSION

There is reasonable and reliable evidence to support the contention that Appellees acted in reckless disregard for the rights, health, and welfare of Caleb Lindsey. The Court of Appeals decision to uphold summary judgment should be reversed.

Respectfully submitted,  
**WILLIAM T. WHITAKER CO., LPA**



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**CERTIFICATE OF SERVICE**

A copy of the foregoing was served by regular U.S. mail this 9<sup>th</sup> day of July, 2009 upon:

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William T. Whitaker

STATE OF OHIO )  
COUNTY OF SUMMIT )

COURT OF APPEALS  
DANIEL M. HORRIGAN  
IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT  
2009 MAY 27 AM 7:48

STEPHEN LINDSEY, ADM'R.

SUMMIT COUNTY, No. 24352  
CLERK OF COURTS

Appellant

v.

SUMMIT COUNTY CHILDREN'S  
SERVICES BOARD, et al.

Appellees

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2007 03 2160

DECISION AND JOURNAL ENTRY

Dated: May 27, 2009

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MOORE, Presiding Judge.

{¶1} Appellant, Stephen Lindsey, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This case results from the tragic death of two-year-old C.L. in December of 2002. C.L. was born in November of 2000 and his parents separated shortly thereafter. His Mother, nka Crystal Jones ("Mother"), left the family home and moved in with her parents. C.L. remained with his Father, Appellant Stephen Lindsay ("Father"), and starting in February of 2002, C.L. began visiting Mother overnight. These visits took place at Mother's parents' home on Gale Street in Akron, Ohio. On March 25, 2002, Father arrived at Mother's residence to pick up C.L. Father noticed a red mark on C.L.'s face and questioned Mother. Mother indicated that she was not sure what caused the mark, and that perhaps it was an allergy. Father took C.L. to daycare, and as he was removing C.L.'s sweatshirt, he noticed that the red mark was more

extensive than he had originally thought. Father immediately took C.L. to the hospital. The hospital reported the incident (hereinafter referred to as "the March incident") to the Summit County Children Services Board ("CSB") and to the police.

{¶3} CSB employee, Patricia Westfall ("Westfall"), began an investigation into the incident. After several unsuccessful attempts to reach C.L.'s parents, Westfall was finally able to schedule a meeting with the parents regarding the March incident. On June 17, 2002, Westfall met with C.L.'s parents, his grandmother and C.L. At the meeting, Westfall learned that Mother had a boyfriend but that the boyfriend was not living with her. After the meeting, Father continued to allow C.L. to visit with Mother at Mother's parents' home. In July 2002, CSB closed its investigation into the March incident, noting that C.L. was safe in Father's care.

{¶4} Sometime after the June meeting, Mother moved out of her parents' Gale Street home. Father continued taking C.L. for overnight visits at Mother's new home. While Mother stated that she was pregnant with her boyfriend's, Gerald Barham, child, he did not live with her at the new address. He did, however, often stay overnight. On December 27, 2002, Father took C.L. to stay the night at Mother's home. Although Father stated that he believed Mother was home at the time, he did not see her and left C.L. with Barham. The parties agree that that night, Barham fatally struck and killed C.L. In their deposition testimony, Mother and Father alleged that Barham was also responsible for the March incident.

{¶5} On March 16, 2007, Father filed a wrongful death action against CSB, and CSB employees, Patricia Westfall and Steven Bodey (collectively "the Employees"). CSB and the Employees answered, asserting that they were immune to suit. On April 29, 2008, CSB filed its motion for summary judgment. On May 1, 2008, the Employees filed their motion for summary

judgment. Father filed a combined response to these motions. On July 1, 2008, the trial court granted summary judgment in favor of CSB and the Employees.

## II.

**ASSIGNMENT OF ERROR I**

“THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT IN FAVOR OF [] WESTFALL AND [BODEY] BASED UPON A FINDING OF FACT THAT WAS NOT RAISED IN THE MOTION FOR SUMMARY JUDGMENT AS A POTENTIALLY DISPUTED MATERIAL FACT AND, THUS, DENYING THE NONMOVING PARTY THE OPPORTUNITY TO PRESENT EVIDENCE ON THAT ISSUE.”

**ASSIGNMENT OF ERROR II**

“THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT IN FAVOR OF [] WESTFALL AND [BODEY] AS THERE ARE GENUINE DISPUTES WITH REGARD TO MATERIAL FACTS[.]”

{¶6} In his first assignment of error, Father contends that the trial court erred in granting summary judgment in favor of the Employees based upon an issue that was not raised in their motion for summary judgment. In his second assignment of error, Father contends that the trial court erred in granting the Employees’ summary judgment motion as there are genuine disputes with regard to material facts. We conclude that the trial court properly granted the Employees’ summary judgment motion.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civil Rule 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party “may not rest upon the mere allegations and denials in the pleadings” but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶10} With regard to the moving party’s burden to inform the trial court of the basis for the motion, “[a] party seeking summary judgment must specifically delineate the basis for [the motion] in order to allow the opposing party a meaningful opportunity to respond.” *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 116. We have explained that if the moving party does not raise an issue in its motion for summary judgment, then it is improper for the trial court to grant the motion on that basis. *Wilson v. Smith*, 9th Dist. No. 22193, 2005-Ohio-337, at ¶15. “[I]f a party files a motion based on some, but not all, issues in a case, the trial court should restrict its ruling to those matters raised. It is reversible error to award summary judgment on grounds not specified in the motion for summary judgment.” (Internal citations omitted.) *Caplinger v. New*

*Carlisle*, 2d Dist. No. 2007CA0072, 2008-Ohio-1585, at ¶26. The trial court may not rely on law or fact that is not presented in the moving party's motion. *Id.* at ¶28.

{¶11} Lindsey contends that the trial court improperly granted the Employees' motion on the basis that Westfall made a determination that Mother hit C.L. and therefore she [(Westfall)] was not reckless in failing to pursuing any further investigation into the incident. With regard to whether the Employees were reckless, in its judgment entry the trial court stated that

"[t]he key is the conclusion reached by Westfall and Brody (sic)<sup>1</sup>—disregarded by [Lindsey's expert] in reaching her opinions—that Mother was the likely perpetrator of the March assault. Plaintiff does not question that conclusion, he simply ignores it. \*\*\* It is not that [the Employees] simply closed the case without forming a belief as to what had happened, blindly leaving a potentially dangerous but unknown likely perpetrator in proximity to [C.L.] Rather they drew the reasonable conclusion that Mother had struck [C.L.] (in frustration, as Westfall believed), but that there was unlikely to be repetition, especially since [C.L.'s] father would have primary custody and control of him and it was thought that [C.L.] would continue to be at the Grandparents' house when visiting with Mother. They concluded it was safe to close the case out on that basis. \*\*\* The evidence will not support the conclusion that either Westfall or Brody (sic) were reckless or acted wantonly in deciding to close the case when and how they did, without pursuing the identity of the boyfriend or imposing restrictions on his contact with [C.L.], once they concluded that Mother was the likely perpetrator."

{¶12} In other words, the trial court relied heavily on its determination that the Employees concluded that Mother was the perpetrator of the March incident. Therefore, we look to the Employees' arguments in their motion to determine if the trial court erred in relying on this fact. Nowhere in the Employees' motion is there mention that the Employees made a determination regarding the March incident and therefore closed the case. Accordingly, we conclude that the trial court erred in relying on this fact. However, we have consistently held

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<sup>1</sup> We note that throughout the trial court's entry, it spells Steven Bodey's name as both Bodey and Brody. The correct spelling is Bodey.

that “[a]n appellate court shall affirm a trial court’s judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial.” *In re Estate of Baker*, 9th Dist. No. 07CA009113, 2007-Ohio-6549, at ¶15, citing *Reynolds v. Budzik* (1999), 134 Ohio App.3d 844, 846, at fn. 3. As we will fully set out below, we have determined that there were other grounds upon which to affirm the trial court, and therefore, any error the trial court made with regard to relying on this fact was harmless. We next turn to the facts and arguments presented in the Employees’ motion for summary judgment to properly conduct our de novo review of this case.

{¶13} The Employees argued that they were not liable for C.L.’s death, that they were statutorily immune from the claims being asserted and that their conduct was not the direct and proximate cause of C.L.’s death.

{¶14} Pursuant to the Ohio Administrative Code, “[u]pon receipt of a report of a child at risk of abuse and neglect, the public children services agency (PCSA) shall determine the *immediacy of need* for agency response based on information from the following sources: (1) The referent/reporter[,] (2) Child protective services records for the family.” (Emphasis added.) O.A.C. 5101:2-34-32(A). Further, “[t]he PCSA shall consider the report an emergency when it is determined that there is an immediate threat of serious harm to the child or there is insufficient information to determine whether or not the child is safe at the time of the report.” O.A.C. 5101:2-34-32(D). The Ohio Administrative Code sets forth the *duty* of the Employees. However, R.C. 2744.03(A)(6)(c) provides statutory immunity for the Employees’ negligent conduct “absent an express imposition of civil liability in a separate section of the Revised Code.” *Estate of Graves v. Circleville*, 4th Dist. No. 06CA2900, 2008-Ohio-6052, at ¶26. R.C. 2744.03(A)(6) states in part:

“In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies: “\*\*\* “(b) The employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]”

{¶15} In *Shadoan v. Summit Cty. Children Serv. Bd.*, 9th Dist. No. 21486, 2003-Ohio-5775, we elaborated on the type of conduct that meets the standard set forth in R.C. 2744.03(A)(6). Regarding malice, we stated that “[i]n order for a malicious purpose to exist, there must be ill will or enmity of some sort.” *Shadoan*, supra, at ¶12. Malice includes “the willful and intentional design to do injury, or the intention or desire to harm another through conduct which is unlawful or unjustified.” (Quotations and citations omitted.) *Id.*

{¶16} “[B]ad faith’ embraces more than a simple misjudgment or negligence.” *Id.* “It imports a dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive or ill will[.]” *Id.* citing *Jackson v. Butler Cty. Bd. of Cty. Commsrs.* (1991), 76 Ohio App.3d 448, 454.

{¶17} One acts wantonly when there is a complete “failure to exercise any care whatsoever.” *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356. Importantly, “mere negligence will not be construed as wanton misconduct in the absence of evidence establishing a disposition of perversity on the part of the tortfeasor [.]” *Shadoan*, supra, at ¶13, citing *Fabrey*, 70 Ohio St.3d at 356.

{¶18} The Ohio Supreme Court has explained that a person’s conduct

“is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. Distilled to its essence, \*\*\* recklessness is a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. In fact, the actor must be conscious that his conduct will in all

probability result in injury.” (Internal citations and quotations omitted.) *O’Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, ¶¶73-74

{¶19} We deduce from their motion that the Employees claim that they were not reckless or malicious in their investigation of the March incident because they did not determine that there was an immediate need for their response. Specifically, they contend that they determined that the Gale Street address provided a safe environment for C.L. and that they recommended that visitation continue with Mother on the basis that the Grandmother would be present in the home. They further contend that they did not know that Mother had moved to the Thornton St. home with Barham or, that on the night of the murder, Father willingly dropped C.L. off at the Thornton home with Barham. What was known to the Employees was that after the March incident, there were no further reports or inquiries from Father regarding either the investigation of the March incident or any other incidents of abuse.

“Showing recklessness is subject to a high standard. *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, ¶37. Thus, although the determination of recklessness is typically within the province of the jury, summary judgment is appropriate in instances where the individual’s conduct does not demonstrate a disposition to perversity. *O’Toole* at ¶75; *Fabrey.*, 70 Ohio St.3d 351.” *Fields v. Talawanda Bd. of Edn.*, 12th Dist. No. CA2008-02-035, 2009-Ohio-431, at ¶16.

{¶20} To conclude whether there was a genuine issue of material fact with regard to the Employees’ recklessness and whether they were entitled to judgment as a matter of law, we turn to the evidence presented to determine what the Employees knew at the time of the March incident. The Employees supported their motion with the deposition testimony of Mother, Grandmother, Father, and the Employees’ affidavits.

{¶21} In their motion, the Employees contend repeatedly that they were unaware of Barham’s presence in Mother’s home. We find that this conclusion is supported by the record. Notably, Westfall testified that at the June hearing, the fact that Mother had a boyfriend was

mentioned. She asked the parties whether the boyfriend could have been responsible for hitting C.L. and that there was no response to her question. She further asked for the name, and the parties did not share it with her. She then explained that she cautioned everyone in the room to be careful about boyfriends and girlfriends around C.L. Westfall further testified that she spoke with Bodey, her supervisor, and informed him about the boyfriend, but told him that no one would give her additional information. Finally, on the risk assessment sheet that Westfall completed, she indicated that there was insufficient information regarding whether there was a boyfriend in Mother's home. She explained that she made this statement because there was a mention of a boyfriend, but it was not clear if he ever stayed in the home.

{¶22} Next, we look at Bodey's deposition testimony. He confirmed that Westfall informed him that Mother had a boyfriend and that she asked for more information, but that "it didn't appear that anybody wanted to offer that information[.]" He further explained that it was not an uncommon occurrence that the parties would decline to give Westfall the name of the boyfriend. When later questioned whether the Employees followed up to determine the identity of the boyfriend, Bodey reiterated that they "would have no method to do that unless somebody told us who the person is." To this end, Father testified that prior to the March incident he knew that Barham was Mother's boyfriend and that he informed Mother that he did not want his son around another man. He confirmed that the Grandmother said something at the June meeting about Mother's boyfriend, but that she did not say anything that would have put the boyfriend in a bad light in terms of his relationship with C.L. He stated that the Grandmother did not say anything that would indicate that the boyfriend was a danger or risk to C.L. Finally, Father stated that when Westfall asked if anyone else was living in the home at the time of the March incident, both the Grandmother and Mother said no. The Grandmother and Mother's deposition

testimony confirm this fact. The parties are in agreement that Barham's name did not come up at the June 2002 meeting, despite the fact that the records show that a discussion was had regarding a boyfriend. Thus, we conclude that no genuine issue of material fact exists as to whether the Employees knew Barham's identity at the time of the investigation of the March incident. It is clear that they did not.

{¶23} We must next determine whether the decision not to further investigate the boyfriend issue showed a "perverse disregard of a known risk." *O'Toole*, supra, at ¶73. We reiterate that we are not determining whether the Employees were *negligent* in this regard, but rather if their alleged failure to act was "with malicious purpose, in bad faith, or in a wanton or reckless manner". R.C. 2744.03(A)(6). We conclude that based on the information the Employees had at the time they closed the case on the March incident, their "conduct does not demonstrate a disposition to perversity." *Fields*, supra, at ¶16, citing *O'Toole*, supra, at ¶75. As we fully discussed above, it is clear that the Employees did not know who Mother's boyfriend was, nor did they have any reason to believe that the boyfriend was a threat to C.L. Specifically, Father stated at his deposition that the Grandmother, although indicating that she did not like the boyfriend, said nothing to put him in a bad light. When questioned further about the boyfriend, none of the parties present at the June meeting offered any information.

{¶24} In response, Father points to the affidavit of Ann Wolbert Burgess, a forensic examiner and professor of nursing at Boston College. He states that the trial court failed to consider this affidavit when it determined the merits of the summary judgment motion. Burgess' affidavit states that after reviewing the entire record, including the depositions and hospital records, that CSB and the Employees had a duty to determine Barham's identity and that C.L.'s death was a direct and proximate result of CSB and the Employees' reckless conduct. In

discussing expert affidavits with regard to R.C. 2744.03(A)(6)(b), we have determined that “[t]he affiants’ statements that [the appellant] was reckless were legal conclusions, not factual statements. Such legal conclusions should not have been included in the affidavits and, in any event, did not create any issues of fact.” *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772. Accordingly, the trial court was correct to disregard these statements.

{¶25} Given these facts, we conclude that the Employees were entitled to judgment as a matter of law and that after viewing the evidence in the light most favorable to Father, reasonable minds can only conclude that the Employees did not act “with malicious purpose, in bad faith, or in a wanton or reckless manner”. R.C. 2744.03(A)(6). Accordingly, the trial court did not err when it granted the Employees’ summary judgment motion. Father’s first and second assignments of error are overruled.

### ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED IN GRANTING [CSB’S] MOTION FOR SUMMARY JUDGMENT[.]”

{¶26} In his third assignment of error, Father contends that the trial court erred in granting CSB’s motion for summary judgment. We do not agree.

{¶27} We explained above that we review a grant of a motion for summary judgment de novo. *Grafton*, 77 Ohio St.3d at 105. CSB alleged in its motion that it was immune to suit pursuant to R.C. 2744.02(A)(1) and that none of the statutory exceptions to political subdivision immunity pursuant to R.C. 2744.02(B) applied.

{¶28} We have recently determined that “CSB is clearly a political subdivision entitled to immunity under R.C. 2744.02(A)(1)[.]” *Grimm v. Summit Cty. Children Servs. Bd.*, 9th Dist. No. 22702, 2006-Ohio-2411, at ¶62. We explained that once immunity has been established pursuant to R.C. 2744.02(A)(1), we turn to the five exceptions to immunity pursuant to R.C.

2744.02(B)(1)-(5) to determine if they apply. *Id.* Only after a determination that an exception to immunity applies do we turn to any of the defenses in R.C. 2744.03. *Id.*

{¶29} In his response below, Father conceded that our decision in *Grimm* “may have foreclosed the possibility of recovery against the agency, CSB, in the short term[.]” He stated that “he continues to present his claim against CSB to preserve the issue and to allow for Supreme Court review.” Despite this concession below, Father alleges on appeal that the trial court erred in granting the summary judgment in CSB’s favor because the Employees acted with “malicious purpose, in bad faith, or in a wanton or reckless manner,” pursuant to R.C. 2744.03(A)(5). However, both here and below, Father fails to argue the second step in an immunity analysis, as set forth by the Ohio Supreme Court, that one of the five exceptions to immunity pursuant to R.C. 2744.02(B)(1)-(5) exists. *Grimm*, supra, at ¶62. Instead, he has skipped this step and moved onto the third step, the defenses in R.C. 2744.03. This analysis ignores established Ohio Supreme Court precedent that “R.C. 2744.03(A)(5) is a defense to liability; it cannot be used to establish liability[.]” *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 32.

{¶30} We determine that none of the five exceptions to immunity exist in the instant case. The five exceptions are: 1) when the injury is caused by the negligent operation of a motor vehicle by their employees, 2) when the claim arises from the “negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions[.]” 3) when the claim arises from the negligent failure to keep public roads in repair or other negligent failure to remove obstructions from public roads, 4) when the claim arises from the negligence of employees “that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental

function[.]” and 5) “when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code[.]” R.C. 2744.02(B)(1)-(5).

{¶31} In his complaint, Father alleged that CSB acted maliciously, willfully and wantonly by allegedly failing to conduct a meaningful investigation into the March incident. He does not invoke any of the exceptions to immunity stated above. Nor do we conclude that any of the exceptions apply in this case. In *Grimm*, we determined that an argument that CSB allegedly failed to properly investigate a claim of child abuse did not fall within the exception of R.C. 2744.02(B)(5). Concluding that, as a matter of law, none of the exceptions apply to nullify CSB’s immunity, CSB is entitled to judgment as a matter of law. Accordingly, Father’s third assignment of error is overruled.

#### ASSIGNMENT OF ERROR IV

“THE POLITICAL SUBDIVISION TORT LIABILITY ACT (PSTLA) IS UNCONSTITUTIONAL[.]”

{¶32} In his fourth assignment of error, Father contends that the political subdivision tort liability act (PSTLA) is unconstitutional. We do not agree.

{¶33} We decided this issue in *Grimm*. We stated that:

“In *Shadoan*, the appellant challenged the PSTLA on the same constitutional grounds as cited in the instant matter: the right to a remedy, the right to a jury trial, the right to due process and to equal protection of the law.

“In *Shadoan*, this Court declined to strike down the PSTLA as unconstitutional because the plurality opinion in *Butler v. Jordan* (2001), 92 Ohio St.3d 354[], (expressing concern that R.C. 2744 et seq. may be unconstitutional) did not command a majority on the Ohio Supreme Court. *Shadoan* at ¶7.

“Based on our holding in *Shadoan*, we decline to strike down the PSTLA as unconstitutional.” *Grimm*, supra, at ¶¶85-87.

{¶34} Further, the Ohio Supreme Court has recently stated that the issue of the constitutionality of the PSTLA is well settled and declined to further discuss the appellant’s

constitutional challenge. *O'Toole*, supra at ¶95. Accordingly, Father's fourth assignment of error is overruled.

III.

{¶35} Father's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



CARLA MOORE  
FOR THE COURT

DICKINSON, J.  
CONCURS

BELFANCE, J.

CONCURS IN PART AND DISSENTS IN PART, SAYING:

{¶36} I concur with my colleagues that the trial court erroneously granted summary judgment in this matter. However, I respectfully dissent with that portion of the opinion which holds that it is appropriate to grant summary judgment in favor of the CSB employees as the issue of recklessness is a question that should be decided by a jury.

{¶37} In its summary judgment ruling, the trial court concluded that in the absence of the Appellees' adverse conclusion that the mother was the likely perpetrator of the abuse; the Appellees would have "closed the case without forming a belief as to what had happened, blindly leaving a potentially dangerous but unknown likely perpetrator in proximity to [C.L.]" The trial court concisely and aptly describes behavior that reasonable minds could find was not merely negligent but reckless, under circumstances where the CSB employees had not concluded that mother was the likely perpetrator. Thus, I believe that whether the Appellees/employees were reckless under circumstances where physical abuse was substantiated, and there was a failure to fully investigate all obvious potential perpetrators of the abuse, is a question of fact for a jury to decide. Based upon review of the record, I believe summary judgment is inappropriate given that reasonable minds could differ as to whether the actions and/or inactions of the CSB employees amounted to recklessness.

{¶38} As pointed out by the majority, the general rule is that the determination of recklessness is typically a question of fact within the province of the jury. Thus, deviation from this general standard must be considered with caution. As stated in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574:

"[A]n actor's conduct 'is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to

realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” Id. at ¶73, quoting *Thompson v. McNeil* (1990), 53 Ohio St.3d 102, 104-105, quoting 2 Restatement of the Law 2d, Torts (1965) 587, Section 500.

{¶39} We have reiterated that standard in our prior decisions. *Thornton v. Summit Cty. Children Servs. Bd.*, 9th Dist. No. 23490, 2007-Ohio-4657, at ¶12; *Slauterbeck v. Delaney* (Nov. 8, 2000), 9th Dist. No. 99CA0068, at \*2; *Maxwell v. Rowe* (Sept. 23, 1998), 9th Dist. No. 97CA0075, at \*2; *Bentley v. Cuyahoga Falls Bd. of Edn.* (1998), 126 Ohio App.3d 186, 189.

{¶40} In applying the above standard of recklessness, I would find that reasonable minds could differ on whether the failure to investigate an obvious potential perpetrator of substantiated abuse created an unreasonable risk of harm to C.L. that was substantially greater than that which would make the conduct negligent. As an initial observation, it is undisputed that the CSB employees, in the face of a hospital referral that C.L. had been struck, did not promptly investigate the report of abuse, but rather took two and a half months to meet with the parents. By this point, the CSB employees could not have seen the actual physical marks on C.L.—a fact that may have contributed to forming a belief as to the seriousness of the abuse and thereby affecting the outcome of the risk assessment. Further, given the failure to promptly meet with the parties, the CSB employees lost the opportunity to question the parties at a point in time that they would have had heightened recollection of many of the surrounding facts and circumstances, which could have resulted in a more accurate risk assessment.

{¶41} In reaching its conclusion, the majority relies on the undisputed fact that the CSB employees did not know the identity of the mother’s boyfriend. Clearly that fact is undisputed. However, the real question is **why** the CSB employees did not know of the identity of the boyfriend and the risk of harm attendant to the failure to fully investigate his identity in the face

of not knowing who had perpetrated the abuse. In this regard, the CSB employees aver that they asked mother who the boyfriend was and she did not give his name. Further, when asked whether boyfriend might have perpetrated the abuse, the CSB employee received no response—a fact that could reasonably be seen as a serious warning sign that there was a potential risk regarding boyfriend. Employee Westfall reported to her supervisor that information regarding the boyfriend was not forthcoming. Bodey, the supervisor, stated that it did not appear that anyone wanted to give more information about the boyfriend. In light of the fact that CSB had not formed an opinion as to the perpetrator of the abuse, the question is whether the CSB employees were reckless in failing to investigate a potential perpetrator of the abuse, given this obvious red flag. Notably, there is no testimony that CSB communicated to C.L.'s father any concern that mother's boyfriend could be a potential perpetrator and that the risk assessment was incomplete in light of the lack of information concerning the boyfriend. Nor was there any effort to use father as an intermediary to obtain the boyfriend's name for CSB. Further, there was no communication with the father, mother or grandmother concerning the importance of disclosing the name of the boyfriend and providing more detail as to the nature of any interaction he might be having with C.L. The implicit suggestion that the CSB employees were helplessly unable to at a minimum obtain the name of mother's boyfriend is simply not credible especially in light of the father's concerns for C.L.'s safety and the parties' cooperation with CSB.

{¶42} In light of these facts, I cannot agree with the majority's conclusion that the CSB employees had no reason to believe that the boyfriend was a threat. The CSB employees had not identified the perpetrator of the abuse and had information that the boyfriend might be the perpetrator by virtue of the mother's failure to be open and forthcoming regarding his identity

and the non-response to a direct question as to the whether boyfriend could be responsible for the abuse.

{¶43} Because summary judgment terminates a litigant's right to trial and precludes a jury from considering a case, and given that the determination of recklessness is generally a question of fact for the jury to determine, summary judgment should be used very cautiously and sparingly. See *Norris v. Ohio Standard Oil Co.* (1982), 70 Ohio St.2d 1, 2. "It is imperative to remember that the purpose of summary judgment is not to try issues of fact, but rather to determine whether triable issues of fact exist." *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 15. Construing the evidence in the light most favorable to Appellant, reasonable minds could differ as to whether the facts of which the CSB employees had reason to know permitted an unreasonable and substantial risk of harm to C.L. Thus a jury question is presented as to whether the actions and/or inactions of the Appellees rose to a level of recklessness sufficient to impose liability under R.C. 2744.03(A)(6)(b).

APPEARANCES:

WILLIAM T. WHITAKER, and ANDREA WHITAKER, Attorneys at Law for Appellant.

ORVILLE L. REED, III, Attorney at Law, for Appellees.



**I. THE EVIDENCE**

**A. EVIDENCE REVIEWED**

The Court has reviewed all of the evidence submitted in connection with the motions:

- 1) *Deposition transcripts* of Bodey, Westfall, Stephen A. Lindsey ("Father"), Crystal Dawn Jones (formerly Lindsey) ("Mother") and Melanie Jones ("Grandmother").
- 2) *Affidavits* of Bodey, Ann Wolbert Burgess, DNSc. ("Burgess"), and Westfall.
- 3) *Plaintiff's Deposition Exhibits* (Depo), Depo A (CSB Referral for Family Assessment, 3/26/02; Depo B (CSB Contact Report 3/27/02); Depo C (Letter from Westfall to Father, 5/21/02); Depo D (Letter from Westfall to Mother, 5/21/02); Depo E (CSB Contact Report 5/30/02); Depo F (CSB Contact Report 5/30/02); Depo G (CSB Contact Report 6/11/02); Depo H (CSB Contact Report 6/17/02 – family meeting) and Depo I (CSB Risk Assessment Matrix, 7/12/02).
- 4) *Plaintiff's Opposition Brief Exhibits* (Brief), Brief A (Childrens' Hospital Records, Bates numbered CSB 163-176); Brief B (Letter from Doyle Lott to Childrens' Hospital, 3/26/02, CSB 219-220); Brief C (CSB Contact Reports, CSB 111-124, inc. Depo B, E, G and H); Brief D (CSB Referral for Family Assessment, 7/12/02, CSB 95-97); Brief E (CSB Risk Assessment Matrix, CSB 25-33, same as Depo I); and Brief G (Ohio Attorney General Offender Detail Report for Gerald Barham ("Barham"), 9/27/02).
- 5) *Defendants' Reply Brief Exhibits* (Reply), Reply 1 (number assigned by the Court for purposes of this Judgment) (Journal Entry of 9/22/99 in *State v. Barham*, Summit County Case No. CR 99 07 1561); Reply 2 (Journal Entry of 9/13/00 in *State v. Barham*, Summit County Case No. CR 00 03 0738(A)); and Reply 3 (Journal Entry of 11/27/01 in *State v. Barham*, Summit County Case No. CR 01 10 2851).

6) *Records of Barham's Conviction for Murder.* The Court takes judicial notice of the Indictment dated January 7, 2003, in *State v. Barham*, Case No. CR 2002 12 3764 in this Court and the Journal Entry in the same case dated May 30, 2003, reflecting Barham's guilty plea to and conviction of the murder of Caleb. Both documents are attached to this Judgment.

None of the Brief Exhibits were authenticated, except as some of them also appear as Deposition Exhibits, but Defendants did not object to the Court's consideration of any of the Brief Exhibits and it is in the interests of justice that the Court do so, since they all could readily be authenticated for admission at trial.

#### **B. FINDINGS OF FACT**

Caleb was born on November 19, 2000, to Stephen Lindsey ("Father") and Crystal Dawn Lindsey, now Jones ("Mother"). By March 26, 2002, Father and Mother had separated, with Father being Caleb's primary caregiver. Mother then resided with her mother, Melanie Jones ("Grandmother"), and stepfather, Brent Andes ("Grandfather"), at 158 Gale Street in Akron. Mother had begun a relationship with Gerald Barham ("Barham"), by whom she was pregnant. Barham lived in the Gale Street neighborhood with his parents. Mother and Barham frequently were at each other's houses.

As he had begun to do in the recent preceding weeks, Father dropped Caleb off at Gale Street on the evening of March 25, 2002, to stay overnight with Mother and the Grandparents. Early the next morning, on March 26, 2002, Father picked Caleb up to take him to day care. Father noticed a red mark on Caleb's cheek, which he thought at first was food and so started to try to wipe it off. But Mother told him that it was not food, rather a rash from an allergic reaction, and he did nothing further concerning it at that time.

However, when Father took Caleb's hooded sweatshirt off at the day care center, the mark appeared larger than he had originally believed, causing Father to take Caleb to Children's Hospital ("the Hospital"). It was determined at the Hospital that the mark was from a hand strike; the redness was the imprint of the hand. A report was made to CSB and to the Police.

Father was interviewed at the Hospital. Included in one of the interview records (Brief A, page CSB 169) was Father's statement that he knew of Mother's boyfriend (identified only as "Wink"), who had been at Gale Street when Caleb was dropped off but had not been there the next morning. In another Hospital interview record (Brief A, page CSB 174), Father was reported not to have been sure if the boyfriend had been at Gale Street in the morning.

Kerri Marshall, LSW, MSSA ("Marshall"), the Hospital social worker who conducted the intake interview with Father, noted Mother as the "Suspected Perpetrator." (Brief A, page CSB 175). The Hospital was satisfied that Caleb could safely be released to Father and that was done after the examination and interviews were completed.

CSB became involved in the incident the same day, March 26, 2002. Westfall was the social worker assigned to the case. Westfall's supervisor at the time was Doyle Lott. Brodey thereafter became her supervisor, receiving Caleb's case on May 21, 2002. Westfall had conversations with Marshall on March 26, then spoke with Mother by telephone on March 27. Mother told Westfall she had custody of Caleb and was concerned about him being released to Father. She told Westfall the mark on Caleb's cheek might have been from a fall, as well as possibly from an allergic reaction to the carpet.

Westfall had no substantive contact with anyone concerning Caleb until June 11, 2002, when she spoke again by phone with Mother. Westfall had made a number of attempts to reach the parents by phone and finally by letter. There was no information from the conversation with Mother or any other source to indicate any reason for concern about Caleb's safety at that time. A meeting was set up for June 17, 2002, at CSB, with Westfall, Mother, Father, Grandmother and Caleb. There is nothing in the record to indicate the delay in speaking with the family had any consequences.

At the meeting, Westfall had the opportunity to observe and to speak in person with all of the participants, so as to assess their credibility. She met with them as a group and also with Mother and Father alone. She also had the benefit of her earlier phone conversations with Mother, in which Mother had told Westfall she had custody of Caleb, had expressed concern about Caleb being released to Father and believed the mark had been from a fall or an allergic reaction. By the time of the meeting, Westfall had received information suggesting that the statements by Mother had been incorrect (custody), doubtful (cause of mark) or inappropriate (concern about release to Father).

Westfall's meeting report (Brief C, page CSB 124) included various statements about the possibility that Mother had struck Caleb. Thus, "Grandmother does not believe that mother hit or harmed Caleb in anyway;" "Mother denied the allegation. Mother reported that she did not hit or slap Caleb;" "Father reported that he has never seen Mother hit Caleb and does not believe she hit him but is not sure how Caleb got the mark;" "Neither parent is able of (sic) willing to acknowledge how Caleb obtained the mark on his face." There was no statement that Westfall ruled Mother out as the perpetrator, however.

The meeting report also included a reference to Mother's boyfriend: "Reportedly mother's boyfriend had been in the home the night Caleb stayed over and in the morning had the mark on his face – it was not clear if the boyfriend was in the mother's home in the morning." The sentence quoted above concerning "neither parent" followed that one. The report described Father as the primary caregiver/caretaker for Caleb and that Caleb primarily resided with him.

Westfall testified at her deposition that she had in fact concluded following the June 17 meeting that "most likely it was the mother" who had struck Caleb on March 26. *Westfall Tr.*, page 47, lines 15-22. She had discussed the matter with Bodey soon thereafter, probably on June 18. They agreed that Mother had probably inflicted the injury to Caleb. *Westfall Tr.*, page 68, lines 18-22 to page 69, line 2; *Bodey Tr.*, page 25, lines 8-18. Neither Westfall nor Bodey saw any reason to pursue the issue of the identity of Mother's boyfriend further after Mother, Father and Grandmother all declined to provide his name.

Neither the meeting report nor any other CSB document in evidence states the conclusion that Mother had struck Caleb, or even that she probably had done so. Nor does any document *exonerate* Mother or anyone else. The Risk Assessment Matrix (Depo I/Brief E) by which the case was closed contains entries that are consistent with the conclusion that Mother was the assailant, however, notably the "low risk" rating assigned to Mother (as opposed to the "no risk" rating for Father) in the category of Parenting Skills/Knowledge, including the factor of "willingness to protect."<sup>1</sup> The fact that Father was the primary custodial parent and caregiver was noted repeatedly as a justification for closing the case.

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<sup>1</sup> The Court takes it from Westfall's deposition testimony, *Tr.*, pages 82 line 25 through page 83 line 1, that she had mixed up which parent was "H" and which was "I" on the Matrix.

The Court finds Westfall's deposition testimony as to her July 2002 conclusion that Mother had struck Caleb to be credible and unrebutted, especially in the context of Bodey's confirmation that the conclusion concerning Mother was discussed between them at the time, the absence of any contrary evidence, the information in the record that the Hospital had treated Mother as the likely perpetrator from the outset and finally, the Matrix notations that are consistent with Westfall having reached that conclusion concerning Mother.

The mere absence of a direct statement to that effect in the contemporaneous documents is insufficient to create a genuine issue of fact, particularly since no document exonerates Mother either, or contains anything inconsistent with Westfall having reached her claimed conclusion at the time.

Westfall was in contact with the Police concerning their investigation. She did not recall that the Police made a determination as to who had struck Caleb. No one was ever charged with doing so. There is no stipulation or admissible evidence in the record that Barham actually struck Caleb on March 26. Father stated in his deposition that he had heard from others that Barham had confessed to doing so. *Father's Tr.*, pages 112, line 14 through 113, line 9. Mother stated in her deposition that Barham had never admitted to the March incident, only that she had concluded from the circumstances that he obviously had done it. *Mother's Tr.*, pages 53, line 20 through page 55, line 6.

CSB closed Caleb's case pursuant to the July 12, 2002, Matrix and had no further involvement with the family until the following December, when Caleb was murdered.

The record contains no direct evidence concerning Caleb's death, but the Court takes it as stipulated by the parties that Barham killed Caleb on December 27, 2002, and takes notice of the records of this Court in the matter. Father had dropped Caleb off that evening

at Mother's residence at 136 Thornton Street in Akron, to which Mother had moved some months earlier, after CSB's involvement with the family had ended in July. There is no evidence or contention that CSB or the individual defendants knew that Mother had moved from Gale Street.

Father left Caleb with Barham, who was at Thornton Street with Barham's infant child, who had been born recently to Mother. The evidence is disputed as to whether Father believed that Mother was at Thornton Street then, or would soon be there. Mother was in fact at work and the evidence is disputed as to whether she had told Father she would not be returning to Thornton Street until much later.

Barham is implicitly stipulated by the parties to have had an extensive criminal record prior to March of 2002, including crimes of violence. He was a registered Tier III sex offender. CSB and the individual defendants were unaware of Barham's identity before the murder and were therefore unaware of his criminal history. There is no evidence that any members of Caleb's family were aware of Barham's record or status either. There is no evidence that CSB would have handled the matter of the March assault differently had it been aware of Barham and his record, particularly as to Caleb's custody and Mother's visitation rights, but it is fair to infer that it would have done so, to prevent any contact between Caleb and Barham.

Burgess' Affidavit establishes her as an expert in the field of forensic investigation of child and adolescent abuse, qualified to render an opinion as to whether the defendants' conduct was a reckless or wanton failure to comply with the duties imposed upon them. Defendants have not disputed Burgess' qualification to render such an opinion.

Burgess' opinion was first that, "the activity of CSB in this case is evidence of a conscious disregard for a great and obvious harm . . . The failure to further investigate the perpetrator of the assault on a 16 month baby constituted a reckless conduct which created an unreasonable risk of physical harm to Caleb Lindsey." Burgess' summary opinion was that, "the death of Caleb Lindsey is a direct and proximate result of the reckless conduct of CSB, Mr. Steven Brody and Ms. Patricia Westfall which created an unreasonable risk of harm to Caleb Lindsey." *Burgess Affidavit*, paragraphs 9 and 11.

Burgess' opinions are founded on certain conclusions she drew from the evidence. Specifically, Burgess concluded that 1) "It was determined at [the June 17, 2002] meeting that it was unlikely that either parent had inflicted the injury to young Caleb." (Paragraph 5). 2) "CSB failed to rule out the only remaining possible perpetrator of the assault: [Mother's] boyfriend." (Paragraph 7.) 3) "The CSB workers had a duty to determine the name of the likely perpetrator and check out his past" (Paragraph 8). 4) Mr. Barham [was] the likely perpetrator of the March 26<sup>th</sup> assault on Caleb." (Paragraph 11.)

## II. APPLICABLE LAW.

A. Motions for Summary Judgment are analyzed under Civ. R. 56(C), requiring a finding from the evidence submitted that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327. *See also, Norris v Ohio Std. Oil Co.*, (1982), 70 Ohio St. 2d 1.

Once the moving party supports its position with appropriate evidentiary materials, the non-moving party must set forth specific facts that demonstrate that a genuine issue for trial exists. *Dresher v. Burt* (1996), 75 Ohio St. 3d. 280, 296; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64.

**B.** A political subdivision enjoys immunity from suit pursuant to R.C. 2744.02(A)(1), unless one of the exceptions of R.C. 2744.02(B) applies. In the context of the present case, the only potential exception would be that of R.C. 2744.02(B)(5), “where civil liability is expressly imposed upon the political subdivision by section of the Revised Code.”

Plaintiff contends that R.C. 2151.421 generally imposes a duty to investigate suspected abuse and to prevent further abuse that forms an exception to public agency immunity. In *Marshall v. Montgomery County Children Servs. Bd.*, 92 Ohio St. 3d 348 (Ohio 2001), the provision for investigation of abuse in R.C. 2151.421 was held not to create an exception to immunity, at 353. *Marshall* was held by the 9<sup>th</sup> District Court of Appeals to apply so as maintain agency immunity even if recklessness or wanton disregard can be established, *Grimm v. Summit County Children Servs. Bd.*, 2006 Ohio 2411, {¶¶ 66-69}.

There is no subsequent law that puts in question the binding effect on this Court of the holding in *Grimm*. Plaintiff concedes that *Grimm* bars his claim against CSB in the present action. R.C. 2151.421(A)(1)(a) was furthermore recently held not to create an exception to immunity by way of a duty to cross-report to law enforcement agencies, *O’Toole, Adm’r. v. Denihan*, 2008 Ohio 2574 (Supreme Court), at {¶ 61}. The Supreme Court likewise recently declined to find a “special relationship” exception to immunity, in *Rankin v. Cuyahoga County Dept. of Children and Family Services*, 2008 Ohio 2567 and reaffirmed expressly that, “a political subdivision is not liable for damages . . . caused by any

act or omission in connection with its operation of a public services agency except as provided in R.C. 2744.02(B)" at ¶ 39}.

C. Employees of a public agency can be held personally liable, however, if "the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b). Plaintiff asserts the "wanton or reckless manner" exception to immunity in the present case.

The Court in *Rankin, supra*, emphasized the elevated burden imposed on a plaintiff seeking to establish wanton or reckless conduct. By remanding for further consideration by the trial court of a motion for a summary judgment on those issues, the Supreme Court made it clear that the trial court is to exercise its gatekeeper function rigorously to test the sufficiency of the evidence against that high standard:

¶37} We note that showing recklessness is subject to a high standard. "This court has defined the term 'reckless' to mean that the conduct was committed "'knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.'" *Cater*, 83 Ohio St.3d at 33, 697 N.E.2d 610, quoting *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 96, 559 N.E.2d 699, fn. 2, quoting 2 *Restatement of the Law 2d, Torts* (1965) 587, Section 500. "[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury." *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St. 3d 351, 356, 1994 Ohio 368, 639 N.E.2d 31, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 55 O.O.2d 165, 269 N.E.2d 420.

¶38} Although the court of appeals recited a standard of recklessness that is consistent with our decisions, we are not convinced that the record supports the court's conclusion that "reasonable minds could conclude that these two individuals acted in a reckless manner in allowing these 'supervised' visits between Martin and D.M. to be conducted as they were." *Rankin*, 2006 Ohio 6759, P 28. The record before us is incomplete as to whether genuine issues of material fact exist regarding McCafferty's and Zazzara's alleged reckless conduct. Thus, we affirm the decision of the court of appeals to remand this cause to the trial court for further proceedings

regarding what involvement, if any, McCafferty and Zazzara had in the supervised visit that occurred between D.M. and Martin.

The standard to be applied on summary judgment in a matter such as this was even more fully examined in *O'Toole, supra*, at {¶¶ 70-92}, including a favorable discussion of the 9<sup>th</sup> District Court of Appeals' decisions in *Grimm, supra*, (no recklessness established) and *C.S. Hahn v. Wayne Cty. Children Servs.*, 2001 WL 489959 (recklessness established.) See also, *Shadoan v. Summit County Children Servs. Bd.*, 2003 Ohio 5775, {¶14} (9<sup>th</sup> Dist. App.).

This Court has the obligation to weigh the evidence presented with sufficient scrutiny to determine whether there is a genuine issue of material fact as to whether there was recklessness or wanton misconduct, not just negligence.

### III. ANALYSIS.

As Plaintiff concedes, the action against CSB must be dismissed on the authority of *Grimm*. The issue requires no further discussion.

The evidence concerning Westfall and Brody does not approach the high threshold for showing recklessness or wanton misconduct. The key is the conclusion reached by Westfall and Brody – disregarded by Burgess in reaching her opinions – that Mother was the likely perpetrator of the March assault. Plaintiff does not question that conclusion, he simply ignores it. Burgess' opinions, being founded on a completely inaccurate reading of the evidence in the record, cannot be accorded any credibility at all.

Indeed, on the present record, the Court cannot conclude that Westfall and Brody were wrong in their conclusion concerning Mother, even in retrospect. There is no evidence beyond remote, disputed hearsay that Barham was the perpetrator of the March assault. The information Defendants had at the time reasonably supported their conclusion that Mother

had struck Caleb, consistent with the initial Hospital suspicion and not put into question by any contrary Police determination.

The case appears in an entirely different light with Defendants' adverse conclusion concerning Mother in mind. It is not that Defendants simply closed the case without forming a belief as to what had happened, blindly leaving a potentially dangerous but unknown likely perpetrator in proximity to Caleb. Rather they drew the reasonable conclusion that Mother had struck Caleb (in frustration, as Westfall believed), but that there was unlikely to be a repetition, especially since Caleb's responsible Father would have primary custody and control of him and it was thought that Caleb would continue to be at the Grandparents' house when visiting with Mother. They concluded that it was safe to close the case out on that basis.

Was it negligent nevertheless not to press for information on the boyfriend, so as to have total certainty before closing the case? Perhaps, but that is not the issue before the Court. The evidence will not support the conclusion that either Westfall or Brody were reckless or acted wantonly in deciding to close the case when and how they did, without pursuing the identity of the boyfriend or imposing restrictions on his contact with Caleb, once they concluded that Mother was the likely perpetrator.

It is unclear whether Plaintiff contends that Defendants should have anticipated Mother's moving from Gale Street, but the evidence would not support any conclusion that it was reckless or wanton for Defendants to have failed to do so and to have imposed restrictions against that possibility.

Defendants have also argued that negligence by Plaintiff bars liability to him. The contention need not be discussed at length, since judgment is being granted for Defendants

on other grounds. It may be said, however, that Plaintiff's own comparative negligence cannot act as a bar, since he brings suit in his capacity of Administrator of Caleb's estate, not in his own right. To the extent that Defendants argue Plaintiff's negligence as intervening causation, eliminating proximate causation by Defendants' acts and omissions, the evidence is sufficiently in conflict to bar summary judgment on that basis.

#### **IV. CONCLUSION, INCLUDING JUDGMENT**

Defendants' Motions for Summary Judgment are **GRANTED**. The Complaint against all Defendants is **DISMISSED** on the merits with prejudice at Plaintiff's costs.

**IT IS SO ORDERED.**



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JUDGE ROBERT M. GIPPIN

cc: Attorney William T. Whitaker, Jr.  
Attorney Orville L. Reed III