[Cite as *Nash v. Cleveland Clinc Found.*, 2015-Ohio-1376.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101389

AMY NASH, ETC., ET AL.

PLAINTIFFS-APPELLANTS

vs.

CLEVELAND CLINIC FOUNDATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-06-588421

BEFORE: Keough, J., Boyle, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 9, 2015

ATTORNEYS FOR APPELLANTS

William K. Redmond
William K. Redmond Co., L.P.A.
16700 Brigadoon Drive
Chagrin Falls, Ohio 44023

James G. Corrigan
3134 Somerset Drive
Shaker Heights, Ohio 44122

ATTORNEYS FOR APPELLEES

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Barbara R. Marburger
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

KATHLEEN ANN KEOUGH, J.:

{¶1} Plaintiffs-appellants, Amy Nash, administrator of the estate of S.C. ("Nash"), and Mary Jo, Daniel Sr., Daniel Jr., Joshua, Michael, and Taylor Bajc (the "Bajcs"), appeal the trial court's judgment granting summary judgment in favor of defendants-appellees, Cuyahoga County, the Cuyahoga County Division of Children and Family Services ("CCDCFS"), and CCDCFS employees James McCafferty, James Provost, Kathleen Sullivan, Marie Velez, Theresa Almusaad, and LaShawna Thornton. For the reasons that follow, we affirm.

I. Procedural History

{¶2} The procedural history of this case was summarized by this court in *Nash v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 99128, 2013-Ohio-3618, as follows:

> The underlying consolidated cases were originally filed as three separate actions. The first action, *Nash v. Cleveland Clinic Found.*, Cuyahoga C.P. No. CV-588421, was filed by plaintiff-appellant Nash, as administrator of the estate, and Mary Jo Bajc. The defendants were the Cleveland Clinic Foundation and two of its employees, Drs. Johanna Goldfarb and Rita Steffen, as well as MetroHealth Medical Center and its employee, Dr. Irene Dietz.
>
> This action alleged that S.C. and his twin brother, "A.B.," were medically fragile infants who were placed in foster care with Bajc and her husband, Daniel Bajc, shortly after their birth in September 2002. The children were removed from their home on July 22, 2004, and placed in other foster homes after CCDCFS received a referral alleging that Mary Jo Bajc suffered from Munchausen Syndrome by Proxy, a psychological condition in which a parent falsifies or exaggerates symptoms in order to convince others that his or her child is sick and/or needs medical attention. S.C. died in another foster home on October 11, 2004.
>
> Nash later filed an action for wrongful death against Cuyahoga County, CCDCFS, six CCDCFS employees, and Joanne and Bryce Smith, the foster parents who were caring for the twins at the time of S.C.'s death. *Nash v.*

Cuyahoga Cty., et al., Cuyahoga C.P. No. 06-CV-603845. The Bajcs also filed a separate action in which they claimed that CCDCFS and the six employees created a false suspicion that Mary Jo fit the profile for Munchausen Syndrome by Proxy and thus defamed her, cast her in a false light, and interfered with her guardianship interest in the twins. *Bajc v. Cuyahoga Cty.*, Cuyahoga C.P. No. CV-602833.

* * *

In January 2007, all three actions were consolidated under Cuyahoga C.P. No. CV-588421.

In May 2007, the trial court dismissed the Bajcs' false light and invasion of privacy claim, finding that it was not a recognized tort under Ohio law. *See Ferreri v. Plain Dealer Publishing Co.*, 142 Ohio App.3d 629, 643, 756 N.E.2d 712 (8th Dist.2001).

The consolidated cases moved slowly through a lengthy pretrial process. In 2008, the trial court entered a ruling in which it denied the Cleveland Clinic's motion to quash subpoenas of its witnesses. The Cleveland Clinic appealed, and we reversed the trial court's decision in part. *Nash v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 92564, 2010-Ohio-10, ¶ 16. * * *

This court remanded the case with instructions for the trial court to enter a protective order allowing the depositions to go forward subject to restrictions on the scope of inquiry. *Id.*

In March 2011, the trial court entered a protective order to allow the depositions to proceed, but the parties objected to the protective order, and the court modified the protective order in July 2011. From June 2011 through August 2012, numerous discovery disputes arose in the trial court.

The Cleveland Clinic moved for summary judgment and, on May 31, 2012, the plaintiffs filed two motions requesting a 30-day extension of time to respond to the Cleveland Clinic's motion for summary judgment and an order extending the time for completion of discovery and for the filing of expert reports. In their motions, the plaintiffs argued that they had been unable to take the deposition of key Cleveland Clinic and CCDCFS employees, due in part to "stonewalling, delay, and motion practice" by those entities.

On July 23, 2012, Cuyahoga County, CCDCFS, and the CCDCFS

employees * * * filed a joint motion for summary judgment.

On July 31, 2012, the plaintiffs filed their brief in opposition to the Cleveland Clinic's motion for summary judgment. The next day, on August 1, 2012, the trial court granted the plaintiffs' 30-day extension request and issued rulings on at least thirty additional motions, finding most of them moot. Of importance, the trial court gave the plaintiffs an additional 60 days to finish discovery and file expert reports. In its order, the trial court stated, "No more extensions of time will be given. Trial remains set for 11/5/2012."

On August 22, 2012, the plaintiffs motioned the court for a 30-day continuance to respond to the County defendants' motion for summary judgment * * * until September 24, 2012. The trial court granted the motion, giving the plaintiffs until September 24, 2012, to respond to the County defendants' motion for summary judgment.

On August 28, 2012, the parties had a pretrial conference with the trial court and the court's staff attorney. The conference was not recorded.

On August 30, 2012, the plaintiffs dismissed their claims against MetroHealth and Dr. Dietz without prejudice.

On September 24, 2012, the day the plaintiffs' briefs in opposition to the County defendants' motion for summary judgment were due, Nash filed notices of voluntary dismissal without prejudice of her claims against the County and CCDCFS, foster parents Joanne and Bryce Smith, the Cleveland Clinic, and Drs. Steffen and Goldfarb. The Bajcs filed notices of voluntary dismissal without prejudice of their claims against the Cleveland Clinic and Drs. Steffen and Goldfarb.

Therefore, at that juncture, the following parties and claims remained. The Bajcs' claims for defamation and interference with guardianship remained against the County, CCDCFS, and the individually named CCDCFS employees. The estate's claims for wrongful death remained only as to the individually named CCDCFS employees.

Also on September 24, 2012, the plaintiffs filed a Civ.R. 56(F) motion for continuance and stay of consideration of the County defendants' motion for summary judgment. In their motion, the plaintiffs argued that, because of the "bad faith efforts" of opposing attorneys, they had been unable to take the depositions of defendants McCafferty, Provost, Almusaad, or the twins' treating pediatrician, Dr. Conrad Foley, or complete Velez's deposition.

> On October 4, 2012, the trial court entered an order denying plaintiffs' Civ.R. 56(F) motion, noting that * * * plaintiffs had ample time for discovery, had failed to timely file a brief in opposition to the motion for summary judgment, and there was sufficient evidence in the record from which the court could consider the summary judgment motion and render a decision.
>
> Also on October 4, 2012, the trial court issued a separate order granting the County defendants' motions for summary judgment. The court found the following:
>
> Under the three-tiered analysis in *Cater v. Cleveland*, 83 Ohio St.3d 24, 28 (1988): (1) under R.C. 2744.02(A)(1), defendants the County and [CCDCFS] are political subdivisions and have blanket immunity from liability for any acts and[/]or omissions they or their employees committed[;] (2) none of the exceptions to immunity apply under R.C. 2744.02(B), as defendants the County and CCDCFS engaged in a governmental function[;] (3) because no exceptions apply under R.C. 2744.02(B), the court does not need to determine whether any defenses to the exceptions apply. The court also finds that under R.C. 2744.03(A)(6), the County employee defendants * * * are entitled to immunity from liability, as: (1) none committed acts or omissions manifestly outside the scope of their employment or official responsibilities; (2) none committed acts or omissions with malicious purpose, in bad faith, or in a wanton or reckless manner; and (3) no other section of the Revised Code imposes civil liability upon them.

Id. at ¶ 3-21.

{¶3} Appellants appealed the trial court's grant of summary judgment to the County defendants, as well as the court's denial of their Civ.R. 56(F) motion for a continuance and to stay consideration of the County defendants' motion for summary judgment, and the trial court's issuance of a protective order denying appellants' access to, or deposition inquiry into, CCDCFS's investigatory file concerning the alleged abuse of the twins by Mary Jo Bajc.

{¶4} This court affirmed the trial court's grant of the protective order and denial of

the Civ.R. 56(F) motion. However, this court determined that there were 18 evidentiary submissions filed under seal in the trial court that were transmitted to the court of appeals with their seals and envelopes unbroken. *Id.* at ¶ 41. Included in those submissions were the depositions of 16 potential witnesses, including the depositions of three County defendants: Sullivan, Velez, and Thornton. *Id.* Accordingly, this court reversed the grant of summary judgment, and remanded to the trial court with instructions to conduct a conscientious examination of the record to determine whether summary judgment was appropriate. *Id.* at ¶ 43.

{¶5} The trial court subsequently issued a judgment affirming its previous grant of summary judgment. This appeal followed.

II. Facts

{¶6} This court set forth the underlying facts of this case in *Nash*, 8th Dist. Cuyahoga No. 99128, 2013-Ohio-3618, as follows:

> Twins S.C. and A.B. were born prematurely and drug-exposed on September 29, 2002. They were taken into custody by CCDCFS and, within a month, placed into the Bajc foster home. The twins were considered "medically fragile," had multiple special needs, eating problems, and were on daily medications.
>
> On July 21, 2004, CCDCFS social workers met with Bajc to discuss finalizing the adoptions of the twins. Adoption unit supervisor Kathleen Sullivan testified at deposition that she wanted to meet with Bajc to hear from her "what she felt the barriers were to their completing the adoption."
>
> According to Sullivan, when she returned to her office from her visit with Bajc, there was a referral on her desk that the agency had received concerning allegations that Bajc suffered from Munchausen Syndrome by Proxy. The next day, the agency removed the twins from the Bajcs' home as part of the investigation.

> While the agency investigated the allegations, the twins were placed in multiple foster homes. The twins were eventually placed in the Smith foster home. S.C. died in his crib on October 11, 2004. The coroner opined that his death was caused by asphyxia due to aspiration of gastric contents, *i.e.*, he choked or suffocated on his own vomit. The coroner ruled the death accidental.
>
> According to the allegations of plaintiffs-appellants, S.C. weighed 25 pounds at the time he left the Bajcs' home but only 22 pounds when he died, a 12 percent loss of his total body weight. Bajc averred that S.C. was in a greatly weakened state before he died and this weakened state contributed to his death. The agency, however, had reported that S.C. "thrived, " gained weight, and was doing well in the Smiths' home.
>
> Eventually, the agency ruled that the allegations that Bajc suffered from Munchausen Syndrome by Proxy were "unsubstantiated." The surviving twin was returned to the Bajcs' care and they adopted him.

Id. at ¶ 22-27.

{¶7} The gist of appellants' allegations, based on these events,

> is that the County defendants' concocted and falsely investigated allegations that Bajc suffered from Munchausen Syndrome by Proxy in response to the Bajcs' request for a higher monthly subsidy to care for the twins. According to [appellants], the agency further manipulated and falsified the facts of the investigation and the medical records of both boys in order to bolster their case for abuse by Bajc and the removal of the twins from the Bajcs' care. This sham investigation, according to [appellants], led to the abuse and neglect of both boys and resulted in the eventual and wrongful death of S.C.

Id. at ¶ 76.

III. Analysis

{¶8} In their motion for summary judgment, the County defendants argued that they were entitled to summary judgment under R.C. Chapter 2744, Ohio's Political Subdivision Immunity Act, which generally provides immunity from tort liability to political subdivisions and their employees.

{¶9} In their single assignment of error, appellants contend that the trial court erred in granting summary judgment to CCDCFS employees James McCafferty, James Provost, Kathleen Sullivan, Maria Velez, Theresa Almusaad, and LaShawna Thornton (collectively "CCDCFS employees").[1]

A. Standard of Review

{¶10} An appellate court review a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201.

{¶11} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.*

[1]Appellants do not challenge the trial court's grant of summary judgment to Cuyahoga County and CCDCFS.

If the party does not respond, summary judgment, if appropriate, shall be entered against the party. Civ.R. 56(C).

B. Political Subdivision Employee Immunity

{¶12} Under R.C. 2744.03(A)(6), an employee of a political subdivison is immune from liability unless "(a) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; [or] (c) civil liability is expressly imposed upon the employee by a section of the Revised Code."

{¶13} Appellants argue that the trial court erred in granting summary judgment because there are genuine issues of material fact regarding whether the CCDCFS employees' actions were manifestly outside the scope of their employment or official responsibilities and whether their actions were done with malicious purpose, in bad faith, or in a wanton or reckless manner. Appellants do not argue that liability is imposed by the Revised Code.

{¶14} We note that appellants did not file a brief in opposition to the County defendants' motion for summary judgment. The fact that no response was filed should not automatically lead to the granting of the motion for summary judgment, however. *Conway v. Thermafab Alloy*, 8th Dist. Cuyahoga No. 98901, 2013-Ohio-1539, ¶ 31, citing *CitiMortgage, Inc. v. Hoge*, 196 Ohio App.3d 40, 2011-Ohio-3839, 962 N.E.2d 327 (8th Dist.). Under summary judgment procedure, for the CCDCFS employees to prevail on their motion for summary judgment, they must still meet their evidentiary burden.

Accordingly, the issue on appeal is whether they demonstrated there is no genuine issue of material fact as to whether their actions were outside the scope of their employment, or whether they acted maliciously, wantonly, recklessly, or in bad faith with respect to their investigation of the Munchausen Syndrome by Proxy allegation against Mary Jo Bajc and the removal of the twins from the Bajcs' care.

> R.C. Chapter 2744 does not define the type of employee acts that fall "manifestly outside the scope of employment or official responsibilities" under R.C. 2744.03(A)(6)(a). However, Ohio courts have generally drawn from agency-law principles to hold that "conduct is within the scope of employment if it is initiated, in part, to further or promote the master's business." *Curry v. Blanchester*, 12th Dist. Clinton No. CA2009-08-010, 2010-Ohio-3368, ¶ 30, quoting *Jackson v. McDonald*, 144 Ohio App.3d 301, 307, 760 N.E.2d 23, 760 N.E.2d 24 (5th Dist.2001). "In the context of immunity, '[a]n employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment." *Id*. "It is only where the acts of state employees are motivated by actual malice or other [situations] giving rise to punitive damages that their conduct may be outside the scope of their state employment." *Id.*

Smith v. Pierce Twp., 12th Dist. Clermont No. CA2013-10-079, 2014-Ohio-3291, ¶ 35.

{¶15} For purposes of R.C. 2744.03(A)(6), "malice" is the willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified. *Pierce v. Woyma*, 8th Dist. Cuyahoga No. 97545, 2010-Ohio-3947, ¶ 15. "Bad faith" is more than bad judgment or negligence; it involves a dishonest purpose, conscious wrongdoing, the intent to mislead or deceive, or the breach of a known duty through some ulterior motive or ill will. *Id.*

{¶16} "'Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the

circumstances and is substantially greater than negligent conduct.'" *Gilbert v. Cleveland*, 8th Dist. Cuyahoga No. 99708, 2013-Ohio-5252, ¶ 12, quoting *Anderson v. Massillon*, 134 Ohio St.3d 380, 983 N.E.2d 266 (2012), ¶ 24. Finally, "wanton misconduct" is conduct that "manifests a disposition to perversity" such that the party acting or failing to act knows that his conduct will in all likelihood result in injury. *Id.*

{¶17} Issues regarding whether an actor's conduct was malicious, wanton, reckless, or in bad faith are generally for the jury to decide. *Gilbert* at ¶ 15. However, the standard for proving such conduct is high, and when the facts presented show that reasonable minds could not conclude that the conduct at issue meets that high standard, a court may determine that such conduct is not malicious, wanton, reckless, or in bad faith as a matter of law. *Taylor v. Cleveland*, 8th Dist. Cuyahoga No. 97597, 2012-Ohio-3369, ¶ 22. In this case, applying the foregoing standards to the motion for summary judgment, we find that the trial court did not err in granting the CCDCFS employees' motion.

1. James McCafferty

{¶18} There is no evidence whatsoever that James McCafferty, the director of CCDCFS during the relevant time period, had any direct involvement in the decisions or actions that appellants contend caused their injuries. On appeal, appellants do not point to any evidence of McCafferty's involvement but merely assert that he must have been involved in the "massive conspiracy" and "organizational misconduct" that allegedly led to S.C.'s death. Without any evidence of his involvement, however, the trial court properly granted summary judgment to McCafferty.

2. The other CCDCFS defendants

{¶19} Maria Velez was the CCDCFS adoption social worker assigned to the case; Kathleen Sullivan, a senior supervisor at CCDCFS, was Velez's supervisor; and James Provost was Sullivan's supervisor. LaShawna Thornton, a social worker in CCDCFS's special investigations unit, and Theresa Almusaad, a social worker assigned to CCDCFS's medical investigations unit, investigated the allegation that Mary Jo Bajc suffered from Munchausen Syndrome by Proxy. We find nothing in the record to suggest that their actions were outside the scope of their employment or done with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶20} The record reflects that on July 21, 2004, a mandated reporter called the CCDCFS hotline and notified CCDCFS that the reporter suspected that Bajc was causing S.C. to be subjected to unnecessary medical procedures for reasons other than his physical welfare. The agency commenced an investigation. To protect the twins, and as part of its investigation into whether Mary Jo Bajc suffered from Munchausen Syndrome by Proxy, CCDCFS removed the children from the Bajcs' home to determine whether the children's medical condition would improve while they were in the care of other individuals. An improvement would suggest that Mary Jo Bajc did indeed suffer from Munchausen Syndrome by Proxy.

{¶21} On August 12, 2004, Almusaad sent S.C.'s medical records to Dr. Mark Feingold at the MetroHealth Pediatrics Department. She asked him to render an expert opinion evaluating whether the history being reported by the Bajcs was consistent with the clinical evidence, and whether the medical interventions of the children while in the

Bajcs' home had been appropriate in light of the report that CCDCFS had received. Dr. Feingold testified that he reviewed "at least" 1,000 pages of medical records, including records from before S.C.'s and A.B.'s removal from the Bajc home, and records of their visits to MetroHealth after their removal. On September 12, 2004, he issued a written opinion to CCDCFS in which he opined that based upon his review of the records, "regardless of the conflicting opinions about the quality and safety of the twins' care with their original foster mother, they appear improved in their new home environment." Dr. Feingold testified that he concluded that removing the twins from the Bajcs' care was a "reasonable step, given [his] review of the information."

{¶22} The twins were placed in the Smith home on August 6, 2004. They were seen at MetroHealth that same day by Dr. Robert A. Johnson, who referred them to MetroHealth's Pediatric Comprehensive Care Program for evaluation of feeding aversion and developmental delay. On August 26, 2004, they were evaluated by Dr. Irene Dietz. Almusaad, Velez, Smith, and the children's guardian ad litem accompanied the twins on this visit.

{¶23} Dr. Dietz testified that she was aware that the twins had been diagnosed with failure to thrive and gastroesophageal reflux disease, and that doctors at the Cleveland Clinic had recently placed a gastrostomy tube in S.C. for feeding due to his alleged inadequate food intake and because Mary Jo Bajc had reported that it took up to five hours to feed him. Mrs. Smith told Dr. Dietz that she knew how to use S.C.'s feeding tube but had not used it since August 6 because S.C. was "eating well" and had no diarrhea or vomiting. Dr. Dietz testified that upon her examination, the twins appeared

"well nourished and well developed," although they had some developmental delays.

{¶24} Based on her physical examination and her observation that day of S.C. eating, Dr. Dietz found there was no need to start feeding him again via the feeding tube, and recommended that he be seen again at MetroHealth in two weeks. She also found that in-home nursing care was not necessary because Mrs. Smith was providing adequate aerosol breathing treatments for the boys, and their food aversions could be adequately addressed in an out-patient setting.

{¶25} On September 8, 2004, the twins were seen again at MetroHealth by Dr. Carmella Sosa. They were accompanied by Almusaad, Velez, and Smith. S.C. weighed 24 lbs. 8.2 oz, which Dr. Sosa noted was a "good interval weight gain" since his last visit. Dr. Sosa's report noted that the gastrostomy tube was not being used for any feedings, and that S.C. was "eating well," including three meals and three snacks a day. Dr. Sosa noted that Smith was "requesting a change from gastrostomy tube to a button." Dr. Sosa's plan was to consider surgically changing the tube to a button, and then consider discontinuing use of the tube or button at a later date "with demonstrated good weight gain and no feeding aversion."

{¶26} Dr. Dietz saw the twins again on September 20, 2004. Smith accompanied the twins at this visit; no one from CCDCFS was at this visit. With respect to S.C., Dr. Dietz noted that upon physical examination, he was "cooperative, smiling, well-developed and well-nourished." S.C. weighed 24 lbs. 5 oz., a 2 percent decrease since his visit on September 8. Smith told Dr. Dietz she was surprised that S.C. had lost weight because there had been no change in his appetite and he was "eating solids well

within brief period of time." Smith told Dr. Dietz that she was not using the gastrostomy tube and that there had been no vomiting or diarrhea. Dr. Dietz recommended that the feeding tube remain in place for a minimum of three more months for future use if necessary, and that S.C. return for another evaluation in one month.

{¶27} Despite this evidence, which indicates that the twins were properly removed from the Bajcs' home for their protection, and then cared for by competent medical providers who made recommendations for the twins' care based on their physical examinations and observations of the twins, appellants insist that there was a conspiracy among the employees of CCDCFS to remove the children from the Bajcs' care and then deliberately deprive them of medical care.

{¶28} Appellants first contend that the allegation that Mary Jo Bajc suffered from Munchausen Syndrome by Proxy was made by someone at CCDCFS in retaliation for Bajc's request on July 21, 2004, for a higher subsidy due to the twins' serious medical conditions before she would finalize their adoption. Appellants insist that the report must have been retaliatory because CCDCFS knew as early as July 8, 2004, that a Cleveland Clinic social worker suspected that Bajc suffered from Munchausen Syndrome by Proxy, yet Sullivan and Velez met with Bajc on July 21, 2004, to discuss what was necessary to finalize the Bajcs' adoption of the twins.

{¶29} But appellants' assertion of "a retaliatory nexus" between Bajc's refusal to finalize the adoption that day and the hotline report is pure speculation. In *Nash, supra,* this court concluded that on July 21, 2004, a mandated reporter notified CCDCFS that the reporter suspected that Mary Jo Bajc suffered from Munchausen Syndrome by Proxy and

was causing the children to be subjected to unnecessary medical procedures. *Nash*, 8th Dist. Cuyahoga No. 99128, 2013-Ohio-3618, at ¶ 83. Under R.C. 2151.421, whenever a suspected incident of child abuse or neglect is reported, an investigation must be commenced within 24 hours. "The legislation manifests the clear intention of the General Assembly that these social service agencies shall protect children from abuse and neglect and eliminate the source of any such abuse." *Brodie v. Summit Cty. Children Svc. Bd.*, 51 Ohio St.3d 112, 117, 554 N.E.2d 1301 (1990). Thus, although appellants may dispute the motivation for the report, CCDCFS was statutorily required to investigate the report, even if there was a risk that the report would subsequently turn out to be false.

{¶30} Moreover, the fact that someone from CCDCFS may have made the referral does not demonstrate that it was retaliatory. Sullivan testified that a Cleveland Clinic social worker who was familiar with S.C.'s and A.C.'s medical treatment at the Clinic advised CCDCFS on July 8, 2004, that she suspected Mary Jo Bajc suffered from Munchausen Syndrome by Proxy, but that she was reluctant to make a referral. Sullivan testified that if there are grounds for a referral but the mandated reporter is reluctant to make the report, CCDCFS will make the report if there appear to be grounds for a referral. In this case, in light of the social worker's suspicions, which she voiced to CCDCFS employees, CCDCFS had a duty to investigate the social worker's suspicions to protect the twins.

{¶31} Appellants next contend that the record contains evidence that Velez and Almusaad took various purposeful actions to deprive the twins of medical care. They first assert that Velez and Almusaad told Smith not to use S.C.'s feeding tube, even

though Dr. Johnson had not ordered that the gastrostomy feedings be discontinued and even though they knew that S.C. could not maintain adequate nutrition and hydration without it. Appellants contend that Dr. Johnson's deposition testimony that discontinuing the feeding tube was "not in my plan" means that he did not order its discontinuance, and that a CCDCFS note dated August 6, 2004 stating that Dr. Johnson did not want the gastrostomy tube used was purposely false. But Dr. Johnson testified that his statement "it was not in my plan" was merely confirmation that he did not include that specific order in the plan; it was not confirmation that he did not order discontinuing use of the feeding tube. In fact, Dr. Johnson testified that he could not remember whether he did or did not order that feedings through the gastrostomy tube be stopped. Thus, the evidence does not support appellants' contention. Moreover, Dr. Dietz testified that part of her evaluation of S.C. on August 26, 2004, included determining whether he needed a feeding tube, and she concluded that he did not. Thus, even if Velez and Almusaad told Smith not to use the feeding tube, the medical evaluation supported their recommendation.

{¶32} Appellants next contend that Velez and Almusaad purposely did not tell Smith that she should use a glucometer to monitor the twins' blood sugar. But a CCDCFS case note dated August 6, 2004, reflects that Smith was told the children's blood sugar should be monitored if their temperature became elevated or in cases of dehydration and nausea. Although Smith denies receiving this instruction from CCDCFS, Dr. Dietz testified that at the August 26, 2004 appointment, she gave Smith very specific instructions on how to monitor the twins for low blood sugar by watching

for certain symptoms, and then how to treat it. Furthermore, Dr. Dietz acknowledged that she was aware of the twins' history of low blood sugar and could have ordered the use of a glucometer for monitoring purposes, but chose not to do so. Thus, the evidence demonstrates there was no need for Velez and Almusaad to tell Smith to use a glucometer.

{¶33} Appellants next contend that Almusaad and Velez "convinced" the Smiths that the twins did not need the services of visiting nurses, again in a deliberate effort to deprive the twins' of needed medical care. This allegation is likewise unsupported by the evidence. Dr. Dietz's patient notes regarding the August 26, 2004 visit specifically state: "'in home nursing not recommended." Dr. Dietz testified that after her examination of the twins on August 26, 2004, she concluded that in-home nursing visits were not necessary because she believed that speech and language therapy for the twins, as well as occupational therapy to assist with trying to increase their food intake, could be accomplished in an out-patient setting. Dr. Dietz further testified that in-home nurses were not necessary because Mrs. Smith was giving the boys adequate aerosol treatments for their asthma.

{¶34} Appellants also contend that the CCDCFS employees purposely moved the twins from the foster home of Melanie Tilley, one of the homes the twins were placed in after their removal from the Bajcs' home, in order to deprive them of medical care. This allegation is also not supported by the record. Sullivan testified that to effectuate the diagnostic separation necessary to determine whether Mary Jo Bajc suffered from Munchausen Syndrome by Proxy, the twins needed to be in "an environment that did not

have any biased individuals in it." Sullivan testified that CCDCFS moved the twins from Tilley's care because the agency was concerned that Tilley, a registered nurse, might have an unintentional bias in favor of Mary Jo Bajc because she was friends with Bajc and had provided in-home nursing care to the twins during their placement with the Bacjs.

{¶35} Next, appellants contend that Velez and Almusaad purposefully withheld the twins' medical records from the doctors at MetroHealth because even though there were voluminous records from the twins' medical treatment at the Cleveland Clinic, Dr. Johnson did not have any records from the Clinic when he examined the twins on August 6, 2004, and Dr. Dietz only had a small packet of records when she examined the twins on August 26, 2004. Appellants contend the lack of records must have been intentional because in an email dated August 9, 2004, Almusaad stated that she would "take all the records to Metro this week." Without any other evidence, however, appellants' contention that Almusaad's failure to deliver the records was purposeful is pure speculation. Moreover, Almusaad's promise on August 9, 2004, to deliver the records that week is irrelevant to appellants' argument about Dr. Johnson's lack of records on August 6, 2004, several days prior to the email.

{¶36} Appellants also contend that the CCDCFS employees intentionally withheld critical care information about the twins from their caregivers, and placed them with foster parents who were unable to meet their medical needs. Again, the evidence does not support appellants' assertion. In a hearing on October 14, 2004, before the juvenile court to determine whether A.C. should be returned to the Bajc's care, Dr. Dietz testified that she had treated other foster children in the Smiths' care before they took in

the twins, and that they "absolutely" could recognize the signs and symptoms of dehydration and hypoglycemia. She testified further that the Smiths followed every recommendation she made, and that the twins "absolutely improved and were thriving" in their care.

{¶37} Appellants also contend that Velez and Almusaad falsely reported that the twins were "thriving" and "gaining weight" in the Smith home in a deliberate effort to falsely substantiate the Munchausen Syndrome by Proxy allegation against Mary Jo Bajc. According to appellants, Dr. Feingold, the expert retained by CCDCFS to review the twins' medical records to determine whether they were victims of Munchausen Syndrome by Proxy, recommended a diagnostic separation of the twins from Mary Jo Bajc's care in order to determine if their medical symptoms disappeared or abated after their removal. Appellants contend that Dr. Feingold told Almusaad that to determine the validity of the Munchausen by Proxy Syndrome allegation, it was important to assess how the twins were eating and growing after their removal from the Bajc's home. Therefore, appellants contend that even though the twins were losing weight, Almusaad and Velez falsely told Dr. Feingold that the twins had been eating regularly, gaining weight, and thriving since their placement in the Smith home. Appellants also assert that Velez and Almusaad gave Dr. Thomas M. Anuszkiewicz, the psychologist who evaluated Mary Jo Bajc regarding the Munchausen by Proxy Syndrome allegation, the same false report about the twins.

{¶38} Again, appellants' assertions are not borne out by the evidence in the record. At the hearing on October 14, 2004, Dr. Dietz testified that she had "never seen that degree of improvement that quickly" as she saw in the twins after they were removed

from the Bajcs' home, and that her two examinations of the twins indicated they "were absolutely improved and were thriving." She testified further that S.C. "had been growing and gaining and was eating 100% by mouth." Consequently, Velez's and Almusaad's alleged representations to Dr. Feingold and Dr. Anuszkiewicz that the twins were thriving and gaining weight were, in fact, true.

{¶39} Finally, appellants contend that the CCDCFS employees violated Ohio Administrative Code regulations and their own agency policies as part of their scheme. First, appellants contend that by taking away S.C.'s feeding tube and stopping the twins' medical care without any authorization to do so, the CCDCFS employees violated OAC § 5101:2-5-35 and CCDCFS policy 7.06.02, which guarantee children the right to receive adequate and appropriate medical care and adequate and appropriate food. As discussed above, however, the twins were seen regularly by medical professionals who determined the course of treatment and care for the twins; the CCDCFS employees did not withhold medical treatment from them nor stop the use of S.C.'s feeding tube.

{¶40} Appellants also contend that the CCDCFS employees unlawfully extended the time period for completion of the investigation into the allegation of Munchausen Syndrome by Proxy, again in an attempt to bolster their case against Mary Jo Bajc. We find nothing in the record to suggest that the CCDCFS employees improperly extended the length of the investigation as part of a deliberate scheme to prove Munchausen Syndrome by Proxy. Indeed, despite appellants' assertions of "unlawful, unethical, wanton, dangerously reckless, malicious and bad faith organizational misconduct," the record unequivocally demonstrates that the CCDCFS employees acted appropriately, in

good faith, to investigate the Munchausen Syndrome by Proxy report against Mary Jo Bajc.

{¶41} It is undisputedly tragic that S.C. died after he was removed from the Bajcs' care. However, there is no genuine issue of material fact that the CCDCFS employees' actions with respect to the investigation of the Munchausen Syndrome by Proxy allegation against Mary Jo Bajc and the removal of the twins from the Bajcs' care were not manifestly outside the scope of their employment, nor done with a malicious purpose, in bad faith, or in a wanton or reckless manner. Accordingly, the CCDCFS employees are immune from liability under R.C. 2744.03(A)(6); therefore, the trial court did not err in granting their motion for summary judgment.

{¶42} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

MARY J. BOYLE, P.J., and
MARY EILEEN KILBANE, J., CONCUR