

[Cite as *Sobiski v. Cuyahoga Co. Dept. of Children & Family Servs.*, 2004-Ohio-6108.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84086

CHRISTINE SOBISKI

:
:

Plaintiff-Appellee

:

JOURNAL ENTRY

vs.

:
:
:
:
:

and

OPINION

CUYAHOGA COUNTY DEPARTMENT
OF CHILDREN AND FAMILY
SERVICES, et al.

:

Defendants-Appellants

:

DATE OF ANNOUNCEMENT
OF DECISION:

November 18, 2004

CHARACTER OF PROCEEDING:

Civil appeal from
Common Pleas Court
Case No. CV-505643

JUDGMENT:

REVERSED AND REMANDED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendants-appellants, Kenneth Crookston, Elizabeth Feeney, Joan Todd, Allan Sowell, and Cuyahoga County Department of Children and Family Services (“appellants”), appeal from the trial court’s decision. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand.

I.

{¶ 2} According to the facts in the case sub judice, Christine Sobiski, D.D.S., L.S.W. (“appellee”), was in the process of adopting two boys, one through Cuyahoga County Department of Children and Family Services (“CCDCFS”) and the other through Adoption by Gentle Care in Franklin County, Ohio. However, the case at bar only involves the adoption of the child through CCDCFS. Appellee and her husband, Terry Reed, acted as foster parents and wanted to adopt the children. At the time, both children were under a year old and had special needs. The child being adopted through CCDCFS had particular gastric needs which appellee managed.

{¶ 3} As was admitted in the complaint, while acting as foster parents, a domestic violence situation occurred at the Sobiski foster home. Subsequently, the county removed the foster child, and appellee sued the county and four of its employees for money damages. The county and its employees asserted their immunity before this court.

{¶ 4} Appellee filed her complaint on July 16, 2003. She had voluntarily dismissed her previous complaint. Appellants moved to dismiss the refiled complaint on grounds that included immunity. The court denied the motion by order dated December 17, 2003. The pertinent section of R.C. 2744.02, “classification of functions of political subdivisions; liability; exceptions” regarding final orders, states the following:

{¶ 5} “(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.”

{¶ 6} In the case at bar, the order denying the motion to dismiss merely noted that the motion was denied, without further explanation. On January 13, 2004, appellants filed their notice of appeal.

II.

{¶ 7} Because of the substantial interrelation between appellants’ assignments of error and for the sake of judicial economy, we will address appellants’ assignments of error together.

{¶ 8} Appellants’ first assignment of error states: “The trial court erred by overruling immunity, under Chapter R.C. 2744, of defendant, identified as Cuyahoga County Department of Children and Family Services.”

{¶ 9} Appellants’ second assignment of error states: “The trial court erred by overruling immunity, under Chapter R.C. 2744, of defendant, Elizabeth Feeney (identified in the complaint as ‘Libbey Feeney’).”

{¶ 10} Appellants’ third assignment of error states: “The trial court erred by overruling immunity, under Chapter R.C. 2744, of defendant, Kenneth Crookston.”

{¶ 11} Appellants' fourth assignment of error states: "The trial court erred by overruling immunity, under Chapter R.C. 2744, of defendant, Allan Sowell."

{¶ 12} Appellants' fifth assignment of error states: "The trial court erred by overruling immunity, under Chapter R.C. 2744, of defendant, Joan Todd."

{¶ 13} The standard of review on a Civ.R. 12(B)(6) motion to dismiss, which raises questions of law, is de novo. *Hunt v. Marksman Prods.* (1995), 101 Ohio App.3d 760.

{¶ 14} In the case at bar, the foster child was removed from the home of appellee and her husband following a domestic violence situation.¹ Appellee admits that an incident occurred in her home and that her husband was arrested following the incident.² Appellee's complaint states that "on or about 29 January 2003, Dr. Sobiski was struck by Mr. Terry Reed (her now estranged husband) in an act of domestic violence."³ The county, without objection from appellee, entered into the record a certified copy of a complaint filed by appellee's husband with the domestic relations court in Case No. DV 03 291088. However, in the court filing, Reed stated that he was the victim of domestic violence perpetrated by appellee.⁴ For purposes of this appeal, these issues are not material. They are mentioned simply to illustrate some of the complex factors facing county child protection workers in this case.

{¶ 15} The foster parents in this case were not without recourse. As a foster parent, appellee could have requested permission from the juvenile court to intervene as a party. The determination

¹Appellee's brief, p.4.

²Appellee's brief, p.2, complaint, ¶8.

³Appellee's complaint, p.2, ¶7.

⁴Appendix to brief of defendants-appellants, pgs.32-35.

as to such request for intervention is within the juvenile court's discretion. While a foster parent is not automatically entitled to party status, the court has wide discretion to name parties to a juvenile court action, and this discretion includes naming foster parents as parties. *In re Zhang* (1999), 135 Ohio App.3d.

{¶ 16} Moreover, the foster parents could have petitioned the juvenile court to challenge the placement change. Other disappointed foster parents have filed such motions with a juvenile court. *In re Moorehead* (1991), 75 Ohio App.3d 711, 719. R.C. 2151.353(E)(2) allows any party, other than the parents whose parental rights have been terminated, to move for an order modifying or terminating any dispositional order, including an award of permanent custody. *In re G.R.*, Cuyahoga App. No. 83146, 2004-Ohio-999.

{¶ 17} As previously stated, the key issue in this case is immunity. The Political Subdivision Tort Liability Act, R.C. 2744 et seq., sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability. R.C. 2744.02(A) sets forth the general rule of immunity that political subdivisions are not liable in damages for the personal injuries or death of a person. *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24.

{¶ 18} Under R.C. 2744.01(F),⁵ a county is a political subdivision, and the operation of a county human services department is a governmental function. R.C. 2744.01(C)(2)(m);⁶ *Jackson v. Butler County Bd. of County Commrs.* (1991), 76 Ohio App.3d 448.

⁵(F) "'Political subdivision' or 'subdivision' means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. 'Political subdivision' includes, but is not limited to, a county hospital commission appointed under Section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to Section 713.22 of the Revised Code, joint planning council created pursuant to Section 713.231 [713.23.1] of the

{¶ 19} The Ohio immunity statute provides a three-tiered analysis for determining whether or not a political subdivision or its employees have immunity. First, R.C. 2744.02(A)(1) confers on all political subdivisions a blanket immunity which provides that they are not liable for injury, death or loss to persons or property that occurred in relation to the performance of a governmental or proprietary function. Second, R.C. 2744.02(B) lists five exceptions to this blanket immunity. *Marshall v. Montgomery County Children Servs. Bd.* (Mar. 31, 2000), Montgomery App. No. 17856. Finally, if one of the exceptions to immunity is found to apply, R.C. 2744.03 lists several defenses or immunities to liability for both the political subdivision and its employees. However, the defenses in R.C. 2744.03 do not come into play unless liability attaches under one of the exceptions in R.C. 2744.02(B). *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28.

{¶ 20} Under the first tier of the analysis, the court must consider whether immunity is established pursuant to R.C. 2744.02(A)(1). “Classification of functions of political subdivisions; liability; exceptions” provides the following:

Revised Code, interstate regional planning commission created pursuant to Section 713.30 of the Revised Code, port authority created pursuant to Section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under Section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to Section 307.052 [307.05.2] of the Revised Code, a fire and ambulance district created pursuant to Section 505.375 [505.37.5] of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under Section 343.01 or 343.012 [343.01.2] of the Revised Code, and community school established under Chapter 3314. of the Revised Code.”

⁶(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent.

{¶ 21} “(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, *a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.*”

{¶ 22} (Emphasis added.)

{¶ 23} The exceptions are set forth in R.C. 2744.02(B)(1) which provides the following:

{¶ 24} “(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

{¶ 25} “(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

{¶ 26} “(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

{¶ 27} “(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

{¶ 28} “(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

{¶ 29} “(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability,

when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

{¶ 30} “(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and 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, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶ 31} “(5) *In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term ‘shall’ in a provision pertaining to a political subdivision.*”

{¶ 32} (Emphasis added.)

{¶ 33} Under the third tier of the analysis, immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies. *Cater v. Cleveland*, supra. R.C. 2744.03(A)(5) provides in relevant part:

{¶ 34} “(5) **The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised *with malicious purpose, in bad faith, or in a wanton or reckless manner.***”

{¶ 35} (Emphasis added.)

{¶ 36} In the case at bar, none of the second tier exceptions apply and the third tier is inapplicable as well.

{¶ 37} However, assuming arguendo that the analysis had progressed to the third tier, it would have failed. This is because there was no malicious, bad faith, or reckless conduct demonstrated by appellants. The foster child in the case at bar was removed from the home of appellee only after an extensive evaluation and consideration on the part of CCDCFS and its employees. Both parties acknowledged that the child was only removed subsequent to a domestic violence incident. Appellee admits that an incident occurred in her home and that her husband was arrested following the incident. A “safety plan” was developed by CCDCFS, and the county later inspected the home where appellee was residing following the domestic violence.

{¶ 38} On February 3, 2004, a staffing meeting was held and CCDCFS decided to remove the foster child from the care of appellee. The county recommended that the approved home study for appellee be rescinded and deemed invalid. Later, without objection from appellee, the county entered into the record a certified copy of a complaint filed by appellee’s husband with the domestic relations court in Case No. DV 03 291088. In this filing, Reed stated that he was the victim of domestic violence. It is only after the safety plan, the home inspection, the staffing meeting, the domestic violence incident, and other criteria that CCDCFS decided to remove the child from appellee foster parent.

{¶ 39} The removal of a child from its current care giver, even in a foster parent situation, is a painful and contentious event. Emotions are high and people are vulnerable. The end result of such a custody situation is that one party will not obtain the result it desires. While this court is sensitive to appellee’s situation, the evidence in the record indicates that statutory immunity applies, without exception, in this case. Furthermore, the evidence does not demonstrate any malice or wrongdoing on the part of appellants.

{¶ 40} This case would have been better served in probate court. However, that being said, we find merit with appellants' arguments. We find that the trial court erred, as to all appellants, when it overruled appellants' motion. The evidence in the case at bar demonstrates that immunity applies under R.C. 2744 and none of the statutory exceptions apply. CCDCFS and its employees did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. Furthermore, finding individual CCDCFS' employees liable for engaging in proper daily activities inherent in their CCDCFS job duties would be contrary to public policy and result in an undesired chilling effect.

{¶ 41} Appellants' five assignments of error are sustained.

Judgment is reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellee costs herein.

It is ordered that a special mandate issue out of this court directing the Common Pleas 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.

ANTHONY O. CALABRESE, JR.
JUDGE

FRANK D. CELEBREZZE, JR., P.J., CONCURS;

DIANE KARPINSKI, J., DISSENTS WITH SEPARATE
DISSENTING OPINION.

N.B. This entry is an announcement of the court's decision.

See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

KARPINSKI, J., DISSENTING:

{¶ 42} Because this court lacks jurisdiction to hear this appeal, I respectfully dissent from the majority opinion. In its July 30th memorandum supplementing its original appellate motion, the county correctly noted that this court does not have jurisdiction over this case because the order appealed is not “a final appealable order.”

{¶ 43} The foster mother’s complaint stated that the alleged wrongdoing by the county and its agents occurred on or about February 4, 2003. When R.C. 2744.02(C) was revised, the legislature made the denial of a motion to dismiss based on sovereign immunity a final appealable order. That portion of the statute, however, did not go into effect until April 9, 2003.

In enacting S.B. 106, the legislature did not express any intent that R.C. 2744.02(C) is to operate retroactively; nor did it indicate that R.C. 2744.02, as amended, applies to pending cases in which the cause of action accrued prior to the effective date of the act, April 9, 2003. Cf. *State ex rel. Kilbane v. Indus. Comm.* (2001), 91 Ohio St.3d 258, 2001 Ohio 34, 744 N.E.2d 708. To the contrary, in uncodified law in Section 3 of S.B. 106, the General Assembly specifically stated that R.C. 2744.02 and other statutes “*as amended by this act, apply only to causes of action that accrue on or after the effective date of this act. Any cause of action that accrues prior to the effective date of this act is governed by the law in effect when the cause of action accrued.*” (Emphasis added by *Jackson* court.)

The legislative statements contained in the uncodified law in Section 3 of S.B. No. 106 unequivocally express the legislative intent that R.C. 2744.02(C) is to operate prospectively, not retroactively, and is to apply to a plaintiff's cause of action that accrues on or after, not before, the effective date of the act. *LaSalle*, supra. Moreover, the "causes of action" the legislative statements refer to include underlying actions, or lawsuits, pending before a court. See Black's Law Dictionary (7th Ed.1999). In this case the "cause of action" is the Chief's claim for defamation against the City. The "cause of action" is not, as the City suggests, its right to appeal the trial court's June 6, 2003 order partially denying immunity to the City.

{¶ 44} *Jackson v. Columbus* (2004), 156 Ohio App.3d 114, ¶¶12-13. See also *Beam v. Iacovone*, Lake App. No. 2003-L-199, 2004-Ohio-1163; *Pannunizio v. Hubbard*, Trumbull App. No. 2003-T-0143, 2004-Ohio-3930; *Oliver v. Phelps*, Trumbull App. No. 2003-T-0184, 2004-Ohio-2787; *Dolis v. Tallmadge*, Summit App. No. 21803, 2004-Ohio-4454.

{¶ 45} In the case at bar, the law in effect at the time the foster mother filed her complaint did not allow the county to appeal a denial of its motion to dismiss as a final appealable order without any Civ.R 54(B) language. This court, therefore, has no jurisdiction to hear the appeal. Accordingly, the case should be dismissed or remanded to allow the court to add the 54(B) language.