STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STEPHEN LINDSEY, ADM'R. Appellant v. SUMMIT COUNTY CHILDREN'S SERVICES BOARD, et al. Appellees	C. A. No. 24352 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

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)[1]—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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[1] 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:

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