**[Cite as *Moore v. Lake Cty.*, 2010-Ohio-825.]**

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

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| JIANNA MOORE, MINOR, BY NEXT FRIEND AND LEGAL GUARDIAN DANIELLE MOORE, et al., | : | **O P I N I O N** |
| | : | **CASE NO. 2009-L-053** |
| Plaintiffs-Appellants, | : | |
| - vs - | : | |
| COUNTY OF LAKE, OHIO, a.k.a. LAKE COUNTY DEPARTMENT OF JOB AND FAMILY SERVICES, a.k.a. LCDJFS, et al., | : | |
| Defendants-Appellees. | : | |

Civil Appeal from the Lake County Court of Common Pleas, Case No. 06 CV 002928.

Judgment: Affirmed.

*Mitchell D. D'Amico*, 7333 Center Street, Mentor, OH 44060, and *Werner G. Barthol*, Werner G. Barthol Co., L.P.A., 7327 Center Street, Mentor, OH 44060 (For Plaintiffs-Appellants).

*Charles E. Coulson*, Lake County Prosecutor, and *Eric A. Condon*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077; *John T. McLandrich*, *Todd M. Raskin*, *Frank H. Scialdone*, Mazanec, Raskin, Ryder & Keller Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Solon, OH 44139 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

**{¶1}** Appellant, Jianna Moore, a minor, by and through her natural parents, appellants Danielle Moore and Fred Waterwash, and appellant Danielle Moore in her personal capacity, appeal the summary judgment of the Lake County Court of Common Pleas in favor of appellees, Lake County Department of Job and Family Services

("LCDJFS") and its agents, on appellants' claims arising from appellees' placement of Jianna with foster caregivers Raymond Knapp and Lisa Knapp. Jianna sustained injuries consistent with "shaken baby syndrome" while in the care of the Knapps. We are asked to consider whether factual issues exist on appellants' claims, thus precluding summary judgment. For the reasons that follow, we affirm.

**{¶2}** In July 2002, Raymond Knapp and Lisa Knapp initiated proceedings to adopt a child through LCDJFS. While these proceedings were pending, they called LCDJFS and said that because there were so few children in the age range they wanted to adopt, i.e., up to three years old, they wanted to be licensed to provide foster care. While adoption involves the permanent placement of a child, foster care involves the placement of a child in a foster home on a temporary basis and the goal is reunification with the birth family.

**{¶3}** Pursuant to regulations of the Ohio Department of Job and Family Services, the Knapps completed 24 hours of pre-service training. Also, pursuant to state regulations**,** LCDJFS conducted criminal and background checks of the Knapps, checked their personal employment references, and reviewed their financial statements and medical records. Pursuant to state regulations, LCDJFS is only required to obtain references from the applicant's current employers. Mr. Knapp did not disclose that one of his previous employers, Malish Brush, had fired him due to anger-related issues. As a result, LCDJFS was unaware of this fact.

**{¶4}** In September 2003, the Ohio Department of Job and Family Services issued a license to the Knapps to operate a foster home from September 15, 2003

through September 15, 2005. They were licensed for placement of two children between the ages of zero and three.

**{¶5}** On October 24, 2003, the Knapps completed LCDJFS' "foster parent training needs assessment." Under the infant care section of the assessment, the Knapps indicated they needed some development in infant care. Melissa Flick, an LCDJFS agent involved in the Knapps' foster care training and the decision to place Jianna with them, testified that with new foster parents like the Knapps, it is typical and appropriate they indicate the need for some development in these areas.

**{¶6}** After reviewing the assessment, on December 18, 2003, LCDJFS social worker Eugene Tetrick prepared a training plan for the Knapps, indicating they needed four hours of training in infant care as part of their ongoing training. The Knapps completed 20 hours of ongoing training between 2003 and 2004, as mandated by the Ohio Department of Job and Family Services. Ms. Flick testified that according to regulations of the Ohio Department of Job and Family Services, foster parents have two years from the date of their license to complete their required ongoing training. They are not required to obtain this training prior to placement. The Knapps were therefore not required to complete their ongoing training until September 15, 2005.

**{¶7}** Again, in September 2004, Mr. and Ms. Knapp completed a foster parent training needs assessment. They again indicated they needed training in infant care. After reviewing their assessment, Mr. Tetrick recommended the Knapps take three hours of infant care training. However, according to Ms. Flick, the Knapps were not required to complete this training until September 15, 2005.

**{¶8}** On December 9, 2004, Jianna was born to Danielle Moore and Fred Waterwash. LCDJFS filed a dependency action in the Lake County Juvenile Court. On December 12, 2004, LCDJFS was granted temporary custody of Jianna, who was then three days old. Shortly thereafter, Erin Whipple, children services administrator for LCDJFS, placed Jianna with the Knapps.

**{¶9}** On December 17, 2004, the Lake County Juvenile Court granted visitation of Jianna to her birth mother Danielle Moore. While Ms. Knapp was initially upset and irritable about the court's grant of visitation to Ms. Moore, Ms. Flick testified that Ms. Knapp eventually agreed with the visitation, and understood the goal of Jianna's placement with her and her husband was Jianna's reunification with her birth mother.

**{¶10}** In the following weeks, Ms. Whipple conducted regular visits with the Knapps in their home to monitor Jianna's safety. Ms. Whipple saw Jianna on a weekly basis at the regular supervised visits between Jianna and her birth mother. Ms. Whipple testified she never saw anything that gave rise to a concern for Jianna's safety. Jianna's birth mother Danielle Moore also testified that during her weekly visits with Jianna, she never saw anything indicating that Jianna had been injured while with the Knapps.

**{¶11}** On February 3, 2005, Jianna sustained injuries while in the care of the Knapps consistent with "shaken baby syndrome." She was taken to Lake East Hospital and then transferred to Rainbow Babies and Children's Hospital in Cleveland. Custody of Jianna was thereafter given to Ms. Moore.

**{¶12}** The Mentor Police Department and LCDJFS independently investigated and determined Jianna's injuries were the result of physical abuse while in the care and

custody of the Knapps. However, because it could not be proven whether Lisa or Raymond Knapp had inflicted Jianna's injuries, no criminal charges were filed against either of them.

**{¶13}** Appellants filed this action in the trial court against LCDJFS; its employees Matthew Battaito, Art Iacofano, Teresa Palm, Melanie Hale, Roberta Barb, Erin Whipple, Melissa Flick, Emily Hazel, and Jaime Lette; and John Does 1-5. Appellants alleged in their second amended complaint reckless placement, failure to train and failure to monitor (count one); negligent/reckless conduct (count two); loss of consortium (count three); release of confidential information (count four); declaratory judgment challenging the constitutionality of Ohio's political subdivision immunity statute (count five); and a violation of 42 U.S.C. Sec. 1983 (count six).

**{¶14}** Appellees removed the case to the United States District Court for the Northern District of Ohio, Eastern Division, due to appellants' Sec. 1983 claim. The district court granted appellees' motion for summary judgment on that claim. The district court found that "the actions [of the LCDJFS employees] were reasonable and did not constitute 'deliberate indifference' to Jianna's safety and well-being." The district court also found: "LCDJFS followed Ohio law and the regulations of the Ohio Department of Job and Family Services in investigating, reviewing and training the Knapps as foster parents. Further, LCDJFS complied with all applicable laws and regulations when they placed Jianna in the Knapps['] state-licensed foster home. *** [T]he LCDJFS social workers and [s]upervisors closely monitored the situation *** and observed nothing that caused them concern for Jianna's safety and well-being." The

district court also dismissed all John Doe Defendants as not identified or served, and remanded appellants' state claims to the trial court for resolution.

**{¶15}** After the parties engaged in discovery, appellees filed a motion for summary judgment on appellants' remaining claims. Appellees argued they are immune from liability under R.C. Chapter 2744, and that even if they are not immune, there is no evidence their conduct was reckless. In opposition, appellants argued that appellees are immune only for their negligent acts, but not immune for acts done in a wanton or reckless manner. The trial court found that none of the exceptions to political subdivision immunity applied to LCDJFS, and that it was therefore immune from liability. The court also found the employee-appellees were also immune from liability because their conduct did not rise to the level of recklessness.

**{¶16}** Appellants appeal the trial court's judgment, asserting the following as their sole assignment of error:

**{¶17}** "The trial court erred to the prejudice of Appellants' [sic] in granting Appellees' Motion for Summary Judgment with respect to Appellants' claim for Recklessness."

**{¶18}** Appellate courts review a trial court's grant of summary judgment de novo. *Alden v. Kovar*, 11th Dist. Nos. 2007-T-0114 and 2007-T-0115, 2008-Ohio-4302, at ¶34; *Brown v. Scioto County Comm'rs* (1993), 87 Ohio App.3d 704, 711. The *Brown* court held that "we review the judgment independently and without deference to the trial court's determination." Id. An appellate court must evaluate the record "in a light most favorable to the nonmoving party." *Link v. Leadworks Corp*. (1992), 79 Ohio App.3d

735, 741. Furthermore, a motion for summary judgment must be overruled if reasonable minds could find for the party opposing the motion. Id.

**{¶19}** In order for summary judgment to be granted, the moving party must prove:

**{¶20}** "*** (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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389.

**{¶21}** The Supreme Court stated in *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 1996-Ohio-107:

**{¶22}** "*** 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 which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The 'portions of the record' to which we refer are those evidentiary materials listed in Civ.R. 56(C), such as the pleadings, depositions, answers to interrogatories, etc., that have been filed in the case. ***." (Emphasis omitted.)

**{¶23}** If the moving party satisfies its burden, then the nonmoving party has the burden to provide evidence demonstrating a genuine issue of material fact. If the nonmoving party does not satisfy this burden, then summary judgment is appropriate. Civ.R. 56(E).

**{¶24}** As a preliminary matter, we note that appellants challenge the constitutionality of Ohio's political subdivision immunity act on the ground that it violates their right to trial by jury, in violation of Section 5, Article I of the Ohio Constitution. Appellants have not cited any case law finding this statute to be unconstitutional. This court has had occasion to address appellants' argument in *Spencer v. Lakeview School District*, 11th Dist. No. 2002-T-0175, 2004-Ohio-5303, in which this court stated:

**{¶25}** "*** The Ohio Supreme Court has rejected this argument with respect to Section 16, Article I of the Ohio Constitution. See, generally, *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666, 1995-Ohio-295***. With respect to Section 5, Article I of the Ohio Constitution [regarding the right to jury trial], we agree with the Ninth District Court of Appeals, which stated:

**{¶26}** "'Although we recognize that in *Butler v. Jordan* (2001), 92 Ohio St.3d 354, 2001-Ohio-204***, a plurality of the Supreme Court expressed the belief that R.C. 2744 et seq. may be unconstitutional, a majority of the court did not concur in that opinion. In fact, some of the justices expressed opposing views in a spirited dissent. Furthermore, no appellate court in this state has followed the *Butler* plurality's opinion and found R.C. 2744 et seq. unconstitutional. Thus, until the plurality's views command a majority on the Ohio Supreme Court, we will not strike down the legislation as unconstitutional.' (Internal quotations and citations omitted.) *Shadoan v. Summit County Children Services Bd*., 9th Dist. No. 21486, 2003-Ohio-5775, at ¶7. Appellants' first assignment of error is without merit," *Spencer*, supra, at ¶11-12.

**{¶27}** We therefore hold the trial court did not err in finding R.C. Chapter 2744 to be constitutional.

**{¶28}** In their summary judgment motion, appellees also challenged appellants' claim that appellees released confidential information during the course of the dependency and neglect investigation of Danielle Moore, in violation of R.C. 5153.17 and O.A.C. 5101:2-34-38. However, appellants did not oppose this argument in their brief in opposition. Appellants failed to produce any evidence in support of such claim, nor did they present any argument in support.

**{¶29}** We therefore hold the trial court did not err in awarding summary judgment to appellees.

**{¶30}** With respect to appellants' loss of consortium claim, they conceded in their brief in opposition to summary judgment that this claim was derivative of their primary claims. On appeal appellants have not addressed this claim and it is therefore abandoned. In any event, since we hold today that appellees are entitled to summary judgment on appellants' primary claims, we hold the trial court did not err in awarding summary judgment to appellees on appellants' loss of consortium claim.

**{¶31}** We turn now to appellants' claims premised on the alleged reckless placement of Jianna in the care of the Knapps. In *Frazier v. City of Kent*, 11th Dist. Nos. 2004-P-0077 and 2004-P-0096, 2005-Ohio-5413, this court addressed the appropriate analysis upon the assertion of a defense based on political subdivision immunity, as follows:

**{¶32}** "R.C. Chapter 2744 sets forth a three tiered analysis for determining a political subdivision's immunity from liability. *Greene Cty. Agricultural Soc. v. Liming*, (2000), 89 Ohio St.3d 551, 556, 2000-Ohio-486***. First, R.C. 2744.02(A)(1) codifies the general rule of sovereign immunity, viz., that '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.' However, this general rule is limited by R.C 2744.02(B), which sets forth five instances in which a political subdivision is not immune. Hence, the second tier of the analysis requires a court to determine whether any of the exceptions under R.C. 2744.02(B) apply. Finally, if a political subdivision is exposed to liability through the application of R.C. 2744.02(B), a court must consider whether the political subdivision could legitimately assert any of the defenses or immunities under R.C. 2744.03. See, e.g., *Greene Cty. Agricultural Soc*., supra, at 557." *Frazier*, supra, at ¶20.

**{¶33}** We begin our analysis by noting that a department of job and family services is a "political subdivision" as defined by R.C. 2744.01(F). In *Wilson v. Stark Cty*. *Dept*. *of Human Services*, 70 Ohio St.3d 450, 1994-Ohio-394, the Supreme Court of Ohio found a county and the human services department were immune under R.C. 2744.02. Id. at 453. Moreover, in their complaint, appellants concede LCDJFS is a political subdivision. Further, R.C. 2744.01(C)(2)(m) provides that the operation of a job and family services department is a governmental function.

**{¶34}** The potential exceptions to immunity for a political subdivision involve: (1) the negligent operation of a motor vehicle by an employee; (2) the negligent performance of a proprietary function; (3) the negligent failure to keep public roads open and in repair; (4) injury caused by a defect on the grounds of a public building, and (5) instances in which civil liability is expressly imposed upon the subdivision by a section of the Revised Code. See R.C. 2744.02(B)(1)-(5). The record below does not support

the applicability of any of these exceptions to immunity. Moreover, appellants do not even attempt to argue that any of these exceptions apply. We therefore hold that LCDJFS is immune from liability under R.C. 2744.02(A)(1), and that the trial court did not err in so finding with respect to appellants' claims based on the placement of Jianna with the Knapps.

**{¶35}** Appellants' reliance on R.C. 2744.03(A)(5) is misplaced because that section does not provide an independent basis of liability. Rather, it potentially acts as a defense or immunity, but only after one of the exceptions to immunity has been shown to be applicable. In *Cater v. Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, the Court held that "R.C. 2744.03(A)(5) is a defense to liability; it cannot be used to establish liability." Id. at 32. Here, because no exception to immunity applies, R.C. 2744.03(A)(5) cannot be used as a basis for liability.

**{¶36}** Appellants have also asserted their claims against certain employees of LCDJFS. Under R.C. 2744.03(A)(6)(b), an employee of a political subdivision is immune from individual liability unless: (a) The employee's acts were outside the scope of the employee's employment; (b) The employee's acts 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. *Fogle v. Bentleyville*, 8th Dist. No. 88375, 2008-Ohio-3660, at ¶55. Appellants claim that the conduct of the employee-appellees was reckless in nature, and that the employees are therefore not immune from liability.

**{¶37}** The Supreme Court of Ohio in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, held:

**{¶38}** "*** Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk. Cf. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 1994-Ohio-368 ***.

**{¶39}** "Recklessness, therefore, necessarily requires something more than mere negligence. *Fabrey*, 70 Ohio St.3d at 356. In fact, 'the actor must be conscious that his conduct will in all probability result in injury.' Id.

**{¶40}** "Although the determination of recklessness is typically within the province of the jury, the standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity. Id." *O'Toole*, supra, at 386-387.

**{¶41}** Appellants argue that the record as a whole demonstrates appellees acted recklessly in placing Jianna with the Knapps. However, they do not specify the facts on which they rely in making this argument. Moreover, appellants do not state any facts or cite the record in support of their claim of recklessness against any particular appellee. Our review of the record shows that LCDJFS placed Jianna with foster parents who were duly licensed by the State of Ohio. LCDJFS complied with regulations of the Ohio Department of Job and Family Services in conducting criminal, background, employment, financial, and medical checks of the Knapps. The federal district court found that the Knapps' family physician reported that both Mr. and Ms. Knapp made "excellent candidates" as foster parents. The Knapps were in compliance with the State's training requirements. LCDJFS visited with the Knapps and Jianna on a regular basis after Jianna's placement, and never saw anything suggesting Jianna was at risk of physical injury. The Knapps had no history of previously causing harm to a child.

While we are sympathetic to the tragic injuries sustained by Jianna at the hands of the Knapps, our review of the record reveals that there is no evidence that would sustain a jury finding of recklessness on the part of any individual appellee.

**{¶42}** Appellants also argue that in placing Jianna with the Knapps, appellees violated certain provisions of the Ohio Administrative Code. Appellants do not, however, cite any authority for the proposition that a violation of such code is tantamount to recklessness or even evidence of recklessness.

**{¶43}** First, appellants argue appellees violated O.A.C. 5101:2-42-05(B) in placing Jianna with the Knapps. That section provides:

**{¶44}** "If a suitable relative is not available to assume temporary custody or guardianship, the [department of job and family services] shall explore placement with a suitable nonrelative who has a relationship with the child and/or family."

**{¶45}** Our review of the record reveals that Kay Fitch, a friend of Danielle Moore's family and herself a licensed foster caregiver, advised Ms. Flick that she would be willing to act as Jianna's foster parent. However, Ms. Flick decided to place Jianna with the Knapps. We fail to see how such conduct is evidence of recklessness. Recklessness requires evidence of a perverse disregard of a known risk. Even if LCDJFS did not explore placement with Ms. Fitch, that would not be evidence that it was aware of a risk of injury in placing Jianna with the Knapps or that it perversely disregarded such risk.

**{¶46}** Next, appellants argue appellees violated O.A.C. 5101:2-42-05(E), which provides:

**{¶47}** "When the [department of job and family services] has temporary custody of a child, it shall select a substitute care setting that is consistent with the best interest and special needs of the child and which meets the following criteria: (1) is considered the least restrictive, most family-like setting available to meet the child's emotional and physical needs ***."

**{¶48}** Appellants argue appellees violated this provision because Mr. and Ms. Knapp worked opposite shifts and so were rarely at home together with Jianna. However, the fact that appellees placed Jianna with the Knapps knowing they worked opposite shifts is no evidence appellees perversely disregarded a known risk of injury.

**{¶49}** Next, contrary to appellants' argument, there is no evidence in the record that any of appellees were aware of Mr. Knapp's previous anger issues. It is undisputed that Mr. Knapp did not disclose to LCDJFS his termination by a previous employer due to anger issues. As a result, LCDJFS was unaware of this history. Moreover, regulations of the Ohio Department of Job and Family Services only required LCDJFS to obtain references for the applicant's current employers. LCDJFS was therefore not required to investigate Mr. Knapp's history with prior employers. As a result, appellees did not know and were not legally obligated to discover that Mr. Knapp had been fired from a previous employer due to anger issues when they placed Jianna with the Knapps.

**{¶50}** Finally, while the Knapps indicated on their self-assessments that they needed some development in infant care, as noted above, Ms. Flick testified this was typical and appropriate for new foster care parents, who did not have experience with most aspects of child care. This did not indicate that the Knapps were unable to meet

job expectations with respect to infant care. Further, as noted above, while Mr. Tetrick required the Knapps to take 3-4 hours of infant care training, the Knapps had two years until September 15, 2005, to complete it. Thus, the Knapps were not out of compliance with their training plan when Jianna sustained her injuries.

**{¶51}** The following remarks of the Supreme Court of Ohio in *O'Toole*, supra, are pertinent here:

**{¶52}** "Although Sydney's death was tragic, that tragedy does not mean that the burden for showing recklessness is any different in this case. We must apply the law without consideration of the emotional ramifications and without the benefit of 20-20 hindsight. In construing the facts most strongly in favor of appellee, [social worker] George-Munro's conduct does not rise to the level of recklessness. In investigating the matter, George-Munro could act and react based only on the information provided to him by [case worker] Duncan. Although Duncan may have failed to complete some paperwork, a safety plan had been established and agreed to by all interested parties. Furthermore, in his review of the evidence shortly after Duncan's initial investigation, only the marks on Sydney's face and the explanation for those marks aroused his suspicions. Nevertheless, given the fact that the safety plan was in place, that the home was clean and free of any hazards, that the background check on LaShon came back negative, and that LaShon appeared to be cooperating with appellants, George-Munro did not feel that he had any grounds to remove Sydney from the home.

**{¶53}** "***

**{¶54}** "*** Although it is tempting to employ hindsight to blame George-Munro *** there is no evidence that George-Munro consciously left Sydney in the home with the

knowledge that it was substantially certain that she would be *** injured." *O'Toole*, supra, at 387.

**{¶55}** We agree with the findings of the trial court that there is no evidence that LCDJFS employees were aware of any facts from which an inference could be drawn that, in placing Jianna with the Knapps, appellees perversely disregarded a known risk of injury.

**{¶56}** We therefore hold the trial court did not err in entering summary judgment in favor of appellees.

**{¶57}** For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

DIANE V. GRENDELL, J., dissents.