

IN THE SUPREME COURT OF OHIO

Case No. 2020-1062

TAMMY SMATHERS, individually and
on behalf of the ESTATE OF
HARMONY BROOKLYN RAYNE
CARSEY,
Plaintiff-Appellant,

On Appeal from the Ohio Court of
Appeals, Fifth Appellate District

Fifth District Case No. 19 CA 00018

v.

RICK GLASS, Executive Director of
Perry County Children's Services, et al
Defendants-Appellees.

**BRIEF OF THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF
CHILDREN AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS**

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TABLE OF AUTHORITIES

CASES

Anderson v. Massillon, 134 Ohio St.3d 380 (2012).

Brown v. Cuyahoga Falls, 2010-Ohio-4330 (2010).

DeShaney v. Winnebago County, 489 U.S. 189 (1989).

Harlow v. Fitzgerald, 457 U.S. 800 at 814 (1982)

Norris v. Ohio Standard Oil Co, 70 Ohio St.2d 1 (1982).

Saucier v. Katz, 533 U.S. 194 at 195 (2001).

Thompson v. Smith 2008-Ohio-5532 (2008).

STATUTES, RULES, AND REGULATIONS

ORC §5153.15- Vesting Powers in a Single County Agency

OAC §5101: 2-37-01- PCSA Requirements for Completing the Safety Assessment

ORC Title 51- Public Welfare

OAC §5101- Department of Job & Family Services

42 U.S.C. §5101-5116i- Child Abuse Prevention and Treatment Act of 2019 (CAPTA)

42 U.S.C.A. §1305- Adoption and Safe Families Act of 1997 (ASFA)

OAC §5101:2-36-03- PCSA Requirements For Intra-familial Child Abuse and/or Neglect Assessment/Investigations.

OAC §5101:2-42-04- Authority to Assume and Retain Custody of a Child

ORC §2744.03- Political Subdivision Tort Liability: Defenses- Immunities

ORC §2913.42- Tampering with Records

OTHER AUTHORITIES

- American Psychiatric Association (2013). *The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*. (DSM-V).
- Browne, C. G. (2014). Tortured prosecuting: Closing the gap in Virginia's criminal code by adding a torture statute. *56 William & Mary Law Review* 269.
- Catani, C., Neuner, F., Wienbruch, C., Elbert, T. (2008). The tortured brain. In: *The trauma of psychological torture* (A.E. Ojeda, Ed.), pp. 173-188. Praeger Publishers: Westport, Connecticut.
- Fields, R.M. (2008). The neurobiological consequences of psychological torture. In: *The trauma of psychological torture* (A.E. Ojeda, Ed.), pp. 139-162. Praeger Publishers: Westport, Connecticut.
- Herman, J. L. (1992). *Trauma and recovery*. New York: Basic Books.
- Jones, B. (2015). CAPTA Citizen Review Panels 101. *U.S. Department of Health and Human Services, Administration for Children Youth and Families, Office of Child Abuse and Neglect*. Available for search at <http://library.childwelfare.gov>
- Kennedy, J.M., Lazoritz, S., Palusci, V.J. (2020). Risk factors for child maltreatment fatalities in a national pediatric inpatient database. *Hospital Pediatrics*, 10(3), pp.230-237.
- Knox, B. L., Starling, S. P, Feldman, K. W., Kellogg, N. D., Frasier, L. D., & Tiapula, S. L. (2014). Child torture as a form of child abuse. *Journal of Child and Adolescent Trauma*, 7, 37-49.
- Macy, A. R. (2019). A precarious gap in U.S. criminal codes for cases of child torture and suggested model statute. *Children and youth services review* (96), 500-508.
- Miller, P.J. (2020). Intrafamilial child torture: Training mandated reporters. *The APSAC Advisor*, 32(1), pp. 3-8.
- Miller, P. J. (2019, February). *Violence intervention: Recognizing and responding to child torture*. Proceedings from the Gundersen National Child Protection Training Center, Violence Intervention and Prevention Summit; Orlando Florida.
- Forthcoming*: Miller, P.J., Rycus, J., Hughes, R. (2021). Intrafamilial child torture: Making the case for a distinct category of child maltreatment. *American Professional Society on the Abuse of Children, Center for Child Policy*.
- The National Center for Fatality Review and Prevention (n.d.) <http://www.ncfrp.org>

Ohio Attorney General (n.d.) *List of Public Child Welfare Agencies*. Available at <https://www.ohioattorneygeneral.gov/Individuals-and-Families/Foster-Families/Public-Child-Welfare-Agencies>

Ohio Office of Families and Children (n.d.) https://jfs.ohio.gov/ocf/gen_stat.stm

Putnam-Hornstein, E. (2011). Report of maltreatment as a risk factor for injury death: A prospective birth cohort study. *Child Maltreatment*, 16(3), pp. 163–174.

Rockwell, B. (2018, February 16). Carsey pleads no contest to voluntary manslaughter of daughter. Perry County Tribune. Retrieved from https://www.perrytribune.com/news/article_c190bc96-56dc-5cb7-aa70-aa045af8ad01.html

Rycus, J.S. & Hughes, R.C. (2004). *Field Guide to Child Welfare*. Washington D.C.: Child Welfare League of America Press.

Schnitzer, P.G. & Ewigman, B.G. (2005). Child deaths resulting from inflicted injuries: Household risk factors and perpetrator characteristics. *Pediatrics*, 116(5), pp. e687–e693.

U.S. Advisory Board on Child Abuse and Neglect (1995). *A nation's shame: Fatal child abuse and neglect in the United States*. Washington D.C.: Administration for Children and Families. Available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015042920671&view=1up&seq=11>

U.S. Department of Health & Human Services (2020). *Child Maltreatment 2018*. Washington, D.C.: Administration for Children and Families. Available at <https://www.acf.hhs.gov/cb/data-research/child-maltreatment>

U.S. Commission to Eliminate Child Abuse and Neglect Fatalities. (2016). *Within our reach: A national strategy to eliminate child abuse and neglect fatalities*. Washington, DC: Administration for Children and Families. Available at <https://www.acf.hhs.gov/cb/resource/cecanf-final-report>

I. INTRODUCTION

The American Professional Society on the Abuse of Children (“APSAC” or the “Society”) respectfully appear as amicus curiae so that APSAC can provide the specialized viewpoints of their members relating to the Court’s consideration of whether to overturn the Fifth District’s summary judgment in *Smathers v. Glass*, 2020 Ohio 3264 (2020).

“Intrafamilial Child Torture,” or “ICT,” is a term used in the child maltreatment professional community.¹ It is usually referred to as either “intrafamilial child torture” or “child torture” in the context of families. ICT occurs when a parent or caregiver subjects their child to conditions of physical or psychological torture, which may include conditions of captivity, solitary confinement, and severe neglect.² In this case, the facts alleged by plaintiff-appellants, along with their supporting photos and documentary evidence, indicate that Harmony was subjected to ICT and died from ICT (See Autopsy Report of Dr. C. Jeff Lee, Chief Forensic Pathologist and Licking Co. Coroner; autopsy photos as Plaintiff’s Ex. MSJ Nos. 15, 23, 24; Cabell Huntington Hospital Records PI’s Ex. MSJ No. 11 & Cabell MR-PCCS 1084; PICU Photos PI’s Ex. MSJ No. 15; *Smathers T. Dep.* 58:8, June 22, 2018). Specifically, Harmony died from non-accidental water deprivation while tied up and locked in a cage, in a hot room, in solitary confinement. (Autopsy Report of Dr. C. Jeff Lee for cause of death; *Smathers Dep.* 26-27, 30-31, 58, 67 for description of conditions that lead to death, Taylor Deposition 59 and Activity Log 11/15/15 PCCS-00358-00360 for defendant-appellee awareness of conditions that lead to death)

¹ Miller, Rycus, & Hughes, 2021; Miller, 2020; Miller, 2019; Macy, 2019; Browne, 2014; Knox, Starling, Feldman, Kellogg, Frasier, & Tiapula, 2014

² Knox, 2014; Miller, 2019; 2020; 2021.

The plaintiff's evidence demonstrates that Perry County Children's Services (PCCS) investigators knew that Harmony was being kept tied up with an electrical cord, in a cage, without food or water access, in a hot room, in solitary confinement, while she was still alive (*Infra* Taylor Dep. and Activity Log of 11/15/15; also see Activity Log of 12/11/15 PCCS 000370-000371; also Pl's Ex. MSJ No. 5 for photo of the cage-like structure). Plaintiffs submitted evidence that Defendant-Appellee Nick Pease actually viewed the cage used to keep the toddler while Harmony was still alive (See evidence listed *infra*.) The evidence presented to the trial court (Listed *infra*, especially PCCS activity logs; also Affidavit of Pease) demonstrates that Nick Pease and PCCS had multiple opportunities over a period of two months to intervene and protect Harmony, that they knew Harmony was in grave danger, and they failed to act, in violation of numerous administrative laws governing the practice of Child Protective Service (CPS) agencies³ in Ohio and even falsifying the required safety assessment by completing it two months after the initial home visit, after Harmony was already dead (see ORC §5153.15 which vests powers and duties in a single county children services agency). OAC §5101: 2-37-01 provides details on the safety assessment requirement and requires that safety assessment be entered into the computer within 10 working days of when the hotline call came in; appellee Pease submitted it 48 days later, after the child's death, and falsified the content and risk level score.

The Court should overturn summary judgment and remand the case for trial because plaintiff-appellants have presented extensive evidence that there is a genuine issue of material

³ Ohio statutes and official bodies use the terms Public Children Service Agency (PCSA), Public Child Welfare Agency (PCWA), Job and Family Services (JFS), and Children Services Board (CSB) to refer to what is commonly known throughout the U.S. as Child Protective Services. See ORC §5153.15 (uses JFS and CSB), Ohio Attorney General webpage (uses PCWA) and Ohio Office of Children and Families webpage (uses PCSA). For consistency and clarity, this brief will use the common term: CPS.

fact for trial (see Brief of the Appellants before the Fifth District). The Court has no greater interest than upholding the laws passed by the General Assembly (see ORC and OAC provisions cited *infra*) for the protection of children from torture and homicide by their own parents. If the egregious misconduct of PCCS in this case (including wanton, reckless, and bad faith misconduct) cannot survive summary judgment, there will be no case of CPS misconduct that can survive summary judgment. Thus, there will be no legal mechanism for holding PSCAs agencies accountable when they recklessly or intentionally fail to protect Ohio's 2.7 Million children.

II. INTERESTS OF AMICUS CURIAE APSAC

The American Professional Society on the Abuse of Children (APSAC) is a non-profit organization focused on serving children and families impacted by child maltreatment, including both abuse and neglect. Founded in 1986, APSAC brings together professionals from across disciplines who focus on combating child maltreatment. The Society's members include physicians, attorneys, social workers, child protective service workers, law enforcement officers, researchers, professors, psychologists, clergy, and administrators. APSAC's work includes conducting expert training, educational activities, and policy leadership.⁴ APSAC is focused on combating child maltreatment through evidence-based principles. For example, APSAC routinely issues policy reports on various issues related to child welfare through which APSAC's professionals detail current research and propose policy outcomes in order to enhance the practice of child protection.

⁴ See APSAC, Center for Child Policy, <http://centerforchildpolicy.org>

APSAC regularly files amicus briefs in cases where child maltreatment is at issue. Specifically, the Society aims to participate in those cases where the knowledge and experience of APSAC's professional members can be of assistance to the courts in understanding how a particular discipline deals with issues of child protection. In this particular case, we hope to provide the Court with information on intrafamilial child torture and child maltreatment fatalities. We will provide expertise on how professionals in the field of child protection normally deal with cases of child torture in families in order to prevent fatalities.

III. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

A. FACTS PROFFERED BY PLAINTIFFS

According to the evidence submitted by plaintiffs, the defendant-appellees were aware of the dangerous circumstances Harmony was placed in for nearly two months before her death on January 8, 2016 (See Activity Log 11/15/15 PCCS-00358-00360 for notes on what appellee Nick Pease observed at the initial home visit two months before Harmony died; See Taylor Dep. 59 for what appellees observed on a subsequent home visit). Even before Nick Pease's first home visit on November 15, 2015, Harmony's Grandmother, Ms. Smathers, had informed PCCS that Harmony was living in a cage, in a hot room, with no access to water or food, and was kept in there alone (Smathers Dep. cited *infra*). Nick Pease viewed Harmony's cage and the electrical cord used to tie her up during his visit on November 16, 2015, but did not complete a safety assessment (per OAC cited *infra*), make a safety plan for Harmony to be kept outside the cage, or remove Harmony from her mother's custody (See Activity Log of 11/5/15 cited *infra*; Pease Affidavit cited *infra*, and legally prescribed requirements for CPS agencies throughout ORC Title 51 and OAC §5101). Pease would have also seen Harmony's malnourished body and patches of missing hair on this date. Nonetheless, he failed to perform

the required safety assessment regarding her nutrition or head banging, make a safety plan, or remove Harmony from mother's custody (See Cabell Huntington Hospital Records and Autopsy Report of Dr. Lee, cited *infra*, for documentation that these would have been visible to appellees during their home visits).

During a brief visit to her Grandmother's home, Harmony fell unconscious, was life-flighted to a pediatric intensive care unit (PICU), and the medical team found "overwhelming evidence of abuse and neglect" (See Pl. Ex. No. 11 and 15, cited *infra*, for report and photos from Cabell Huntington Hospital, and Taylor Dep. 114-115 that appellees reviewed the medical records), including multiple injuries in different stages of healing, being emaciated, and only weighing 15 pounds). The hospital promptly informed PCCS of the medical findings and the diagnosis of child abuse and neglect (Id). The hospital expressed extreme concern about Harmony returning to her mother's care (see Id). Still, defendant-appellees did not perform a safety assessment, make a safety plan, or remove Harmony from her mother's custody (see Activity Log of 12/11/15 cited *infra*).

Even after defendant-appellees knew that Harmony had been returned to her mother's custody in December, after the hospital, and saw her in the Mother's home after the hospital, they did not take any action to complete a safety assessment, make a safety plan, or remove Harmony from her mother's custody (Id). Consequently, Harmony died of non-accidental water deprivation while in her cage on January 8, 2015 (Autopsy Report, cited *infra*). That is, per usual, Mother put her in her cage, tied her into the cage using an electrical cord so she could not escape, and left her alone in the hot room without any access to water. Per plaintiff's evidence, Harmony died in the exact manner in which PCCS knew she was being kept (Id).⁵

⁵ On October 27, 2016, mother Crystal Carsey was indicted by a grand jury on three counts: felony child endangering, involuntary manslaughter (first degree felony, requires a mental state of recklessness), and reckless

B. COURT OF APPEALS OPINION

After the trial court granted summary judgment to defendants on October 15, 2019, plaintiffs timely appealed. Plaintiff-Appellants issued six assignments of error, including that the trial court made erroneous findings of fact, not consistent with the evidence and exhibits submitted, and at times failed to address plaintiffs' evidence at all in their summary judgment analysis (See Brief of the Appellants, February 28, 2020, pp.22-27). The Fifth District ruled against the plaintiff-appellants on all six assignments of error and upheld summary judgment. The Fifth District opinion failed to address most of the evidence submitted by plaintiffs and used defendant-appellee's set of facts in their summary judgment analysis (see Fifth Appellate District Opinion, June 8, 2020).

IV. ARGUMENT

A. SOCIETY HAS A COMPELLING INTEREST IN RESPONDING TO INTRAFAMILIAL CHILD TORTURE AND CHILD FATALITY

1. Intra-familial Child Torture (ICT) is a severe and often fatal form of child maltreatment

Intrafamilial Child Torture, or ICT, is a type of child maltreatment (CM) that, while often including other forms of child maltreatment, manifests its own unique and specific set of family dynamics and outcomes for its child victims. ICT differs from other types of CM largely in the type and extent of parental psychopathology. ICT is also substantially different in the lived

homicide. *State of Ohio v. Crystal M. Reed Carsey*, Case No. 16-CR-0088. Shortly before trial was to begin, she agreed to a plea offer, changed her plea of not guilty to no contest with regard to the involuntary manslaughter charge, and was convicted and sentenced to nine years in prison. Prosecutor Joe Flautt told the media that Crystal Carsey left Harmony alone in her room for 9 hours without food or water, and when Crystal finally checked on her, she had died from dehydration (Rockwell, 2018).

experiences of child victims when compared to the experiences of victims of other forms of child maltreatment.⁶ ICT is both more severe, and categorically different, from ordinary CM.

ICT is defined as a “systematic and deliberate child maltreatment, occurring within a child’s family or household, where the child is physically and/or psychologically captive and not free to leave. The components of torture may include intentional physical abuse, deliberate neglect, planned sexual abuse, or methodical psychological abuse...”⁷ Solitary confinement, or being left alone for long periods of time without human interaction, is a component of ICT documented in clinical data. In Knox and colleagues’ seminal paper, they explained that while typical physical abuse is the result of episodic, unchecked anger, ICT typically involves a systematic infliction of harm over time.⁸

ICT leads to severe consequences for child victims, including permanent physical damage or disfigurement, permanent psychological damage, permanent medical harm, and sometimes death.⁹ Catani and colleagues found that both physical and psychological torture have “the same crucial feature: exposing a person to an uncontrollable and unpredictable life-threatening situation of extreme stress.”¹⁰ Fields noted that this type of extreme stress, which includes intense fear and powerlessness, “can and often does impact the brain, spinal cord, and organ integrity and therefore has medical consequences.”¹¹ The most comprehensive case study to date describes a woman who survived years of ICT, and went on to have permanent harms including kidney disease, epilepsy, gastrointestinal disease, bone tumors, reproductive cancer- and permanent PTSD and depression.¹²

⁶ Miller, Rycus, & Hughes, 2021.

⁷ Id, p.8

⁸ Knox, et al, 2014.

⁹ Miller, et al, 2021; Miller, 2020; 2019; Knox, 2014; Browne, 2014.

¹⁰ Catani, et al, 2008, p.175.

¹¹ Fields, 2008.

¹² Miller, Rycus, & Hughes, 2021.

Parents who torture their children have an extremely poor prognosis for change, because of the unique parental factors that underlie ICT.¹³ While most child maltreatment is related to factors such as poverty, parental depression or substance use disorder, or lack of natural supports from friends and family, ICT is primarily caused by severe psychopathology in the offending parent, including personality disorders that are extremely difficult and sometimes impossible to treat. Parents who torture their children may have personality traits such as psychopathy (being a “psychopath”), narcissism, and borderline personality traits¹⁴, and may be psychologically dependent on their child to play out the other half of a torturous interpersonal dynamic.¹⁵ Parents who torture typically lack empathy and concern for their child’s well-being is nonexistent. Therefore, it is dangerous and ultimately harmful to leave a child in the care of a parent who physically or psychologically tortures them. When torture is discovered, the child victim should be removed immediately and placed in a safe environment. It is also dangerous to remove a child and then later attempt reunification with the offending parent, who is unlikely to change their behavior.¹⁶

Intrafamilial child torture (ICT) is believed to be highly lethal. In a study by child abuse pediatrician Dr. Barbara Knox and her colleagues, they chose a sample set of 28 cases from their previous hospital patients that they believed constituted child torture. Their sample set had a one-third fatality rate.¹⁷ While there are obvious limits in this kind of selected sample, other clinical data from child welfare and mental health professionals supports a high risk of death in children tortured by their parents.¹⁸

¹³ Id.

¹⁴ See Diagnostic and Statistical Manual of Mental Disorders (DSM-V), 2013.

¹⁵ Herman, 1992, p.75.

¹⁶ See Knox et al, 2014; Miller et al, 2021; see Rycus & Hughes, 2004 for basic principles of child welfare risk assessment, safety decision making, and permanency planning.

¹⁷ Knox, et al, 2014.

¹⁸ Miller, et al, 2021; Miller, 2020; Miller 2019.

2. Child fatalities caused by Intrafamilial Child Torture or other maltreatment have known risk indicators that should trigger swift protective action by Child Protective Services, as federal law requires child safety to be the paramount concern of CPS.

Federal law establishes basic requirements for child protective services agencies receiving federal funds. Both the Child Abuse Prevention and Treatment Act (CAPTA) and the Adoption and Safe Families Act (ASFA) require state law to specify that the child's health and safety are of "paramount concern" to the CPS agencies (Child Abuse Prevention and Treatment Act of 2019, 42 U.S.C. §5101-5116i; Adoption and Safe Families Act of 1997, 42 U.S.C.A. §1305). These laws require CPS agencies to carry out their duties with child safety as the paramount concern.

The death of a child is a sentinel event for a community, prompting a need to understand the cause and to prevent further deaths. When the death is caused by ICT or other child maltreatment (CM), the cause is potentially preventable.¹⁹ An estimated 1770 children died as the result of maltreatment in the United States in 2018, a rate of 2.4 per 100,000 children.²⁰ This number has increased in recent years (see Figure 1 in appendix). Most of the children that died (70+%) were under the age of three years, and most deaths occurred as the result of neglect²¹ (73% in 2018) or neglect in combination with physical abuse²². This number is thought to be an undercount, and the actual number may be two or three times larger than reported in official statistics.²³

¹⁹ U.S. Advisory Board, 1995.

²⁰ U.S. DHHS, 2020.

²¹ Ohio defines a "neglected child" by listing 8 possible criteria, OAC §5101:2-1-01(B)(191)(a)-(g)

²² Ohio defines an "abused child" by listing 5 possible criteria, which include suffering physical or mental harm, sexual harm, or endangerment. OAC §5101-2-1-01(B)(1)(a)-(e)

²³ U.S. Commission, 2016.

When a child has been admitted to the hospital with a diagnosis of child abuse or neglect, the risk of subsequent fatality from child maltreatment triples.²⁴ Many children who subsequently die from maltreatment are known to CPS or have been receiving prevention services.²⁵ In 2016, 29.7% of children that died from CM had at least 1 prior CPS contact in the 3 years prior to death. In 2018, 20.3% of CPS cases with child deaths had received family preservation (i.e., intensive) services within 5 years.²⁶ A prior call to a child protection hotline, regardless of whether it is screened in or screened out, is the best predictor of a later CM fatality.²⁷

While some ICT or other CM fatalities may not be preventable despite the CPS agency's best efforts, many children who have died from abuse or neglect were known to CPS agencies that *did not* take adequate action to ensure their safety.²⁸ CPS agencies are critical to society's response, leading the effort to respond quickly to reports of harm. CPS leaders and staff must be held accountable for doing the job they are trained and legally sanctioned to do. Child death review teams, fetal-infant mortality review teams, and CPS citizens review panels²⁹ can only respond *after* the death of a child. CPS agencies are uniquely situated to *prevent* child deaths with evidence-based³⁰ and legally proscribed³¹ child welfare practices

²⁴ Kennedy, Lazowitz & Palusci, 2020.

²⁵ Putnam-Hornstein, 2011; US DHHS, 2020.

²⁶ U.S. DHHS, 2020.

²⁷ Schnitzer & Ewigman, 2005.

²⁸ U.S. Commission, 2016, p.14.

²⁹ -Child Death Review Teams (CDRTs) "equip communities to improve safety and prevent future fatalities through multidisciplinary, in-depth case review" of individual child deaths. Fetal and infant mortality review (FIMR) "is the community-based, action-oriented process of reviewing fetal and infant death cases to improve maternal and infant health outcomes". See The National Center for Fatality Review and Prevention, n.d.

-The federal Child Abuse Prevention and Treatment Act (CAPTA) requires each state to create citizen review panels (CRPs) to meet quarterly and report annually on efforts to ensure that the State is following child protection requirements. CRPs vary in design and function. Jones, 2015.

³⁰ Rycus & Hughes, 2004.

³¹ See generally, ORC Title 51; OAC §5101.

B. PERRY COUNTY CHILDREN SERVICES (PCCS) IGNORED THE TORTURE OF HARMONY CARSEY

1. The Child Protective Services workers in Harmony's case engaged in egregious misconduct, including wanton and reckless behavior.

In this case, PCCS employees behaved in a wanton, reckless, sometimes intentional, and egregious manner by leaving Harmony in conditions of torture at her mother's house, which resulted in Harmony's death. (see *infra*, Introduction, Brief Statement of Facts, also see Brief of the Appellants before the Fifth District, for discussion of facts and citation to applicable documentary evidence and testimonial evidence proffered by the plaintiff-appellants).

In Ohio, wanton behavior and reckless behavior are two different standards. In *Anderson v. Massillon*, 134 Ohio St.3d 380, at 388 (2012), this Court defined wanton conduct as “the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result” and reckless conduct as “the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances.” *Anderson* at 388.

In this case, Ms. Smathers, Harmony's grandmother, called PCCS with concerns about Harmony's safety. Child Protective Services worker Nick Pease responded to the home and discovered exactly what Ms. Smathers described- Harmony was being kept in a cage-like structure, with an electrical cord tied around her to keep her from escaping, in a hot room, alone, without access to food or water. At this point, the standard of care in child welfare practice, mandated by OAC §5101:2-36-03(F), would be to immediately complete a Safety Assessment (form JFS 01401³²), document the dangerous circumstances observed, and obtain information

³² Form JFS 01401 is available at <http://www.odjfs.state.oh.us/forms/num/JFS01401/pdf/>

from the family on any additional risk factors as well as protective factors³³. Other risk factors that should have been documented in the safety assessment include Harmony's young age, non-verbal status, and inability to self-protect which increase the chance of a fatality.³⁴ Also, the mother's long history of involvement with PCCS, including a history of numerous calls to the child protection hotline, should have been documented in the safety assessment, as this also increases the chances of a subsequent child fatality. The Ohio Administrative Code delineates many of these specific items which must be included in the safety plan: "the PCSA shall document the assessment of safety threats, past history, child vulnerability, and family protective capacities...to determine the safety response" OAC §5101-2-37-01(C).

Weighing all these risk factors, unless Pease had a reason to be certain that Harmony would no longer be kept in the cage or in any imminent danger, the standard of care would be for Pease to remove Harmony from her mother's custody and place her in the emergency custody of PCCS. Had Pease completed the Safety Assessment, it likely would have indicated the same safety response. Pease and PCCS are bound by CAPTA and ASFA to make child safety the paramount concern (see *infra*). As an alternative to out-of-home placement, Nick Pease could have made a safety plan for Harmony to be kept outside the cage at all times. He could have sought protective supervision orders for rehabilitative services and for two-year-old Harmony to be kept free of constraints and supervised by an adult at all times.

By choosing to do nothing at all, Pease not only failed to meet the standard of care and legal mandates- he engaged in wanton and reckless misconduct. His conduct was wanton because he failed to exercise any care towards Harmony, even though there was a great

³³ For a treatise on the foundations of child welfare practice, widely used by the experts at APSAC, see Rycus & Hughes, 2004.

³⁴ See *infra* IV, A, 2 on child fatalities, also see Rycus & Hughes, 2004.

probability that harm would result if he did not take some protection action. In fact, Pease knew that it was more than a great probability of harm- he knew Harmony was *already* being harmed and had no reason to believe the harm would stop. Pease's conduct was also reckless because he consciously disregarded, and was indifferent to, the obvious risk that Harmony could die in the hot cage with no access to water, and this indifference was highly unreasonable and egregious, in the opinion of the child maltreatment experts at amicus APSAC, and according to the published literature in child welfare practice (see *Anderson v. Massillon* at 388, *infra*; see Rycus & Hughes, FN 23, 24).

Shortly after Pease's initial home visit, Harmony went to visit her grandmother, collapsed, and was unconscious. The emergency room doctor determined that she needed to be life-flighted to a pediatric hospital with a pediatric intensive care unit (PICU). She was admitted to the PICU at Cabell-Huntington Hospital. During Harmony's hospitalization, the medical team discovered, what they termed: "overwhelming evidence of child abuse and neglect" (see evidence cited in Brief Statement of Facts, *infra*, especially Pl. Ex. No. 11 and 15; Taylor Depo 114-115). The medical team discovered pustules, welts, rash, bruising, and swelling on her genitals and buttocks. Her vagina was bruised and swollen. She had signs of abusive head trauma, her hair was falling out, and her face was bruised. In total she had dozens of injuries all over her body in various stages of healing, including injuries to her abdomen, and concern about an injury to her liver. She was also emaciated, weighed only 15 pounds (0.00 percentile for her age), was starving to death, and was severely dehydrated. The hospital staff informed PCCS of all of these findings on multiple occasions and expressed their extreme concern about Harmony returning to her mother's care upon discharge from the hospital (see Brief Statement of Facts

infra, also see Brief of the Appellants before the Fifth District, pp. 5-10, for citation to documentary and testimonial evidence).

At this point in the case, the standard of care would be to pursue emergency and temporary custody of Harmony, place her in a safe home, and pursue evaluations to help determine if it is emotionally safe for Harmony to visit with mother (OAC §5101:2-42-04(B)(1) grants authority for PCSA's to initially assume custody of a child through an emergency, ex parte order). Despite having extensive evidence that Harmony's life was in imminent danger in her mother's care, PCCS allowed Harmony to be discharged from the hospital to her mother's home, where she subsequently died of intentional water deprivation while in the cage.

Defendant-appellees not only failed to meet the standard of care, they engaged in wanton and reckless behavior by allowing her to return to mother's home without taking *any* protective action. Defendants' failure to protect Harmony after she nearly died in the PICU constitutes some of the most egregious behavior the experts at APSAC have ever encountered. This behavior easily meets, and even exceeds, both the wanton and reckless standards set forth in *Anderson*. PCCS' conduct was wanton because they failed to exercise any care towards Harmony, even though there was a great probability that she would be harmed or killed if no action was taken. PCCS' conduct was reckless because they consciously disregarded, and were indifferent to, the risk that Harmony would be harmed or killed upon return to her mother's house, and this indifference is highly unreasonable according to the child maltreatment experts at APSAC.

2. Nick Pease acted in bad faith when he falsified the safety assessment after Harmony was already dead, which amounts to intentional, possibly criminal, misconduct.

Ohio statute requires caseworkers to promptly complete a Safety Assessment, as part of a Comprehensive Assessment Planning Model, when an investigation is opened (see *infra*, OAC §5101:2-37-01). This tool assists the caseworker in identifying individual risk factors as well as overall risk to the child in the home. Accurately identifying the risk level is essential to sound decision-making about whether to leave a child in a parent's care, or place that child in a safer home.

In this case, Nick Pease did not complete the safety assessment until after Harmony died, roughly two months after his initial visit. He falsified the record by completing it as though she were still alive and marked all 15 risk factors as "no" when actually every risk should have been marked as "yes" (see Appellant's Reply Brief pp.98-100 re: analysis of falsifications on the form). Therefore, the safety assessment was falsified. Intentional falsification of records obviously amounts to *bad faith* (see ORC §2744.03(A)(6)(b) which lists malicious purpose, bad faith, wanton, or reckless behavior as precluding governmental immunity, see *supra* in IV.C.1).

ORC §2913.42 criminalizes "Tampering with Records." The statute states the following: "(A) No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following: (1) Falsify...any writing, computer software, data, or record." It states further: "(4) If the writing, data, computer software, or record is kept by or belongs to a local, state, or federal government entity, [the act is] a felony of the third degree."

In this case, it is clear that Nick Pease falsified and tampered with the safety assessment—a government record kept by PCCS. This behavior is not only in bad faith, it rises to the level of intentional, criminal behavior.

C. IF PERRY COUNTY CHILDREN SERVICES CAN IGNORE CHILD TORTURE WITHOUT LEGAL CONSEQUENCE, THERE WILL BE NO CASE OF CHILD PROTECTIVE SERVICES MISCONDUCT SUBJECT TO LEGAL CONSEQUENCE.

1. PCCS does not qualify for governmental immunity because they engaged in wanton, reckless, and bad faith misconduct

Ohio, like most states, has a statute granting legal immunity to government actors (“employees of a political subdivision,” see ORC §2744.03), in order to avoid excessive disruption of government, excessive constraint on employees, and to protect competent workers from frivolous claims (see *Saucier v. Katz*, 533 U.S. 194 at 195 (2001), “the goal of qualified immunity is to avoid excessive disruption of government”). However, “it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty,” *Harlow v. Fitzgerald*, 457 U.S. 800 at 814 (1982). In order to allow worthy claims to be heard by the judiciary, Ohio’s statute creates three exceptions to governmental immunity (ORC §2744.03(A)(6)). Only one of the exceptions is applicable to this case. The applicable exception states that a government employee is not immune from liability if “the employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner” (ORC §2744.03(A)(6)(b)). In this case, the plaintiffs have demonstrated that Nick Pease and PCCS acted in a wanton and reckless manner repeatedly, to an extreme that the experts at APSAC have rarely encountered. The plaintiffs have also demonstrated that Nick Pease acted in bad faith when he falsified the safety assessment, which also amounts to criminal behavior. Therefore, Pease and PCCS do not qualify for governmental immunity.

2. Issues of wanton and reckless behavior create an issue of material fact for the

jury

Ohio case law is clear that questions about whether a party was wanton or reckless is a question of fact for a jury. See *Brown v. Cuyahoga Falls*, 2010-Ohio-4330 (2010) (Explains that whether a defendant was wanton or reckless is an issue of material fact; “Reasonable minds could differ as to whether [the defendant’s] actions were reckless”). See also *Thompson v. Smith* 2008-Ohio-5532 (2008) (affirming the denial of summary judgment when “material issues of fact remained concerning whether [defendant’s] conduct was willful, wanton, or reckless...”). Also see also *Norris v. Ohio Standard Oil*, 70 Ohio St.2d 1, at 5. (1982) (Justice Brown dissent: “the majority’s conclusions...invade the jury function”; the Court should not answer the question of negligence on summary judgment analysis because this is a question of fact where reasonable minds could disagree; i.e., a question of fact for a jury.)

The plaintiffs have shown that the defendant-appellees acted in a wanton and reckless manner with regard to Harmony Carsey. Therefore, there is a question of material fact for a jury, and the Fifth District erred in upholding summary judgment.

3. If this fact pattern cannot survive summary judgment, there will be no case of CPS misconduct that can survive summary judgment.

In *Norris v. Ohio Standard Oil*, 70 Ohio St.2d 1 (1982), this Court stated: “summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try. *It must be awarded with caution*, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion.” *Norris* at 2; emphasis added.

In this case, the trial court erroneously granted summary judgment to the defendant-appellees based on government immunity, even though the defendant-appellees do not qualify

for government immunity because they acted in a wanton manner, a reckless manner, and in bad faith criminal behavior (see *infra* III.B. Court of Appeals Opinion; IV.B.1. on wanton and reckless behavior, IV.B.2. on bad faith criminal behavior). The trial court also erred in construing the evidence against the plaintiffs, rather than against the defendants (see Brief of the Appellants, February 28, 2020). The Fifth District erred in ignoring plaintiff's evidence, ignoring the fact that questions of wanton and reckless behavior create an issue of material fact for trial (*Brown v. Cuyahoga Falls; Thompson v. Smith*) and erroneously affirmed the trial court's grant of summary judgment (see Fifth Appellate District Opinion, June 8, 2020).

If this case cannot survive summary judgment, given the evidence presented by the plaintiff-appellants, there will be no case of CPS misconduct that can survive summary judgment. In this case, the acts and omissions of PCCS are some of the most egregious misconduct the experts at APSAC have ever seen. If the most egregious cases cannot be heard at trial, there is no hope for deceased children and their families to receive justice from the court system.

When the executive and legislative branches fail to keep child protection agencies in compliance with the law, the only option for aggrieved parties is to turn to the judiciary to compel compliance with state laws and minimum standards of care. In *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), Justice Blackmun's famous dissent outlines his vision for CPS accountability in the court system. Blackmun found that once CPS begins to investigate the abuse of the child and intervene with the family, they have moved beyond "mere passivity" to "state intervention" which "triggered a fundamental duty to aid the child once the state learned of the severe danger to which he was exposed" *DeShaney* at 202.

In this case, PCCS learned of the severe danger to which Harmony was exposed on their first home visit. They failed to act, to protect Harmony. They failed to comply with state laws and minimum standards of care in child welfare practice. They acted in a wanton manner, reckless manner, and in a bad faith, criminal manner. The rules and oversights created by the executive and legislative branches were ineffective in this case. Therefore, the plaintiff-appellants can only turn to the courts to compel compliance with state laws and minimum standards of care.

V. CONCLUSION

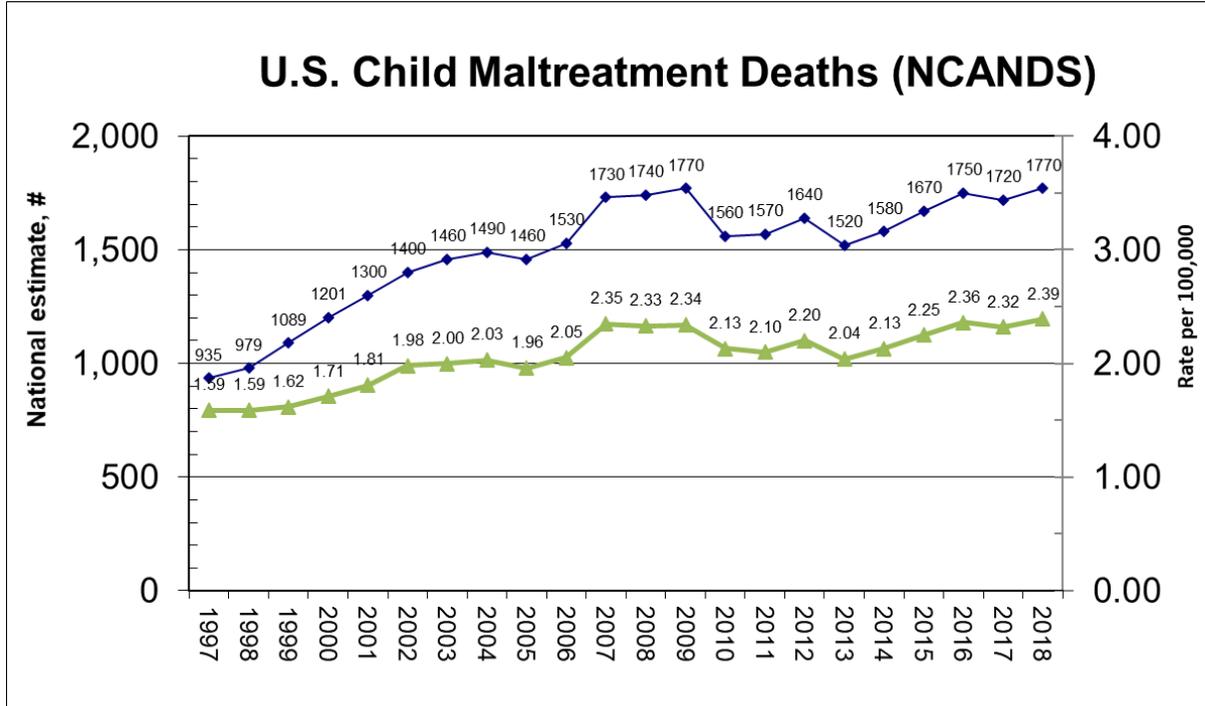
For the reasons stated, amicus curiae APSAC asks this Court to OVERTURN SUMMARY JUDGMENT and remand the case for trial.

Respectfully submitted,

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APPENDIX

Figure 1. U.S. Child Maltreatment Deaths: Frequencies and Rates, NCANDS 1997-2018



SERVICE

This is to certify that the foregoing BRIEF OF THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS was served by First Class U.S. Mail on this _____ Day of February, 2021, upon the following: 16th

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