

IN THE SUPREME COURT OF OHIO

07-1311

JANE DOE, , et al., )

Appellants, )

v. )

MASSILLON CITY )

SCHOOL DISTRICT, et al., )

Appellees. )

ON APPEAL FROM THE STARK  
COUNTY COURT OF APPEALS,  
FIFTH APPELLATE DISTRICT

COURT OF APPEALS  
CASE NO. 2006CA00227

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANTS JANE DOE AND JENNY DOE**

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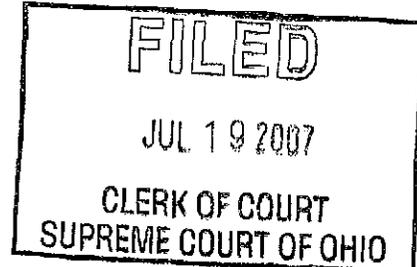
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**EXPLANATION OF WHY THIS CASE IS A CASE  
OF PUBLIC OR GREAT GENERAL INTEREST**

The following issue of public or great general interest is presented in this case: **Does the former R.C. 2744.02(B)(4) exception to sovereign immunity grant blanket immunity to a school district where a previously convicted child molester/“school volunteer” and “chess coach” repeatedly molests elementary school students, as long as the molestations do not occur on the grounds of the school district?** The answer to this question affects potentially thousands of Ohio school children who are unable to protect themselves against sexual predators lurking within their own school district.

When parents send their children to school, they cede the control and safety of their children to the school district, which stands *in loco parentis* to these children. Indeed, during any given school year, students will spend more time at school than at home, both in curricular and in extracurricular programs. Sadly, this case illustrates how vulnerable small schoolchildren are to the very real threat of sexual predators, even within a formal institutional setting like an elementary school.

In 1989, John Smith plead guilty to gross sexual imposition for molesting two Boy Scouts, ages 9 and 10 (the exact ages of the minor children-Appellants here), and spent two years in Lucasville prison. In 1997, Appellees allowed Smith to teach chess to elementary students at Franklin-York Elementary School.

Eventually, the school formed a chess club – known as the “Franklin-York Elementary Chess Club.” Smith began to teach chess to the elementary students at Franklin-York, as much as three days per week, after school. By 2001, Smith was under investigation for molesting as many as forty students in the Club. Eventually, that investigation revealed that Smith had repeatedly molested the two Appellants/minor children in this case. At no time did Appellees

ever conduct any background check of Smith, much less a criminal background check, and were therefore unaware of his sordid past.

The trial court granted summary judgment to Appellees, rejecting the notion that *Hubbard v. Canton City Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 708 N.E.2d 543, allowed for an exception to immunity under former R.C. 2744.02(B)(4) as long as the negligence which led to the injuries – and not the injuries themselves – occurred on political subdivision grounds.

In *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 855 N.E.2d 324, this Court held that the former R.C. 2744.02(B)(3) exception to immunity for nuisance liability does not limit recovery when the injury, death, or loss caused by the nuisance occurs outside the political subdivision. (Syllabus.) In reaching this conclusion, the Court noted that *Hubbard, supra*, “dealt with a similar issue of statutory interpretation regarding an R.C. 2744.02(B) immunity exception.” *Id.* at ¶11.

However, in the case at bar, the Fifth District relied upon the following passage in *Sherwin-Williams* in concluding that the R.C. 2744.02(B)(4) exception required that the injuries occur on the grounds of a political subdivision:

“Former R.C. 2744.02(B)(4) demonstrates that the General Assembly is perfectly capable of limiting the reach of a political subdivision’s liability to injuries or losses that occur on property within the political subdivision; as this court held in *Hubbard*, pursuant to former R.C. 2744.02(B)(4) political subdivisions were liable for employee negligence that occurred in public buildings or on their grounds.” *Id.* at ¶17.

Appellants allege that Appellees negligently allowed Smith to have unsupervised access to elementary school children on school grounds, thus allowing Smith to “groom” them for potential abuse, and negligently retained him after ignoring certain complaints about him (which

will be discussed *infra*). As a result of the Fifth District's decision, when read in conjunction with this Court's decision in *Sherwin-Williams*, school districts now enjoy blanket immunity under former R.C. 2744.02(B)(4) when malevolent school personnel molest school children, as long as the molestations do not occur on school grounds. However, under the neighboring former R.C. 2744.02(B)(3) exception for nuisance liability, school districts can be liable even if the injury occurs off the grounds of the political subdivision.

Thus, the juxtaposition of *Hubbard*, *Sherwin-Williams*, and the Fifth District's opinion in this case raises the following important legal questions. Did this Court, in *Hubbard*, limit the former R.C. 2744.02(B)(4) exception solely to injuries that occurred on the grounds of the political subdivision, or did it allow an exception to immunity as long as the *negligence* occurs within or on the grounds of the political subdivision? Similarly, was it the Court's intention in *Sherwin-Williams* to restrict the scope of *Hubbard* and limit the R.C. 2744.02(B)(4) exception solely to injuries occurring on the grounds of the political subdivision, while simultaneously placing no such limit on a political subdivision's nuisance liability under former R.C. 2744.02(B)(3)? Appellants submit that this case is of great public interest because the Fifth District's interpretation of *Hubbard* and *Sherwin-Williams* has spawned an alarming incongruity of result which now mutates from its interpretation of former R.C. 2744.02(B)(4) and these cases.

The following example illustrates this incongruity under the Fifth District's reasoning. If a school district sponsored a pep rally/bonfire that raged out of control, burning nearby houses and injuring the occupants, the former R.C. 2744.02(B)(3) exception would apply as a potential nuisance. It would be irrelevant if the injuries to the occupants occurred off the grounds of the school property. However, in this case, school districts which negligently fail to take

precautionary measures to weed out sexual predators who infiltrate an elementary school, and negligently ignore complaints made about these predators' fitness to be around children, enjoy blanket immunity under R.C. 2744.02(B)(4) as long as the predator molests the students one foot off of school property. Appellants submit that it was neither the intention of the General Assembly nor this Court to create such contradictory and incongruous results within adjoining sections of the exceptions to immunity under former R.C. 2744.02(B). As such, the former R.C. 2744.02(B)(4) exception is in dire need of clarification.

The timeline of events in this case illustrates that it retains public or great general interest despite the fact that it involves former R.C. 2744.02(B)(4) and its related case law. Smith began his tenure as chess coach for Appellees in approximately 1997. The children were molested numerous times between 2000 and 2001 as nine and ten year olds. Suit was not filed until 2005, almost eight years after Smith was negligently retained and almost four years after the molestations surfaced. This lengthy timeline illustrates that the former R.C. 2744.02(B) exceptions may well apply to a whole class of minor children, where their causes of action accrued before the former R.C. 2744.02(B)(4) was amended, effective April 9, 2003<sup>1</sup>. For example, a six-year-old child who was injured before April 9, 2003 would have until 2017 to bring a claim and the former R.C. 2744.02(B) exceptions would still apply. Because of the applicable statute of limitations for minors of tender years, and the lag time that may accrue between when the injury occurred and when suit is brought, a correct interpretation of the scope and breadth of the former R.C. 2744.02(B) exceptions will be salient for years to come.

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<sup>1</sup> S.B. 106 modified R.C. 2744.02(B), effective April 9, 2003. The pre-S.B. 106 version of R.C. 2744.02(B)(4) applies to this case. See *Sherwin-Williams, supra* at ¶3.

## STATEMENT OF THE CASE AND FACTS

### Procedural History

On September 30, 2005, Appellants Jane Doe and Jenny Doe brought suit against Appellees, the Massillon City School District and the Massillon Board of Education, on behalf of their respective children, ages 9 and 10. These two children were third and fourth graders at Franklin Elementary School. They were repeatedly molested by one John Smith, who was a school volunteer for Appellees and who, unquestionably, was running an after school chess club at Franklin Elementary School.

Appellants' Complaint alleged that Appellees were negligent in allowing Smith to infiltrate their own elementary school without taking any measures to investigate his background. It also alleged that Appellees ignored certain complaints about Smith's fitness and character during his tenure as Franklin-York Chess Club coach, and therefore negligently retained him. Finally, Appellants alleged that the lack of investigation of Smith, the lack of any institutional control over his activities, and choosing not to follow-up on complaints about him, rose to the level of willful and wanton misconduct.

Appellees denied the allegations, and extensive discovery ensued over the course of months. Trial was scheduled for August 12, 2006.

On July 26, 2006, after extensive briefings by the parties, the trial court granted Appellees' Motion for Summary Judgment. It simultaneously denied Appellants' Motion for Summary Judgment.

This appeal to the Fifth District Court of Appeals was perfected on August 1, 2006. On June 7, 2007, the Fifth District affirmed the decision of the trial court.

## Statement of Facts

In the fall of 1997, John Smith visited Franklin Elementary School and approached Judith Kenny, Franklin's newly appointed principal. Smith wished to start a school "Chess Club" and teach chess to Franklin students after school. (Kenny, p. 22, Ex. 24, Appx. p. 150.) He was not asked to fill out a written application to become a volunteer, nor was he asked for a list of references to vouch for him. (Kenny, pp. 24-25, Ex. 24, Appx. pp.152-153.) Further, no index information was obtained, such as date of birth, social security number, address, phone number, or any other basic background information. (Kenny, p. 24, Ex. 24, Appx. p. 152.)

When Smith got the Chess Club up and running, it adopted the name of the school: "The Franklin-York Chess Club." There is no denying that Smith was a school volunteer for Appellees at Franklin Elementary School, running an after school program. (See Deposition of Judith Kenny [hereinafter Kenny], pp. 28-32, Ex. 24, Appx. pp. 156-160; Deposition of Susan Rohr [hereinafter Rohr], pp. 21-24, Ex. 25, Appx. pp. 181-184; Deposition of Al Hennon [hereinafter Hennon], pp. 39-41, Ex. 26, Appx. pp. 196-198). The team's successes were published in a school newsletter, known as the "Franklin Gazette." (Ex. 2, Appx. pp. 85-86.) Smith was referred to as a "coach" in various newsletters (Ex. 4, Appx. pp. 89-90), and was given a column in the April 2000 edition of The Gazette. (Ex. 6, Appx. pp. 93-94.) Students wishing to participate in the Chess Club were required to sign permission slips and medical authorizations. (Ex. 7, Appx. p. 95 and Ex. 8, Appx. p. 96.) What's more, Smith was listed as "Chess Club Advisor" in the school yearbook. (Ex. 9, Appx. pp. 97-98.)

All practices of the Franklin-York Chess Club were held at the school. (Kenny, p. 20-21, Ex. 24, Appx. pp. 148-149 and Rohr, p. 12, Ex. 25, Appx. p. 176). Eventually, practices grew to

three days per week throughout the entire school year. (Ex. 7, Appx. p. 95 and Deposition of John Doe, pp. 19-20, Ex. 28, Appx. p. 222.)

In the Spring of 2000, Smith sent home a letter inviting certain “select members” of the Franklin-York Chess Club on a field trip over spring break, including the Doe Children. Both had been actively involved in the Chess Club for approximately two to three years. (Ex. 16, Appx. pp. 107-108.) The Doe parents thought the trip was sponsored by the school, and were aware that the school guidance counselor, Sue Rohr, was accompanying the group to Michigan. (Deposition of Jenny Doe, p. 17, Ex. 29, Appx. p. 224; Deposition of Jane Doe, p. 13, Ex. 30, Appx. p. 227.) During this field trip, Smith slept alone with the Doe children in a motel room. During the eventual criminal investigation of Smith some nine months later, Massillon Child Sex Crimes Investigator, Bobby Grizzard, interviewed both boys, then ages 9 and 10. Both reported that Smith had done something to them in the room while they were sleeping; neither were willing to provide details. (Grizzard, pp. 28, 30, 35-36, Ex. 27, Appx. pp. 213, 215-217.)

Just a few months before this field trip, Smith was suspended from membership in the Stark County Scholastic Chess Federation, a local non-profit organization that promotes youth chess. (Zutali, p. 17, Ex. 31, Appx. p. 238.) After an alleged racial incident that occurred amongst members of the Franklin-York Chess Club team at a local chess tournament, Wuyanbu Zutali, the head of the Chess Federation, met with Principal Kenny regarding Smith. During that meeting, Zutali raised questions about Smith’s fitness to coach chess to small children. (Zutali, p. 19, Ex. 31, Appx. p. 239.) In Zutali’s words, “She (Kenny) pretty much, well, blew me off.” (*Id.*)

In the fall of 2001, Zutali persisted in contacting the Massillon Police Department with continued concerns about Smith. (Zutali, p. 23, Ex. 31, Appx. p. 240.) Eventually, Zutali and

Detective Grizzard were able to obtain an old address for Smith, and ran his name and address through a law enforcement computer known as LEADS. (Grizzard, p. 14, Ex. 27, Appx. p. 237.) Within minutes, Smith's previous criminal conviction for gross sexual imposition surfaced. (*Id.*) Smith was then asked by new Franklin-York principal, Jody Ditcher, to submit to a criminal background check and, when Smith refused to do so, Appellees terminated him. (Ditcher, p. 29, Ex. 32, Appx. p. 246.) The criminal investigation then ensued.

Since 1994, Appellees had a written policy involving "Volunteers". (Ex. 21, Appx. p. 144.) It provided, in part, that ". . . the building principal shall be responsible for recruiting community volunteers, reviewing the capabilities of each applicant, and making appropriate placements." Unfortunately, Appellees chose not to include a criminal background check requirement into the volunteer policy, despite the fact that criminal background check policies were already in place in 1994 in the school district for all teachers, aides, staff, cooks, janitors, bus drivers -- anybody who was involved in the "care, custody, and/or control" of children. (Ex. 22, Appx. p. 145.)

It was technologically and economically feasible in 1997 to run criminal background checks on volunteers. (Hennon, pp. 35-36, Ex. 26, Appx. pp. 194-195.) The same criminal background check run on teachers, cooks, janitors, and others in the school district for years most likely would have revealed that Smith was previously convicted of child molestation. (Hennon, p. 72, Ex. 26, Appx. p. 204.)

Neither the Superintendent nor the Board of Education had any idea about the particulars of the Chess Club, who Smith was, or what Smith was doing, including taking small children out of state under the guise of a "field trip," in violation of Board policy. Candidly, Superintendent

Hennon admitted that what happened to the Doe children was preventable. (Ex. 26, pp. 204-206.)

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### Proposition of Law No. I:

**Under former R.C. 2744.02(B)(4), a political subdivision may be liable for injuries, death, or loss to persons caused by negligence occurring on the grounds of a building used in connection with a government function, when the injury, death, or loss occurs outside the political subdivision.**

Former R.C. 2744.02(A)(1) provided immunity to political subdivisions. Former R.C. 2744.02(B) provided exceptions to this general rule. This case involves former R.C. 2744.02(B)(4), which provides:

. . . Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

In *Hubbard, supra*, this Court interpreted the 2744.02(B)(4) exception applicable here, in a lawsuit brought by parents who alleged their daughters were sexually assaulted by a middle school teacher. Plaintiffs alleged that the school district was negligent in supervising and retaining the teacher charged with these offenses. The school district argued that the 2744.02(B)(4) exception was limited to physical defects within or on the grounds of the school district buildings. In rejecting the “physical defects” rule, this Court declared that “**since the injuries claimed by the plaintiffs were caused by negligence occurring on the grounds of a**

**building used in connection with a government function, R.C. 2744.02(B)(4) applies and the board is not immune from liability.”** *Id.* at ¶18 (emphasis added).

*Hubbard* is identical to the case at bar in that both involve a negligent hiring/retention claim against the school district for molestations by a school official or agent. The only difference is that the molestations in *Hubbard* happened to occur on school grounds. However, since the theory of relief allowed in *Hubbard* was negligent retention, logically it flows that the focus must be on the facts and circumstances, if any, that led to the negligent retention and which precipitated the injury, irrespective of where it actually occurred. Therefore, the exact location of where the molestations occurred in *Hubbard* was not a dispositive fact.

In *Beck, Adm. v. Adam Wholesalers of Toledo, Inc.*, 2001 Ohio App. LEXIS 4400. 2001-Ohio-4391, the Sixth District Court of Appeals reversed summary judgment in favor of a school district, recognizing the “absurd” nature of an on/off premises distinction for purposes of former R.C. 2744.02(B)(4):

“The [trial] court then concluded that because Christian was struck while in the roadway, the exception did not apply. Under the specific facts of this case, particularly focusing on the continuous chain of events which culminated in the accident, we reject such a narrow interpretation of the statute. We agree with appellant that the foreseeability and proximity aspects in this particular case cannot be ignored. Denying review under R.C. 2744.02(B)(4) based upon a matter of inches leads to an absurd result.” *Id.* at 13-14.

In *Sherwin-Williams, supra*, this Court rejected an “on the premises” injury requirement for the former R.C. 2744.02(B)(3) nuisance exception to sovereign immunity. This Court did state with respect to the (B)(4) exception: “. . . the General Assembly is perfectly capable of limiting the reach of a political subdivision’s liability to injuries or losses that occur on property within the political subdivision.” *Sherwin-Williams* at ¶17. However, in the same breath, this Court concluded: “as this court held in *Hubbard*, pursuant to former R.C. 2744.02(B)(4)

political subdivisions were liable for **employee negligence that occurred in public buildings or on their grounds.**” *Id.* (emphasis added).

The essence of Appellants’ claims is that the “employee negligence” referred to in *Sherwin-Williams* – allowing a convicted child molester to infiltrate an elementary school without the identical background check given to everyone else within the district, and subsequently ignoring complaints about this “coach’s” fitness to be around small children – occurred on the grounds of the school district.

Thus, despite (1) *Hubbard’s* clear admonition that “since the injuries . . . were caused by negligence occurring on the grounds of a building used in connection with a government function . . . the board is not immune from liability”, and (2) the quoted passage from *Sherwin-Williams* referring to “employee negligence,” do these cases, taken together, now create an absolute, “on the premises” injury requirement before a claim of negligent hiring and/or retention is actionable against a political subdivision? If jurisdiction in this case is not accepted, school districts and boards of education may be held civilly accountable for hiring sexual predators or failing to investigate personnel complaints – as long as their negligence fortuitously culminates in school children being arbitrarily molested on the grounds of the school district. On the other hand, school districts and boards of education which take no precautionary measures to weed out sexual predators, or ignore complaints about school personnel, enjoy blanket immunity if those same malevolent personnel molest a school child one foot off the grounds of school property.

**Proposition of Law No. II:**

**An elective, after school activity either approved or not approved by a political subdivision/board of education is not a governmental function under R.C. 2744.01(C)(1)(c). Rather, it is a proprietary function under R.C. 2744.01(G)(1)(a). Therefore, R.C.**

**2744.02(B)(2) and not R.C. 2744.02(B)(4) applies and determines whether the immunity granted under R.C. 2744.02(A)(1) is removed.**

Appellees in the lower courts claimed, correctly, that Smith was not formally hired, paid, approved, or recommended as a volunteer by the Board or the Superintendent. Similarly, “. . . the Board did not act to authorize, approve, or financially support the operation of a “chess club” or similar organization at either Franklin or York Elementary Schools.” (Appellees’ Motion for Summary Judgment, Exhibit C.) Thus, Appellants raised the following issue in the lower courts:

If there is immunity for governmental functions, how can Appellees claim sovereign immunity for a supposed non-agent/non-employee, who is, according to defendant, merely using school space for a program completely unrelated to its governmental function of operating a system of public education under R.C. 2744.01 (B)(2)(c)? To be sure, Appellees want the shield of sovereign immunity, while in the same breath claim that Smith and his program had no connection to the Appellees. In essence, Appellees are saying: “We had nothing to do with Smith, whatever you call him, who was a stranger to us, for which we are entitled to immunity for whatever he did!” Admittedly, the Sovereign Immunity statute has been less than a beacon of clarity, but it has not yet been judicially declared schizophrenic to date. (Appellants’ Reply Brief, p. 5.)

If the club were nothing more than a loose association of users of school space with no connection with Appellees, then, as a matter of law, such activities cannot be related to “the provision of a system of public education” under R.C. 2744.01(B)(2)(c). Rather, such activity would fit squarely into “activities that are not engaged in or not customarily engaged in by nongovernmental persons.” See *Greene v. Cty. Agricultural Society v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486. Although a system of public education is clearly a “governmental function” under R. C. 2744.01(C)(2)(c), school boards are not required to operate *officially sponsored or approved* after school, extracurricular clubs, **much less ones that were not approved in any fashion by Appellees**. If this “club” is deemed to be a proprietary function,

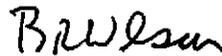
then R.C. 2744.02(B)(4) would not apply, and R.C. 2744.02(B)(2) would control the issue of whether the general grant of immunity grounded in R.C. 2744.02(A)(1) is lost.

### CONCLUSION

For the forgoing reasons, the present discretionary appeal is a case of public and great general interest. This Court should, therefore, exercise jurisdiction over the present appeal in order to resolve the important issues of whether arbitrary distinctions of where schoolchildren are molested operate as an impenetrable shield to a school district's legal accountability. Appellants submit that such an interpretation of the former 2744.02(B)(4) exception is not supported by the language of R.C. 2744.02(B)(4), the intent of the General Assembly, nor is it borne out by this Court's seminal ruling in *Hubbard* and its progeny. Further, the Court should provide guidance as to what loose or formal associations of school clubs or activities fall within the rubric of proprietary functions.

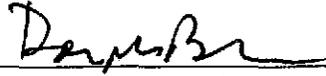
If jurisdiction is not accepted, this is, reduced to its essence, immunity breeding irresponsibility from admittedly preventable tragedies to small children entrusted to a school district.

Respectfully submitted:



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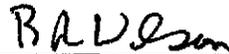
**COUNSEL FOR APPELLANTS,  
JANE DOE AND JENNY DOE**

**CERTIFICATE OF SERVICE**

This certifies that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction was served, via ordinary U.S. Mail, postage pre-paid, upon the following parties on this 19<sup>th</sup> day of July, 2007:

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MASSILLON BOARD OF EDUCATION



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# APPENDIX

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STARK COUNTY, OHIO

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

Jane Doe, etc., et al.,	)	Case No. 2005CV03339
	)	
	)	Judge Sara Lioi
Plaintiffs,	)	
	)	
vs.	)	JUDGMENT ENTRY
	)	
Massillon City School District, et al.,	)	
	)	
Defendants.	)	

This matter came before the Court upon the following:

1. The plaintiffs<sup>1</sup> motion for summary judgment;
2. The motion of the defendant<sup>2</sup>, Massillon City School District Board of Education (hereinafter "the Board"), for summary judgment and memorandum in support;
3. The Board's response to the plaintiffs' motion for summary judgment;
4. The response of the plaintiffs to the Board's motion for summary judgment;
5. The plaintiffs' reply in support of their motion for summary judgment; and,

<sup>1</sup> Given the protective order filed October 31, 2005, the Court will refer to the plaintiffs in this matter collectively only as "plaintiffs."

<sup>2</sup>The defendant has been identified by the plaintiffs as Massillon City School District and Massillon Board of Education.

6. The Board's reply in support of its motion for summary judgment.

Upon review, the Court finds the plaintiffs' motion for summary judgment not well taken and the Board's motion for summary judgment well taken.

I.  
Facts

Given the protective order filed October 31, 2005, and the sensitive nature of this case, the Court will not recite the facts in this entry. However, in ruling on the motions for summary judgment, the Court will view the facts in a light most favorable to the non-moving party. Importantly, however, the Court finds that there is no dispute that the injuries which occurred in this case did not occur within the grounds or buildings that were used in connection with the performance of the Board's governmental function.

II.  
Law and Analysis

Summary judgment is appropriate where no genuine issues of material fact exist and the undisputed facts entitle the moving party to judgment as a matter of law. Ohio Civil Rule 56(C); *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46. The Ohio Supreme Court, in *Dresher v. Burt* (1966), 75 Ohio St. 3d 280, 662 N.E.2d 264, outline more specifically the duties of the parties in summary judgment proceedings as follows:

Accordingly, we hold that a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving

party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

See also, *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing, *Dresher v. Burt* (1966), 75 Ohio St. 3d 280, 662 N.E.2d 264.

The plaintiffs and the Board have taken opposing positions as to whether the statutory immunity set forth in R.C. 2744.02 applies to count one (negligence) of the plaintiffs' complaint. The plaintiffs argue that such immunity does not apply and that there are no genuine issues of material fact as to their claims for negligence. The Board, however, asserts that statutory immunity bars count one of the complaint; that there are no genuine issues of material fact as to count two (negligence *per se*) of the complaint; that there are no statutory immunity exceptions applicable in this case; that the plaintiffs are not entitled to recover punitive damages against a political subdivision; and, that the claims by the parents are barred by the statute of limitations.

A. Application of Statutory Immunity

A "political subdivision" is "a municipal corporation, township, county, school district, or other body corporate and politic responsible for government activities in a geographic area smaller than that of the state." R.C. 2744.01. All

functions of political subdivisions are classified as either proprietary functions or governmental functions.

The availability of the defense of statutory immunity is a question of law to be determined by a court prior to trial. *Carpenter v. Scherer Mountain Ins. Agency* (1999), 135 Ohio App.3d 316, citing *Conley v. Shearer* (1992), 64 Ohio St.3d 284; *Hall v. Ft. Frye Local School Dist. Bd. of Edn.* (1996), 111 Ohio App.3d 690, 694. As set forth in R.C. Chapter 2744, a three-tier analysis is used to determine if a political subdivision is entitled to such immunity. As a general rule, a political subdivision is not liable for in a civil action for damages resulting from an act or omission by a political subdivision or an employee thereof if the damage results in connection with a governmental or proprietary function. R.C. 2744.02(A)(1).

However, this immunity is not absolute. R.C. 2744.02(B) lists give instances in which statutory immunity does not apply to a political subdivision. Yet, even if one of the exceptions under R.C. 2744.02(B) applies, a political subdivision may still have immunity if it can establish one of the defenses enumerated in R.C. 2744.03(A)(1)-(5) and (7).

The Board is a school district and a school district is a political subdivision. R.C. 2744.01(F). As a political subdivision, the sovereign immunity set forth in R.C. Chapter 2744 may apply to the Board and the aforementioned three-tier analysis must be employed. Further, by definition, the provision of a public school system is a "governmental function." R.C. 2744.01(C)(2)(c).

Starting with the premises that political subdivisions are immune from liability for injury resulting from the performance of a governmental function, this Court must next determine if any of the exceptions to such general immunity, set forth in R.C. 2744.02(B)(1)-(5), apply in this case. R.C. 2744.02(B)(4)<sup>3</sup> and (5) provide as follows:

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for *injury, death, or loss to person or property* that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

(Emphasis added.)

In *Hubbard v. Canton City School Board of Education* (2002), 97 Ohio St.3d 451, the Supreme Court of Ohio held as follows:

We therefore hold that the exception to political-subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental

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<sup>3</sup> As correctly noted by both parties, R.C. 2744.02 has been modified since the instant causes of action accrued. For the purposes of this motion, the Court will use the version of R.C. 2744.02 that was effective at the time of the incidents giving rise to the claims.

function. The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings.

In *Hubbard*, two middle school students were sexually assaulted by a teacher on school premises. The parents of the students brought suit against the school board for negligent retention/supervision and intentional infliction of emotional distress. The trial court granted summary judgment in favor of the school board finding that R.C. 2744.02(B)(4) was not intended to negate immunity for any negligence that occurred within a government building. The Fifth District Court of Appeals affirmed, finding that R.C. 2744.02(B)(4) was a "premise liability" exception to the general immunity provision. The Supreme Court, however, disagreed, finding that the exception in R.C. 2744.02(B)(4) was not confined to injury resulting physical defects or negligent use of a governmental building, but applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a government function. The Court in *Hubbard* did not address the situation wherein alleged negligent action or inaction results in injuries that occur outside the grounds of buildings that are used in connection with the performance of a governmental function.

The plaintiffs assert that the general political subdivision immunity afforded the Board is stripped by R.C. 2744.02(B)(4) because the alleged *negligence* by the Board (e.g., the negligent supervision/"retention") occurred within a building used for governmental functions, (i.e., an elementary school). They maintain that even though the injuries which are the subject of this litigation occurred outside of

the school grounds and did not occur in any other building or on other grounds used by the Board, that such exception is applicable.

This Court disagrees with the plaintiffs analysis of R.C. 2744.02(B)(4) and finds the case of *Keller v. Foster Wheel Energy Corp.* (10<sup>th</sup> Dist., 2005), 163 Ohio App.3d 325, 2005-Ohio-4821, instructive in this matter. In *Keller*, the wife of a firefighter contracted asbestosis allegedly from contact with fibers on her husband's work clothing. After her death, her husband brought suit against several defendants, including the city for which he worked. The Tenth District Court of Appeals, in interpreting R.C. 2744.02(B)(4) (the same version of the statute at issue in this case), and applying the Supreme Court of Ohio's holding in *Hubbard*, found that R.C. 2744.02(B)(4) requires that the *injury* occur on or within the grounds of a governmental building before such exception to the statutory immunity will apply. This Court finds the Tenth District's reasoning in *Keller* instructive and that it warrants quoting, as follows:

{¶ 14} Further, our own review of former R.C. 2744.02(B)(4) reveals that it requires the injury, not the negligent act or omission, to occur on public grounds. In determining the meaning of statutory language, a court must read words and phrases in context and apply the rules of grammar and common usage. R.C. 1.42. According to the rules of grammar, dependent clauses must modify some part of the main clause. *Bryan Chamber of Commerce v. Bd. of Tax Appeals* (1966), 5 Ohio App.2d 195, 200, 34 O.O.2d 351, 214 N.E.2d 812. See, also, *Independent Ins. Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814, quoting *Carter v. Youngstown* (1946), 146 Ohio St. 203, 209, 32 O.O. 184, 65 N.E.2d 63 ("[R]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent."). Here, former R.C. 2744.02(B)(4) contains two adjective dependent clauses modifying the nouns "injury, death, or loss" contained in the main clause. *Sherwin Williams Co.*, supra, at ¶ 25. No rule of grammar or common usage supports appellant's contention that one dependent clause ("that occurs within or on the

grounds of [public] buildings") modifies another dependant clause ("that is caused by the negligence of their employees"). Thus, according to the plain meaning of former R.C. 2744.02(B)(4), a political subdivision is liable only for "injury, death, or loss" if it (1) "is caused by the negligence of their employees" and (2) "occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function."

Id., at 862-863.

The Second District Court of Appeals has also determined that in order for the exception in R.C. 2744.02(B)(4) to apply, that the *injury* must occur on or within the grounds of a governmental building. In *Sherwin Williams Co. v. Dayton Freight Lines*, (2<sup>nd</sup> Dist., 2005), 161 Ohio App.3d 444, 2005-Ohio-2773, the court explained its reasoning, in part, as follows:

{¶ 24} As stated supra, courts give words in a statute their plain and ordinary meaning unless legislative intent indicates a different meaning. *Hubbard v. Canton City Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 13. In our view, the structure of R.C. 2744.02(B)(4) clearly sets forth two requirements for the imposition of liability for an injury, death, or loss: (1) the injury, death, or loss was caused by employee negligence and (2) the injury, death, or loss occurred within or on grounds of buildings that are used in connection with the performance of a governmental function. Because no evidence was offered in this case to support the latter requirement, the exception set forth at R.C. 2744.02(B)(4) did not apply.

Id., at 451. See also, *Kennerly v. Montgomery Cty. Comm'rs*, (2<sup>nd</sup> Dist., 2004), 158 Ohio App.3d 271, 2004-Ohio-4258.

This Court finds the rationale and holdings in *Keller* and *Sherwin Williams* persuasive and finds that the exception to sovereign immunity set forth in R.C. 2744.02(B)(4) does not apply when the *injuries* did not occur within or on the grounds of buildings that are used in connection with the performance of a

governmental function.<sup>4</sup> Accordingly, because the injuries in this case did not occur within or on the grounds of buildings that are used in connection with the performance of a governmental function, R.C. 2744.02(B)(4) does not apply in this case.

R.C. 2744.02(B)(5) provides another potential applicable exception to immunity as to the Board. Upon review, the Court finds that no law or fact exists which would support a finding that the exception set forth in R.C. 2744.02(B)(5) applies in this case.

However, assuming arguendo that an exception to the general grant of immunity did apply, the Court finds that, under the third tier of the immunity analysis, the Board could reinstate its immunity pursuant to the defenses set forth in R.C. 2744.03(A). The Court finds the following sections of R.C. 2744.03(A) applicable in this case:

In a civil action brought against a political subdivision or an employee or a political subdivision to recover damages for injury,

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<sup>4</sup> The plaintiffs argue that the holding of the Fifth District Court of Appeals in *Toles v. Regional Emergency Dispatch Center*, 5<sup>th</sup> Dist. No. 2002CA00332, 2003-Ohio-1190, supports the contention that R.C. 2744.02(B)(4) applies to injuries that occur outside the political subdivision's grounds or buildings where the negligence that results in such injuries occurred on such grounds or buildings. In *Toles*, a 911 dispatcher received a call regarding an assault that was occurring in a motor vehicle. The dispatcher was alleged to have failed to report the call to the police. The assault victim died and the estate brought suit against, *inter alia*, the 911 dispatch center. The trial court granted summary judgment in favor of the 911 dispatch center based upon a lack of wanton or willful conduct. Citing *Hubbard*, *supra*, the Fifth District Court of Appeals reversed, holding that, if the dispatcher "committed negligence within a building being utilized in this clearly governmental function, immunity under R.C. 2744.02(B)(4) would not apply, nor would wanton or willful misconduct be required." Respectfully, this Court finds that *Hubbard* does not stand for the proposition that R.C. 2744.04(B)(2) requires the *negligence*, as opposed to the *injury*, to have occurred within or on the grounds of buildings that are used in connection with the performance of a governmental function. See, *Keller*, *supra*, at 429, ¶ 13 ("both the syllabus and concluding paragraph of the *Hubbard* decision indicate that the Supreme Court of Ohio interpreted former R.C. 2744.02(B)(4) to require the injury to occur on public grounds)(citation omitted); *Sherwin Williams*, *supra*, at 275, ¶ 17 ("We find nothing in *Hubbard* that rejects the requirement imposed by R.C. 2744.02(B)(4) that the injury . . . from which the alleged liability arises must be an injury that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function.")

death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

\* \* \*

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

\* \* \*

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

In this case, even assuming that the individual who committed the sexual assaults was a school supported volunteer, the Court finds that the decision by the Board to accept him as a volunteer was within the discretion of the Board, through its employees and their planning powers. Additionally, such decision was an exercise of judgment or discretion in the use and acquisition of personnel. Further, the court finds that there is no evidence to support a finding that such judgment or discretion was exercised with "malicious purpose, in bad faith, or in a wanton or reckless manner."

Accordingly, the Court finds that the Board, by virtue of its status as a political subdivision, was immune from liability for the alleged negligent "retention"/supervision of the individual who committed the sexual assaults at issue in this case.

B. Negligence Per Se

Count two of the plaintiffs' complaint asserts a cause of action for negligence *per se* based upon a violation of R.C. 3319.39. The version of R.C. 3319.39(A)(1) in effect at the time of the events giving rise to this case provided as follows:

Except as provided in division (F)(2)(b) of section 109.57 of the Revised Code and division (I) of this section, the appointing or hiring officer of the board of education of a school district, the governing board of an educational service center, or of a chartered nonpublic school shall request the superintendent of the bureau of criminal identification and investigation to conduct a criminal records check with respect to any applicant who has applied to the school district, educational service center, or school for employment in any position as a person responsible for the care, custody, or control of a child.

For the purposes of this section, an "applicant" is:

a person who is under final consideration for appointment or employment in a position with a board of education, governing board of an educational service center, or a chartered nonpublic school as a person responsible for the care, custody, or control of a child, except that "applicant" does not include a person already employed by a board or chartered nonpublic school in a position of care, custody, or control of a child who is under consideration for a different position with such board or school.

R.C. 3319.39(G)(1).<sup>5</sup> Upon review, the Court finds that there are no facts which support a finding that the individual was an "employee" or "appointee" of the Board. Further, as he was neither appointed nor employed by the Board by virtue of its statutory authority, the Board was not required by law to perform a criminal

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<sup>5</sup> The plaintiffs cite to R.C. 109.75 for the position that criminal background checks apply to volunteers at a school. However, this provision was not in effect at the time the individual responsible for the assaults began volunteering and, moreover, requires *notice* of the *possibility* of a criminal background check, not the background check itself.

records check with respect to such individual. Accordingly, the plaintiffs' claim for negligence *per se* based upon a violation of R.C. 3319.39 fails as a matter of law.

C. Punitive Damages

R.C. 2744.05(A) provides as follows:

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function:

(A) Punitive or exemplary damages shall not be awarded.

As the Board is a political subdivision, punitive damages cannot be awarded against it by statutory mandate. Accordingly, the plaintiffs' request for punitive damages fails as a matter of law.

D. Parental Claims

In count five of the complaint, the parents of the victims assert claims against the Board for past and future expenses related to the care and treatment of the victims. R.C. 2744.04(A) provides as follows:

An action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action accrues, or within any applicable shorter period of time for bringing the action provided by the Revised Code.

In *Adamsky v. Buckeye Local School District* (1995), 73 Ohio St.3d 360, the Supreme Court of Ohio held that R.C. 2744.04(A) was unconstitutional as applied to minors. However, in the instant matter, the claims asserted in count

five of the complaint are brought by the parents of the victims in this case, and are not brought on behalf of the minor victims. Accordingly, the two-year statute of limitations applies. As the plaintiffs were made aware of the sexual assaults in 2001, and the instant complaint was not filed until September 30, 2005, the Court finds that count five is barred by the statute of limitations for actions against a political subdivision as set forth in R.C. 2744.04(A).

E. Request for Attorney Fees and Costs

In its motion, the Board seeks the imposition of attorney fees and costs pursuant to Civ.R. 11 and/or R.C. 2323.51. Upon review, the Court finds said request not well taken and **OVERRULES** same.

III.  
Conclusion

For the reasons set forth herein, as well as those set forth in support of the Board's motion, the Court finds the plaintiffs' motion for summary judgment not well taken and **OVERRULES** same and, further, finds that there are no genuine issues of material fact for trial as to the Board's motion for summary judgment and that reasonable minds can come to but one conclusion, and that conclusion is adverse to the plaintiffs. Accordingly, the Board's motion for summary judgment is, hereby, **SUSTAINED**. This decision is meant in no way to demean the victimization that occurred in this case. While the Court is sympathetic to the trauma that the victims have endured, the Court is bound to follow the law as

written by the General Assembly, and in accordance with the interpretation contained within the decisional cases of the Supreme Court of Ohio.

**IT IS SO ORDERED.**

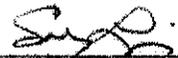


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**HON. SARA LIOI**

**NOTICE TO THE CLERK:  
FINAL APPEAL ORDER  
CASE NO. 2005CV03339**

**IT IS HEREBY ORDERED** that notice and a copy of the foregoing Judgment Entry shall be served on all parties or record within three (3) days after docketing of this Entry and the service shall be noted on the docket.



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**HON. SARA LIOI**

c: Brian R. Wilson  
Don M. Benson  
Richard W. Ross / Nicole M. Donovsky

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

JANE DOE, ET AL.

Plaintiff-Appellants

-vs-

MASSILLON CITY SCHOOL DISTRICT,  
ET AL.

Defendant-Appellees

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. Julie A. Edwards, J.

Case No. 2006CA00227

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of  
Common Pleas, Civil Case No.  
2005CV03339

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellants

For Defendant-Appellees

BRIAN R. WILSON  
337 Third St. N.W.  
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And

DON M. BENSON  
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07 JUN -4 PM 2:50

PHIL G. GAWISS  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

APPROPRIATE COPY TESTER  
PHIL G. GAWISS, CLERK  
BY *[Signature]*  
DATE 6-5-07

ENTERED BY 18

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*Hoffman, J.*

{¶1} Plaintiffs-Appellants Jane Doe, et al. appeal the July 26, 2006 Judgment Entry entered by the Stark County Court of Common Pleas, which overruled Appellants' motion for summary judgment and granted Defendants-Appellees Massillon City School District, et al's motion for summary judgment.

STATEMENT OF THE FACTS AND CASE<sup>1</sup>

{¶2} In 1997, Wuyanbu Zutali, founder of the Stark County Chess Federation, approached Judith Kenny, the principal of Franklin Elementary School, to inquire as to whether the school would be interested in offering its students an opportunity to learn and play chess after school. Kenny believed such would be beneficial to the students. Zutali assigned John Smith as the coach to oversee the chess activities at the school. Smith's nephew attended Franklin Elementary and he was interested in serving at that specific school. Appellees did not have a written contract with Smith or pay him any compensation. Appellees did not conduct a criminal background check on Smith. It was subsequently learned Smith had spent two years in prison for convictions of sex offenses against small children.

{¶3} In September, 2001, the Child Sex Crimes Unit of the Massillon Police Department received information regarding Smith, which lead to an investigation. The information obtained by the Massillon Police Department ultimately lead to the conviction and sentence of John Smith.

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<sup>1</sup> A full rendition of the facts relative to Appellants' position Appellees' conduct constituted wanton and reckless misconduct is unnecessary as our disposition of this appeal requires a purely legal analysis under R.C. 2744.02.

{14} On September 30, 2005, Appellants, on behalf of their children, filed a Complaint in the Stark County Court of Common Pleas, naming Appellees Massillon School District and Massillon Board of Education as defendants. In the Complaint, Appellants alleged their two children, who were students at Franklin Elementary School, which is operated by Appellees, were repeatedly molested by John Smith, who taught the children chess at the after school chess class.

{15} In their Complaint, Appellants asserted claims of negligence as a result of Appellees' failure to investigate, evaluate and/or screen Smith's background; negligent retention as a result of Appellees' failure to act upon complaints received about Smith; and willful and wanton misconduct due to Appellees' lack of institutional control over Smith's activities. The trial court filed a protective order on October 31, 2005, in order to protect the identity of Appellants' minor children.

{16} Appellants filed a motion for summary judgment, arguing Smith was an employee of Appellees and the "chess club" was a school sponsored activity. Appellees filed a motion for summary judgment, asserting immunity from liability under R.C. Chapter 2744. The trial court granted summary judgment in favor of Appellees, finding Appellees were immune from liability and none of the exceptions to immunity contained in R.C. 2744.02(B) operated to except Appellees from that general immunity.

{17} It is from the July 26, 2006 Judgment Entry Appellants appeal, raising the following assignments of error:

{18} "1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES UNDER FORMER R.C. 2744.02(B)(4).

{¶9} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES IN LIGHT OF *TOLES V. REGIONAL EMERGENCY DISPATCH CENTER*, 2003 OHIO 1190, 2003 OHIO APP. LEXIS 1131 (OHIO CT. APP., STARK COUNTY, MAR. 10, 2003).

{¶10} "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES IN CONCLUDING THAT APPELLEES' CONDUCT DID NOT CONSTITUTE WANTON OR RECKLESS MISCONDUCT AS A MATTER OF LAW, ON THE STATE OF THE RECORD BEFORE IT."

#### STANDARD OF REVIEW

{¶11} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212.

{¶12} Civ.R. 56(C) states, in pertinent part:

{¶13} "Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law \* \* \* A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶14} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶15} It is based upon this standard we review Appellants' assignments of error.

{¶16} Because Appellants' first and second assignments of error involve a similar analysis, we shall address said assignments of error together. In their first assignment of error, Appellants maintain the trial court erred in granting summary judgment to Appellees under former R.C. 2744.02(B)(4). In their second assignment of error, Appellants submit the trial court erred in granting summary judgment to Appellees in light of this Court's opinion in *Toles v. Regional Emergency Dispatch Center*, Stark App. No. 2002CA00332, 2003-Ohio-1190.

{¶17} The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, requires a three-tiered analysis to determine whether a political subdivision should be allocated immunity from civil liability." *Hubbard v. Canton Bd. of Edn.*, 97 Ohio

St.3d 451, 2002-Ohio-6718, ¶ 10, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421. "Under the first tier, R.C. 2744.02(A) grants broad immunity to political subdivisions. If immunity is established under R.C. 2744.02(A), such immunity is not absolute, however. Under the second tier of the analysis, one of five exceptions set forth in R.C. 2744.02(B) may serve to lift the blanket of general immunity. Our analysis does not stop here, because under the third tier of the analysis, immunity may be 'revived' if the political subdivision can demonstrate the applicability of one of the defenses found in R.C. 2744.03(A)(1) through (5). *Ziegler v. Mahoning Cty. Sheriff's Dept.* (2000), 137 Ohio App.3d 831." *Summers v. Slivinsky*, 141 Ohio App.3d 82, 86-87, 2001-Ohio-3169 (overruled on other grounds, *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179).

{¶18} It is undisputed Appellees qualify for the general immunity granted to political subdivisions. *Hubbard*, supra at ¶11. "R.C. 2744.01(F) declares public school districts to be political subdivisions and R.C. 2744.01(C)(2)(c) states that the provision of a system of public education is a governmental function." *Id.*

{¶19} We must next determine whether any of the exceptions to immunity provided in R.C. 2744.02(B)(1)-(5) apply. In so determining, we must look to the version of R.C. 2744.02(B) in effect at the time of the alleged activity occurred.<sup>2</sup> That version provided:

{¶20} "(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to

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<sup>2</sup> The version of the immunity statute applicable is the law which was in effect at the time the alleged negligent acts occurred. *Hubbard*, supra, at ¶ 17.

persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

{¶21} "(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon public roads, highways, or streets when the employees are engaged within the scope of their employment and authority \* \* \*.

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

{¶23} "(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivision open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

{¶24} "(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails,

places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶25} "(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, \* \* \*" Former R.C. 2744.02.

{¶26} The matter before us involves R.C. 2744.02(B)(4), which, as quoted above, grants an exemption from immunity for injuries resulting from the negligence of political subdivision employees occurring "within or on the grounds of buildings that are used in connection with the performance of a governmental function."

{¶27} Appellants argue, although the injuries occurred off the premises, the negligence which lead to the injuries occurred within or on the grounds of buildings used in connection with the political subdivision; therefore, Appellees are exempt from the general grant of immunity. In support of their position, Appellants rely on this Court's opinion in *Toles v. Regional Emergency Dispatch Center*, supra. We find Appellants' reliance on *Toles* to be tenuous, at best.

{¶28} In *Toles*, this Court reviewed the propriety of the trial court's grant of summary judgment in favor of a 911 dispatch center, whose employee-dispatcher failed to relay to the police a report of an assault. The majority reversed and remanded the matter to the trial court, explaining "the determination of the existence of wanton or willful misconduct under the facts of the case sub judice is a question for a jury as are facts supporting negligence only, if such term is applicable under facts found to warrant

the applicability of R.C. 2744.02(B)(4)." *Id.* at ¶85. The majority specifically stated the Court was not determining liability. *Id.*

{¶29} We find the weight to be given to *Toles* is limited. The author herein concurred in judgment only. I did so because the only exception argued by the parties in *Toles* was subsection (B)(5) of R.C.2744.02. The parties never raised the applicability of subsection (B)(4) in their briefs before this Court or in the trial court. Judge Edwards dissented yet did agree the case should be reversed and remanded to consider the applicability of R.C. 2744.02(B)(4).<sup>3</sup>

{¶30} Contrary to Appellants' assertion, the *Toles* Court did not hold the R.C. 2744.02(B)(4) exception to the general grant of immunity applies to situations where the negligence occurred on property used for a governmental function, but the injury occurred elsewhere. This Court reversed and remand for the determination of whether the facts "warrant applicability of R.C. 2744.02(B)(4)." *Id.* at ¶85. We do not read *Toles* as a definitive holding the exception did apply.

{¶31} Recently, in *Sherwin Williams v. Dayton Freightlines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, the Ohio Supreme Court provided guidance on the issue. The *Sherwin-Williams* Court addressed the question of whether under the former R.C. 2744.02(B)(3), a political subdivision is liable for injury, death or loss resulting from a nuisance which exists on a public grounds within the political subdivision, but where the injury, death, or loss caused thereby occurs outside the political subdivision. *Id.* at paragraph 7. The Supreme Court began its analysis by determining whether former R.C. 2744.02(B)(3) was clear and unambiguous. The Court found the statute makes

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<sup>3</sup>To that extent I believe Judge Edward's opinion would more appropriately be considered as concurring in part and dissenting in part.

one factor regarding the injury relevant, i.e. the injury be caused by the nuisance. *Id.* The *SherwinWilliams* Court noted the statute did not require the injury occur on the property of the political subdivision, but did however, require the nuisance arise on public property. *Id.*

{¶32} In explaining its reasons for finding former R.C. 2744.02(B)(3) clear and unambiguous, the Supreme Court stated:

{¶33} "Former R.C. 2744.02(B)(4) demonstrates that the General Assembly is perfectly capable of limiting the reach of a political subdivision's liability to injuries or losses that occur on property within the political subdivision; as this court held in *Hubbard*, pursuant to former R.C. 2744.02(B)(4) political subdivisions were liable for employee negligence that occurred in public buildings or on their grounds. The General Assembly made no such attempt to limit to public areas the geographical reach of R.C. 2744.02(B)(3)." *Id.* at ¶17.

{¶34} By so stating, the *Sherwin Williams* Court has clarified the issue before this Court. Under former Rule 1 of the Rules for Reporting Opinions, the language of paragraph 17 of *Sherwin Williams* would be dicta. However, under the new Rep. R.1, which became effective May 1, 2002, the law stated in a Supreme Court opinion is contained within its syllabus and its text, including footnotes. In other words, paragraph 17 is law. Accordingly, we hold the exception to general immunity under former R.C. 2744.02(B)(4) is limited to situations where the injury or loss occurred on the property of the political subdivision. It is undisputed the injuries herein occurred off the premises; therefore, we find no exception from the general immunity granted by the legislature to Appellees.

{¶35} We find the trial court did not err in granting summary judgment to Appellees. Accordingly, Appellants' first and second assignments of error are overruled.

III

{¶36} In their final assignment of error, Appellants maintain the trial court erred in granting summary judgment to Appellees upon concluding Appellees' conduct did not constitute wanton or reckless misconduct.

{¶37} In light of our disposition of Appellant's first and second assignment of error, we need not address this issue.

{¶38} Appellants' third assignment of error is overruled.

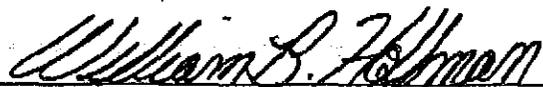
{¶39} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J., concur;

Edwards, J. concurs

separately

  
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HON. WILLIAM B. HOFFMAN

  
\_\_\_\_\_  
HON. W. SCOTT GWIN

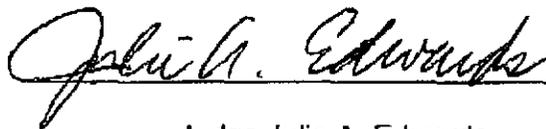
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HON. JULIE A. EDWARDS

EDWARDS, J., CONCURRING OPINION

{¶40} Appellants were correct to claim error in this case based on our opinion in *Toles v. Regional Emergency Dispatch Center*, Stark App. No. 2002CA00332, 2003-Ohio-1190.

{¶41} One of the reasons *Toles* was reversed and remanded to the trial court was for the trial court to determine if the facts that were found warranted the applicability of R.C. 2744.02(B)(4). The injury and death in *Toles* did not occur within or on the grounds of buildings used in connection with the performance of a governmental function. Therefore, even though this court remanded *Toles* to determine if R.C. 2744.02(B)(4) was applicable under the facts, we implicitly found that the place where the injury occurred was not a factor in this determination.

{¶42} In spite of our decision in *Toles*, I concur with Judge Hoffman as to the analysis and disposition of this case. On revisiting R.C. 2744.02(B)(4), as it existed at the time of *Toles*, and in light of the Ohio Supreme Court's analysis of that section in *Sherwin Williams v. Dayton Freightlines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, I find that my interpretation of R.C. 2744.02(B)(4) in *Toles* was incorrect. That section does require that the injury occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function.



Judge Julie A. Edwards

JAE/rmn

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

JANE DOE, ET AL.

Plaintiff-Appellants

-vs-

MASSILLON CITY SCHOOL DISTRICT,  
ET AL.

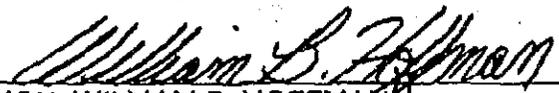
Defendant-Appellees

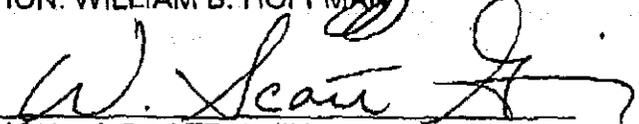
JUDGMENT ENTRY

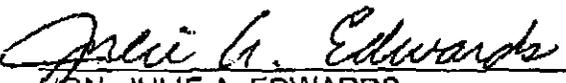
Case No. 2006CA00227

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For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellants.

  
HON. WILLIAM B. HOFFMAN

  
HON. W. SCOTT GWIN

  
HON. JULIE A. EDWARDS