

IN THE SUPREME COURT OF OHIO

JANE DOE, ET AL.,)
)
APPELLANTS,)
)
v.)
)
MASSILLON CITY SCHOOL)
DISTRICT, ET AL.,)
)
APPELLEES.)

07 - 1311

On Appeal from the Stark County
Court of Appeals, Fifth Appellate
District

Court of Appeals
Case No.2006 CA 00227

**MEMORANDUM OF AMICI CURIAE CHILDREN'S DEFENSE FUND AND
EQUAL JUSTICE FOUNDATION IN SUPPORT OF JURISDICTION**

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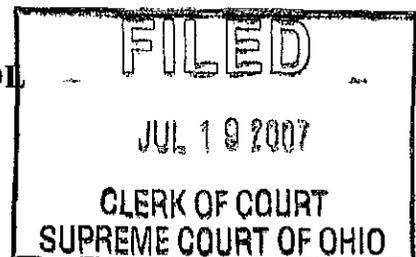


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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST**

I. INTRODUCTION AND INTEREST OF AMICI CURIAE

The Children's Defense Fund ("CDF") and The Equal Justice Foundation ("EJF") respectfully come before this Honorable Court as an Amici Curiae. The CDF is a national, private, non-profit organization created to provide strong and effective voices for all children of America who themselves, cannot vote, lobby or speak for themselves.

The EJF is a non-profit organization that represents the poor and disadvantaged who may not otherwise have access to the legal system. It undertakes class action and other impact litigation on behalf of individuals with disabilities, minorities, immigrants, children, the aging victims of predatory lending and consumer fraud, tenants denied their rights, and institutionalized persons.

Every child has the right to be protected from molesters who pose as school officials or school volunteers. The Fifth District Court of Appeals has interpreted the former R.C. 2144.02(B)(4) as providing a blanket immunity to school districts who permit child molesters to volunteer as coaches and molest school children as long the molestations occur off of school premises.

For these reasons, and the reasons set forth herein, the CDF and EJF urge this Honorable Court to accept jurisdiction of this case and reverse the decision of the Fifth District Court of Appeals.

II. THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.

In 2001, John Smith, a previously convicted child molester and chess coach at the Franklin-York Elementary School repeatedly molested two boys (Appellants' minor children) who participated in the Franklin-York school chess club. Although the Massillon School District

conducted no background check of Smith prior to placing him in this position and ignored complaints about Smith after he was retained, the Massillon City School District was protected by immunity solely because Smith's multiple acts of molestation occurred off school premises. Indeed, some of the acts of molestation occurred during a "field trip" to Michigan for select members of the club – an event attended by a school guidance counselor.

Specifically, the Fifth District Court of Appeals concluded that the following exclusion contained in the former R.C. 2744.02(B), although providing an exception to immunity, required the molestations to occur on school premises:

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 the 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 doing so, the Fifth District relied upon this Court's decision in *Sherwin-Williams v. Dayton Freight Lines, Inc.* (2006) 112 Ohio St.3d 52, 54, 2006-Ohio-6498, a decision which, ironically, held that a political subdivision may be held liable for injury, death, or loss resulting from a nuisance that exists on public grounds within the political subdivision when the injury, death, or loss caused by the nuisance occurs outside the political subdivision. The Fifth District, however, focused on this Court's statement in *Sherwin-Williams* with regard to R.C. 2744.02(B)(4):

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 Fifth District's decision has raised a great public interest inasmuch as the decision has limited the application of *Hubbard v. Canton City School Bd. of Edn.* (2002) 97 Ohio St.3d 451, 2002-Ohio-6718. In *Hubbard*, this Court held that a school district could be held liable for negligently supervising and retaining a teacher who sexually assaulted a student inside the school building. This Court held that the plain language of former R.C. 2744.02(B)(4) supported the conclusion that the General Assembly intended to allow political subdivisions to be sued in all cases where the injury resulted from the negligence of their employees occurring within or on the grounds of any government building.

Certainly it was not the intention of this Court to limit the application of the former R.C. 2744.02(B)(4), and this Court's decision in *Hubbard* to sanction immunity to political subdivisions simply because the molestations and injuries occur off of school premises. The Fifth District's decision in this case, however, has done just that and its result may have a devastating impact. Although R.C. 2744.02 was amended and modified through Senate Bill 106, effective April 9, 2003, its former version nevertheless continues to apply to an entire class of individuals, namely, children. Because of the statute of limitations for minors, several children who may have suffered injury or harm during this time period will be directly impacted by its interpretation.

STATEMENT OF THE CASE AND FACTS

The Amici Curiae concur in the statement of facts and procedural history as presented in the Memorandum in Support of Jurisdiction of Appellants.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Under the 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.

As noted *supra*, the distinction set forth by the Fifth District Court of Appeals in this case is not only arbitrary, but is not grounded in a literal reading of the statute. It is submitted that the language of R.C. 2744.02(B)(4) has spawned numerous decisions, where courts have struggled over whether the negligence versus the injury must occur on “the grounds of a building . . .” Indeed, the school district/Appellees in *Hubbard* interpreted the (B)(4) exception to be limited to “physical defects” existing on the premises, which this Court rejected. *Hubbard*, ¶14. After *Hubbard* was decided, R.C. 2744.02(B)(4) was amended to limit the scope of liability to physical defects. See S.B. 106, effective April 9, 2003.

Amici Curiae respectfully submit that if the General Assembly intended to specifically limit a political subdivision’s negligence liability to “on premises” injuries, it would have better articulated such a narrow window of liability. To be sure, both the judicial and legislative interplay regarding R.C. 2744.02(B)(4) after *Hubbard* illustrates the statute’s ambiguity of both scope and intent.

However, in this case, it would strain credulity for any political subdivision to argue that there are good policy reasons for immunizing school districts from liability, simply because the perpetrator molested the district’s own children off the premises. Children face the very real threat of molestation and abuse at the hands of many sexual predators masquerading as “role models”. Sadly, stories continue to abound about schoolchildren being molested by various school personnel in a variety of contexts.

The children in this case were originally introduced to the perpetrator, as six and seven year old children, through chess practices at school. But for the school district allowing Smith

and the Chess Club to flourish, these children would have never known him. As most experienced child molesters do, Smith groomed these children, and built their trust largely on school grounds. He even took them out of state under the color of a school field trip, and was accompanied by a school official. What's more, he was a previously convicted sex offender who spent countless hours per week at chess practice, unsupervised, with dozens of small children. Not only was Smith's background not checked, but the Appellees even claim to have no knowledge of the Club or Smith.

If this is true, should political subdivisions like schools be able to hide behind sovereign immunity after extending open arms to a child molester and giving him free reign, as long as he is clever enough to molest his victims coming home from either chess practice at school or a chess tournament? Amici Curiae submit that it was not the intent of the General Assembly to narrowly restrict liability in such a manner.

If the Fifth District's opinion stands, then it is open season on thousands of school children if there is no measure or semblance of accountability. To be sure, R.C. 3319.39 mandates criminal background checks for any school "applicants under final consideration for appointment or employment," if that person is "responsible for the care, custody, or control" of a child. See R.C. 3319.39(G)(1); R.C. 3319.39(A)(1). Amazingly, failure to comply with this mandatory statute creates no exception to immunity, because R.C. 3319.39 is not a statute that expressly imposes civil liability, as required by R.C. 2744.02(B)(5). School districts are therefore free to impose criminal background checks for school personnel or ignore R.C. 3139.39 altogether and incur no liability for not performing one, or negligently performing one, as long as the molestations occur "off the property."

CONCLUSION

Amici Curiae respectfully ask this Court to accept this case on behalf of Ohio school children, many of whom are too small to protect themselves at the hands of sexual predators lurking in the hallways of what is supposed to be a nurturing, positive experience: their education.

Respectfully Submitted:



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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 19th day of July, 2007:

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A handwritten signature in cursive script, reading "Stacie L. Roth", written over a horizontal line.

Stacie L. Roth (0071230)

COUNSEL FOR AMICI CURIAE
CHILDREN'S DEFENSE FUND
AND EQUAL JUSTICE FOUNDATION

APPENDIX

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

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

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FILED
CLERK OF COURTS
STARK COUNTY, OHIO

This matter came before the Court upon the following:

1. The plaintiffs¹ motion for summary judgment;
2. The motion of the defendant², 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,

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

²The 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)³ 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

³ 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.* (10th 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**863 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*, (2nd 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*, (2nd 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.⁴ 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,

⁴ The plaintiffs argue that the holding of the Fifth District Court of Appeals in *Toles v. Regional Emergency Dispatch Center*, 5th 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).⁵ 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

⁵ 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.

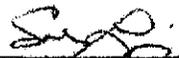
IT IS SO ORDERED.



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.



HON. SARA LIOI

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

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
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And

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PHIL G. GRANSS
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO
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PHIL G. GRANSS, CLERK
BY *Chatter*
DATE *6-5-07*

ENCLOSURE BY 15

8

Hoffman, J.

{11} 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 CASE¹

{12} 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.

{13} 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.

¹ 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.

I, II

{¶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 *Tofes 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.² 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

² 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).³

{¶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

³ 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.

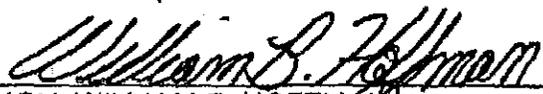
{¶39} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J., concur;

Edwards, J. concurs

separately


HON. WILLIAM B. HOFFMAN


HON. W. SCOTT GWIN

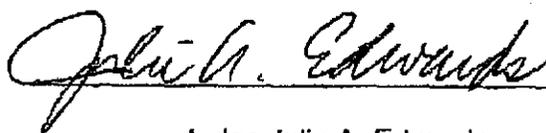
HON. JULIE A. EDWARDS

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.

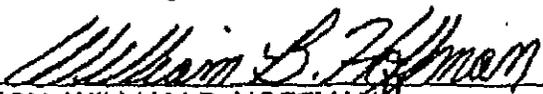
Defendant-Appellees

JUDGMENT ENTRY

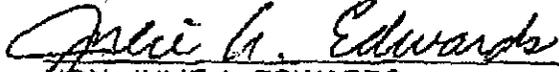
Case No. 2006CA00227

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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