IN THE SUPREME COURT OF OHIO

JANE DOE, et al.,	:	
	:	**CASE NO. 07-1311**
Appellants,	:	
	:	**On appeal from Stark County**
v.	:	**Court of Common Pleas**
	:	**Case No. 2006CA00227**
MASSILLON CITY SCHOOL DISTRICT, et al.,	:	
	:	
Appellees.	:	

MEMORANDUM IN RESPONSE AND OPPOSITION TO JURISDICTION OF APPELLEE MASSILLON CITY SCHOOL DISTRICT BOARD OF EDUCATION

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STATEMENT OF APPELLEE'S POSITION

For the reasons stated herein, it is the position of Appellee Massillon City School District Board of Education (identified by Appellants as two distinct entities) that this case involves no substantial constitutional question, is not a case of public or great general interest, and that leave to appeal should be denied.

STATEMENT OF FACTS

In their Memoranda in Support of Jurisdiction, Appellants and Amici Curiae distort the record below. However, there is only one relevant fact that this Court needs to consider: the molestations that Smith perpetrated upon Appellants' minor sons did not occur on grounds or in buildings owned or used by Appellee. This fact has never been disputed by Appellants.

ARGUMENT

This appeal presents neither a substantial constitutional question, nor a case that is of public or great general interest. The appeal relates directly and exclusively to the interpretation and application of R.C. 2744.01, *et seq.* This Court has, on prior occasion, provided sufficient direction on the interpretation and application of the "Immunity Statute." Both the Trial Court and Court of Appeals carefully analyzed the statutory provisions and the opinions of this Court and other courts, and held that the Board of Education is immune from liability in this instance.

Proposition of Law No. I:

Under former R.C. 2744.02(B)(4),[1] 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.

Appellants have lodged this appeal as one involving a great injustice to children by putting them in harm's way. However, the issue presented by Appellants is much more limited and narrow than Appellants suggest. The issue before this Court for consideration is nothing more than a straight interpretation of statutory language, an interpretation that has been previously settled by this Court and the appellate courts of this State.

In Proposition of Law No. I, Appellants attempt to change the plain and specific language of R.C. 2744.02(B)(4) which states:

> 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.

Emphasis added. Appellants propose that R.C. 2744.02(B)(4) be construed to encompass injuries that occur outside the grounds or buildings of a political subdivision. In effect,

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[1] R.C. 2744.02(B)(4) was amended with an effective date of April 2003. Under the present version of the statute, as amended, not only must the injury be caused by the negligence of an employee and occur on school grounds, it must also be due to a physical defect in the school property.

Appellants want this Court to assume the role of the General Assembly and rewrite the statute.

As indicated by the Trial Court and Fifth District Court of Appeals, the interpretation of the exception to immunity contained in R.C. 2744.02(B)(4), as it relates to where the injury must occur, is well-settled. This Court has previously issued two opinions that specifically address the issue raised by Appellants in Proposition of Law No. 1. Appellants present no valid reason why a third opinion is needed.

In 2002, this Court decided *Hubbard v. Canton City School Board of Education ("Hubbard")*, 97 Ohio St.3d 451, 2002-Ohio-6718. *Hubbard,* involved minor students who were sexually assaulted by a middle school teacher on school grounds. The complaint set forth ten causes of action, all of which were disposed of in a motion for summary judgment except the claims for negligent hiring/retaining/supervision and intentional infliction of emotional distress, to which, the trial court held, an immunity exception applied. This Court recognized that "[c]ourts give words in a statute their plain and ordinary meaning unless legislative intent indicates a different meaning" and "it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Hubbard,* ¶¶ *13-14.* The Court held:

> 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 function.

Hubbard, syllabus, emphasis added. While the Court held that the exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings, the Court

specifically refrained from extending the exception to circumstances where the injury occurred somewhere other than the school grounds or buildings. Therefore, while the exception to immunity could result in a liability under a negligent retention of an employee theory, the injury must still occur on school property.

More recently this Court issued a decision in *Sherwin Williams Co. v. Dayton Freight Lines ("Sherwin Williams"),* 112 Ohio St.3d 52, 2006-Ohio-6498, in further support that R.C. 2744.02(B)(4) does not provide an exception to immunity where the injury occurs outside the grounds or buildings of a political subdivision. The Court considered the exception to immunity contained in R.C. 2744.02(B)(3) and found that (B)(3) does not require that the injury occur on political subdivision property, unlike the requirement in R.C.2744.02(B)(4). In referencing R.C. 2744.02(B)(3) the Court says, "the statute makes only one factor regarding the injury relevant – that it is caused by the nuisance. There is no requirement that the injury must also occur on the property of the political subdivision . . ." *Id.,* ¶ 16. The Court goes on to say, "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." *Id.,* ¶ 17. The statute clearly requires the injury to occur within or on the grounds or buildings of a political subdivision. Appellants concede that did not occur here.

The Tenth District Court of Appeals embraced the guidance offered by this Court in *Hubbard,* and held that R.C. 2744.02(B)(4) does not apply where the injury does not occur within or on the grounds of a political subdivision. *Keller v. Foster Wheel Energy Corp.*

("Keller"), 163 Ohio App.3d 325, 2005-Ohio-4821. In *Keller*, the Tenth District held that R.C. 2744.02(B)(4) "requires the injury, not the negligent act or omission, to occur on public grounds." *Id., p. 14.* The court found that R.C. 2744.02(B)(4) did not apply where a firefighter's wife was exposed to asbestos fibers from her husband's uniform because the injury and exposure occurred in her home and not on public property. *Id.*

In the present case, both John Doe Nos. 1 and 2 testified at their depositions that any molestation by Smith occurred in Smith's car, at Smith's house or at the gas station. The Fifth District Court of Appeals relied upon the prior decisions of this Court in holding that Appellee was immune from liability. The Fifth District held that R.C. 2744.02(B)(4) did not apply since none of the molestation occurred on school property.[2]

This Court's decisions in *Hubbard* and *Sherwin Williams*, along with the consistent application of these decisions in the Tenth and Fifth District Courts of Appeals (the only appellate courts that appear to have addressed this specific issue), indicate that the issue presented by Appellants for appeal is well-settled and does not warrant further consideration by this Court. The issue presented by Appellants is a narrow interpretation of an exception to immunity about which this Court has already spoken, and it does not involve an issue of public or great general interest. Therefore, jurisdiction must be denied.

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[2] It should also be noted that the Trial Court did not end its analysis after concluding that the exception contained in R.C. 2744.02(B)(4) does not apply. The Trial Court indicated that even if the exception applied, the Board clearly exercised its discretion pursuant to R.C. 2744.03(A). Since there was no evidence that the Board acted in a reckless, willful or wanton manner or in bad faith, immunity would be reinstated. *Judgment Entry*, pp. 9-10. Appellants did not raise this issue in their appeal to this Court.

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. 2744.029(B)(4) applies and determines whether the immunity granted under R.C. 2744.02(A)(1) is removed.

In Proposition of Law No. II, Appellants raise an issue that was raised before neither the Trial Court nor the Court of Appeals below. Generally, reviewing courts do not consider questions that the lower courts did not have an opportunity to consider. *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81, 679 N.E.2d 706, 709, quoting *Goldberg v. Indus. Comm.* (1936), 131 Ohio St. 399, 404, 6 O.O. 108, 110, 3 N.E.2d 364, 367; *State ex rel. Porter v. Cleveland Dept. of Pub. Safety* (1998), 84 Ohio St.3d 258, 703 N.E.2d 308. In their Memorandum In Support of Jurisdiction, Appellants assert, for the first time, that the exception to immunity contained in R.C. 2744.02(B)(2) applies since Appellee was engaged in a "proprietary" rather than a "governmental" function. Since Appellants did not properly preserve this issue in the lower courts, Appellants are precluded from raising the issue on appeal before this Court.

At the trial court level, both Appellants and Appellee filed Motions for Summary Judgment. In *Plaintiffs' Reply Brief,* filed in response to Appellee's Motion for Summary Judgment, Appellants only peripherally reference "governmental" function. In their *Reply,* Appellants stated:

> Indeed, if defendant is correct that school volunteers are legal nullities under the Sovereign Immunity statute, it creates the following absurdity that mutates from its own argument. If there is immunity for "governmental functions," how can defendant claim sovereign immunity for a supposed non-agent/non-employee, who is according to defendant, running a program completely unrelated to its governmental function of operating a system of public education under R.C. 2744.01(B)(2)(c).

Plaintiffs' Reply Brief, p. 10. This language does not suggest that Appellee was engaged in a "proprietary" rather than "governmental" function, triggering R.C. 2744.02(B)(2). Further, the exception to immunity contained in R.C. 2744.02(B)(2) is never referenced in the Reply.

In their own Motion for Summary Judgment, filed in the Trial Court, Appellants include the analysis of statutory immunity under a three-tiered analysis. The only exception to immunity that is referenced is the exception contained in R.C. 2744.02(B)(4). *Plaintiffs' Motion for Summary Judgment, pp. 53-54.* Appellants did not reference the exception contained in R.C. 2744.02(B)(2) at all.

In their Brief to the Fifth District Court of Appeals, Appellants cited the following Assignments of Error:

> Assignment of Error No. I: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES UNDER FORMER R.C. 2744.02(B)(4)
>
> Assignment of Error No. II: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES IN LIGHT OF *TOLES V. REGIONAL EMERGENCY DISPATCH CENTER*

Assignment of Error No. 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

Nowhere in their Brief do Appellants raise or analyze the exception to immunity contained in R.C. 2744.02(B)(2). Nor do Appellants suggest that Appellee was engaged in a "proprietary" rather than "governmental" function. Since Appellants failed to preserve this issue for appeal at either the Trial Court or Appellate Court levels, the issue cannot be raised on appeal before this Court.

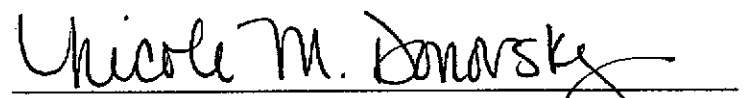
Even if this Court were inclined to accept the issue for appeal, appellate districts appear to be in agreement that conducting extracurricular activities, as Appellants have characterized the situation, are an extension of the "governmental" function of boards of education. See, *Summers v. Slivinsky* (2001), 141 Oho App.3d 82; *Hall v. Board of Education* (1996), 111 Ohio App.3d 690. Also, Appellee's characterization of the situation, i.e., allowing the community to use the school facilities for the education of its youth, is a statutorily-required, governmental function. See, R.C. 3313.77. Therefore, Appellants' suggestion that Appellee engaged in "proprietary" rather than "governmental" function is without merit.

In light of Appellants' failure to properly preserve the issue raised in Proposition of Law No. II for appeal, and the issue being otherwise a reasonably settled issue of law, the issue is not an appropriate subject requiring consideration by this Court.

CONCLUSION

Based upon the foregoing facts and law, it is obvious that both the Trial Court and Court of Appeals were correct in their judgment. Appellee respectfully requests that this Court decline the opportunity to exercise its jurisdiction over this cause.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Response and Opposition to Jurisdiction was sent by ordinary U.S. mail to the following, this 17th day of August, 2007:

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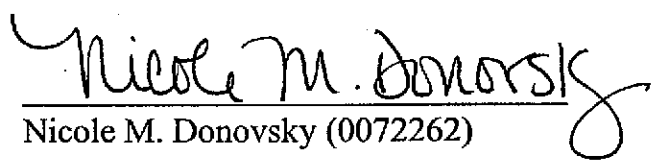

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