

IN THE SUPREME COURT OF OHIO

JANE DOE, et al.,

Appellants,

v.

MASSILLON CITY SCHOOL  
DISTRICT, et al.,

Appellees.

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: CASE NO. 07-1311  
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: On Appeal from the Stark County  
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: Court of Appeals, Fifth Appellate District  
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MERIT BRIEF OF APPELLEE  
MASSILLON CITY SCHOOL DISTRICT BOARD OF EDUCATION

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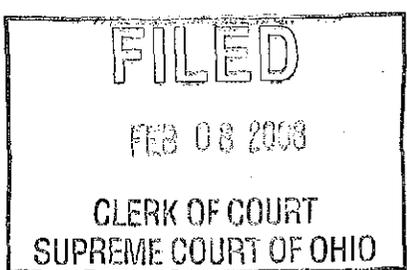
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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

I. INTRODUCTION ..... 1

II. STATEMENT OF FACTS ..... 2

III. ARGUMENT ..... 11

    A. Appellee’s Proposition of Law No. I: ..... 11

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

    B. Appellee’s Proposition of Law No. II: ..... 18

        Issues which are not presented to the court whose judgment is sought to be reversed may not be raised on appeal.

    C. Appellee’s Proposition of Law No. III: ..... 20

        A board of education that permits the operation of a “chess club” on public grounds is engaged in a governmental function, pursuant to R.C. § 2744.01(C).

    D. Appellee’s Proposition of Law No. IV: ..... 22

        Pursuant to R.C. § 2744.03(A)(5), a political subdivision is immune from liability if the injury complained of resulted from an employee's exercise of judgment or discretion unless that judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner. The Trial Court correctly concluded that there was no evidence that Appellee’s employees acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

IV. CONCLUSION ..... 26

CERTIFICATE OF SERVICE ..... 27

**CASES:**

*Beck v. Adam Wholesalers of Toledo, Inc.* (Sept. 28, 2001), 6<sup>th</sup> Dist. No. S-00-038,  
2001 WL 1155820 ..... 1

*Geraci v. Conte* (June 18, 1998), 8<sup>th</sup> Dist. No. 72440, 1998 WL 323564, \*5 ..... 7

*Hubbard v. Canton City School Board of Education*, 97 Ohio St.3d 451,  
2002-Ohio-6718, 780 N.E.2d 543 ..... 12

*Keller v. Foster Wheel Energy Corp.*, 163 Ohio App.3d 325, 2005-Ohio-4821,  
837 N.E.2d 859 ..... 18

*Sherwin Williams Co. v. Dayton Freight Lines*, 112 Ohio St.3d 52,  
2006-Ohio-6498, 858 N.E.2d 324 ..... 23

*State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78,  
679 N.E.2d 706 ..... 29

*Stevens v. Ackman*, 91 Ohio St. 3d 182, 2001-Ohio-249, 743 N.E.2d 901 ..... 37

*Summers v. Slivinsky* (2001), 141 Ohio App.3d 82, 749 N.E.2d 854,  
appeal denied 92 Ohio St.3d 1417, 748 N.E.2d 549 ..... 49

*Toles v. Regional Emergency Dispatch Center*, Stark App. No. 2002CA332,  
2003-Ohio-1190 ..... 58

**STATUTES:**

R.C. § 109.575 ..... 66

R.C. § 3313.77 ..... 67

R.C. § 3313.78 ..... 68

R.C. § 3319.39 (current version) ..... 69

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b><u>CASES:</u></b>	
<i>Beck v. Adam Wholesalers of Toledo, Inc.</i> (Sept. 28, 2001), 6 <sup>th</sup> Dist. No. S-00-038, 2001 WL 1155820 .....	15, 16
<i>Doe v. Jefferson Area Local School District</i> (1994), 97 Ohio App.3d 11, 646 N.E.2d 187 .....	12
<i>Geraci v. Conte</i> (June 18, 1998), 8 <sup>th</sup> Dist. No. 72440, 1998 WL 323564, *5 .....	21
<i>Hubbard v. Canton City School Board of Education</i> , 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543 .....	12-14, 16, 17
<i>Keller v. Foster Wheel Energy Corp.</i> , 163 Ohio App.3d 325, 2005-Ohio-4821, 837 N.E.2d 859 .....	15, 16
<i>Marcum v. Talawanda City Schools</i> (1996), 108 Ohio App.3d 412, 670 N.E.2d 1067 .....	13
<i>Sherwin Williams Co. v. Dayton Freight Lines</i> , 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324 .....	14-17
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</i> , 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062 .....	13
<i>State ex rel. Porter v. Cleveland Dept. of Pub. Safety</i> (1998), 84 Ohio St.3d 258, 703 N.E.2d 308 .....	18
<i>State ex rel. Quarto Mining Co. v. Foreman</i> (1997), 79 Ohio St.3d 78, 81, 679 N.E.2d 706 .....	18
<i>State v. Driscoll</i> (1922), 106 Ohio St. 33, 38-39, 138 N.E. 376 .....	18
<i>Stevens v. Ackman</i> , 91 Ohio St. 3d 182, 193, 2001-Ohio-249, 743 N.E.2d 901 .....	12
<i>Summers v. Slivinsky</i> (2001), 141 Ohio App.3d 82, 749 N.E.2d 854, appeal denied 92 Ohio St.3d 1417, 748 N.E.2d 549 .....	21
<i>Toles v. Regional Emergency Dispatch Center</i> , Stark App. No. 2002CA332, 2003-Ohio-1190 .....	16, 17

<i>Williams v. Columbus Board of Education</i> (1992), 82 Ohio App.3d 18, 610 N.E.2d 1175 .....	13
<i>Zellman v. Kenton Board of Education</i> (1991), 71 Ohio App.3d 287, 593 N.E.2d 392 .....	13

**STATUTES:**

R.C. § 109.575 .....	24, 25
R.C. § 2744.01 .....	19-21
R.C. § 2744.01(C) .....	2, 20, 21
R.C. § 2744.01(C)(1) .....	21
R.C. § 2744.01(C)(2)(c) .....	2, 20, 21
R.C. § 2744.01(C)(2)(e) .....	2, 21, 22
R.C. § 2744.01(F) .....	2
R.C. § 2744.01(G)(1) .....	21
R.C. § 2744.02(B)(2) .....	18-20
R.C. § 2744.02(B)(3) .....	14
R.C. § 2744.02(B)(4) .....	1, 11-17, 19
R.C. § 2744.03(A) .....	23
R.C. § 2744.03(A)(5) .....	22
R.C. § 3313.22 .....	23
R.C. § 3313.26 .....	3
R.C. § 3313.29 .....	3
R.C. § 3313.31 .....	3
R.C. § 3313.77 .....	22, 25

R.C. § 3313.78..... 25  
R.C. § 3319.01..... 3, 23  
R.C. § 3319.21..... 23  
R.C. § 3319.39..... 1, 23-25  
R.C. § 3319.39(A)(1) ..... 25  
R.C. § 3319.39(G)(1) ..... 25

**OTHER AUTHORITY:**

Am.H.B. 350..... 13

I. INTRODUCTION

This appeal involves two students of the Massillon City School District who allege that they were molested by a community member, John Smith (“Smith”). Appellants (the two students and their mothers) submit that the Massillon City School District Board of Education (“Appellee”) was negligent by failing to investigate, evaluate and/or screen Smith’s background, by failing to act upon complaints, investigate said complaints, terminate Smith, and act with due care. Appellants also asserted that Appellee was negligent and negligent per se, pursuant to R.C. § 3319.39, for failing to conduct a criminal background check on Smith. Appellants concede that the molestations did not occur on school grounds.

The primary issue before this Court is whether the lower courts properly analyzed former R.C. § 2744.02(B)(4) in determining that no exception to statutory immunity applies. Both the Stark County Court of Common Pleas (the “Trial Court”) and the Fifth District Court of Appeals (the “Court of Appeals”) held that, pursuant to former R.C. § 2744.02(B)(4), the alleged injury must occur on school grounds for liability to ensue. Since the alleged molestations did not occur on school grounds, as conceded by Appellants, the exception to immunity does not apply. Appellee submits that to hold otherwise opens political subdivisions to potential liability that was not contemplated by the General Assembly. Therefore, the decisions of the Trial Court and the Court of Appeals must be affirmed.

II. **STATEMENT OF FACTS**

This case does not turn upon whether a genuine issue of material fact exists. In fact, there is no issue of material fact for this Court to consider. However, in order to analyze the legal principles under consideration, a full understanding of the relevant facts is necessary. To the extent that Appellants state “facts” in their Merit Brief, Appellee agrees. However, Appellants also present conclusions that they, and others, have drawn, which are not supported by the underlying record. In addition, Appellants’ recitation of facts is incomplete. Therefore, Appellee takes this opportunity to clarify, qualify and complete the record.

Appellee, the Massillon City School District Board of Education, as it is legally known, is a political subdivision of the State of Ohio. R.C. § 2744.01(F). During all relevant times, Appellee operated several school buildings in the Massillon City School District (“School District”), including the Franklin and York Elementary Schools. (Second Supp. 37-38, Kenny Dep. at 5-6). As a creature of statute, Appellee is charged with certain functions, including those “governmental functions” specifically defined in R.C. § 2744.01(C). In pertinent part, Appellee is engaged in the governmental functions of: (1) providing a system of public education; and (2) the regulation of the use of public grounds. R.C. §§ 2744.01(C)(2)(c) and 2744.01(C)(2)(e), respectively.

During all relevant times, Alfred Hennon was the Superintendent of the School District (the “Superintendent”). (Second Supp. 34, 101, Hennon Dep. at 5, Hennon Aff.

¶ 2). A superintendent is the chief executive officer of a school district and reports directly to the board of education. R.C. § 3319.01. As the chief executive officer, the superintendent runs the day-to-day operations of the board of education. He attends the meetings of the board and makes recommendations, inviting formal board action upon a variety of issues. R.C. § 3319.01. (Second Supp. 35, 101, Hennon Dep. at 8, Hennon Aff. ¶ 3).

Teresa Emmerling is the Treasurer of the School District (the "Treasurer"). A treasurer is the chief fiscal officer of the school district and attends and records all of the meetings of the board. The treasurer maintains custody and control of the board meeting minutes reflecting all board action, as well as the financial records of the board. R.C. §§ 3313.26, 3313.29, 3313.31. (Second Supp. 99, Emmerling Aff. ¶¶ 2, 3).

Judith Kenny was the principal of the Franklin Elementary School (the "Principal") from the 1997-1998 school year until the end of the 1999-2000 school year. During the 1999-2000 school year, Ms. Kenny split her time and also served as the principal of the York Elementary School. (Second Supp. 37-38, Kenny Dep. at 5-6). During the 2000-2001 school year, Chris Smith acted as principal of York Elementary School and Matthew Plybon as principal of Franklin Elementary. Beginning in the Fall of 2001, Jody Ditcher was assigned as the principal of York Elementary. (Second Supp. 2, Ditcher Dep. at 6-8). During all relevant times, the guidance counselor of the Franklin and York Elementary Schools was Susan Rohr (the "Counselor"). (Second Supp. 44, Rohr Dep. at 6).

In approximately 1993, Wuyanbu Zutali (“Zutali”), a community member with no relationship to the School District, founded a community chess organization, which later became known as the Stark County Chess Federation (“Chess Federation”). Initially, the Chess Federation included adults who enjoyed playing chess and who met on a weekly basis to play. It was during this time, in approximately 1989, when Zutali met Smith. Smith was a member of the Chess Federation and a regular chess player. As the Chess Federation grew, children of the adult members became interested and involved in the Chess Federation’s activities. (Second Supp. 55-57, Zutali Dep. at 5-7).

Due to this interest, Zutali started approaching schools in the area to see if there was any interest in offering the children in the community enrolled in the schools an opportunity to learn to play chess after school. Zutali considered the after-school chess activities to be a community activity, similar to the Brownies or Boy Scouts, and not a “school-sponsored” activity. (Second Supp. 57-59, Zutali Dep. at 7-9). In approximately 1997, Zutali approached Franklin Elementary to see if there was interest in offering Franklin students an opportunity to stay after school to learn to play chess, and spoke to the Principal. (Second Supp. 60-62, Zutali Dep. at 10-12).

Recognizing the intellectual impact that learning to play chess might have, the Principal agreed that an after-school activity, such as what was proposed, appeared to be a good idea. In addition, since there were already students staying after school in a classroom next to where the chess activities would be conducted, a custodian had to stay for that purpose. The fact that students were staying after school, on a voluntary basis, to

learn to play chess in a classroom imposed no additional burden or cost to Appellee. (Second Supp. 39-40, Kenny Dep. at 20-22).

As was the practice with other schools that he approached, Zutali, as founder of the Chess Federation, assigned a "coach" to oversee the chess activities being offered after school hours at Franklin Elementary. Nephews of Smith attended Franklin, and Smith was interested in serving as a "coach" for that group of children. Smith seemed to be the obvious choice to Zutali. The Chess Federation not only provided a coach, but also provided chess supplies, guidance and support for the chess activities. The Chess Federation held weekly meetings with the coaches and made unannounced visits to see how the coaches were doing. (Second Supp. 62-66, Zutali Dep. at 12-16).

The Principal met Smith and also asked the Counselor of her experiences with Smith. (Second Supp. 39-40, Kenny Dep. at 21-23). At that point, Appellee's dealings with Smith had been limited to issues involving Smith's nephews, who attended the School District. Smith's relationship with the school remained very limited. He simply used school space, after school hours, to teach children in the community to learn to play chess on behalf of the Chess Federation. (Second Supp. 39, 46, Kenny Dep. at 20-21, Rohr Dep. at 14).

At no time was Smith ever recruited, recommended, employed, approved or appointed by Appellee or the Superintendent in any capacity, and more specifically, in the capacity as a chess club coach, advisor or volunteer. Appellee never issued a written contract to Smith, nor did it pay Smith any compensation for the chess activities in which

he was involved. Further, neither Appellee nor the Superintendent ever acted to approve or appoint Smith as a chess club coach, advisor or volunteer. Nor did Appellee or the Superintendent approve the chess club itself or sponsor any of its activities. (Second Supp. 99, 101, Emmerling Aff. ¶¶ 4-5; Hennon Aff. ¶¶ 4-6). Appellants have failed to show any evidence to the contrary.

Admittedly, Appellee did not subject Smith to a criminal background check before allowing him to use school space to teach children to play chess. Criminal background checks were not performed on any of the Chess Federation coaches by any school district, e.g. East Canton, Jackson, North Canton. (Second Supp. 64, Zutali Dep. at 14).

The response to the chess activities was positive. The Counselor attended some of the chess tournaments to show her support of the kids. Her attendance was not a part of her employment with Appellee. (Second Supp. 44-45, Rohr Dep. at 9-10). The group of students who played chess was referred to as the “Franklin-York Chess Club” by Smith and others. There is no evidence or indication that Smith ever requested permission to coin the name of the school for the Chess Club. Smith created certificates of achievement, permission slips and emergency contact forms using the name “Franklin-York Chess Club.” These were not forms created or used by the school. (Second Supp. 41, 42, 47, 103, Kenny Dep. at 37-38, Rohr Dep. at 20, Rohrer Aff. ¶¶ 3-5).

In order to recognize the success and accomplishments of the students involved in chess such announcements were included in the “Franklin Gazette” and on morning announcements. A chess photograph was also included in the Franklin “yearbook.”

(Second Supp. 47, 48, 50, Rohr Dep. at 18, 24, 44). The Franklin Gazette and the Franklin “yearbook” were not approved publications of the Board of Education and the Board had no oversight of these publications. (Second Supp. 50, 99, 101, Rohr Dep. at 44, Emmerling Aff. ¶¶ 6-7, Hennon Aff. ¶¶ 7-8).

For the most part, the Chess Club activities continued without consequence. When Smith was initially assigned by the Chess Federation to assist the students at Franklin Elementary, Zutali reviewed and objected to a letter Smith was going to send out to students soliciting interest in chess. The letter made a reference to being a “pervert.” However, Zutali simply directed Smith to correct the letter and did not share this issue with any school official. On another occasion, Zutali reported an incident to the Principal where students in the Chess Club were misbehaving at a chess tournament. There was no indication that Smith’s behavior was a concern. (Second Supp. 71-74, 88-89, Zutali Dep. at 21-24, 38-39).

In April 2001, an article appeared in a local newspaper about another Chess Federation member who was accused of raping two fifth grade students in another school district. Zutali was concerned because Smith was friends with the accused. Although Zutali had no specific information that Smith was having inappropriate relations with students, he wrote the new principal (Principal Ditcher) a letter alerting her to the newspaper article. Zutali also sent copies of the letter to the Massillon Police Chief and Stark County Sheriff. (Second Supp. 73-74, Zutali Dep. at 23-24). Principal Ditcher received the letter from Zutali on or about September 21, 2001 and was in immediate

contact with the Superintendent and Detective Grizzard of the Massillon City Police Department (the "Detective"). (Second Supp. 3-4, Ditcher Dep. at 47-50). A copy of the letter was received by the police department, was time-stamped, and provided to the Detective. The Detective received the letter on September 21, 2001. (Second Supp. 24, Grizzard Dep. at 5). The Detective requested additional information from Zutali and discovered, through his own investigation, that Smith had been convicted of a sex offense involving minors in 1989. (Second Supp. 25-28, Grizzard Dep. at 6-8, 14). With the assistance of Principal Ditcher and Appellee, the Detective scheduled a meeting with parents of students who played chess under Smith's direction. (Second Supp. 4, Ditcher Dep. at 51-52). Through his investigation and after interviewing many students and parents, the Detective learned that two children, John Doe Nos. 1 and 2, were molested by Smith. (Second Supp. 29-32, Grizzard Dep. at 17-19, 22).

Smith's contact with John Doe Nos. 1 and 2 started with their participation in the after-school chess activities. Smith frequently, if not always, took the boys to and from chess practices and tournaments, as he did some of the other children. (Second Supp. 12, 13, 19, John Doe No. 1 Dep. at 20-21, John Doe No. 2 Dep. at 8). In addition, John Doe Nos. 1 and 2 went on the overnight trip with Smith to Michigan (which was a reward for the chess players organized by Smith). (Second Supp. 13, 20, John Doe No. 1 Dep. at 22-24, John Doe No. 2 Dep. at 10). The mothers of John Doe Nos. 1 and 2 were aware that Smith was transporting their children to and from chess practices and tournaments,

and that Smith organized the Michigan trip. (Second Supp. 6, 8-10, Jane Doe Dep. at 15-16, Jenny Doe Dep. at 12-17).

In addition to the interaction described above, John Doe No. 1 indicated that he and Smith went to the store on three separate occasions. They would also go putt-putting and to Smith's house. Smith bought John Doe No. 1 gifts and milkshakes. (Second Supp. 13-14, John Doe No. Dep. at 21-26). Consistent with the information shared with the Detective, John Doe No. 1 indicated that Smith would make him feel uncomfortable when Smith touched the inner part of John Doe No. 1's upper thigh, while Smith was driving and John Doe No. 1 was sitting in the passenger seat of the car. Smith also made John Doe No. 1 feel uncomfortable while at Smith's house when Smith would sit John Doe No. 1 on his lap and hold him there and tickle his stomach. John Doe No. 1 also recalled a few times when Smith would graze John Doe No. 1's private parts, which John Doe No. 1 thought at the time was an accident. (Second Supp. 15-16, John Doe No. 1 Dep. at 35-39).

None of the touching occurred on school grounds. In fact, most of the touching occurred while Smith and John Doe No. 1 were in Smith's vehicle. John Doe No. 1 denies any other incidents of inappropriate touching by Smith. John Doe No. 1 did not report any of these incidents to any school employee. (Second Supp. 16-17, John Doe No. 1 Dep. at 39-42).

John Doe No. 2 similarly spent time with Smith outside of the occasions mentioned above. John Doe No. 2 went fishing with Smith, on more than one occasion.



III. ARGUMENT

A. APPELLEE'S PROPOSITION OF LAW NO. I:

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

The primary issue before this Court is whether an exception to statutory immunity, pursuant to former R.C. § 2744.02(B)(4), applies when an injury, that is allegedly caused by the negligence of an employee, does not occur on the grounds of the political subdivision. Both the Trial Court and the Court of Appeals held that the exception to statutory immunity, contained in former R.C. § 2744.02(B)(4), does not apply since the injuries alleged by Appellants did not occur on school grounds. The well-reasoned decisions by these courts must be affirmed.

Former R.C. § 2744.02(B)(4) 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. This Court has held 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 v. Canton City School Board of Education*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶¶ 13-14.

The plain and ordinary meaning of the words contained in R.C. § 2744.02(B)(4) is easy to extract. Pursuant to the statutory language, the General Assembly indicated that, in order for liability to ensue, two things must occur. First, the injury must be caused by the negligence of an employee of the political subdivision. Second, as indicated by the use of the conjunctive “and,” the injury must occur on the grounds of the political subdivision. Therefore, unless there is some ambiguity, this two-part analysis applies.

If there is ambiguity, which Appellee denies, then legislative intent is considered. Perhaps the most telling evidence of legislative intent is found in the amendments (and attempted amendments) to the statutory provision itself. *Stevens v. Ackman*, 91 Ohio St. 3d 182, 193, 2001-Ohio-249, 743 N.E.2d 901. For over a decade, the General Assembly has struggled to clarify R.C. § 2744.02(B)(4), in light of the difficulty courts have had interpreting it. Prior to 1996, R.C. § 2744.02(B)(4) stated that a school district is “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.” Some courts maintained that the exception to immunity contained in R.C. § 2744.02(B)(4) only applied where injury was due to maintenance of the property. Other courts maintained that the exception contained in R.C. § 2744.02(B)(4) applied more broadly. Compare *Doe v. Jefferson Area Local School District* (1994), 97 Ohio App.3d 11 646 N.E.2d 187;

*Zellman v. Kenton Board of Education* (1991), 71 Ohio App.3d 287, 593 N.E.2d 392; *Marcum v. Talawanda City Schools* (1996), 108 Ohio App.3d 412, 670 N.E.2d 1067, and *Williams v. Columbus Board of Education* (1992), 82 Ohio App.3d 18, 610 N.E.2d 1175.

Late in 1996, the General Assembly amended over one hundred statutes, including sections of R.C. Chapter 2744, and specifically, R.C. § 2744.02(B)(4), when it passed, Am.H.B. 350. The Am.H.B. 350 amendment to R.C. § 2744.02(B)(4), injected a requirement that any alleged injury must be caused by a “physical defect” on the property of the political subdivision. Revised Code § 2744.02(B)(4) reverted to its pre-Am.H.B.350 version when Am. H.B. 350 was declared unconstitutional by *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062. In 2003, the General Assembly once again amended R.C. § 2744.04(B)(4) to return the same “physical defect” requirement to the law. This amendment remains the current language.

The significant multiple efforts of the General Assembly to amend R.C. § 2744.02(B)(4) cannot be ignored. These amendments reflect the true legislative intent – which is consistent with the plain and ordinary meaning of the statutory language. Therefore, 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.

This Court has previously issued two opinions in line with this mandate. In 2002, this Court decided *Hubbard v. Canton City School Board of Education*, *supra*. *Hubbard* involved minor students who were sexually assaulted by a middle school teacher on



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 further reasoned:

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 2744.02(B)(4) exception to statutory immunity is far narrower than the (B)(3) exception.

It appears that only the Fifth, Sixth and Tenth District Courts of Appeal have addressed the issue of the situs of an injury. In *Keller v. Foster Wheel Energy Corp.*, 163 Ohio App.3d 325, 2005-Ohio-4821, 837 N.E.2d 859, 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., ¶ 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 *Beck v. Adam Wholesalers of Toledo, Inc.*, (Sept. 28, 2001), 6<sup>th</sup> Dist. No. S-00-038, 2001 WL 1155820, the Sixth District’s entire analysis of R.C. § 2744.02(B)(4) is contained in a single paragraph:

In its September 27, 2000 judgment entry, the trial court engaged in a lengthy discussion regarding the statutory construction of the above statute. The court reviewed the grammatical construction as well as legislative intent and concluded that the injury, death or loss had to occur on school property. The 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.

While the ultimate holding of this case is different than *Keller*, a review of the facts is insightful. In *Beck*, a 6 year-old student was playing on a playground during recess, while a teacher and an aide supervised. Beck was kicking a ball near the edge of the playground which meets U.S. Highway 20. A yellow faded line served as the boundary, which the students were not supposed to cross. There were some cones not far from the line to alert traffic to the play area. Beck apparently crossed the line and was hit and killed by a semi truck. *Id.* It appears that these very sad and tragic facts led the court to bend the rules to find that the exception to immunity applied. Furthermore, there was no precedent, such as is found in *Hubbard* and *Sherwin Williams*, to help direct the Sixth District, and justify what it otherwise characterizes as an “absurd” result.

In the present case, the Fifth District embraced *Keller’s* application of *Hubbard* and also relied upon this Court’s more recent decision in *Sherwin Williams*. The Fifth District Court of Appeals relied upon the law, as stated by this Court in paragraph 17 of *Sherwin Williams*, that the injury must occur on the property of the political subdivision in order for the (B)(4) exception to apply. In addition, the Fifth District took the opportunity to distinguish its prior decision in *Toles v. Regional Emergency Dispatch*

Center, Stark App. No. 2002CA332, 2003-Ohio-1190, upon which Appellants heavily relied. The *Toles* court indicated that it did not conclude that the (B)(4) exception applied. Rather, since the trial court had not previously ruled on the specific issue, the court remanded the case to the trial court to consider whether the (B)(4) exception applied.

By simply reviewing Appellants' Proposition of Law No. 1, it is evident that Appellants are asking this Court to assume the role of the General Assembly and rewrite R.C. § 2744.02(B)(4). Appellants propose that R.C. § 2744.02(B)(4) be construed to encompass injuries that occur off of the grounds or buildings of a political subdivision. The plain and ordinary meaning of the words as well as the legislative intent of the statute requires that the injury must occur on school grounds for the immunity exception to apply.

In the present case, both John Doe Nos. 1 and 2 testified that any molestation by Smith occurred in Smith's car, at Smith's house or at the gas station – not inches from the school's boundary line or under conditions that were within Appellee's control. None of the molestation occurred on school grounds. 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, indicate that the issue presented by Appellants for appeal is well-settled. Appellants' injuries did not occur on school grounds, and therefore, the exception to immunity does not apply.

**B. APPELLEE'S PROPOSITION OF LAW NO. II:**

**Issues which are not presented to the court whose judgment is sought to be reversed may not be raised on appeal.**

In their Brief, 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. Appellants are precluded from raising a legal issue on appeal to this Court, that they failed to raise in either the Trial Court or Court of Appeals.

“Ordinarily, 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, quoting *Goldberg v. Indus. Comm.* (1936), 131 Ohio St. 399, 404, 6 O.O. 108, 3 N.E.2d 364. The reasoning behind this concept is “deeply embedded in a just regard to the fair administration of justice.” *Id.* By requiring a party to raise issues at the trial court level, the opposing party has an opportunity to respond to the issues. This worthy principle precludes a party from sitting “idly by until he or she loses on one ground only to avail himself or herself of another on appeal.” *Id.* Further, this rule protects the integrity and “dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.” *Id.* See also, *State ex rel. Porter v. Cleveland Dept. of Pub. Safety* (1998), 84 Ohio St.3d 258, 703 N.E.2d 308; *State v. Driscoll* (1922), 106 Ohio St. 33, 38-39, 138 N.E. 376.

As indicated in their Merit Brief, Appellants assert that they raised the issue on prior occasions. Appellants rely upon the vague reference in their Complaint to “RC 2744.01, et seq.” and an excerpt in their Reply Brief, at p. 10, that neither mentions R.C. § 2744.02(B)(2) nor “proprietary function.” Looking specifically at Appellants’ Complaint, the Appellants reference the alleged negligent actions of Appellee and state, in part, “all of which constitute an exception to sovereign immunity, as well as any other sections of R.C. § 2744.01, et seq. that make sovereign immunity not applicable.” In their Reply Brief, though they question how Appellee can assert it was engaged in a governmental function, Appellants do not submit evidence or authority to indicate that Appellant was engaged in anything other than a governmental function, or more specifically, a propriety function. In reviewing the Reply Brief in toto, it is obvious that Appellants skipped right over the first tier of immunity analysis, presuming that statutory immunity applied, and looked immediately at whether the exceptions to immunity applied.

Appellants also failed to raise the first tier of immunity analysis in the Court of Appeals. In their Brief to the 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, Appellee submits that the issue cannot be raised for the first time before this Court.

**C. APPELLEE'S PROPOSITION OF LAW NO. III:**

**A board of education that permits the operation of a "chess club" on public grounds is engaged in a "governmental function," pursuant to R.C. § 2744.01(C).**

Even if this Court is inclined to consider Appellant's Proposition of Law No. II, which Appellant has failed to raise until this appeal, Appellant's proposition is an incorrect statement of law. Both the operation of an extracurricular activity and the regulation of the use of public grounds are "governmental functions" pursuant to R.C. § 2744.01. Therefore, a board of education that permits the operation of a chess club within its walls is engaged in a governmental function, and as a result, immune from liability.

Revised Code § 2744.01 defines both “governmental” and “propriety” functions. “Governmental function” is defined in R.C. § 2744.01(C), and includes, specifically, “[t]he provision of a system of public education,” and “the regulation of the use of \*\*\*. public grounds.” R.C. § 2744.01(C)(2)(c) and (e), respectively. A “proprietary function” is a function that is not described in R.C. § 2744.01(C)(1) or (2) and “promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental person.” R.C. § 2744.01(G)(1). Regardless of how Appellee’s involvement with the Chess Club is described, it engaged in a “governmental function.”

Appellants have described the operation of the Chess Club, as an extracurricular activity. Providing extracurricular activities is a component of the “provision of a system of public education.” See, *Summers v. Slivinsky* (2001), 141 Ohio App.3d 82, 749 N.E.2d 854, appeal denied, 92 Ohio St.3d 1417, 748 N.E.2d 549, overruled on other grounds by *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 151 Ohio App.3d 16, , 2002-Ohio-5179, 783 N.E.2d 523, holding that cheerleading, an extracurricular activity, is a governmental function. Se also, *Geraci v. Conte* (June 18, 1998), 8<sup>th</sup> Dist. No. 72440, 1998 WL 323564, \*5, holding that a swimming party was “a governmental function - the provision of a system of public education.” Therefore, viewing the underlying facts in the manner in which Appellants propose, and characterizing the Chess Club as an extracurricular activity, it is evident that Appellee was engaged in a governmental function.



forth in R.C. § 2744.03(A).” Analyzing the cause of action as a negligent retention/supervision claim, the Trial Court found that this case involved an exercise of judgment or discretion in the use and acquisition of personnel. The Trial Court concluded that there was “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.’” (Judgment Entry, p. 10, Appx.-26). The Court of Appeals affirmed the Trial Court’s finding and simply ruled that “Appellants’ third assignment of error is overruled.” (Opinion, ¶ 38, Appx.-15).

Appellants state that “the record below is chock full of evidence raising numerous issues of material fact as to Appellees’ collective reckless conduct.” (Appellants’ Merit Brief, p. 29). However, Appellants’ argument is flawed. Appellee does not dispute any of the facts cited by Appellants in arguing for summary judgment and on appeal of the granting of summary judgment.

More importantly, Appellee had no legal duty to engage in a background check as Appellants suggest. Therefore, this Court cannot find that Appellant, through its employees, engaged in wanton or reckless conduct where there was no duty to act.

Employment and appointment of individuals, by a board of education, is authorized and limited by the Ohio Revised Code. See, for example, R.C. §§ 3313.22, 3319.01-3319.21. The mandatory requirement to conduct a criminal background check upon employees is authorized in R.C. § 3319.39. The version of R.C. § 3319.39 in effect from 1996 until 2004 states, in pertinent part:

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.

R.C. § 3319.39(A)(1). As stated, this statutory mandate is directed only to an “applicant who has applied to a school district.” An “applicant” is defined as an individual “under final consideration for appointment or employment” by the Board of Education. R.C. § 3319.39(G)(1). Therefore, there is no authority under R.C. § 3319.39 to conduct a criminal background check on either volunteers or users of school space.

Since the inception of R.C. § 3319.39, the statute has been amended on twelve occasions. More recently, the scope of the statute has been broadened to require background checks on all employees of a school district. R.C. § 3319.39, effective, November 14, 2007. By comparison, the authority to conduct a criminal background check upon a school volunteer is permissive, and not mandatory. This statute, R.C. § 109.575, became law in 2001, and was not in effect when the alleged molestations occurred in this case. Regardless, the statute provides, in pertinent part:

At the time of a person's initial application to an organization or entity to be a volunteer in a position in which the person on a regular basis will have unsupervised access to a child, the organization or entity shall inform the person that, at any time, the person might be required to provide a set of impressions of the person's fingerprints and a criminal records check might be conducted with respect to the person.

R.C. § 109.575. Neither R.C. §§ 3319.39, 109.575, nor any other provision of the Revised Code authorizes a board of education to conduct a criminal background check on mere users of school space.

The authorization and amendment of the statutes mentioned above serves to emphasize that the General Assembly certainly has the ability to require criminal background checks on mere users of school space, or even volunteers, if it so chooses. However, even with the most recent amendments and emphasis on student and school safety, the General Assembly has not imposed such a duty. It is easy to understand why this is so. School Districts must open its buildings to religious, civic, social or recreational meetings. R.C. §§ 3313.77, 3313.78. One cannot imagine a board of education conducting background checks on such users even when children are involved.

In their Brief, Appellants also assert that Appellee disregarded "complaints about Smith that raised a red flag to outsiders as to Smith's fitness to be around young children." However, Appellants mischaracterize the "complaints" made to Appellee. As stated in Appellee's Statement of Facts, *supra*, there was only one "complaint" voiced to Appellee, and this "complaint" was about the behavior of members of the chess club, and was not about concerns with Smith. Zutali admitted that the one instance of



**CERTIFICATE OF SERVICE**

I certify that a copy of this Merit Brief of Appellee was sent by U.S. mail to the following, this 8<sup>th</sup> day of February, 2008:

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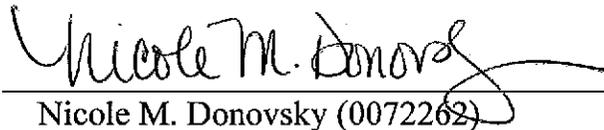
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IN THE SUPREME COURT OF OHIO

JANE DOE, et al.,

Appellants,

v.

MASSILLON CITY SCHOOL  
DISTRICT, et al.,

Appellees.

:  
: CASE NO. 07-1311  
:  
: On Appeal from the Stark County  
: Court of Appeals, Fifth Appellate District  
:  
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:

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APPENDIX TO MERIT BRIEF OF  
APPELLEE MASSILLON CITY SCHOOL DISTRICT BOARD OF EDUCATION

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Beck ex rel. Estate of Beck v. Adam Wholesalers of Toledo, Inc.  
Ohio App. 6 Dist., 2001.  
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Sandusky County.  
Antoinette Marie BECK, Adm., et al., Appellant,  
v.  
ADAM WHOLESALERS OF TOLEDO, Inc., et al.  
No. S-00-038.

Sept. 28, 2001.

Steven P. Collier and Anthony E. Turley, for appellant.  
Daniel D. Mason, for appellees.

*DECISION AND JUDGMENT ENTRY*

PIETRYKOWSKI, P.J.

\*1 This is an appeal from the Sandusky County Court of Common Pleas, which granted summary judgment in favor of appellee, Bellevue City Schools Board of Education, against appellant, Antoinette Marie Beck, Administratrix of the estate of Christian Anthony Beck, deceased. For the reasons that follow, we reverse the decision of the trial court.

This matter arose as a result of the tragic death of Christian Anthony Beck, six years old, on February 26, 1998. On that date, Christian was struck by a semi tractor trailer, operated by an employee of Adam Wholesalers, Inc., during an outdoor recess at York Elementary School, in Bellevue, Ohio.

On appeal, appellant sets forth the following four assignments of error:

"I. The trial court erred in finding that the nuisance exception to immunity in R.C. 2744.02(B)(3) is not applicable.

"II. The trial court erred in interpreting R.C. 2744.02(B)(4) as requiring that injury, death, or loss occur on the grounds of the school.

"III. The trial court erred in finding that defendant Bellevue City Schools Board of Education is afforded immunity for an alleged 'exercise of discretion' pursuant to R.C. 2744.03(A)(5).

"IV. The trial court erred in finding no genuine issue of material fact with regard to defendant Bellevue City Schools Board of Education's recklessness, so as to satisfy the exception to immunity in R.C. 2744.03(A)(5).

"V. The trial court erred in refusing to find R.C. Chapter 2744 unconstitutional."

The relevant facts of this case are as follows. On February 26, 1998, Christian Beck was in pre-first grade at York Elementary School which is located in Bellevue, Sandusky County, Ohio, along U.S. Route 20. Weather permitting, Christian received two fifteen minute recess periods daily. On the date of the accident, Christian's recess periods were from 11:30 to 11:45 a.m. and 1:00 to 1:15 p.m. At the 1:00 p.m. recess there were approximately one hundred fifty children on the playground supervised by Rebecca Cotterill, a first grade teacher, and Laura Thompson, a teacher's aide in the severe behavioral disability class ("SBH").

In her deposition Beverly DeBlase, principal at York School, described the playground schematics. To the west of the school, students were not to go past the busses. The boundary to the north was the school building and playground equipment. The students were not to go behind the building. The eastern boundary was the main or original part of the building. Finally, the southern boundary, which was in front of the school and adjacent to U.S. Route 20, was even with some playground equipment. There was a yellow line on the blacktop to indicate the boundary. Several feet beyond this line were orange cones which were to prevent vehicular traffic from entering the playground.

Thompson testified that during recess she was primarily responsible for her SBH students. She testified that she was not aware of the yellow line and that it served as part of the southern playground boundary. She did testify that the students generally were not to go beyond the playground equipment south of the building.

\*2 On the date of the accident, Thompson was supervising her children at the merry-go-round, south of the building. She left the children but as she looked back to make certain they were following her instructions, she spotted Christian trying to pick up a ball and running toward the cones. Once she realized he was not stopping, she began "screaming" at him to try and get him to stop. Thompson testified that Christian kept kicking the ball further toward the road each time he attempted to pick it up. She then saw him get hit by the semi truck.

During her deposition, Cotterill testified that at the start of the 1:00 p.m. recess on the date of the accident, she was busy making certain that the children who had gotten in trouble during the prior recess were sitting along a wall where they were to stay as punishment. Cotterill next noticed Thompson running toward her and saying that someone had been hit. Cotterill went to Christian and immediately ascertained that he was dead.

Regarding playground rules, Cotterill testified that each teacher reviewed them with their students. She indicated that she felt that a verbal warning about playground safety and boundaries was sufficient to inform the younger students. Cotterill further testified that playground balls had crossed the yellow line on several occasions and, on each occasion, the student would inform a teacher and the teacher would retrieve it.

Appellant commenced the instant action on April 27, 1998, naming as defendants appellee Bellevue City Schools Board of Education, which operates York School, semi truck driver Floyd D. DeCair and his employer Adam Wholesalers, Inc. On March 8, 1999, appellant filed her first amended complaint. As to appellee, the complaint alleged negligence in its failure to erect a fence, failure to activate the school zone flashing lights during recess, and failure to maintain an effective barrier or boundary. Appellant further alleged that appellee failed to provide adequate supervision of the children during recess.

Appellee filed a motion for summary judgment arguing that it was entitled to immunity pursuant to R.C. Chapter 2744. The trial court granted appellee's motion for summary judgment on April 22, 1999. On appeal, this court remanded the case finding that the trial court improperly relied on the amended version of R.C. Chapter 2744 found unconstitutional in State ex rel. Ohio Academy of Trial Lawyers v. Sheward

(1999), 86 Ohio St.3d 451. See Beck v. Adam Wholesalers of Toledo, Inc. (June 2, 2000), Sandusky App. No. S-99-018, unreported. We did, however, consider and find not well-taken appellant's eighth assignment of error which argued that R.C. Chapter 2744 was unconstitutional.

On remand, on June 27, 2000, appellee filed its motion for summary judgment again arguing that it was immune from liability pursuant to R.C. Chapter 2744. The trial court again granted appellee's motion for summary judgment based upon R.C. Chapter 2744 immunity, and this appeal followed.

\*3 At the outset we note that when reviewing a motion for summary judgment, this court must apply the same standard as the trial court. Lorain Natl. Bank v. Saratoga Apts. (1989), 61 Ohio App.3d 127, 129. Civ.R. 56(C) provides that summary judgment can be granted only if (1) no genuine issue of material fact remains to be litigated, (2) viewing the evidence in a light most favorable to the nonmoving party, reasonable minds can reach but one conclusion and that conclusion is adverse to the nonmoving party, and (3) the moving party is entitled to summary judgment as a matter of law. Horton v. Harwick Chem. Corp. (1995), 73 Ohio St.3d 679, paragraph three of the syllabus. The party moving for summary judgment has the burden of showing that there is no genuine issue of material fact on the essential elements of the nonmoving party's claim. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. If the moving party satisfies this burden, the nonmoving party has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts demonstrating a genuine issue exists for trial. *Id.*

In determining whether appellee is entitled to sovereign immunity pursuant to R.C. Chapter 2744, we must answer four questions. We must first determine (1) whether or not appellee is a political subdivision, (2) whether appellee was engaged in a governmental or proprietary function, (3) if any of the exceptions to the general grant of immunity under R.C. 2744.02(B) apply, and (4) whether appellee is entitled to a defense or qualified immunity under R.C. 2744.03(A).

Appellant, in her assignments of error, argues that appellee is not immune from liability based upon the nuisance exception, R.C. 2744.02(B)(3). Appellant also argues that, under R.C. 2744.02(B)(4), the death or injury need not have occurred on school property and, further, that there were physical defects on the

property. Further, appellant contends that appellee is not entitled to the exercise of discretion defense under R.C. 2744.03(A)(5) in that appellee was reckless. Finally, appellant claims that R.C. Chapter 2744, *in toto*, is unconstitutional. We shall address each assignment of error in order.

In her first assignment of error, appellant argues that the trial court erred when it rejected her argument that the condition of the playground at York Elementary School created a nuisance. Specifically, appellant contends that appellee improperly maintained the yellow line and failed to install fencing and activate the "school zone" flashing lights.

R.C. 2744.02(A)(1) creates a general grant of immunity to governmental entities. It provides:

"\* \* \*. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

\*4 It is undisputed that a school district is a political subdivision. R.C. 2744.01(F); Hall v. Bd. of Edn. (1972), 32 Ohio App.2d 297. Further, the parties do not dispute that appellee was engaged in a governmental function. Thus, pursuant to R.C. Chapter 2744, appellee is entitled to immunity from civil liability. We must now address whether the nuisance exception to immunity is applicable.

R.C. 2744.02(B)(3) requires that a political subdivision "keep [its] public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, \* \* \*." Such failure may result in civil liability.

In support of her argument that the nuisance exception applies under the facts of this case, appellant cites Franks v. Lopez (1994), 69 Ohio St.3d 345; Cater v. Cleveland (1998), 83 Ohio St.3d 24; and Siebenaler v. Montpelier (1996), 113 Ohio App.3d 120.

In Franks, the Ohio Supreme Court found that a question of fact remained regarding whether the township created a nuisance by failing to maintain an existing sign's ability to reflect. The court, however,

rejected the argument that defective design or construction or lack of signage constitutes a nuisance. *Id.* at 349-350.

Cater and Siebenaler involve injuries associated with municipality-owned swimming pools. In Cater, the Ohio Supreme Court held that the trial court erred in directing a verdict in favor of the city, where the trier of fact should have determined whether the glare from the reflection off the glass panels which obstructed visibility into the pool "created an unreasonable risk of harm[.]" Cater at 31. In Siebenaler, this court examined whether the alleged slippery condition on a diving board ladder amounted to a failure to keep the grounds in repair and free from nuisance under R.C. 2744.02(B)(3). We ultimately found that appellants failed to demonstrate that the ladder was poorly maintained or a nuisance. Siebenaler at 124.

Upon review of the above cases and the body of case law interpreting R.C. 2744.03(B)(3), we are reluctant to stretch the nuisance exception to include the absence of a fence or flashers involved in this case. The cases we have reviewed finding issues of fact as to nuisance address conditions *existing* on the property, not the lack of a condition. Unlike Franks, we can find no legal duty requiring appellee to erect a fence or activate the flashers.<sup>FNI</sup> Franks stands for the proposition that once the fence or flashers had been erected or activated, appellee would be charged with the responsibility of proper maintenance.

<sup>FNI</sup> In fact, R.C. 4511.21(B)(1)(a) provides, in part:

"Nothing in this section or in the manual and specifications for a uniform system of traffic control devices shall be construed to require school zones to be indicated by signs equipped with flashing or other lights, or giving other special notice of the hours in which the school zone speed limit is in effect."

In Cater, the court found the glare emanating from the wall of glass panels was an obstruction to visibility. In this case, appellant argues that the faded yellow line may not have been visible to Christian and may have been a cause of the accident.

\*5 Actual or constructive notice is a prerequisite under R.C. 2744.02(B)(3). Harp v. City of Cleveland Heights (2000), 87 Ohio St.3d 506, 513. There is evidence that appellee had, at minimum, constructive

notice of the faded condition of the yellow line. Beverly DeBlase, principal at York School, testified that the yellow line was the partial southern playground boundary and, when asked if the line was faded stated "probably, yes." Rebecca Cotterill, one of the playground supervisors on the date of the accident, stated that she did not know how bright or faded the line was but that it had been there for years.

Based on the foregoing, as a matter of law we find that civil liability may be imposed under R.C. 2744.02(B)(3). Accordingly, appellant's first assignment of error is well-taken.

In appellant's second assignment of error, she argues that the trial court erroneously interpreted R.C. 2744.02(B)(4) as requiring that the injury, death or loss complained of must have occurred on school grounds. The statute reads:

"[P]olitical 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, \* \* \*."

In its September 27, 2000 judgment entry, the trial court engaged in a lengthy discussion regarding the statutory construction of the above statute. The court reviewed the grammatical construction as well as legislative intent and concluded that the injury, death or loss had to occur on school property. The 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.

We must now address whether, as a matter of law, potential liability exists under R.C. 2744.02(B)(4). Appellee correctly asserts that this court, in Tijerina v. Bd. of Edn. of Fremont (Sept. 30, 1998), Sandusky App. No. S-98-010, unreported, adopted the principle that "R.C. 2744.02(B)(4) applies only to negligence which occurs in connection with the maintenance of school property." In Tijerina, a junior high school student with a known heart condition died of a heart

arrhythmia after attending gym class. We found that the exception to immunity provided in R.C. 2744.02(B)(4) was not available because appellant alleged only the negligence of the school officials, not a physical defect in the school building or grounds or improper maintenance relative thereto.<sup>FN2</sup>

<sup>FN2</sup>. Acknowledging a split among the districts, the Supreme Court of Ohio, in Hubbard v. Canton City School Bd. of Edn.(1999), 84 Ohio St.3d 1486, accepted the Fifth Appellate District's proposed issue for certification in its December 7, 1998 judgment entry which set forth: " 'Is the exception to the political subdivision immunity found in R.C. 2744.02(B)(4), effective 7/1/89, applicable only to negligence occurring in connection with the maintenance of school property or equipment, or to physical defects within or on the grounds of school property?' " The action, however, was subsequently dismissed as being improvidently allowed. See Hubbard v. Canton City School Bd. of Edn.(2000), 88 Ohio St.3d 14.

Noteworthy though not the current law, H.B. 350 amended R.C. 2744.02(B)(4) to read: " \* \* \* 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, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function \* \* \*." (Emphasis added.)

\*6 In the instant case, we find that no genuine issue of fact exists as to any actual physical defects on school grounds. Appellant has set forth no evidence that the absence of flashers during recess or a fence around the playground constitutes a "physical defect" as contemplated by the statute. Further, there is no evidence that a fence or flashers were required by law.

With regard to the actual maintenance of the property, appellant contends that the yellow line, or the "border" which the children were not permitted to cross, was faded and thus improperly maintained. As set forth in our analysis of appellant's first assignment of error, appellee admitted that the yellow line was faded.

Based on the foregoing, we find as a matter of law that civil liability under R.C. 2744.02(B)(4) may be

imposed. Appellant's second assignment of error is well-taken.

Appellant's third and fourth assignments of error relate directly to the availability of the defenses and immunities under R.C. 2744.03(A). In her third assignment of error, appellant contends that the maintenance of the line was not a discretionary act and, thus, appellee is not entitled to immunity under R.C. 2744.03(A). In her fourth assignment of error, appellant, arguing alternatively, asserts that even assuming that the maintenance of the line was discretionary, issues of material fact exist as to whether appellant acted recklessly.

R.C. 2744.03(A) provides a mechanism by which a defendant may "regain" its immunity status when the activity at issue falls within one of the exceptions under R.C. 2744.02(B). Relevant to the instant case, R.C. 2744.03(A) provides:

"(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons 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 persons 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 interpreting the above provisions, the Supreme Court of Ohio has held that the nonliability provisions under R.C. 2744.03 must be read more narrowly than the exceptions to immunity under R.C. 2744.02(B), "or the structure of R.C. Chapter 2744 makes no sense at all." Greene Cty. Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 561.

\*7 As to appellee's potential liability under R.C. 2744.02(B)(3), the Fifth Appellate District has held that where an alleged negligent act of a political subdivision constitutes a nuisance, the "discretionary" defenses under R.C. 2744.03(A)(3) and (5) do not apply. Jones v. Shelly Co. (1995), 106 Ohio App.3d 440, 445, citing Scheck v. Licking Cty. Comm'rs. (July 18, 1991), Licking App. No. CA-3573, unreported.

The Supreme Court of Ohio has also suggested that the maintenance of a nuisance does not involve the type of discretion contemplated in R.C. 2744.03(A)(3) and (5). Franks v. Lopez, 69 Ohio St.3d at 349. Specifically, the Franks court, addressing a township's failure to maintain existing signage, stated:

"Overhanging branches and foliage which obscure traffic signs, malfunctioning traffic signals, signs which have lost their capacity to reflect, or even physical impediments such as potholes, are easily discoverable, and the elimination of such hazards involves no discretion, policy-making or engineering judgment. The political subdivision has the responsibility to abate them and it will not be immune from liability for its failure to do so." *Id.*

See, also, Cater v. Cleveland, 83 Ohio St.3d 24, 30-31, where the court found that R.C. 2744.02(B)(3) was applicable and that it was for the trier of fact to determine whether the city created an unreasonable risk of harm.

Regarding the liability provision under R.C. 2744.02(B)(4), the Supreme Court of Ohio, in Perkins v. Norwood City Schools (1999), 85 Ohio St.3d 191, found that:

"the decision of whom to employ to repair a leaking drinking fountain is not the type of decision involving the exercise of judgment or discretion contemplated in R.C. 2744.03(A)(5). Such a decision, under the facts of this case, is a routine maintenance decision requiring little judgment or discretion." *Id.* at 193

In Hall v. Ft. Frye Loc. School Dist. Bd. of Edn. (1996), 111 Ohio App.3d 690, the appellant was injured when he stepped on an exposed sprinkler head during football practice on his high school practice field. *Id.* at 693. Finding that the R.C. 2744.03(B)(5) defense to liability was not available, the court distinguished the board's decision to purchase and install the sprinkler system from maintenance of the system. *Id.* at 699-700. The court noted that the installation of the sprinkler system was a discretionary

act which was immunized from liability. *Id.* at 700. As to maintenance, however, the court stated: "[T]he maintenance of the school's irrigation system by appellee's employees is a totally separate matter that does not involve the exercise of such judgment or discretion. The decision to allocate resources, *i.e.*, 'how to use, equipment \* \* \* or facilities,' has been made and is immunized. However, once that policy is put into effect, appellee's maintenance procedures must be performed in a reasonably safe manner. If the evidence establishes that appellee negligently maintained the irrigation system through arbitrary and random attempts to cover the sprinkler heads, liability may be imposed pursuant to R.C. 2744.02(B)(4)." *Id.*

\*8 Appellee, in response to appellant's arguments relative to R.C. 2744.03(B)(5), cites this court's decision captioned *Banchich v. Port Clinton Pub. School Dist.* (1989), 64 Ohio App.3d 376. In *Banchich*, we determined that R.C. 2744.03(A)(5) was available as a defense to the manner in which a teacher instructed and supervised his students and his maintenance and inspection of a power jointer used in carpentry class. *Id.* at 378.

Upon review, we agree with appellant that the more recent pronouncement of law in *Perkins, supra*, is applicable in this case. The decision to place the yellow line on the playground for the purpose of using it as a portion of the southern boundary falls within the defenses to liability as a "discretionary" act. However, once the line was in place and the children were instructed to stay north of the line, the maintenance of the line *cannot* be considered a discretionary act. Accordingly, the defenses and immunities set forth in R.C. 2744.03(A)(3) and (5) are not applicable in this case and appellee may be exposed to civil liability under R.C. 2744.02(B)(3) and (4).

Accordingly, appellant's third assignment of error is well-taken. Based upon our disposition of appellant's third assignment of error, we find appellant's fourth assignment of error moot.

In appellant's fifth and final assignment of error she claims that the trial court erred when it failed to find R.C. Chapter 2744 unconstitutional. This claim was rejected in appellant's prior appeal in this matter and we find that it is barred by the doctrine of *res judicata*. See *Beck v. Adam Wholesalers of Toledo, Inc.* (June 2, 2000), Sandusky App. No. S-99-018, unreported. Appellant's fifth assignment of error is not

well-taken.

On consideration whereof, we find that substantial justice has not been done the party complaining, and the judgment of the Sandusky County Court of Common Pleas is reversed and the case is remanded for further proceedings consistent with this decision. Court costs of this appeal are assessed to appellee.

*JUDGMENT REVERSED.*

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

RESNICK and KNEPPER, JJ., PIETRYKOWSKI, P.J., concur.  
Ohio App. 6 Dist., 2001.  
Beck ex rel. Estate of Beck v. Adam Wholesalers of Toledo, Inc.  
Not Reported in N.E.2d, 2001 WL 1155820 (Ohio App. 6 Dist.)

END OF DOCUMENT

Geraci v. Conte  
 Ohio App. 8 Dist., 1998.  
 Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR  
 REPORTING OF OPINIONS AND WEIGHT OF  
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga  
 County.  
 Sandra GERACI, Plaintiff-Appellant,  
 v.  
 Walter CONTE, et al., Defendants-Appellees.  
 No. 72440.

June 18, 1998.

Civil Appeal from Court of Common Pleas, No.  
 CV-314795.

Patrick J. Perotti, Susan E. Rusnak, Dworken &  
 Bernstein, Painesville, OH, for plaintiff-appellant.  
Albert L. Purola, Mentor, OH, David K. Smith,  
 Means, Bichimer, Burkholder & Baker, Cleveland,  
 OH, for defendants-appellees, Walter Conte, et al.  
Jeffrey J. Wedel, Squire, Sanders & Dempsey,  
 Cleveland, OH, for South Euclid School District.

JOURNAL ENTRY AND OPINION

MCMONAGLE, J.

\*1 Plaintiff-appellant, Sandra Geraci ("appellant"), appeals from the judgment of the Cuyahoga County Court of Common Pleas wherein the trial court granted a motion to dismiss filed by defendants-appellees Walter Conte, Susan Conte (collectively referred to as the "Contes") and the South Euclid-Lyndhurst Board of Education (collectively referred to as the "Board of Education") pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief could be granted. Finding that the complaint is sufficient to survive a Civ.R. 12(B)(6) challenge against the Contes, we reverse and remand the decision of the trial court as to these parties but affirm the decision as it pertains to the Board of Education. Our reasons for doing so follow.

The record reflects that on September 6, 1996,

appellant filed a class-action complaint <sup>FN1</sup> seeking to represent a class of students who had been invited to and did attend various swimming parties at the home of Walter Conte, a former principal of Brush High School. Besides Walter Conte, appellant named as defendants, Conte's wife (Susan Conte), the South Euclid-Lyndhurst Board of Education and Charles F. Brush High School. The complaint contained allegations of invasion of privacy, emotional distress and negligence against Walter and Susan Conte, as well as reckless disregard for student safety and negligent hiring and supervision against the Board of Education.

<sup>FN1</sup>. Appellant's motion for class certification was not ruled on by the time appellees' respective motions to dismiss were granted.

Appellant's complaint alleged that Walter Conte, in his capacity as principal of Brush High School, invited certain groups of Brush High School students to his home in the summer for swimming parties. Conte required that all students change clothes in a specific room in his house. Unbeknownst to the students, Conte had installed a one-way mirror in the room for the purpose of spying upon the students as they were undressing. In addition, without their knowledge or consent, Conte videotaped female students as they were changing clothes in the aforesaid room. Appellant maintains that the Board of Education allowed school buses, bus drivers or other school employees to be involved in and/or transport students to Contes' home for swimming parties without adequate supervision or promulgated guidelines.

On November 6, 1996 the Board of Education filed a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6) maintaining that it was immune from suit pursuant to R.C. 2744.02(A)(1) as it is a political subdivision engaged in a governmental function for which immunity attaches. Similarly, on November 15, 1996, Walter and Susan Conte filed their motion to dismiss the complaint pursuant to Civ.R. 12(B)(6). The Contes maintained that appellant failed to state a claim upon which relief could be granted since the complaint failed to allege that Walter Conte invaded appellant's privacy or that appellant was ever in the

room when the spying and/or videotaping occurred. In addition, Susan Conte argued that she had no duty or connection regarding any of the alleged activities of her husband Walter Conte.

\*2 The trial court granted both motions. This appeal followed wherein appellant assigns the following errors for our review:

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT AGAINST THE CONTE DEFENDANTS PURSUANT TO RULE 12(B)(6), WHICH BARS DISMISSAL UNLESS THERE IS NO SET OF FACTS UNDER WHICH PLAINTIFF COULD RECOVER.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT AGAINST SOUTH EUCLID-LYNDHURST BOARD OF EDUCATION BECAUSE IMMUNITY IS NOT AVAILABLE FOR THESE CLAIMS.

I.

In her first assignment of error, appellant contends that, in dismissing her complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, the trial court improperly ignored her allegations that she was spied upon. Specifically, appellant maintains that her claim for invasion of privacy was improperly dismissed since she is not required to demonstrate that a particular individual observed her through the one-way mirror in a state of undress. Moreover, she further argues that the mere installation of a hidden viewing device constitutes a viable claim for invasion of privacy.

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. State ex rel Hanson v. Guernsey Ct. Bd. of Commrs. (1992), 65 Ohio St.3d 545, 605 N.E.2d 378; State, ex rel Lee Fisher v. Am. Courts, Inc. (1994), 96 Ohio App.3d 297, 644 N.E.2d 1112. It is well settled that "when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." Byrd v. Faber (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584 citing Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753; Thompson v. Central Ohio Cellular, Inc. (1994), 93 Ohio App.3d 530, 538, 639 N.E.2d 462.

The issue for this court's determination is whether plaintiff-appellant's complaint includes a statement of claim against Walter and Susan Conte pursuant to Civ.R. 8(A). This court held in Kelley v. East Cleveland (Oct. 28, 1982), Cuyahoga App. No. 44448, unreported at 5, that:

All the civil rules require is a short plain statement of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it is based.

In order for a court to properly grant a motion to dismiss for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." O'Brien v. University Community Tenants Union (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753. Moreover, a trial court should not dismiss a complaint based upon doubt that plaintiff will win on the merits. Slife v. Kundtz Properties (1974), 40 Ohio App.2d 179, 182, 318 N.E.2d 557.

In Ohio, the tort of invasion of privacy was first recognized by the supreme court in Housh v. Peth (1956), 165 Ohio St. 35, 133 N.E.2d 340. Paragraph two of the Housh syllabus states:

\*3 An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

*Id.* See, also, Rothstein v. Montefiore Home (1996), 116 Ohio App.3d 775, 689 N.E.2d 108; Smith v. Dean's and Dave's Discount Stores (Oct. 30, 1997), Cuyahoga App. No. 71766, unreported at 4.

This case involves the "intrusion-upon-seclusion" branch of the tort of invasion of privacy. In Sustin v. Fee (1982), 69 Ohio St.2d 143, 431 N.E.2d 992, the supreme court set forth the scope of liability for this tort as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Id. at 145, 431 N.E.2d 992 (quoting Restatement of the Law 2d, Torts (1977), section 652B); see, also, Rothstein, 116 Ohio App.3d at 778, 689 N.E.2d 108; Hidey v. Ohio State Hwy. Patrol (1996), 116 Ohio App.3d 744, 749-750, 689 N.E.2d 89.

Our understanding of the case law as it applies to the intrusion-upon-seclusion branch of this tort allows this court, by analogy, to find that appellant, and those class members she seeks to represent, need not allege that she and the others were actually spied upon in order to defeat a motion to dismiss for failure to state a claim.

We reach this conclusion based on Comment a to Section 652B, which states that this form of invasion of privacy "does not depend [that] any publicity be given to the person whose interest is invaded." The invasion consists solely of an intentional interference with the person's interest in solitude or seclusion. See, Hidey, 116 Ohio App.3d at 750, 689 N.E.2d 89. Relying on this comment, the New Hampshire Supreme Court in Hamberger v. Eastman (N.H.1964), 106 N.H. 107, 206 A.2d 239, 242 found it unnecessary for the plaintiffs to allege that anyone listened or overheard any sounds originating from the plaintiffs' bedroom and held that the secret installation of a listening device in another's home is an invasion of privacy, without regard to whether it was actually utilized. Accord Carter v. Innisfree Hotel, Inc. (Ala.1995), 661 So.2d 1174, 1179 (plaintiffs need not prove the actual identity of the "peeping Tom," nor need they demonstrate actual use of the spying device); Harkey v. Abate (Md.App.1983), 131 Mich.App. 177, 346 N.W.2d 74, 76 (the installation of hidden viewing devices alone constituted an interference with seclusion); see, also, New Summit Assoc. Ltd. Partnership v. Nistle (Md.App.1987), 73 Md.App. 351, 533 A.2d 1350, 1354 ("To establish an invasion of her privacy, appellee was not required to prove that a particular individual actually observed her while she used the facilities in her bathroom. The intentional act that exposed that private place intruded upon appellee's seclusion." Emphasis in original.)

\*4 Testing the sufficiency of appellant's complaint based upon the discussion above, appellant's complaint at paragraph 5, states:

Plaintiff, Sandra Geraci, brings this action on behalf of herself, and all other persons similarly situated, who changed their clothes or otherwise undressed in the bathroom of the home owned by the Conte defendants \*\*\* where a one-way peephole

mirror had been installed.

Paragraphs 13 through 16 then state that appellant and other potential class members were at the home of Walter Conte when he directed "all of them" to change clothes in the room where the peeping device was installed. Since the intrusion-upon-seclusion branch of the tort of invasion of privacy "does not depend upon any publicity given to the person whose interest is invaded," we find appellant's complaint to sufficiently allege a claim for invasion of privacy.

Accordingly, appellant's first assignment of error is well taken.

## II.

In her second assignment of error, appellant argues that, since the Board of Education is a political subdivision, it is subject to the immunities and liabilities established by R.C. 2744 *et seq.* For purposes of the statute, all acts of a political subdivision are classified as either governmental or proprietary functions. R.C. 2744.02(A)(1). Generally, governmental functions of a political subdivision are immune from liability while proprietary functions are not immune. It is appellant's position that, in this instance, the Board of Education was engaged in a proprietary function (i.e. an informal swimming party at the principal's private residence) the negligent performance of which subjects the Board to liability. R.C. 2744.02(B)(2).

In Neelon v. Conte (Nov. 13, 1997), Cuyahoga App. No. 72646, unreported, this court addressed the issue of whether the Board of Education was engaged in a governmental or proprietary function regarding its involvement, or lack thereof, in the swimming parties at the Conte residence. In Neelon, this court stated in pertinent part:

The dispute between the parties centers around whether the Board was engaged in a proprietary function or a governmental function at the time of the incident that resulted in Neelon's injury. A proprietary function is defined as "one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by a non-governmental person." R.C. 2744.01(G)(1)(b). Proprietary functions include the operation of a hospital, a public cemetery, a utility such as a light, gas, power, or heat plant, a railroad, busline or other transit company, an airport, and a municipal

corporation water supply system, a sewer system, a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

A governmental function is one that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement; a function that is for the common good of all citizens of the state; and a function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by non-governmental persons and is not specified as a proprietary function. R.C. 2744.01(C)(1)(a)-(c). Governmental functions include the provision of a system of public education and the maintenance and repair of public roads.

\*5 We conclude that, at the time of the incident which gave rise to Neelon's injuries, the Board was engaged in a governmental function—the provision of a system of public education.

The Board acknowledges that it was aware of the parties in Conte's home and that it allowed Board school buses to be used to transmit students to Conte's home. The party was an extracurricular activity conducted with the knowledge and cooperation of the Board.

*Id.* at 3, 4.

Based upon this court's ruling in *Neelon*, and after full consideration of all cases cited by the parties, this court finds that the Board of Education was a political subdivision engaged in a governmental function and, as such, immune from liability pursuant to R.C. 2744.01. See Hall v. Fort Frye Local School District Bd. of Ed. (1996), 111 Ohio App.3d 690, 676 N.E.2d 1241; Hackathorn v. Springfield Local School Dist. Bd. of Edn. (1994), 94 Ohio App.3d 319, 325, 640 N.E.2d 882.

Accordingly, appellant's second assignment of error is not well taken.

Judgment of the trial court is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

This cause is affirmed in part, reversed in part and remanded for further proceedings consistent with the opinion herein.

It is, therefore, considered that plaintiff-appellant Geraci pay two-thirds of the costs herein taxed and defendants-appellees Contes pay one-third of the costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, P.J., concurs.

#### CONCURRING AND DISSENTING OPINION

MICHAEL J. CORRIGAN, J., concurring in part and dissenting in part.

While I agree with the conclusion that appellee South Euclid-Lyndhurst School District is immune from liability for the acts alleged in appellant's complaint, I respectfully dissent from the majority opinion as it relates to the reinstatement of appellant's complaint for invasion of privacy against the Conte defendants.

It has been suggested that the trial court erred in dismissing appellant's complaint against Walter and Susan Conte pursuant to Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted. I disagree. The relevant portion of appellant's complaint states:

13. Plaintiff and the class members in this case are individuals (including minor children) who were at the home of defendant Walter Conte and invited to go swimming.<sup>FN2</sup>

<sup>FN2</sup>. It should be noted that, although pled as a class action, appellant's request for class certification was never ruled upon by the trial court.

14. Defendant Walter Conte required all of them to change clothes in a specific room of the house (hereinafter referred to as the "peeping room").

15. Without their knowledge or consent, defendant Walter Conte installed a peephole by use of a one-way mirror, to peep and spy on them while they were in the peeping room.

16. Additionally, and without their knowledge and consent, defendant Walter Conte installed a video camera which videotaped persons in the peeping room

in various states of undress.

\*6 The majority maintains that these allegations state a viable claim for invasion of privacy, recklessness and emotional distress against Walter and Susan Conte. This conclusion is based upon the premise that a plaintiff need not demonstrate that a particular individual utilized an alleged spying device, but that the mere installation of such a device is sufficient to constitute an invasion of privacy for purposes of surviving a motion to dismiss for failure to state a claim upon which relief can be granted. Four out-of-state cases are cited in support of this contention. See, Hamberger v. Eastman (N.H.1964), 106 N.H. 107, 206 A.2d 239, 242; Carter v. Innisfree Hotel, Inc. (Ala.1995), 661 So.2d 1174, 1179; Harkey v. Abate (Mich.App.1983), 131 Mich.App. 177, 346 N.W.2d 74, 76; New Summit Assoc. Ltd. Partnership v. Nistle (Md.App.1987), 73 Md.App. 351, 533 A.2d 1350, 1354.

However, these cases are distinguishable from the case at bar in that each cited case dealt with a plaintiff that personally discovered the spying apparatus in question and acted upon the discovery. In this case, the appellant does not allege that she ever discovered the hidden viewing device nor does she allege that the device was ever used to spy upon her. She merely alleges that, at some point in time, she used the Contes' bathroom where a hidden viewing device was eventually discovered by another individual on a later date. The appellant herein has pled her complaint in the third person, this is no accident. In essence, appellant asserts a vicarious claim for invasion of privacy against the Contes' through the experiences of other Brush High School students who were, in fact, spied upon in the manner alleged. If appellant's invasion of privacy claim is permitted to proceed under these circumstances, anyone who had ever been to the Conte residence during this time period and used the room in question could also pursue such a claim even where the elements of the tort of invasion of privacy had not been sufficiently pled.

In addition, appellant's complaint is completely devoid of any meaningful cause of action against Susan Conte. The mere fact that she resided in the same household as Walter Conte as his spouse does not, in the absence of some other contention, establish a cause of action against her sufficient to survive a Civ.R. 12(B)(6) motion to dismiss the underlying claims.

Accordingly, I would affirm the decision of the trial court in all respects.

Ohio App. 8 Dist., 1998.  
Geraci v. Conte  
Not Reported in N.E.2d, 1998 WL 323564 (Ohio App. 8 Dist.)

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Hubbard v. Canton City School Bd. of Edn.  
Ohio,2002.

Supreme Court of Ohio.  
HUBBARD et al., Appellants,  
v.  
CANTON CITY SCHOOL BOARD OF  
EDUCATION et al., Appellees.  
No. 2001-0904.

Submitted April 24, 2002.  
Decided Dec. 18, 2002.

Parents of middle school students brought complaint against city school board of education for damages in connection with alleged sexual assaults on students by teacher on school premises. On remand following a partial summary judgment in favor of board, board renewed motion for summary judgment on remaining claims for negligent retention/supervision and intentional infliction of emotional distress. The Court of Common Pleas, Stark County, granted motion, and parents appealed. The Court of Appeals affirmed, and discretionary appeal was allowed. The Supreme Court, Moyer, C.J., held that: (1) there are no exceptions under Political Subdivision Tort Liability Act to immunity for intentional torts of fraud and intentional infliction of emotional distress; (2) statutory exception to political-subdivision immunity applies to all cases where an injury resulting from negligence of an employee of political subdivision occurs within or on grounds of buildings that are used in connection with performance of a governmental function and is not confined to injury resulting from physical defects or negligent use of grounds or buildings; and (3) under that exception, board was not immune from liability on negligent supervision/retention claim.

Judgment of Court of Appeals affirmed in part and reversed in part, and cause remanded.

Lundberg Stratton, J., filed an opinion concurring in part and dissenting in part in which Resnick, J., joined.  
West Headnotes

[1] Appeal and Error 30 ↪ 78(1)

30 Appeal and Error  
30III Decisions Reviewable

30III(D) Finality of Determination

30k75 Final Judgments or Decrees

30k78 Nature and Scope of Decision

30k78(1) k. In General. Most Cited

Cases

City school board of education could not appeal from denial of motion for summary judgment, asserted on basis of political subdivision immunity, on negligent retention/supervision claim asserted by parents of middle school students in connection with alleged sexual assaults on students by a teacher on school premises; ruling was not a final appealable order. R.C. § 2501.02.

[2] Municipal Corporations 268 ↪ 723

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k723 k. Nature and Grounds of Liability.

Most Cited Cases

There are no exceptions under Political Subdivision Tort Liability Act to immunity for intentional torts of fraud and intentional infliction of emotional distress. R.C. § 2744.02(B).

[3] Municipal Corporations 268 ↪ 723

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k723 k. Nature and Grounds of Liability.

Most Cited Cases

Political Subdivision Tort Liability Act requires a three-tiered analysis to determine whether a political subdivision should be allocated immunity from civil liability: first, as general rule, political subdivisions are not liable in damages; second, court determines whether any of enumerated exceptions to immunity apply; third, if immunity does not apply, court determines whether political subdivision qualifies for any of the listed statutory defenses. R.C. §§ 2744.02, 2744.03.

[4] Statutes 361 ↪ 188

361 Statutes

361VI Construction and Operation  
361VI(A) General Rules of Construction  
361k187 Meaning of Language  
361k188 k. In General. Most Cited

Cases

Courts give words in a statute their plain and ordinary meaning unless legislative intent indicates a different meaning.

**[5] Municipal Corporations 268 ↪723.5**

268 Municipal Corporations  
268XII Torts  
268XII(A) Exercise of Governmental and Corporate Powers in General  
268k723.5 k. Constitutional and Statutory Provisions. Most Cited Cases  
In construing Political Subdivision Tort Liability Act, court is bound to apply the words of the law in effect at the time the alleged negligent acts occurred. R.C. § 2744.02.

**[6] Municipal Corporations 268 ↪747(1)**

268 Municipal Corporations  
268XII Torts  
268XII(B) Acts or Omissions of Officers or Agents  
268k747 Particular Officers and Official Acts  
268k747(1) k. In General. Most Cited

Cases

**Municipal Corporations 268 ↪848**

268 Municipal Corporations  
268XII Torts  
268XII(E) Condition or Use of Public Buildings and Other Property  
268k848 k. Buildings in General. Most Cited Cases

Statutory exception to political-subdivision immunity applies to all cases where an injury resulting from negligence of an employee of political subdivision occurs within or on grounds of buildings that are used in connection with performance of a governmental function and is not confined to injury resulting from physical defects or negligent use of grounds or buildings. R.C. § 2744.02(B)(4).

**[7] Schools 345 ↪89.2**

345 Schools  
345II Public Schools  
345II(F) District Liabilities  
345k89.2 k. Negligence in General. Most

Cited Cases

City school board of education was not immune under Political Subdivision Tort Liability Act from liability on negligent retention/supervision claim asserted by parent of middle school students in connection with alleged sexual assaults on those students by teacher on school premises, as claimed injuries were allegedly caused by negligence occurring on grounds of a building used in connection with a government function. R.C. § 2744.02(B)(4).

West Codenotes Recognized as Unconstitutional R.C. §§ 2305.131, 2305.27, 2307.42, 2307.43, 2309.01. Prior Version Recognized as Unconstitutional R.C. §§ 109.36, 163.17, 723.01, 901.52, 1343.03(C), 1701.95, 1707.01, 1707.432, 1707.433, 1707.434, 1707.435, 1707.436, 1707.437, 1707.438, 1775.14, 1901.041, 1901.17, 1901.18, 1901.181, 1901.20, 1901.262, 1905.032, 1907.262, 2101.163, 2117.06, 2125.01, 2125.02, 2125.04, 2151.542, 2303.202, 2305.01, 2305.011, 2305.012, 2305.10, 2305.11, 2305.113, 2305.16, 2305.25, 2305.251, 2305.252, 2305.35, 2305.37, 2305.38, 2305.381, 2305.382, 2307.31, 2307.32, 2307.33, 2307.331, 2307.48, 2307.60, 2307.61, 2307.71, 2307.72, 2307.73, 2307.75, 2307.78, 2307.791, 2307.792, 2307.80, 2307.801, 2315.01, 2315.18, 2315.19, 2315.20, 2315.21, 2317.45, 2317.46, 2317.62, 2323.51, 2323.54, 2323.59, 2501.02, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.04, 2744.05, 2744.06, 3113.219, 3701.19, 3722.08, 4112.02, 4112.14, 4112.99, 4113.52, 4171.10, 4399.18, 4507.07, 4513.263, 4582.27, 4909.42, 5111.81, 5591.36, 5591.37.

**\*451\*\*544 SYLLABUS OF THE COURT**

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

\*456 Edward L. Gilbert, for appellants.  
Britton, McGown, Smith, Peters & Kalail Co., L.P.A.,  
Susan S. McGown, Matthew J. Markling and David  
A. Rose, Cleveland, for appellees.  
MOYER, C.J.

{¶ 1} Appellants, Regina Hubbard and Charlotte Davis ("plaintiffs"), appeal from the judgment of the Stark County Court of Appeals affirming the trial court's grant of summary judgment for appellees, Canton \*\*545 City School Board of Education and the Canton City Schools (collectively, "board").

{¶ 2} This action arises from a complaint seeking damages for the alleged sexual assault of plaintiffs' daughters by Milton Dave, a teacher at Hartford Middle School in the city of Canton. The alleged sexual assaults occurred on the \*452 premises of Hartford Middle School. The trial court granted summary judgment in favor of the board on all counts except negligent retention/supervision and intentional infliction of emotional distress.

[1] {¶ 3} Plaintiffs appealed, and the court of appeals affirmed the trial court's denial of summary judgment for plaintiffs on the negligent retention/supervision claim, but reversed the denial of summary judgment for plaintiffs on the claim of intentional infliction of emotional distress. The appeal to this court was dismissed as having been improvidently allowed for lack of a final appealable order,<sup>FN1</sup> the judgment of the court of appeals was vacated, and the cause was remanded to the trial court for determination of plaintiffs' remaining claims. *Hubbard v. Canton City School Bd. of Edn.* (2000), 88 Ohio St.3d 14, 722 N.E.2d 1025.

<sup>FN1</sup>. The case at bar was pending before this court when we ruled H.B. 350 unconstitutional in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062. One of the several results of our decision in *Sheward* was to strike down H.B. 350's amendment of R.C. 2501.02, allowing the appeal of any order denying a political subdivision "the benefit of an alleged immunity from liability as provided in [R.C.] Chapter 2744." 146 Ohio Laws, Part II, 3982. Thus the board was not able to appeal from the lower court's denial of its motion for summary judgment because the ruling was no longer a final appealable order. See *Stevens v. Ackman* (2001), 91 Ohio St.3d 182, 186, 743 N.E.2d 901 (denial of summary judgment not a final appealable order).

{¶ 4} Upon remand, the board renewed its motion for

summary judgment on the plaintiffs' claims for negligent retention/supervision and intentional infliction of emotional distress. The trial court sustained the board's motion for summary judgment, and plaintiffs again appealed.

{¶ 5} The court of appeals affirmed, stating that a strict reading of R.C. 2744.02(B)(4) would allow political subdivisions, such as school boards, to be sued for any negligence occurring in government buildings. The court held that such a broad exception does not comport with the overall statutory scheme and therefore the exception to immunity in R.C. 2744.02(B)(4) does not apply in this case and the board is immune from suit. The cause is now before this court upon the allowance of a discretionary appeal.

{¶ 6} The issue presented for review is whether that portion of R.C. 2744.02(B)(4) stating that "[p]olitical 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" should be limited to negligence in connection with physical defects within or on the grounds of governmental buildings.

{¶ 7} Plaintiffs' appeal derives from two separate causes of action. We will first address plaintiffs' claim of intentional infliction of emotional distress.

[2]\*453 {¶ 8} R.C. 2744.02(B)(5) states that in addition to the specific exceptions to immunity listed in (B)(1) to (4), liability may exist when it is "expressly imposed" by any section of the Revised Code. However, "[l]iability shall not be construed to exist \* \* \* 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." This court has reviewed R.C. 2744.02(B)(5)\*\*546 in the context of intentional torts and concluded that "[t]here are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress \* \* \*." *Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450, 452, 639 N.E.2d 105. For this reason we affirm the grant of summary judgment to the board on plaintiffs' claim of intentional infliction of emotional distress.

{¶ 9} Plaintiffs' remaining claim alleged that the board was negligent in supervising and retaining Milton Dave. R.C. 2744.02(B) provides for the elimination of immunity from suit for injury caused by the negligence of political-subdivision employees in certain circumstances. R.C. 2744.02(B)(4) is applicable to the case at bar because the alleged sexual assault occurred in a school building-i.e., a building used in connection with a government function-and (B)(4) specifically addresses negligent conduct within or on the grounds of such a building.

[3] {¶ 10} 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. Cater v. Cleveland (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610. This court has observed that the general rule, stated in R.C. 2744.02(A)(1), is that "political subdivisions are not liable in damages." Greene Cty. Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 556-557, 733 N.E.2d 1141.

{¶ 11} It is undisputed that the board meets the first step of the analysis and qualifies for general immunity because 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.

{¶ 12} We must next determine whether any of the exceptions to immunity listed in R.C. 2744.02(B) apply. Cater, 83 Ohio St.3d at 28, 697 N.E.2d 610. It is this second tier of analysis that is implicated in the case at bar.

[4] {¶ 13} R.C. 2744.02(B)(4) 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." Plaintiffs urge us to give a plain reading to R.C. 2744.02(B)(4). Courts give words in a statute their plain and ordinary meaning unless legislative intent indicates a different meaning. Coventry Towers, Inc. v. Strongsville (1985), 18 Ohio St.3d 120, 122, 18 OBR 151, 480 N.E.2d 412. The \*454 plain language of the subsection supports the conclusion that the General Assembly intended to permit political subdivisions to be sued in all cases where injury results from the negligence of their employees occurring within or on the grounds of any government building.

{¶ 14} This court has stated that where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom. Bernardini v. Conneaut Area City School Dist. Bd. of Edn. (1979), 58 Ohio St.2d 1, 4, 12 O.O.3d 1, 387 N.E.2d 1222; Wheeling Steel Corp. v. Porterfield (1970), 24 Ohio St.2d 24, 28, 53 O.O.2d 13, 263 N.E.2d 249; Dougherty v. Torrence (1982), 2 Ohio St.3d 69, 70, 2 OBR 625, 442 N.E.2d 1295; Spartan Chem. Co., Inc. v. Tracy (1995), 72 Ohio St.3d 200, 202, 648 N.E.2d 819. Based upon these rules of statutory construction, we refuse to recast the language of R.C. 2744.02(B)(4) so that the subsection may accommodate some unstated meaning or purpose.

{¶ 15} The board argues that there is evidence that R.C. 2744.02(B)(4) was not \*\*547 intended to have the effect of applying to all negligent acts occurring within or on the grounds of government buildings. In support of this proposition, the board cites two recent attempts in the General Assembly to change the application of the subsection.

{¶ 16} In Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 3867, new language was inserted in R.C. 2744.02(B)(4) changing the subsection to read, "[P]olitical 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, and is due to physical defects within or on the grounds of buildings that are used in connection with the performance of a governmental function." (Emphasis added to indicate new language.) 146 Ohio Laws, Part II, 3988. However, a majority of this court declared H.B. 350 to be unconstitutional and therefore the change to R.C. 2744.02(B)(4) never went into effect. State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062. The new "physical defects" language appears again in Am.Sub.H.B. No. 215, passed shortly after H.B. 350. 147 Ohio Laws, Part I, 909, 1150. However, the H.B. 215 version of R.C. 2744.02(B)(4) was also invalidated by this court. Stevens v. Ackman, 91 Ohio St.3d 182, 743 N.E.2d 901.

[5] {¶ 17} We acknowledge that the General Assembly has attempted to change the language of R.C. 2744.02(B)(4). We are bound to apply the words of the law in effect at the time the alleged negligent

acts occurred. The board urges us to add words to R.C. 2744.02(B)(4). We decline to rewrite the subsection to produce a different result than the words of the statute require.

{¶ 18} 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 \*455 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. The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings. Since the injuries claimed by 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.

{¶ 19} We reverse the judgment of the court of appeals on the claim of negligent supervision and retention with instructions that it remand the case to the trial court for the purpose of applying the third tier of analysis necessitated by R.C. Chapter 2744, which requires a determination of whether the board qualifies for any of the statutory defenses listed in R.C. 2744.03.

{¶ 20} For the foregoing reasons, the judgment of the court of appeals is affirmed in part and reversed in part, and the cause is remanded.

Judgment accordingly.

DOUGLAS, FRANCIS E. SWEENEY, SR., PFEIFER and COOK, JJ., concur.

RESNICK and LUNDBERG STRATTON, JJ., concur in part and dissent in part. LUNDBERG STRATTON, J., concurring in part and dissenting in part.

{¶ 21} I concur with the majority's affirmance of summary judgment on the claim of intentional infliction of emotional distress. However, I respectfully dissent from its interpretation of the exception to immunity in R.C. 2744.02(B)(4). Without the requirement that the negligence must arise out of a physical defect or negligent use of the grounds or buildings, a political \*\*548 subdivision now may be liable for any negligent act of an employee that occurs within or on the grounds of its buildings. Such a literal interpretation effectively

obliterates the doctrine of sovereign immunity. It creates a situation where a political subdivision is immune from liability for negligent acts that are committed away from governmental buildings, whereas there is no immunity for negligence that occurs within or on the grounds of the buildings. I do not believe that the General Assembly intended such a contradictory result.

{¶ 22} Instead, I believe that the majority of appellate courts has correctly interpreted subsection (B)(4) as a premises-liability exception to sovereign immunity. See Steward v. Columbus (Sept. 10, 1998), Franklin App. No. 97APG12-1567, 1998 WL 598433; Kaderly v. Blumer (Oct. 15, 1996), Stark App. No. 1996CA00022, 1996 WL 608480.

{¶ 23} I believe that the majority's interpretation of R.C. 2744.02(B)(4) is inconsistent with the other provisions in the statute, as explained by various appellate courts. "When R.C. 2744.02(B)(4) and R.C. 2744.03(A)(5) are read in concert, it becomes apparent that, in regard to governmental buildings or facilities, the intent of the General Assembly was that a political subdivision can only be held liable for damages stemming from *negligent maintenance*." (Emphasis sic.) Vance v. Jefferson Area Local School Dist. Bd. of Edn. (Nov. 9, 1995), Ashtabula App. No. 94-A-0041, 1995 WL 804523. "For example, R.C. 2744.02(B)(2) states that political subdivisions are liable for damages caused '\* \* \* by the negligent performance of acts by their employees with respect to proprietary functions \* \* \*.' If appellants' interpretation of (B)(4) was correct, then there would be no need for (B)(2). Any acts which would fall under (B)(2) would also fall under (B)(4)." Zellman v. Kenston Bd. of Edn. (1991), 71 Ohio App.3d 287, 291, 593 N.E.2d 392.

{¶ 24} The majority ignores a cardinal rule of statutory construction: courts must strive to avoid absurd or unreasonable results. Mishr v. Poland Bd. of Zoning Appeals (1996), 76 Ohio St.3d 238, 240, 667 N.E.2d 365. The majority's interpretation grants immunity and removes it in the same stroke of a pen. Therefore, while I concur that summary judgment on the claim of intentional infliction of emotional distress was proper, I must respectfully dissent from the reversal of the judgment on the claim of negligent supervision and retention.

RESNICK, J., concurs in the foregoing opinion. Ohio, 2002.

780 N.E.2d 543

97 Ohio St.3d 451, 780 N.E.2d 543, 172 Ed. Law Rep. 442, 2002 -Ohio- 6718  
(Cite as: 97 Ohio St.3d 451, 780 N.E.2d 543)

Hubbard v. Canton City School Bd. of Edn.  
97 Ohio St.3d 451, 780 N.E.2d 543, 172 Ed. Law Rep.  
442, 2002 -Ohio- 6718

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Keller v. Foster Wheel Energy Corp.  
 Ohio App. 10 Dist.,2005.

Court of Appeals of Ohio, Tenth District, Franklin  
 County.  
 KELLER et al., Appellants,  
 v.  
 FOSTER WHEEL ENERGY CORP. et al., Appellees.  
 No. 04AP-951.

Decided Sept. 15, 2005.

**Background:** Firefighter brought action against city and others for damages arising from death of his wife from asbestos related causes. The Court of Common Pleas, Franklin County, No. 03CVB05-5357, dismissed action. Firefighter appealed.

**Holding:** The Court of Appeals, Klatt, J., held that injury occurred at wife's home, not on public grounds, and therefore exception to city's sovereign immunity did not arise.

Affirmed.

West Headnotes

**[1] Municipal Corporations 268 ↪ 847**

**268 Municipal Corporations**

**268XII Torts**

**268XII(E) Condition or Use of Public Buildings and Other Property**

**268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases**  
 Injury to firefighter's wife, allegedly caused by exposure to asbestos particles brought home on firefighter's work clothes, occurred in her home and not on public grounds, so exception to city's sovereign immunity did not arise to permit damages claim, even though the alleged negligence itself occurred on public grounds, namely, in the asbestos contaminated firehouses in which firefighter worked. R.C. § 2744.02(B)(4).

**[2] Husband and Wife 205 ↪ 209(3)**

**205 Husband and Wife**

**205VI Actions**

**205k206 Rights of Action by Husband or Wife or Both**

**205k209 For Torts**

**205k209(3) k. Personal Injuries to Wife Resulting in Loss of Services or Consortium, Impairment of Earning Capacity, or Expenses. Most Cited Cases**

Firefighter's loss of consortium claim, arising from death of wife after exposure to asbestos brought home on firefighter's clothes over long period of time, was a derivative claim dependent upon the existence of his primary claim against city, which failed on grounds of sovereign immunity, and therefore the consortium claim failed with it.

**[3] Appeal and Error 30 ↪ 767(1)**

**30 Appeal and Error**

**30XII Briefs**

**30k767 Striking Out**

**30k767(1) k. In General. Most Cited Cases**

Article from public health journal, attached to appellate reply brief of firefighter who sued city and others for alleged negligence resulting in exposure of his wife to asbestos, would be stricken, as it was not a part of the trial court's original record.

**\*\*860 Young, Reverman & Mazzei Co., L.P.A., Richard E. Reverman, Cincinnati, and Kelly W. Thye, for appellants.**

**Richard C. Pfeiffer Jr., Columbus City Attorney, and David E. Peterson, and Jeffrey S. Furbee, Assistant City Attorneys, for appellees.**

**KLATT, Judge.**

**\*326 {¶ 1} Plaintiff-appellant, Jerome Keller, on behalf of himself and the estate of Merelle Keller, appeals the judgment of the Franklin County Court of Common Pleas that dismissed his action against defendant-appellee, the city of Columbus. For the following reasons, we affirm.**

**{¶ 2} From 1966 to 2000, the city employed appellant as a firefighter. While he was a firefighter, appellant worked directly with and nearby products containing asbestos. Allegedly, asbestos fibers from these products adhered to appellant's work clothing. When appellant wore that clothing home, he exposed**

Merelle, his wife, to asbestos. Appellant claims that due to this exposure, Merelle contracted an asbestos-related lung cancer, which caused protracted illness and, ultimately, Merelle's death.

{¶ 3} On May 12, 2003, appellant brought suit against a number of manufacturers of asbestos-containing products, as well as the city and another of his previous employers. In this complaint, appellant alleged that the city was negligent because it knew or should have known that the asbestos used in the firehouses in which appellant worked was hazardous to appellant and his wife, but nevertheless failed to warn them of the hazard and continued to expose them to asbestos. Appellant claimed that as a result of the city's negligence, his wife fell ill and died, and, thus, her estate is entitled to damages for her medical bills, lost earning capacity and wages, mental and physical pain, and death. Additionally, appellant alleged that through the city's wrongful actions, he lost the services, companionship, society, and relationship of his wife, and, thus, he is due damages for loss of consortium.

{¶ 4} On July 22, 2003, the city filed a Civ.R. 12(B)(6) motion to dismiss, in which it asserted its immunity as a political subdivision. In response to the city's motion, appellant argued that the city was liable because former R.C. 2744.02(B)(4), one of the five exceptions to sovereign immunity, applied to his claims. The trial court disagreed with appellant's argument, finding in its decision that the city was immune under R.C. 2744.02(A) and that none of the R.C. 2744.02(B) exceptions vitiated this immunity.

{¶ 5} On March 12, 2004, the trial court issued a judgment entry dismissing appellant's claims against the city. On August 24, 2004, the trial court deemed its \*327 earlier entry a final judgment because there was no just cause for delay. Appellant then appealed to this court.

\*\*861[1] {¶ 6} On appeal, appellant assigns the following errors:

[1.] The trial court erred when it dismissed Plaintiffs-Appellant's complaint on the grounds that Defendant-Appellee was immune from suit pursuant to R.C. § 2744.02(A)(1), especially in light of the Court of Appeals decision in Frederick v. Vinton Cty. Bd. of Edu., (Feb. 5, 2004), Vinton App. No. 03CA579, unreported (2004 WL 232129).

[2.] The trial court failed to address Plaintiffs-Appellants' claim for loss of consortium

against the City.

{¶ 7} By his first assignment of error, appellant argues that the trial court erred in granting the city's motion to dismiss because sovereign immunity does not bar his claims against the city. We disagree.

{¶ 8} Appellate review of a judgment granting a Civ.R. 12(B)(6) motion to dismiss is de novo. Perrysburg Twp. v. Rossford, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶ 5. When reviewing such a judgment, an appellate court must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. Maitland v. Ford Motor Co., 103 Ohio St.3d 463, 2004-Ohio-5717, 816 N.E.2d 1061, at ¶ 11. For a defendant to prevail on a Civ.R. 12(B)(6) motion, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. Cincinnati v. Beretta U.S.A. Corp., 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, at ¶ 5; Desenco, Inc. v. Akron (1999), 84 Ohio St.3d 535, 538, 706 N.E.2d 323, quoting Vail v. Plain Dealer Publishing Co. (1995), 72 Ohio St.3d 279, 280, 649 N.E.2d 182.

{¶ 9} The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, requires courts to employ a three-tiered analysis to determine whether a political subdivision is immune from liability for tort claims. Colbert v. Cleveland, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, at ¶ 7; Cater v. Cleveland (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610. First, pursuant to R.C. 2744.02(A)(1), a court must initially find political subdivisions immune from liability incurred in performing either a governmental or proprietary function. Id. However, the immunity afforded by R.C. 2744.02(A)(1) is not absolute, but rather, it is subject to the five exceptions contained in R.C. 2744.02(B). Id. Accordingly, the second tier of the analysis requires a court to determine whether any of these exceptions apply. Colbert, supra, at ¶ 8; Cater, supra, 83 Ohio St.3d at 28, 697 N.E.2d 610. If the court answers affirmatively, then it must move to the third tier: determining whether any of the R.C. 2744.03 defenses against \*328 liability require the court to reinstate immunity. Colbert, supra, at ¶ 9; Cater, supra, 83 Ohio St.3d at 28, 697 N.E.2d 610.

{¶ 10} In the case at bar, appellant does not dispute that the trial court properly negotiated the first tier of the analysis. The trial court found that when the city allegedly incurred liability for appellant's

damages, it was performing a governmental function, i.e., providing fire services. R.C. 2744.01(C)(2)(a) ("A 'governmental function' includes, but is not limited to, \* \* \* [t]he provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection."). Therefore, the trial court held, and we agree, that the city is immune from appellant's tort claims under R.C. 2744.02(A)(1).

{¶ 11} Appellant, however, argues that the trial court erred in not stripping this immunity from the city pursuant to former R.C. 2744.02(B)(4),<sup>FNI</sup> which states:

FNI R.C. 2744.02(B)(4) was amended by Am.Sub.S.B. No. 106, effective April 9, 2003, to also include the requirement that the "injury, death, or loss" be "due to physical defects within or on the grounds of \* \* \* buildings that are used in connection with the performance of a governmental function." Appellant, however, bases his arguments upon the previous version of R.C. 2744.02(B)(4), which apparently was in effect when his cause of action accrued. Accordingly, this opinion, too, construes the previous version of R.C. 2744.02(B)(4). Sub.S.B. No. 108, 149 Ohio Laws, Part I, 382, 462.

\*\*862 [P]olitical 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 \* \* \*.

Sub.S.B. No. 108, 149 Ohio Laws, Part I, 382, 462. Appellant maintains that this provision applies when a political subdivision's negligent act or omission occurs on public grounds. Because the city's alleged negligence-exposing appellant to asbestos-occurred in a city firehouse, appellant asserts that former R.C. 2744.02(B)(4) prevents the city from asserting immunity. On the other hand, the city argues that a political subdivision is liable for its tortious conduct under former R.C. 2744.02(B)(4) only when a plaintiff's injury, not the political subdivision's negligence, occurs on public grounds. Because Merelle's injury occurred in her home, the city maintains that R.C. 2744.02(B)(4) does not apply here.

{¶ 12} The Supreme Court of Ohio construed

former R.C. 2744.02(B)(4) in Hubbard v. Canton City School Bd. of Edn., 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, in which the court considered whether the exception was confined to injury resulting from physical defects or negligent use of public grounds. In concluding that former R.C. 2744.02(B)(4) was not so confined, 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 \*329 governmental function." Id., syllabus. Thus, R.C. 2744.02(B)(4) requires that the injury, not the negligent act or omission, occur within or on public grounds. Sherwin Williams Co. v. Dayton Freight Lines, 161 Ohio App.3d 444, 2005-Ohio-2773, 830 N.E.2d 1208, at ¶ 25; Kennerly v. Montgomery Cty. Bd. of Comms., 158 Ohio App.3d 271, 2004-Ohio-4258, 814 N.E.2d 1252, at ¶ 20.

{¶ 13} Appellant, however, supports his reading of former R.C. 2744.02(B)(4) by relying upon the following sentence from the Hubbard decision:

The plain language of [R.C. 2744.02(B)(4)] supports the conclusion that the General Assembly intended to permit political subdivisions to be sued in all cases where injury results from the negligence of their employees occurring within or on the grounds of any government building.

Id. at ¶ 13. Although read alone this sentence indicates that the negligence must occur on public grounds, 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. Sherwin Williams Co., supra, at ¶ 32-33; Kennerly, supra, at ¶ 18-19.

{¶ 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.”

{¶ 15} Moreover, this conclusion is not altered by *Frederick v. Vinton Cty. Bd. of Edn.*, Vinton App. No. 03CA579, 2004-Ohio-550, 2004 WL 232129. In *Frederick*, the plaintiff asserted negligence claims against the county board of education \*330 and local school district after his daughter fell on her school playground and died. The defendants claimed that they were immune from liability based upon R.C. 2744.02(A)(1), requiring the court to conduct the three-tiered immunity analysis. In addressing the second tier, the court held, “Because [the plaintiff] alleged negligence by the School’s employees that occurred on the grounds of the School’s building, the R.C. 2744.02(B)(4) exception to immunity applies \* \* \*.”Id. at ¶ 34. Although the Fourth District Court of Appeals focused upon the location of the negligence, not the injury, in reaching its holding, we do not find the court’s reasoning dispositive here. As both the school’s negligence and the daughter’s injury occurred on school grounds, the court was not presented with and did not address the issue now before this court.

{¶ 16} Finally, we do not accept appellant’s invitation to “stretch” the language of former R.C. 2744.02(B)(4) so that it applies to his claim. When the language of a statute is clear and unambiguous, it is the duty of a court to enforce the statute as written, neither making additions to nor subtractions from the statutory language. *Hubbard*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 14. As we explained above, former R.C. 2744.02(B)(4) requires the injury to occur on public grounds, and we cannot ignore the language of the statute no matter how meritorious appellant’s negligence claim may be.

{¶ 17} In the case at bar, the complaint alleges that Merelle’s injury occurred in her home, not on public grounds. Accordingly, former R.C. 2744.02(B)(4) does not apply here, and we must overrule appellant’s first assignment of error.

[2] {¶ 18} By appellant’s second assignment of error, he argues that the trial court erred by not addressing his claim for loss of consortium.

{¶ 19} Appellant is correct that the trial court failed to specifically discuss appellant’s loss of consortium claim before granting the city’s motion to dismiss in its entirety. However, any error resulting from this failure is moot. Generally, a loss of consortium claim is a derivative claim dependent upon the existence of a primary claim, and it can be maintained only so \*\*864 long as the primary claim continues. *Martinez v. Yoho’s Fast Food Equip.*, Franklin App. No. 02AP-79, 2002-Ohio-6756, 2002 WL 31752047, at ¶ 27, quoting *Messmore v. Monarch Mach. Tool Co.* (1983), 11 Ohio App.3d 67, 68-69, 11 OBR 117, 463 N.E.2d 108. Because a derivative claim cannot afford greater relief than that relief permitted under a primary claim, a derivative claim fails when the primary claim fails. Id. Therefore, when the trial court dismissed appellant’s negligence claim, it necessarily had to dismiss his loss of consortium claim as well. Accordingly, we conclude that the trial court properly dismissed all appellant’s claims, and we overrule appellant’s second assignment of error.

\*331[3] {¶ 20} As a final matter, we must address the city’s “Motion to Strike and/or Disregard Portion of Plaintiff-Appellant’s Reply Brief.” In this motion, the city argues that we should strike and disregard all mention of a 1985 article from the American Journal of Public Health that appellant attached to his reply brief. Appellant responds that the article rebuts the city’s contention that his negligence claim is baseless.

{¶ 21} Appellate courts cannot consider any evidence that was not properly certified as part of the trial court’s original record. *In re Estate of Taris*, Franklin App. No. 04AP-1264, 2005-Ohio-1516, 2005 WL 736627, at ¶ 24. Here, the trial court’s record does not include the disputed article. Therefore, we strike the article from our record and forego consideration of all portions of the reply brief discussing the article.

{¶ 22} For the foregoing reasons, we overrule appellant's first and second assignments of error and affirm the judgment of the Franklin County Court of Common Pleas. Further, we grant the city's motion to strike.

Judgment affirmed.

PEGGY L. BRYANT and BOWMAN, JJ., concur.  
BOWMAN, J., retired, of the Tenth District Court of Appeals, sitting by assignment.  
Ohio App. 10 Dist., 2005.  
Keller v. Foster Wheel Energy Corp.  
163 Ohio App.3d 325, 837 N.E.2d 859, 2005 -Ohio- 4821

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Sherwin-Williams Co. v. Dayton Freight Lines, Inc.  
 Ohio,2006.

Supreme Court of Ohio.  
 SHERWIN-WILLIAMS COMPANY et al.  
 v.  
 DAYTON FREIGHT LINES, INC. et al., Appellees;  
 Village of Lewisburg, Appellant.  
 Nos. 2005-1194, 2005-1247.

Submitted April 26, 2006.  
 Decided Dec. 27, 2006.

**Background:** Motorists involved in multiple-vehicle accident on interstate highway brought action against village, alleging smoke from village employees' burning of lumber waste within village had caused blackout-like conditions on highway outside of village. The Court of Common Pleas, Montgomery County, No. 20651, granted summary judgment to village, based on immunity. Plaintiffs appealed. The Court of Appeals, Wolff, J., 161 Ohio App.3d 444, 2005-Ohio-2773, 830 N.E.2d 1208, affirmed in part and reversed in part, and certified conflict.

**Holding:** Upon determination that conflict existed and acceptance of village's discretionary appeal, the Supreme Court, Pfeifer, J., held that under former statute providing exception to general immunity from civil liability granted to political subdivisions, a political subdivision may be 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, abrogating Kareth v. Toyota Motor Sales, 1998 WL 667845.

Judgment of Court of Appeals affirmed.

Lundberg Stratton, J., dissented and filed opinion.

West Headnotes

**[1] Municipal Corporations 268**  736

**268** Municipal Corporations

**268XII** Torts

**268XII(A)** Exercise of Governmental and Corporate Powers in General

**268k736 k.** Nuisances. **Most Cited Cases**

Under former statute providing exception to general immunity from civil liability granted to political subdivisions, a political subdivision may be 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; abrogating Kareth v. Toyota Motor Sales, 1998 WL 667845, R.C. § 2744.02(B)(3).

**[2] Statutes 361**  190

**361** Statutes

**361VI** Construction and Operation

**361VI(A)** General Rules of Construction

**361k187** Meaning of Language

**361k190 k.** Existence of Ambiguity.

**Most Cited Cases**

Court's first duty in interpreting a statute is to determine whether it is clear and unambiguous.

**[3] Statutes 361**  190

**361** Statutes

**361VI** Construction and Operation

**361VI(A)** General Rules of Construction

**361k187** Meaning of Language

**361k190 k.** Existence of Ambiguity.

**Most Cited Cases**

If a statute is ambiguous, court must interpret the statute to determine the General Assembly's intent.

**[4] Statutes 361**  190

**361** Statutes

**361VI** Construction and Operation

**361VI(A)** General Rules of Construction

**361k187** Meaning of Language

**361k190 k.** Existence of Ambiguity.

**Most Cited Cases**

If a statute is not ambiguous, court need not interpret it; court must simply apply it.

West Codenotes

Prior Version Recognized as Unconstitutional R.C. § 2744.02.

**\*\*324** Breidenbach, O'Neal & Bacon, Robert M. O'Neal, and Steven E. Bacon, for appellee Dayton Freight Lines.

Dyer, Garofalo, Mann & Schultz and Robert A. Burke, for appellees Ronald E. Tracy Jr. and Candace Tracy. Freund, Freeze & Arnold and Patrick J. Janis, Dayton, for appellees Gainey Transportation Services, Inc., Gainey Insurance **\*\*325** Services, Inc., Richard D. Estes, and Heidi Boyd.

Richard M. Hunt Co., L.P.A., Richard M. Hunt, Dayton, and Kevin M. Hunt, for appellees Richard D. Estes and Heidi Boyd.

James W. Gustin & Associates Co., L.P.A., and James W. Gustin, Cincinnati, for appellant PFEIFER, J.

#### **\*52** Factual and Procedural Background

{¶ 1} On the evening of February 7, 2000, a multiple-vehicle accident occurred on Interstate 70 near the Lewisburg exit. Appellees are 19 individuals or entities involved in litigation relating to the accident. Those involved in the accident claimed that a mixture of fog and smoke had created visibility problems that night. Whence came the smoke? Appellees claim that it came from the property of appellant, the village of Lewisburg.

{¶ 2} Earlier on the day of the accident, in an area behind the village's water plant, Lewisburg employees were burning scrap lumber, tree limbs, and discarded Christmas trees. The burn piles were located approximately 2,000 feet north of Interstate 70. Around 3:30 that afternoon, Lewisburg employees covered the burn piles with dirt and left the area. At 10:51 that evening, the Preble County Sheriff's Office received a complaint about smoke in the location of the earlier burning. Firefighters responding to the scene found four or five piles of smoldering brush. One firefighter testified that smoke from the piles hung close to the ground and moved south toward the interstate.

{¶ 3} Whether the smoke wound its way toward I-70 and combined with fog to create conditions that caused the accident is not before us today. Appellees did assert that the smoke contributed to the accident and brought claims against the village, but the Montgomery County Court of Common Pleas (in which eight separate claims were consolidated) concluded by summary judgment that Lewisburg **\*53** was immune from liability pursuant to the version of

R.C. 2744.02 in effect at the time of the accident, Am.Sub.S.B. No. 221, 145 Ohio Laws, Part II, 2211, 2215 ("S.B. 221"). Although former R.C. 2744.02 was amended twice after S.B. 221 was enacted and before the date of the accident, both of those amendments were held to be invalid by this court. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062; *Stevens v. Ackman* (2001), 91 Ohio St.3d 182, 743 N.E.2d 901.

{¶ 4} The trial court found that Lewisburg's actions fell under the general immunity from civil liability granted to political subdivisions in former R.C. 2744.02(A)(1) and further found that none of the exceptions to immunity contained in former R.C. 2744.02(B) operated to except Lewisburg from that general immunity.

{¶ 5} The Montgomery County Court of Appeals reversed the trial court. The appellate court held that the exception to sovereign immunity contained in former R.C. 2744.02(B)(3), which made political subdivisions liable for injuries "caused by their failure to keep \* \* \* public grounds within the political subdivision \* \* \* free from nuisance," applied. The trial court had held that since the accidents did not occur on village property, former R.C. 2744.02(B)(3) did not apply.

{¶ 6} The appellate court certified that its decision conflicted with the decision in *Kareth v. Toyota Motor Sales* (Sept. 28, 1998), Clermont App. No. CA 98-01-011, 1998 WL 667845. This court granted jurisdiction by accepting a discretionary appeal and by certifying that a conflict over the following question exists:

**\*\*326** {¶ 7} "Under the former R.C. 2744.02(B)(3), is a political subdivision liable for injury, death, or loss resulting from a nuisance that exists on public grounds within the political subdivision where the injury, death, or loss caused thereby occurs outside the political subdivision?" 106 Ohio St.3d 1502, 2005-Ohio-4605, 833 N.E.2d 1245.

#### Law and Analysis

[1] {¶ 8} Former R.C. 2744.02(A)(1) provided immunity to political subdivisions from civil liability for injuries or losses it or its employees caused. Former R.C. 2744.02(B) provided exceptions to that statutorily granted immunity. This case deals with the

exception set forth in former R.C. 2744.02(B)(3), which stated:

{¶ 9} “[P]olitical subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep \* \* \* public grounds within the political subdivision open, in repair, and free from nuisance.” S.B. 221, 145 Ohio Laws, Part II, at 2216.

{¶ 10} To answer the certified question before us, we must assume that Lewisburg’s burning of refuse on its property did create a nuisance that did contribute to the accident of February 7, 2000. No one disputes the fact that the \*54 accident did not occur on village property. We must determine whether the fact that the injuries and losses associated with the accident were not suffered on Lewisburg’s property renders the former R.C. 2744.02(B)(3) exception to immunity inapplicable.

{¶ 11} We dealt with a similar issue of statutory interpretation regarding an R.C. 2744.02(B) immunity exception in Hubbard v. Canton City School Bd. of Edn., 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543. In Hubbard, plaintiffs alleged that the Canton City School Board of Education had been negligent in supervising and retaining a teacher who had allegedly sexually assaulted their daughters inside a city school. The plaintiffs argued that former R.C. 2744.02(B)(4) created an exception from immunity for the board. That statute provided:

{¶ 12} “[P]olitical 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.” S.B. 221, 145 Ohio Laws, Part II, at 2216.

{¶ 13} The board asserted that former R.C. 2744.02(B)(4) was limited to claims arising from negligence related to physical defects within or on the grounds of governmental buildings.

{¶ 14} The court applied in Hubbard our long-standing rule concerning statutory interpretation that “where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.” Hubbard, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 14. In

interpreting the statute, this court held that “[t]he plain language of the subsection supports the conclusion that the General Assembly intended to permit political subdivisions to be sued in all cases where injury results from the negligence of their employees occurring within or on the grounds of any government building.” Id. at ¶ 13. This court concluded that “[t]he exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings.” Id. at ¶ 18.

[2][3][4] {¶ 15} As was true in Hubbard, our first duty in interpreting former R.C. 2744.02(B)(3) is to determine whether it is clear and unambiguous. “If it is ambiguous, we must then interpret the statute to determine the General Assembly’s intent. \*\*327 If it is not ambiguous, then we need not interpret it; we must simply apply it.” State v. Hairston, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 13.

{¶ 16} In short, former R.C. 2744.02(B)(3) provided that “[p]olitical subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep \* \* \* public grounds within the political subdivisions \* \* \* free from \*55 nuisance.” Immunity is lost, according to the plain language of the statute, when a political subdivision fails to keep its public grounds free from nuisance and an injury results from that failure. 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. There is only a requirement that the *nuisance* arise on public property. Former R.C. 2744.02(B)(3) is not ambiguous; to interpret it as Lewisburg urges would require this court to add language to the statute.

{¶ 17} 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).

{¶ 18} The court of appeals decision in this case conflicts with the decision of the court in Kareth, Clermont App. No. CA98-01-011, 1998 WL 667845.

*Kareth* concerned an accident that occurred near the intersection of State Route 133 and Twin Bridges Road, a county road in Clermont County. The plaintiff alleged that as a result of the county's failure to keep Twin Bridges Road free from nuisance, surface water drained onto or across State Route 133, creating a hazardous condition that caused the accident. The plaintiff argued that even though the accident had occurred on state property, the county was responsible for the nuisance that caused the accident.

{¶ 19} *Kareth* states, "The Supreme Court of Ohio has 'refused to extend a political subdivision's liability to areas outside its territorial limits' reasoning that the political subdivision lacks possession and control of such areas. *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, 133, 652 N.E.2d 702, citing *Ruwe v. Bd. of Springfield Twp. Trustees* (1987), 29 Ohio St.3d 59, 29 OBR 441, 505 N.E.2d 957; *Mitchell v. Cleveland Elec. Illum. Co.* (1987), 30 Ohio St.3d 92, 30 OBR 295, 507 N.E.2d 352."

{¶ 20} *Kareth* mischaracterizes this court's earlier holdings. In *Simpson*, the plaintiff sued Big Bear for injuries she suffered when she was attacked in a parking lot adjacent to a Big Bear store; the lot was not owned by or under the control of Big Bear. *Simpson* in no way involved sovereign immunity, but this court cited sovereign-immunity cases in *Simpson* to illustrate the requirement of an owner's possession and control of the property in premises-liability cases.

{¶ 21} In both *Ruwe*, 29 Ohio St.3d 59, 29 OBR 441, 505 N.E.2d 957, and *Mitchell*, 30 Ohio St.3d 92, 30 OBR 295, 507 N.E.2d 352 (both of which arose from accidents that occurred prior to the enactment of R.C. Chapter 2744) the \*56 nuisances arose outside of the political subdivision and were not caused by employees of the political subdivision. In *Ruwe*, an accident occurred when a muffler lying in the roadway was catapulted by one car into the windshield of another car. Evidence established\*\*328 that the muffler had been in or near the roadway in Wyoming, Ohio, for less than 90 minutes. However, the muffler had lain in the roadway just outside the corporation limits of Wyoming for at least 24 hours. The plaintiffs sought to charge the city with constructive notice of the presence of the muffler for the time that it was close to but not within the city limits. This court recognized that municipal corporations must keep public highways and streets *within* their municipality free from nuisance, but "refuse[d] to place the additional burden of inspecting and maintaining the

highways and streets of neighboring jurisdictions on a municipality," *Ruwe*, 29 Ohio St.3d at 61, 29 OBR 441, 505 N.E.2d 957. This court held that the city was not liable, because there was no evidence that the city had created the nuisance or had notice of it. *Id.* at 60, 29 OBR 441, 505 N.E.2d 957.

{¶ 22} Likewise, in *Mitchell*, the nuisance at issue was not created by the city or on city-owned property. In *Mitchell*, a father and son drowned while fishing in Lake Erie, 100 feet outside the city of Avon Lake. They had entered the lake at Miller Road Park, a city park. It was alleged that the Mitchells' drowning resulted from an undertow caused by the release of heated water from an electric-generating plant that was located within Avon Lake. The plant was not municipally owned. The plaintiff alleged that Avon Lake was negligent because it was aware of the dangerous nature of the undertow but failed to erect fences, post warning signs, or take other measures in the park to inform persons of an alleged nuisance outside the park. This court refused to impose a duty "requiring a municipality to protect individuals from or warn them of dangers existing on property which is beyond its corporate limits or control." *Mitchell*, 30 Ohio St.3d at 95, 30 OBR 295, 507 N.E.2d 352.

{¶ 23} Thus, although it is true that this court in *Ruwe* and *Mitchell* declined to impose liability on political subdivisions for nuisances over which they had no control, this case is different. The property where the nuisance arose was under the control of Lewisburg. And Lewisburg employees allegedly caused the nuisance. Former R.C. 2744.02(B)(3) created an immunity exception for instances in which injury or loss was caused by a nuisance arising on public grounds; neither the language of former R.C. 2744.02(B)(3) nor our previous case law requires that the injury or loss also be suffered on public grounds in order for a political subdivision to be liable for damages.

{¶ 24} We thus answer in the affirmative the certified question "Under the former R.C. 2744.02(B)(3), is a political subdivision liable for injury, death, or loss resulting from a nuisance that exists on public grounds within the political \*57 subdivision where the injury, death, or loss caused thereby occurs outside the political subdivision?" Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., RESNICK, O'CONNOR, O'DONNELL and LANZINGER, JJ., concur.  
LUNDBERG STRATTON, J., dissents.  
LUNDBERG STRATTON, J., dissenting.

{¶ 25} In my view, the village's liability for a nuisance within the political subdivision does not extend beyond the geographic limits of the political subdivision. Accordingly, for the reasons that follow, I dissent.

{¶ 26} In this case, appellees assert that smoke from a smoldering fire on the property of the village blew over an interstate \*\*329 outside of the village, combined with fog, and resulted in multiple car accidents. The majority holds that under former R.C. 2744.02(B)(3), a political subdivision is 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 thereby occurs outside the political subdivision.

{¶ 27} In my view, the focus of the analysis should be on whether the village had possession and control over the area where the accidents occurred, not whether the village had possession or control over the area where the nuisance originated. Because the accidents occurred in an area not under the possession or control of the village, I would reverse the judgment of the court of appeals and find that the village was immune from liability.

{¶ 28} In Simpson v. Big Bear Stores Co. (1995), 73 Ohio St.3d 130, 652 N.E.2d 702, a grocery store customer was physically attacked after she left the grocery, which was located in a shopping center. The customer sued the grocery store, and this court refused to extend liability to premises not in the possession and control of the business owner. I see no distinction between that case and the case at bar.

{¶ 29} In Simpson, this court held that "[i]t is fundamental that to have a duty to keep premises safe for others one must be in possession and control of the premises." Id. at 132, 652 N.E.2d 702, citing Wills v. Frank Hoover Supply (1986), 26 Ohio St.3d 186, 26 OBR 160, 497 N.E.2d 1118.

{¶ 30} With regard to requiring control over the premises of the injury, this court noted: "The element of control has its origin at common law. McKinney v. Hartz & Restle Realtors, Inc. (1987), 31 Ohio St.3d

244, 31 OBR 449, 510 N.E.2d 386. This element has been continually reiterated in our decisions and is \*58 incorporated into the Restatement position. \* \* \* Under similar circumstances we have refused to extend a political subdivision's liability to areas outside its territorial limits, applying this same reasoning. See Ruwe v. Bd. of Springfield Twp. Trustees (1987), 29 Ohio St.3d 59, 29 OBR 441, 505 N.E.2d 957; Mitchell v. Cleveland Elec. Illum. Co. (1987), 30 Ohio St.3d 92, 30 OBR 295, 507 N.E.2d 352." Simpson, 73 Ohio St.3d at 133, 652 N.E.2d 702. There is no evidence that the village had control over the interstate.

{¶ 31} In the conflict case, Kareth v. Toyota Motor Sales (Sept. 28, 1998), Clermont App. No. CA 98-01-011, 1998 WL 667845, the Twelfth District Court of Appeals held that a county was not responsible for an accident caused by a nuisance on a state highway, even though the source of the nuisance was on property within the control of the political subdivision. The Kareth court held that the duty of a municipality to keep its public areas free from nuisance does not extend to property that is beyond its corporate limit or control. Thus, "since a county does not have any control over state highways," the appellate court concluded, "the Commissioners do not have a duty under R.C. 2744.02(B)(3) to repair or protect others from a nuisance that exists on a state highway regardless of where the source of the nuisance is located." I would adopt the sound reasoning of the Kareth court.

{¶ 32} The majority's interpretation means that the village can be held responsible for car accidents that did not happen within the village, but actually happened on a highway 2,000 to 3,000 feet outside the village in an area over which the village had no control. The village had no authority to close the highway even if the village knew that the smoke would ultimately drift to the highway. How far would the majority extend this liability? Although the village created the smoke, it \*\*330 did not create the fog. According to Lt. Peck, the fog extended to Huber Heights, approximately 20 miles east of the accident scene. And, clearly, the village had no control over the wind that carried the smoke and fog.

{¶ 33} I believe that the majority's interpretation of former R.C. 2744.02(B)(3) today runs afoul of legislative intent. I would call upon the General Assembly to clarify this important issue. I dissent.

858 N.E.2d 324  
112 Ohio St.3d 52, 858 N.E.2d 324, 2006 -Ohio- 6498  
(Cite as: 112 Ohio St.3d 52, 858 N.E.2d 324)

Ohio,2006.  
Sherwin-Williams Co. v. Dayton Freight Lines, Inc.  
112 Ohio St.3d 52, 858 N.E.2d 324, 2006 -Ohio- 6498

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State ex rel. Quarto Mining Co. v. Foreman  
 Ohio, 1997.

Supreme Court of Ohio.  
 The STATE ex rel. QUARTO MINING COMPANY,  
 Appellant,  
 v.  
 FOREMAN et al., Appellees.  
 No. 95-248.

Submitted March 18, 1997.  
 Decided June 18, 1997.

Employer filed complaint in mandamus, alleging Industrial Commission's order granting claimant permanent total disability (PTD) compensation failed to cite reliance on record evidence supporting finding of PTD and that Commission's order failed to address fact that claimant remained in workforce until nonoccupational heart attack and subsequent surgery forced him to quit working. The Court of Appeals, Franklin County, denied writ. Employer appealed as of right. The Supreme Court held that: (1) Commission, in evaluating claimant's application for PTD compensation, did not abuse its discretion by failing to initiate issue of whether claimant's retirement precluded his eligibility for PTD compensation, and (2) Commission's order awarding PTD compensation was supported by some evidence.

Affirmed.

West Headnotes

**[1] Appeal and Error 30 ↪169**

30 Appeal and Error  
30V Presentation and Reservation in Lower Court of Grounds of Review  
30V(A) Issues and Questions in Lower Court  
30k169 k. Necessity of Presentation in General. Most Cited Cases  
 Ordinarily, reviewing courts do not consider questions not presented to court whose judgment is sought to be reversed.

**[2] Appeal and Error 30 ↪181**

30 Appeal and Error  
30V Presentation and Reservation in Lower Court of Grounds of Review  
30V(B) Objections and Motions, and Rulings Thereon  
30k181 k. Necessity of Objections in General. Most Cited Cases  
 Appellate courts do not have to consider error which complaining party could have called, but did not call, to trial court's attention at time when such error could have been avoided or corrected by trial court.

**[3] Workers' Compensation 413 ↪1078**

413 Workers' Compensation  
413XII Administrative Officers and Boards  
413k1077 Status and Character  
413k1078 k. In General. Most Cited Cases  
 Industrial Commission is not to be regarded as adversary of workers' compensation claimant as in other litigation.

**[4] Workers' Compensation 413 ↪1764**

413 Workers' Compensation  
413XVI Proceedings to Secure Compensation  
413XVI(P) Hearing or Trial  
413XVI(P)6 Findings of Fact and Conclusions of Law by Board, Commission, or Court  
413k1764 k. Conclusiveness and Effect.  
Most Cited Cases  
 Under doctrine of res judicata, workers' compensation claimant cannot relitigate prior finding that he voluntarily retired.

**[5] Workers' Compensation 413 ↪1358**

413 Workers' Compensation  
413XVI Proceedings to Secure Compensation  
413XVI(L) Presumptions and Burden of Proof  
413XVI(L)2 Particular Matters  
413k1356 Injuries or Death for Which Compensation May Be Had  
413k1358 k. Injuries Arising Out of and in Course of Employment in General. Most Cited Cases  
 Workers' compensation claimant's burden is to persuade Industrial Commission that there is proximate causal relationship between his

work-connected injuries and disability, and to produce medical evidence to this effect; claimant's burden in this regard does not extend so far as to require him to raise, and then eliminate, other possible causes of disability.

**[6] Workers' Compensation 413 ⚡1358**

**413 Workers' Compensation**

**413XVI Proceedings to Secure Compensation**

**413XVI(L) Presumptions and Burden of Proof**

**413XVI(L)2 Particular Matters**

**413k1356 Injuries or Death for Which Compensation May Be Had**

**413k1358 k. Injuries Arising Out of and in Course of Employment in General. Most Cited Cases**

After permanent total disability (PTD) claimant produced direct medical evidence linking his disability with injuries allowed in claim so as to establish prima facie causal connection, burden fell upon employer to raise and produce evidence on its claim that other circumstances independent of claimant's allowed conditions caused him to abandon job market.

**[7] Workers' Compensation 413 ⚡1691**

**413 Workers' Compensation**

**413XVI Proceedings to Secure Compensation**

**413XVI(P) Hearing or Trial**

**413XVI(P)1 In General**

**413k1691 k. Scope and Extent; Matters and Evidence Considered. Most Cited Cases**

Industrial Commission, in evaluating claimant's application for permanent total disability (PTD) compensation, did not abuse its discretion by failing to initiate issue of whether claimant's retirement precluded his eligibility for PTD compensation, where issue was not presented to Commission.

**[8] Workers' Compensation 413 ⚡847**

**413 Workers' Compensation**

**413IX Amount and Period of Compensation**

**413IX(B) Compensation for Disability**

**413IX(B)2 Total Incapacity**

**413k847 k. Incapacity for Work or Employment Generally. Most Cited Cases**

Physician's alleged lack of awareness of claimant's previous job duties was of little consequence in permanent total disability (PTD) determination;

relevant issue was not ability to return to former job, but, rather, claimant's capacity for any sustained remunerative work.

**[9] Workers' Compensation 413 ⚡846**

**413 Workers' Compensation**

**413IX Amount and Period of Compensation**

**413IX(B) Compensation for Disability**

**413IX(B)2 Total Incapacity**

**413k846 k. In General. Most Cited**

**Cases**

Industrial Commission, in permanent total disability (PTD) compensation proceeding, could not base its conclusion solely on basis of percentages of impairment assigned to claimant, without regard to claimant's actual physical restrictions and nonmedical disability factors.

**[10] Workers' Compensation 413 ⚡1936**

**413 Workers' Compensation**

**413XVI Proceedings to Secure Compensation**

**413XVI(T) Review by Court**

**413XVI(T)12 Scope and Extent of Review**

**In General**

**413k1936 k. Discretion. Most Cited**

**Cases**

It was entirely within Industrial Commission's prerogative as exclusive evaluator of disability in permanent total disability (PTD) compensation proceeding to conclude that, at age 57, claimant was old, not young, and that his age was hindrance, not help, to his retraining.

**[11] Workers' Compensation 413 ⚡846**

**413 Workers' Compensation**

**413IX Amount and Period of Compensation**

**413IX(B) Compensation for Disability**

**413IX(B)2 Total Incapacity**

**413k846 k. In General. Most Cited**

**Cases**

Workers' compensation claimant's age is not only relevant, but necessary consideration in determining permanent total disability (PTD).

**[12] Workers' Compensation 413 ⚡846**

**413 Workers' Compensation**

**413IX Amount and Period of Compensation**

**413IX(B) Compensation for Disability**

413IX(B)2 Total Incapacity  
413k846 k. In General. Most Cited

Cases

Very fact of workers' compensation claimant's advancing age may serve to support granting of application for permanent total disability (PTD) compensation after initial denial.

**[13] Workers' Compensation 413 ↪1795**

413 Workers' Compensation

413XVI Proceedings to Secure Compensation

413XVI(R) Rehearing and New Trial

413k1795 k. Grounds. Most Cited Cases

Showing of new and changed circumstances is not prerequisite to Industrial Commission consideration of subsequent application for permanent total disability (PTD) compensation after initial denial.

**[14] Workers' Compensation 413 ↪1939.11(9)**

413 Workers' Compensation

413XVI Proceedings to Secure Compensation

413XVI(T) Review by Court

413XVI(T)12A Questions of Law or Fact, Findings, and Verdict

413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator

413k1939.11 Particular Findings

413k1939.11(9) k. Amount and

Period of Compensation. Most Cited Cases

Industrial Commission's order awarding claimant permanent total disability (PTD) compensation was supported by some evidence, where employer's medical and nonmedical challenges were meritless.

**\*\*707** On July 12, 1972, claimant-appellee, Glen Foreman, was injured in a roof cave-in in an underground mine while working as a roof bolter for appellant, Quarto Mining Company ("employer"). Claimant filed a workers' compensation claim which was ultimately allowed by appellee Industrial Commission of Ohio for "[f]racture distal right tibia and fibula; laceration left occipital (scalp); talocalcaneal dislocation right ankle; lumbosacral strain; and osteomyelitis of the distal end of the tibia."

Claimant was initially off work for approximately one year. He attempted to return to his former job as a roof bolter, but was unable to do so. He was then transferred to the job of "outside supply man," at

which he remained for approximately three years. Thereafter, claimant was transferred to the job of dispatcher in the coal mine. During this time, claimant underwent multiple surgeries in an effort to treat and correct the injuries to his right leg and foot and the osteomyelitis that developed secondary to surgery.

Claimant remained at the dispatcher job until September 1984, when he suffered a myocardial infarction and underwent a coronary artery bypass graft. Also, the mine closed and claimant was laid off. He has not worked since September 27, 1984, and has been receiving Social Security disability benefits since March 1, 1985.

On December 16, 1985, claimant filed an application for permanent total disability ("PTD") compensation, which the commission denied by order dated February 24, 1987. On January 24, 1989, claimant filed another application for PTD benefits. In the statement of facts prepared for the commission, it was stated: "It is the opinion of this statement writer that the weight of the evidence on file does not support a finding of permanent total disability. Claimant retired \*79 in 1984 as a result of his cardiac condition. In September of 1984, the claimant underwent a coronary bypass surgery." However, on January 10, 1991, the commission denied PTD compensation "for the reason that the disability is not total; that is, the claimant is able to perform sustained remunerative employment."

Claimant again filed an application for PTD compensation on August 18, 1992. By order dated June 15, 1993, the commission granted the application, explaining as follows:

"The reports of Drs. Smith and Gatens were reviewed and evaluated. This order is based particularly upon the reports of Drs. Smith and Gatens, evidence in the file and/or evidence adduced at the hearing.

"After reviewing the medical evidence relevant to the claimant's 1972 industrial injury, it is concluded that his allowed conditions severely restrict his ability to pursue gainful employment. The medical evidence relied upon in making this determination includes the reports of Drs. Smith and Gatens. Dr. **\*\*708** Smith, claimant's attending physician, opined Mr. Foreman is permanently and totally disabled as a result of his allowed conditions. Dr. Gatens, Commission Physical

Medicine Specialist, rated Mr. Foreman's impairment at a relatively high 55% and opined that he is unable to return to his former position of employment. However, Dr. Gatens did indicate Mr. Foreman retains the ability to pursue sedentary employment. It is further noted that Mr. Foreman has undergone a number of surgical procedures in an attempt to correct his right lower extremity injuries and relatively recent diagnostic testing evidence suggests the continued presence of ankle impairment. Accordingly, based on the foregoing medical evidence, the Commission concludes Mr. Foreman does not possess the ability to engage in his former work activities and, at best, only is capable of engaging in sedentary work activities which do not require standing or ambulating of any significant degree.

"Considering his non-medical disability factors, the Commission concludes that he does not possess the vocational potential to obtain sedentary work of a sit-down nature. Mr. Foreman is 57 years of age, possesses an eleventh grade education with a G.E.D., and has work history as a roof bolter, supply man, dispatcher, coal miner, corrections officer and experience in the U.S. Army. Due to the fact Mr. Foreman's prior work experience all entailed significant physical exertion and did not qualify him for similar or related employment of a reduced physical capacity nature, it is concluded that he currently lacks job skills transferable to sit-down sedentary work.

"Furthermore, Mr. Foreman's advancing age and G.E.D. educational level do not serve as vocational assets in his attempt to acquire new and specialized vocational skills. Specifically, it is determined that Mr. Foreman's age and \*80 education indicate that he lacks the useful remaining industrial life, educational ability, and above average intellectual capacity in order for him to acquire the skills necessary for him to obtain a new vocation of a sit-down sedentary nature. Accordingly, for the foregoing reasons, Mr. Foreman's application for permanent and total disability is granted."

On December 28, 1993, the employer filed a complaint in mandamus with the court of appeals. The complaint alleged (1) that the commission's June 15, 1993 order fails to "cite reliance on some evidence of record which would support a finding of permanent total disability" and (2) that the commission's order fails to "address the obvious facts of record that \* \* \* [claimant] remained in the workforce until a 1984

non-occupational heart attack and subsequent surgery forced him to quit working."

The cause was assigned to a referee, who recommended that the writ be granted to the extent of ordering the commission to make a factual determination as to the voluntariness of claimant's departure from the workforce. The referee essentially reasoned that since references were made in the record to claimant's heart attack, layoff and/or retirement, it was incumbent upon the commission to determine the nature and extent of claimant's removal from the workforce.

The appellate court rejected the referee's conclusions and recommendation and denied the writ. The court essentially held that the failure of the employer to have raised the retirement issue administratively precludes it from arguing the issue in an action in mandamus. Additionally, the court of appeals found that the record contains some evidence to support the commission's award of PTD compensation.

This cause is before the court upon an appeal as of right.

Hanlon, Duff, Paleudis & Estadt Co., L.P.A., and John G. Paleudis, St. Clairsville, for appellant. Larrimer & Larrimer and David H. Swanson, Columbus, for appellee Glen Foreman. Betty D. Montgomery, Attorney General, and Melanie Cornelius, Assistant Attorney General, for appellee Industrial Commission of Ohio.  
PER CURIAM.

*Per Curiam.* This appeal raises two issues. The first question presented is whether the commission,\*\*709 in evaluating claimant's application for PTD compensation, abused its discretion by failing to initiate the issue of whether claimant's retirement precludes his eligibility for PTD compensation. This question can also be framed in terms of whether the employer waived the retirement issue by not raising it administratively. The second issue is whether the cause should be remanded for further consideration on the basis that the medical reports upon \*81 which the commission relied do not constitute "some evidence" of PTD, or the commission failed to adequately explain and/or apply claimant's nonmedical disability factors.

I

79 Ohio St.3d 78, 679 N.E.2d 706, 1997 -Ohio- 71  
(Cite as: 79 Ohio St.3d 78, 679 N.E.2d 706)

It is important to understand initially that the question in this case is not, as the employer claims, about whether an issue must be raised by some "formal procedure" or placed on some "formal record" before the commission. The employer nowhere denies that it failed to raise the retirement issue administratively. Nor does the employer claim to have raised the issue administratively at all, by any means, "formal" or otherwise; during either the proceedings culminating in the order of June 15, 1993, or in any of the proceedings leading to the two prior commission orders denying PTD compensation. Instead, the essence of the employer's first three arguments, properly construed, is that the issue raises itself by virtue of being manifest in the record.

[1][2] "Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." Goldberg v. Indus. Comm. (1936), 131 Ohio St. 399, 404, 6 O.O. 108, 110, 3 N.E.2d 364, 367. See, also, State ex rel. Moore v. Indus. Comm. (1943), 141 Ohio St. 241, 25 O.O. 362, 47 N.E.2d 767, paragraph three of the syllabus; State ex rel. Gibson v. Indus. Comm. (1988), 39 Ohio St.3d 319, 320, 530 N.E.2d 916, 917 (rule that issues not previously raised are waived is applicable in an appeal from a denial of a writ of mandamus). Nor do appellate courts have to consider an error which the complaining party "could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." State v. Williams (1977), 51 Ohio St.2d 112, 117, 5 O.O.3d 98, 101, 364 N.E.2d 1364, 1367.

These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error. Id., 51 Ohio St.2d at 117, 5 O.O.3d at 101, 364 N.E.2d at 1367. See, also, State v. Driscoll (1922), 106 Ohio St. 33, 38-39, 138 N.E. 376, 378.

The employer, however, essentially seeks a dispensation or relaxation of these rules in

proceedings before the commission. However, there is nothing about the purpose of workers' compensation legislation or the character of the proceedings before the commission that would justify such action. As Professor Larson \*82 explains, "evidentiary and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." 2B Larson, Workmen's Compensation Law (1996) 15-4, Section 77A.10. Thus, "when the rule whose relaxation is in question is more than a merely formal requirement and touches substantial rights of fair play, the relaxation is no more justified on a compensation appeal than on any other. *Such a rule is that forbidding the raising on appeal of an issue that has not been raised below \* \* \**" (Emphasis added.) *Id.* at 15-101, 15-103, Section 77A.83. (The term "below" is used broadly by Professor Larson to include issues not raised at the administrative level. *Id.* at 15-103 to 15-116, fn. 46, Section 77A.83.)

In a well-reasoned decision, the California appellate court in Bohn v. Watson (1954), 130 Cal.App.2d 24, 37, 278 P.2d 454, 462, applied these rules to proceedings before the Real \*\*710 Estate Commissioner of Los Angeles County. The court refused to consider an issue not raised administratively, despite the fact that the lower court, upon an action for a writ of mandate, considered the issue. The court held that the issue was not properly injected into the claim by virtue of the lower court's consideration. In so holding, the court aptly explained:

"It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial *de novo*, on expanded issues, in the reviewing court. \* \* \* The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play. Had [appellant] desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, and the hearing officer might have made appropriate findings thereon." (Citations omitted.) See, also, Foster v. Bozeman City Comm. (1980), 189 Mont. 64, 68, 614 P.2d 1072, 1074 ("The facts do not permit us to extricate [relator] from the situation he helped to create."); Shakin v. Bd. of Med. Examiners

(1967), 254 Cal.App.2d 102, 111, 62 Cal.Rptr. 274, 282; Harris v. Alcoholic Beverage Control Appeals Bd. (1961), 197 Cal.App.2d 182, 187, 17 Cal.Rptr. 167, 170-171.

[3] To do as the employer suggests would not only deny the claimant a meaningful opportunity to respond, but would also conflict with the court's directive that "[the commission] is not to be regarded as an adversary of the claimant as in other litigation." Miles v. Elec. Auto-Lite Co. (1938), 133 Ohio St. 613, 616, 11 O.O. 339, 341, 15 N.E.2d 532, 534. It would also open the door to forcing an already overworked commission to comb the files of every PTD case in search of \*83 issues that could potentially be raised by both sides at the hearing table. In addition, it would waste judicial and administrative resources by permitting a party to secure another bite at the PTD apple based upon the commission's failure to consider an issue or correct an error upon which the party remained silent.

[4] These concerns apply with particular force in the case *sub judice*. The circumstances which the employer claims preclude PTD compensation occurred some two years prior to the commission's first order and eight and one-half years prior to its June 15, 1993 order. The record has contained references to claimant's retirement since as early as April 25, 1986. Had the employer raised the issue during the 1987 proceedings, it may well have avoided the processing of two more PTD applications and two additional hearings before a total of seven commissioners over a six-year span. A claimant cannot relitigate a prior finding that he had voluntarily retired. State ex rel. Crisp v. Indus. Comm. (1992), 64 Ohio St.3d 507, 597 N.E.2d 119. Instead, the employer sat idly by at each successive hearing, allowing the commission each time to determine the extent of claimant's disability on other grounds. Then, when it finally lost administratively in 1993, the employer raised the issue for the first time in a complaint in mandamus to the court of appeals.

Utilizing another approach, the employer seems to be trying to argue that the commission's responsibility to initiate the issue of claimant's retirement arises by virtue of claimant's duty to prove that his disability is causally related to his employment. In so arguing, the employer merges those cases which provide that pre-PTD retirement precludes eligibility for PTD compensation, with cases holding that a finding of PTD cannot be based,

in whole or in part, on nonallowed conditions. The suggestion here is that, since it is claimant's burden to prove that his disability is causally related to allowed conditions in the claim, it is necessarily claimant's burden to prove that nonallowed conditions played no part in his decision to retire.

[5][6] The argument is misguided. The claimant's burden is to persuade the commission that there is a proximate causal relationship between his work-connected injuries and disability, and to produce medical evidence to \*\*711 this effect. Murphy v. Carrollton Mfg. Co. (1991), 61 Ohio St.3d 585, 575 N.E.2d 828; State ex rel. Basham v. Consolidation Coal Co. (1989), 43 Ohio St.3d 151, 541 N.E.2d 47; Fox v. Indus. Comm. (1955), 162 Ohio St. 569, 55 O.O. 472, 125 N.E.2d 1; Aiken v. Indus. Comm. (1944), 143 Ohio St. 113, 28 O.O. 50, 53 N.E.2d 1018. The claimant's burden in this regard does not extend so far as to require him to raise, and then eliminate, other possible causes of his disability. This is not a case in which the cause remains unexplained, as in slip-and-fall cases. Here, the claimant has produced direct medical evidence linking his disability with the \*84 injuries allowed in the claim. This evidence is sufficient to establish a prima facie causal connection. The burden should then properly fall upon the employer to raise and produce evidence on its claim that other circumstances independent of the claimant's allowed conditions caused him to abandon the job market.

None of the parties cites State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm. (1985), 29 Ohio App.3d 145, 29 OBR 162, 504 N.E.2d 451. Jones was the first of "a trilogy of cases" which developed "[t]he rule that voluntary retirement will, but injury-induced retirement will not, preclude a claimant's eligibility for TTD [temporary total disability] compensation." State ex rel. Baker Material Handling Corp. v. Indus. Comm. (1994), 69 Ohio St.3d 202, 210, 631 N.E.2d 138, 145. In particular, the court of appeals in Jones ruled that voluntary retirement may be a basis for terminating TTD compensation. However, the appellate court refused to apply the rule because the employer failed to raise the issue before the commission. The court found itself "unable to find that respondent Industrial Commission abused its discretion by failing to consider and determine an issue that was not presented to it. \* \* \* [W]e cannot find an abuse of discretion for failure of the respondent Industrial Commission to initiate such an issue under the circumstances of this case." Jones, 29

Ohio App.3d at 148, 29 OBR at 164-165, 504 N.E.2d at 454.

[7] Accordingly, we hold that the commission, in evaluating a claimant's application for PTD compensation, does not abuse its discretion by failing to initiate the issue whether claimant's retirement precludes his or her eligibility for PTD compensation. Thus, the judgment of the court of appeals is affirmed as to this issue.

## II

### A. Medical Challenges

Most of the employer's arguments concerning its challenges to the medical opinions are directed at Dr. Smith's report. It is not necessary to consider these arguments because, as the employer observes, "it appears the Commission did not even accept Dr. Smith's conclusion [that claimant was medically permanently and totally disabled], but rather preferred Dr. Gatens' conclusion [that claimant suffers a fifty-five percent permanent partial impairment and is medically capable of performing sedentary work]." Thus, even if Dr. Smith's report were removed from evidentiary consideration, there still remains the report of Dr. Gatens.

The employer, without any supporting authority, raises the following challenges to Dr. Gatens's report:

[8] 1. The employer challenges Dr. Gatens's understanding of claimant's job duties between 1972 and 1984. However, "[a] lack of awareness of previous duties is generally of little consequence in a permanent total determination, since \*85 the relevant issue is not the ability to return to the former job, but is instead claimant's capacity for any sustained remunerative work." State ex rel. Lopez v. Indus. Comm. (1994), 69 Ohio St.3d 445, 449, 633 N.E.2d 528, 531. See, also, State ex rel. Domjancic v. Indus. Comm. (1994), 69 Ohio St.3d 693, 695, 635 N.E.2d 372, 375.

2. The employer assails Dr. Gatens's report for failing to "mention the 1984 heart attack" and failing to "evaluate the 1984 heart attack's impact on claimant's ability to remain in the work force." However, as the employer noted in reference to the first issue, an award of PTD compensation cannot be based in whole or part on nonallowed medical

conditions. Dr. Gatens did the correct thing when he stated that although claimant "does have a history of cardiac \*\*712 problems, \* \* \* they will not be considered in terms of the impairment related to the allowed industrial injuries."

3. The employer asserts that Dr. Gatens did "not seek to evaluate the claimant's condition in 1984." However, the claimant's condition in 1984 has little to do with the relevant inquiry in this case, viz., the claimant's condition on March 12, 1993, the date on which he was examined by Dr. Gatens.

### B. Nonmedical Challenges

Here, again, the employer fails to support its arguments as to the nonmedical disability issues with any authority, and the arguments that it raises are easily disposed of:

[9] 1. The employer argues that the commission's order fails to explain "how the claimant with a 60% permanent partial impairment award was able to do the supplyman or dispatcher job until his 1984 heart attack." The employer is apparently referring to the fact that the claimant received a sixty percent permanent partial disability award which was paid "to 1/6/80." The thrust of the argument is that if the claimant could perform the jobs of supplyman or dispatcher prior to 1984 while his physical disability was found to be sixty percent, it must be explained why he cannot perform those same jobs thirteen years later when his impairment was rated by Dr. Gatens at fifty-five percent.

The argument attaches too much significance to the percentage of impairment assigned by Dr. Gatens. Indeed, it would have constituted error for the commission to draw its conclusion on the basis of such percentages alone, without regard to the claimant's actual physical restrictions and nonmedical disability factors as they existed in 1993. State ex rel. Koonce v. Indus. Comm. (1994), 69 Ohio St.3d 436, 437-438, 633 N.E.2d 520, 522.

[10][11][12][13] 2. The employer challenges the commission's conclusion that claimant's advancing age does not serve as a vocational asset. According to the employer, "[t]hat he [claimant] is now 57 [years of age] is irrelevant." This argument is \*86 questionable at best. Age is a *Stephenson* factor. State ex rel. Stephenson v. Indus. Comm. (1987), 31 Ohio St.3d

167, 31 OBR 369, 509 N.E.2d 946. Thus, it is not only a relevant, but a necessary, consideration in determining PTD. See Basham, 43 Ohio St.3d at 152, 541 N.E.2d at 48. It is entirely within the commission's prerogative as exclusive evaluator of disability to conclude that, at age fifty-seven, claimant was old, not young, and that his age was a hindrance, not a help, to his retraining. Thus, the very fact of claimant's advancing age may serve to support the granting of an application for PTD compensation after an initial denial. Moreover, a showing of new and changed circumstances is not "a prerequisite to commission consideration of a subsequent application for permanent total disability compensation after an initial denial." State ex rel. Youghioghney & Ohio Coal Co. v. Indus. Comm. (1992), 65 Ohio St.3d 351, 352-353, 603 N.E.2d 1026, 1027. In Youghioghney, the claimant filed his second application (which was ultimately granted) four weeks after the commission denied his first application.

3. The employer's remaining arguments deal with the commission's interpretation of other nonmedical disability factors. In particular, the employer interprets a vocational evaluation screening summary by the bureau's rehabilitation division, not referred to in the commission's order, as vocationally favorable. The employer notes that such report listed claimant's work history and education as "assets."

"As to the commission's failure to refer to the evaluation of the vocational rehabilitation consultant, that evaluation may be accepted or rejected as the commission deems appropriate because the determination of extent of disability is the function of the commission." State ex rel. Adkins v. Indus. Comm. (1986), 24 Ohio St.3d 180, 182, 24 OBR 410, 412, 494 N.E.2d 1105, 1107. As to the report itself, it is not so one-sided as the employer claims. It lists claimant's age, at that time fifty-four, as a vocational limitation. It also rates claimant as "below average" in every vocational aptitude for which he was tested but one (he was "proficient" at adding and subtracting whole numbers).

**\*\*713[14]** Having found the employer's medical and nonmedical challenges to be without merit, we find further that the commission's order is supported by "some evidence." Thus, the judgment of the court of appeals is affirmed as to this issue.

In light of all the foregoing, we affirm the judgment of the court of appeals.

*Judgment affirmed.*

MOYER, C.J., and DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.  
Ohio, 1997.

State ex rel. Quarto Mining Co. v. Foreman  
79 Ohio St.3d 78, 679 N.E.2d 706, 1997 -Ohio- 71

END OF DOCUMENT

Stevens v. Ackman  
 Ohio,2001.

Supreme Court of Ohio.  
 STEVENS, Appellant,  
 v.  
 ACKMAN et al.; City of Middletown, Appellee.  
 Nos. 00-225, 00-513.

Submitted Nov. 29, 2000.  
 Decided March 28, 2001.

Mother of teenager killed in automobile accident brought wrongful death action against driver and city. The Butler County Court of Common Pleas denied city's motion for summary judgment based on immunity, and city appealed. The Court of Appeals denied mother's motions to dismiss appeal and reversed trial court's judgment. Upon determination that conflict existed, the Supreme Court, Alice Robie Resnick, J., held that: (1) wrongful death action was not special proceeding, and thus order was not appealable, and (2) unconstitutional statute allowing for appealability of orders denying statutory immunity to political subdivisions was not reenacted.

Court of Appeals reversed and remanded.

Lundberg Stratton, J., concurred separately and filed opinion in which Moyer, C.J., joined.

Cook, J., concurred in part and filed opinion in which Moyer, C.J., joined.

West Headnotes

**[1] Appeal and Error 30 ↪70(8)**

30 Appeal and Error  
30III Decisions Reviewable  
30III(D) Finality of Determination  
30k67 Interlocutory and Intermediate Decisions  
30k70 Nature and Scope of Decision  
30k70(8) k. On Motion for Judgment.

Most Cited Cases

The denial of a motion for summary judgment generally is considered an interlocutory order not

subject to immediate appeal.

**[2] Appeal and Error 30 ↪78(1)**

30 Appeal and Error  
30III Decisions Reviewable  
30III(D) Finality of Determination  
30k75 Final Judgments or Decrees  
30k78 Nature and Scope of Decision  
30k78(1) k. In General. Most Cited

Cases

Wrongful death action was ordinary civil action, and not special proceeding within meaning of statute designating final orders, and thus order denying city's motion for summary judgment based on immunity in action arising out of automobile accident was not appealable, as wrongful death action was recognized at common law, statute did not create action but only substituted right of representative to sue in place of deceased, and statute was enacted in 1851. R.C. §§ 2125.01, 2505.02(B).

**[3] Appeal and Error 30 ↪78(1)**

30 Appeal and Error  
30III Decisions Reviewable  
30III(D) Finality of Determination  
30k75 Final Judgments or Decrees  
30k78 Nature and Scope of Decision  
30k78(1) k. In General. Most Cited

Cases

A trial court order entered in a civil action for damages seeking recovery for a wrongful death is not an order entered in a special proceeding for purposes of statute defining appealable final orders. R.C. § 2505.02.

**[4] Appeal and Error 30 ↪78(1)**

30 Appeal and Error  
30III Decisions Reviewable  
30III(D) Finality of Determination  
30k75 Final Judgments or Decrees  
30k78 Nature and Scope of Decision  
30k78(1) k. In General. Most Cited

Cases

General Assembly did not intend to reenact statute, which had been previously declared unconstitutional, that designated orders denying immunity to political subdivisions as appealable orders when it reprinted

entirety of statute in act, and thus order denying city's motion for summary judgment based on immunity was not final order, as text of reprinted statute was in regular type indicating that statute was not new material. R.C. § 2744.02(C); § 101.52 (1999).

**[5] Statutes 361 ↪ 181(1)**

**361 Statutes**

361VI Construction and Operation  
361VI(A) General Rules of Construction  
361k180 Intention of Legislature  
361k181 In General  
361k181(1) k. In General. Most Cited

**Cases**

**Statutes 361 ↪ 188**

**361 Statutes**

361VI Construction and Operation  
361VI(A) General Rules of Construction  
361k187 Meaning of Language  
361k188 k. In General. Most Cited

**Cases**

The goal of statutory construction is to give effect to the intent of the General Assembly, and such intent may be inferred from the particular wording the General Assembly has chosen to set forth the substantive terms of a statute.

**[6] Statutes 361 ↪ 181(1)**

**361 Statutes**

361VI Construction and Operation  
361VI(A) General Rules of Construction  
361k180 Intention of Legislature  
361k181 In General  
361k181(1) k. In General. Most Cited

**Cases**

**Statutes 361 ↪ 230**

**361 Statutes**

361VI Construction and Operation  
361VI(A) General Rules of Construction  
361k230 k. Amendatory and Amended Acts. Most Cited Cases

**Statutes 361 ↪ 232**

**361 Statutes**

361VI Construction and Operation

361VI(A) General Rules of Construction

361k232 k. Repealing Acts. Most Cited

**Cases**

The intent of the General Assembly may be revealed in the procedural passage of the legislative act under consideration, when that body passes legislation that enacts, amends, or repeals a statute.

**\*182\*\*90ISYLLABUS OF THE COURT**

1. A trial court order entered in a civil action for damages seeking recovery \*\*902 for a wrongful death is not an order entered in a special proceeding for purposes of R.C. 2505.02.

2. R.C. 2744.02(C), as purportedly enacted in 1996 Am.Sub.H.B. No. 350, is invalid. R.C. 2744.02(C) was neither enacted nor reenacted by 1997 Am.Sub.H.B. No. 215. (*State ex rel. Ohio Academy of Trial Lawyers v. Sheward* [1999], 86 Ohio St.3d 451, 715 N.E.2d 1062, paragraph three of the syllabus, and *Hubbard v. Canton City School Bd. of Edn.* [2000], 88 Ohio St.3d 14, 722 N.E.2d 1025, followed.)

Ted L. Wills, Howard M. Schwartz and Marc D. Meziboy, Cincinnati, for appellant.

Robert J. Gehring, Cincinnati, and Leslie S. Landen, Middletown Law Director, for appellee.

Arthur, O'Neil, Mertz & Bates Co., L.P.A., and Joseph W. O'Neil, Defiance, urging reversal for amicus curiae Ohio Academy of Trial Lawyers.

John E. Gotherman, Columbus, Barry M. Byron and Stephen L. Byron, Willoughby, urging affirmance for amicus curiae Ohio Municipal League.

Isaac, Brant, Ledman & Teetor, Mark Landes and Paul A. Mackenzie, Columbus, urging affirmance for amici curiae County Commissioners' Association of Ohio and County Engineers' Association of Ohio. ALICE ROBIE RESNICK, J.

I

**Facts and Procedural History**

On December 16, 1994, seventeen-year-old Corey C. Banks died in an automobile accident on Roosevelt Avenue (also called Roosevelt Road) in Middletown, Ohio. Banks was a passenger in an automobile operated by Emily J. Duff, now known as Emily J. Ackman, a classmate of his at Middletown High School. Duff's vehicle went left of center in a

heavy rain and collided with an oncoming vehicle. When police arrived at the scene, Banks was dead.

\*183 On December 13, 1996, plaintiff-appellant Shira Sue Stevens (the mother of Banks and the administrator of his estate) filed a complaint against Ackman and appellee, the city of Middletown, in the Butler County Court of Common Pleas, alleging that they were responsible for the wrongful death of Banks. Stevens asserted that Middletown was liable for Banks's death for its failure to properly maintain Roosevelt Road, including allowing an unsafe pavement edge drop to exist on the side of the road, which caused Ackman to lose control of her vehicle when she attempted to return it to the roadway after it had dropped off the pavement edge. Stevens alleged that Middletown breached its duty to maintain Roosevelt Road open, in repair, and free from nuisance, and that the roadway was unsafe.

Middletown moved for summary judgment pursuant to R.C. Chapter 2744, the Political Subdivision Tort Liability Act, claiming that it was entitled to statutory immunity and that Stevens was unable to prevail against it as a matter of law. Middletown argued that the exception to political subdivision immunity found in R.C. 2744.02(B)(3) ("political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads \* \* \* open, in repair, and free from nuisance") was not applicable in the circumstances of this case to defeat its immunity.

The trial court denied the motion for summary judgment, relying on this court's decisions in Dickerhoof v. Canton (1983), 6 Ohio St.3d 128, 6 OBR 186, 451 N.E.2d 1193; Manufacturer's Natl. Bank of Detroit v. Erie Cty. Rd. Comm. (1992), 63 Ohio St.3d 318, 322, 587 N.E.2d 819, 823; and Franks v. Lopez (1994), 69 Ohio St.3d 345, 632 N.E.2d 502, to conclude that the alleged failure of the city to eliminate the edge drop on Roosevelt Road was potentially a failure to keep the roadway free from nuisance pursuant to the exception to \*\*903 immunity under R.C. 2744.02(B)(3). The trial court specifically rejected Middletown's argument that the city could be liable only for the failure to maintain the actual roadway itself, so that there could be no liability because the shoulder or berm of Roosevelt Road was not the roadway.

The trial court also found that there were issues of fact as to whether Middletown had notice of the

condition, and further that there was no merit to Middletown's contention that the defense for discretionary decisions contained in R.C. 2744.03(A)(5) was applicable. The trial court determined that the city had failed to meet its burden in support of the motion and that genuine issues of material fact remained to be determined.

Middletown appealed the denial of its summary judgment motion to the Court of Appeals for Butler County, initially relying on R.C. 2744.02(C): "An order that denies a political subdivision or an employee of a political subdivision the benefit \*184 of an alleged immunity from liability as provided in Chapter 2744, or any other provision of the law is a final order."

After the parties had briefed the appeal on the merits, Stevens filed a motion to dismiss the appeal on August 10, 1999, primarily arguing that R.C. 2744.02(C) was not retroactive to apply to a case arising from a death that occurred in 1994. Stevens also argued that the order appealed from was not a final order because it was taken from a trial court ruling on issues of fact, not of law, and further argued that the failure of the trial court to determine in its order that there was "no just reason for delay" deprived the court of appeals of jurisdiction. See Civ.R. 54(B).

Before the court of appeals ruled on that motion to dismiss, this court, on August 16, 1999, announced the decision in State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062. On August 25, 1999, Stevens filed a second motion in the court of appeals to dismiss the appeal, again urging that the court of appeals was without jurisdiction to entertain Middletown's appeal. Stevens argued that because R.C. 2744.02(C) was enacted in Am.Sub.H.B. No. 350 ("H.B. 350"), and because this court's opinion in Sheward, at paragraph three of the syllabus, had declared H.B. 350 to be "unconstitutional in toto," there was no basis for the court of appeals to maintain jurisdiction over the appeal.

Middletown responded to Stevens's second motion to dismiss by arguing that, as an alternate ground for its appeal, the court of appeals had jurisdiction over the order pursuant to R.C. 2505.02(B)(2) as an order that affected a substantial right made in a special proceeding, or pursuant to R.C. 2505.02(B)(4) as an order that denied a provisional

remedy. Middletown also argued that the lack of Civ.R. 54(B) certification by the trial court did not deprive the court of appeals of jurisdiction.

In its opinion, the court of appeals denied both of Stevens's motions to dismiss. The court of appeals found that it had jurisdiction over the appeal pursuant to R.C. 2505.02(B)(2), finding that the trial court order denying statutory immunity affected a "substantial right" and was entered in a "special proceeding," and so denied Stevens's second motion to dismiss for that reason. The court of appeals found that the underlying action was a "civil claim for wrongful death and survivorship," both of which were unknown at common law and "did not exist in law or equity prior to 1853," so that a special proceeding was involved within the meaning of R.C. 2505.02(A)(2).

The court of appeals therefore did not specifically rule on Stevens's argument, raised within her second motion to dismiss, that it had no jurisdiction pursuant to R.C. 2744.02(C) in the wake of the *Sheward* decision. Furthermore, because it \*185 based its jurisdiction on R.C. 2505.02(B)(2), the court of appeals denied Stevens's first motion to dismiss, relating \*\*904 to retroactivity of R.C. 2744.02(C), as moot.

After thus finding Middletown's appeal properly before it, the court of appeals reversed the judgment of the trial court on the merits and entered summary judgment in favor of Middletown, finding that the municipality was entitled to political subdivision immunity. The court of appeals held as a matter of law that the edge drop at issue did not constitute a nuisance within the meaning of R.C. 2744.02(B)(3), so that Middletown could not be liable for an alleged failure to keep the roadway free from nuisance.

Finding its judgment on the merits issue to be in conflict with the judgment of the Fifth District Court of Appeals in *Thompson v. Muskingum Cty. Bd. of Comms.* (Nov. 12, 1998), Muskingum App. No. CF98-0010, unreported, 1998 WL 817826, the court of appeals granted Stevens's motion to certify a conflict. The issue certified is "whether an edge drop on the berm of a county or city road, in and of itself, constitutes a nuisance within the meaning of R.C. 2744.02(B)(3)." In *Thompson*, the Fifth District Court of Appeals found that whether the edge drop between the pavement and the berm is a nuisance for purposes of R.C. 2744.02(B)(3) is a factual question, relying on Dickerhoof, 6 Ohio St.3d 128, 6 OBR 186, 451 N.E.2d

1193. Thus, the court of appeals in *Thompson* refused to adopt the position adopted by the court of appeals in the case *sub judice*, which is that an edge drop cannot be a "nuisance" as that term is used in R.C. 2744.02(B)(3).

Stevens also moved the court of appeals to certify a conflict on the issue of whether, in the wake of the *Sheward* decision, a court of appeals has jurisdiction pursuant to R.C. 2744.02(C) to hear an interlocutory appeal from the denial of a political subdivision's summary judgment motion based upon statutory immunity. The court of appeals declined to certify a conflict on that issue.

The cause is now before this court upon our determination that a conflict exists on the edge-drop issue (case No. 00-513), and pursuant to the allowance of a discretionary appeal (case No. 00-225).

## II

### Appellate Court Jurisdiction

#### A

### Standards for Appealability

Section 3(B)(2), Article IV of the Ohio Constitution limits the appellate jurisdiction of the courts of appeals to the review of judgments and final orders of lower courts. Section 3(B)(2), Article IV provides:

\*186 "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies."

The initial issue for resolution, as a prerequisite to any consideration of the merits of this case, is whether the trial court order denying Middletown's motion for summary judgment premised on immunity under R.C. Chapter 2744 was a final appealable order. If this order was not a final appealable order, the court of appeals was without jurisdiction to entertain the appeal, and should have dismissed it without reaching the merits.

[1] The denial of a motion for summary judgment generally is considered an interlocutory order not subject to immediate appeal. See Celebrezze v. Netzley (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292, 1293-1294. See, also, State ex rel. Overmeyer v. Walinski (1966), 8 Ohio St.2d 23, 37 O.O.2d 358, 222 N.E.2d 312. In this case, Middletown argues that at least one exception to this general rule \*\*905 applies, so that the trial court order at issue was subject to an immediate appeal.

## B

### Appealability Pursuant to R.C. 2505.02(B)

[2] The court of appeals in this case specifically determined that R.C. 2505.02(B)(2) provided the basis for appellate jurisdiction. Therefore, we first consider the propriety of that determination.

R.C. 2505.02(B) provides that “[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

“ \* \* \*

“(2) An order that affects a substantial right made in a special proceeding \* \* \*.”

R.C. 2505.02(A)(1) defines “substantial right” as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.”

R.C. 2505.02(A)(2) defines “special proceeding” as “an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.”

In Polikoff v. Adam (1993), 67 Ohio St.3d 100, 108, 616 N.E.2d 213, 218, fn. 8, this court noted that in considering whether a particular order affected a substantial right in a special proceeding, the reviewing court's analysis first \*187 focuses on the special proceeding portion of the inquiry. Only if it is first determined that an order was entered in a special proceeding is it necessary to go on to consider whether the order affected a substantial right.

This court held in Polikoff, at the syllabus, that “[o]rders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02.”

In Polikoff, 67 Ohio St.3d at 104, 616 N.E.2d at 216, this court quoted from Missionary Soc. of M.E. Church v. Ely (1897), 56 Ohio St. 405, 407, 47 N.E. 537, 538: “[A]ny ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving the process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or an order, is a special proceeding.”

Furthermore, Polikoff, 67 Ohio St.3d at 105, 616 N.E.2d at 216, quoted In re Estate of Wyckoff (1957), 166 Ohio St. 354, 358, 2 O.O.2d 257, 260, 142 N.E.2d 660, 663-664, which in turn had quoted Schuster v. Schuster (1901), 84 Minn. 403, 407, 87 N.W. 1014, 1015, for the proposition that “ ‘[w]here the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term ‘special proceedings.’ ” ”

The Polikoff court, 67 Ohio St.3d at 105, 616 N.E.2d at 216, went on to again quote Wyckoff, 166 Ohio St. at 358, 2 O.O.2d at 260, 142 N.E.2d at 664, with approval: “ ‘[T]he proceeding provided by [the statute at issue], in connection with which a petition and no other pleadings are required and wherein there is notice only, without service of summons, and which represents essentially an independent judicial inquiry, is a special proceeding.’ ”

In Walters v. The Enrichment Ctr. of Wishing Well, Inc. (1997), 78 Ohio St.3d 118, 121, 676 N.E.2d 890, 893, this court clarified the syllabus paragraph of Polikoff: “The determining factor of Polikoff is whether the ‘action’ was recognized at common law or in equity and not whether the ‘order’ was so recognized. In making the determination courts need look only at the underlying action.”

\*\*906 For our purposes here, the key term in this statement is that the *underlying action* must be the focus of the inquiry.

The court of appeals below, in ruling that a case seeking recovery for a wrongful death is a special proceeding, did not adequately address what the true "underlying action" was in the case before it, and so reached its conclusion through an analysis that strayed from the correct focus of the inquiry. This case, although it includes claims for wrongful death and survival claims, is an ordinary \*188 civil action seeking damages for purposes of R.C. 2505.02. The fact that a case involves an alleged wrongful death does not transform it into a special proceeding.

R.C. Chapter 2125 is commonly denominated under the heading "Action for Wrongful Death." See heading to R.C. Chapter 2125 in both Baldwin's Ohio Revised Code Annotated and Page's Ohio Revised Code Annotated. The "action" referred to in this sense is a civil action for damages. It is apparent that R.C. Chapter 2125 does not give rise to a special proceeding in the sense that that term is used in *Ely*, *Schuster*, *Wyckoff*, and *Polikoff*. R.C. Chapter 2125 does not provide for a remedy to be sought through "an original application to a court for a judgment or an order" (*Ely*, 56 Ohio St. at 407, 47 N.E. at 538), it does not authorize "a special application to a court to enforce" a right (*Schuster*, 84 Minn. at 407, 87 N.W. at 1015), and it does not provide for what is "essentially an independent judicial inquiry" (*Wyckoff*, 166 Ohio St. at 358, 2 O.O.2d at 260, 142 N.E.2d at 664).

R.C. Chapter 2125 details measures for pursuing a wrongful-death recovery within an ordinary action for money damages. R.C. 2125.01 provides that someone who causes the wrongful death of another "shall be liable to an action for damages, notwithstanding the death of the person injured." <sup>FNI</sup> This provision does not "specially create" an action or proceeding that was not recognized at common law or in equity within the meaning of *Polikoff* or of R.C. 2505.02(A)(2). Thus, it does not establish the requirements that would be necessary for a case involving a wrongful death to be a special proceeding. In the same way, no other provision within R.C. Chapter 2125 establishes the necessary requirements.

FNI. Am.Sub.H.B. No. 350 attempted to amend R.C. 2125.01. However, we do not identify the statute as "former," because H.B. 350 was declared unconstitutional in its entirety in *Sheward*, which had the effect of invalidating the amendment to R.C. 2125.01.

See *Harp v. Cleveland Hts.* (2000), 87 Ohio St.3d 506, 509, 721 N.E.2d, 1020, 1023, fn. 1.

When a court considers whether a particular statute specially creates an action or proceeding that may qualify as a special proceeding for purposes of R.C. 2505.02, the court must pointedly examine the basic core of the statute at issue. The court must specifically ask whether the particular statute actually does create a special proceeding, or whether the statute merely supplies details within the structure of an ordinary action.

If an action has the characteristics of an ordinary action it does not qualify as a special proceeding. See *Polikoff*, 67 Ohio St.3d at 107, 616 N.E.2d at 218: "[Plaintiffs] sought redress of an alleged wrong by filing a lawsuit in the court of common pleas. \* \* \* The underlying action can be distinguished from a special proceeding in that it provides for an adversarial hearing on the issues of fact and law which arise from the pleadings and which will result in a judgment for the \*189 prevailing party." See, also, *Walters*, 78 Ohio St.3d at 122, 676 N.E.2d at 893: "In the case *sub judice*, the underlying action was an ordinary civil action, seeking damages. It was recognized at common law and hence was not a special proceeding."

As in both *Polikoff* and *Walters*, the order at issue in this case was not entered in a special proceeding. The "underlying action" is an ordinary civil suit for damages, which of course was known at common law.

\*\*907 Although we have focused on the consideration that the true underlying action in this case was recognized at common law, there is another aspect of R.C. 2505.02 and *Polikoff* that indicates that the trial court order in this case was not entered in a special proceeding. Both R.C. 2505.02(A)(2) and *Polikoff's* syllabus paragraph require that a special proceeding be one "specially created by statute." (Emphasis added.)

In *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 181, 637 N.E.2d 917, 921, a majority of this court, by quoting *Griffiths v. Earl of Dudley* (1882), 9 Q.B.Div. 357, 363, seemed to accept, at least by implication, that R.C. Chapter 2125 does not "give any new cause of action, but only substitute[s] the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived."

” See *Thompson*, 70 Ohio St.3d at 186, 637 N.E.2d at 925 (Douglas, J., concurring in judgment).

Therefore, the explicit requirement that a special proceeding be “specially created by statute” does not appear to be fulfilled in this case, as R.C. Chapter 2125 does not create a right of action for wrongful death.

Also, there is a further obstacle to a wrongful-death action being a special proceeding, separate from those discussed above. R.C. 2505.02(A)(2) requires that for a proceeding to be special, it must be one “that prior to 1853 was not denoted as an action at law or a suit in equity.” Ohio’s first wrongful-death statute, as this state’s version of what is commonly called Lord Campbell’s Act, was enacted in 1851. See 49 Ohio Laws 117. Today’s wrongful-death statute contains the essential provisions of the 1851 statute.

Because a wrongful-death recovery was delineated by statute in 1851, an action for wrongful death was denoted as an action at law prior to 1853 for purposes of R.C. 2505.02(A)(2). Hence the precise statutory definition of special proceeding is not met for that reason.

Because we have found that there is no special proceeding at issue in this case, we need not specifically consider whether the order appealed from affected a substantial right. See *Polikoff*, 67 Ohio St.3d at 108, 616 N.E.2d at 218, fn. 8.

\*190 Having found that R.C. 2505.02(B)(2) does not confer jurisdiction on the court of appeals in this case, we further find that no other provision in R.C. 2505.02(B) supports the appeal.

[3] For all the foregoing reasons, we hold that a trial court order entered in a civil action for damages seeking recovery for a wrongful death is not an order entered in a special proceeding for purposes of R.C. 2505.02. We reverse the judgment of the court of appeals on this issue.

Our conclusion that an order denying a motion for summary judgment in a civil action for damages involving a wrongful death is not an order entered in a special proceeding for purposes of R.C. 2505.02(B)(2) offers some consistency in an area of law that is frequently fraught with inexplicable discrepancies. It

would be anomalous to hold that such an order would not be a final order in a case involving a personal injury, but would be one in a case involving a wrongful death, when the actions are so similar and are conducted procedurally in much the same manner. If a particular order is not appealable in a personal injury case, the same order should not be appealable in a wrongful-death case. We emphasize that, to qualify as a special proceeding, a particular proceeding must have the characteristics that indicate that an independent judicial inquiry is taking place. These characteristics are not present in the case *sub judice*.

C

#### Appealability Pursuant to R.C. 2744.02(C)

Because we have found that R.C. 2505.02(B) does not support appellate jurisdiction in this case, we proceed to consider whether R.C. 2744.02(C) provides an \*\*908 alternative ground for the court of appeals to exercise appellate jurisdiction.

1

#### Am.Sub.H.B. No. 350 and the Ramifications of *Sheward*

Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 3867, was signed into law by former Governor George Voinovich on October 28, 1996, and took effect on January 27, 1997. Am.Sub.H.B. No. 350 purported to amend, enact, or repeal “over one hundred sections of the Ohio Revised Code ‘relative to changes in the laws pertaining to tort and other civil actions.’ ” See *Sheward*, 86 Ohio St.3d at 458, 715 N.E.2d at 1073, fn. 6, quoting the title of the Act. One of the purported new enactments of Am.Sub.H.B. No. 350 was R.C. 2744.02(C), which provided that “[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744. or any other provision of the law is a final order.” 146 Ohio Laws, Part II, 3989.

\*191 Am.Sub.H.B. No. 350 also purported to amend R.C. 2501.02 to grant jurisdiction to courts of appeals “upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district, \* \* \* INCLUDING AN ORDER DENYING A POLITICAL SUBDIVISION

OR AN EMPLOYEE OF A POLITICAL SUBDIVISION THE BENEFIT OF AN ALLEGED IMMUNITY FROM LIABILITY AS PROVIDED IN CHAPTER 2744. OR ANOTHER PROVISION OF THE REVISED CODE, for prejudicial error.” *Id.* at 3982. (Am.Sub.H.B. No. 350 purported to add the phrase capitalized above to the previous version of R.C. 2501.02 in effect at that time.)

The reason we use the word “purported” in the above descriptions to refer to the legislative actions contained within Am.Sub.H.B. No. 350 is that in Sheward, 86 Ohio St.3d 451, 715 N.E.2d 1062, at paragraph three of the syllabus, this court held that “Am.Sub.H.B. No. 350 violates the one-subject provision of Section 15(D), Article II of the Ohio Constitution, and is unconstitutional *in toto*.” The one-subject rule holding reflected in paragraph three of the syllabus of Sheward was based on an “ancillary” claim raised in that case as part of relators’ attempt to have Am.Sub.H.B. No. 350 declared unconstitutional in its entirety and to have its implementation enjoined. See 86 Ohio St.3d at 452, 715 N.E.2d at 1069.

In Sheward, this court thus struck down all legislative action contained within Am.Sub.H.B. No. 350, including the attempted enactment of R.C. 2744.02(C) and the attempted amendment of R.C. 2501.02.

After the decision in Sheward was announced, this court issued a series of entries in cases implicating R.C. 2744.02(C), resolving them on authority of Sheward, and indicating that the law regarding appealability of orders denying statutory immunity to political subdivisions and employees of political subdivisions had returned to the law that existed prior to Am.Sub.H.B. No. 350’s attempt to change it. See, e.g., Burger v. Cleveland Hts. (1999), 87 Ohio St.3d 188, 718 N.E.2d 912; Estate of Weitzel v. Cuyahoga Falls (1999), 87 Ohio St.3d 200, 718 N.E.2d 921; Braden v. Cleveland Bd. of Edn. (1999), 87 Ohio St.3d 206, 718 N.E.2d 924; Hubbard v. Canton City School Bd. of Edn. (2000), 88 Ohio St.3d 14, 722 N.E.2d 1025.

2

Am.Sub.H.B. No. 215 and “Reenactment”

In one of the cases mentioned above, Hubbard,

two justices dissented from the entry vacating the opinion of the court of appeals for lack of a final appealable order. In the Hubbard dissent, the following statement was made:

\*192 “Whether the judgment of the trial court denying immunity is final and appealable\*\*909 depends on whether R.C. 2744.02(C) was validly reenacted by the General Assembly in Am.Sub.H.B. No. 215, given that R.C. 2744.02(C) was declared unconstitutional as being part of Am.Sub.H.B. No. 350. That is, if Am.Sub.H.B. No. 215 validly reenacted this section, then the trial court’s decision denying immunity to the board of education would be final, and the jurisdiction of the court of appeals would not be questioned by this court.” 88 Ohio St.3d at 15, 722 N.E.2d at 1026 (Cook, J., dissenting).

Am.Sub.H.B. No. 215, effective June 30, 1997, contained an amendment to R.C. 2744.02(B)(2), which deals with the liability of political subdivisions for negligent acts by their employees with respect to proprietary functions. The sole purpose of the amendment was to insert a reference to a statute (R.C. 3314.07) that was not previously mentioned within R.C. 2744.02(B)(2). Am.Sub.H.B. No. 215 made no other changes to R.C. 2744.02.<sup>FN2</sup> 147 Ohio Laws, Part I, 1149-1150.

FN2. Am.Sub.H.B. No. 215 made no changes to the version of R.C. 2501.02 purportedly in effect at the time after that statute’s attempted amendment by Am.Sub.H.B. No. 350.

Section 15(D), Article II of the Ohio Constitution requires that “[n]o law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.”

Consistent with this provision, Am.Sub.H.B. No. 215, in amending R.C. 2744.02(B)(2), reprinted the entire version of R.C. 2744.02 thought to be in existence at the time, including R.C. 2744.02(C) as purportedly enacted in Am.Sub.H.B. No. 350.

Middletown argues that, because Am.Sub.H.B. No. 215 amended R.C. 2744.02(B)(2) in compliance with the requirement of Section 15, Article II, the General Assembly thereby “enacted” an entirely new R.C. 2744.02 (including a new R.C. 2744.02[C]) in

91 Ohio St.3d 182, 743 N.E.2d 901, 2001 -Ohio- 249  
(Cite as: 91 Ohio St.3d 182, 743 N.E.2d 901)

Am.Sub.H.B. No. 215. Middletown argues that, because *Sheward* found Am.Sub.H.B. No. 350 unconstitutional, and therefore the version of R.C. 2744.02(C) that the bill attempted to enact unconstitutional as well, then R.C. 2744.02(C) was never truly “enacted” until Am.Sub.H.B. No. 215 enacted the statute, because everything in Am.Sub.H.B. No. 350 was a nullity.

In a related vein, Middletown argues that, pursuant to Section 15, Article II, the General Assembly's actions within Am.Sub.H.B. No. 215 should be viewed as a “repeal” in its entirety of the version of R.C. 2744.02 believed to be in effect at the time. According to this “reenactment” argument, the act therefore repealed the version of R.C. 2744.02(C) that this court found unconstitutional in *Sheward*, and replaced it with a later version of R.C. 2744.02(C) that was free of the constitutional infirmity that had caused Am.Sub.H.B. No. 350 to be struck down \*193 in *Sheward*. But, see, *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, 14-17, 711 N.E.2d 203, 214-216.

While the reenactment argument exposes an ambiguity and is plausible on its face, serious deficiencies in the argument emerge when its specifics are considered.

3

#### The Intent of the General Assembly

[4][5][6] The essential goal of statutory construction is to give effect to the intent of the General Assembly. See *Carter v. Youngstown* (1946), 146 Ohio St. 203, 32 O.O. 184, 65 N.E.2d 63, paragraph one of the syllabus. The intent may be inferred from the particular wording the General Assembly has chosen to set forth the substantive terms of a statute. See *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 36 O.O. 554, 78 N.E.2d 370, paragraph five of the syllabus. Intent may also be revealed in the procedural passage of the legislative act under consideration, when that body passes legislation that enacts, amends, or repeals a statute. See \*\*910 *State v. Wilson* (1997), 77 Ohio St.3d 334, 336-337, 673 N.E.2d 1347, 1350; see, also, *State ex rel. Durr v. Spiegel* (1914), 91 Ohio St. 13, 22, 109 N.E. 523, 525; *In re Hesse* (1915), 93 Ohio St. 230, 235, 112 N.E. 511, 512 (both determining intent of General Assembly by considering the way the statute at issue was amended).

Thus, for Am.Sub.H.B. No. 215 to successfully enact or reenact R.C. 2744.02(C), the General Assembly must have intended the act to have that effect. It is readily apparent that no such intent was present. At the time Am.Sub.H.B. No. 215 was passed, the General Assembly had no reason to believe that the purported enactment of R.C. 2744.02(C), attempted a short time earlier in Am.Sub.H.B. No. 350, would later be found to be unsuccessful. It is clear that while the General Assembly intended to make a minor amendment in Am.Sub.H.B. No. 215 to R.C. 2744.02(B), the General Assembly did not intend to take any action whatsoever with regard to R.C. 2744.02(C).

R.C. 101.53 (formerly 101.52, see 1998 H.B. No. 649, 147 Ohio Laws, Part III, 5043), provides:

“Bills shall be printed in the exact language in which they were passed, under the supervision of the clerk of the house in which they originated. New matter shall be indicated by capitalization and old matter omitted by striking through such matter. Prior capitalization in a Revised Code section shall be indicated by italicized type.”

The editor's comment in Baldwin's Ohio Revised Code Annotated to Section 15, Article II of the Ohio Constitution makes some relevant comments regarding \*194R.C. 101.53, and indicates a relationship between that statute and Section 15(D), Article II:

“When amending a law or reviving a law previously repealed many legislative bodies include in the act only the desired amending language or words of revivor, which can be confusing because the language does not appear in context with the law amended or revived. The General Assembly is prohibited from this practice by division (D) of this section, which also requires that the act repeal the amended section. R.C. 101.52 (now R.C. 101.53) provides devices for showing changes in context in the printed bill or act: matter to be deleted is shown struck through, and new matter to be inserted is shown in capital letters.”

The printing format of Am.Sub.H.B. No. 215 indicates no intent to reenact or enact R.C. 2744.02(C). R.C. 2744.02(C) appears in the printed act in regular type, without the capitalization that

would indicate new material pursuant to R.C. 101.53.

R.C. 1.54 provides: "A statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute." In In re Hesse, 93 Ohio St. at 234, 112 N.E. at 512, this court stated:

"Section 16 [now Section 15(D)], Article II of the Constitution, requires that where a law is amended, the new act shall contain the section or sections amended, and the section or sections so amended shall be repealed. In compliance with this the general assembly, when it amended [the statute at issue], did repeal the section as it existed prior thereto. It is to be remembered that the only change made in the statute was the addition of two classes of misdemeanors. The provisions contained in the act as amended which were in the original act are not considered as repealed and again reenacted, but are regarded as having been continuous and undisturbed by the amendatory act. In re Allen [1915], 91 Ohio St. 315 [320-321, 110 N.E. 535, 537]."

In Weil v. Taxicabs of Cincinnati, Inc. (1942), 139 Ohio St. 198, 206, 22 O.O. 205, 208, 39 N.E.2d 148, 152, this court stated:

"The courts have generally held, notwithstanding this [current Section 15(D), Article II] and similar constitutional provisions,\*\*911 that where an act is amended, the part of the original act which remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions as having become the law only at the time of the amendment. Black on Interpretation of Laws (2d Ed.) 579 and 582, Sections 168 and 169; 1 Sutherland Statutory Construction (2d Ed.) 441 and 445, Sections 237 and 238; McKibben v. Lester [1859], 9 Ohio St. 627 [1859 WL 40]; State ex rel. McLaughlin v. City of Newark [1894], 57 N.J.L. 298, 30 A. 543.

\*195 "The court in the last cited case says that 'by observing the constitutional form of amending a section of a statute, the Legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated. Any other rule of construction would surely introduce unexpected results and work great inconvenience.' " See, also, In re Petition to Annex 320 Acres to the Village of S. Lebanon (1992), 64

Ohio St.3d 585, 595, 597 N.E.2d 463, 470, citing In re Allen, 91 Ohio St. at 320-321, 110 N.E. at 537, for the proposition that "when a statute is amended the part that remains unchanged is to be considered as having continued as the law from the time of its original enactment."

As the preceding discussion illustrates, Section 15(D), Article II sets out the form for the General Assembly to follow when amending a statute, but cases such as Hesse, Allen, and Weil explain the substantive significance of what is occurring, and give guidance for ascertaining the intent of the General Assembly when an amendment to a specific statute is contained within a particular act.

In accordance with these precedents, it is apparent that R.C. 2744.02(C) continued forward as purportedly enacted in Am.Sub.H.B. No. 350, despite Middletown's arguments based on Section 15(D), Article II. Clearly, the General Assembly did not intend to reenact R.C. 2744.02(C) in Am.Sub.H.B. No. 215. Therefore, that act neither reenacted nor enacted R.C. 2744.02(C). When this court in Sheward struck down Am.Sub.H.B. No. 350, it struck down the version of R.C. 2744.02(C) that Am.Sub.H.B. No. 350 attempted to enact, and R.C. 2744.02(C) remains invalid as a result of Sheward.

For all the foregoing reasons, we hold that R.C. 2744.02(C), as purportedly enacted in Am.Sub.H.B. No. 350, is invalid. Furthermore, R.C. 2744.02(C) was neither enacted nor reenacted by Am.Sub.H.B. No. 215. Sheward, 86 Ohio St.3d 451, 715 N.E.2d 1062, paragraph three of the syllabus, and Hubbard, 88 Ohio St.3d 14, 722 N.E.2d 1025, followed.

### III

#### Conclusion

Neither R.C. 2505.02(B) nor R.C. 2744.02(C) provided a valid basis for the court of appeals to exercise jurisdiction to entertain Middletown's appeal. Therefore, the court of appeals should have dismissed the appeal without reaching the merits of this case. Consequently, we vacate the decision of the court of appeals on the merits. See Walters, 78 Ohio St.3d at 123, 676 N.E.2d at 894. Since the court of appeals was without jurisdiction to reach the merits of the appeal, we \*196 likewise may not reach the merits.<sup>EN3</sup>

FN3.Haynes v. Franklin (Sept. 25, 2000), Warren App. No. CA2000-03-025, unreported, 2000 WL 1371000, discretionary appeal and certified conflict allowed today, case Nos. 00-2004 and 00-2141, presents this court with an opportunity to address the edge-drop issue on the merits.

Accordingly, the judgment of the court of appeals as to its jurisdiction is reversed, the judgment of the court of appeals on the merits of the appeal is vacated, and this cause is remanded to the trial court for further proceedings.

*Judgment reversed and cause remanded.*

**\*\*912 DOUGLAS FRANCIS E. SWEENEY, SR., PFEIFER and LUNDBERG STRATTON, JJ., concur. MOYER, C.J., and LUNDBERG STRATTON, J., concur separately. MOYER, C.J., and COOK, J., concur in part. LUNDBERG STRATTON, J., concurring.**

**LUNDBERG STRATTON, J., concurring.** I reluctantly concur with the determination in Part II C of the majority opinion that R.C. 2744.02(C) was neither enacted nor reenacted by 1997 Am.Sub.H.B. No. 215, because, based upon the format of the language of R.C. 2744.02 in H.B. 215, it was apparent that the General Assembly merely amended a section of the statute and did not enact or reenact a new law and repeal the old one. No one has disputed the General Assembly's authority to determine when issues involving immunity may be appealed. Had the majority in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, merely severed those sections in 1996 Am.Sub.H.B. No. 350 that violated the one-subject rule, I believe that R.C. 2744.02(C) would have remained a valid enactment.

I did not agree with the majority in *Sheward* that the bill in its entirety was unconstitutional. In particular, I expressed the opinion that even if certain provisions violated the one-subject rule of the Constitution, those offending provisions should be severed without striking the entire Act. *Id.* at 539, 715 N.E.2d at 1128 (Lundberg Stratton, J., dissenting). This case presents a perfect example of the chaos resulting from *Sheward*.

The General Assembly clearly intended to provide a political subdivision or an employee of a

political subdivision the ability to immediately appeal from an order that denied the benefit of an alleged immunity from liability and enacted R.C. 2744.02(C) as part of H.B. 350. The city cites strong public policy in support of this law. Nevertheless, with no analysis of the constitutional viability of R.C. 2744.02(C) itself, the statute was struck down in *Sheward* merely because it was part of the overall tort reform bill.

**\*197** Nevertheless, I am constrained to agree that, based upon the technical requirements in the bill-making process, R.C. 2744.02(C) was neither enacted nor reenacted by H.B. 215. Therefore, I concur.

MOYER, C.J., concurs in the foregoing concurring opinion. COOK, J., concurring in part

**COOK, J., concurring in part.** I agree with the syllabus paragraphs and with most of the majority's reasoning. I respectfully disagree, however, with two points the majority suggests and with the majority's characterization of the disposition of this case.

First, the majority states that "in considering whether a particular order affected a substantial right in a special proceeding, the reviewing court's analysis first focuses on the special proceeding portion of the inquiry. Only if it is first determined that an order was entered in a special proceeding is it necessary to go on to consider whether the order affected a substantial right." To constitute a final appealable order under R.C. 2505.02(B)(2), the order at issue must be "[a]n order that affects a substantial right" and must have been "made in a special proceeding." Given that there is no statutory basis for the sequential inquiry set forth in dicta in *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 108, 616 N.E.2d 213, 218, fn. 8, and again by the majority today, and given that the failure of either prong of the two-part inquiry would yield a resolution regarding appealability, I conclude that a reviewing court may address either the substantial right inquiry or the special proceeding inquiry first.

Second, in holding that this case involves an ordinary civil action for damages and not a special proceeding, the majority refers to the headings to R.C. Chapter 2125\*\*913 contained in both Baldwin's Ohio Revised Code Annotated and Page's Ohio Revised Code Annotated. But R.C. 1.01 provides that "Title, Chapter, and section headings and marginal General Code section numbers do not constitute any part of the law as contained in the 'Revised Code.'" One member of this court has explained the character of

such headings as follows:

"[H]eadings are publisher's aids to the user of the code. [They are not] part of the code; [they are not] official. 'In Ohio, the General Assembly does not assign official Revised Code headings, or taglines; they are written by the Publisher's editorial staff.' Baldwin's Ohio Legislative Service (1994), User's Guide, 4. 'Where new sections have been added to the Revised Code without official headings, descriptive headings have been supplied by the publisher's editorial staff.' Page's Revised Code Annotated (1990), Preface, vi." Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc. (1994), 70 Ohio St.3d 281, 286, 638 N.E.2d 991, 995, fn. 1 (Resnick, J., concurring).

Therefore, I decline to join this cumulative point of analysis.

\*198 Finally, the procedural disposition of this case is redundant. The majority reverses the court of appeals' determination of its jurisdiction, vacates its order as to the merits of the underlying appeal, and remands the cause to the trial court for further proceedings. This court has in the past most often merely vacated courts of appeals' orders when no final appealable order exists. See, e.g., Walters v. The Enrichment Ctr. of Wishing Well, Inc. (1997), 78 Ohio St.3d 118, 676 N.E.2d 890; Hitchings v. Weese (1997), 77 Ohio St.3d 390, 674 N.E.2d 688; State v. Lambert (1994), 69 Ohio St.3d 356, 632 N.E.2d 511; State v. Crago (1990), 53 Ohio St.3d 243, 559 N.E.2d 1353. This is so because by vacating for want of jurisdiction the judgment of the court of appeals, we implicitly overturn that court's determination regarding its jurisdiction. Therefore, I believe that the correct disposition of this case is simply to vacate the judgment of the court of appeals and to remand this cause to the trial court for further proceedings.

Accordingly, with the exception of the three foregoing points, I concur in the majority's reasoning and consequent disposition of this cause.

MOYER, C.J., concurs in the foregoing opinion.  
Ohio, 2001.

Stevens v. Ackman  
91 Ohio St.3d 182, 743 N.E.2d 901, 2001 -Ohio- 249

END OF DOCUMENT

Summers v. Slivinsky  
Ohio App. 7 Dist., 2001.

Court of Appeals of Ohio, Seventh District, Jefferson  
County.

SUMMERS et al., Appellants and Cross-Appellees,  
v.

SLIVINSKY et al., Appellees and  
Cross-Appellants.<sup>FN\*</sup>

FN\* Reporter's Note: A discretionary appeal  
to the Supreme Court of Ohio was not  
allowed in (2001). 92 Ohio St.3d 1417, 748  
N.E.2d 549.

No. 99 JE 15.

Decided Jan. 31, 2001.

Public high school student sued school district, school board, and varsity cheerleading advisor for shoulder injury sustained as student attempted back bend during cheerleading practice. The Court of Common Pleas, Jefferson County, granted summary judgment to defendants. Student appealed, and defendants cross-appealed. The Court of Appeals, Waite, J., held that: (1) a school-sponsored cheerleading practice is part of a school district's broad governmental function of providing public education and therefore does not fall within statutory exception to political subdivision immunity, applicable when loss is caused by negligent performance of acts by employees with respect to proprietary functions of the subdivision; and (2) fact issue existed as to whether cheerleading advisor acted recklessly in allegedly intimidating student into attempting back bend, precluding a summary judgment declaring advisor statutorily immune from liability.

Affirmed in part; reversed and remanded in part.

Vukovich, J., filed a dissenting opinion.

West Headnotes

**[1] Appeal and Error 30 ↪ 773(3)**

30 Appeal and Error  
30XII Briefs

30k769 Failure to File or Serve, or to File or  
Serve in Time

30k773 Dismissal or Affirmance or  
Reversal

30k773(3) k. Grounds for Not  
Dismissing. Most Cited Cases  
Cross-appeal would not be dismissed based on  
appellees' failure to file separate brief in support of  
cross-appeal within normally applicable 20-day  
period imposed by procedural rule, where appellees  
filed timely notice of cross-appeal, received two  
extensions on filing brief, and filed brief within time  
as extended. Rules App.Proc., Rules 4(B)(1), 11(B),  
18(A, C).

**[2] Municipal Corporations 268 ↪ 723**

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and  
Corporate Powers in General

268k723 k. Nature and Grounds of Liability.

Most Cited Cases

Three-tiered analysis applies in determining whether a  
political subdivision is immune from liability: first tier  
examines whether immunity is granted under Political  
Subdivision Tort Liability Act; under second tier of  
the analysis, one of five exceptions set forth in that  
statute may serve to lift the blanket of general  
immunity; and under third tier, immunity may be  
"revived" if political subdivision can demonstrate  
applicability of one of the defenses found in that  
statute. R.C. § 2744.02(A, B) (2000).

**[3] Appeal and Error 30 ↪ 893(1)**

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate  
Court

30k893(1) k. In General. Most Cited  
Cases

When reviewing a trial court's decision to grant  
summary judgment, Court of Appeals reviews the  
evidence de novo and applies the same standard used  
by the trial court. Rules Civ.Proc., Rule 56.

**[4] Judgment 228 ↪ 178**228 Judgment228V On Motion or Summary Proceeding228k178 k. Nature of Summary Judgment.Most Cited Cases**Judgment 228 ↪ 185(2)**228 Judgment228V On Motion or Summary Proceeding228k182 Motion or Other Application228k185 Evidence in General228k185(2) k. Presumptions and Burdenof Proof. Most Cited CasesSummary judgment should be granted with caution, being careful to resolve doubts in favor of the nonmoving party. Rules Civ.Proc., Rule 56.**[5] Municipal Corporations 268 ↪ 847**268 Municipal Corporations268XII Torts268XII(E) Condition or Use of Public Buildings and Other Property268k847 k. Nature and Grounds of Liabilityof Municipality as Proprietor. Most Cited CasesException to immunity of political subdivisions for injuries caused by acts or omissions of their employees, permitting suit for loss caused by negligence of subdivision's employee when loss occurs within or on grounds of building used in connection with performance of governmental function, establishes liability only for loss resulting from maintenance of governmental property. R.C. § 2744.02(B)(4) (2000).**[6] Schools 345 ↪ 89.4**345 Schools345II Public Schools345II(F) District Liabilities345k89.4 k. Athletics and Physical Education. Most Cited Cases

For purposes of assessing school district's potential liability, shoulder injury that high school cheerleader suffered during practice in store at local mall as alleged result of intimidation by cheerleading advisor to perform a back bend did not fall within statutory exception to immunity, applicable when loss is caused by negligence of political subdivision's employee and occurs within or on grounds of building used in

connection with performance of governmental function. R.C. § 2744.02(B)(4) (2000).**[7] Municipal Corporations 268 ↪ 724**268 Municipal Corporations268XII Torts268XII(A) Exercise of Governmental and Corporate Powers in General268k724 k. Governmental Powers inGeneral. Most Cited CasesImmunities that are provided under Political Subdivision Tort Liability to political subdivisions that are specifically listed as serving a government function must be construed liberally in favor of those subdivisions. R.C. § 2744.01(F).**[8] Schools 345 ↪ 89.4**345 Schools345II Public Schools345II(F) District Liabilities345k89.4 k. Athletics and Physical Education. Most Cited CasesA school-sponsored cheerleading practice is part of a school district's broad "governmental function" of providing public education and therefore does not fall within statutory exception to political subdivision immunity, applicable when loss is caused by negligent performance of acts by employees with respect to proprietary functions of the subdivision. R.C. § 2744.01(F); § 2744.02(B)(2) (2000).**[9] Judgment 228 ↪ 181(27)**228 Judgment228V On Motion or Summary Proceeding228k181 Grounds for Summary Judgment228k181(15) Particular Cases228k181(27) k. Public Officers and Employees, Cases Involving. Most Cited CasesIssue of material fact existed as to whether cheerleading advisor for public high school acted recklessly when, after cheerleader allegedly told advisor that she wanted to speak with her physical therapist before attempting back bend, advisor allegedly warned her she would be placed in back row during upcoming competition if she did not do the back bend, precluding a summary judgment declaring advisor statutorily immune, as employee of a political subdivision, from liability for shoulder injury sustained by cheerleader. R.C. § 2744.03(A)(6)

(2000); Rules Civ.Proc., Rule 56.

**[10] Municipal Corporations 268 ↪ 742(6)**

**268 Municipal Corporations**

**268XII Torts**

**268XII(A) Exercise of Governmental and Corporate Powers in General**

**268k742 Actions**

**268k742(6) k. Trial, Judgment, and Review. Most Cited Cases**

Whether conduct is reckless, in the context of an immunity claim asserted by political subdivision's employee under Political Subdivision Tort Liability Act, is typically a question for the trier of fact. R.C. § 2744.03(A)(6) (2000).

**[11] Contracts 95 ↪ 176(9)**

**95 Contracts**

**95II Construction and Operation**

**95II(A) General Rules of Construction**

**95k176 Questions for Jury**

**95k176(9) k. Subject-Matter. Most Cited Cases**

Specific terms of waivers and releases are typically questions for a jury, particularly if it is alleged that they are ambiguous, overly generalized, or encompass conditions not contemplated by the parties.

**[12] Schools 345 ↪ 147**

**345 Schools**

**345II Public Schools**

**345II(K) Teachers**

**345II(K)1 In General**

**345k147 k. Duties and Liabilities. Most Cited Cases**

Waiver and release forms signed by high school cheerleader and her mother did not necessarily bar cheerleader from recovering, under statutory exception to immunity of political subdivision's employee if employee acts in reckless manner, from cheerleading advisor who allegedly intimidated her into attempting a back bend and thereby injuring her shoulder. R.C. § 2744.03(A)(6) (2000).

**\*\*856\*84** Harry W. White, St. Clairsville, for appellants and cross-appellees.

John DeFazio, Canfield, for appellees and cross-appellants.

WAITE, Judge.

Plaintiffs-appellants/cross-appellees Michael Summers et al. ("appellants") appeal from a judgment rendered by the Jefferson County Common Pleas Court, sustaining a motion for summary judgment filed by defendants-appellees/cross-appellants Geri Slivinsky et al. ("appellees"). For the following reasons, the \*85 judgment of the trial court is affirmed in part and reversed in part, and this cause is remanded for further proceedings.

**STATEMENT OF THE FACTS**

Hilary Summers, a seventeen-year-old student at Buckeye Local High School, was a member of that school's cheerleading squad. In July 1997, she injured her shoulder at practice. She was prescribed pain medication and an immobilizer sling. After one week without attending practice, Hilary attempted to participate. Her pain returned. Her physician advised her not to practice and ordered physical therapy. In mid-August, Hilary, her mother Kelli Summers, and Geri Slivinsky, the varsity cheerleading advisor, all agreed that Hilary would begin some limited activities at her own pace.

On August 28, 1997, the squad was preparing for a cheerleading competition. The routine required certain cheerleaders to perform a back bend. Allegedly, Hilary informed Slivinsky that she had a physical therapy session in thirty minutes and that she wanted to ask her therapist whether she could do the back bend. Hilary contends that Slivinsky warned that if she did not do the back bend, she would be placed in the back row for the competition. Claiming that she felt intimidated by this, Hilary attempted the back bend, seriously reinjuring her shoulder.

Hilary, Kelli, and Michael Summers, Hilary's father, brought suit against Slivinsky, Buckeye Local School District, and Buckeye Local School Board. The complaint alleged that appellants suffered damages as a result of appellees' negligent and reckless conduct. Appellees filed a motion for summary judgment, claiming statutory immunity under R.C. 2744.01 et seq. On March 1, 1999, the trial court filed a journal entry sustaining appellees' motion for summary judgment. The court added a "correction" as to appellee Slivinsky on March 3, 1999.

Appellants filed their appeal on March 19, 1999. Appellees filed a cross-notice of appeal on March 26,

1999.

## MOTION TO DISMISS CROSS-APPEAL

[1] As a preliminary matter, appellants have filed a motion with this court seeking to dismiss appellees' cross-appeal. Appellants argue that under App.R. 18(A), appellees should have filed a separate brief within twenty days after the date on which the clerk of courts mailed the notice required by App.R. 11(B). That notice was sent on April 28, 1999. Appellants argue that appellees did not properly request an extension for filing their cross-appeal brief and failed to file a brief in support of their cross-appeal until August 11, 1999, which was well after \*86 the twenty-day deadline. \*\*857 For this reason, appellants contend that the cross-appeal should be dismissed.

Appellees filed a timely notice of cross-appeal within the time allowed by App.R. 4(B)(1). It is within our discretion to extend the time for filing briefs on appeal. App.R. 18(C). Appellees filed a motion for extension on May 18, 1999, which we granted. We also granted appellees' July 8, 1999 motion for extension. Appellees filed their brief, which contained their arguments in support of the cross-appeal, within the time as extended. Appellants' motion to dismiss is therefore overruled.

APPELLANTS' ASSIGNMENTS OF ERROR  
NUMBERS ONE AND TWO

Appellants set forth three assignments of error on appeal. Appellees set forth one assignment of error on cross-appeal. Appellants' first two assignments of error and appellees' cross-assignment of error will be discussed together, as they have a common basis in law and fact. They allege respectively:

"The trial court erred in finding that the appellees were entitled to immunity from appellants' claims by virtue of R.C. 2744.03(A)(3).

"The trial court erred in finding that appellees were entitled to immunity from appellants' claims by virtue of R.C. 2744.03(A)(5)."

"The trial court erred in concluding that cheerleading by high school students, when performed on school property and under the supervision and direction of a school employee who serves as their advisor, is not a governmental function for purposes of

conferring tort immunity on the school district under R.C. § 2744.01, et seq."

Ohio first recognized the concept of sovereign immunity in State v. Franklin Bank of Columbus (1840), 10 Ohio 91, 1840 WL 18. The doctrine was first applied to political subdivisions in Dayton v. Pease (1854), 4 Ohio St. 80, 1854 WL 63. In Enghauser Mfg. Co. v. Eriksson Eng., Ltd. (1983), 6 Ohio St.3d 31, 6 OBR 53, 451 N.E.2d 228, syllabus, the Ohio Supreme Court abolished the common-law doctrine of sovereign immunity with respect to municipal corporations. In response, the Ohio General Assembly enacted the Political Subdivision Tort Liability Act, codified as R.C. 2744.01 et seq.

[2] In Cater v. Cleveland (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610, 614-615, the Ohio Supreme Court established a three-tiered analysis for determining whether a political subdivision is immune from liability. 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 \*87 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, 739 N.E.2d 1237. These third-tier defenses are relevant only in determining the immunity of a political subdivision where a plaintiff has shown that a specific exception to immunity under R.C. 2744.02(B) applies. *Id.*

As opposed to the political subdivision itself, R.C. 2744.03(A)(6) provides a more limited immunity for employees of political subdivisions:

"In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that \*\*858 division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

"(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

“(b) *The employee's acts or omissions were with malicious purpose, in bad faith, or in wanton or reckless manner;*

“(c) Liability is expressly imposed upon the employee by a section of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term ‘shall’ in a provision pertaining to an employee.”(Emphasis added.)

#### STANDARD OF REVIEW

[3] When reviewing a trial court's decision to grant summary judgment, we review the evidence de novo and apply the same standard used by the trial court. *Varisco v. Varisco* (1993), 91 Ohio App.3d 542, 543, 632 N.E.2d 1341, 1341-1342, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121, 1122-1123. Summary judgment under Civ.R. 56 is proper only when the movant demonstrates:

“(1) [N]o genuine issue as to any material fact remains to be litigated;

“(2) [T]he moving party is entitled to judgment as a matter of law; and

“(3) [I]t appears from the evidence that reasonable minds [could] come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129, 1132.

\*88[4] These factors make it clear that summary judgment should be granted with caution, being careful to resolve doubts in favor of the nonmoving party. *Id.*

The party seeking summary judgment has the initial burden of informing the court of the motion's basis and identifying those portions of the record tending to show that there are no genuine issues of material fact on the essential elements of the opposing party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d

280, 293, 662 N.E.2d 264, 273-274. The movant must be able to point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the opposing party has no evidence to support its claim. *Id.* If this initial burden is met, the opposing party has a reciprocal burden to “set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” *Id.*

#### GENERAL IMMUNITY (TIER ONE)

R.C. 2744.02(A)(1) provides:

“For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.”

In order to be entitled to a general veil of immunity under R.C. 2744.02(A), appellees\*\*859 must be a “political subdivision.” Pursuant to R.C. 2744.01(F), “political subdivision” means “a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographical area smaller than that of the state \* \* \*.” (Emphasis added.) Appellees Buckeye Local School District and Buckeye Local School Board are thus protected under the first tier of the analysis.

#### EXCEPTIONS TO IMMUNITY (TIER TWO)

[5][6] Under the second tier, it must be determined whether an exception to general immunity applies. *Cater, supra*. R.C. 2744.02(B) provides five exceptions to immunity. R.C. 2744.02(B)(4) establishes an exception for loss caused by an employee's negligence when that loss “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 \* \* \*.” As construed, R.C. 2744.02(B)(4) establishes liability only for loss resulting from the maintenance of governmental

property. \*89Cook v. Hubbard Exempted Village <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=578&FindType=Y&ReferencePositionType=S&SerialNum=1997234494&ReferencePosition=1062>*Bd. of Edn.*(1996), 116 Ohio App.3d 564, 570, 688 N.E.2d 1058, 1062;*Hall v. Ft. Frye Loc. School Dist. Bd. of Edn.*(1996), 111 Ohio App.3d 690, 695, 676 N.E.2d 1241, 1244-1245. The record indicates that the cheerleading practice in question took place within a J.C. Penney store at a local mall and not within a government building. There is nothing in the record indicating that the injuries were the result of a building maintenance problem relating to a government building. Therefore, R.C. 2744.02(B)(4) does not serve as an exception to appellees' statutory immunity.

The only other exception to immunity that might apply is R.C. 2744.02(B)(2), which states: “[E]xcept as otherwise provided \* \* \*, *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.”(Emphasis added.)

Assuming *arguendo* that appellee Slivinsky was an employee of the school district, we must determine whether the cheerleading practice was a proprietary or governmental function. If the activity was a governmental function, the school district and school board are immune from liability and our analysis is complete as to those entities. If the activity was a proprietary function, we must further determine whether immunity is revived through one of the provisions listed in R.C. 2744.03(A)(1) through (5).

The trial court determined that the cheerleading practice in question constituted a proprietary function. This decision was partially based in its analysis that cheerleading is not an activity in all respects exclusive to schools. The trial court concluded, however, that R.C. 2744.03(A)(3) and (5) applied to reinstate immunity. Appellants' argument assumes that the cheerleading practice falls under the definition of a proprietary function, but contends that R.C. 2744.03(A)(3) and (5) do not apply. Appellees insist that the cheerleading practice was a governmental function and that no further analysis is necessary to establish immunity. We find appellees' argument persuasive.

R.C. 2744.01(C)(1) provides:

“ ‘Governmental function’ means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

“(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision \*\*860 voluntarily or pursuant to legislative requirement;

“(b) A function that is for the common good of all citizens of the state;

“(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily \*90 engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.”

R.C. 2744.01(C)(2) provides a nonexhaustive list of governmental functions. Among the examples is “[t]he provision of a system of public education.” R.C. 2744.01(C)(2)(c).

R.C. 2744.01(G)(1) states:

“ ‘Proprietary function’ means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

“(a) The function is not [a governmental function];

“(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.”

R.C. 2744.01(G)(2) provides examples of proprietary functions. Such examples include the operation of hospitals, cemeteries, utilities, sewer systems, bands, orchestras, and stadiums.

[7] The Ohio Supreme Court recently held that when the political subdivision at issue is not one of those mentioned in R.C. 2744.01(F), the exceptions to immunity found in R.C. 2744.02(B) “should be construed in a way that leads to a finding of immunity for only the central core functions of the political

subdivision." *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 560, 733 N.E.2d 1141, 1149. The logical corollary to this principle is that if the political subdivision is one of those specifically listed in R.C. 2744.01(F), the exceptions to immunity found in R.C. 2744.02(B) should be construed more broadly. School districts are one of the political subdivisions specifically listed in R.C. 2744.01(F). Therefore, R.C. 2744.02(B) should be construed liberally in its favor.

While at first blush it can be argued that cheerleading is not compulsory to a system of education, it is clearly some part of the school system's educational program. Bearing this fact in mind, coupled with the fact that the immunities provided under R.C. 2744.01(F) must be construed liberally in favor of the school district and board of education, we turn to a review of the current case law.

In *Neelon v. Conte* (Nov. 13, 1997), Cuyahoga App. No. 72646, unreported, 1997 WL 711232, the Eighth District Court of Appeals broadly construed R.C. 2744.02(B)(2) when it held that a cheerleading event held in a private home was governmental function because it was part of the school board's provision of a system of public education.

Other courts have also found that high school cheerleading events fall under the governmental function umbrella. In \*91 *Anderson v. Indian Valley School* Dist. <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4031&FindType=Y&SerialNum=1999091415> *Bd. of Edn.* (Mar. 22, 1999), *Tuscarawas App. Nos. 1998AP122, 1998AP123 and 1998AP124*, unreported, 1999 WL 175218, a student was injured while attending a cheerleader-sponsored pep rally at a local park and this was determined to be a governmental function for purposes of statutory immunity. The aforementioned cases are in keeping with the general rule that the organization of school-sponsored athletic teams is a governmental function covered under political subdivision immunity. Annotation, \*\*861 *Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning* (1970), 33 A.L.R.3d 703, 743.

[8] While there are certainly instances of professional, paid cheerleading squads that can be compared to the current situation, this is not the

customary situation. We are in agreement with the holdings of *Neelon* and *Anderson, supra*, and hold that a school-sponsored cheerleading practice is part of a school district's broad governmental function of providing public education. Therefore, it does not fall within the exception to political subdivision immunity under R.C. 2744.02(B)(4). This said, there is no need to continue on to the third tier of the immunity analysis under R.C. 2744.03(A). As earlier discussed, further analysis is necessary only if the action involves a proprietary, rather than a governmental, function, which is not the case here. As we hold that appellees' cross-assignment of error is meritorious and appellants' first two assignments are without merit, the decision of the trial court with respect to appellees Buckeye Local School District and Buckeye Local Board of Education is affirmed.

#### APPELLANTS' ASSIGNMENT OF ERROR NUMBER THREE

Appellants' third assignment of error alleges:

"The trial court erred in finding that appellee, Geri Slivinsky, was not reckless."

[9] Appellants argue that employees of political subdivisions are subject to a more limited immunity under R.C. 2744.03(A)(6), which is separate from the immunity provided to the political subdivision itself. Appellants argue that employees are not immune for acts or omissions that are done with malicious purpose, in bad faith, or in a wanton or reckless manner. Appellants contend that they presented evidence that created an issue of material fact as to appellee Slivinsky's recklessness and, thus, summary judgment should not have been granted with respect to her. We agree with this contention.

[10] R.C. 2744.03(A)(1) through (5) pertain to immunities granted to a political subdivision based on certain actions by its employees. R.C. 2744.03(A)(6) discusses the immunities enjoyed by the employees themselves. This section states that employees of political subdivisions are immune from liability *unless*\*92 "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in wanton or reckless manner." The term "reckless" means that the conduct was committed "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also

that such risk is substantially greater than that which is necessary to make his conduct negligent.' " Marchetti v. Kalish (1990), 53 Ohio St.3d 95, 96, 559 N.E.2d 699, 700, fn. 2, quoting 2 Restatement of the Law 2d, Torts (1965) 587, Section 500. Whether conduct is reckless, in the context of an employee claiming immunity under R.C. 2744.03(A)(6), is typically a question for the trier of fact. Singer v. Fairborn (1991), 73 Ohio App.3d 809, 819, 598 N.E.2d 806, 813.

Appellants alleged both in their complaint and in their response to appellees' motion for summary judgment that Slivinsky's conduct was reckless. Appellants presented evidence, which, if believed, could establish that Slivinsky told Hilary Summers either to do a back bend or be consigned to the back row of the cheerleading team at the competition, knowing that Hilary was still suffering from a serious shoulder injury. Appellants also presented evidence that Hilary was somehow intimidated into attempting the maneuver. \*\*862 While the record as it currently exists is sketchy as to whether the evidence presented goes beyond the standard of negligence to reach "recklessness," appellants have raised a question of fact sufficient to overcome summary judgment. It should be left to the jury to determine whether Slivinsky's behavior rose to the level of recklessness needed to overcome the immunity provided by R.C. 2744.03(A)(6).

[11][12] Although appellees' motion seeking summary judgment contained waiver and release forms signed by both Hilary Summers and her mother, the significance of these forms was not argued in appellees' brief. Such forms do not necessarily bar appellants from recovery. The specific terms of waivers and releases are typically questions for a jury, particularly if it is alleged that they are ambiguous, overly generalized, or encompass conditions not contemplated by the parties. Tanker v. N. Crest Equestrian Ctr. (1993), 86 Ohio App.3d 522, 525, 621 N.E.2d 589, 590-591.

We conclude that appellants' third assignment of error has merit and that summary judgment was erroneously granted to appellee Slivinsky. We reverse the judgment of the trial court only as to appellee Slivinsky, affirm the decision on other grounds as to appellees Buckeye Local School District and Buckeye Local School Board, and remand the cause for further proceedings consistent with this court's opinion.

*Judgment accordingly.*

\*93COX, P.J., concurs.

VUKOVICH, J., dissents.

VUKOVICH, Judge, dissenting.

I respectfully dissent from the opinion of the majority because I do not agree with the majority's conclusion that cheerleading is a governmental function.

Greene Cty. Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 733 N.E.2d 1141, involved a dispute concerning the eligibility of a hog named "Big Fat" to compete in a hog show held at the Greene County Fair. After Big Fat was named "Reserve Grand Champion," the second highest award for a hog at the show, the Greene County Agricultural Society's suspicion of the hog's ineligibility led to an investigation of its owner. The investigation resulted in sanctions against Big Fat's owner. The society filed suit to enforce the sanctions. Big Fat's owner filed a counterclaim contending that the society violated her due process rights and defamed her. The trial court sustained the society's motion for summary judgment based upon sovereign immunity. The court of appeals affirmed the trial court's decision. The sole issue before the Ohio Supreme Court was whether the society was entitled to immunity under R.C. Chapter 2744. It held that immunity did not apply. The court determined that the society was not engaging in governmental functions because its actions were not for the common good of all citizens of the state and were the type customarily engaged in by nongovernmental persons. It concluded that, while conducting a county fair is something that is not customarily engaged in by nongovernmental persons, conducting a livestock competition is. The court further noted that the activities of the society were not described in R.C. 2744.01(C)(2).

While I recognize that *Greene* was decided by only a plurality of the Ohio Supreme Court, I agree with its rationale. A review of R.C. 2744.01(C)(1) leads to the conclusion that cheerleading cannot be considered a governmental function. It cannot be said that cheerleading is a function imposed upon the state as an obligation\*\*863 of sovereignty. It is not a function that is for the common good of all citizens of the state. Moreover, cheerleading is an activity that is engaged in by nongovernmental actors. The Los Angeles Laker Girls and the Dallas Cowboy Cheerleaders are two common examples. Therefore, cheerleading could only be considered a governmental

function if it is described in R.C. 2744.01(C)(2). Among the examples of governmental functions provided by that section is the provision of a system of public education. The majority holds that cheerleading is at least a part of the school system's education program and must, therefore, be a governmental function. However, educational value alone is not enough to convert what otherwise would not be a governmental function into something that is a governmental function. Greene, supra, at 560, 733 N.E.2d at 1148-1149.

\*94 Under the majority's approach, anything a school system does could be considered a governmental function. The legislature did not intend this result. If it did, it would have so stated explicitly. Instead, the legislature included as a governmental function "[t]he provision of a system of public education." R.C. 2744.01(C)(2)(c). It included as proprietary functions the operation of public stadiums, bands, or orchestras. R.C. 2744.01(G)(2)(e). These proprietary functions are performed by virtually every school district. In Greene, the Ohio Supreme Court held that livestock competitions are proprietary functions performed within the government function of holding a county fair. Likewise, school districts operating a stadium, band, or orchestra are performing proprietary functions, even though those functions aid in the provision of education. I agree with the trial court's observation that cheerleading is not distinguishable from bands or orchestras.

My position would be different if the record revealed that Summers received academic credit for her participation in cheerleading. In Angelot v. Youngstown Bd. of Edn. (Sept. 18, 1998), Mahoning App. No. 96CA90, unreported, 1998 WL 668158, this court held that the school board was immune from liability to a student who was injured while moving volleyball equipment during a regularly scheduled physical education class. That class was part of the regular curriculum and was, thus, part of the provision of education. However, to construe cheerleading, an *extracurricular* activity, as the provision of a system of public education is to declare also that operating a stadium, band, or orchestra is the provision of a public education system. Those activities, which the legislature clearly considered to be proprietary, would thus become governmental by virtue of a school district's performing them. No such blanket immunity exists for schools.

The effect of the majority's sweeping

interpretation of "governmental function" is to leave many who should be compensated under our system for their injuries without any legal recourse. Section 16, Article I of the Ohio Constitution provides, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law \* \* \*." Notwithstanding this provision, the legislature chose to provide political subdivisions with immunity for certain conduct. If that immunity is to be expanded, the General Assembly, not the courts, is the proper forum.

For these reasons, I respectfully dissent from the majority opinion.

Ohio App. 7 Dist., 2001.

Summers v. Slivinsky

141 Ohio App.3d 82, 749 N.E.2d 854, 154 Ed. Law Rep. 659, 2001 -Ohio- 3169

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Toles v. Regional Emergency Dispatch Center  
Ohio App. 5 Dist.,2003.

CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF  
LEGAL AUTHORITY.

Court of Appeals of Ohio,Fifth District, Stark County.  
Eleanor TOLES, Administratrix of the Estate of Jean  
K. Toles, Plaintiff-Appellant,

v.

REGIONAL EMERGENCY DISPATCH CENTER,  
et al., Defendants-Appellees.  
No. 2002CA00332.

Decided March 10, 2003.

Estate of murder victim brought action against 911  
dispatch center alleging that 911 dispatcher failed to  
relay report of assault to police. The Court of  
Common Pleas, No., 2001-CV-01535, granted  
summary judgment in favor of 911 dispatch center,  
and estate appealed. The Court of Appeals, Boggins,  
J., held that whether 911 dispatcher's conduct  
constituted wanton or willful misconduct was a  
question of material fact precluding summary  
judgment.

Reversed and remanded.

Hoffman, J., concurred in judgment only.

Edwards, J., dissented with opinion.

West Headnotes

[1] Judgment 228 ↪ 181(6)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(5) Matters Affecting Right to

Judgment

228k181(6) k. Existence of Defense.

Most Cited Cases

Whether 911 dispatcher's conduct in failing to relay  
report of assault to police constituted wanton or willful  
misconduct, and thus, whether emergency telephone

number system liability statute applied, was a question  
of material fact precluding summary judgment in  
action brought by estate of murder victim. R.C. §  
4931.49(A).

[2] Municipal Corporations 268 ↪ 747(1)

268 Municipal Corporations

268XII Torts

268XII(B) Acts or Omissions of Officers or

Agents

268k747 Particular Officers and Official

Acts

268k747(1) k. In General. Most Cited

Cases

Emergency telephone number system liability statute  
applied with respect to the training given to 911  
dispatcher as such fell within the development of the  
911 system; therefore, whether such training or  
manual contents fell within the sphere of negligence  
was immaterial in that statute required wanton and/or  
willful misconduct in order to impose liability. R.C. §  
4931.49(A).

[3] Judgment 228 ↪ 181(6)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(5) Matters Affecting Right to

Judgment

228k181(6) k. Existence of Defense.

Most Cited Cases

Whether alleged negligence of 911 dispatcher in  
failing to relay report of assault to police occurred on  
the grounds of buildings being utilized for a  
governmental function, thus negating governmental  
immunity, was a question of material fact precluding  
summary judgment in action brought by estate of  
murder victim. R.C. § 2744.02(B)(4).

Civil Appeal from the Court of Common Pleas, Case  
No.2001-CV-01535.

Mary Cavanaugh, Cleveland, OH, for  
Plaintiff-Appellant.

J. Fred Stergios, Massillon, OH, for the City of  
Massillon.

Robert J. Tscholl, Jennifer L. Arnold, Canton, OH, for  
Logic, Red Center and Lisa Ellington.

Sharon D. Miller, Howard T. Lane, Stark County Prosecutor's Office, Canton, OH, for Stark County.  
BOGGINS, J.

\*1 ¶ 1 This is an appeal from the granting of Summary Judgment by the Court of Common Pleas of Stark County on the issue of the lack of existence of disputed material facts as to wanton and willful misconduct under R.C. 4931.49.

¶ 2 The sole Assignment of Error is:

I.

¶ 3 "THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT AS A MATTER OF LAW UNDER THE WILLFUL AND WANTON MISCONDUCT STANDARD OF OHIO REV. CODE SECTION 4931.49 WHERE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE CONDUCT OF BOTH THE POLITICAL ENTITY AND ITS EMPLOYEE DISPATCHER IN THE OPERATION OF 9-1-1 EMERGENCY SERVICES."

STATEMENT OF THE FACTS AND CASE

¶ 4 Appellee, Regional Emergency Dispatch Center (RED) is a public safety answering service for 9-1-1 calls in western Stark County under the auspices of several police and fire departments entitled Local Organized Governments in Cooperation (LOGIC).

¶ 5 Lisa Ellington was an employee of LOGIC and RED at the time of the occurrence of the events forming the basis of this action and appeal.

¶ 6 On September 16, 2000, Jean Toles was stabbed multiple times by Lamarr Parr resulting in her death and the death of her fetus. This occurred in the vehicle driven by Mr. Parr in which Jean Toles was a passenger.

¶ 7 A vehicle proceeding behind the Parr vehicle observed the assault taking place, though not specifically the weapon involved, and reported such to 9-1-1.

¶ 8 Lisa Ellington, as the 9-1-1 dispatcher, received the call and informed the caller that she would tell the officers so maybe we can watch for them.

¶ 9 However, Ms. Ellington did not notify the police.

STANDARD OF REVIEW

¶ 10 Civil Rule 56(C) states, in pertinent part:

¶ 11 "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."

¶ 12 Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. In order to survive a motion for summary judgment, the non-moving party must produce evidence on any issue to which that party bears the burden of production at trial. Wing v. Anchor Media Ltd. of Texas (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, citing Celotex v. Catrett (1986), 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265. 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.

I.

\*2[1] ¶ 13 The trial court in the case sub judice ruled:

¶ 14 "The Court finds that the facts presented herein as provided to the Court would not permit a finding, as a matter of law, of wanton misconduct or willful misconduct. Even significant evidence of negligence does not rise to the appropriate legal level necessary to maintain this action."

¶ 15 The statutes relative to governmental immunity are:

{¶ 16} “2744.02 Classification of functions of political subdivisions; liability; exceptions.

{¶ 17} “(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

{¶ 18} “(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

{¶ 19} “(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 person 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:

{¶ 20} “(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

{¶ 21} “(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

{¶ 22} “(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

{¶ 23} “(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

\*3 {¶ 24} “(2) Except as otherwise provided in sections 3314.07 and 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.

{¶ 25} “(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 subdivisions open, in repair, and free from nuisance, except that it is a full defense to that 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.

{¶ 26} “(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.

{¶ 27} “(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."

{¶ 28} "2744.03 Defenses or immunities of subdivision and employee.

{¶ 29} "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons 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:

{¶ 30} "(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

{¶ 31} "(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

\*4 {¶ 32} "(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.

{¶ 33} "(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to

be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

{¶ 34} "(5) The political subdivision is immune from liability if the injury, death, or loss to persons 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.

{¶ 35} "(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

{¶ 36} "(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

{¶ 37} "(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶ 38} "(c) Liability is expressly imposed upon the employee by a section of the Revised Code.

{¶ 39} "(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

{¶ 40} "(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code."

\*5 ¶ 41 Revised Code 4931.49(A) and (B) provide:

¶ 42 “(A) The state, the state highway patrol, or a subdivision participating in a 9-1-1 system and any officer, agent, or employee of the state, state highway patrol, or a participating subdivision is not liable in damages in a civil action for injuries, death, or loss to persons or property arising from any act or omission, except willful or wanton misconduct, in connection with developing, adopting, or approving any final plan or any agreement made under section 4931.48 of the Revised Code or otherwise bringing into operation a 9-1-1 system pursuant to those provisions.

¶ 43 “(B) Except as otherwise provided in sections 701.02 and 4765.49 of the Revised Code, an individual who gives emergency instructions through a 9-1-1 system established under sections 4931.40 to 4931.54 of the Revised Code, and the principals for whom the person acts, including both employers and independent contractors, public and private, and an individual who follows emergency instructions and the principals for whom that person acts, including both employers and independent contractors, public and private, are not liable in damages in a civil action for injuries, death, or loss to persons or property arising from the issuance or following of emergency instructions, except where the issuance or following of the instructions constitutes willful or wanton misconduct.”

¶ 44 Wanton and willful misconduct has been defined in numerous decisions.

¶ 45 Justice Cook in Gladon v. Greater Cleveland Regional Transit Authority (1996), 75 Ohio St.3d 312, 662 N.E.2d 287 stated:

¶ 46 “...‘willful conduct’ involves intent, purpose, or design to injure, and wanton conduct involves failure to exercise any care whatsoever toward those to whom he owes duty of care, and his failure occurs under circumstances in which there is great probability that harm will result.”

¶ 47 Brockman v. Bell (1992), 78 Ohio App.3d 508, 605 N.E.2d 445 held:

¶ 48 “ ‘Willful misconduct’ involves more positive mental state prompting injurious act than

‘wanton misconduct’ on continuum between negligence and intentional misconduct, but ‘willful misconduct’ implies intent relating to misconduct rather than relating to result so that intent to injure need not be shown.

¶ 49 “ ‘Reckless misconduct’ as defined in Restatement of Torts, 2d 500, may be used interchangeably with ‘willful misconduct’ and, thus, ‘wanton or reckless misconduct’ as used in sovereign immunity statute protecting governmental or proprietary functions of government employees is functional equivalent of ‘willful or wanton misconduct’ as used in immunity statute protecting fire fighters from liability for negligent operation of motor vehicles R.C. 2744.02(B)(1)(b), 2744.03(A)(6).”

¶ 50 Tighe v. Diamond (1948), 149 Ohio St. 520, 80 N.E.2d 122 added:

¶ 51 “The term ‘willful tort’ implies an intent or purpose to injure, and is not synonymous with ‘wanton misconduct’ or ‘willful misconduct’...”

\*6 ¶ 52 “ ‘Wanton misconduct’ comprehends an entire absence of all care for safety of others and an indifference to consequences, but it is not necessary that an injury be intended or that there be any ill will on the part of the actor toward the person injured as a result of such conduct.”

¶ 53 The court in Shallehauser v. City of Medina (2002), 148 Ohio App.3d 41, 772 N.E.2d 129 defined such terms:

¶ 54 “ ‘Wanton misconduct’ has been defined as the failure to exercise any care toward one to whom a duty of care is owed when the failure occurs under circumstances for which the probability of harm is great and when the probability of harm is known to the tortfeasor.”(Citation omitted.) Brockman v. Bell (1992), 78 Ohio App.3d 508, 515, 605 N.E.2d 445.

¶ 55 “ ‘Willful misconduct’ is ‘an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.’ “ (Citations omitted.) Id., quoting Tighe v. Diamond 1948), 149 Ohio St. 520, 527, 37 O.O. 243, 80 N.E.2d 122.

{¶ 56} This Court in Jackson v. McDonald (2001), 144 Ohio App.3d 301, 760 N.E.2d 24 further defined such terms:

{¶ 57} "To act in reckless disregard of the safety of others, thereby removing protection of official immunity, a government employee's conduct must be of such risk that it is substantially greater than that which is necessary to make the conduct negligent.

{¶ 58} "'Wanton misconduct' has been defined as a failure to exercise any care whatsoever. Hawkins v. Ivy (1977), 50 Ohio St.2d 114, 363 N.E.2d 367, syllabus. The court in such case eliminated the phraseology of disposition of perversity contained in Rozzman v. Sammett (1971), 26 Ohio St.2d 94, 96-97, 269 N.E.2d 420. To act in reckless disregard of the safety of others, the conduct must be of such risk that it is substantially greater than that which is necessary to make the conduct negligent. Thompson v. McNeill (1990) 53 Ohio St.3d 102, 559 N.E.2d 705."

{¶ 59} With these definitional guides we must determine the material facts, disputed or not, under our de novo review as to the applicability of Summary Judgment.

[2] {¶ 60} Initially, we must dismiss outright the argument that appellee, contractually, had nothing to do with 9-1-1 calls. Appellee, also dismisses the applicability of R.C. 4931.49.

{¶ 61} Appellee is the entity to receive emergency calls from the public and forward these for the protection of the public to the appropriate authority capable of responding.

{¶ 62} Revised Code 4931.49(A) clearly is applicable with respect to the training given to Ms. Ellington as such falls within the development of the 9-1-1 system. Whether such training or manual contents fell within the sphere of negligence is therefore immaterial in that this specific statute which is applicable to the development of such system would require wanton and/or willful misconduct.

\*7 {¶ 63} Section (B) of such section also provides immunity to acts or omissions less than wanton and/or willful misconduct as to persons giving emergency instructions. An examination of the content of the transcript indicates that no emergency

instructions were given by Ms. Ellington and therefore this Subsection (B) is inapplicable. We must therefore refer to other statutes as to governmental immunity, including R.C. 2744.02 and .03 set forth heretofore.

{¶ 64} The record of the call in the case sub judice is:

{¶ 65} "Station Recorded on Sept. 16, 400, at 1746

{¶ 66} "Caller-Help please. Can we talk to someone.

{¶ 67} "Passenger screaming in background-Oh God. Oh no ...

{¶ 68} "Dispatcher-Hello.

{¶ 69} "Caller-There's some kind of altercation going on in a car. They were driving crazy down the street and then they were fighting, and ...

{¶ 70} "Dispatcher-Okay, what street? Where at?

{¶ 71} "Caller-They were, I don't see them anymore and they were on Arch and Third Street Southeast.

{¶ 72} "Dispatcher-OK. What kind of a car?

{¶ 73} "Caller-We didn't get the license plates ... It was an older white looking car.

{¶ 74} "Passenger-I think it was two males.

{¶ 75} "Dispatcher-She said two males.

{¶ 76} "Caller-That's what she said. I don't know. All I could see was them fighting.

{¶ 77} "Dispatcher-Okay, I'll tell the officers so maybe we can watch out for them." With this record of the call, the fact that Ms. Ellington had no recollection of the contents of such call at her deposition is immaterial to this Court's de novo review as to the Crim. R. 56 motion.

[3] {¶ 78} The Ohio Supreme Court in partially reversing Hubbard v. Canton City School Board of

Education (2002), 97 Ohio St.3d 451, 780 N.E.2d 543 determined that the language of R.C. 2744.02(B)(4) referencing negligence of the employees of a political subdivision occurring on the grounds of buildings being utilized for a governmental function negating immunity was not limited to injury resulting from physical defects or use of such grounds or buildings.

{¶ 79} Therefore, if Ms. Ellington 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.

{¶ 80} However, in addition to this determination, we must respectfully disagree with Judge Sinclair as to the legal absence of the existence of wanton or willful misconduct possibly occurring due to the lack of any attempt by Ms. Ellington to notify the police.

{¶ 81} Again, as stated in Glendon v. Greater Cleveland Regional Transit Authority (1996), 75 Ohio St.3d 312, 662 N.E.2d 287:

{¶ 82} “ ‘Wanton conduct’ involves failure to exercise any care whatsoever toward those to whom he owes a duty of care, and his failure occurs under circumstances in which there is great probability that harm will result.”

\*8 {¶ 83} Such term “implies intent relating to misconduct rather than relating to result, so that intent to injure need not be shown.” Brockman v. Bell (1992), 78 Ohio App.3d 508, 605 N.E.2d 445.

{¶ 84} As stated in Fabrey v. McDonald Village Police Department (1994), 70 Ohio St.3d 351, 639 N.E.2d 31 the issue of wanton misconduct is normally a jury question.

{¶ 85} We, in sustaining the sole Assignment of Error, are not determining liability but are stating that 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).

{¶ 86} This cause is reversed, the Summary Judgment vacated and remanded for further proceedings consistent herewith.

BOGGINS and EDWARDS, JJ., dissent.  
HOFFMAN, P.J., concurs in judgment only.  
EDWARDS, J., dissenting.

{¶ 87} I concur with the majority's disposition and analysis, with one exception. The majority finds that R.C. 4931.49(A) clearly is applicable with respect to the training given to Ms. Ellington as such falls within the development of the 9-1-1 system. Thus, the majority concludes that the issue of whether training or manual contents fell within the sphere of negligence is immaterial because R.C. 4931.49(A) requires wanton and/or willful misconduct. However, I would find that R.C. 4931.49(A) is inapplicable to the training or manual contents. Therefore, I respectfully dissent from that portion of the majority's opinion.

{¶ 88} Revised Code 4931.49(A) states that: “[t]he state, the state highway patrol, or a subdivision participating in a 9-1-1 system and any officer, agent, or employee of the state, state highway patrol, or a participating subdivision is not liable in damages in a civil action for injuries, death, or loss to persons or property arising from any act or omission, except willful or wanton misconduct, in connection with developing, adopting, or approving any final plan or any agreement made under section 4931.48 of the Revised Code or otherwise bringing into operation a 9-1-1 system pursuant to those provisions.”

{¶ 89} The majority finds that the training of Ms. Ellington falls within the development of the 9-1-1 system. However, R.C. 4931.49(A) refers to the development of a final plan or agreement pursuant to R.C. 4931.48. A review of R.C. 4931.43(B) which specifies what shall be in a final plan demonstrates that the term final plan refers to the creation of the 9-1-1 system and does not reach the training of the personnel who will man the 9-1-1 system.

{¶ 90} Pursuant to R.C. 4931.43(B), a final plan shall specify the following:

{¶ 91} “(1) Which telephone companies serving customers in the county will participate in the 9-1-1 system;

{¶ 92} “(2) The location and number of public safety answering points; how they will be connected to a company's telephone network; from what geographic territory each will receive 9-1-1 calls; whether basic or enhanced 9-1-1 service will be

provided within such territory; what subdivisions will be served by the answering point; and whether an answering point will respond to calls by directly dispatching an emergency service provider, by relaying a message to the appropriate provider, or by transferring the call to the appropriate provider;

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\*9 {¶ 93} “(3) What subdivision will establish, equip, furnish, operate, and maintain each public safety answering point;

{¶ 94} “(4) A projection of the initial cost of establishing, equipping, and furnishing and of the annual cost of the first five years of operating and maintaining each public safety answering point;

{¶ 95} “(5) Whether the cost of establishing, equipping, furnishing, operating, or maintaining each public safety answering point should be funded through charges imposed under section 4931.51 of the Revised Code or will be allocated among the subdivisions served by the answering point and, if any such cost is to be allocated, the formula for so allocating it;

{¶ 96} “(6) How each emergency service provider will respond to a misdirected call.”

{¶ 97} Thus, a final plan does not reach the level of actually establishing training requirements or procedures for the persons manning the systems.

{¶ 98} Likewise, the agreements referred to in R.C. 4931.48 and 4931.49 do not concern the training or manual contents. Revised Code 4931.48 addresses when a municipal corporation or township may establish its own 9-1-1 system.

{¶ 99} Therefore, I would hold that R.C. 4931.49(B) is inapplicable to the issues relating to training and manual contents. I would reverse and remand the issues of training or manual contents for consideration of whether the facts found warrant the applicability of R.C. 2744.02(B)(4).

{¶ 100} I concur with the majority as to the analysis and disposition of all other issues.

Ohio App. 5 Dist., 2003.

Toles v. Regional Emergency Dispatch Center

Not Reported in N.E.2d, 2003 WL 1145441 (Ohio App. 5 Dist.), 2003 -Ohio- 1190

R.C. § 109.575

Baldwin's Ohio Revised Code Annotated Currentness

Title I. State Government

▣ Chapter 109. Attorney General (Refs & Annos)

▣ Bureau of Criminal Identification and Investigation

**→ 109.575 Notification to volunteers of fingerprinting or criminal background checks**

At the time of a person's initial application to an organization or entity to be a volunteer in a position in which the person on a regular basis will have unsupervised access to a child, the organization or entity shall inform the person that, at any time, the person might be required to provide a set of impressions of the person's fingerprints and a criminal records check might be conducted with respect to the person. Not later than thirty days after the effective date of this section, each organization or entity shall notify each current volunteer who is in a position in which the person on a regular basis has unsupervised access to a child that, at any time, the volunteer might be required to provide a set of impressions of the volunteer's fingerprints and a criminal records check might be conducted with respect to the volunteer.

(2000 S 187, eff. 3-22-01)

**RESEARCH REFERENCES**

**Encyclopedias**

OH Jur. 3d Criminal Law § 678, Entities Responsible for Care of Children.

OH Jur. 3d Family Law § 1451, Criminal Records Check.

**Treatises and Practice Aids**

Hastings, Manoloff, Sheeran, & Stype, Ohio School Law § 31:6, School Volunteers.

R.C. § 109.575, OH ST § 109.575

Current through 2007 File 47 of the 127th GA (2007-2008),  
apv. by 2/6/08, and filed with the Secretary of State by 2/6/08.

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R.C. § 3313.77

Baldwin's Ohio Revised Code Annotated Currentness

Title XXXIII. Education--Libraries

Chapter 3313. Boards of Education (Refs & Annos)Use of Schoolhouses**→ 3313.77 Use of school property for public functions; board to adopt policy**

The board of education of any city, exempted village, or local school district shall, upon request and the payment of a reasonable fee, subject to such regulation as is adopted by such board, permit the use of any schoolhouse and rooms therein and the grounds and other property under its control, when not in actual use for school purposes, for any of the following purposes:

- (A) Giving instructions in any branch of education, learning, or the arts;
- (B) Holding educational, religious, civic, social, or recreational meetings and entertainments, and for such other purposes as promote the welfare of the community; provided such meetings and entertainments shall be nonexclusive and open to the general public;
- (C) Public library purposes, as a station for a public library, or as reading rooms;
- (D) Polling places, for holding elections and for the registration of voters, or for holding grange or similar meetings.

Within sixty days after the effective date of this section, the board of education of each school district shall adopt a policy for the use of school facilities by the public, including a list of all fees to be paid for the use of such facilities and the costs used to determine such fees. Once adopted, the policy shall remain in effect until formally amended by the board. A copy of the policy shall be made available to any resident of the district upon request.

(1975 S 170, eff. 8-29-75 [FN1]; 1953 H 1; GC 4839-2)

[FN1] 1975 S 170 states that it takes effect 8-29-75. The Ohio Constitution provides that "no law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state" (Art II, § 1c)—*except* for emergency laws and laws providing for tax levies or appropriations for current expenses, which take effect immediately (Art II, § 1d). In State ex rel Akron Ed Assn v Essex, 47 OS(2d) 47, 351 NE(2d) 118 (1976), the Ohio Supreme Court held that 1975 S 170 was not an appropriation bill. Therefore, this section took effect 11-28-75, ninety days after the Act was filed with the secretary of state, rather than 8-29-75, as stated on the Act.

## HISTORICAL AND STATUTORY NOTES

**Pre-1953 H 1 Amendments:** 120 v 475

## CROSS REFERENCES

Board of elections to use public schools for polling places, 3501.29

Nearest public school to be used for polling place, 3501.18

R.C. § 3313.78

Baldwin's Ohio Revised Code Annotated Currentness

Title XXXIII. Education--Libraries

☞ Chapter 3313. Boards of Education (Refs & Annos)

☞ Use of Schoolhouses

→ **3313.78 Political meetings in schoolhouses and on grounds; liability for damage**

Upon application of a committee representing any candidate for public office or any regularly organized or recognized political party, the board of education having control of any school grounds mentioned in section 3313.76 of the Revised Code, shall permit the same to be used as a place wherein to hold meetings of electors for the discussion of public questions and issues. No such meeting shall be held during regular school hours. No charge shall be made for such use, but the candidate or committee so holding a meeting shall be responsible for any damage done or expense incurred by reason thereof.

(1953 H 1, eff. 10-1-53; GC 4839-3)

HISTORICAL AND STATUTORY NOTES

**Pre-1953 H 1 Amendments:** 120 v 475

CROSS REFERENCES

Possession of autoinjectors by students, immunities, 3314.141

LIBRARY REFERENCES

Schools ☞ 72.

Westlaw Topic No. 345.

C.J.S. Schools and School Districts §§ 375, 381, 387, 396.

RESEARCH REFERENCES

**Encyclopedias**

OH Jur. 3d Schools, Universities, & Colleges § 136, Use of School Property-- Uses Authorized by Statute.

**Treatises and Practice Aids**

Hastings, Manoloff, Sheeran, & Stype, Ohio School Law § 36:15, Power to Dispose of Property.

Hastings, Manoloff, Sheeran, & Stype, Ohio School Law § 38:15, Use of School Property by Others, in General--Discretion of Board.

Hastings, Manoloff, Sheeran, & Stype, Ohio School Law § 38:25, Use of School Property for Political Purposes.

R.C. § 3319.39

Baldwin's Ohio Revised Code Annotated Currentness

Title XXXIII. Education--Libraries

Chapter 3319. Schools--Superintendent; Teachers; Employees (Refs & Annos)Records and Reports→ **3319.39 Criminal records check; disqualification from employment**

(A)(1) Except as provided in division (F)(2)(b) of section 109.57 of the Revised Code, 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. The appointing or hiring officer shall request that the superintendent include information from the federal bureau of investigation in the criminal records check.

(2) A person required by division (A)(1) of this section to request a criminal records check shall provide to each applicant a copy of the form prescribed pursuant to division (C)(2) of section 109.572 of the Revised Code, provide to each applicant a standard impression sheet to obtain fingerprint impressions prescribed pursuant to division (C)(2) of section 109.572 of the Revised Code, obtain the completed form and impression sheet from each applicant, and forward the completed form and impression sheet to the superintendent of the bureau of criminal identification and investigation at the time the person requests a criminal records check pursuant to division (A)(1) of this section.

(3) An applicant who receives pursuant to division (A)(2) of this section a copy of the form prescribed pursuant to division (C)(1) of section 109.572 of the Revised Code and a copy of an impression sheet prescribed pursuant to division (C)(2) of that section and who is requested to complete the form and provide a set of fingerprint impressions shall complete the form or provide all the information necessary to complete the form and shall provide the impression sheet with the impressions of the applicant's fingerprints. If an applicant, upon request, fails to provide the information necessary to complete the form or fails to provide impressions of the applicant's fingerprints, the board of education of a school district, governing board of an educational service center, or governing authority of a chartered nonpublic school shall not employ that applicant for any position.

(B)(1) Except as provided in rules adopted by the department of education in accordance with division (E) of this section and as provided in division (B)(3) of this section, no board of education of a school district, no governing board of an educational service center, and no governing authority of a chartered nonpublic school shall employ a person if the person previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, a violation of section 2925.11 of the Revised Code that is not a minor drug possession offense, or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(b) A violation of an existing or former law of this state, another state, or the United States that is substantially equivalent to any of the offenses or violations described in division (B)(1)(a) of this section.

## R.C. § 3319.39

(2) A board, governing board of an educational service center, or a governing authority of a chartered nonpublic school may employ an applicant conditionally until the criminal records check required by this section is completed and the board or governing authority receives the results of the criminal records check. If the results of the criminal records check indicate that, pursuant to division (B)(1) of this section, the applicant does not qualify for employment, the board or governing authority shall release the applicant from employment.

(3) No board and no governing authority of a chartered nonpublic school shall employ a teacher who previously has been convicted of or pleaded guilty to any of the offenses listed in section 3319.31 of the Revised Code.

(C)(1) Each board and each governing authority of a chartered nonpublic school shall pay to the bureau of criminal identification and investigation the fee prescribed pursuant to division (C)(3) of section 109.572 of the Revised Code for each criminal records check conducted in accordance with that section upon the request pursuant to division (A)(1) of this section of the appointing or hiring officer of the board or governing authority.

(2) A board and the governing authority of a chartered nonpublic school may charge an applicant a fee for the costs it incurs in obtaining a criminal records check under this section. A fee charged under this division shall not exceed the amount of fees the board or governing authority pays under division (C)(1) of this section. If a fee is charged under this division, the board or governing authority shall notify the applicant at the time of the applicant's initial application for employment of the amount of the fee and that, unless the fee is paid, the board or governing authority will not consider the applicant for employment.

(D) The report of any criminal records check conducted by the bureau of criminal identification and investigation in accordance with section 109.572 of the Revised Code and pursuant to a request under division (A)(1) of this section is not a public record for the purposes of section 149.43 of the Revised Code and shall not be made available to any person other than the applicant who is the subject of the criminal records check or the applicant's representative, the board or governing authority requesting the criminal records check or its representative, and any court, hearing officer, or other necessary individual involved in a case dealing with the denial of employment to the applicant.

(E) The department of education shall adopt rules pursuant to Chapter 119. of the Revised Code to implement this section, including rules specifying circumstances under which the board or governing authority may hire a person who has been convicted of an offense listed in division (B)(1) or (3) of this section but who meets standards in regard to rehabilitation set by the department.

(F) Any person required by division (A)(1) of this section to request a criminal records check shall inform each person, at the time of the person's initial application for employment, of the requirement to provide a set of fingerprint impressions and that a criminal records check is required to be conducted and satisfactorily completed in accordance with section 109.572 of the Revised Code if the person comes under final consideration for appointment or employment as a precondition to employment for the school district, educational service center, or school for that position.

(G) As used in this section:

(1) "Applicant" means 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, except that "applicant" does not include a person already employed by a board or chartered nonpublic school who is under consideration for a different position with such board or school.

(2) "Teacher" means a person holding an educator license or permit issued under section 3319.22 or 3319.301 of the Revised Code and teachers in a chartered nonpublic school.

R.C. § 3319.39

(3) "Criminal records check" has the same meaning as in section 109.572 of the Revised Code.

(4) "Minor drug possession offense" has the same meaning as in section 2925.01 of the Revised Code.

(H) If the board of education of a local school district adopts a resolution requesting the assistance of the educational service center in which the local district has territory in conducting criminal records checks of substitute teachers under this section, the appointing or hiring officer of such educational service center shall serve for purposes of this section as the appointing or hiring officer of the local board in the case of hiring substitute teachers for employment in the local district.

(2007 H 190, eff. 11-14-07; 2007 S 97, eff. 7-1-07; 2004 S 2, eff. 6-9-04; 1996 S 230, eff. 10-29-96; 1996 S 269, eff. 7-1-96; 1996 H 445, eff. 9-3-96; 1995 S 2, eff. 7-1-96; 1995 H 223, eff. 11-15-95; 1995 H 117, eff. 9-29-95; 1994 H 694, eff. 11-11-94; 1994 H 715, eff. 7-22-94; 1993 S 38, eff. 10-29-93)

#### UNCODIFIED LAW

2007 H 190, § 8: See Uncodified Law under RC 3319.22.

1999 H 121, § 3: See Uncodified Law under Ch 3314.

#### HISTORICAL AND STATUTORY NOTES

**Amendment Note:** 2007 H 190 rewrote division (A)(1); deleted "for which a criminal records check is required pursuant to division (A)(1) of this section" at the end of division (A)(3); deleted "as a person responsible for the care, custody, or control of a child" between "person" and "if"; and deleted "as a person responsible for the care, custody, or control of a child" between "school" and "except" and deleted "in a position of care, custody, or control of a child" from between "school" and "who" in division (G)(1). Prior to amendment, division (A)(1) read:

"(A)(1) Except as provided in division (F)(2)(b) of section 109.57 of the Revised Code, 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. Except as provided in division (A)(1) of this section, if the applicant does not present proof that the applicant has been a resident of this state for the five-year period immediately prior to the date upon which the criminal records check is requested or does not provide evidence that within that five-year period the superintendent has requested information about the applicant from the federal bureau of investigation in a criminal records check, the appointing or hiring officer shall request that the superintendent obtain information from the federal bureau of investigation as a part of the criminal records check for the applicant. Except as provided in division (A)(1) of this section, if the applicant presents proof that the applicant has been a resident of this state for that five-year period, the appointing or hiring officer may request that the superintendent include information from the federal bureau of investigation in the criminal records check. In the case of an applicant who is applying to be employed as driver of a school bus or motor van, the appointing or hiring officer shall request that the superintendent include information from the federal bureau of investigation in the criminal records check."

**Amendment Note:** 2007 S 97 substituted "Except as provided in division (A)(1) of this section, if" for "If" at the beginning of the second and third sentences in division (A)(1); and added the fourth sentence to division (A)(1).

**Amendment Note:** 2004 S 2 deleted "and division (I) of this section" after "Revised Code" in division (A)(1); inserted "or (3)" in division (E); deleted ", internship certificate," before "or permit" and ", 3319.28," before "or 3319.301" in division (G)(2); deleted division (I); and made other nonsubstantive changes. Prior to deletion,