

IN THE SUPREME COURT OF OHIO
CASE NO. 2007-1311

ON APPEAL FROM COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO
CASE NO. 2006 CA 00227

JOHN DOE, ET AL.
PLAINTIFFS-APPELLANTS

v.

MASSILLON CITY SCHOOL DISTRICT, ET AL.
DEFENDANTS-APPELLEES

**REPLY OF PLAINTIFFS-APPELLANTS TO
APPELLEES' MERIT BRIEF AND BRIEF OF AMICUS CURIAE,
THE OHIO SCHOOL BOARDS ASSOCIATION**

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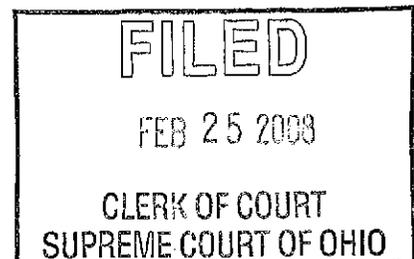


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A. SCOPE OF FORMER R.C. 2744.02(B)(4) EXCEPTION

As to the scope of former R.C. 2744.02(B)(4), Appellees and Amicus Curiae (referred to herein as simply “Appellees”) appear to be walking an intellectual tight rope. On the one hand, they argue that R.C. 2744.02(B)(4)’s intent is “easy to extract,” “plain and ordinary,” and reveals “little ambiguity.” On the other hand, they refer to this immunity exception as “sometimes ambiguous” and acknowledge conflicting decisions on whether the injury must occur on or off the premises of the political subdivision for the immunity exception to apply.

With over twenty years of R.C. 2744.02(B)(4)’s dried ink, at least five judicial interpretations, two legislative amendments, and 20/20 hindsight, this much is true: R.C. 2744.02(B)(4) was a flawed, inartful attempt to limit the reach of the immunity exception to “physical defects.” And it is beyond serious argument that R.C. 2744.02(B)(4) was flawed because its text was entirely unclear on the specific issue of whether negligence relating to a “physical defect” was a necessary pre-requisite for the immunity exception to apply.

Hubbard v. Canton City School Bd. of Edn. (2002), 97 Ohio St.3d 451, 454, 2002-Ohio-6718 cleared away the thicket of confusion on this issue and made it clear that the language of R.C. 2744.02(B)(4) supported the notion that *acts of negligence unrelated to physical defects* of political subdivision grounds could support an exception to immunity. As a result of *Hubbard*, it is not necessary under R.C. 2744.02(B)(4) to prove that any negligent acts (retaining the malevolent teacher) **OR** the injuries involved (sexual molestations) are tied or connected to any physical defect.

Nevertheless, Appellees assert that the plain language of R.C. 2744.02(B)(4) supports a bright line “on the premises” demarcation before the immunity exception can apply. On a conceptual level, Appellants would pose the following retort: If the text of R.C. 2744.02(B)(4)

(and all of its interpretive gymnastics) rejected the ostensible intent of the General Assembly, is this a sign that the statute lacks the crystalline specificity necessary for such a bright line test?

Realistically, however, two crucial pieces of evidence literally left starving for any attention in Appellees' briefs highlight the absurdity of cementing a newly created "on the premises" injury/immunity exception. The first is the Michigan field trip. Approved or not approved, it was a school function. There is no dispute that this trip originated on school grounds, as the children all met there, along with school guidance counselor, Susan Rohr. She accompanied John Smith, the Doe children, and other Chess Club members and chaperones on this field trip. There is also no denying that Smith slept alone with the two Doe children in a motel room on this trip.

During the criminal investigation of Smith, Detective Grizzard interviewed the Doe children about the trip, and neither were willing to provide details about what happened in the room; Grizzard, in his experience, believed that something occurred between Smith and the Doe children in the room. It requires no leap of inductive or circumstantial reasoning to conclude that a previously convicted child molester who eventually pled guilty (again) to repeatedly molesting the Doe children did, in fact, do something to them while alone in the motel room during this field trip.

Nevertheless, if Appellees are correct, then *Hubbard* inexplicably (1) allows a negligent hiring and/or retention claim and (2) recognizes sexual molestation claims as an exception to immunity, yet re-imposes immunity as long as the molestation occurred outside of the school grounds on a school field trip. A statutory construction of R.C. 2744.02(B)(4) that both creates and denies immunity for the sexual molestation of children at a school function, depending upon whether the molestation occurred "on school grounds," is the apex of absurdity.

The second piece of evidence omitted from Appellees' brief that shines a glaring spotlight on the arbitrariness of a wooden "on the premises" immunity test is the meeting between Wyanbu Zutali and Principal Kenny. Although at the time of this meeting Zutali did not know of Smith's sordid past, Zutali was nevertheless concerned about Smith's actions and his fitness to be around children. In fact, before the meeting, the Stark County Chess Federation actually terminated Smith from membership in that organization. When Zutali relayed this and other facts about Smith to Principal Kenny, Zutali testified that Principal Kenny "blew me off." This prompted Zutali to contact the Massillon Police Department and, through Zutali's and Detective Grizzard's persistence, Zutali's intuition about Smith proved to be correct.

Once again, if *Hubbard* allows for negligent retention claims and recognizes sexual molestation claims as an exception to immunity, an "on the premises" injury test essentially emasculates *Hubbard*, based upon the fortuity of where the molestation occurs. Thus, political subdivisions are free to ignore specific complaints about potentially malevolent employees, as long as the employees' tortious acts occur "off the property." **Additionally, this arbitrary rule would grant immunity even if Appellees *knew in fact* that Smith was a previously convicted pedophile, and even if he molested children during an official school sanctioned event – as long as he molested the children off the property of the school district.** Worse yet, if the employee-offender traveled with the student to another school district's building, and molested the student there, immunity would still attach.

Unless the statutory maxim that a statute "should not be interpreted to yield an absurd result" is nothing more than a toothless paper tiger, it should apply here. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 320, 2007-Ohio-2070.

B. GOVERNMENTAL v. PROPRIETARY FUNCTION

In support of its contention that the Chess Club was a governmental function, Appellees refer to “extracurricular activities” it frequently sanctions, and the operation of certain clubs it occasionally permits on its public grounds. However, one critical factor is missing here: By their own admission, neither the Board of Education nor the Superintendent had any knowledge whatsoever about any aspects of the Chess Club. Therefore, to advance the notion that the Board of Education somehow “permitted” the operation of this Club is a misnomer (see Appellees’ Brief, page 20). One cannot permit or sanction that which one knows nothing about.

As to the procedural issue of whether the “governmental versus proprietary” function was preserved below, it is somewhat ironic that Appellees are claiming that Appellants failed to properly raise this issue. In their answer, it was Appellees who launched the defense that Smith was not employed by or had any connection to Appellees. Furthermore, countless documents and depositions were devoted to the issue of Smith’s status, the status of the Chess Club, and exactly what Appellees knew about it. And as to the charge that Appellants “failed to produce any evidence,” it should be noted that virtually every newsletter, certificate, yearbook, authorization, permission slip, and other documentation pertaining to the particulars of the chess club was produced independently by Appellants.

Disturbingly, Appellees physically burned a school file that was located at Franklin-York Elementary School pertaining to Smith and the Chess Club after the allegations against Smith hit the media (yet another fact not mentioned in Appellees’ brief). Spoliation issues aside, Appellees have no right to complain about the lack of production of evidence when it consciously destroys evidence directly related to the central issues in this case: Smith’s status with the school district.

Also noticeably absent from Appellees brief is any discussion of the seminal *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 2000-Ohio-486 decision. If *Greene* stands for anything, it illustrates that there are indeed boundaries or limits to what is considered a “governmental function.” It is undeniable in this case that the Board of Education and the Superintendent did not approve, sanction, oversee, fund, regulate, support, or even know about the Chess Club. More importantly, the Michigan field trip was not approved by the Board of Education in direct violation of specific Board policy. What happened here was quite simple: there was no institutional approval or oversight of the Club or any of Smith’s activities.

If Appellees are correct that the Club was nevertheless a “governmental function,” perhaps we should add certain new modifiers to the lexicon of that term: the “*accidental*,” “*haphazard*,” or “*institutionally ignorant*” governmental function. Indeed, Appellees appear to be advocating a draconian rule that “as long as something happened on school grounds, even if we didn’t know about it or approve it, it qualifies as a governmental function.”

C. R.C. 2744.03(A)(5) – WANTON AND RECKLESS STANDARD

Appellees’ argument has been cleverly and seductively funneled down to the singular issue of the propriety of conducting a criminal background check on Smith. Their brief on this issue is devoted to a virtual “parade of imaginary horrors” (to quote Justice Oliver Wendell Holmes) that would ensue such that everybody who steps into a school, for whatever reason, needs a criminal background check or else the political subdivision will be subject to chaotic and crippling civil liability.

As is hopefully evident by now, Smith was not a transient voter or an infrequent attendee at a Boy Scouts meeting held after school, nor was he akin to a one time volunteer reader at the school during “Ohio Reads” week. And if he was merely a “facility user” as Appellees suggest,

he inexplicably spent hours per week (for close to four years) unsupervised with school children as young as six years old, was given the label “Coach” and “Advisor” to the “Franklin-York Chess Club,” wrote a column in the school newsletter, and even took students on the out of state field trip.

This is not a case where a school district granted access to its building to a transient user of space who committed a singular wrongful act during an isolated incident on school grounds. Rather, Appellees gave Smith frequent access to young school children on a regular, continued basis for a program that was promoted and encouraged by Appellees. To compare Smith’s status to that of a one-time voter or “facility user” is like comparing lightning to a lightning bug.

Nor have Appellants ever argued that a political subdivision should be subject to civil liability for failing to conduct a mandatory criminal background check of the incidental invitee on school grounds, or even a volunteer who enters school property for limited purposes, such as reading to second graders during “Ohio Reads” week. Many volunteers perform valuable duties on behalf of school districts under direct supervision of staff. Rather, it was the fact that Smith had regular, frequent, and unsupervised access to small children that Appellants argued that R.C. 3319.39 applied to him as well, regardless of his label as “coach,” “advisor,” or “volunteer.”

Unfortunately for Appellees, the universe of its liability under R.C. 2744.03(A)(5) is not constricted to the singular issue of the propriety of performing criminal background checks on volunteers like Smith. When Smith approached Franklin-York elementary school with the idea to form a chess club, very little was known about him. According to Principal Kenny, no background or index information was even taken on Smith, including personal history, work history, references, or even his experience in teaching chess to youths. One could argue that

simple verification of basic information about a volunteer applicant is customary or prudent, even if it does not constitute a formal background check.

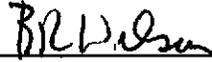
Furthermore, when complaints about Smith surfaced and Mr. Zutali personally expressed his concerns about Smith to Principal Kenny on more than one occasion, Appellees chose not to investigate Mr. Zutali's complaints. By this time, Appellees had in their arsenal the newly enacted R.C. 109.575, which simply codified Appellees' right to request that volunteers like Smith undergo a criminal background check. It chose not to do so. It was not until after Mr. Zutali and Detective Grizzard discovered Smith's past convictions for gross sexual imposition that Smith was finally asked to undergo a criminal background check, which he refused, and for which he was "terminated" by Appellees.

In summary, there was no investigation of Smith's credentials, references, or of any **actual complaints** that surfaced against him regarding his fitness to be around small children. The bottom line here is that there was an admitted system failure that allowed Smith to flourish, unchecked, with no institutional oversight whatsoever. Superintendent Hennon candidly admitted this fact. To constrict the issue of Appellees' recklessness to the sole issue of failing to conduct a criminal background check virtually ignores a truckload of other evidence meticulously unearthed in discovery that collectively raises a genuine issue of material fact on this issue.

D. CONCLUSION

Respectfully, Appellants request that the lower courts' rulings be reversed, and that the case be remanded for a jury trial.

Respectfully submitted:



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CERTIFICATE OF SERVICE

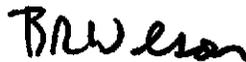
This certifies that a true and accurate copy of the foregoing Brief was served, via ordinary U.S. Mail, postage pre-paid, upon the following parties on this 22nd day of February, 2008:

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