

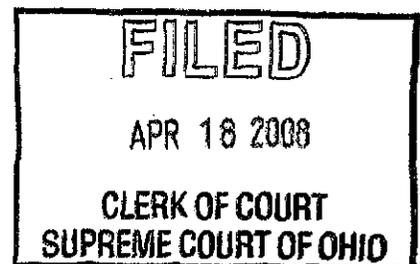
IN THE SUPREME COURT OF OHIO

DOTTIE HUBBELL : Supreme Court Case No. 08-0569
 :
 Plaintiff-Appellee, : *W*
 : **On Appeal from the Greene County**
 : **Court of Appeals, Second Appellate**
 v. : **District**
 :
 CITY OF XENIA, OHIO : **Court of Appeals Case No. 2005 CA 0099**
 :
 Defendant-Appellant. :

**MEMORANDUM OF APPELLEE DOTTIE HUBBELL IN RESPONSE
 TO MEMORANDUM IN SUPPORT OF JURISDICTION BY
 APPELLANT CITY OF XENIA, OHIO**

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I. **THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.**

The decision issued by the Second District Court of Appeals and sought to be appealed here, is both heavily fact-sensitive and of limited applicability. It does not have the far-reaching, widespread implications that Xenia suggests. It is not, in other words, a decision that makes this case one of public or great general interest.

The only arguably public or great general interest aspect of this case was, in fact, resolved in favor of Xenia by the Second District. In the first prong of its decision, the Second District held that Xenia's sewer inspection and cleaning *program* was the result of discretionary decisions by the City on how to use equipment, supplies, materials, personnel, and other resources, for which it was entitled to immunity under R.C. § 2744.03(A)(5).

But the second prong of the appellate decision has far more limited applicability, and does not remotely implicate the fundamental inspection and cleaning *programs* employed by Ohio cities in general.

Rather, the Second District merely held that: 1) where a city maintains emergency sewer repair services and provides its residents access to those services through an emergency telephone number, as Xenia did, then that city also undertakes a duty to provide those services in a non-negligent manner; and 2) where, as here, a city's emergency sewer response personnel makes an individual decision not to respond to an emergency telephone call as he is required to do, due to his personal belief that the emergency is the result of excess rainfall and not a sewer problem, then that decision is not one for which immunity is provided under R.C. § 2744.03(A)(5).

Thus, the appellate decision at issue here does not come close to creating an entirely new duty for municipalities to immediately respond to emergency sewer and water calls. To the contrary, the decision plainly reiterates the long-held principle that *if* a municipality *voluntarily* provides such emergency services, then it has a corresponding duty to perform those services in a *non-negligent manner*. The Second District's holding in that regard is neither novel nor unique, and does not implicate a public or great general interest.

The other aspect of the Second District decision attempting to be appealed here is even more fact-specific. In that aspect of the opinion, the appellate court relied on the testimony of Xenia officials themselves to find that the emergency response worker on call the evening of the emergency was required to respond to all emergency telephone calls; he did not have any discretion to determine which calls he would respond to and which calls he would not. His own testimony then, that he made the unilateral determination not to respond to Ms. Hubbell's emergency call because of his own personal belief that her flooding was due to excessive rainfall rather than a sewer emergency, created a genuine issue of material fact as to whether or not his actions were negligent.

It was not the appellate court decision that eliminated the discretion of Xenia's emergency personnel to decide which emergencies they would respond to and which they would not. It was Xenia's own policy to maintain an emergency service for its residents, and the testimony of Xenia's public officials that their emergency personnel, in fact, do not possess any such discretion.

Thus, the Second District decision at issue here does not create or extend any duty upon Ohio municipalities. It simply restates the obvious to those municipalities: if you provide these services to your residents, then you have a duty to provide them non-negligently; if your

emergency response personnel choose not to respond at all to a resident's plea for help in violation of municipal procedures, then you may be liable for negligence. Certainly nothing in that holding requires the attention of this Court.

Nor does this case present any sort of opportunity to clarify the motion for summary judgment standard in Ohio. That standard is one of the clearest and most well established standards in Ohio jurisprudence. Xenia's true grievance is not with the standard itself, but its application by the appellate court.

The fact remains that, although Xenia does not agree with the evidence pointed to by Hubbell to carry her reciprocal burden, it was proper evidence and was properly relied on by the court. To demonstrate that her lateral sewer line was attached to the Monroe Street sewer main, Hubbell presented the testimony of Hubbell and Xenia officials themselves that, when the Monroe Street sewer main was unclogged, the flow of sewage into the house stopped. In addition, Hubbell offered her own affidavit that her lateral line was connected to the Monroe Street sewer main, knowledge gained in her decades long residence in that house.

Thus, the summary judgment standard is not at issue here. It is the evidence provided by Hubbell under that standard that Xenia takes issue with. Obviously though, every case where an unsuccessful summary judgment movant takes issue with the evidence offered in opposition to their motion does not present a public or great general interest. This case is no different.

II. RESPONSES TO PROPOSITIONS OF LAW

Response to First Proposition of Law: A municipality has a duty to respond to emergency sewer calls inside a citizen's home if that municipality maintains an emergency sewer response service and provides its citizens access to that service.

Response to Second Proposition of Law: R.C. § 2744.03(A)(5) does not provide immunity for an emergency on-call municipal worker's decision to disregard his obligation to respond to all emergency calls.

Response to Third Proposition of Law: The Second District relied on proper summary judgment evidence from Hubbell to deny Xenia's motion for summary judgment.

A. **A municipality has a duty to respond to emergency sewer calls inside a citizen's home if that municipality maintains an emergency sewer response service and provides its citizens access to that service.**

Contrary to Xenia's depiction, Dottie Hubbell did not simply call the police dispatch number to report the flooding in her home. Because the public services department was closed for the day, the emergency number provided to Xenia residents routed those calls to the police dispatcher. The police dispatcher, in turn, paged the emergency sewer personnel on call on that day.

This was the emergency sewer response service put in place by Xenia. It was the program voluntarily instituted by the City and which it had a duty to administer in a non-negligent fashion.

Xenia continues to rely on *Bingham v. The City of Fairborn* (2 Dist. 1980), Greene County App. No. CA 1121, 1980 WL 352391 and *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 543 N.E.2d 1188, for its claim that it did not have a duty to respond to Hubbell's emergency call. Xenia fights an uphill battle in its continued reliance on *Bingham*, as *Bingham* was itself a Second District case; and the Second District declined to extend its holding in *Bingham* as Xenia requested. The Second District also correctly rejected Xenia's reliance on *Commerce & Industry Ins. Co.*

The crucial differences in *Bingham*, recognized by the Second District, actually highlight Xenia's culpability in the instant case. At issue in *Bingham* was whether a municipality had a duty, as part of its duty to operate its sewer system, to maintain an emergency crew. *Bingham*, at 5. Also at issue was whether the city could be held liable for the time period they failed to respond to an emergency call because no one was available to answer the phone. *Id.* at 1.

The court held that a city does not have a duty to maintain an emergency utility crew. *Id.* at 2. In so holding, the court disposed of the second issue, whether the city could be held liable for its failure to respond to an emergency it had no notice of. That is, the holding in *Bingham* relevant to the instant case is two-fold: First, a city has no duty to maintain an emergency utilities capability; Second, if a city is not able to be notified of a problem with the sewer system due to a lack of emergency communications, it cannot be held liable for the damage caused to private property.

The differences between *Bingham* and the case at bar emphasize Xenia's negligence. Unlike the city of Fairborn, Xenia does and did at the time of this incident maintain an emergency worker whose sole responsibility was to respond to emergency sewer and water calls. Xenia also provided an emergency phone number that Hubbell called in her time of need.

Contrary to Xenia's assertion then, the duty did not arise when William Buckwalter, Xenia's on-call sewer emergency worker on the evening of the incident, decided to do his job and respond, the duty existed the entire time because Xenia maintained an emergency system to resolve sewer and water emergencies throughout the city, and provided its residents an emergency number through which notice of those emergencies could be given. Furthermore, unlike in *Bingham*, the city was in fact given notice of the problem with the Monroe Street sewer main—by Hubbell.

It bears mention as well that Hubbell's claim of negligence in this regard focuses on Buckwalter. Buckwalter is bound absolutely to follow the policies and procedures of the Xenia Public Service Department in responding to emergencies. This he simply did not do. His superior, Ed Quinlan, outlined that policy, which required Buckwalter to report immediately to the city garage to pick up the appropriate truck, and then immediately to the call site.

Buckwalter did nothing. We are concerned, therefore, with the negligence of a Xenia employee to perform a job he was duty bound to perform. This was a duty imposed on him by the city of Xenia, and a duty he shirked to Hubbell's extreme detriment.

Xenia's focus on its duty to maintain an on-call utilities emergency crew is, thus, misplaced. Assuming *arguendo* that no duty exists to establish such a crew, the fact remains that Xenia *did* establish such a crew and incurred a duty of response as such.

This was precisely the distinction made by the Second District below. Xenia's voluntary implementation of an emergency sewer response service for its residents was in the nature of a contractual obligation, on which its residents had the right to rely. These facts were not present in *Bingham* and represented a very material distinction, which the appellate court accurately recognized.

Xenia's reliance on *Commerce & Industry Ins. Co.* is even more misplaced. Through that case, Xenia attempts to argue that its duty to act in a non-negligent manner did not arise until Buckwalter decided he would respond. Not only does Xenia's interpretation of *Commerce* defy logic, it is completely contradicted by the case itself. To be sure, Xenia sounds the death knell right out of the gate, admitting that its analogy to *Commerce* is "not a perfect analogy...but it was the best available."

As Xenia acknowledges, this Court in *Commerce* held that generally, a private utility provider does not have a duty to respond to gas and electric emergencies inside their customers' homes unless and until the utility had notice that its failure to respond could result in harm to that customer. *Id.* at 98. Thus, the holding in *Commerce* turned on notice; once a private utility has notice of a customer's utility emergency, the duty arises.

For the Second District, the obvious inapplicability of *Commerce* to the instant case ostensibly did not even warrant discussion. Irrespective, *Commerce* does nothing to advance Xenia's cause. As with *Bingham*, the holding in *Commerce* does purport to address a utility company's duty when it voluntarily undertakes the responsibility of maintaining an emergency service response and provides its customers access to that service. Further, the holding in *Commerce* creates that duty upon notice to the utility of a customer's emergency.

Those holdings do not support Xenia's position here. Again, Xenia did *in fact* implement and maintain an emergency sewer response service and provided its residents access to that service. It had a clear duty as such. The Second District decision does not depart from the holdings in *Bingham* and *Commerce* by imposing a duty where one would not have arisen by a voluntary act of, or notice to, the defendant. The decision merely recognizes the point at which the duty arose in this instance.

And the notice that was important to the decision in *Commerce* existed here as well. Xenia has never disputed that Buckwalter received notice of Hubbell's sewer emergency more than three hours before he decided to respond. Even if *Commerce* were analogous to this case (which it is not), that notice would have provided Xenia the knowledge that, if it did not act, Hubbell could be damaged.

Xenia's first proposition of law is contradicted by established case law and was properly rejected by the appellate court below. The duty of a municipality to respond to an emergency call can arise if that municipality voluntarily implements an emergency response program on which its residents rely. A city is not required to implement such a program, but if it does it cannot pick and choose which calls it will respond to while its residents wait helplessly, not knowing their calls for help have been disregarded.

B. R.C. § 2744.03(A)(5) does not provide immunity for an emergency on-call municipal worker's decision to disregard his obligation to respond to all emergency calls.

In its second proposition of law, Xenia proclaims that Buckwalter's decision to shirk his obligation to respond to Hubbell's emergency, an obligation imposed upon him by virtue of the duty assumed by Xenia and also by city procedure, was a decision for which the City is entitled to immunity under R.C. § 2744.03(A)(5).

R.C. § 2744.03(A)(5) provides:

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

This Court has repeatedly held that not all decisions of political subdivision employees are afforded immunity under R.C. § 2744.03(A)(5). In *Perkins v. Norwood City Schools* (1999), 85 Ohio St.3d 191, 707 N.E.2d 868, this Court held that a school principal's decision to use the school's janitorial services to fix a leaking water fountain, rather than hire an independent plumbing service, "is a routine maintenance decision requiring little judgment or discretion" and, therefore, not entitled to immunity. *Id.* at 193.

And recently, this Court reiterated that principle in *Elston v. Howland Local Schools* (2007), 113 Ohio St.3d 314, 865 N.E.2d 845. In that case, this Court held that a school gym teacher's decision to use an "L-screen" protective device during batting practice was within the decisions given immunity under R.C. § 2744.03(A)(5).

But that decision was based on this Court's recognition, with citation, to the well-settled rule that "teachers and coaches, as employees of a political subdivision, have 'wide discretion under R.C. § 2744.03(A)(5) to determine what level of supervision is necessary to ensure the

safety of the children in' their care." *Id.* at 318 (citing *Marcum v. Talawanda City Schools* (1996), 108 Ohio App.3d 412, 416, 670 N.E.2d 1067; *Frederick v. Vinton Cty. Bd. of Edn.*, Vinton App. No. 03CA579, 2004-Ohio-550, 2004 WL 232129).

Of course, if a municipal employee's decision to flatly and blatantly disobey a fundamental obligation imputed to him as a condition of his employment were a decision for which R.C. § 2744.03(A)(5) provided immunity, a manifest absurdity would result. But that is the result urged by Xenia.

There can be no doubt that Buckwalter's actions are not within R.C. § 2744.03(A)(5). The most fundamental obligation arising from his duty as an emergency sewer response technician is to respond to sewer emergencies. Xenia imputed that duty upon him, without discretion, by implementing its emergency response program. A legal duty does not carry with it the discretion to decide whether or not the obligor will choose to exercise that duty.

Perhaps more fundamentally, Buckwalter is a maintenance worker required to follow all policies and procedures of the city of Xenia maintenance department. Chief among these are the policies set forth for response to emergency utility calls after hours. He was required to follow these procedures without question and respond to Hubbell's house the afternoon of her call, as his direct superior testified. Instead he made an impermissible judgment determination that it was likely just rain, and unilaterally decided to do absolutely nothing.

The job Buckwalter was charged with on June 12, 2003, did not allow him any discretion, let alone the discretion to determine whether or not he would even do his job and respond to an emergency at all. His "decision" to disregard his obligations is not covered by R.C. § 2744.03(A)(5).

C. The Second District relied on proper summary judgment evidence from Hubbell to deny Xenia's motion for summary judgment.

With its third proposition of law, Xenia attempts to impute its objections to the evidence relied on by the Second District in finding a genuine issue of material fact, onto the summary judgment standard itself. Specifically, Xenia protests that the trial court and appellate court required it to affirmatively disprove Hubbell's claims, and that the burden never shifted to Hubbell. But in reality, both the trial court and the appellate court acknowledged the burden shift and relied on proper evidence provided by Hubbell to identify genuine issues of material fact.

The single basis on which Xenia rests its objection in this instance is the duty element of Hubbell's negligence claim, and the City's allegation that Hubbell's private lateral sewer line is connected to Home Avenue rather than Monroe Avenue, which it admits was clogged on the day of the incident. In short, Xenia argues that the blockage that caused Hubbell's home to fill with raw sewage was located in her lateral line and not its sewer main.

The crux of Xenia's argument in this regard turns on their contention that while the Monroe Street sewer main was blocked, the Home Avenue sewer main was not. Therefore, Xenia argues, if Hubbell's lateral line is connected to the Home Avenue sewer main, the blockage in the Monroe Street sewer main could not have caused the backup into Hubbell's home.

In opposition, Hubbell presented deposition testimony of Hubbell and of Xenia's own employees who were on-site that day, demonstrating that the Monroe Street sewer main had a blockage, the blockage was cleared by maintenance workers on the evening of June 12, 2003, and the flow into Hubbell's home subsided at that time. Hubbell also presented interrogatory

responses admitting that tree roots were removed from the Monroe Street sewer main, which Xenia itself acknowledged “could have been the possible problem.”

Weighing this evidence, the trial court properly concluded that “[t]he testimony of Xenia’s own employees, however, presents a genuine issue of material fact whether the blockage was located in the lateral line or the sewer main, and thus, whether the City of Xenia owed a duty to Hubbell.” Observing the axiomatic premise of summary judgment disposition, the trial court noted that “[i]n a motion for summary judgment, ‘[a]ll inferences must be construed in favor of the nonmoving party.’”

The appellate court was similarly persuaded:

In opposition to Xenia’s contention that the proximate cause of the back-up was a blockage or other problem in her private line, Hubbell points to evidence that the Home Avenue main connects with Xenia’s sewer main on Monroe Avenue, and that when the manhole cover on the Monroe Avenue main was removed, the back-up of sewage into Hubbell’s home promptly subsided. That fact, construed most strongly in Hubbell’s favor, reasonably supports an inference that the condition of the Monroe Avenue main, which was at least partially blocked, in combination with the heavy rainfall to which Buckwalter testified, proximately caused the back-up into Hubbell’s home. That showing satisfied Hubbell’s reciprocal burden under *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293[.]

Thus, Hubbell did indeed present competent, credible evidence of a genuine issue of material fact regarding whether the blockage was located in the Monroe Avenue sewer main or in her lateral line. More importantly, the Second District unequivocally acknowledged the burden shift to Hubbell. The decision sought to be appealed here, therefore, completely undermines Xenia’s third proposition of law, that Hubbell was never required to satisfy her reciprocal burden.

III. CONCLUSION

The only aspect of this case that would have even arguably had a broader applicability to other Ohio municipalities is not on appeal here, as it was decided in Xenia's favor by the Second District. When that court held that Xenia is entitled to immunity for its sewer maintenance *program*, it limited the remaining issues in this case to the fact-sensitive, limited applicability issues surrounding Xenia's *response* to this particular incident.

The result is that this case has no real public or great general concern. This case concerns whether a municipal employee was negligent when he decided to ignore Hubbell's calls for help for more than three hours, in violation of the duty assumed by Xenia when it implemented an emergency sewer maintenance service and in violation of Xenia's own city procedures.

These are not issues of public concern and carry with them no great general interest such that this Court should grant jurisdiction to hear them. Accordingly, Hubbell requests that this Court deny Xenia's request for discretionary jurisdiction.

Respectfully submitted,

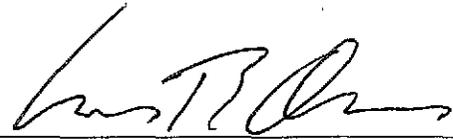


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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was served via First Class U.S. Mail, postage prepaid and properly addressed, this 18th day of April 2008, upon the following:

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UNREPORTED CASES

▶ Bingham vs. The City of Fairborn.
Ohio App. 2 Dist., 1980.
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, Second District, Greene
County.
FRANK G. BINGHAM, et al., Plaintiffs-Appellees
v.
THE CITY OF FAIRBORN, Defendant-Appellant
No. CA 1121.

April 17, 1980.

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OPINION AND FINAL ENTRY

McBRIDE, P.J.

*1 On October 3, 1977 two floors of the residence of the plaintiffs were flooded with raw sewage from a sanitary sewage system operated by the City of Fairborn. The extent of damage is evident from the verdict for \$40,000.00, to which amount no objection has been made.

Plaintiffs alleged four separate causes of action: (1) negligence, (2) appropriation, (3) trespass and (4) *res ipsa loquitur*. It is difficult to comprehend how one sudden incident constitutes an appropriation; however, the jury found on this issue for the defendant in a special finding. The jury similarly disposed of the claim of trespass, which in this case was based upon negligence.

As to the fourth separately stated claim, *res ipsa*

loquitur is a rule of evidence: it is not a rule of substantive law and cannot be expanded into a rule of liability. 39 Ohio Jur. 2d 742. As an evidential rule *res ipsa loquitur* is not essential in pleading negligence and does not constitute a cause of action. Thus, by operation of law and the action of the jury we have here simple negligence issues under the first claim of the plaintiff.

The City of Fairborn operates a sanitary sewer and waste water collection system which is connected to a treatment plant. The lines are inspected regularly and this particular line was and found to be flowing properly on September 26, 1977, one week before the episode in question. On October 3, 1977 plaintiffs returned home at 10:40 A.M. to discover that the toilet bowl was bubbling up and began overflowing with raw sewage. Plaintiffs phoned the sanitation department for help and received no response on the phone. Apparently they were out to lunch. Unable to find any one to respond, at 11:30 they phoned the police. In the meantime the sewage built up in the bathroom and began spreading over the house. Later they phoned the fire department which responded about noon. The utility superintendent arrived shortly after twelve, at which time the sewage was confined to the second floor. The superintendent found the manhole at the rear of the premises filled and blocked. He then went into the premises and removed the clean out plug which relieved the pressure upstairs, but released the stream of sewage onto the first floor, a condition that continued for some time. It was necessary to bring out heavy equipment, described as a "rodder" which was used to rout out the sewer line serving the premises. The sewer line had been blocked by a wooden mop handle, a length of a metallic TV antenna tubing and rags. Upon their removal the sewer line resumed its normal flow. There is testimony of other problems earlier, some so remote as to be of questionable admissibility and none relating to the immediate blockage that surfaced on October 3, 1977.

There arises from the evidence two issues of negligence: first, that of notice and liability for the initial blockage on which the court over objection delivered an instruction on *res ipsa loquitur*; and a second issue of negligence which we will describe as

the "response time" during which notice of the disaster could not be communicated to the city because there was no answer to the phone call. Included in this second issue is the evidence of the opening of the clean out plug which spread the sewage over the additional floor of the residence and the absence of stand-by services. This second issue of negligence appears prior to starting the trial, at page 7 of the record, on arguments for direction by the court and in the proceeding for summary judgment.

*2 On a portion of the second issue the general rule is that custom and usage must be pleaded; however, since notice pleading does not disclose the nature of the negligence alleged, the testimony at trial may take unexpected trails and develop issues under circumstances that do not permit the application of the former rules of pleading.

In a negligence case where the factual issues developed at trial are fluid, shift and take an additional course, the burden falls upon the judge to specifically identify and outline the disputed facts constituting the cause of action even though in the absence of a special request he is usually safe in relying simply upon a general negligence instruction.

The trial judge faced such a situation in this case. The first and obvious issue of the original cause of the blockage was expanded by the evidence into one of negligent response which may have contributed to the damage. In the instructions the court submitted issues of "negligence or other acts" (R. p. 400) without identifying what was intended by acts other than negligence.^{FN1} The second issue of negligent response (identified by the court only as "other acts") developed three subdivisions which appear only in the facts and shifting arguments. These are classified as follows:

FN1. The outline of the negligence issue in the general instruction was as follows: Now, I will instruct you on the issues in the case. In other words, these are the questions of fact which you must determine. The Plaintiffs, Mr. & Mrs. Bingham, claim that the Defendant, City of Fairborn, was guilty of negligence or other acts and that such negligence or other acts caused the sewage to come into their house and damage it and its contents. You have the following issues

to determine: Was the Defendant, City of Fairborn, negligent? If the Defendant was negligent, then was its negligence the proximate cause of the damage to the house and contents? R. p. 400.

(a) Negligence in not answering the phone during regular hours when plaintiffs were trying desperately to reach the sanitation department to notify the City of the disaster.

(b) The time, nature and extent of the city's response with equipment suitable to immediately open the actual blockage in its sewer line, and

(c) The opening by the city of the clean out plug which introduced the flow of sewage to another floor.

As to item (b) plaintiffs complaint and evidence was that the city responded first with an investigator rather than providing immediately full fledged and complete emergency stand by equipment sufficient to clear the blockage in the public lines. We do not believe there is a duty upon the city to maintain complete stand-by emergency service every time a householder phones that he has an overflow in the sewer system on his premises. The plaintiffs provide no authority to support this proposition of law.

*3 The defendant sought to rebut this evidence and argument with testimony of its practice and of the same custom and usage of the sanitation departments other municipalities of investigating such complaints and responding with such manpower and equipment as the investigator found appropriate by summoning existing work crews from their projects by radio and dispatching them to the scene. The trial judge ruled that such evidence of custom was irrelevant.

The appellant City lists five assignments of error. Because of their significance, the assignments will be considered out of their consecutive arrangement.

The fourth assignment of error is expressed as follows:

4.

THE PLAINTIFF'S THIRD AMENDED COMPLAINT CONTAINED A FOURTH CAUSE

OF ACTION WHICH ESSENTIALLY WAS A STATEMENT OF RES IPSA. THE COURT PREJUDICED THE DEFENDANT BY ALLOWING THE PLAINTIFF TO HAVE ITS THEORY OF RES IPSA GO TO THE JURY, AND BY GIVING THE JURY AN INSTRUCTION ON RES IPSA. THE OHIO COURTS HAVE LONG DETERMINED THAT A SEWER BACKUP SUCH AS THIS INSTANT ONE IS NOT A SUBJECT MATTER FOR RES IPSA AND SUCH INSTRUCTION SHOULD NOT HAVE BEEN GIVEN NOR THE JURY BEEN ALLOWED TO ENTERTAIN THE THEORY OF RES IPSA.

At the request of the plaintiffs and over objection the court instructed the jury:

Where the instrumentality that caused the damage is in the exclusive control of the Defendant City of Fairborn and the event is one that would not have happened if ordinary care had been used, you may but are not required to infer from these circumstances that the Defendant was negligent.

Such inference, if made, is sufficient for a finding of negligence; however, the Defendant City of Fairborn may equally -- may equal or overcome such inference by evidence tending to show that ordinary care was used. R. p. 402.

This was followed by an explanation of the meaning of inference.

There is no necessity for a review of the law as to the liability of the city for negligence. Municipal corporations operating sewer lines are responsible in *the same manner and to the same extent as a private person under the same circumstances*. The city is charged with the use of ordinary care and with notice it is chargeable with what a reasonable inspection would disclose. Doud vs. City of Cincinnati, 152 Ohio St. 132.

The doctrine of res ipsa loquitur is fully explained elsewhere. 39 Ohio Jur. 2d 739. The doctrine is applied only where the instrumentality is under the *exclusive control of the defendant* and where *in the absence of specific facts* an accident occurs under circumstances which in justice requires the defendant to explain because the explanation is available to the defendant but not the plaintiff. The defendant made

such explanation in this case.

Appellant in its brief relies upon the general limitations of the rule and upon authorities that do not contain the same facts or circumstances. The closest approach are two cases holding that the doctrine of res ipsa loquitur does not apply to displaced manhole covers because of the absence of exclusive control. Rennecker vs. Cauton Restaurant, 148 Ohio St. 119; City of Cleveland vs. Amato, 123 Ohio St. 575.

*4 By way of response the appellee found no authority to support the doctrine of res ipsa loquitur in sewage collection systems. Instead, appellee argues merely exclusive control from the moment of discovery by plaintiffs of the stoppage at 10:45 A.M. on the morning in question. Res ipsa loquitur has no application to the secondary issues of negligence. Appellees argument appears to concede the impropriety of the charge as applied to the issue of the blockage in the sewer line.

Because of the lack of specificity in the instructions on the multiple issues of negligence the jury was free to apply the instruction on res ipsa loquitur to all *issues of negligence*, including the one designated only as "other acts."

In the absence of authority we are faced with a new application of the res ipsa doctrine. Exploring the memory of this court we found Shelton vs. City of Dayton, No. 4472, Montgomery County, November 21, 1974, Volume 96B page 889, unreported. That opinion reflects that --

There was some mention in the briefs of the principle of res ipsa loquitur. However, plaintiffs brief does not urge that doctrine, and defendant attempts to avert its effect on the theory that some unknown person beyond their control must have put the towels, etc., in the sewer. p. 6.

The opinion offers no other light or authority on the doctrine. The circumstances vary considerably because in Shelton the city was in the process of cleaning out the local line working down hill pushing a bucket ahead in the line. They quit work at 3:00 P.M. and a blockage occurred that night below where they had been working and flooded the basement of a drugstore. The judgment for plaintiff was affirmed on the basis of circumstantial evidence rather than res

ipsa loquitur. The distinction is a close one, but it is not an authority for the application of res ipsa loquitur in this or in any similar case.

Our research on this use of res ipsa loquitur led us through cases on sewer systems and pipe and transmission lines without success. There is a clear distinction between transmission lines that convey water, gas or oil from a supplier to the customer. In such cases the control by the supplier is more or less complete and the degree of care is qualified by the nature of the substance in the line. A sanitary sewer line is altogether different. There is no transmission. Rather, a sanitary sewer is a collection system. It is open and available to all its users. The municipality has no control over what is put into the system by customers or by vandals. In addition, because of the necessity for manholes for the purpose of cleaning and ventilation, such a system is open to anyone who lifts a manhole cover. Consequently we must distinguish between the condition of the system which the city must maintain and its contents over which it has no control. The undisputed evidence in the case points to a sudden stoppage caused by the introduction by parties unknown of a stick, a TV antenna pipe and rags into the system which resumed normal functioning upon removal of the foreign objects.

*5 We conclude that the doctrine of res ipsa loquitur has no application to the facts and circumstances in this case and that the instruction delivered was error and prejudicial on the general issue of negligence. The fourth assignment is sustained.

5.

The fifth assignment of error springs out of the secondary issues of negligence of "other acts" developed at trial. This we have described as the "response time" issue although it includes all of the activities of the defendant and its employees from the moment plaintiffs began, at first without success, to notify the sanitation department of the blockage.

The fifth assignment asserts:

THE COURT ERRED TO THE PREJUDICE OF DEFENDANT IN FAILING TO ALLOW TESTIMONY AS TO THE CUSTOM IN OTHER COMMUNITIES WHO HAVE SIMILAR SEWER

SYSTEMS AS TO THEIR METHOD OF RESPONDING TO EMERGENCY SEWER CALLS.

The factual circumstances involve a failure to man a telephone during business hours, a delay in responding with stand-by equipment during an emergency, whether there was a delay in response or equipment after notice, whether the removal of the clean out plug proximately contributed and whether under all the circumstances there was ordinary care after notice on the part of the defendant.

The defendant sought to show custom and usage of other municipal units with respect to the availability of emergency stand-by service.

Mr. Jennings, the Superintendent of the Fairborn sanitation department was permitted to testify in part as to his experience when he worked for the City of Franklin. T. p. 335-338. Some objections were sustained; others overruled. He was not permitted to respond as to whether he knew of any community that maintained a stand-by emergency crew for emergencies in the sanitation department.

The questions raised here are whether a phone should be manned during lunch hour, whether sanitation departments do or should in the use of ordinary care maintain emergency standby crews to respond immediately to emergencies rather than be called off from some other regular projects in the department and whether as a first response before investigating a complaint the sanitation department should immediately bring a large rodder such as was eventually used to the location of the complaint, whether needed or not for the particular problem.

The defendant sought to introduce the testimony of Joseph R. Harner of the public services of the City of Xenia to establish that it was not the custom of municipalities to maintain emergency stand-by crews in the sanitation department. On the day of trial this witness was in the hospital. T. p. 273. His deposition had been taken with both counsel present. Defendant sought to show what others in the public business do under similar circumstances; that it is not feasible or possible to maintain stand-by emergency crews for sewer problems. T. p. 274, 277. The witness had years of experience at Xenia and in other cities. T. p. 275. The arguments on the question before the trial

judge reflect a difference on the admissibility of custom and usage, and the extent of testimony of the custom and usages of individual cities as opposed to a general custom and usage. T. p. 272-278.

*6 Upon plaintiffs general objection to admissibility of Mr. Harner's testimony -- whether in person or by deposition-- the court ruled that it was irrelevant:

COURT: The Court will find that the testimony as to the operation of the sewer system specifically in the City of Xenia is not relevant or evidence of custom and usage of how cities in general operate their system or how they should be operated. So the *general objection* to this whole deposition will be sustained.

MR. CLARK: We will not be permitted to read any portion of it?

COURT: That is correct. T. p. 278.

Appellee's only argument to support this denial is that the deposition is not before this court and the testimony was not proffered and its denial was not prejudicial. Appellee does not argue here that the testimony was irrelevant or that the form of the evidence of such witness, who was in the hospital, was improper.

True, we do not find that the deposition was proffered at trial. However, its contents and purpose was known to all of counsel and fully disclosed in the record at trial. T. p. 272-278. Under these conditions the actual proffer was unnecessary. The trial court denied the admission of all evidence of general custom and usage as irrelevant.

The question whether municipal sewage operations should in the use of ordinary care be put to the expense of maintaining fully equipped stand-by emergency crews, independent of maintenance crews that may be summoned by radio is not one that can be answered by anyone unfamiliar with the operation, practices and customs in that field. The plaintiffs claim of delayed response time with heavy and suitable equipment is an important element of the second issue of negligence which plaintiff first presented at trial and argued.

Stand-by emergency facilities imply instant responses of a nature equivalent to that of professional municipal fire departments, a type of service that is not commonly provided by sewer maintenance departments. Having permitted evidence by the plaintiff suggesting negligence because complete stand-by emergency equipment did not respond, it was error and an abuse of discretion to limit and to deny the defendant the opportunity to present evidence relevant to general customs and usages in the conduct of public sanitation departments which contradicted plaintiffs assertion of negligence after the blockage occurred.

For this reason, the fifth assignment of error is sustained.

6.

The sixth assignment of error:

THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY ADMITTING CERTAIN EXHIBITS OFFERED ON BEHALF OF THE PLAINTIFF WHICH WERE EX PARTE MEMORANDUM, AND/OR BY FAILING TO ADMIT THE SAME TYPE EVIDENCE WHEN OFFERED BY DEFENDANT.

The defense objected to the introduction of plaintiff's exhibits 1 and 2.

Exhibit 1 consists of two undated and unsigned sheets listing phone calls and activities individually from 10:40 to 5:00. The testimony indicates that this information was first noted in a book (Winnie The Pooh) and recopied on exhibit 1. The book itself was marked (17) for identification but is not shown to have been introduced. R. p. ii. Exhibit 1 was altered to exclude a reference to insurance. Initially admission was denied. R. p. 211. However later it was admitted over defendant's objections. R. p. 328.

*7 Exhibit 2 is a nine page list of 287 items of personal belongings and an amount for each. The pages are from a legal pad undated and unsigned and carries a total of \$47,337.78. The court indicated that "faced with the alternative of going through each individual item, the court is going to admit the exhibit." R. p. 214.

Exhibit 1 and 2 do not constitute business records. Each is an ex parte memorandum, useful for refreshing the memory of the witness but otherwise self serving. 21 Ohio Jur. 2d, Section 563.

The defendant offered Exhibit B (R. 342, 359) which was a summary statement of action taken by the city employees at the scene. This was prepared with the aid of the employees within a week following the event. (R. p. 360). Its admission was denied. R. p. 387. While we have not located this exhibit in the record, it appears from the record to be similar to plaintiff's Exhibit 2 which contained a statement of the value of items of personal property prepared over a period of time. Except for the time of preparation, Exhibit B is comparable to plaintiff's Exhibit 1 since both contain a record of the activities of parties and witness who testified or could have testified.

Admittedly there is some degree of discretion in the trial court in what is admitted for the jury's consideration; however, self-serving statements such as all three of those involved here should not be introduced to substantiate testimony of the same parties or witnesses. The timesaving factor, mentioned by the court with reference to plaintiff's Exhibit 2, is not a reason for its introduction. While there appears to be error on this assignment and it suggests some partiality we do not consider it to be prejudicial under the circumstances in this case. There is no complaint by appellee on the amount of the damages awarded by the jury.

The sixth assignment is denied.

2,3.

Returning to the first three assignments the second and third relate to the denial of motions for direction at the conclusion of plaintiff's evidence and at the conclusion of all the evidence in the case. The election of the defendant to proceed waived the second assignment of error. As to the third, after all the evidence was in there developed what we have described as the "response" issue involving several disputed factual possibilities of negligence, identified and described by the court only as "other acts" in the instructions. Applying the favorable interpretation required we cannot say that the court committed prejudicial error even though these belated issues

were not specifically submitted under the court's general instructions on negligence.

The second and third assignments are overruled.

1.

This brings us to the remaining assignment which relates to the denial of summary judgment on the issues presented at the early stage in the proceeding before trial. This assignment is expressed as follows:

***8 IN THE CASE OF A MUNICIPAL SEWER BACKUP, UPON MOTION FOR SUMMARY JUDGMENT BY THE CITY, THE SAME SHOULD BE GRANTED WHERE ANSWERS TO INTERROGATORIES AND UNCONTROVERTED AFFIDAVITS ESTABLISH THE SEWER OPERATED PROPERLY BEFORE AND AFTER THE STOPPAGE, THAT THE SEWER WAS INSPECTED REGULARLY, THAT IT WAS STOPPED UP BY FOREIGN OBJECTS INSERTED IN THE SEWER BY UNKNOWN PERSONS, AND THAT THE CITY HAD NO NOTICE OF THE STOPPAGE UNTIL AFTER IT HAD BACKED UP INTO PLAINTIFF'S HOME.**

From the answer of plaintiff to interrogatory No. 3 we find that the defendant was first notified of the backup in the sewer on October 3, 1977 at 10:45 A.M. Leave to file a motion for summary judgment was granted March 15, 1979 and the motion filed March 27, 1979.

The affidavit of Ronald E. Jennings, superintendent, indicates the sewer line was inspected and flowing properly on September 23, 1977; that in response to a call on October 3, 1977 reporting a blockage, the defendant on that date routed the sewer line and removed a length of TV cable, rags and a mop handle; upon their removal the line worked properly and continues to work properly. In response, the plaintiff's affidavits did not deny defendant's affidavit but added that after notifying the City at 10:45 A.M. there was no response until 12:30; that defendant opened the clean out plug at 12:30 and caused quantities of sewage to flow into plaintiff's residence; that there were prior blockages at times not specified; that the calls to the sanitation department on October 3, 1977 resulted in no answer on the phone; that a neighbor experienced an

overflow of sewage in her backyard 10 to 12 years ago.

The defendants motion for summary judgment was overruled without explanation on August 6, 1979.

In support of its motion the defendant submitted a decision of Judge Hieber of the Xenia Municipal Court in *Sollenberger vs. City of Xenia*, No. 5057, filed August 16, 1978 holding in a similar situation that the City was not liable in either negligence or nuisance for a blockage caused by others except after notice of the blockage or after a failure to conduct reasonable inspection. In *Sollenberger* the motion of defendant for summary judgment was sustained based primarily upon *Steiner vs. Lebanon*, 40 Ohio App. 2d 219, which held that a city is not liable for injuries from a particular stoppage solely on the evidence of different prior blockages over a period of years.

In view of the testimony relating to "other acts": no response on the phone and conduct after notice, we find no error in the denial of the defendants motion for summary judgment.

CONCLUSION

From this record we conclude that as a matter of law the plaintiff failed to establish liability for the original blockage discovered on the morning of October 3, 1977; that the error of submitting this issue to the jury, compounded by the error of submitting an instruction on res ipsa loquitur was prejudicial to the defendant and requires a reversal of the judgment regardless of any other ruling in this case.

*9 The secondary issues of "other acts", related to response time and response conduct after discovery, were submitted to the jury without specific instructions that such issues existed and, in addition without permitting the defendant to introduce relevant testimony on custom and usage in the operation of public sanitary lines for public sewage.

The error of delivering the instruction on res ipsa loquitur without limiting it to the original blockage, expanded such error to all issues of negligence. This application of res ipsa loquitur to the secondary

issues of negligence, plus the denial of relevant testimony on custom and usage does not permit the application of the two issue rule to this case.

The judgment of the trial court will be reversed and the case remanded for further proceedings.

KERNS and PHILLIPS, JJ., concur.

FINAL ENTRY

The judgment of the trial court is reversed and this case remanded to the trial court for further proceedings according to law.

Ohio App. 2 Dist., 1980.
Bingham v. The City of Fairborn
Not Reported in N.E.2d, 1980 WL 352391 (Ohio App. 2 Dist.)

END OF DOCUMENT

Frederick v. Vinton County Bd. of Educ.
Ohio App. 4 Dist., 2004.

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

Court of Appeals of Ohio, Fourth District, Vinton
County.

Bert FREDERICK, Plaintiff-Appellant,
v.

VINTON COUNTY BOARD OF EDUCATION, et
al., Defendants-Appellees.
No. 03CA579.

Decided Feb. 5, 2004.

Background: Father of deceased student brought action against county board of education, local school district, elementary school principal, and substitute teacher to recover for student's injury and death after falling from tree on school playground. The Court of Common Pleas, Vinton County, entered summary judgment in favor of defendants. Father appealed.

Holdings: The Court of Appeals, Kline, P.J., held that:

- (1) expert witness affidavit was admissible, even though expert did not visit scene of accident, did not view "all" evidence, and opined on ultimate issues;
- (2) expert's statement that school was negligent in assigning so many students to one teacher at recess was inadmissible for failure to establish standard of care;
- (3) fact question precluded summary judgment on issue of whether school negligently failed to maintain playground;
- (4) school was immune from negligence claims arising from exercise of discretionary functions;
- (5) father failed to establish that school was reckless in assigning one teacher to supervise the entire second grade; and
- (6) fact question precluded summary judgment on issue of whether school recklessly designed playground.

Affirmed in part, reversed in part, and remanded.

Harsha, J., concurred in part, dissented in part, and filed opinion.

West Headnotes

[1] Judgment 228 ↪ 185.1(3)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and

Execution of

228k185.1(3) k. Personal Knowledge or

Belief of Affiant. Most Cited Cases

Expert witness was not required to visit scene of accident to satisfy "personal knowledge" requirement of rules governing expert affidavits offered in support of or in opposition to summary judgment in tort action. Rules Civ.Proc., Rule 56; Rules of Evid., Rule 702.

[2] Judgment 228 ↪ 185.1(2)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and

Execution of

228k185.1(2) k. Persons Who May

Make Affidavit. Most Cited Cases

Rules governing expert affidavits offered in support of or in opposition to summary judgment do not require an expert to review "all" existing evidence before rendering an opinion; rules only require that expert base his opinion on admissible evidence. Rules Civ.Proc., Rule 56; Rules of Evid., Rule 702.

[3] Appeal and Error 30 ↪ 881.1

30 Appeal and Error

30XVI Review

30XVI(C) Parties Entitled to Allege Error

30k881 Estoppel to Allege Error

30k881.1 k. In General. Most Cited

Cases

Not Reported in N.E.2d

Not Reported in N.E.2d, 2004 WL 232129 (Ohio App. 4 Dist.), 2004 -Ohio- 550

(Cite as: Not Reported in N.E.2d, 2004 WL 232129)

In action against school and school employees to recover for death of student on school playground, defendants could not argue on appeal that expert witness relied on inadmissible evidence in forming opinion that student fell from tree on playground, where defendants had stipulated for purposes of reviewing trial court's summary judgment determination that student received her injury by falling from tree.

[4] Judgment 228 ↪ 185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in

Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Expert's affidavit in opposition to defendants' motion for summary judgment was admissible in action against school and school employees to recover for death of student who fell from tree on school playground, even though affidavit contained allegations on ultimate issue of whether school negligently or recklessly designed and maintained playground, where expert specifically described how school failed to conform to standard of care embodied in product safety commission's guidelines for playground safety by failing to take steps such as trimming low-hanging branches, adding cushioning material beneath tree, or installing fence to limit access to tree.

[5] Judgment 228 ↪ 185(4)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(4) k. Documentary Evidence

or Official Record. Most Cited Cases

Judgment 228 ↪ 185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in

Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

In action against school and school employees to recover for death of student who fell from tree on school playground, expert's statement in affidavit in opposition to defendants' motion for summary judgment, that school acted negligently or recklessly in assigning so many students to one teacher during recess, was inadmissible, where expert failed to identify the standard of care from which school allegedly deviated, and failed to swear to authority or authenticity of exhibit setting forth allegedly appropriate ratio of adults to children.

[6] Judgment 228 ↪ 185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in

Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Genuine issue of material fact as to whether school negligently failed to maintain playground precluded summary judgment in favor of defendants in deceased student's father's action against county board of education, local school district, elementary school principal, and substitute teacher to recover for student's injury and death after falling from tree on school playground; despite indicators that children used tree as climbing equipment, school did not take measures to prevent children from climbing tree or add protective surfacing. R.C. §§ 2744.02(B), 2744.03.

[7] Schools 345 ↪ 89.2

345 Schools

345II Public Schools

345II(F) District Liabilities

345k89.2 k. Negligence in General. Most

Cited Cases

Action alleging that public school and school employees were negligent in assigning only one teacher to supervise between sixty-six and one hundred twenty-nine students between the ages of seven and ten at recess was barred by discretionary function immunity. R.C. § 2744.03(A)(5).

[8] Schools 345 ↪ 89.2

345 Schools

345II Public Schools

345II(F) District Liabilities

345k89.2 k. Negligence in General. Most

Cited Cases

Father of deceased student failed to establish that school was reckless in assigning one teacher to supervise the entire second grade during recess, where admissible evidence showed that approximately seventy-five students were under teacher's supervision during recess, and that assigning one or two teachers to supervise an entire grade during recess, or about seventy-five students, was not unusual. R.C. § 2744.03(A)(5).

[9] Schools 345 ↪ 89.2

345 Schools

345II Public Schools

345II(F) District Liabilities

345k89.2 k. Negligence in General. Most

Cited Cases

Public school teacher's supervision of students at recess fell within scope of her job duties, and thus teacher was not liable to father of student for alleged negligent supervision. R.C. § 2744.03(A)(5).

[10] Schools 345 ↪ 89.2

345 Schools

345II Public Schools

345II(F) District Liabilities

345k89.2 k. Negligence in General. Most

Cited Cases

Action alleging that public school and school principal negligently failed to train teachers to adequately supervise students at recess was barred by discretionary function immunity. R.C. § 2744.03(A)(5).

[11] Judgment 228 ↪ 185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in

Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Genuine issue of material fact as to whether school playground that incorporated trees was recklessly designed precluded summary judgment in favor of defendants in deceased student's father's action against county board of education, local school district, elementary school principal, and substitute teacher to recover for student's injury and death after falling from tree on school playground; despite indicators that children used tree as climbing equipment, school did not take measures to prevent children from climbing tree or add protective surfacing.

Daniel N. Abraham, Columbus, OH, for appellant.

Daniel D. Mason, OH, for appellees.

KLINE, P.J.

*1 {¶ 1} Bert Frederick, individually and as an administrator of the estate of Kimberly R. Frederick, appeals the Vinton County Court of Common Pleas' grant of summary judgment to the Vinton County Board of Education and the Vinton County Local School District (together, "the School"), and to McArthur Elementary School Principal Sandra Robbins, and substitute teacher Patty Napier (together, "Employees"), on tort claims relating to Kimberly's injury and death on her school playground. Frederick asserts that the trial court erred in failing to apply R.C. 2744.02(B) to preclude the School and Employees' immunity defense. Because the trial court appropriately looked at R.C. 2744.02(B) and R.C. 2744.03(A) in concert to determine the availability of the immunity defense, we disagree.

{¶ 2} Frederick also asserts that genuine issues of material fact exist pertaining to whether the School and its Employees acted negligently in: (1) maintaining the playground, (2) supervising recess, and (3) training the Employees; and that the School and Robbins acted recklessly in: (1) assigning only one teacher to supervise recess, and (2) designing the playground. Because reasonable minds, when construing the admissible evidence in a light most favorable to Frederick, could conclude that the School negligently maintained and recklessly designed its playground, we agree in part. However, the School and its Employees are entitled to judgment as a matter of law on the issues of negligent supervision and negligent training, as we find that these are discretionary functions entitled to immunity from negligence claims. Additionally, Frederick did

not present any admissible evidence to indicate that the School or Robbins acted recklessly in assigning only one teacher to supervise recess, and therefore the School and Robbins are entitled to judgment as a matter of law on that claim. Thus, we overrule Frederick's first assignment of error and his second assignment of error in part, but sustain Frederick's second assignment of error to the extent that it relates to his claims for negligent maintenance of the playground and reckless design of the playground. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

I.

{¶ 3} On November 17, 1999, Frederick's seven-year old daughter Kimberly fell on the McArthur Elementary School playground during recess. She died as a result of a blunt trauma to her head. Although the evidence regarding how Kimberly fell is not conclusive, much of the evidence indicates that Kimberly climbed a tree on the playground and fell from it. The School and Employees explicitly state in their brief that they do not contest Frederick's claim that Kimberly fell from the tree for purposes of this appeal.

{¶ 4} On the day of Kimberly's death, McArthur Elementary School's Principal, Sandra Robbins (nka Pappas), or her staff assigned Patty Napier, a substitute teacher in Kimberly's classroom, to supervise the playground during recess. Robbins testified in her deposition that sixty-six second grade children were on the playground during recess. Frederick claims that police reports indicate that as many as one hundred twenty-nine children between the ages of seven and ten were on the playground at the time of Kimberly's injury. Napier was the only adult assigned to supervise the children on the playground. Napier was attending to other children when Kimberly fell, and did not observe the accident.

*2 {¶ 5} The regular second grade teachers and Robbins had observed children swinging from and using the tree in question in this case "like monkey bars." The student handbook does not contain a rule against climbing trees. The second grade teachers put their own "no climbing trees" rule in place, and the teachers informed the children of all the playground rules at the beginning of the school year. But the teachers deposed agreed that they expect children to

break rules from time to time.

{¶ 6} The parties do not dispute that the tree is located on the playground, and is not surrounded by a fence or any other device to prevent children's access to it. The tree has several sturdy, low-hanging branches within close reach of children, which would make climbing the tree relatively easy. A grassy area surrounds the tree, but the grass is worn in a ring surrounding the trunk and limb span in a manner suggesting heavy foot traffic at the base of the tree, and tree roots protrude from the ground. No mulch or other cushioning, protective material surrounds the base of the tree.

{¶ 7} Frederick filed a complaint in the trial court alleging negligence and recklessness in the staffing and supervision of the playground during recess, and alleging negligence and recklessness in the maintenance and design of the playground. The School, Robbins, and Napier each filed motions for summary judgment, asserting that they are entitled to political subdivision immunity, because their allegedly negligent acts relate to discretionary decisions or activities undertaken within the scope of their duties. The School and its Employees also asserted that the record does not contain any evidence that they acted recklessly.

{¶ 8} Frederick opposed the motions for summary judgment, and argued that political subdivision immunity does not apply to negligent maintenance issues such as trimming trees. Additionally, Frederick argued that the School and Robbins acted recklessly in assigning only one supervisor to such a large number of children, that Napier acted negligently in accepting such an assignment without requesting additional supervisors, and that the School acted recklessly in designing the playground.

{¶ 9} Frederick supported his motion with the affidavit of William Mason, a purported expert on playground safety. Mason attached several exhibits to his affidavit, including his curriculum vitae and a sworn copy of the U.S. Consumer Product Safety Commission Guidelines of playground safety. Mason opined that the School and its Employees "fell below the established standard of reasonable care" by failing to maintain the playground, by failing to properly design the playground, and by failing to provide adequate supervision.

{¶ 10} The trial court struck Mason's affidavit on the grounds that it was not based on personal knowledge, and thus did not comply with Civ.R. 56(E). Specifically, the trial court found that Mason never visited the scene of the accident and could not have known that Kimberly fell from a tree or that the playground was not properly maintained. Additionally, the court noted that Mason repeatedly averred that the School and its Employees negligently and recklessly failed to fulfill their duties. Because the affidavit, through its characterization of behavior as "negligent" and "reckless," included legal conclusions, the trial court disregarded it.

*3 {¶ 11} The trial court concluded that the record contains no evidence that any of the Appellees acted recklessly, and that the record contains no evidence that the Appellees negligently maintained the playground. Therefore, the court concluded that political subdivision immunity applied to bar most of Frederick's claims, and that the absence of evidence of negligence barred his negligent maintenance claim. Accordingly, the court granted the School's, Robbins,' and Napier's motions for summary judgment.

{¶ 12} Frederick appeals, asserting the following assignments of error: "1. The trial court erred in granting summary judgment as a matter of law by improperly applying a wanton and reckless standard to [Appellees'] conduct where genuine issues of fact exist as to the negligence of Appellees' conduct pursuant to R.C. 2744.02(B). 2. The trial court erred in finding that no genuine issue of fact existed demonstrating Appellees['] negligence and recklessness."

II.

{¶ 13} In his first assignment of error, Frederick asserts that the School and its Employees are not entitled to political subdivision immunity based upon R.C. 2744.02(B) and the Ohio Supreme Court's recent ruling in Hubbard v. Canton City School Bd. of Edn., 97 Ohio St.3d 451, 2002-Ohio-6718. Specifically, Frederick asserts that, pursuant to the Court's interpretation of R.C. 2744.02(B), an exception to the general presumption of political subdivision immunity exists for negligent conduct on school grounds. Appellees contend that Frederick's

analysis is incomplete, because it stops at the second "tier" of the political subdivision immunity analysis.

{¶ 14} The availability of statutory immunity raises a purely legal issue. Hall v. Ft. Frye Loc. School Dist. Bd. of Edn. (1996), 111 Ohio App.3d 690, 694, 676 N.E.2d 1241, citing Nease v. Med. College Hosp. (1992), 64 Ohio St.3d 396, 400, 596 N.E.2d 432. Therefore, we review the trial court's determination regarding the application of the R.C. 2744.02(B) exception to political subdivision immunity under a de novo standard of review. See Continental Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc. (1996), 74 Ohio St.3d 501, 502, 660 N.E.2d 431.

{¶ 15} "The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, requires a three-tiered analysis to determine whether a political subdivision should be allocated immunity from civil liability." Hubbard at ¶ 10, citing Cater v. Cleveland (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610. The first tier of the analysis, stated in R.C. 2744.02(A)(1), is the general rule that "political subdivisions are not liable in damages." Hubbard at ¶ 11, citing Greene Cty. Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 556-557, 733 N.E.2d 1141. Public school districts are political subdivisions and providing public education is a governmental function. R.C. 2744.01(F); R.C. 2744.01(C)(2)(c); Hubbard at ¶ 11.

{¶ 16} The second tier of the analysis requires the court to determine whether any of the exceptions to immunity listed in R.C. 2744.02(B) apply. Hubbard at ¶ 12, citing Cater, 83 Ohio St.3d at 28, 697 N.E.2d 610. In Hubbard, the issue before the court was whether any of the R.C. 2744.02(B) exceptions applied. Id. at ¶ 12, 780 N.E.2d 543. The Hubbard Court found that an exception did apply. Therefore, the court remanded the matter 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," which would reinstate the board's immunity. Id. at ¶ 19, 780 N.E.2d 543. Thus, the Hubbard Court did not make a definitive determination that the school district in that case was not entitled to immunity, but rather remanded the matter so that the analysis could be carried through its third tier. Hubbard at ¶ 19; Cater at 29, 697 N.E.2d 610.

*4 {¶ 17} In this case, the trial court explicitly based its determination that the School and its Employees are immune from liability upon the defenses listed in R.C. 2744.03(A)(5)-(6). Thus, the trial court carried its analysis through to the third tier of the political subdivision immunity analysis. Although the trial court did not expressly consider the R.C. 2744.02(B) exception to political subdivision immunity, it effectively did so (and implicitly resolved the issue in Frederick's favor) by considering whether the R.C. 2744.03(A)(5)-(6) exceptions to the R.C. 2744.02(B) exception applied. Because the court found immunity based upon the applicability of R.C. 2744.03, rather than upon the non-applicability of R.C. 2744.02, the court's determination that the School and its Employees are entitled to immunity is entirely consistent with Hubbard. Therefore, we overrule Frederick's first assignment of error.

III.

{¶ 18} In his second assignment of error, Frederick asserts that the trial court erred in determining that no genuine issues of material fact exist. Frederick asserts that genuine issues of material fact exist based upon the affidavit of his expert, Mason, and that the trial court erred in "criticizing" Mason's evidence.

{¶ 19} Summary judgment is appropriate only when it has been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(A). See Bostic v. Connor (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411, 599 N.E.2d 786. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. Doe v. First United Methodist Church (1994), 68 Ohio St.3d 531, 535, 629 N.E.2d 402.

{¶ 20} A party raising an immunity defense to support a motion for summary judgment "must present evidence tending to prove the underlying facts upon which the defense is based. Evans v. S. Ohio Med. Ctr. (1995), 103 Ohio App.3d 250, 255, 659 N.E.2d 326. See, also, Vance v. Jefferson Area Local School Dist. Bd. of Edn. (Nov. 9, 1995),

Ashtabula App. No. 94-A-0041. The plaintiff, as the nonmoving party, must then present evidence showing the existence of a genuine issue as to these material facts. Id."Hall, 111 Ohio App.3d at 694-695, 676 N.E.2d 1241.

{¶ 21} In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences that can be drawn from it to determine if the opposing party can possibly prevail. Morehead, 75 Ohio App.3d at 411-12, 599 N.E.2d 786. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." Id. See, also, Schwartz v. Bank-One, Portsmouth, N.A. (1992), 84 Ohio App.3d 806, 809, 619 N.E.2d 10.

{¶ 22} However, questions regarding the admissibility of evidence are within the sound discretion of the trial court, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to a party. State v. Hymore (1967), 9 Ohio St.2d 122, 224 N.E.2d 126, certiorari denied (1968), 390 U.S. 1024, 88 S.Ct. 1409, 20 L.Ed.2d 281; Rigby v. Lake Cty. (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056. The term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. Blakemore, supra, at 219. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. Berk v. Matthews (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

A.

*5 {¶ 23} First, we examine whether the trial court abused its discretion or failed to exercise its discretion in line with the rules of procedure and evidence when it disregarded Mason's affidavit. Expert affidavits offered in support of or in opposition to summary judgment must comply with Civ.R. 56(E) as well as the evidence rules governing expert opinion testimony, Evid.R. 702-705. Copper and Brass Sales, Inc. v. Platting Resources, Inc. (Dec. 9, 1992), Summit App. No. 15563; Ambulatory Health Care Corp. v. Schulz (May 30, 1991), Cuyahoga App. No. 58595. Thus, the affidavit must

demonstrate that the affiant's opinion is based on personal knowledge; that the facts contained in the affidavit are admissible in evidence; and that the affiant is competent to testify as to the matter. Civ.R. 56(E). Further, the affidavit must set forth the expert's credentials and the facts or data he considered in rendering his opinion. Evanoff v. Ohio Edison Co. (Nov. 10, 1994), Portage App. No. 93-P-0015; Copper and Brass Sales, supra; see also Evid.R. 703 and 705.

{¶ 24} Although Civ.R. 56(E) contains a “personal knowledge” requirement for all affiants, in the context of expert opinions this requirement does not refer to the event underlying the claim. Schwarze v. Divers Supply, Stark App. No.2001CA301, 2002-Ohio-3945, at ¶ 39; Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc. (1996), 110 Ohio App.3d 732, 738, 675 N.E.2d 65. Requiring personal knowledge of the underlying event would prevent expert testimony in all situations in which the expert was not also an eyewitness to the underlying event. When a qualified expert relies upon facts shown by admissible evidence, his affidavit is admissible for purposes of summary judgment. Burens v. Indus. Comm. (1955), 162 Ohio St. 549, 124 N.E.2d 724, paragraph one of the syllabus; Douglass v. Salem Community Hosp. (2003), 153 Ohio App.3d 350, 361, 794 N.E.2d 107; Smith v. Cincinnati Gas & Elec. Co. (1991), 75 Ohio App.3d 567, 570, 600 N.E.2d 325.

[1]{¶ 25} In this case, the trial court disqualified Mason's affidavit in part because it found that Mason obviously “never visited the scene of the accident”. However, Civ.R. 56(E) does not require Mason to personally visit the scene of the accident in order to testify about it. He could glean his knowledge of the scene from facts in evidence; namely the deposition and deposition exhibits, including sketches and photographs of the scene, which Mason averred he reviewed.

[2]{¶ 26} The court further found fault with Mason's affidavit because it was apparent to the court that Mason did not “read all of the statements of students” (emphasis sic) who witnessed Kimberly's accident. The court based this conclusion on the fact that “five students stated that Kimberly was pushed to the ground by another student.” First, we note that Civ.R. 56(E) does not require an expert to review “all”

existing evidence before rendering an opinion. It only requires that the expert base his opinion on admissible evidence. Additionally, as the School and its Employees admit in their brief, the student statements are not sworn statements, and it is not even certain that the students are mature enough to be competent to testify. Therefore, the student statements do not constitute admissible evidence. The trial court disqualified Mason's opinion on the grounds that he failed to consider inadmissible evidence, when in fact Mason could not have properly considered inadmissible evidence. Thus, the trial court erred in excluding the affidavit on these grounds.

*6[3]{¶ 27} The School and its Employees attack the Mason affidavit on the opposite grounds that the trial court used to disqualify it. The School and its Employees contend that Mason must have relied upon inadmissible evidence, i.e., the unsworn student statements that say Kimberly fell from the tree, because there is no other direct evidence that Kimberly fell from the tree. However, the record is replete with circumstantial evidence that Kimberly fell from the tree, beginning with the simple fact that Kimberly was found unconscious under the tree. Additionally, The School and its Employees stipulated for purposes of reviewing the trial court's summary judgment determination that Kimberly received her injury by falling from the tree. Therefore, they cannot base their arguments on appeal upon the lack of evidence regarding the matter.

{¶ 28} The trial court also excluded Mason's affidavit on the grounds that it states a legal conclusion. It is improper for an experts affidavit to set forth conclusory statements and legal conclusions without sufficient supporting facts. Wall v. Firelands Radiology, Inc., 106 Ohio App.3d at 335-336, 666 N.E.2d 235; Davis v. Schindler Elevator Corp. (1994), 98 Ohio App.3d 18, 21, 647 N.E.2d 827; see also Evid.R. 704 and 705. However, pursuant to Evid.R. 704, an experts opinion, if otherwise admissible, cannot be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. Douglass v. Salem Community Hosp., 153 Ohio App.3d 350, 360-361, 2003-Ohio-4006 at ¶ 28. In Douglass, the court concluded that because the expert opinion merely stated that the defendant deviated from the standard of care, but did not

identify the standard of care, the expert's conclusory opinion was not admissible. *Id.* In contrast, when the expert testimony identifies specific facts to illustrate how a defendant deviated from the accepted standard of care, or the extent of the deviation, expert testimony that a defendant behaved "negligently" or "recklessly" is admissible. See Lambert v. Shearer (1992), 84 Ohio App.3d 266, 276, 616 N.E.2d 965; Douglass, supra.

[4]{¶ 29} In this case, Mason's affidavit does not merely contain allegations that the School negligently or recklessly designed and maintained the playground without identifying the specific facts that illustrate the negligence or recklessness. To the contrary, Mason specifically identified the tree's low-hanging branches and exposed roots, and the School's failure to act in reasonable conformity with an identified standard of care, particularly the standard outlined by the U.S. Consumer Product Safety Commission guidelines for playground safety. Mason specifically described how the School failed to conform to this standard of care by describing the failure to take steps such as trimming the low-hanging branches, adding cushioning material beneath the tree, or installing a fence to limit access to the tree.

{¶ 30} Because Mason identified facts shown by admissible evidence, namely, deposition testimony and exhibits depicting the scene of the accident, and because he identified the specific facts and standard of care that he believes illustrate that the School was negligent or reckless in designing and maintaining the playground, we find that the Mason affidavit meets the standards for admissibility outlined by the rules of procedure and evidence. Therefore, the trial court erred in disregarding it in its entirety.

*7[5]{¶ 31} Mason also opined in his affidavit that the School and Robbins acted negligently or recklessly in assigning so many students to one teacher during recess. However, Mason failed to identify the standard of care from which the School and Robbins allegedly deviated. While Mason noted the ratio of adults to children on the playground at the time of Kimberly's injury, he did not identify what he would consider a reasonable ratio of adults to children. Instead, he merely labeled the School's and Robbins' decisions regarding playground supervision negligent and reckless. He attached an exhibit to his affidavit entitled "A blueprint for increasing

playground safety," which identified an appropriate ratio as approximately one adult to twenty children. However, Mason did not swear to the authority or authenticity of the exhibit nor even mention it in his affidavit. Therefore, it does not meet the standards of admissibility and cannot remedy Mason's conclusory statement. See Davis v. Findley Industries, Inc. (Aug.24, 1994), Montgomery App. No. 13982. Thus, the trial court did not err in excluding Mason's averments regarding the supervision of children from its consideration.

B.

{¶ 32} We now turn our analysis to whether, when considering the evidence (including the admissible portions of Mason's affidavit) in a light most favorable to Frederick, reasonable minds could differ regarding whether Frederick can prevail on his claims against the School and its Employees.

{¶ 33} The School and its Employees asserted statutory immunity as a defense to Frederick's claims, and therefore bore the initial burden of presenting evidence tending to prove that they are entitled to immunity. See Hall, supra, at 695, 676 N.E.2d 1241. R.C. 2744.02(A)(1) states, "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 persons 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 * * * function." As we noted in our consideration of Frederick's first assignment of error, public school districts are political subdivisions. R.C. 2744.01(F); Hubbard at ¶ 11. Providing public education and the design, construction, reconstruction, renovation, repair, maintenance, and operation of a school playground are governmental functions. R.C. 2744.01(C)(2)(c) and (u); Hubbard at ¶ 11; Hall at 695, 676 N.E.2d 1241. Thus, the School and its Employees qualify for immunity under the first tier of the immunity analysis.

{¶ 34} Also as we noted in connection with Frederick's first assignment of error, the general grant of immunity found in R.C. 2744.02(A) is subject to the exceptions contained in R.C. 2744.02(B). The exception contained in R.C. 2744.02(B)(4) states, "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." Because Frederick 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, and the second tier of the political subdivision analysis resolves in Frederick's favor.

*8 {¶ 35} In the third tier of the immunity analysis, the exceptions contained in R.C. 2744.02(B) are themselves subject to exceptions, which may reinstate the political subdivision's immunity. R.C. 2744.03(A)(3) provides immunity to a political subdivision "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." R.C. 2744.03(A)(5) provides immunity to a political subdivision for injuries resulting "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." Finally, R.C. 2744.03(A)(6) provides immunity to any employee of a political subdivision unless the employee was acting outside the scope of her duties, was acting recklessly or wantonly, or is expressly subject to liability by statute.

{¶ 36} Construing R.C. 2744.02(B) and R.C. 2744.03 together, "[i]mmunity operates to protect political subdivisions from liability based upon discretionary judgments concerning the allocation of scarce resources; it is not intended to protect conduct which requires very little discretion or independent judgment. The law of immunity is designed to foster freedom and discretion in the development of public policy while still ensuring that implementation of political subdivision responsibilities is conducted in a reasonable manner." Hall at 699, 676 N.E.2d 1241, citing Marcum v. Adkins (Mar. 28, 1994), Gallia App. No. 93CA17. Thus, a political subdivision can be held liable for damages stemming from negligent maintenance of its buildings or grounds. *Id.* at 699,

quoting Vance v. Jefferson Area Local School Dist. Bd. of Edn. (Nov. 9, 1995), Ashtabula App. No. 94-A-0041. However, immunity applies to discretionary decisions, and therefore a political subdivision can only be held liable for injuries resulting from its discretionary decisions if its conduct was reckless or wanton.

I.

{¶ 37} Frederick alleges that the School negligently maintained the playground by failing to trim the low-hanging branches or take some other measure to mitigate the danger posed by the tree. The School contends that Frederick's claim relates to the design of the playground, not maintenance of the playground, and thus asserts that it is entitled to immunity. The determination of whether Frederick's claim is properly characterized as negligent maintenance or as negligent design is a question of law. Nease, 64 Ohio St.3d at 400, 596 N.E.2d 432; Hall at 698, 676 N.E.2d 1241. In *Hall*, when we were faced with the question of whether a student athlete's injury arose from the design or the maintenance of a sprinkler system on the football field, we noted, "[t]he R.C. 2744.02(B)(4) exception to nonliability can be applicable only to the maintenance of the building or facility after it has been constructed. The decision to 'build or not' is immunized as a matter of law because of its policy/discretionary nature." Hall at 699-700, 676 N.E.2d 1241, citing *Vance, supra*. We therefore concluded that, while the decision of whether to install a sprinkler system or which sprinkler system to install were discretionary decisions, the upkeep of the field and the sprinkler system was a maintenance issue.

*9 {¶ 38} Similarly, decisions in this case relating to whether to have trees on the playground, how many trees, or where they should be placed, are discretionary decisions. Likewise, once the School became aware that the children were using the tree as climbing equipment, it could have decided to treat the tree as a piece of climbing equipment, or it could have decided to take measures to prevent the children from climbing the tree, and these decisions would fall within its protected discretion. However, the School's duty to ensure that the tree, like any other fixture on the playground, did not pose a safety hazard is a maintenance issue.

{¶ 39} In evaluating Frederick's claim for negligent maintenance, the trial court held that the record did not contain any credible evidence that the School was negligent in maintaining the playground. The trial court properly considered and evaluated the maintenance claim under the negligence standard rather than requiring proof of recklessness. However, upon our independent review of the evidence properly before the court, we find that a genuine issue of material fact exists as to whether the School negligently maintained the playground.

[6]{¶ 40} Specifically, the deposition exhibits depict that the grass around the tree is worn in a manner that suggests heavy foot traffic, and that the limbs on the tree hang low enough for a child to easily reach them. The deposition testimony indicates that the second grade teachers and Robbins had seen children using the low-hanging limbs of the tree in question like monkey bars. Thus, the School and its teachers were aware, or should have been aware, that the children viewed the tree as a piece of climbing equipment. However, despite the many indicators that children used the tree on the playground like monkey bars, the School did not take measures to prevent children from climbing the tree, such as trimming the low-hanging limbs.^{FN1} Nor did the School take steps to treat the tree as a piece of climbing equipment, such as adding a cushioning layer of mulch at the base of the tree. A property owner has a common law duty to maintain, i.e., trim or remove, trees on his property that he is aware pose a danger to others. See Pummell v. Carnes, Ross App. No. 02CA2659, 2003-Ohio-1060 at ¶ 38. We find that reasonable minds could differ regarding whether the School breached its duty to the children when it chose to take no action. Therefore, we find that the trial court erred in granting summary judgment to the School on Frederick's claim for negligent maintenance of the playground.

FN1. Although the teachers took it upon themselves to create a "no climbing trees" rule, they also acknowledged in their depositions that they expect children to break rules from time to time.

2.

{¶ 41} The remainder of Frederick's claims relate to

discretionary decisions by the School or actions undertaken within the scope of Robbins' and Napier's duties as employees of the School. Therefore, the Appellees are entitled to summary judgment unless Frederick can point to evidence in the record which could lead reasonable minds to conclude that the School's or the Employees' actions were reckless or wanton.

*10 {¶ 42} "Recklessness" refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of harm, and that this risk is substantially greater than that necessary to make the conduct negligent. Thompson v. McNeill (1990), 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705; Piro v. Franklin Township (1995), 102 Ohio App.3d 130, 139, 656 N.E.2d 1035. Foreseeability refers to the foreseeability of a similar injury, not foreseeability of the specific injury that occurred. See Oiler v. Willke (1994), 95 Ohio App.3d 404, 413, 642 N.E.2d 667. The term "wanton" connotes "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." Toles v. Regional Emergency Dispatch Center, Stark App. No. 2002CA332, 2003-Ohio-1190 at ¶ 52, quoting Tighe v. Diamond (1948), 149 Ohio St. 520, 80 N.E.2d 122.

[7]{¶ 43} Frederick alleges that the School and Robbins were negligent or reckless in assigning only one teacher to supervise between sixty-six and one hundred twenty-nine students between the ages of seven and ten. The supervision of students is a discretionary function within the context of R.C. 2744.03(A)(5). See Marcum v. Talawanda City Schools (1996), 108 Ohio App.3d 412, 417, 670 N.E.2d 1067. Likewise, the allocation of personnel is explicitly a protected function under R.C. 2744.03(A)(5). The Appellees supported their motions for summary judgment with the depositions of Robbins, Napier, and other teachers, who testified that assigning one or two teachers to supervise an entire grade during recess, or about seventy-five students, was not unusual. Additionally, Robbins testified that only one grade level goes to recess at a time.

[8]{¶ 44} Frederick attempted to rebut this evidence

with Mason's affidavit and exhibits, but as we determined in ¶ 31 above, the affidavit merely stated a legal conclusion as to the adult to student ratio, and the relevant exhibit was not properly sworn to or certified. Additionally, the police report indicating that one hundred twenty-nine students were on the playground at the time police arrived was not properly sworn or certified. Thus, Frederick did not present any admissible evidence to rebut the Appellees' assertion that the School and Robbins were not reckless in assigning one teacher to supervise the entire second grade during recess. Nor did he present any admissible evidence that more than approximately seventy-five students were under Napier's supervision during recess.

{¶ 45} Therefore, even when construing the evidence in a light most favorable to Frederick, reasonable minds could not conclude that the School recklessly or wantonly exercised its discretion to allocate its personnel by assigning one teacher to supervise the entire second grade. Nor could reasonable minds conclude that Robbins recklessly or wantonly carried out her duties as principal by assigning just one teacher to supervise the entire second grade during recess. Thus, we find that the trial court did not err in granting summary judgment in the School and Robbins' favor on Frederick's claim for negligent or reckless allocation of personnel or supervision of students.

*11[9]{¶ 46} Frederick also alleged in his complaint that Napier was negligent in her supervision of students during Kimberly's recess, but did not allege that Napier was reckless in her supervision of the students. Because the supervision of students falls within the scope of Napier's job duties, and because Frederick did not allege Napier was reckless in her supervision of students, Napier is immune from liability on this claim. Therefore, the trial court did not err in granting summary judgment in favor of Napier on Frederick's claim for negligent supervision.

[10]{¶ 47} Additionally, Frederick alleged in his complaint that the School and Robbins negligently failed to train their employees adequately, and that this negligent training proximately caused that Kimberly's injury. However, Frederick did not allege that the School and Robbins recklessly failed to properly train the employees. The training of employees requires the exercise of judgment or

discretion in the use of personnel and resources, and therefore the School is immune from liability resulting from negligent training. Robbins testified in her deposition that training employees falls within the scope of her duties as principal, and therefore Robbins is immune from liability resulting from negligent training. Because Frederick did not allege recklessness with regard to training, the trial court did not err in granting summary judgment in favor of the School and Robbins on Frederick's claim for negligent training.

{¶ 48} Frederick also alleged in his complaint that the School and Robbins were reckless in designing the playground. As we noted in connection with Frederick's negligent maintenance claim, the design of the playground includes decisions such as: whether to have trees on the playground; how many trees; where they should be placed; whether and what measures to take to prevent children from climbing trees; whether to treat the tree as a piece of climbing equipment; and whether and what type of cushioning material to use under climbing equipment. The trial court found that the record does not contain any evidence that the School Board recklessly exercised its discretion or judgment in the use of its facilities by having trees on the playground.

[11]{¶ 49} The record contains evidence that the School Board or its employees were aware that the students used the tree like monkey bars, and that the only action taken in response to this knowledge was the "no climbing trees" rule that the teachers announced at the start of the school year. The teachers testified in their depositions that they expect children to break rules from time to time. Additionally, the record includes the Mason affidavit and a sworn copy of the U.S. Consumer Product Commission guidelines for playground safety, which indicate that protective surfacing is a necessary precaution for playground climbing equipment. Mason opined that an accident like Kimberly's was not only foreseeable, but also highly probable under the circumstances. When this evidence is construed in a light most favorable to Frederick, reasonable minds could conclude that the School demonstrated an entire absence of care for safety of the children and an indifference to the foreseeable consequence, i.e., an injury caused by a fall from the tree, resulting from the School leaving the tree in place without modification, barriers, or protective surfacing.

Therefore, we find that the trial court erred in granting summary judgment in favor of the School on Frederick's claim for reckless design of the playground.

III.

*12 {¶ 50} In conclusion, we overrule Frederick's first assignment of error. We sustain Frederick's second assignment of error on his claims regarding negligent maintenance and reckless design of the playground. We overrule Frederick's second assignment of error on all other grounds. Accordingly, we affirm in part and reverse in part the judgment of the trial court, and we remand this case for further proceedings consistent with this opinion.

**JUDGMENT AFFIRMED IN PART,
REVERSED IN PART AND CAUSE
REMANDED.**

HARSHA, J., concurring in part and dissenting in part.

I concur in judgment and opinion except for the holding that reinstates appellant's claim for recklessly designing the playground. Like the majority, I conclude the decision to have trees on the playground is discretionary in nature and cannot be characterized as reckless. Unlike the majority, I would limit the need for trimming of the trees, application of barriers and protective surfacing as maintenance issues to be resolved under a negligence standard as we did in *Hall, supra*, and Section III. B.(1) of this opinion. I do so because trees are included on the playground for their aesthetic value rather than as playground equipment. While the fact that children might climb them is foreseeable, I believe this "misuse" creates a maintenance issue rather than a design problem. Thus, I would not reverse the trial court's summary judgment on the reckless design cause of action.

HARSHA, J.: Concurs in Part and Dissents in Part with Opinion.

EVANS, J.: Concurs in Judgment Only.

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Not Reported in N.E.2d, 2004 WL 232129 (Ohio App. 4 Dist.), 2004 -Ohio- 550

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