

IN THE SUPREME COURT OF OHIO

TRI-VALLEY LOCAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Appellant,

v.

RANDY J. EPPLEY, ADMINISTRATOR OF
THE ESTATE OF JOSHUA M. EPPLEY,
DECEASED,

Appellee.

) SUPREME COURT CASE
) NO. 2008-0366
)
)
) ON APPEAL FROM THE
) MUSKINGUM COUNTY COURT OF
) APPEALS, FIFTH APPELLATE
) DISTRICT
)
)
)
)

REPLY BRIEF OF APPELLANT TRI-VALLEY
LOCAL SCHOOL DISTRICT BOARD OF EDUCATION

David Kane Smith (0016208)
Michael E. Stinn (0011495) (Lead Counsel)
BRITTON, SMITH, PETERS
& KALAIL CO., L.P.A.
3 Summit Park Drive, Suite 400
Cleveland, Ohio 44131-2582
Telephone: (216) 503-5055
Facsimile: (216) 503-5065
Email: dsmith@ohioedlaw.com
Email: mstinn@ohioedlaw.com

Attorneys for Appellant Tri-Valley Local
School District Board of Education

John W. Gold (0078414)
Peter D. Traska (0079036)
ELK & ELK CO., LTD.
6105 Parkland Blvd.
Mayfield Heights, Ohio 44124
Telephone: (440) 442-6677
Facsimile: (440) 442-7944
Email: jgold@elkandelk.com
ptraska@elkandelk.com

Attorneys for Appellee Randy Eppley,
Administrator of the Estate of Joshua M.
Eppley, Deceased

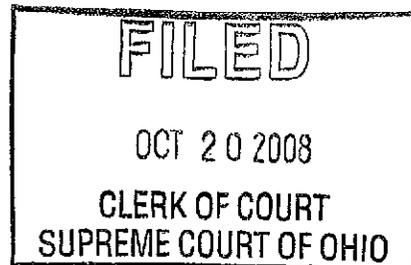


TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
PROPOSITION OF LAW NO. 1: Revised Code Section 2125.04 Does Not Deny Wrongful Death Claimants The Equal Protection Of The Law.	2
PROPOSITION OF LAW NO. 2: A Political Subdivision Is Immune From Liability If There Are No Facts Which Support Any Of The Exceptions Found In Revised Code Sections 2744.02(B)(1) Through (5).	5
PROPOSITION OF LAW NO. 3: Revised Code Sections 2744.03(A)(1) Through (5) Are Defenses That Restore Immunity And Do Not Provide Claimants With A Basis Of Recovery....	5
CONCLUSION	13
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Alakiotis v. Lancion</i> , (1966), 12 Ohio Misc. 257, 232 N.E.2d 663, 666	3
<i>Armbruster v. West Unity Police Dept.</i> (1998), 127 Ohio App.3d 478, 713 N.E.2d 436.....	12
<i>Baltimore and O. R. Co. v. Fulton</i> (1899), 59 Ohio St. 525, 575, 53 N.E. 265, 44 L.R.A. 520, 41 W.L.B. 229.....	3
<i>Boron v. Brooks Beverage Management Company, Inc.</i> (June 30, 1999), No. 98AP-902, at 11; Appeal not allowed, 87 Ohio St.3d 1440, 719 N.E.2d 4.....	4
<i>Cater v. City of Cleveland</i> (1998), 83 Ohio St.3d 24, 32, 697 N.E.3d 610, 618-619	12
<i>Coats v. Columbus</i> , 10 th Dist. No. 06AP-681, 2007-Ohio-761, ¶117; Appeal not allowed, 114 Ohio St.3d 1481, 870 N.E.2d 733, 2007-Ohio-3699 (Ohio July 25, 2007), Table No. 2007- 0607).....	9
<i>Collins v. Baltimore and Ohio Rd. Co.</i> (1998), 7 Ohio Dec. 445, 7 Ohio N.P. 270.....	3
<i>Dougherty v. Fecsik</i> (1996), 116 Ohio App.3d 456, 459, 688.....	2
<i>Elston v. Howard</i> (2007), 113 Ohio St.3d 314, 865 N.E.2d 845, 2007-Ohio-2070, 917 to 918 ..	11
<i>Firelands v. Regional Med. Ctr. v. Jeavons</i> , 6 th Dist. No. E-07-068, 2008-Ohio-5031	1
<i>Franks v. Lopez</i> (1994), 69 Ohio St.3d 345, 349-350, 632 N.E.2d 502	12
<i>Grooms v. Crawford</i> , 12 th Dist. No. CA2005-05-008, 2005-Ohio-7028.....	12
<i>Grubb v. Hollingsworth</i> , 1992 WL 276547, Ohio App. 12 Dist., 1992	2
<i>Hill v. Urbana, supra</i> , 79 Ohio St.3d 130, 679 N.E.2d 1109	12
<i>Huffman v. Board of County Commissioners</i> , 7 th Dist. No. 05CO71, 2006-Ohio-3479.....	12
<i>Lines v. Ashtabula Area City School</i> , 11 th Dist. No. 2003-A-0062, 2004-Ohio-4535.....	12
<i>Peterson v. Teodosio</i> (1973), 34 Ohio St.2d 161, 166, 297 N.E.2d 113.....	1
<i>Presley Admx., et al. v. Janette Fraley, et al.</i> , Franklin County Common Pleas Court Case No. 06 CV-05-6963	4
<i>Shover v. Cordis Corp.</i> (1991), 61 Ohio St.3d 213, 219, 574 N.E.2d 457	7
<i>State ex rel. Quarto Mining Co. v. Foreman</i> (1977), 79 Ohio St.3d 78, 81, 679 N.E.2d 706, 709 7	
<i>Thompson v. Bagley</i> , 3 rd Dist. No. 11-04-12, 2005-Ohio-1921	6, 7
<i>Turner v. Central Local Sch. Dist.</i> (1999), 85 Ohio St.3d 95, 97, 706 N.E.2d 1261	5
<i>Valescu v. Cleveland Metroparks Sys.</i> (1993), 90 Ohio App.3d 516, 522, 630 N.E.2d 1.....	12
<i>Vento v. Strongsville Bd. of Edn.</i> , 8 th Dist. No. 88789, 2007-Ohio-4172.....	9

STATUTES

Revised Code Section 2125.02	2, 13
Revised Code Section 2125.04	2,3, 4, 5, 13
Revised Code Section 2305.19	3, 13
Revised Code Section 2744.02(A).....	13
Revised Code Section 2744.02(B).....	12
Revised Code Section 2744.02(B)(1)	10
Revised Code Section 2744.02(B)(4)	8, 9
Revised Code Section 2744.02(B)(5)	8, 10, 11
Revised Code Section 2744.03	12
Revised Code Section 2744.03(A)(2).....	12

Revised Code Section 2744.03(A)(3).....	11
Revised Code Section 2744.03(A)(5).....	12
Revised Code Section 2744.03(A)(6).....	13
Revised Code Section 3749.99.....	7
Revised Code Sections 2744.02(B)(1) Through (5).....	5, 6
Revised Code Sections 2744.03(A)(1) Through (5).....	5, 7, 11

OTHER AUTHORITIES

2003 Senate Bill 80, Section 3(A)(3).....	4
Ohio Adm. Code 3301-83-12(D)(4).....	10
Ohio Adm. Code 3701-31.....	7

RULES

Rule 12(H) of the Ohio Rules of Civil Procedure.....	5
--	---

BRIEF

INTRODUCTION

Appellee, in his Statement of Facts, asserts that he has a good faith belief that “(a) the Appellant (Tri-Valley Local School District Board of Education, hereinafter referred to as the “Board”) had a known and pervasive history of failures in monitoring student accountability which went uncorrected for years prior to Joshua’s death; and (b) the design of the facility where students are assembled and monitored for transport back home is wholly inadequate for that task.” Appellee’s Merit Brief, 1. This statement of Appellee’s beliefs, however, is not contained in the Complaint, nor is it contained in any motion or document filed before Appellee’s Merit Brief. These beliefs are being articulated for the first time on appeal to this Court. This Court should, therefore, disregard them.

Further, this Court should disregard Appellee’s beliefs because they are not facts.¹ This Court should limit its review of this matter to: (1) whether the second Complaint was timely filed and, if it was; (2) whether the facts asserted in the Complaint, if true, state a cause of action against the Board. The re-filed Complaint was not timely filed. The Court of Appeals erred in ruling that it was. Moreover, even if the second Complaint was timely filed, the facts alleged in the Complaint demonstrate that Joshua M. Eppley died after school hours as a result of the injuries he sustained in a motor vehicle accident caused by the negligence of a fellow student, Corey W. Jenkins. The Court of Appeals, therefore, erred in reversing the trial court’s order granting the Board’s Motion for Judgment on the Pleadings regardless of whether the Complaint was timely filed.

¹ In ruling on a Motion for Judgment on the Pleadings, a Court may consider only what is contained in the pleadings; matter outside the pleadings are excluded. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166, 297 N.E.2d 113. See, also, *Firelands v. Regional Med. Ctr. v. Jeavons*, 6th Dist. No. E-07-068, 2008-Ohio-5031, ¶21.

PROPOSITION OF LAW NO. 1: Revised Code Section 2125.04 Does Not Deny Wrongful Death Claimants The Equal Protection Of The Law.

In *Grubb v. Hollingsworth*, 1992 WL 276547, Ohio App. 12 Dist., 1992, plaintiff timely filed a wrongful death complaint against defendant but dismissed it before the statute of limitations set forth in R.C. §2125.02 expired. Plaintiff, in less than a year, re-filed her complaint. The trial court found that the second complaint was timely filed, pursuant to §2125.04, and permitted the case to proceed to trial where a verdict was rendered in plaintiff's favor. The Court of Appeals reversed the trial court's judgment and dismissed the case because the wrongful death savings statute did not apply and did not save plaintiff's cause of action:

We must follow well-settled principles of statutory interpretation. Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language of a statute. (Citation omitted.) If the language is unambiguous, there is no reason to resort to other means of interpretation

The trial court aptly described a major flaw inherent in the savings statute. However, the language of the statute is clear We cannot ignore the statute's plain language in an attempt to make it better.

...

We therefore hold, however, reluctantly, that the savings statute, R.C. 2125.04, does not apply in the present case since the action was dismissed prior to the expiration of the two-year period.

Grubb, at pages 7 and 8. See, also, *Doughtery v. Fecsik* (1996), 116 Ohio App.3d 456, 459, 688.

The Court of Appeals ignored the plain meaning of R.C. §§2125.02 and 2125.04 and erroneously declared that R.C. §2125.04 was unconstitutional.

The Court of Appeals, in declaring R.C. §2125.04 unconstitutional, agreed with Appellee's contention that R.C §2125.04 irrationally treats similarly situated claimants differently. Opinion, ¶36. The Court of Appeals, however, erred in believing that wrongful death

claimants are similarly situated to non-wrongful death claimants. It's decision that R.C.§2125.04 is unconstitutional should be reversed.

Wrongful death claimants have a claim only because one was created by statute for them.

The claim which has been created is limited to a certain term, two years, and:

Where a cause of action is created by statute and is limited therein to a specific period, time is of the essence of the right created and there is no right whatever independent of the limitation, so that a lapse of the statutory period operates to extinguish the right altogether.

Collins v. Baltimore and Ohio Rd. Co. (1998), 7 Ohio Dec. 445, 7 Ohio N.P. 270, quoting, *Baltimore and O. R. Co. v. Fulton* (1899), 59 Ohio St. 525, 575, 53 N.E. 265, 44 L.R.A. 520, 41 W.L.B. 229.

Because wrongful death claims must be brought within two years of decedent's death, R.C.§2305.19 does not and never did apply to claims filed under the wrongful death statute:

From a reading of these cases and the authorities referred to in the opinions, the conclusion is inescapable that the savings clause of Section 2305.19, Revised Code, does not apply to a cause of action which is unknown to the common law and which in terms contains its own statute of limitations.

Alakiotis v. Lancion, (1966), 12 Ohio Misc. 257, 232 N.E.2d 663, 666.

Ohio Revised Code §2125.04 contains the same requirements as did former R.C.§2305.19.

These requirements have a rational basis underlying them:

[T]here is a rational basis underlying the savings statute's requirement that the original dismissal occur after the limitations period had expired. "Rational-basis scrutiny is intended to be a paradigm of judicial restraint, and where there are plausible reasons for the General Assembly's action a court's inquiry must end." *Am. Assoc. of Univ. Professrs, Cent. State Univ. Chapter v. Cent. State Univ.* (1998), 83 Ohio St.3d 229, 239, 699 N.E.2d 463 (Cook, J., dissents) (majority decision summarily reversed by the United States Supreme Court, [1999], 526 U.S. 124, 119 S. Ct. 1162, 143 L.Ed.2d 227). Here the distinction made is neither

arbitrary nor capricious in that it merely distinguishes between those who actually need saving and those who do not. Moreover, the statutes encourage litigants to re-file within the original statute of limitations if they can.

Boron v. Brooks Beverage Management Company, Inc. (June 30, 1999), No. 98AP-902, at 11; Appeal not allowed, 87 Ohio St.3d 1440, 719 N.E.2d 4.

The Court of Appeals recognized that the State of Ohio has a “rational and legitimate interest in insuring Ohio has a fair, predictable system of civil justice, preserving the rights of those who have been harmed by negligent behavior while curbing frivolous lawsuits.” Opinion, ¶37. Indeed, R.C. §2125.04 was amended, effective April 7, 2005, to further the State of Ohio’s “rational and legitimate ... interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the right of those who have been harmed by negligent behavior, while curbing frivolous lawsuits” 2003 Senate Bill 80, Section 3(A)(3). It is conceivable the R.C. §2125.04 serves this purpose. It is also conceivable that:

the General Assembly may have concluded that the savings provision of R.C. 2125.04 served a different, legitimate governmental purpose than the purposes served by the general savings statute, R.C. 2305.19. It is not irrational to conclude that amending R.C. 2125.04 to extend the time to file a wrongful death action would not further those legitimate government purposes identified in *Brookbank*. Moreover, because the Wrongful Death Act serves purposes that are different from an action for personal injury or other tortious conduct, the General Assembly was within its right to differentiate between the causes of action.

Presley Admx., et al. v. Janette Fraley, et al., Franklin County Common Pleas Court Case No. 06 CV-05-6963. (Decision rendered Jun. 13, 2008.) (Appx. 48.)

The Equal Protection Clause does not prohibit classifications. People or claims can be treated differently, absent a fundamental right or a suspect class, if there is a rational basis to support the disparate treatment. There is a rational basis for the treatment of wrongful death

claimants. Therefore, R.C. §2125.04 does not violate the Equal Protection Clause. It is constitutional, and the Court of Appeals' ruling should be reversed.

PROPOSITION OF LAW NO. 2: A Political Subdivision Is Immune From Liability If There Are No Facts Which Support Any Of The Exceptions Found In Revised Code Sections 2744.02(B)(1) Through (5).²

PROPOSITION OF LAW NO. 3: Revised Code Sections 2744.03(A)(1) Through (5) Are Defenses That Restore Immunity And Do Not Provide Claimants With A Basis Of Recovery.

Appellee asserts that he was not required to “plead facts sufficient to overcome an affirmative defense that may, or may not, be asserted.” Appellee’s Merit Brief, at 19.³ Even assuming this to be true, Appellee was, however, still required to plead sufficient facts upon which a claim for relief could be granted. See, *Franklin v. Dayton Probation Serv. Dept.* (1996), 109 Ohio App.3d 613, 672 N.E.2d 1039. See, also, *Lambert v. Hartmann*, 1st Dist. No. C-070600, 2008-Ohio-4905, ¶10. (“The clerk may well be immune from liability, but that is unclear from the state of the pleadings, as Lambert sufficiently alleged facts that, if true, provided an exception to that immunity.”) Political subdivisions are generally immune from liability pursuant to R.C. §2744.02(A). Appellee, therefore, was required and to plead sufficient facts to overcome the immunity afforded to the Board. The Court of Appeals erred in finding that he did. The Court of Appeals holding, even if R.C. §2125.04 is unconstitutional, should be reversed.⁴

² Appellee’s claims in opposition to Propositions of Law Nos. 2 and 3 will be addressed together.

³ Appellee was or should have been aware that the Board would assert immunity as a defense to this claim before he filed his Complaint. The Board asserted immunity when it filed a Motion for Judgment on the Pleadings in Case No. CH2005-0409. Moreover, the case cited by Appellee, *Turner v. Central Local Sch. Dist.* (1999), 85 Ohio St.3d 95, 97, 706 N.E.2d 1261, does not apply to the facts of this case. *Turner* dealt with the assertion of an affirmative defense for the first time in a motion for summary judgment. This Court held that the defendant in *Turner* waived the defense, pursuant to Rule 12(H) of the Ohio Rules of Civil Procedure, by not asserting it as an affirmative defense in response to plaintiff’s Amended Complaint.

⁴ Appellee asserted in his Complaint that Defendants acted wantonly or recklessly. An allegation of wanton or reckless conduct is sufficient to state a claim against an employee of a political subdivision. R.C. §2744.03(A)(6). It is not sufficient, however, to state a claim against a political

Appellee claims that “a conceivable set of facts whereby liability may attach” exists. Appellee’s Merit Brief, at 15. Appellee believes that it is conceivable that Ohio Administrative Code 3301-83-12(D)(4) and R.C. §2744.02(B)(4) apply to this case. Appellee also asserts that, given the holding in the case of *Thompson v. Bagley*, 3rd Dist. No. 11-04-12, 2005-Ohio-1921, ¶44, it is conceivable that the defenses set forth in R.C. §§2744.03(A)(3) and (5) do not restore the immunity afforded the Board. Appellee’s Merit Brief, at 15-16.

Appellee, however, never made these claims before the trial court or the Court of Appeals. Appellee argued before the trial court and Court of Appeals that:

the record is not nearly complete enough for the Defendants to demonstrate a lack of any genuine issue of material fact regarding the application of the immunity doctrine. Assuming, *arguendo*, that the Defendants were engaged in a “governmental function,” there are several potential exceptions which may allow the Plaintiff to overcome the “general” immunity afforded to the Defendants, most noticeably where the record demonstrates that the Defendant or its agent acted willfully or recklessly (such as, *inter alia*, removing the child from school premises without first obtaining parental consent).

Appellee’s Memorandum in Opposition to the Board’s Motion for Judgment on the Pleadings, at 18.⁵

This Court should not consider arguments that are being made for the first time on appeal. Appellee has waived these arguments:

“Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.”
Goldberg v. Indus. Comm. of Ohio (1936), 131 Ohio St. 399, 3

subdivision, as there is no exception to the immunity afforded political subdivisions for wanton or reckless conduct. R.C. §§2744.02(B)(1) through (5).

⁵ “Assuming, *arguendo*, that the Defendant-Appellee was engaged in a “governmental function,” there are several potential exceptions which may allow the Plaintiff-Appellant to overcome the “general” immunity afforded to Defendant-Appellee, most notably where the record demonstrates that the Defendant-Appellee or its agents acted willfully or recklessly.” Appellee’s Brief in the Court of Appeals, at 17.

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

State ex rel. Quarto Mining Co. v. Foreman (1977), 79 Ohio St.3d 78, 81, 679 N.E.2d 706, 709.

See, also, *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 219, 574 N.E.2d 457, overruled on other grounds.

Further, the *Thompson v. Bagley* case provides no support to Appellee, even if he had made an argument concerning the applicability of R.C. §§2744.03(A)(3) and (A)(5) before now. In *Thompson* plaintiffs’ son, a fourth grade student, was found on September 30, 2002; unconscious lying under water in the school district’s pool during physical education class after he and the class had taken a freestyle front crawl test. Plaintiffs’ son’s teacher attempted to revive him, but was unable to do so. Plaintiffs’ son, after being transported to Paulding County Hospital, was pronounced dead shortly thereafter. An autopsy was then performed, and the coroner determined that drowning was the probable cause of plaintiffs’ son’s death.

Plaintiffs sued their son’s physical education teacher, the superintendent of schools and the school district contending that defendants negligently supervised the physical education class, had acted with malicious purpose, in bad faith and/or recklessly in staffing and operating the pool, and were liable, pursuant to R.C. §3749.99, for failing to comply with Ohio Adm. Code 3701-31. Defendants filed a motion for summary judgment, which was granted by the trial court. Plaintiffs appealed.

The Third District Court of Appeals (“Third District”) reversed the trial court’s order granting summary judgment in favor of defendants. The Third District found that questions of fact existed as to whether defendants were negligent, that the pool was a “public swimming pool” subject to mandatory administrative regulations and that questions of fact existed as to whether the individual defendants acted recklessly.

The Third District ruled as it did because the version of R.C. §2744.02(B)(4) in effect on the date of the incident did not require the injury, death, or loss to be caused by a physical defect on the premises and the version of R.C. §2744.02(B)(5) in effect on September 30, 2002 did not require civil liability to be specifically imposed upon the political subdivision by a section of the Revised Code. Indeed, the Third District found that:

An amended version of R.C. 2744.02(B)(4) went into effect on April 9, 2003. The current version now excludes from liability only negligence that “is due to physical defects within or on the grounds of” a building being used by a political subdivision for a governmental function. Furthermore, the amendment changed the wording of R.C. 2744.02(B)(5), which now states that only the imposition of civil liability by a section of the Revised Code involves an exception to liability. These changes were not a part of the statutory language at the time of Christopher’s death and will not be considered in this opinion. We are bound to apply the words of the law in effect at the time the alleged negligent acts occurred.” *Hubbard*, at Paragraph 17.

Thompson, ¶29, FN1.

The versions of R.C. §§2744.02(B)(4) and (5), in effect on November 26, 2003, are different than the versions of these statutes in effect on September 30, 2002. On November 26, 2003, R.C. §2744.02(B)(4) provided the following:

Except as otherwise provided in section 3746.24 of the Ohio Revised Code, political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are

used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or other detention facility, as defined in section 2921.01 of the Revised Code.

The amendment to R.C. §2744.02(B)(4) makes it clear that political subdivisions can no longer be held liable in damages for injury, death or loss caused by negligent supervision or monitoring:

We reiterate that R.C. 2744.02(B) speaks solely in terms of negligence, a claim appellant has not made. Even if the exception were not limited to negligence claims, the General Assembly amended R.C. 2744.02(B)(4) effective April 9, 2003 to make it clear that the exception applies only to cases where the injuries resulted from physical defects in the property. Appellant argues that, in this case, Brandon's injuries resulted from a cause of conduct that began when he left for military service in October of 2002, and that the prior version of R.C. 2744.02(B)(4) and, by extension, the Ohio Supreme Court's decision in *Hubbard* applies. However, it is clear that Brandon did not suffer any injury until after he returned to work in September of 2003. Therefore, the amended version of R.C. 2744.02(B)(4) would apply, and since appellant's claims were not based on injury resulting from a physical defect in appellee's property, the exception would not apply even if negligence had been raised.

Coats v. Columbus, 10th Dist. No. 06AP-681, 2007-Ohio-761, ¶17; Appeal not allowed, 114 Ohio St.3d 1481, 870 N.E.2d 733, 2007-Ohio-3699 (Ohio July 25, 2007), Table No. 2007-0607). See, also, *Vento v. Strongsville Bd. of Edn.*, 8th Dist. No. 88789, 2007-Ohio-4172, ¶19.

Before the exception to immunity set forth in R.C. §2744.02(B)(4) applies to a case, a plaintiff has to plead and prove that (1) the injury, death, or loss; (2) occurred on or within the grounds or buildings used by the political subdivision; (3) was caused by the negligence of an employee of the political subdivision; and (4) was due to a physical defect on the premises. Appellee did not plead and cannot prove what R.C. §2744.02(B)(4) requires. Rather, what was alleged by Appellee demonstrates that R.C. §2744.02(B)(4) has no application to this case.

Appellee's son was not injured on the Board's property. The injury occurred on a public road or highway. None of the Board's employees negligently caused the motor vehicle accident that caused injury to Appellee's son and his subsequent death. The motor vehicle accident was caused by the negligence of Corey W. Jenkins, a fellow student. Appellee's son's injury and subsequent death was not due to a physical defect on the Board's property. It was caused by Mr. Jenkins' failure to maintain control over his motor vehicle.

R.C. §2744.02(B)(5) provided, on November 26, 2003, the following:

In addition to the circumstances described in (B)(1) to (4) of this section, a political subdivision is liable for injury, death or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including but not limited to sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

Appellee claims that Ohio Adm. Code 3301-83-12(D)(4) may impose liability upon the Board. Appellee's contention, even if argued below, has no merit. Appellee's son was not on a school bus or in a motor vehicle owned by the Board at the time of the accident, nor was the motor vehicle being operated by one of the Board's employees. If this were the case, Appellee should have asserted that R.C. §2744.02(B)(1) provided an exception to the immunity afforded the Board. Further, Ohio Adm. Code 3301-83-12(D)(4) is neither a section of the Ohio Revised Code nor does it specifically impose civil liability upon the Board. Again, if a section of the Ohio Revised Code specifically imposed liability upon the Board for Appellee's son's death, Appellee should have asserted it when he first filed this claim, when this claim was re-filed in September, 2006, in response to the Board's Motions for Judgment on the Pleadings, and argued or attempted

to argue it before the Court of Appeals, none of which he did. Quite simply, no such claim was plead or argued because there is no legal or factual basis to support it. Neither Ohio Adm. Code 3301-83-12(D)(4) nor R.C. §2744.02(B)(5) has any application to this matter.

Appellee did not allege in his Complaint what he is arguing now. He alleged that the Board and/or its employees “recklessly, wantonly and willfully engaged in conduct which caused harm to Joshua M. Eppley.” Complaint, ¶4. In an effort to somehow cure his insufficient pleadings, Appellee now claims that the Ohio Civil Rules permit him to “develop proof that the Defendants’ actions were reckless or wanton, and that liability attaches under the governing law.” Appellee’s Merit Brief, at 18. An allegation of reckless or wanton conduct, however, is not sufficient to state a cause of action against the Board, and no amount of discovery will ever make it so.

Whether the Board was willful or reckless comes into play if, and only if, an exception to immunity applies and the Court is considering whether R.C. §§2744.03(A) (1) through (5) restore the immunity afforded the Board.⁶ *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 32, 697

⁶ R.C. §2744.03(A)(3) provides that:

the political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

If this section applies, it restores the immunity afforded the Board regardless of whether someone acted wantonly or recklessly.

Further, if the building in which or the area where students gather to wait for buses was not properly designed, as Appellee says he believes, and an exception to the immunity afforded the Board applies, which it does not, then R.C. §2744.03(A)(3) would restore the immunity afforded the Board. The decision to design a building is the type of policy making, planning or enforcement power referred to in R.C. §2744.03(A)(3). See, *Elston v. Howard* (2007), 113 Ohio St.3d 314, 865 N.E.2d 845, 2007-Ohio-2070, 917 to 918. See, also, *Valescu v. Cleveland*

N.E.3d 610, 618-619. (“Appellants further contend that R.C. §2744.03(A)(5) provides an independent basis for imposing liability on the city. We reject this contention. In *Hill v. Urbana*, *supra*, 79 Ohio St.3d 130, 679 N.E.2d 1109, a similar argument was made. However, R.C. 2744.03(A)(5) is a defense to liability; it cannot be used to establish liability. *Id.* at 135, 679 N.E.2d 1113, fn. 2 (Lindberg Stratton, J., concurring in part and dissenting in part); *Id.* at 138-139, 679 N.E.2d at 1116 (Moyer, C.J., dissenting).”) “R.C. 2744.03(A)(5), however, is not an exception to immunity, it is a defense to liability. Only a (political subdivision) may assert the defenses and immunities provided in R.C. 2744.03, in response to a claim of liability based on the statutory exceptions to immunity enumerated in R.C. 2744.02(B).” Judge Moyer’s dissent in *Hill v. Urbana*, 79 Ohio St.3d 130, at 139, 679 N.E.2d 1109, 1997-Ohio-400. See, also, *Armbruster v. West Unity Police Dept.* (1998), 127 Ohio App.3d 478, 713 N.E.2d 436. (“In this case, Ms. Armbruster seeks to wield R.C. 2744.03(A)(2) as a sword contending that the defendants are liable for the negligent acts of their employees in requesting, obtaining and executing the search warrant. However, based on the foregoing, the court concludes that the five categories listed in 2744.02(B) provide the only permissible grounds for imposing liability against a political subdivision.” *Armbruster*, at 485.) See, also, *Grooms v. Crawford*, 12th Dist. No. CA2005-05-008, 2005-Ohio-7028. Headnote No. 20. See, also, *Huffman v. Board of County Commissioners*, 7th Dist. No. 05CO71, 2006-Ohio-3479, Headnote No. 4. No facts were alleged that arguably support an exception to immunity, nor are there any facts that could conceivably be asserted that overcome the immunity afforded the Board. Therefore, whether the Board was willful or reckless is irrelevant.

Metroparks Sys. (1993), 90 Ohio App.3d 516, 522, 630 N.E.2d 1. See, also, *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 349-350, 632 N.E.2d 502. See, also, *Lines v. Ashtabula Area City School*, 11th Dist. No. 2003-A-0062, 2004-Ohio-4535, ¶127.

Finally, Appellee misses the point of Propositions of Law Nos. 2 and 3. The Court of Appeals applied R.C. §2744.03(A)(6) to the Board. It erred in doing so, even if R.C. §2125.04 is unconstitutional. If R.C. §2125.04 is unconstitutional and R.C. §2305.19 saves Appellee's cause of action, the cause of action is saved only with respect to the claims made against the John Doe Defendants. The claim asserted against the Board is not saved because no claim against the Board exists. The Board is immune from liability pursuant to R.C. §2744.02(A).

The Court of Appeals erred in holding that the Board could be held liable pursuant to R.C. §2744.03(A)(6), if Appellee proves that one of its employees acted wantonly or recklessly. R.C. §2744.03(A)(6), however, applies only to employees of political subdivisions. Therefore, if R.C. §2125.04 is unconstitutional, this matter should be remanded for further proceedings against the John Doe Defendants only. The trial court's ruling as to the Board should be affirmed.

CONCLUSION

Appellee's Complaint was not timely filed. It was filed approximately ten months too late.

Ohio Revised Code §§2125.02 and 2125.04 are clear and unambiguous. The requirements for filing a wrongful death claim should have been followed.

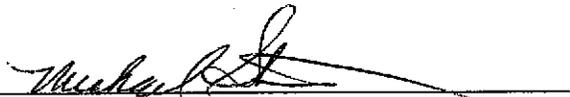
Ohio Revised Code §2125.04 applies only to wrongful death claims, and R.C. §2305.19 applies to all other claims. Ohio Revised Code §2305.19 does not apply to this case and does not save Appellee's cause of action against the Board or the John Doe Defendants.

The Court of Appeals erred in ruling R.C. §2125.04 unconstitutional. Assuming *arguendo*, R.C. §2125.04 is unconstitutional, the Court of Appeals erred in finding R.C. §2744.03(A)(6) applicable to the Board. This case should not be remanded to the trial court, but if

it is, it should only be remanded on the claims asserted against the John Doe Defendants. There is no set of facts which, if proven, can overcome the immunity afforded the Board.

The Board asks that the Court of Appeals' decision on the Third and Fourth Assignments of Error, Opinion, ¶39 and ¶50, be reversed. In the alternative, if this Court finds that R.C. §2125.04 is unconstitutional, then the Board asks the Court of Appeals' decision on the Fourth Assignment of Error, Opinion, ¶50, be reversed, and this matter be remanded for further proceedings on the claims against the John Doe Defendants only.

Respectfully submitted,



David Kane Smith (0016208)
Michael E. Stinn (0011495)
BRITTON, SMITH, PETERS
& KALAIL CO., L.P.A.
3 Summit Park Drive, Suite 400
Cleveland, Ohio 44131-2582
Telephone: (216) 503-5055
Facsimile: (216) 503-5065
Facsimile: (216) 642-0747
Email: dsmith@ohioedlaw.com
Email: mstinn@ohioedlaw.com

Attorneys for Appellant Tri-Valley Local
School District Board of Education

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing *Reply Brief of Appellant Tri-Valley Local School District Board of Education* was sent this 17th day of October, 2008, via UPS Overnight Delivery, postage-prepaid upon the following:

John W. Gold, Esq.
Peter D. Traska, Esq.
Elk & Elk Co., Ltd.
6105 Parkland Blvd.
Mayfield Heights, Ohio 44124



Michael E. Stinn (0011495)