

IN THE SUPREME COURT OF OHIO

ORIGINAL  
10-0296

Lorain County Board of Mental Retardation, et al.,	:	
	:	On Appeal from the Lorain
	:	County Court of Appeals,
Appellants,	:	Ninth Appellate District
	:	
vs.	:	Court of Appeals
	:	Case No. 09-CA-009550
Jacob Moss, et al.,	:	
	:	
Appellees.	:	

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS LORAIN COUNTY BOARD OF MENTAL RETARDATION, LORAIN COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, CONNIE J. BROWN, KIMBERLY MUSCHITZ, AND RENEE M. OPPENHEIMER

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EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST

This is a case of both public and great general interest because the Ohio Ninth District Court of Appeals effectively strikes the “physical defect” requirement from R.C. 2744.02(B)(4), as well as the duty and breach of duty requirements; ignores the direct relationship between the “reckless and wanton conduct” element in R.C. 2744.03(A)(5) to the specific “physical defect” which triggers R.C. 2744.02(B)(4), as well as R.C. 2744.03(A)(3) entirely; eliminates the pleading distinction between official and individual capacity lawsuits for R.C. Chapter 2744 purposes; and erroneously allows plaintiffs to “jointly plead” the inconsistent and mutually exclusive immunity exceptions outlined in R.C. 2744.03(A)(6)(a) and R.C. 2744.03(A)(6)(b). The result of the Ninth District’s decision is the deterioration of the affirmative defense of statutory immunity which the General Assembly afforded Ohio’s political subdivisions and public employees in order to protect these political subdivisions and employees from unnecessary, costly, and protracted litigation. As was recently stated by this Court, “R.C. Chapter 2744 is the General Assembly’s response to the judicial abrogation of common-law sovereign immunity. Its manifest purpose is the preservation of the fiscal integrity of political subdivisions.” *Estate of Graves v. City of Circleville*, 2010-Ohio-168, at ¶12. A thorough explanation of why this case is of public and great general interest is set forth below.

This is a case of both public and great general interest because, in striking the “physical defect” requirement from R.C. 2744.02(B)(4), the Ninth District ignores both (1) the judicial and legislative history surrounding the “physical defect” requirement itself and (2) the heightened burden placed upon plaintiffs in pleading all elements of the narrow R.C. 2744.02(B)(4) exception including the “physical defect” component and; thereby, virtually guaranteeing that

every case brought against any political subdivision and public employee will be unnecessarily litigated in contradiction with public policy and judicial economy.

As originally enacted, R.C. 2744.02(B)(4) lacked the “physical defect” language it now contains. This led to conflicting jurisprudence wherein some courts read the “physical defect” language into R.C. 2744.02(B)(4) while other courts refused to rewrite the statute to include the “physical defect” requirement.

The 121<sup>st</sup> General Assembly attempted to remedy this judicial conflict by memorializing the “physical defect” element within the statute. “In Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 3867, new language was inserted in R.C. 2744.02(B)(4) changing the subsection to read, ‘political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, *and is due to physical defects within or on the grounds of*, buildings that are used in connection with the performance of a governmental function.’ (Emphasis added to indicate new language.) 146 Ohio Laws, Part II, 3988. However, a majority of this court declared H.B. 350 to be unconstitutional and therefore the change to R.C. 2744.02(B)(4) never went into effect. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 1999 Ohio 123, 715 N.E.2d 1062.” *Hubbard v. Canton City School Bd. of Edn.* (2002), 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, at ¶16.

The 122<sup>nd</sup> General Assembly attempted to remedy the concerns raised by this Court in *Sheward*. “The new ‘physical defects’ language appears again in Am.Sub.H.B. No. 215, passed shortly after H.B. 350. 147 Ohio Laws, Part I, 909, 1150. However, the H.B. 215 version of R.C. 2744.02(B)(4) was also invalidated by this court. *Stevens v. Ackman*, 91 Ohio St.3d 182, 2001 Ohio 249, 743 N.E.2d 901.” *Hubbard*, 2002-Ohio-6718, at ¶16.

After this Court invalidated H.B. 215, this Court had the opportunity in *Hubbard* to consider whether the “physical defect” requirement should be read into R.C. 2744.02(B)(4) given the General Assembly’s numerous attempts to incorporate the same into the narrow immunity exception. In declining to do so, the *Hubbard* majority explained that: “We acknowledge that the General Assembly has attempted to change the language of R.C. 2744.02(B)(4). We are bound to apply the words of the law in effect at the time the alleged negligent acts occurred. The board urges us to add words to R.C. 2744.02(B)(4). We decline to rewrite the subsection to produce a different result than the words of the statute require.” *Hubbard*, 2002-Ohio-6718, at ¶17. Nonetheless, the following justification for Justice Stratton’s dissenting opinion simply cannot go ignored: “I respectfully dissent from [the majority’s] interpretation of the exception to immunity in R.C. 2744.02(B)(4). Without the requirement that the negligence must arise out of a physical defect or negligent use of the grounds or buildings, a political subdivision now may be liable for any negligent act of an employee that occurs within or on the grounds of its buildings. Such a literal interpretation effectively obliterates the doctrine of sovereign immunity. \*\*\* I do not believe that the General Assembly intended such a contradictory result.” *Id.* at ¶21.

Taking into consideration the majority and dissenting opinions in *Hubbard*, as well as the concerns raised in *Stevens*, the 124<sup>th</sup> General Assembly yet again changed the language of R.C. 2744.02(B)(4) by adding the “physical defect” element to the limited statutory immunity exception pursuant to Am.Sub.S.B. No. 106. This revised version of R.C. Chapter 2744 (which includes the “physical defect” requirement) has been applied by this Court. See, e.g., *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839 (applying other provisions of Am.Sub.S.B. No. 106).

After the General Assembly successfully inserted the “physical defect” element into R.C. 2744.02(B)(4), the Ninth District now disregards this essential precondition, as well as its own precedent wherein the Ninth District held that: “R.C. 2744.02(B)(4) is an exception to general immunity. By requiring that the injury both be caused by employee negligence within or on the grounds of certain types of buildings and be due to physical defects within or on the grounds of those buildings, the legislature has narrowed the scope of a political subdivision’s liability, not the scope of its immunity.” *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517, 913 N.E.2d 997, at ¶14.

By ignoring the “physical defect” requirement, the Ninth District both broadens the scope of political subdivision liability and narrows the scope of immunity as warned in Justice Stratton’s dissenting *Hubbard* opinion because “[w]ithout the requirement that the negligence must arise out of a physical defect or negligent use of the grounds or buildings, a political subdivision now may be liable for any negligent act of an employee that occurs within or on the grounds of its buildings.” *Hubbard*, 2002-Ohio-6718, at ¶21. Specifically, the Ninth District concludes that “the negligent design, maintenance and construction resulted in a physical defect, namely, the kitchen.” *Moss v. Lorain Cty. Bd. of Mental Retardation*, 2009-Ohio-6931, at ¶16. Such an obliteration of the doctrine of sovereign immunity is clearly contradictory to the legislative intent because the current version of R.C. 2744.02(B)(4) mandates a “physical defect.”

Assuming that a “physical defect” is somehow pled, the Ninth District is nonetheless silent as to the requirement that plaintiffs must also plead both a duty and breach of the same to satisfy the R.C. 2744.02(B)(4) exception. The plain and unambiguous language of R.C. 2744.02(B)(4) mandates that both these elements be pled and, yet, the Ninth District wholly

ignores each requirement; thereby, again broadening the scope of political subdivision liability and narrowing the scope of immunity.

In order to ensure that the scope of political subdivision liability is narrowed and the scope of immunity broadened, “the burden lies with the plaintiff to show that one of the recognized exceptions apply.” *Maggio v. City of Warren*, 2006-Ohio-6880, at ¶38. Allowing lawsuits to continue past the pleading stage merely by concluding that a physical defect exists in a building renders R.C. 2744.02(B)(4) a nullity and negates the very purpose of statutory immunity. As this Court explained in *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶25: “If the appellate court holds that the political subdivision is immune, the litigation can come to an early end, with the same outcome that otherwise would have been reached only after trial, resulting in a savings to all parties of costs and attorney fees. Alternatively, if the appellate court holds that immunity does not apply, that early finding will encourage the political subdivision to settle promptly with the victim rather than pursue a lengthy trial and appeals. Under either scenario, both the plaintiff and the political subdivision may save the time, effort, and expense of a trial and appeal, which could take years [Citations Omitted].” The Ninth District’s decision renders nugatory this Court’s desire to preserve scarce fiscal resources in statutory immunity cases.

This is also a case of both public and great general interest because the Ninth District both wholly disregards the R.C. 2744.03(A)(3) defense and ignores the direct relationship between the “reckless and wanton conduct” element in R.C. 2744.03(A)(5) to the specific “physical defect” which triggers R.C. 2744.02(B)(4). Assuming that a “physical defect” is immaterial, the Ninth District blatantly sidestepped the fact that R.C. 2744.03(A)(3) reinstates immunity to political subdivisions because decisions regarding the design, construction, and

maintenance of school facilities involve the type of “policy-making, planning, or enforcement powers.” See, e.g., *Valescu v. Cleveland Metroparks Sys.* (1993), 90 Ohio App.3d 516, 522, 630 N.E.2d 1 (holding that a building design “is a planning function of the political subdivision, entitling the subdivision to immunity as to liability arising from the design”).

Assuming that a “physical defect” has been pled, the Ninth District ignores the fact that a nexus must exist between that specific physical defect and the alleged “wanton and reckless” conduct in order for the additional R.C. 2744.03(A)(5) defense to be negated. Here, the Ninth District focuses its analysis solely upon the relationship between the alleged “negligent supervision” to the alleged “wanton and reckless” conduct. No “physical defect” nexus exists.

This is a case of both public and great general interest because the Ninth District eliminates the pleading distinction between official and individual capacity lawsuits for R.C. Chapter 2744 purposes. “A determination of whether there is an identity of parties requires a court to look behind the nominal parties to the substance of the cause to determine the real parties in interest.” *City of N. Olmsted v. Eliza Jennings, Inc.* (1993), 91 Ohio App.3d 173, 184, 631 N.E.2d 1130. In making this determination, the Ninth District refused to examine “the body of the complaint,” which is essential since “the proper party is not determined from the caption.” *Kirby v. Cole*, 163 Ohio App.3d 297, 2005-Ohio-4753, 837 N.E.2d 839, ¶14.

This is also a case of both public and great general interest because the Ninth District erroneously allows plaintiffs to “jointly plead” the inconsistent and mutually exclusive immunity exceptions outlined in R.C. 2744.03(A)(6)(a) and R.C. 2744.03(A)(6)(b). The position taken by the Ninth District permits plaintiffs to assert both (1) that a public employee is acting within the scope of his/her employment and (2) that the same employee is engaged in acts that are with malicious purpose, in bad faith, or in a wanton or reckless manner. Such pleading is not a form

of “alternate pleading” that is permitted by Civ.R. 8(E)(2). Rather, this type of pleading is “inconsistent pleading” inasmuch as a plaintiff can both admit that a public employee was at all times acting within the scope of his/her employment and yet allege conduct that would inevitably be outside the scope of his/her employment. Permitting such contradictory and inconsistent pleading clearly undermines judicial economy and is contrary to sound public policy.

As set forth above, this case raises important issues regarding the very essence of statutory immunity, thereby affecting every political subdivision and public employee in the State of Ohio. To promote the purposes and preserve the integrity of statutory immunity, and to ensure that political subdivisions and their employees are afforded the protection guaranteed by R.C. Chapter 2744, this Honorable Court must grant jurisdiction to hear this case and review the erroneous and potentially destructive decision of the Ninth District.

#### STATEMENT OF THE CASE AND FACTS

On September 4, 2008, Plaintiffs-Appellees Jacob Moss and Kim Moss (collectively, “Moss”) filed their amended complaint against Defendant-Appellants Defendants Lorain County Board of Mental Retardation, Lorain County Board of Mental Retardation and Developmental Disabilities, Connie J. Brown, Kimberly Muschitz, and Renee M. Oppenheimer (collectively, the “Board”) alleging nothing more than a simple claim of negligent supervision.

All allegations contained within the Amended Complaint are taken as true and construed liberally in favor of Moss for the purpose of the instant appeal.

“Defendant, Lorain County Board of Mental Retardation, and New-Party Defendant, Lorain County Board of Mental Retardation and Developmental Disabilities \* \* \* are political subdivisions of the State of Ohio [who] \* \* \* owned and operated the Murray Ridge School in Elyria.” Amended Complaint at ¶¶ 2-3.

At all times relevant, Connie Brown, Kimberly Muschitz, and Renee M. Oppenhenier were acting as employees/agents of the Lorain County Board of Mental Retardation and Developmental Disabilities. See Amended Complaint at ¶7 (alleging the same).

Jacob Moss was a student of Murray Ridge School at the time of the alleged incident. See Amended Complaint at ¶¶4-5 (asserting the same).

On August 29, 2007, Moss injured himself by spilling a pot of coffee. See Amended Complaint at ¶¶ 5, 10-11 (alleging the same).

No other material allegations have been pled as the remaining allegations in the Amended Complaint consist entirely of unsubstantiated legal conclusions.

On October 17, 2008, the Board filed its answer, which contains an assertion of immunity under R.C. Chapter 2744. See Answer at ¶27 (asserting the affirmative defense).

On December 16, 2008, the Board filed its motion for judgment on the pleadings based upon R.C. Chapter 2744 grounds alone. On January 15, 2009, Moss filed his memorandum in opposition to judgment on the pleadings on R.C. Chapter 2744 grounds. On February 2, 2009, the Board filed its reply memorandum based upon R.C. Chapter 2744 grounds alone.

On February 9 and 10, 2009, the Trial Court denied the Board the benefits of its alleged statutory immunity from the negligent supervision claim as provided in R.C. Chapter 2744.

On March 10, 2009, the Board timely appealed the Trial Court's statutory immunity denial pursuant to R.C. 2744.02(C) to the Ninth District.

On December 30, 2009, the Ninth District affirmed the decision of the Trial.

The Board now timely appeals the decision of the Ninth District to this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: In order for an exception to political subdivision immunity to be recognized under R.C. 2744.02(B)(4), the burden is on plaintiffs to plead specific factual allegations demonstrating (1) an injury, (2) employee negligence, (3) a physical defect, (4) causation between the employee negligence and physical defect, (5) causation between the injury and employee negligence, and (6) causation between the injury and physical defect.**

The Ninth District erred in failing to place the burden upon Moss to plead all six of the following R.C. 2744.02(B) elements: (1) an injury, (2) employee negligence, (3) a physical defect, (4) causation between the employee negligence and physical defect, (5) causation between the injury and employee negligence, and (6) causation between the injury and physical defect. Specifically, R.C. 2744.02(B)(4) provides that:

Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, 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 any other detention facility, as defined in section 2921.01 of the Revised Code.

While Moss has pled an injury, he cannot meet the second R.C. 2744.02(B)(4) element as no employee negligence has been pled. Admittedly, Moss does assert that “[t]he kitchen area had been negligently and carelessly designed, constructed, and maintained by employees” inasmuch as “circle time” and the “kitchen area” were in too close proximity to one another. Amended Complaint at ¶¶5, 6. Yet, it is well-established that negligence requires “a duty, a breach of the duty, and an injury resulting proximately therefrom.” *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. And, while Moss has pled an injury resulting from employee negligence, he fails to plead either a duty or breach of the same.

As a political subdivision, the Board only derives duties by statute and accompanying regulations. See, e.g., *Ebert v. Stark Cty. Bd. of Mental Retardation* (1980), 63 Ohio St.2d 31, 33, 406 N.E.2d 1098 (finding that a board of mental retardation and developmental disabilities, as a creature of statute, has only those powers expressly granted or necessarily incident to the performance of its powers and duties). Here, Moss has pled to absolutely no statute or regulation that, in anyway, establishes a standard for the manner in which Board employees shall design, construct, or maintain the proximity of “circle time” and “kitchen area” because no such standard exists.

Rather than meeting his burden of pointing to any “factual allegations” demonstrating a breach of any legally cognizable duty, Moss simply cites to an array of unsupported conclusions, which clearly “are not sufficient to withstand a motion to dismiss.” *City of Rocky River v. City of Lakewood*, 2008-Ohio-6484, ¶5 (omitting citations).

Assuming that Moss has pled a cognizable duty to design, construct, or maintain the proximity of “circle time” and “kitchen area” in a particular manner, Moss fails to plead that the Board breached such a duty. Rather, Moss simply hypothesizes that such a duty may have been breached, and pleads that:

**For example purposes only**, Plaintiffs reasonably believe, and therefore allege that the counter where pots and other cookware were supposed to be heated had been situated within easy reach of the young students and lacked the barriers and other safety features necessary to prevent them from being burned. [Emphasis added.]

Amended Complaint at ¶6.

Assuming that employee negligence has been pled, Moss cannot meet the third R.C. 2744.02(B)(4) element since no “physical defect” has been pled. Specifically, there is no allegation that the coffee pot was not doing that for which it was intended to do – i.e., serving as

a container, usually with a handle and a spout or lip, in which coffee is made or served, or both. There is no allegation that the kitchen counter was not doing that for which it was intended to do – i.e., providing a surface for the preparation of food and beverages in a kitchen. There is no allegation that the kitchen area was not doing that for which it was intended to do – i.e., serving as a room or place equipped for cooking. There is no allegation that the circle time area was not doing that for which it was intended to do – i.e., serving as an area where a group of people can sit together and engage in activities involving everyone. And there is no allegation that the classroom was not doing that for which it was intended to do – i.e., serving as a place where one learns and gains experience.

It cannot be overstated that Moss in no way alleges any “physical defect” with respect to the coffee pot, kitchen counter, kitchen area, circle time area, or classroom. Rather, Moss is simply asserting **employee negligence** in the manner in which these were designed, constructed, and maintained – which addresses the employee negligence element of R.C. 2744.02(B)(4), not the physical defect element.

**Proposition of Law No. II: In order to proceed with a claim against a political subdivision when alleging an exception to immunity under R.C. 2744.02(B)(4) due to negligent design, maintenance, and construction, as well as a physical defect; plaintiffs must show that no nexus exists between either the negligent design, maintenance, and construction and R.C. 2744.03(A)(3) or R.C. 2744.03(A)(5) and the physical defect.**

In the event this Court determines that the Board must be divested of immunity under R.C. 2744.02(B)(4), the Board must nonetheless be granted judgment on the pleadings as to the negligence claim because the Board is entitled to have its immunity reinstated under both R.C. 2744.03(A)(3) and R.C. 2744.03(A)(5). The Ninth District completely disregards the R.C. 2744.03(A)(3) defense and then ignores the direct relationship between the “reckless and wanton conduct” element in R.C. 2744.03(A)(5) to the specific “physical defect” which triggers R.C.

2744.02(B)(4). Assuming that a “physical defect” has been pled, the Ninth District fails to find that any nexus has been pled between that specific physical defect and the alleged “wanton and reckless” conduct in order for the additional R.C. 2744.03(A)(5) defense to be negated. Here, the Ninth District focuses its analysis solely upon the relationship between the alleged “negligent supervision” to the alleged “wanton and reckless” conduct. No “physical defect” nexus exists.

**Proposition of Law No. III: In order to state a claim for relief against employees of a political subdivision being sued in their individual capacity, the burden is on plaintiffs to plead specific factual allegations, as opposed to unsupported conclusions, demonstrating that the public employees were acting outside the scope of their employment.**

The Ninth District erred in failing to hold that Board Employees Brown, Muschitz, and Oppenheimer have been named in their official capacities only. “A determination of whether there is an identity of parties requires a court to look behind the nominal parties to the substance of the cause to determine the real parties in interest.” *City of N. Olmsted*, 91 Ohio App.3d at 184. In making this determination, this Court must examine “the body of the complaint” since “the proper party is not determined from the caption.” *Kirby v. Cole*, 163 Ohio App.3d 297, 2005-Ohio-4753, 837 N.E.2d 839, ¶14.

In *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶19, the Ohio Supreme Court found that, “[c]learly, the individuals named were being sued in their official capacities, not in their individual capacities.” Paragraphs 7, 9-10, and 12 of the Amended Complaint make it clear that all of the alleged wrongdoing stems from conduct by Brown, Muschitz, and Oppenheimer in their official roles as Board employees. All of the acts of Brown, Muschitz, and Oppenheimer arose exclusively in their exercise of official duties and responsibilities as employees, albeit political subdivision employees. All of these acts were taken – and could only have been taken – in the exercise of their official duties and

responsibilities as public employees and due to the position that Brown, Muschitz, and Oppenheimer occupied as public employees. None of these acts could have been taken by Brown, Muschitz, and Oppenheimer had they been acting in a personal capacity as a mere citizens.<sup>2</sup>

See *Kirkhart*, 2004-Ohio-1496, at ¶14 (applying the same analysis).

**Proposition of Law No. IV: In stating a claim against public employees, plaintiffs cannot “jointly plead” that the employees acted within the scope of employment and engaged in acts that were with malicious purpose, in bad faith, or in a wanton or reckless manner as such acts are automatically outside the scope of employment.**

The Ninth District erred in finding that the R.C. 2744.03(A)(6)(b) immunity exception is applicable because such conduct is inconsistent with Moss’s own admission that Brown, Muschitz, and Oppenheimer were acting within the scope of their employment and official responsibilities. As a matter of law, malicious, wanton, and reckless conduct is, by its very nature, “manifestly outside the scope of the employee’s employment or official responsibilities.” *Booker v. GTE.net LLC* (C.A.6 2003), 350 F.3d 515, 518 (holding that “intentional torts are committed outside the scope of the employment”).

Brown, Muschitz, and Oppenheimer are cognizant of the fact that, pursuant to Civ.R. 8(E)(2), a plaintiff may set forth two or more statements of a claim alternately. However, as a matter of law, “[w]hen a conceded material fact in a pleading is inconsistent with a general allegation in the same pleading, such conceded fact must prevail, and the general allegation be disregarded. Both cannot be true.” *State ex rel. Hasbrook v. Lewis* (1901), 64 Ohio St. 216, 234. See, also, *Wagner-Smith Co. v. Ruscilli Constr. Co.*, 2006-Ohio-5463, ¶23, 139 Ohio Misc.2d

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<sup>2</sup> Mere citizens cannot be employed by boards of mental retardation and developmental disabilities. Beyond licensure/certification requirements, MRDD employees must pass criminal records checks. See, e.g., R.C. 5126.251 through R.C. 5126.29 (outlining employment requirements).

101 (holding that “allegations that plainly are illogical or inconsistent with more detailed factual allegations in the complaint are insufficient to withstand a motion to dismiss”).

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Defendant-Appellants Defendants Lorain County Board of Mental Retardation, Lorain County Board of Mental Retardation and Developmental Disabilities, Connie J. Brown, Kimberly Muschitz, and Renee M. Oppenheimer request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,  
Matthew John Markling, Counsel of Record

A handwritten signature in black ink, appearing to read "Matthew John Markling", written over a horizontal line.

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BROWN, KIMBERLY MUSCHITZ, AND RENEE  
M. OPPENHEIMER

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellees, Michael D. Shroge, Plevin & Gallucci Co., L.P.A., 55 Public Square, Suite 2222, Cleveland, Ohio 44113, and Paul W. Flowers, Paul W. Flowers Co., L.P.A., Terminal Tower, 35<sup>th</sup> Floor, 50 Public Square, Cleveland, Ohio 44113 on February 16, 2010.



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BROWN, KIMBERLY MUSCHITZ, AND RENEE  
M. OPPENHEIMER

# APPENDIX

STATE OF OHIO )  
 )ss:  
COUNTY OF LORAIN )

JACOB MOSS  
Appellee

v.

LORAIN COUNTY BOARD OF MENTAL  
RETARDATION  
Appellant

COURT OF APPEALS  
IN THE COURT OF APPEALS  
LORAIN COUNTY  
NINTH JUDICIAL DISTRICT

2009 DEC 30 A 10: 24  
C.A. No. 09CA009550  
CLERK OF COMMON PLEAS  
RON NABAKOWSKI

9th APPELLATE DISTRICT  
APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No. 08CV157287

DECISION AND JOURNAL ENTRY

Dated: December 30, 2009

BELFANCE, Judge.

{¶1} Appellants, Lorain County Board of Mental Retardation and Developmental Disabilities (“the Board”), Connie J. Brown, Kimberly Muschitz, and Renee M. Oppenheiner (collectively “the Employees”), have appealed the decision of the Lorain County Court of Common Pleas denying their motion for judgment on the pleadings in the action filed by Appellees, Jacob Moss and Kim Moss (collectively “Moss”). For the reasons set forth below, this Court affirms the decision of the Lorain County Court of Common Pleas.

I.

{¶2} Jacob Moss is the son of Kim Moss. At the time of the incident that led to the filing of the complaint, Jacob Moss was seven-years old. He was attending the Murray Ridge School (“Murray Ridge”) because he was born with Down’s syndrome, and has been diagnosed with other disorders including epilepsy and attention deficit, hyperactivity disorder. Due to these

conditions, Jacob requires constant supervision. Murray Ridge is owned and operated by the Board. Brown, Muschitz, and Oppenheimer are employees at Murray Ridge.

{¶3} On August 29, 2007, Jacob Moss was in a classroom at Murray Ridge with other students of the school and school employees. A kitchen area was located in the classroom. Unbeknownst to the school employees monitoring the children, Jacob Moss entered the kitchen area and spilled a pot of hot coffee down his chest. Pursuant to school policy, no students were supposed to be left unattended in the kitchen. Jacob suffered second-degree burns to his chest and abdomen and was in need of substantial medical treatment. He has permanent scarring as a result of the incident.

{¶4} Moss filed a complaint for personal injury and loss of consortium against the Board, the Employees, and other persons not parties to this appeal. Moss alleged that the classroom in which the injury took place was negligently designed and maintained, in that it included an unsecured kitchen area containing various potential hazards to the special needs students at Murray Ridge. Moss also alleged that in neglecting to supervise Jacob, the Employees acted recklessly and wantonly by failing to comply with school policy and failing to comply with the standard of care which was owed to him and his mother.

{¶5} The Board and the Employees moved for judgment on the pleadings asserting that they were immune from liability. The trial court denied the motion. The instant appeal followed.

{¶6} The Board and the Employees have argued the trial court erred in (1) ruling that the issue of immunity involved questions of law and fact; (2) not recognizing that one analysis of governmental immunity applies to political subdivisions and a different analysis applies to employees of the subdivision; (3) holding that the Employees were not sued in their official

capacities; (4) denying the Board immunity; (5) denying the Employees immunity, and; (6) failing to dismiss Kim Moss' loss of consortium claim. For ease of analysis, we will address the assignments of error out of order.

## II.

### Standard of Review

{¶7} Any order of the trial court that denies a political subdivision and its employees the benefit of immunity is a final order. R.C. 2744.02(C); *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at ¶2. An order denying a motion for judgment on the pleadings filed by a political subdivision or its employees is a final, appealable order. See *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, at ¶¶3-4, 13 (holding that the trial court's order that denied in part Anderson Township's motion for judgment on the pleadings was a final, appealable order because it denied the Township the benefit of immunity).

{¶8} A motion for judgment on the pleadings by a defendant is considered a delayed motion to dismiss an action for failure to state a claim. *Dunfee v. Oberlin School Dist.*, 9th Dist. No. 08CA009497, 2009-Ohio-3406, at ¶6, quoting *Pinkerton v. Thompson*, 174 Ohio App.3d 229, 2007-Ohio-6546, at ¶18. Thus, we review a trial court's ruling on a motion for judgment on the pleadings pursuant to the de novo standard, *id.*, affording no deference to the findings of the trial court. *Akron v. Frazier* (2001), 142 Ohio App.3d 718, 721. We must confine our review to the pleadings, accepting all factual allegations in the complaint as true, and making all reasonable inferences in favor of the nonmoving party. *Dunfee* at ¶6, quoting *Pinkerton* at ¶18. Judgment on the pleadings is appropriate if it is clear that the nonmoving party can prove no set of facts that would entitle that party to relief. *Id.*

#### Assignment of Error 2

“The Trial Court erred in failing to recognize that two separate and distinct tiered analyses are applied in determining whether either a political subdivision or an employee of a political subdivision enjoys the benefit of an alleged immunity from liability under the Political Subdivision Tort Liability Act.”

{¶9} With respect to the second assignment of error, the Board and the Employees have argued the trial court did not apply the separate “tiered” analyses as described in *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 28, to determine whether the Board and the Employees were immune from liability. In their brief, the Board and the Employees have set forth quotations from precedent of the Supreme Court of Ohio that describe the tests to be applied. However, they have not presented any argument in support of their assignment of error. It is the appellants’ responsibility to ensure that the argument “is supported by citations to legal authority and facts in the record.” *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at \*3; see, also, App.R. 16(A)(7). “It is not the function of this [C]ourt to construct a foundation for [the appellants’] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.” *Catanzarite v. Boswell*, 9th Dist. No. 24184, 2009-Ohio-1211, at ¶16, quoting *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60. Thus, as the Board and the Employees have failed to develop this argument, we will not address it.

#### Assignment of Error 4

“The Trial Court erred in denying [the Board] the benefits of statutory immunity under R.C. Chapter 2744.”

{¶10} In order to determine whether a political subdivision is immune from liability, we must engage in a three-tiered analysis. *Cater*, 83 Ohio St.3d at 28. The first tier sets forth the premise that:

“[e]xcept as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property

allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a government or proprietary function.” R.C. 2744.02(A)(1).

Pursuant to the second tier, we determine whether one of the five exceptions to immunity outlined in R.C. 2744.02(B) applies to hold the political subdivision liable for damages. *Cater*, 83 Ohio St.3d at 28. Lastly, immunity may be restored, and the political subdivision will not be liable, if one of the defenses enumerated in R.C. 2744.03(A) applies. *Id.*

{¶11} In the instant matter, it is not disputed that the Board is a political subdivision. See *Ridley v. Hamilton Cty. Bd. of Mental Retardation and Developmental Disabilities*, 150 Ohio App.3d 383, 2002-Ohio-6344, at ¶25. Also, providing a system of public education and operating facilities for the mentally retarded or developmentally disabled are both governmental functions. R.C. 2744.01(C)(2)(c), (o). Thus, the Board is entitled to immunity pursuant to R.C. 2744.02(A)(1).

{¶12} We next examine whether one of the exceptions to immunity applies. The five exceptions are: (1) if the harm was caused by negligent operation of a motor vehicle by an employee of the Board; (2) if the harm was caused by negligent performance of a proprietary function by an employee of the Board; (3) if the claim arises from the negligent failure to keep public roads in repair and free from obstruction; (4) if the harm was caused by “the negligence of [the Board’s] employees and [] occur[ed] 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, \* \* \*” and; (5) if the Revised Code imposes civil liability on the Board. R.C. 2744.02(B)(1)-(5).

{¶13} Moss alleges that the injury sustained occurred due to the negligence of the employees of the Board and due to a physical defect within a building, thereby invoking the

exception specified in R.C. 2744.02(B)(4). In order to invoke this immunity exception, Moss was required to allege that the injury: (1) was caused by negligence on the part of the Board's employees; (2) occurred within or on the grounds of a building in which a governmental function was performed; and; (3) was due to "physical defect within or on the grounds of" the school. R.C. 2744.02(B)(4). See, also, *Dunfee* at ¶13.

{¶14} Having determined above that Murray Ridge is a building in which a governmental function is performed, we next examine whether Moss' complaint contains sufficient allegations that the Board's employees acted negligently and that the injury was due to a physical defect within or on the grounds of the school.

{¶15} Moss' complaint contains allegations of employee negligence that caused his injury. Moss has alleged that the kitchen area had been negligently and carelessly designed, maintained and constructed by the Board's employees and that the named defendants were employees, agents, or contractors of the Board who were responsible for the design, construction and maintenance of the facility and as a consequence, Jacob suffered physical injury. Moss has also alleged that the Board's employees were negligent on the date of the incident.

{¶16} Moss has further alleged that his injury resulted from a physical defect within the grounds of the school. In this regard, Moss claims that the kitchen area constituted a physical defect that caused his injury. The complaint states that Murray Ridge is a facility designated for educating children with special needs. The kitchen area was in close proximity to Jacob's classroom. Moss further alleged that in light of the negligent design, maintenance and construction of the kitchen it contained "physical hazards" which threatened the safety of the special needs students. In other words, the negligent design, maintenance and construction resulted in a physical defect, namely, the kitchen. Furthermore, this physical defect posed

special dangers to the young, special needs students, including Jacob. Finally, the complaint alleges that because of the physical defect, Jacob was injured. Based on the foregoing, we find that Moss has alleged sufficient facts, which if proven, demonstrate that the R.C. 2744.02(B)(4) exception applies to the instant matter.

{¶17} In the final step of the three-tiered analysis, we must determine whether immunity is restored to the Board pursuant to any of the defenses enumerated in R.C. 2744.03(A)(1)-(5), *Cater*, 83 Ohio St.3d at 28. The Supreme Court of Ohio has determined that the defenses to imposition of liability of R.C. 2744.03 must be read more narrowly than the exceptions to immunity outlined in R.C. 2744.02(B). *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 561. The statutory defense potentially applicable in this case is the defense provided in R.C. 2744.03(A)(5), which states:

“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.*” (Emphasis added.)

{¶18} Moss alleges in the complaint that Jacob was injured because the Board’s employees completely failed to properly supervise him in the classroom. In light of this lack of supervision, Jacob was able to wander away from his classmates and into the kitchen area where he reached for a pot of hot coffee on the counter and spilled it on himself. “The way in which a teacher supervises [her] class and maintains the classroom equipment are discretionary acts.” *Bolling v. N. Olmstead City Schools Bd. of Edn.*, 8th Dist. No. 90669, 2008-Ohio-5347, at ¶37, citing *Banchich v. Port Clinton Pub. School Dist.* (1989), 64 Ohio App.3d 376, 378. See, also, *Marcum v. Talawanda City Schools* (1996), 108 Ohio App.3d 412, 416-417. Thus, unless Moss’ complaint sets forth operative facts alleging that the Board’s employees exercised their discretion

in the classroom with a “malicious purpose, in bad faith, or in a wanton or reckless manner[.]” the Board has a defense to immunity pursuant to R.C. 2744.03(A)(5).

{¶19} One acts with a malicious purpose if one willfully and intentionally acts with a purpose to cause harm. *Piro v. Franklin Twp.* (1995), 102 Ohio App.3d 130, 139. Bad faith is defined as a “dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive or ill will.” (Internal quotations and citations omitted.) *Lindsey v. Summit Cty. Children Services Bd.*, 9th Dist. No. 24352, 2009-Ohio-2457, at ¶16. A person acts wantonly if that person acts with a complete “failure to exercise any care whatsoever.” *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356. One acts recklessly if one is aware that one’s conduct “creates an unreasonable risk of physical harm to another \* \* \*.” (Internal quotations and citation omitted.) *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104. Recklessness is more than mere negligence in that the person “must be conscious that his [or her] conduct will in all probability result in injury.” *Fabrey*, 70 Ohio St.3d at 356.

{¶20} We conclude that the allegations of the complaint do not rise to the level of maliciousness or bad faith, as each requires purposeful wrongdoing and the complaint does not contain allegations that the Board’s employees’ alleged failure to appropriately supervise Jacob was purposeful. However, we conclude that the complaint contains a sufficient allegation that the Board’s employees acted in a wanton or reckless manner given the allegations that the supervision of these young, special needs children was so lax that Jacob was able leave the group and enter the kitchen area completely undetected to reach for a pot of hot coffee. In essence, Moss has alleged that the conduct complained of was more than merely negligent but was of such a character that there was a complete failure to exercise care and that the failure to exercise

care created an unreasonable risk of harm. Thus, we hold that the complaint contains sufficient allegations of reckless and wanton conduct. Accordingly, the trial court did not err in denying the motion for judgment on the pleadings as to the Board.

#### Assignment of Error 5

“The Trial Court erred in denying [the Employees] the benefits of statutory immunity under R.C. Chapter 2744 to the extent that they have been sued in their respective individual capacities.”

{¶21} The three-tiered analysis of liability applicable to a political subdivision does not apply when determining whether an employee of the political subdivision will be liable for harm caused to an individual. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, at ¶17. An employee of a political subdivision is immune from liability unless: (1) the employee acted outside the scope of his or her employment or official responsibilities; (2) the employee acted with malicious purpose, in bad faith, wantonly, or recklessly, or; (3) the Revised Code expressly imposes liability on the employee. R.C. 2744.03(A)(6)(a)-(c).

{¶22} Moss alleges that the Employees are not immune from liability because they acted in a wanton or reckless manner with respect to the care and supervision of Jacob Moss. We reiterate that wanton conduct is demonstrated by a “failure to exercise any care whatsoever” *Fabrey*, 70 Ohio St.3d at 356, and reckless conduct “creates an unreasonable risk of physical harm to another \* \* \*.” (Internal quotations and citation omitted.) *Thompson*, 53 Ohio St.3d at 104.

{¶23} In the complaint, Moss states that seven-year-old Jacob requires constant supervision because he suffers from Down’s syndrome, epilepsy, and attention deficit, hyperactivity disorder and is prone to excited and dangerous behavior. Moss further states that the Employees knew, or should have known of the dangers posed by the kitchen in the

classroom, especially a pot of hot coffee within reach of the students. In light of these circumstances, Moss claims that the Employees' failure to adequately supervise Jacob was wanton and reckless and breached their duty to him. Specifically, Moss alleges that none of the Employees in the classroom the day of the accident were even aware that Jacob left the classroom area and entered the kitchen area.

{¶24} Accepting the above facts as true, *Dunfee* at ¶6, quoting *Pinkerton* at ¶18, it is clear that the complaint contains sufficient allegations that the Employees acted recklessly in that their failure to monitor Jacob in the classroom under circumstances where they appreciated the clear hazards posed by the kitchen area created at least an "unreasonable risk of physical harm" to the child. (Internal quotations and citation omitted.) *Thompson*, 53 Ohio St.3d at 104. Further, Moss has also alleged that the Employees' conduct was wanton in light of the allegations that the Employees essentially failed to exercise any care whatsoever. For example, Moss has alleged that none of the Employees even knew where Jacob was at the time of the accident; that the Employees violated school policy regarding the kitchen; and that the Employees clearly appreciated the hazards posed by the kitchen. Thus, the complaint contains sufficient allegations from which the trier of fact could find that the complete lack of supervision by the Employees fell so far below the standard of care that their actions could be found to be wanton. See *Fabrey*, 70 Ohio St.3d at 356. Accordingly, we conclude that the complaint contains sufficient factual allegations of reckless and wanton conduct on the part of the Employees pursuant to R.C. 2744.03(A)(6)(b).

#### Assignment of Error 3

"The Trial Court erred in holding that [the Employees] have not been sued in their respective official capacities only."

{¶25} The Employees argue that the trial court erred in failing to hold that they have been named in their official capacities only. In support of their argument, the Employees contend that that because they were acting as employees of the Board, and not as private persons, “only the three-tiered, political subdivision statutory immunity analysis applies in this case.” Essentially, the Employees argue that because they were acting in their official capacity as employees of the Board, the exceptions to immunity under R.C. 2744.03(A)(6) do not apply. We do not agree.

{¶26} R.C. 2744.03(A)(6) provides in part:

“In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

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

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

“(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]”

{¶27} Thus, an employee is immune from liability unless the employee's conduct was outside of the scope of the employee's responsibilities or the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. In the amended complaint, Moss alleges that the Employees “are all employees and/or agents of the Board who had been responsible for monitoring and controlling Plaintiff Jacob Moss while he was attending ‘circle time’ in Classroom 5.” Moss also alleged that the Employees “recklessly and wantonly” failed to comply with existing policies relative to the duty of care owed to Jacob Moss. The

Employees suggest that despite the specific statutory exception to immunity, the trial court was required to limit the assessment of the claims against the Employees to the three-tiered analysis applicable to a political subdivision. However, the Employees' argument ignores the plain language of R.C. 2744.03(A)(6) which clearly provides for specific exceptions to employee immunity.

#### Assignment of Error 1

"The Trial Court erred in failing to recognize that whether immunity from liability may be invoked under the Political Subdivision Tort Liability Act is a purely legal issue, properly determined by the court prior to trial."

{¶28} The Board and the Employees argue that the trial court erred in failing to recognize that immunity is a purely legal issue properly determined by the trial court before trial.

{¶29} In support of their argument, the Board and the Employees reference that part of the trial court's journal entry that states "application of immunity and the exceptions to immunity as contained in the R.C. Chapter 2744 are mixed questions of fact and law." The Board and the Employees surmise that in light of this language, the trial court must have improperly evaluated their motion for judgment on the pleadings given that the trial court was required to accept all of the allegations of the complaint as true.

{¶30} Moss counters that the trial court did not err in its evaluation of the motion for judgment on the pleadings, but instead suggests that the trial court included this observation in its journal entry because the Board and the Employees repeatedly attempted to generate factual disputes in their motion for judgment on the pleadings rather than accepting all factual allegations in the complaint as true.

{¶31} In analyzing whether a trial court committed reversible error, we have held that we will not reverse the trial court if it reached the correct result, albeit for an incorrect reason.

*State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92 (“[A] reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof.”). As we have determined in our de novo review that the motion for judgment on the pleadings was properly denied, we find that the first assignment of error is without merit.

#### Assignment of Error 6

“The Trial Court erred in not dismissing the loss of consortium claim as derivative of those in which [the Board and the Employees] enjoy the benefits of immunity under R.C. Chapter 2744.”

{¶32} Finally, the Board and the Employees contend that the trial court should have dismissed Kim Moss’ loss of consortium claim. “A claim for loss of consortium is derivative and, but for the primary cause of action by the plaintiff, would not exist.” *Bradley v. Sprenger Enterprises, Inc.*, 9th Dist. No. 07CA009238, 2008-Ohio-1988, at ¶14. Thus, Kim Moss’ cause of action for loss of consortium is derived from, and dependant upon, the personal injury action that arose from the harm suffered by Jacob Moss at Murray Ridge. The Board argues that if Jacob Moss has no cognizable claim against the Board, the derivative claim must also fail. However, as we have determined that the complaint sets forth a cognizable claim against the Board, the loss of consortium claim survives as well. See *Rigby v. Fallsway Equip. Co. Inc.*, 150 Ohio App.3d 155, 2002-Ohio-6120, at ¶65 (reversing the trial court’s grant of summary judgment in favor of Fallsway on Mr. Rigby’s claim for intentional infliction of emotional distress and holding that Mrs. Rigby’s loss of consortium claim also should survive summary judgment as it was supported by Mr. Rigby’s claim against Fallsway).

#### III.

{¶33} We find that the complaint contains sufficient factual allegations to support the claim that the Board and the Employees are not immune from liability with respect to Jacob

Moss' injuries. Thus, the trial court did not err in denying the motion for judgment on the pleadings. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

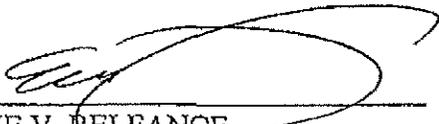
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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

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EVE V. BELFANCE  
FOR THE COURT

MOORE, P. J.  
DICKINSON, J.  
CONCUR

APPEARANCES:

MATTHEW JOHN MARKLING, Attorney at Law, for Appellants.

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