

ORIGINAL

IN THE SUPREME COURT OF OHIO

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CASE NO. 10-0296

JACOB MOSS, A MINOR; KIM MOSS  
Plaintiff-Appellees,

-vs-

LORAIN COUNTY BOARD OF MENTAL RETARDATION AND  
DEVELOPMENTAL DISABILITIES; AMANDA HAMILTON;  
CONNIE J. BROWN; KIMBERLY MUSCHITZ; RENEE M. OPPENHEINER;  
DEBBIE McLILLY  
Defendant-Appellants.

ON APPEAL FROM THE NINTH APPELLATE DISTRICT  
CASE NO. 09CA009550

MEMORANDUM OPPOSING JURISDICTION OF  
PLAINTIFF-APPELLEES, JACOB MOSS, A MINOR AND KIM MOSS

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**EXPLANATION OF WHY THIS CASE PRESENTS NO ISSUES OF PUBLIC OR  
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The First Amended Complaint alleges that a disabled child diagnosed with Down's Syndrome was scalded and permanently scarred because a pot of hot coffee had been accessible to him in his school's negligently designed and constructed kitchen. The Lorain County Court of Appeals simply affirmed the trial judge's determination that the First Amended Complaint sufficiently alleged a potentially viable claim for relief for purposes of Civ.R. 12(C). *Moss v. Lorain Cnty. Bd. of Ment. Ret.*, 9<sup>th</sup> Dist. No. 09CA009550, 2009-Ohio-6931, 2009 W.L. 5156438. Far from "ignoring" the "physical defect" requirement set forth in R.C. §2744.02(B)(4), the panel thoroughly examined this provision and held that the exception to immunity had been properly alleged. *Id.*, ¶ 12-16. This conclusion was hardly surprising, as the First Amended Complaint had specifically stated that:

5. \*\*\* At approximately 9:30 a.m. on August 29, 2007, Plaintiff Jacob Moss was taken to Classroom 5 for "circle time". In close proximity to this classroom was a "kitchen area" which posed a number of potential hazards to the special needs students. No students were supposed to be left unattended in the kitchen area under School policy.

6. The kitchen area had been negligently and carelessly designed, constructed, and maintained by employees, agents, and representatives of the Board and thus contained physical hazards which threatened the safety of the special needs students. 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.

\*\*\*

9. Notwithstanding their clear appreciation of the hazards posed by the nearby kitchen area, the School's Employees permitted Plaintiff to wander into the dangerous facility. No precautions had been taken to

ensure that the special needs children in Classroom 5 would be unable to access the kitchen area.

10. Because of the physical defects within the kitchen area, Plaintiff was able to reach a pot of hot coffee which spilled down his chest. None of the School's Employees, who were supposed to be diligently monitoring him at the time, were aware that he had entered the kitchen area until it was too late to save him from being scalded.

11. Plaintiff suffered severe second degree burns as a result of the incident and had to be transported by emergency rescue personnel to the Elyria Memorial Hospital Regional Medical Center. The next day, he was transferred to a burn unit at the MetroHealth Medical Center where he was admitted and diagnosed with "2<sup>nd</sup> degree partial deep and superficial burns" to his chest and abdomen.

*Id.*, pp. 2-3 (emphasis added). Defendant-Appellant, Lorain County Board of Mental Retardation, was thus potentially liable as a result of the exception to immunity provided by current R.C. §2744.02(B)(4).

That was only one exception to immunity which had been fulfilled, because Plaintiffs had also named the teachers who had been entrusted with supervising and monitoring the special needs child as additional Defendants. *First Amended Complaint*, pp. 2-3. The trial judge and unanimous appellate court all concluded that the employees had been sufficiently charged with reckless and wanton misconduct for purposes of satisfying the exception to immunity set forth in R.C. §2744.03(A)(6)(b). *Moss*, 2009-Ohio-6931 ¶ 25-27. Four jurists have now rejected Defendants' Rule 12(C) Motion, and no plausible reason exists for this Court to analyze the uncomplicated issue any further.

There was nothing difficult or controversial about the lower court's analysis of the substantial and uniform body of judicial decisions addressing political subdivision immunity. All that was surprising was that an appeal was undertaken of the seemingly incontrovertible ruling by some (not all) of the Defendants. Notably, these Defendants

have failed to identify any other appellate districts which have taken a contrary approach to the issues raised. By all appearance, Ohio's judiciary is in accord. No issues of public or great general importance exist which merit this Court's consideration.

### STATEMENT OF CASE

The instant personal injury action was commenced in the Lorain County Court of Common Pleas on June 19, 2008. *Case No. 08CV157287*. The Complaint alleged that Plaintiff-Appellee, Jacob Moss, was a "special needs child enrolled at Murray Ridge School". *Complaint, ¶ 1*. On August 29, 2007, he sustained severe burns when employees and agents of Defendant-Appellant, Lorain County Board of Mental Retardation ("Board"), negligently and carelessly permitted him to reach and dislodge a pot of hot coffee, which scalded the child. *Id.*

Before any discovery could be conducted, a Motion to Dismiss under Civ. R. 12(B)(6) was filed by Defendant Board on July 21, 2008. With leave of Court, the First Amended Complaint was then formally submitted on September 4, 2008 and duly served upon the New Party Defendants. The first Motion to dismiss was denied as moot.

On December 16, 2008 the Second Motion for Judgment on the Pleadings was filed ("Defendant's Second Motion"). In addition to the Board, New Party Defendant-Appellants, Connie J. Brown ("Brown"), Kimberly Muschitz ("Muschits"), and Renee M. Oppenheiner ("Oppenheiner") all demanded an immediate termination of the claims against them pursuant to Civ. R. 12(C). New Party Defendants, Amanda Hamilton ("Hamilton") and Debbie McLilly ("McLilly"), did not join the application. Plaintiff's Memorandum in Opposition was filed on January 15, 2009 ("Plaintiffs' Second Memorandum"). A Reply followed on February 2, 2009.

In an Entry dated February 9, 2009, Judge Miraldi again denied the Motion to Dismiss. *Ct. of App. Brief of Appellant, App-2*. This interlocutory appeal followed.

### ARGUMENT

In order to pique this Court's interest in their ill-conceived Motion to Dismiss, Defendants have devised four Propositions of Law. Each attempts to create an intriguing legal issue where none exists. They will be addressed separately herein.

**PROPOSITION OF LAW NO. 1: 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 second prong of the three-prong test for political subdivision immunity requires consideration of whether any of the exceptions set forth in R.C. §2744.02(B) are potentially available. *Greene Cty. Agr. Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 2000-Ohio-486, 733 N.E. 2d 1141. Such an inquiry is, by necessity, dependent upon the facts and circumstances of each case and cannot be resolved solely on the pleadings. *See Groves v. Dayton Pub. Schs.* (2nd Dist. 1999), 132 Ohio App.3d 566, 570-571, 725 N.E.2d 734, 737-738; *Vinicky v. Pristas* (8<sup>th</sup> Dist. 2005), 163 Ohio App.3d 508, 511-512, 2005-Ohio-5196, 839 N.E. 2d 88.

Once they have had a full and complete opportunity to inspect the kitchen, complete their discovery, and secure their expert reports, Plaintiffs are confident that they will be able to meet the exception for immunity set forth in R.C. §2744.02(B)(4).

That provision states 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. [emphasis added].

Both before and after the amendment adopted in 2002 S.B. 106, Ohio courts have found that this exception to immunity applies to schools and universities. *Hubbard v. Canton City Sch. Bd. of Edn.*, 97 Ohio St.3d 451, 454, 2002-Ohio-6718, 708 N.E.2d 543, 547; *Grine v. Sylvania Schs. Bd. of Edn.* (Mar. 31, 2008), 6th Dist. No. L-06-1314, 2008-Ohio-1562, 2008 W.L. 853519, p. \*10.

Defendants have proclaimed that: "It cannot be said enough that [Plaintiff] is not arguing that any physical defect exists." *Ct. of App. Brief of Appellants*, p. 21. It should not have been said at all. Paragraph 6 of the First Amended Complaint had specifically referenced the "physical hazards which threaten the safety of the special needs students." Paragraph 10 maintained that: "Because of the physical defects within the kitchen area, Plaintiff was able to reach a pot of hot coffee which he spilled down his chest." Since Defendants quickly filed their motions to dismiss before the premises could be inspected and a preliminary investigation conducted, that is all the detail that can be furnished at this early stage in the litigation. Fortunately for Plaintiffs and countless other victims of tortious wrongdoing, they are not required to prove their case at the pleading stage without the benefit of discovery. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063, 1065.

All the allegations of the First Amended Complaint must be accepted as true until the summary judgment stage of the proceedings is reached. *Greeley v. Miami Valley Maint. Contractors, Inc.* (1990), 49 Ohio St.3d 228, 230, 231, 551 N.E.2d 981,

982-983. When construed most strongly in Plaintiffs' favor, the pleading permits the conclusion that all the elements of R.C. §2744.02(B)(4) have been satisfied. Had Defendants been properly vigilant in the design, maintenance, and supervision of the facility, the counter would have been situated away from special needs children and high enough that they could not reach sharp, hot, and otherwise dangerous cookware and utensils. Installing self-closing and latching doors also would have rendered the kitchen inaccessible to them. Incidents such as that suffered by Plaintiff should not occur when proper design considerations have been taken into account, particularly given the appreciation that special needs students were going to be occupying the building. The kitchen facility was thus "defective" in every sense of the term. No other allegations are required to satisfy R.C. §2744.02(B)(4). *See Moore v. Lorain Metro. Housing Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606 (whether absence of smoke detector constituted physical defect such that immunity was dissolved was not properly considered by the trial court).

This Court has also been assured that "no employee negligence has been pled." *Defendant's Memorandum*, p. 9. One can only wonder whether the Board really read the First Amended Complaint. In addition to paragraphs 6 through 12 which detail the special needs school's inexcusable failure to design and maintain a defect-free kitchen which would be safe for the disabled students who had been left in their care, Plaintiffs had further alleged that:

13. As a direct and proximate result of the negligent, reckless, and wanton misconduct of Defendant and New-Party Defendants as aforementioned and to be established at trial, Plaintiff Jacob Moss has required substantial medical treatment, has endured great pain and suffering, and has been precluding from performing many usual activities. \*\*\* [emphasis added].

*First Amended Complaint*, p. 4. More thorough and forceful allegations of liability

under R.C. § 2744.02(B)(4) are difficult to fathom.

The curious argument has also been asserted that “the Board only derives duties by statute and accompanying regulations” and thus the First Amended Complaint must be dismissed unless a violation of such a “statute or regulation” has been alleged. *Defendant’s Memorandum, p. 10*. It is safe to assume that if this were indeed the law in Ohio, the Board would have no trouble identifying a decision which had been issued at some point during the long history of this state’s jurisprudence so holding. But none has been cited. *Id.*

The best the Board has been able to do is *Ebert v. Stark County Bd. of Mental Retardation* (1980), 63 Ohio St. 2d 31, 406 N.E. 2d 1098. That decision concerned only an attempt to modify sick leave policy and reduce employee benefits. No claims for negligence were alleged. No analysis of R.C. Chapter 2744 was undertaken. At no point did this Court suggest that political subdivisions are entitled to early exits from actions for damages unless a statutory or regulatory violation has been alleged.

Even if statutory and regulatory citations were required to prevail against a school board, Plaintiffs expect to produce compelling expert testimony confirming that school representatives and employees authorized, designed, and maintained the kitchen area in violation of the Ohio Basic Building Code and potentially other safety guidelines and standards. Common sense alone recognizes that special needs children should not be able to access kitchen areas and reach pots of hot coffee. It is indeed unfortunate that the Board continues to insist that the pot was “doing that for which [it] was intended to do – i.e., serving as a container, usually with a handle and a spout our lip, in which coffee is made or served, or both.” *Defendant’s Memorandum, pp. 10-11*. By all appearances, those who are in charge of the Murray Ridge School have yet to understand that mentally disabled children require special care and attention

and extra precautions must be undertaken beyond those required for the rest of the student body.

**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.**

Defendants have gone so far as to have accused the Ninth District of having “blatantly sidestepped” their argument that immunity can be restored under R.C. §2744.03(A)(3). *Defendant’s Memorandum, p. 5.* Apparently, they are under the impression that the panel was determined to shirk its fundamental due process responsibilities and render a ruling which was contrary to law by design. Such baseless hyperbole seriously undermines the integrity of the judicial system and should not be encouraged.

R.C. §2744.03(A) “restores” immunity under the following limited circumstances:

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(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

\*\*\*

(5) The political subdivision is immune from liability if the injury, death, or loss to 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.

As with any “defense” the burden of proof rests squarely upon the defendants. See generally *State ex rel. Stacy v. Batavia Loc. Sch. Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 486, 2005-Ohio-2974, 829 N.E. 298, 309; *Roman v. Estate of Gobbo*, 99 Ohio St.3d 260, 273, 2003-Ohio-3655, 791 N.E.2d 422, 432-433.

It is inconceivable that, once discovery has been concluded, Defendants will be able to meet this burden. The provisions of R. C. § 2744.03(A) which permit the immunity defense to be revived must be narrowly construed. *Hallett v. Stow Bd. of Edn.* (9th Dist. 1993), 89 Ohio App. 3d 309, 313, 624 N.E. 2d 272, 274-275. “In other words, the defenses and immunities of R. C. 2744.03 cannot be read to swallow up the liability provisions of R. C. 2744.02(B) so as to render them nugatory.” *Spaid v. Bucyrus City Schs.* (3rd Dist. 2001), 144 Ohio App. 3d 360, 365, 2001-Ohio-2171, 760 N.E. 2d 67, 71. Judge McCormac has sagely reasoned that:

Sovereign immunity, at common law after *Carbone* and under R.C. 2744.03(A)(5), protects only those charged with weighing alternatives in making choices with respect to public policy in planning characterized by a high degree of discretion and judgment. It does not protect a board of education from the negligent conduct of its employees in the details of carrying out the activity even though there is discretion in making choices. This is not the type of discretion for which there is immunity as it does not involve public policy endangering the creative exercise of political judgment.

*Bolding v. Dublin Loc. Sch. Dist.* (June 15, 1995), 10<sup>th</sup> Dist. No. 94APE09-1307, 1995 W.L. 360227, p. \*3. Put differently, immunity will not be conferred on mid-level managers and employees simply because they may possess the “discretion” to select among various options available to them. *McVey v. City of Cincinnati* (1<sup>st</sup> Dist. 1995), 109 Ohio App. 3d 159, 163, 671 N.E. 2d 1288, 1290; *Spaid*, 144 Ohio App. 3d at 366.

The rule in the Ninth District (as elsewhere) is that R. C. § 2744.03(A) is reserved for “public policy and planning that is characterized by a high degree of discretion and

judgment.” *DuBose v. Akron Pub. Sch.* (April 29, 1998), 9<sup>th</sup> Dist. No. 18707, 1998 W.L. 208846, p. \*5.

Plaintiffs seriously doubt that the Board will be able to produce any evidence, expert or otherwise, to the effect that school officials rightfully possessed a “high degree” of “public policy and planning” discretion to construct and maintain kitchens which afforded special needs students easy access to dangerous utensils, hazardous cooking equipment, and – of course – hot pots of coffee. The notion that some higher purpose was served by creating the unacceptably dangerous facility is simply absurd. Undoubtedly, those who were in charge of constructing and maintaining the kitchen had simply decided that protecting the students from the readily apparent hazards was simply too time-consuming or expensive. The issue is ultimately one for the jury. *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 270, 2007-Ohio-1946, 865 N.E. 2d 9.

It should also be observed that the restoration of immunity provided by R.C. §2744.03(A)(5) is unavailable when the official possessing discretionary authority acts “in a wanton or reckless manner.” *Brkic v. City of Cleveland* (8<sup>th</sup> Dist. 1995), 100 Ohio App.3d 282, 287, 653 N.E.2d 1225, 1228. As will be argued more fully in response to the next Proposition of Law, reasonable minds could conclude that the design and maintenance of the kitchen was more than just “negligent.”

**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.**

In paragraph 12 of the First Amended Complaint Plaintiffs had raised a claim against the Employee Defendants (Hamilton, Brown, Muschitz, Oppenheimer, and

McLilly) for reckless and wanton misconduct. This Court has recognized that employees of political subdivisions can be held individually liable for such dereliction under R.C. §2744.03(A)(6)(b). *Wilson v. Stark Cty. Dept. of Human Sers.*, 70 Ohio St. 3d 450, 452, 1994-Ohio-394, 639 N.E. 2d 105, 106. The three-part test for immunity recognized in *Greene Cty. Agr. Soc.*, 89 Ohio St.3d 551, no longer applies and R.C. §2744.02(A)(6) is the sole standard for assessing whether damages are available. *Cramer*, 113 Ohio St. 3d at 270; *Pearson v. Warrensville Hts. City Sch.* (Mar. 13, 2008), 8th Dist. No. 88527, 2008-Ohio-1102, 2008 W. L. 660856, p. \*4. Even when the employee is sued personally in this manner, the political subdivision remains obligated by R.C. §2744.07(A) to indemnify and defend him/her in all but the most extreme cases of malicious wrongdoing. *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St. 3d 574, 576, 2001-Ohio-1287, 752 N.E. 2d 267, 270; *Rogers v. City of Youngstown* (1991), 61 Ohio St. 3d 205, 574 N.E. 2d 451.

Buried in a footnote in Defendants' Second Motion to Dismiss was the novel argument that three of these staff members (Brown, Muschitz, and Oppenheimer) "had been sued in their respective official capacities only" and were thus indistinguishable from the Board. *Defendants' Second Motion*, p. 1 fn. 2. Their reasoning then continued that the employees were entitled to the same immunity defenses, which are available to political subdivisions under R.C. §2744.02(B). *Id.* No claims of reckless and wanton misconduct could be thus brought under R.C. §2744.06(A)(6)(b). Having previously been deemed unworthy of inclusion in the body of Defendants' Motion, the footnoted argument has now blossomed into its own Proposition of Law.

According to Defendants, the teachers are being sued in their "official capacities" only because: "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.” *Defendant’s Memorandum*, pp. 12-13. That is typically the case when individual governmental employees have been sued for reckless and wanton misconduct under R.C. §2744.03(A)(6)(b). If such a claim is only available when the individual defendant is operating in a purely personal capacity without the cloak of official responsibility, then immunity plainly would not apply by operation of R.C. §2744.03(A)(6)(a). The General Assembly has provided in subsection (b), however, that another exception will exist when the “employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]”

Defendant’s nonsensical position is directly contrary to this Court’s precedent. In one recent case, two nurses were sued in their individual capacities when a nursing home resident fell to the floor as they were assisting him into bed. *Cramer v. Auglaize Acres* (July 18, 2005), 2005-Ohio-3609, 2005 W.L. 1662038, p. \*1. Just as in the instant action, the claims “arose exclusively in their exercise of official duties and responsibilities as employees[.]” *Defendant’s Memorandum*, p. 12. The Third District nevertheless concluded that summary judgment was unwarranted due to the “material issues of fact remain[ing] unresolved concerning whether [the nurses’] conduct rose to the level of malice, bad faith, wantonness, and recklessness” required by the statute. *Id.* at p. \*13. Although this Court reversed the Third District’s refusal to recognize a cause of action under the Ohio Nursing Home Patients’ Bill of Rights against the political subdivision, the unanimous Court agreed that “there are material issues of fact as to whether the nurses acted maliciously, in bad faith, wantonly, or recklessly \*\*\*.” *Cramer*, 113 Ohio St.3d at 275. By all appearances, not a single Justice shared Defendants’ peculiar view that an employee who injures another in the course and scope of his/her “official duties” can only be sued in an “official capacity” and is

indistinguishable from the political subdivision itself.

In *Cramer* this Court actually rejected the argument which Defendants are now championing. With regard to the nurses who had been sued for recklessly dropping their nursing home patient while performing their “official duties,” Justice Lanzinger had explained for the unanimous Court that:

For the individual employees of political subdivisions, the analysis of immunity differs. Instead of the three-tiered analysis described in *Colbert*, R.C. 2744.03(A)(6) states that an employee is immune from liability unless the employee’s actions or omissions are manifestly outside the scope of employment or the employee’s official responsibilities, the employee’s acts or omissions were malicious, in bad faith, or wanton or reckless or liabilities expressly imposed upon the employee by a section of the Revised Code.

*Id.* at 270. Defendants’ efforts to lump the claims, which have been brought against the Employee Defendants under R.C. §2744.03(A)(6)(b), with those which have been raised against the Board as permitted by R.C. §2744.02(B)(4), so that the same “three-tiered” analysis can be applied is seriously misguided.

Where reasonable minds can differ as to the importance of the evidence, the issue of wantonness or recklessness should be submitted to a jury. *Burnell v. Dulle* (12<sup>th</sup> Dist. 2006), 169 Ohio App. 3d 792, 797, 2006-Ohio-7044, 865 N.E. 2d 86 (“whether a person acted in a reckless and wanton manner is usually a question of fact for the jury.”); *Anderson v. Lynn* (May 10, 1999), 12th Dist. No. CA98-10-097, 1999 W.L. 296756, p. \*3 (“[B]ecause the line between willful and wanton misconduct and ordinary negligence can be a fine one, the issue of whether conduct was willful or wanton should be submitted to the jury for consideration in light of the surrounding circumstances when reasonable minds might differ as to the import of the evidence. The issue of wanton misconduct is normally a jury question.”) (citations omitted); *Fleming v. Ashtabula Area City Sch. Bd. of Edn.* (Apr. 18, 2008), 11th Dist. No. 2006-

A-0030, 2008-Ohio-1892, 2008 W. L. 1777833, pp. \*7-9 (former substitute teacher allowed to proceed with defamation and emotional distress claims against superintendent). A dismissal on the pleadings cannot be justified.

**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 final Proposition of Law is perhaps the most ludicrous. As an initial matter the First Amended Complaint never charged anyone with "malicious" misconduct. The Employee Defendants were alleged only to have acted "reckless and wantonly" in the course of their supervision of the special needs student. *Id.*, ¶ 12. Notably, no punitive or exemplary damages were sought. *Id.*, p. 5.

Defendants have predicated this Proposition of Law upon *Booker v. GTE.net LLC* (6<sup>th</sup> Cir. 2003), 350 F. 3d 515, but have neglected to mention that the decision is based upon Kentucky law. *Defendant's Memorandum*, p. 13. More troubling than that, Defendants have represented that the Sixth Court had held that "intentional torts are committed outside the scope of employment[.]" *Id.*, p. 13. The full quotation from the federal decision is actually:

Generally, intentional torts are committed outside the scope of the employment. However, some intentional conduct is so closely related to the employment that it is considered within the scope of employment. The question of whether an employee's conduct is within the scope of employment is a question of law, and the proper law to apply is the state law of Kentucky. [emphasis added]

*Id.*, p. 518. Like the first three Propositions of Law, this final one is legally unfounded.

In Ohio, governmental employees can indeed act recklessly and wantonly while remaining in the course and scope of their official duties. *Burnell*, 169 Ohio App. 3d

792 (deputy sheriff striking Plaintiff with vehicle while on duty); *Piispanen v. Carter* (May 12, 2006), 11th Dist. No. 2005-L-133, 2006-Ohio-2382, 2006 W.L. 1313159, pp. \*4-5 (school principle found to be potentially liable for reckless and wanton misconduct allegedly committed in course of employment); *Senu-Oke v. Board of Edn. of Dayton City Sch. Dist.* (Sept. 30, 2005), 2nd Dist. No. 20967, 2005-Ohio-5239, 2005 W.L. 2403910, p. \*3 (recognizing that allegations of reckless and wanton misconduct against assistant superintendant survived a motion to dismiss); *Rankin v. Cuyahoga Cty. Dept. of Children & Fam. Sers.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521 (director and employee of department could be liable for reckless and wanton misconduct); *Bolling v. North Olmsted City Schs. Bd. of Edn.* (Oct. 16, 2008), 8th Dist. No. 90669, 2008-Ohio-5347, 2008 W.L. 4599670, p. \*6 (reasonable minds could conclude that employees' actions were reckless). Since Defendants' contrived positions advocate a complete upheaval of settled Ohio law, nothing would be gained by accepting jurisdiction over this already protracted case (which has not even reached the discovery phase).

### CONCLUSION

For the foregoing reasons, this Court should decline to exercise jurisdiction over this appeal since no issues of great general or public importance are present.

Respectfully Submitted,

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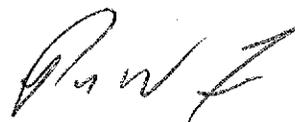
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Memorandum** has been sent by regular U.S. Mail, on this 17<sup>th</sup> day of March, 2010 to:

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