IN THE SUPREME COURT OF OHIO

BOARD OF EDUCATION OF TOLEDO CITY SCHOOL DISTRICT, et al.	:	CASE NO. 2019-1355
Appellants,	:	Appeal of the Lucas County Court of Appeals, Sixth Appellate District, Case No. L-18-1004, 2019-Ohio-3402
v.	:	
A.R., et al.,	:	
Appellees.	:	

BRIEF OF AMICUS CURIAE OHIO FEDERATION OF TEACHERS IN SUPPORT OF APPELLANTS, BOARD OF EDUCATION OF TOLEDO CITY SCHOOL DISTRICT, ET AL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Ohio Statutes:

Authoritative Publications:

INTRODUCTION

A lawsuit filed by a kindergarten student and her parents against her kindergarten teacher Amanda Lute, assistant principal Cynthia Skaff, principal Ralph Schade, and the Toledo School District, properly led to summary judgment for the defendants in trial court. However, in *A.R. v. Toledo City School Dist. Bd. of Edn.*, the Sixth District Court of Appeals reversed the summary judgment for the three employees. 6th Dist. Lucas No. L-18-1004, 2019-Ohio-3402. In doing so, the Sixth District issued a decision that severely impairs the immunity that Ohio public employees are entitled to under R.C. 2744.03(A)(6). The Ohio legislature's intent in enacting R.C. 2744.03(A)(6) was to shield public employees from liability so as to allow them to serve the public effectively and without financial insecurity. While this immunity ceases to exist if the employee acts with a malicious purpose, in bad faith, or in a wanton or reckless manner, the courts and the laws have established high standards for establishing such culpability. Mere negligence should not deprive an employee of immunity.

This case stems from an altercation between two kindergarten students, which occurred despite the kindergarten teacher's and school administrators' consistent efforts to broach peace between the students. The Sixth District's decision robs immunity of its essence by determining that there is a question of material fact as to whether Appellants engaged in reckless conduct. By attributing one student's misconduct to her teacher and school administrators, the Sixth District posits the unrealistic expectation that educators

should be legally liable for every student altercation. Furthermore, the decision undermines the Ohio legislature's intent behind R.C. 2744.03(A)(6) and makes educators and other public employees across Ohio vulnerable to unjustified claims of recklessness.

STATEMENT OF INTEREST OF AMICUS CURIAE OFT

The Ohio Federation of Teachers ("OFT") is a union of professionals representing approximately 15,000 members, the majority of whom work in large, urban school districts. The OFT envisions an Ohio where all citizens have access to the high quality public education and public services they need to develop to their full potential. The OFT supports the social and economic wellbeing of its members, Ohio's children, families, working people, and communities and is committed to advancing these principles through community engagement, legislative action, collective bargaining and political activism, and especially through the work of its members.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae OFT adopts the Appellants' Statement of the Case and Facts and incorporates same as if fully restated herein.

ARGUMENT

A. The Ohio Legislature Intended Public Immunity to Be a High Standard to Overcome.

The Ohio General Assembly enacted the Political Subdivision Tort Liability Act (R.C. Chapter 2744) as a speedy response to the judicial abrogation of common-law immunity for municipal corporations. *Estate of Graves v. City of Circleville*, 124 Ohio St.3d 339, 343, 2010-Ohio-168. In passing the law, which became effective on November 20, 1985, the General Assembly "clearly rejected the judicial abrogation of common-law sovereign immunity and provided broad statutory immunity to political subdivisions and their employees." *Id.* The General Assembly thus clearly held public immunity as crucial to the effectiveness of local and state governmental entities.

The Ohio Supreme Court has also emphasized the necessity of public immunity. In *Sawicki v. Ottawa Hills*, the Court noted that the underlying events in that case had transpired in the temporal gap between the judicial abrogation of sovereign immunity and the enactment of R.C. 2744. 37 Ohio St.3d 222, 225, 525 N.E.2d 468 (1988). The Court then adopted a "public-duty rule" as a defense to a municipality against claims of negligence. *Id.* at 229-30. *See also Graves*, 124 Ohio St.3d at 345 (explaining that the Ohio Supreme Court "adopted the public-duty rule at a time when there was no immunity for a political subdivision" and discarded the rule when R.C. 2744 became effective). That the Court would prescribe public immunity even in the absence of R.C. 2744 demonstrates the Court's high regard for the doctrine and its goal of reflecting the true intent of the legislature.

In enacting R.C. 2744, the General Assembly's "manifest purpose [was] the preservation of the fiscal integrity of political subdivisions." *Id.* at 343. As such, R.C. 2744 "generally shields political subdivisions from tort liability in order to preserve their fiscal integrity." *Riscatti v. Prime Props, Ltd. P'ship*, 137 Ohio St.3d 123, 126, 2013-Ohio-4530. The Ohio Supreme Court has noted that the General Assembly, when enacting R.C. 2744, stated:

> [T]he protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services to their residents.

Summerville v. City of Forest Park, 128 Ohio St.3d 221, 229, 2010-Ohio-6280 (quoting Am.Sub.H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733).

In order to keep political subdivisions and their employees financially secure and able to provide their much-needed services, the legislature has given them broad immunity. Specifically, R.C. 2744.03(A)(6) states that employees of political subdivisions are immune from liability for any injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function. Appellee parents argue that the kindergarten teacher, assistant principal, and principal fall into one of the three exceptions to this immunity, namely R.C. 2744.03(A)(6)(b): "the employee's acts or omissions were with malicious purpose, in bad

faith, or in a wanton or reckless manner." The Appellee parents allege, in particular, that the Appellants' conduct was reckless.

The Ohio Supreme Court has interpreted recklessness to bear a high degree of culpability. *See O'Toole v. Denihan*, 118 Ohio St.3d 374, 375, 2008-Ohio-2574 ("recklessness is a perverse disregard of a known risk," and requires that "the actor [is] conscious that his conduct will in all probability result in injury"); *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 387, 2012-Ohio-5711 ("Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct."). The Ohio Jurisprudence states in regard to employees of political subdivisions:

> Summary judgment is appropriate in instances where the alleged tortfeasor's actions show that the alleged tortfeasor did not intend to cause any harm, did not breach a known duty through an ulterior motive or ill will, and did not have a dishonest purpose. In particular, the standard for showing wantonness and recklessness is high, so summary judgment can be appropriate when an individual's conduct does not demonstrate a disposition to perversity.

52 Eleanor L. Grossman et al., *Ohio Jurisprudence - Government Tort Liability* § 54 (3d ed. 2019). *See also Shadoan v. Summit County Children Servs. Bd.*, 9th Dist. Summit No. 21486, 2003-Ohio-5775, ¶ 14 (stating that the standard for showing recklessness is "high" and finding summary judgment appropriate when the defendant "did not intend to cause any

harm, did not breach a known duty through an ulterior motive or ill will, and did not have a dishonest purpose").

The Sixth District Court of Appeals, by reversing the trial court's summary judgment to Appellant school employees, upended the case and statutory law that came before it. The undisputed facts in this case establish that the Appellant school employees' conduct did not come close to being reckless. As such, there is no genuine issue of material fact with respect to whether the Appellant school employees' conduct was reckless, and the Sixth District erred by denying the protection intended by R.C. 2744 to Appellants.

The conduct of the kindergarten teacher, assistant principal, and principal was not reckless because their actions or omissions did not constitute "a perverse disregard of a known risk." *O'Toole*, 118 Ohio St.3d at 375. Even if the Appellant school employees dispute the facts as found by the majority opinion, those very facts demonstrate that there was no known or obvious risk of S. allegedly assaulting A.R. on March 3, 2016. Several months earlier, Appellant assistant principal Cynthia Skaff had spoken to A.R. and S. to investigate any bullying. *A.R*, 2019-Ohio-3402 at ¶ 24. A.R. had told Ms. Skaff that no one was being mean to her, and S. told her that A.R. was S.'s friend. *Id.* Ms. Skaff also periodically checked on A.R. during lunch or in the classroom and found her to be "fine." *Id.* Appellant principal Ralph Schade, after being informed by Appellee parents in the

autumn of 2015 that A.R. was being teased, frequently checked on A.R. during her lunch in the following months. *Id.* at ¶ 25. A.R. always indicated that everything was alright and often sat with the students who had previously teased her. *Id.* After Appellee parents told Mr. Schade in February 2016 that S. had pressured A.R. to drink a strange concoction of foods, Mr. Schade informed the parents that he had been checking on A.R. in the lunchroom and had not witnessed any bullying. *Id.* at ¶ 34. He also ascertained that the food incident was investigated. *Id.* at ¶ 25. Appellant teacher Amanda Lute avers that upon returning from break in November 2015 and being informed of the teasing, she was not informed or aware of any instance of A.R. further being harassed prior to March 3, 2016. *Id.* at ¶ 23. As the dissent notes, there is no evidence that S. ever pushed A.R. in line, or that the Appellant school employees knew about A.R. being pushed. *Id.* at ¶ 55.

In the absence of a known or obvious risk of physical violence, it is improper to hold the Appellant school employees to be potentially reckless for not keeping A.R. and S. separated at all times. In *Moon v. Trotwood Madison City Schools*, the Second District granted summary judgment to school administrators regarding whether they were reckless in assigning six teachers to supervise 174 students during end-of-day dismissal. 2d Dist. Montgomery No. 25779, 2014-Ohio-1110, ¶ 28. Likewise, the court granted summary judgment to teachers as to whether they were reckless for failing to prevent some students from trampling a classmate. *Id.* The court stated that "the fact that students misbehaved . . . does not, alone, create a genuine issue of material fact regarding

recklessness" on the part of the teachers or administrators, especially when no student had been injured during dismissal over the previous five years. *Id.* at ¶¶ 25-27, ¶ 23. Here, too, one student's unexpected misconduct should not create a question of whether the Appellant school employees acted recklessly. Having A.R. and S. sit at the same table in a supervised classroom, after both students had said that they were amicable, could not be reckless. *See O'Toole*, 118 Ohio St.3d at 375 (for there to be recklessness, "[t]he actor must be conscious that his conduct will in all probability result in injury").

The Appellant school employees are also entitled to immunity because they did not at any point demonstrate a perverse disregard of bullying directed toward A.R. On October 29, 2015, the very day that A.R.'s parents first informed Ms. Skaff of A.R. being bullied, Ms. Skaff spoke to both students about the bullying. *A.R.*, 2019-Ohio-3402 at ¶ 24. Mr. Schade, upon being informed of the bullying in the autumn of 2015, talked to the bullying students until the teasing stopped. *Id.* at ¶ 25. When Mr. Schade was told of a subsequent instance of A.R. being teased, he confirmed that the incident was investigated. *Id.* Both Ms. Skaff and Mr. Schade kept a watchful eye on A.R. throughout the months before the alleged March 3, 2016 incident and regularly asked her about any instances of bullying. *Id.* at ¶¶ 24-25. Ms. Lute was not absent from the classroom during the alleged March 3, 2016 incident, but was present and supervising the class from merely ten feet away. *Id.* at ¶ 23.

In *Roberts v. Warner,* the plaintiff parent informed a school administrator that his co-plaintiff son had been subject to threats and physical violence (including pushing and punching) by another student. 5th Dist. Tuscarawas No. 98AP030070, 1998 Ohio App. LEXIS 6552, p. 1. The administrator then questioned the students involved and told the bullying student that his behavior would not be tolerated. *Id.* at p. 2. Immediately afterward, the bullying student loudly threatened the co-plaintiff son. *Id.* In a subsequent class where the teacher had not been warned to watch the students, the bullying student attacked the co-plaintiff son and caused a fractured sinus cavity and other injuries. *Id.* at p. 3. The Fifth District granted summary judgment to the administrator because he had taken actions to prevent the bullying. *Id.* at pp. 7-8. The court further stated:

> The fact that the assault occurred, in a classroom, with a substitute teacher that [the administrator] had not informed of the situation, also does not rise to the level of recklessness. Although the substitute teacher was not aware of the situation, he was still present, in the classroom, supervising the class when the assault occurred. The fact that the [bullying student] had previously assaulted a female student also does not establish recklessness . . . Although [the administrator was] aware of this previous incident, [the administrator was not reckless because his] conduct indicates that [he was] attempting to address the problem.

Id. at pp. 8-9.

In *Waters v. Perkins Local Sch. Dist. Bd. of Educ.,* a federal court applied R.C. 2744.03(A)(6) to grant summary judgment to school employees in respect to claims of recklessness because they took some steps to curb the bullying of plaintiffs' sons, including by interviewing and disciplining the bullying students. No. 3:12 CV 732, 2014 U.S. Dist. LEXIS 43660, at *1, *74-75 (N.D. Ohio Jan. 31, 2014). Similarly, in *Doe v. Big*

Walnut Local Sch. Dist. Bd. of Educ., a federal court granted summary judgment to school employees as to whether they were reckless in failing to prevent plaintiff's bullying by others in over twenty instances, some of which caused plaintiff injuries requiring surgery. 837 F.Supp.2d 742, 757-758 (S.D. Ohio 2011). The school employees had taken steps to protect the plaintiff, such as regularly meeting with his parents, disciplining the bullying students, and implementing a safety plan. *Id.* at 746-47.

In this case, the Appellant school employees' earnest efforts to shield A.R. from bullying, therefore, preclude any genuine issue of material fact as to whether Appellants were reckless. *See Vidovic v. Hoynes*, 11th Dist. Lake No. 2014-L-054, 2015-Ohio-712, ¶ 58 ("Courts have not required schools to take perfect action to remedy bullying issues to avoid claims related to gross negligence/R.C. 2744.03(A)(6)(b), but that they take some precautions or steps to recognize and address the issue.").

Summary judgment was proper in this case for the teacher, assistant principal, and principal because, by not keeping A.R. and S. separated, the Appellants did not intend to cause any harm, did not breach a known duty through an ulterior motive or ill will, and did not have a dishonest purpose. *See Shadoan*, 2003-Ohio-5775 at ¶ 14. Summary judgment is also appropriate because Appellants were in no way reckless. They did not act with a "conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances." *Anderson*, 134 Ohio St.3d at 387.

B. The Sixth District's Decision Undermines the Purpose of Immunity.

The facts of this case clearly support granting summary judgment to the Appellant school employees based on their public immunity and the absence of any evidence of recklessness. Therefore, the Sixth District's reversal of the trial court's summary judgment was a wrongful evisceration of the Appellants' immunity. If the decision is allowed to stand, it will undermine the legislature's intent in granting immunity to public employees.

The General Assembly, in enacting R.C. 2744, sought to ensure that political subdivisions and their employees would be financially secure and operating effectively. *Graves*, 124 Ohio St.3d at 343. School districts, which are political subdivisions, depend on this immunity to adequately provide indispensable education to children in Ohio. If the immunity becomes attenuated, school districts' limited funding would be diverted from teaching students to fighting lawsuits. Every dollar and resource that a school district spends on defending itself from a dubious recklessness claim are resources that could have been used for education. Consideration should be given not only to this particular case, but to all potential cases that would arise on the basis of similarly unsound facts.

Classroom teachers and other educators are even more vulnerable to lawsuits because the removal of immunity leaves them personally liable. If the misbehavior of students is allowed to be wrongly attributed to teachers and administrators, litigation

against educators would frequently overcome summary judgement. It should never be the case that an educator has to argue for their financial security, reputation, or livelihood in front of a jury every time there is a student altercation.

In withholding immunity from Appellant school employees based on facts that are bereft of evidence of recklessness, the Sixth District has deprived immunity of its essence. If this Court does not overturn the decision, school employees and districts in Ohio may soon face a litany of claims that would overcome summary judgment despite not presenting a genuine issue of material fact as to whether there was recklessness. Other political subdivisions would be similarly affected.

C. The Sixth District's Decision is at Odds with Other Appellate Districts in Ohio.

The Sixth District's determination in this case that there is a genuine issue of material fact as to whether Appellant school employees' conduct was reckless, contrasts with several other Appellate Districts' decisions. The Second District, in *Moon*, found that students' misconduct did not create a genuine issue of material fact as to whether the teachers and administrators who failed to control the students were reckless. 2014-Ohio-1110 at ¶ 25, ¶ 27. The Fifth District, in *Roberts*, granted summary judgment to an administrator who failed to prevent one student's assault upon another despite taking steps to the curb the bullying. 1998 Ohio App. LEXIS 6552 at pp. 7-9. The Eleventh District, in *Vidovic*, granted summary judgment to school employees who took

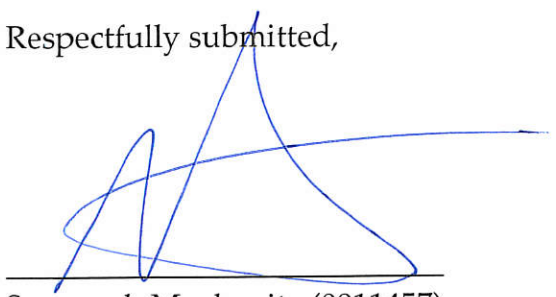
substantive but imperfect actions in preventing the bullying of a student who subsequently committed suicide. 2015-Ohio-712 at ¶ 53.

The split between the Second, Fifth, and Eleventh Districts and the Sixth District in determining immunity under R.C. 2744.03(A)(6) urges this Court's attention. The standards for when a school employee engages in reckless conduct and forsakes immunity must be uniform throughout Ohio.

CONCLUSION

For the reasons set forth above, Amicus Curiae OFT respectfully urges this Court to accept jurisdiction of the Sixth District's decision on appeal and to reverse the decision, thereby granting summary judgment to Appellant school employees based on their statutory immunity.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via electronic mail and regular U.S. Mail, postage prepaid, this 7th day October, 2019.

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