[Cite as *Horen v. Bd. of Edn. of Toledo Pub. Schools*, 2010-Ohio-3631.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Glenn S. Horen, et al.	Court of Appeals No. L-09-1143
Appellees	Trial Court No. CI06-3715
v.	
Board of Education of the City of Toledo Public Schools, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: August 6, 2010

* * * * *

Michelle Kranz for appellees Glenn S. Horen and DeLaney G. Horen.

Joanne Horen, pro se.

Adam Loukx, Acting Director of Law, and Keith J. Winterhalter, Senior Attorney, for appellants City of Toledo and Phillips Carroll.

Lisa E. Pizza, James P. Silk and Randy L. Meyer, for appellants Board of Education, Kellie Fuelling, Mary Therese Reuss, Jean Dykyj, Pamela Knox and Jennifer Spoores.

Albin Bauer, II, and Daniel Everson, for amicus Ability Center.

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HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas denying appellants' motion for summary judgment. Prior to setting forth the salient facts of this case, we must address the standard for summary judgment and the necessity for evidentiary materials both support of and in opposition to that motion.

{¶ 2} Summary judgment is proper under Civ.R. 56(C) if: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) from the evidence offered by the parties, reasonable minds, in viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, can come to but one conclusion, and that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. The party or parties moving for summary judgment have the burden of informing the court of the basis for the motion and pointing out those parts of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280 292-293. If the moving party satisfies its burden, the nonmoving party then has a reciprocal burden "to set forth specific facts showing there is a genuine issue for trial * * *." Id. at 293.

{¶ 3} The only supporting evidentiary material that can be filed in support of or in opposition to a motion for summary judgment are the pleadings, answers to interrogatories, written admissions, affidavits, depositions, transcripts of evidence in the pending case, and written stipulations of fact. Civ.R. 56(C); *Dresher* at 293. If a document is not within one of these categories, Civ.R. 56(E) allows the paper to be

introduced only when it is incorporated by reference in an affidavit and sworn or certified as a true and accurate copy of the original. *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 334.

{¶ 4} Affidavits submitted in conjunction with a summary judgment motion must be based upon personal knowledge, present facts that are admissible into evidence, and show that the affiant is competent to testify to the matters within the affidavit. Civ.R. 56(E). "Personal knowledge" is "'knowledge of the truth in a particular quoting fact or allegation, which is original, and does not depend on information or hearsay.'" *Hillstreet Fund III, L.P. v. Bloom* (1991), 2d Dist. No. 09CA12, 2009-Ohio- 6583, ¶ 11, quoting *Haack v. Bank One, Dayton, N .A.* (April 11, 1997), Montgomery App. No. 16131, quoting Black's Law Dictionary (6 Ed.1990) 873 (Citation omitted.). Furthermore, a party's unsupported and self-serving assertions offered to demonstrate issues of fact, standing alone and without corroborating materials contemplated by Civ.R. 56, are simply insufficient to overcome a properly supported motion for summary judgment. *Deutsche Bank Natl. Trust Co. v. Doucet*, 10th Dist. No. 07AP-453, 2008-Ohio-589, ¶ 13.

{¶ 5} In the case before us, appellees attached several documents to their memorandum in opposition to appellants' motion for summary judgment that were not incorporated into an affidavit. They relied upon alleged facts in these documents to support the claims raised in their complaint. In addition, some of these claims are unsupported by any facts in the record. For example, appellees assert that the students in Educare were, and are, subject to medical experimentation. The only support for this

allegation is, at best, that Joanne Horen claimed she once saw an individual that she described as a medical student in her child's classroom and, on a separate occasion, allegedly encountered a nursing student in that classroom. She never averred that either of these individuals were performing "medical experiments" with any of the children in her child's classroom.

{¶ 6} Moreover, some of the "facts" offered by appellees are a misinterpretation of testimony, e.g. appellees state that Officer Phillip Carroll refused to release Delaney to her parents until an unnamed assistant superintendent told him to do so. In actuality, Carroll stated that he did not take Delaney out to her parents, who were parked in the school lot, because he was previously told that Joanne and/or Glen were required to pick up their child in the building. He was later told by his supervisor to take Delaney out to her parents. Appellees also assert that Dykyj allowed untrained individuals to perform physical therapy on medically fragile children. Dykyj testified, however, that she was allowed to delegate certain of her duties to other individuals, and that she trained these individuals to, for example, position a child in a "stander." Dykyj further stated that some of the physical positioning of the children was not physical therapy. As a consequence, we find that only the following facts, as derived from depositions, affidavits, and an administrative due process proceeding[1] that appellees filed in the federal system will be considered by this court.

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[1]See *Horen v. Bd. Of Education of City of Toledo Public School District* (2009), 655 F. Supp.2d 794, 797 n.1 That case was removed to the federal court and dismissed for lack of jurisdiction. Id.

{¶ 7} Appellants in this cause are: (1) the Board of Education of the city of Toledo Public Schools ("TPS"); (2) the city of Toledo ("City"); (3) Kellie Fuelling, head teacher at the Educare Center TPS Preschool ("Educare"); (4) Pamela Knox, Principal of Glendale-Fielbach Elementary School ("Glendale-Fielbach") and Educare; (5) Mary Therese Reuss, the Special Education Supervisor in that area of the City denominated by TPS as the "Bowsher Center," which includes Educare and Glendale-Fielbach (6) Jennifer Spoores, former Acting Assistant Principal of Glendale-Fielbach and Educare; (7) Officer Phillip Carroll, who is an employee of the Toledo Police Department and is assigned, pursuant to a contract between the City and TPS, as a special resource officer for a number of Toledo public schools, including Educare; and, as previously mentioned, (8) Jean Dykyj, a TPS physical therapist. Appellees are Glen S. Horen and Joanne E. Horen, individually, and as next friends of their daughter, Delaney, whose birth date is September 3, 1998.

{¶ 8} The salient facts of this case are as follows. Delaney was born with Wolf-Hirschorn syndrome, also known as 4p-minus, which occurs when there is a partial deletion of the fourth chromosome. Because of this syndrome, Delaney has multiple disabilities, including, at the time this case arose, a limited ability to stand, to walk, and to feed herself. In 2003, and upon the recommendation of her preschool teacher, Delaney was placed in the elementary, not preschool, program at Educare, which provides care-giving, educational opportunities, and nursing for "medically fragile" children. Medically fragile children have "extreme medical needs" that cannot be met in a

"regular" classroom. At Educare, the teacher and the child's parents receive both an Individualized Education Program ("IEP") and a health plan.

{¶ 9} The three classes at Educare are designated as primary, intermediate, and upper intermediate. These classrooms are housed in a wing of the former Heatherdowns Elementary School, which is currently owned by the University of Toledo. Educare is allowed free use of this space pursuant to the terms of the sale of the school to the former Medical University of Ohio ("MUO"). A school age child is assigned to one of the three classes based upon his or her physical and mental abilities rather than upon his or her chronological age. At the pertinent time in this case, a separate private pediatric preschool class ("PPC") was operated by MUO in the same wing.

{¶ 10} For both the 2004-2005 and 2005-2006 school years, Delaney's teacher was Kellie Fuelling, who, at the time of her deposition, had taught at Educare for "eight or nine years." Pursuant to a contract between TPS and the Toledo Federation of Teachers union, Fuelling and the other teachers at Educare cannot be required to arrive at school prior to 8:45 a.m. Classes commence at 9:00 a.m. and end at 3:15 p.m. The children are to be picked up, either by bus or their parents, at that time. The Educare staff is required to be out of the building by 3:30 p.m., that is, the building is closed at that time. Prior to May 2006, Delaney's parents always dropped her off at Fuelling's classroom and picked her up at that classroom.

{¶ 11} In the 2004-2005 school year, Fuelling accommodated appellees by arriving early and allowing them to bring Delaney to the classroom before 8:45 a.m.

However, she was unable to do so during the ensuing year due to changes in her personal schedule. In a note dated September 14, 2005, Fuelling informed appellees of her inability to arrive at any time prior to 8:45 a.m. and noted that her two paraprofessionals, who helped Fuelling in the classroom, arrived at 8:30 a.m. but were there only to "set up the classroom, copy papers, laundry [sic], etc." Fuelling further noted that the staff must "adhere to school policy" by having a certified individual, that is, Fuelling, present when the children enter the classroom at 8:45 a.m. It is undisputed that parents could, for a fee, leave their child in the PPC until school started.

{¶ 12} One of the goals of Delaney's IEP, as well as those of other children in Fuelling's class, was to teach her how to feed herself. Therefore, parents, including appellees, of children in Delaney's class would supply food for lunch, and often breakfast, to be used as part of their child's instructional program during school hours.

{¶ 13} Some time in the early months of 2006, appellees learned TPS had a breakfast program that started at 8:30 a.m. at Glendale-Fielbach. On May 5, 2006, appellees asked that Delaney be provided with such a breakfast at Educare. Initially, Reuss told appellees that Educare did not have a breakfast program. Subsequently, however, she sent appellees a letter indicating that the school did have a breakfast program and included a menu. At her deposition, Reuss testified that when she told appellees Educare had no breakfast program, she meant that there was no such program at 8:30 a.m. because, as noted infra, under the contract negotiated by the union, the teachers were not at Educare until 8:45 a.m. At Glendale-Fielbach School, however, the

children may arrive for breakfast at 8:30 a.m. and classes began at 9:00 a.m. Breakfast is served at that school in two fifteen minute shifts. In addition, Glendale-Fielbach has a supervisor who oversees breakfast in the cafeteria. On the other hand, Educare consists of only the three aforementioned classrooms.

{¶ 14} Appellants told appellees that breakfast would be provided to Delaney at 8:45 a.m. Appellees insisted, however, on bringing Delaney to Fuelling's classroom at 8:30 a.m. On May 10, 2006, Richard Jackson, the Superintendent of Elementary Schools for TPS, sent appellees a letter informing them of the fact that children could not be dropped off at Educare until 8:45 a.m. Jackson indicated that, for a fee, Delaney could stay in the PPC until the start of school or after the end of school at 3:15 p.m.. He also offered yellow bus service as transportation.

{¶ 15} On that same date, Officer Carroll received a complaint from Fuelling, who alleged that Scott Horen was violating Toledo Municipal Code 537.16, the safe school ordinance, by dropping his daughter off at school too early and picking her up too late. Fuelling also stated that Scott entered her classroom, looked at some personal papers on her desk, and answered her telephone. While Officer Carroll did not believe that Scott's actions constituted a violation of the ordinance, he decided to remain at the school until the time that Scott dropped off his daughter. Thereafter, Principal Knox told Fuelling to lock the door of her classroom until 8:45 a.m.

{¶ 16} When, on May 10, 2006, Scott arrived early with Delaney, Carroll, and Principal Knox were waiting in the common hallway outside the door leading to

Delaney's classroom and the PPC. Principal Knox again informed him of the beginning and ending times of classes at Educare. Scott indicated that he was taking Delaney to PPC, but Knox still refused to allow him to enter. Officer Carroll then had a discussion with Scott. During that discussion, Scott told the officer that due to the fact that he was not allowed to drop his daughter off at school at 8:30 a.m., she would not be picked up until 3:30 p.m.

{¶ 17} On May 17, 2006, Officer Carroll was present when Joanne Horen came to pick up Delaney from Educare. Joanne remained in the parking lot from 3:12 p.m. until 4:10 p.m. and made two calls to emergency services while she was waiting. On that same date, Joanne e-mailed, inter alia, Principal Knox and Acting Assistant Principal Spoores. In the e-mail, Joanne alleged that Spoores told Horen to leave Delaney in the hallway, presumably, without a paraprofessional, and that 24 hour notice must be provided by a parent before he or she could enter a classroom. The e-mail declared that it was 24 hour notice of the fact that either of Delaney's parents would visit Fuelling's classroom from May 17, 2005 until such time that Delaney was no longer a student at Educare. On that same date, Spoores told Joanne Horen that she was not to enter Educare or the classroom, but must leave Delaney in the hallway with a paraprofessional.

{¶ 18} At approximately 8:20 on the morning of May 18, 2006, Joanne left Delaney in the hallway leading to Educare with a pillow, but without the presence of a paraprofessional. Glen Horen began videotaping his daughter. Joanne was then informed of the fact that she could not enter the building to pick up her daughter at 3:15

p.m. Instead, a paraprofessional and Delaney would be at the entrance to the building. At the end of the school day, Joanne arrived at the school before dismissal, but remained in her vehicle. When asked why she would not come to the building entrance to pick up her daughter, Joanne replied that she was not allowed to enter the building.

{¶ 19} In the meantime, Glen Horen called 911 and stated that his wife was at the school but was not allowed to pick up Delaney. Based upon appellees' actions, Officer Carroll called his sergeant, who came to Educare and informed Joanne that the Toledo Police Department would not send out a "crew" every time that she wanted to pick up her daughter. The sergeant also told Carroll to file a report and to issue a summons to Joanne Horen for child endangering. According to a May 18, 2006 e-mail sent by Glen Horen to a number of officials, including the TPS personnel involved in this case, he and Joanne would no longer enter the building to drop off or pick up their daughter. Glen attributed this decision to "intimidation by TPS personnel or their hired police officer, Phil Carroll * * *."

{¶ 20} On May 22, 2006, appellees again refused to pick up Delaney, stating that they could not come into the building. Nonetheless, on May 24, 2006, and despite the fact that (1) she had been told not to enter Educare before 8:45 a.m. and (2) she was told not to enter her daughter's classroom, Joanne Horen entered that facility before that time and dropped Delaney off at Fuelling's classroom. As a result, Officer Carroll filed a charge of criminal trespass against her. It is undisputed that due to the ongoing animosity

between appellees and TPS, Carroll contacted Lucas County Children Services on two occasions to aid in resolving the dispute.

{¶ 21} On May 26, 2006, appellees filed a complaint in the Lucas County Court of Common Pleas asking the trial court to issue a temporary restraining order and preliminary injunction precluding appellants from interfering in Delaney's right to participate in the TPS breakfast program at 8:30 a.m. and ordering them to provide assistance and supervision when Delaney participated in that program. Appellees also asked court to enter an order that prohibited appellants from interfering with the Horens' right to pick up and drop off their daughter from her classroom and their right to enter that classroom. The trial court granted appellees' motion on the date that it was filed. TPS assigned Delaney to Larchmont Elementary School the following school year.

{¶ 22} This case continued over the next few years with appellees filing first and second amended complaints. In their third amended complaint, which was filed on May 1, 2008, appellees set forth the following claims: (1) a civil rights violation pursuant to R.C. 4112.02(G); (2) deprivation of appellees' access to, and interference with, their parental interest in Delaney, a violation of R.C. 2307.50; (3) violation of due process under Section 16, Article I, Ohio Constitution; (4) negligence; (5) exploitation; (6) invasion of privacy; (7) civil conspiracy; (8); gross negligence; ((9) injury to reputation; (10) retaliation; (11) abuse of process; (12) failure to safeguard educational/medical records; (13) "fraudulent and/or false misrepresentation;" (14) loss of consortium; (15) punitive damages; and (16) R. C. Chapter 2744 is unconstitutional because it violates

Section 2, Article I, Ohio Constitution (Equal Protection), by immunizing a political subdivision. Appellees sought compensatory damages and attorney fees.

{¶ 23} On February 13, 2009, the City and Officer Carroll filed their motion for summary judgment asserting that each was immune under R.C. Chapter 2477, Ohio's Political Subdivision Immunity Statute. Specifically, the City argued that it and Officer Carroll were engaged in a governmental function as set forth in R.C. 2477.01(C)(2)(a) and (b). Therefore, the City contended that unless a question of fact existed as to whether one of the exceptions to that immunity existed, both it and Officer Carroll were entitled to summary judgment as a matter of law.

{¶ 24} Likewise, TPS and the individual defendants employed by TPS filed their motion for summary judgment claiming that they were entitled to summary judgment on each of the 16 causes of action set forth by appellees. Additionally, these appellants asserted that they were engaged in a governmental function, see R.C. 2744.01(C)(2)(c), and that none of the exceptions to immunity set forth in the statute were applicable. They therefore argued that they were entitled to summary judgment as a matter of law. Appellees filed a memorandum in opposition and the aforementioned "exhibits" in support thereof. Reply and surreply briefs were also filed.

{¶ 25} On May 15, 2009, the trial court denied appellants' motions for summary judgment. The court below set forth the alleged "facts" of this cause, most of which were those asserted by appellees, and arguments set forth by all of the parties. Without addressing Ohio's Sovereign Immunity Statute, R.C. Chapter 2744, and applying the

salient facts as set forth in the record of this cause, the court below found that appellees "raised a coterie of genuine issues premised upon disputed facts and circumstances, which can only be resolved by the ultimate fact finder in this case. The defendant's 'intentions,' which supposedly are the basis for their actions, are the preponderant issues in this case, and they must be determined by the fact finder's view of the facts, and the judgments to be derived therefrom." Therefore, the trial court denied appellants' motions for summary judgment.

{¶ 26} TPS appeals that judgment and sets forth the following assignments of error:

{¶ 27} "1. The trial court erred in finding that appellants were not immune.

{¶ 28} "2. The trial court erred when it denied appellants' motion for summary judgment with respect to the several causes of action set forth in parents' third amended complaint."

{¶ 29} The City and Officer Carroll also appeal the common pleas court's decision and assert that the following error occurred below:

{¶ 30} "The trial court erred when it denied the City of Toledo and Phillip Carroll immunity under O.R.C. Chapter 2744."

{¶ 31} In addition to the parties' briefs, this court allowed the Ability Center of Greater Toledo ("Ability Center") to file an amicus curiae brief in support of appellees. The Ability Center argues that TPS and its employees cannot avail themselves of the immunity provided in R.C. Chapter 2744 because it is inapplicable in a case "involving a

large-scale pattern of ongoing discrimination against the disabled." It maintains that appellees' claims are based upon federal law rather than state law; therefore immunity is unavailable to appellants under R.C. 2744.09(E). In making these arguments the Ability Center relies on the "facts" set forth by appellees.

{¶ 32} We shall first deal with the assignments of error set forth by TPS and its employees. In their first assignment of error, TPS, Fuelling, Knox, Spoores, and Dykyj contend that the trial court erred in denying their motion for summary judgment.

{¶ 33} While we note that the trial court did not specifically deal with the question of sovereign immunity, it denied appellants' summary judgment motion in toto, thereby denying that aspect of the motion. We start with the proposition that the denial of a political subdivision's motion for summary judgment based upon sovereign immunity is a final, appealable order. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, syllabus. '"The determination of whether immunity is available is a question of law that is properly decided by the court before trial."' *Pernell v. Bills*, 6th Dist. No. L-09-1082, 2009-Ohio-6493, ¶ 10, quoting *Carpenter v. Scherer-Mountain Ins. Agency* (1999), 135 Ohio App.3d 316, 330. The burden of proof is initially on the political subdivision to establish general immunity, and, when established, the burden then shifts to the plaintiff to demonstrate one of the exceptions to immunity applies. *Ramey v. Mudd*, 154 Ohio App.3d 582, 2003-Ohio-5170, ¶ 16. In a case where a political subdivision's motion for summary judgment is predicated upon sovereign immunity, and the trial court denies that motion based upon

genuine issues of material fact, we must still conduct a de novo review of the immunity question. *Xenia v. Hubbell*, supra, at ¶ 21.

{¶ 34} It is undisputed that a school district is a political subdivision for the purposes of R.C. Chapter 2744. See R.C. 2744.01(F). Thus, we must apply the three step analysis found in this statute to determine political subdivision tort liability. *Camer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, ¶ 14 (Citation omitted.). R.C. 2744.02(A)(1) provides:

{¶ 35} "For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

{¶ 36} Governmental functions include "[t]he provision of a system of public education." See R.C. 2744.01(C)(2)(c). As a result, TPS and its employees were performing governmental functions so long as their actions were part of providing a public education. This includes the beginning and ending times of the school day and the regulation of visitors to the school and classrooms because they are fundamental in facilitating the efficient provision of a system of public education. See *Taylor v. Boardman Twp. Local School Dist. Bd. of Edn.*, 7th Dist. No. 2009-Ohio-6528, ¶ 21.

{¶ 37} As to the provision of breakfast, R.C. 3313.18 states, in material part: "The board of education of any city, exempted village, or local school district may establish food service, provide facilities and equipment, and pay operating costs in the schools under its control for the preparation and serving of lunches, *and other meals or refreshments to the pupils*, employees of the board of education employed therein, and to other persons taking part in or patronizing any activity in connection with the schools." (Emphasis added.) Because the provision of meals, such as breakfast, also "facilitates the efficient provision of a system of public education," it is a governmental function. Id. (finding that the provision of lunches by a school district is a governmental function).

{¶ 38} Now that we have decided that TPS was engaging in governmental functions, the second step in our analysis requires us to consider the five exceptions to the general grant of immunity in R.C. 2744.02(A)(1). These exceptions are found in R.C. 2744.02(B). Four of these exceptions are clearly inapplicable in this case. These are: (1) R.C. 2744.02(B)(1), which renders political subdivisions "liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority;" (2) R.C. 2744.02(B)(2), which abrogates a political division's immunity if an employee's negligence in performing a proprietary, not a governmental, function causes death or injury to a person or loss of a person's property; (3) R.C. 2744.02(B)(3), which holds political subdivisions "liable for injury, death, or loss to person or property caused by their negligent repair and other negligent failure to remove obstructions from the road

* * *"; and (4) R.C. 2744.02(B)(4), which holds political subdivisions "[l]iable for injury, death, or loss to person or property that is caused by the negligence of their employees and occurs within or on the grounds of, and is due to physical defects within or on the grounds, of buildings that are used within the performance of governmental functions * * *."

{¶ 39} R.C. 2744.02(B)(5) is applicable to this case, and provides, in material part:

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

{¶ 41} Appellees rely on R.C. 4112.02(G) in Count 1 of their complaint as expressly imposing civil liability on TPS. As relevant to this case, R.C. 4112.02(G) precludes any proprietor or employee of a public place of accommodation from denying any person who has a disability "full enjoyment of the accommodations, advantages, facilities, or privileges of the public accommodation." Nonetheless, a reading of the entire statute reveals that it does not expressly impose civil liability on a political

subdivision for a violation of R.C. 4112.02(G). Instead, R.C. 4112.05 sets forth the procedure to be followed in charging such persons with such unlawful discriminatory practices.

{¶ 42} In Count 2 of their complaint, appellees cite to R.C. 2307.50 as imposing civil liability on TPS. R.C. 2307.50 provides that an individual who has a parental or guardianship interest in a minor child *may* recover damages from one who commits a "child stealing crime" in violation of certain sections of the criminal code. These sections include R.C. 2905.01(kidnapping), R.C. 2905.02 (abduction), R.C. 2905.03 (unlawful restraint), R.C. 2919.23 (interference with custody), and R.C. 2905.04 as it existed before the enactment of R.C. 2307.50. (This statute previously defined child stealing.). R.C. 2307.50 does not, however, automatically impose civil liability on a political subdivision.

{¶ 43} Due to the fact that we conclude that none of the exceptions to the grant of immunity to TPS exist, we need not consider the third step of the analysis, which provides defenses for political subdivisions. We therefore turn to a determination of whether the individual employees of TPS are immune from suit either in an "official capacity" or an individual capacity.

{¶ 44} Well-settled law holds that an action against an individual in his or her official capacity is actually an action against the entity for which the individual is an agent. *State ex rel. Estate of Miles v. Village of Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786, ¶ 23 (Citations omitted.). We have already determined that TPS is immune from

liability. Consequently, we will address only the issue of whether Fuelling, Knox, Reuss, Spoores, and Dykyj incurred any individual liability in this matter.

{¶ 45} R.C. 2477.03(A)(6) lists the immunities available to an employee of a political subdivision who is sued in his or her individual capacity. Specifically, the employee is immune from liability unless (1) the employee's acts or omissions are "manifestly outside the scope of the employee's employment or official responsibilities;" (2) the employee's acts are done "with malicious purpose, in bad faith, or in a wanton or reckless manner;" or (3) "Civil liability is imposed upon the employee by a section of the Revised Code." R.C. 2744.03(A)(6)(a), (b), and (c).

{¶ 46} We therefore turn to a consideration of the remaining exceptions in R.C. 2744.06(A)(6).

{¶ 47} As applied to the situation before us, there is no evidence in the record of this cause demonstrating that an individual defendant's behavior was outside the scope of his or her employment in acting as teacher, principal, acting assistant principal, head supervisor, or physical therapist. The steps taken by the named individuals were attempts to ameliorate a situation in which appellees insisted that their child be provided breakfast at 8:30 a.m. and who became increasingly aggressive in their reaction to the rule that Educare could not supply breakfast at that time, thereby necessitating some new rules for the "drop off" and pick up of Delaney.

{¶ 48} Moreover, we cannot say that any of the acts taken by the individual employees in this case were done "with malicious purpose, in bad faith, or in a wanton or

reckless manner." In order to act with malice, the employee must engage in a "willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified." *Jackson v. Butler Cty. Bd. of Commrs.* (1991), 76 Ohio App.3d 448, 453-454. See, also, *Garrison v. Bobbitt* (1999), 134 Ohio App.3d 373, 384. "Bad faith" signifies that the employee acts "with a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, or ill will, and embraces actual intent to mislead or deceive another." *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 309.

{¶ 49} Wanton misconduct occurs when the employee fails to exercise any care; it implies a disposition to perversity and a failure to exercise care toward those to whom care is owed. *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. Finally, an employee is "reckless" when he or she perversely disregards a known risk. Recklessness requires more than mere negligence. The employee must be conscious of the fact that his or her conduct will, in all probability, result in an injury. *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, paragraph three of the syllabus.

{¶ 50} Appellants did not allege that the individual TPS employees acted with malicious purpose, in bad faith, wantonly, or acted recklessly in Counts 3, 6, 8, 9, 11, 12, 14, 15, and 16. Thus, the TPS employees named in these counts were entitled to summary judgment on the issues raised therein.

{¶ 51} Count 1 of the complaint asserts that, Knox, Fuelling, and Reuss, as well as Officer Carroll, acted in bad faith in depriving Delaney of her right to participate in the before school breakfast program. It also contends that the TPS employees and Officer Carroll acted in bad faith by depriving "Delaney of the ability to apply for or be eligible for Edchoice Scholarship opportunities available to children in district school buildings." As to the scholarship opportunities, Delaney resides in that area of Toledo where children attend Old Orchard Elementary School. She was, however, placed at Educare due to her multiple disabilities where she apparently has no opportunity to apply for the scholarships. Nevertheless, the evidence in the record of this cause shows that none of the TPS employees acted with conscious wrongdoing in having Delaney placed at Educare because Delaney was placed there before the Edchoice Scholarship program was created.

{¶ 52} Furthermore, there is no evidence in this record to show that the TPS defendants or Officer Carroll acted in bad faith in failing to allow Delaney to have her breakfast at Educare at 8:30 a.m. As set forth infra, Educare was not open to the students until 8:45 a.m. due to a union contract. Indeed, Delaney had the opportunity of learning to feed herself during school hours. Thus, the named employees were not acting with any dishonest purpose, ill will, or intent to deceive appellees when they informed them of the fact that Delaney could participate in the breakfast program only at that time. On his part, Officer Carroll was simply enforcing the rule set by TPS and did not display the requisite intent to show bad faith.

{¶ 53} Count 2 complains that Knox, Spoores, Reuss, and Fuelling, together or separately, acted in bad faith by interfering with their rights as parents of their interest in, custody of, and access to their daughter in violation of her rights as a developmentally disabled individual. Apparently, this charge is premised on the fact that appellees were precluded from entering Fuelling's classroom and, at a later point, told that they could not enter the building to pick up their daughter. Again, there is no evidence in the record that appellants acted with ill will, or with an actual intent to mislead or deceive appellees. From the facts as set forth above, these were honest attempts to control a difficult situation that arose from appellees' desire for an 8:30 a.m. breakfast time for Delaney.

{¶ 54} In Count 4, which is captioned "Negligence," appellees maintain that the individual TPS defendants acted with willful, wanton, and malicious conduct in failing to "protect Delaney from exploitation, fear, and to prevent her from being placed in harm's way." Presumably, this allegation is related to the purported, but unsupported by facts, claim that Delaney was the subject of medical experimentation. Otherwise, there is no evidence in the record showing that the TPS employees failed to exercise any care toward Delaney or intentionally sought to inflict serious harm on her without justification.

{¶ 55} Count 5 contains allegations that Fuelling and Reuss acted "willfully, wantonly, and maliciously" by exploiting Delaney. The acts supporting this allegation are: Fuelling locked her classroom door, placed paper on the door window, told the Horens that they would have to provide her with 24 hour notice before entering the classroom, and allowed "medical and/or nursing students access to Delaney for

observation, assessment and/or research purposes" without parental consent. As set forth previously, there is not one scintilla of evidence in this case as to the allegation of medical experimentation. As to locking Fuelling's classroom door, placing paper on the door's window and the 24 hour notice, we are of the opinion that these are related to the ongoing dispute over breakfast. Additionally, there is no evidence in the record demonstrating that Fuelling and/or Reuss performed these acts willfully and with an intentional design to inflict serious injury on Glen, Joanne, or Delaney Horen without excuse or justification. Furthermore, appellees failed to offer any evidence that, in this instance, the TPS employees acted wantonly by failing to exercise any care toward Delaney or her parents.

{¶ 56} Count 7 argues that, among others, Knox, Fuelling, Reuss and Spoores maliciously combined to engage in a civil conspiracy to injure appellees. A civil conspiracy is defined as "'a malicious combination of two or more persons to injure another person in person or property, in a way not competent for one alone, resulting in actual damage.'" *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 419, quoting *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 126. Such a claim requires an underlying tortious act that causes an injury. *Gator Dev. Corp. v. VHH, Ltd.*, 1st Dist. No. C-080193, 2009-Ohio-1802, ¶ 31. If there is "no underlying tortious act, there is no actionable civil conspiracy claim." Here, we find that there was no underlying tortious act; therefore, appellees' civil conspiracy claim must fail.

{¶ 57} In Count 10, which is captioned "Retaliation," appellees argue that R.C. 2307.50 imposes civil liability on all of the individual appellants, including Officer Carroll. We have dealt with this issue and found that this statute does not expressly impose civil liability. Appellees also contend that sections of the Ohio Administrative Code serve as a basis for imposing civil liability on these individuals. These parts of the code, however, are not statutes and, thus, cannot be used to impose such liability on the individual defendants.

{¶ 58} Count 10 also maintains that all of the individual appellants, including Officer Carroll, acted in bad faith in: (1) refusing to allow the Horens, either individually or together, to enter Educare before 8:45 a.m.; (2) denying Glen and Joanne access to Delaney's classroom; (3) making "false, misleading or incorrect police reports and reports to Children Services Bureau;" (5) threatening Glen and Joanne with child endangering and criminal trespass charges; (6) requiring Delaney to eat in a public hallway even after a court order allowed her to have breakfast at 8:30 a.m.; (7) accusing Glen of breaking into Educare to steal his daughter's records; and (8) threatening Joanne's employment "through frivolous unjustified actions."

{¶ 59} There is no evidence in the record of this cause tending to show that the individual appellants engaged in either of the activities set forth in allegations (7) or (8) or that they required Delaney to eat breakfast in the hallway after the court order. Even if there were such actions, there was no evidence presented below demonstrating that any of these individuals acted with a dishonest purpose, moral obliquity, or conscious

wrongdoing. *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 309. Moreover, based upon the relevant facts in this cause, we cannot find that appellants breached any known duty to appellees through some ulterior motive, or ill will that was actually intended to mislead or deceive appellees as to the remaining allegations.

{¶ 60} In Count 13, appellees allege, in essence, that the individual TPS defendants acted with utter disregard and recklessness and fraudulently misled the Horens by concealing the fact that Educare was reported as a TPS Preschool and that Delaney was reported as attending Glendale-Fielbach School, a facility where appellees urge that the discrimination against appellees could not occur due to TPS policies. To repeat, recklessness is the perverse disregard of a known risk. Further, each of the TPS employees in this case had to be conscious of the fact that her conduct would, in all probability, result in an injury.

{¶ 61} There is no evidence in the record of this cause that the named TPS employees made any misrepresentations, reckless or otherwise, concerning the title of Educare as a TPS Preschool or concealed the fact that Delaney was reported as attending Glendale-Fielbach. Here, the only potentially viable, that is, supported by the evidence in the record, discriminatory acts alleged by appellees are that appellants would not allow Delaney to have breakfast at 8:30 a.m. and the subsequent regulation of appellees' ability to enter the building and Fuelling's classroom. The facts in the evidentiary materials offered by the parties, make clear that Delaney would not have been deprived of breakfast--she would be given breakfast at 8:45 a.m. or during school hours. Thus, the

TPS employees did not perversely disregard a known risk that would result in injury to the child.

{¶ 62} As a result, and for all of the foregoing reasons, the trial court erred in denying appellants' motion for summary judgment on Counts 1 through 13 on the basis that TPS and the individual TPS employees were immune from liability under R.C. Chapter 2744.

{¶ 63} Appellants' first assignment of error is found well-taken. Finding that appellants are immune from civil liability renders Count 14, appellants' loss of consortium claim, and Count 15, appellees' request for punitive damages moot.

{¶ 64} In their second assignment of error, appellants argue that the trial court erred in failing to grant their motion for summary judgment on the merits of all counts in the complaint. Finding that appellants' motion for summary judgment should have been granted and all counts against them dismissed, we find appellants' second assignment error moot.

{¶ 65} We now turn to a determination of the assignment of error set forth by the City and Officer Carroll. These appellants argue that the trial court erred when it denied their motion for summary judgment based upon sovereign immunity.

{¶ 66} R.C. 2744.01(C)(2) states, in pertinent part, that a governmental function includes:

{¶ 67} "(a) The provision of or non-provision of police * * * services or protection;

{¶ 68} "(b) The power to preserve the peace, to prevent * * * disturbances and assemblages * * * and to protect persons and property."

{¶ 69} It is undisputed that the protection of TPS personnel and property was the purpose of Officer Carroll's assignment as a TPS human resources officer. Thus, he was engaged in a governmental function. Consequently, absent any of the exceptions set forth in R.C. 2744.02(B), the City cannot be held liable on any of appellees' tort claims.

{¶ 70} The City cannot be held liable under (1) R.C. 2744.02(B)(1) because appellees suffered no injury due to the negligence of Officer Carroll in operating a motor vehicle while acting within the scope of his employment and authority; (2) R.C. 2744.02(B)(2) because Officer Carroll was not engaged in a proprietary function; (3) R.C. 2744.02(B)(3) because appellees suffered no injury to person or property caused by Officer Carroll's negligent repair of a road or negligent failure to remove obstructions from the same; (4) R .C. 2744.02(B)(4) because appellees did not suffer injury to persons or property due to Officer Carroll's negligence on the grounds of the City due to physical defects on the grounds of buildings that are used for the performance of governmental functions; or (5) R.C. 2744.02(B)(5) because appellees failed to set forth any section under the Ohio Revised Code that made the City liable for any injury, death, or loss to person or property caused by Officer Carroll's negligence.

{¶ 71} Because none of these exceptions exist, we need not consider the defenses provided to a political subdivision in R.C. 2744.03 and, therefore, turn to a discussion of Officer Carroll's immunity as the employee of a political subdivision.

{¶ 72} While appellees sued Officer Carroll in both his "official capacity" and as an individual, we only consider those arguments raised by appellees that relate to his actions as an individual police officer. See *State ex rel. Estate of Miles v. Village of Piketon*, supra, at ¶ 23. As with the TPS employees, no *evidence* was offered to show that Officer Carroll was acting outside the scope of his employment as set forth in R.C. 2477.03(A)(6)(a). To the contrary, appellees offer mere allegations that are unsupported by any facts set forth in the record of this cause.

{¶ 73} Officer Carroll is not named in Counts 4, 5, 6, 12, and 13. We have discussed Officer Carroll's individual immunity as an employee of a political subdivision as it relates to Counts 2 and 10. Counts 14 and 15 are moot as set forth infra. Even though he is named as acting in bad faith in Count 1 of appellees' complaint, there is no evidence in the record of this cause establishing that Officer Carroll had any part in determining when Delaney could or could not have her breakfast. Despite the fact that Officer Carroll is named in Count 3 of the complaint as one of the defendants who refused to provide Delaney with due process under Section 16, Article I Ohio Constitution, appellees do not allege that Officer Carroll did so with malicious purpose, bad faith, or in a wanton or reckless manner. The same is true of Count 9, which complains of injury to appellees' reputations.

{¶ 74} In Count 7, appellees contend that, among others, Officer Carroll maliciously conspired to cause injury to appellees. As set forth above, malice requires that an individual engages in a "willful and intentional design to harm another by

inflicting serious injury without excuse or justification." *Garrison v. Bobbitt*, supra, at 384. There is no evidence in the record tending to show that Officer Carroll willfully and intentionally acted in collaboration with the other named individuals to preclude Delaney from having before school breakfast or in preventing appellees from entering Educare and Fuelling's classroom. Rather, Officer Carroll was temporarily stationed at Educare to enforce the rules set by TPS and to keep the peace between the parties.

{¶ 75} Officer Carroll is named in Count 8 as "willfully and intentionally" writing or causing to be written, a false police report identifying appellees as criminal trespassers at Educare "and/or entering their disabled daughter's classroom three minutes prior to the time that Officer Carroll determined was correct." Assuming that an allegation of "willfully and intentionally" is the same as alleging a "malicious purpose" or malice, the facts set forth in the record fail to establish that Officer Carroll's actions were unlawful or unjustified. In particular, due to the dispute over the time that Delaney could receive breakfast and allegations that Glen Horen looked at items on Fuelling's desk and answered her telephone, Educare set a rule that appellees were not to enter the building until 8:45 a.m. and were not to enter Fuelling's classroom. In an attempt to keep the peace, Officer Carroll was simply following the rules set by Educare in preventing appellees from entering the building or Fuelling's classroom. When Joanne Horen insisted upon entering, the officer was justified in filing the criminal trespassing charge. In addition, we cannot say that Officer Carroll acted with malicious purpose in filing a charge of child endangering. In that instance, he was acting upon the order of his

supervisor, who is not named in appellees' complaint. Accordingly, the sole assignment of error set forth by the City and Officer Carroll as it relates to Counts 1 through 13 is well-taken.

{¶ 76} In their amicus curiae brief, the Ability Center of Greater Toledo ("Ability Center") sets forth the following "Issues for Review":

{¶ 77} "(1) Did the trial court err in determining that issues of material fact exist in this case sufficient to preclude Summary Judgment in favor of Appellant Board of Education.

{¶ 78} "(2) Is Appellant Board of Education insulated from suit by R.C. Chapter 2744, which provides immunity for political subdivisions under certain circumstances?"

{¶ 79} The Ability Center relies on the "facts" as set forth in appellees' brief related to the purported "medical experimentation" carried on at Educare as the basis for their issues for review. In fact, the Ability Center cites to appellees' memorandum in opposition to appellants' motion for summary judgment for these "facts", e.g., Educare is a private institution/"pediatric medical facility"/"medical research site" and that Delaney is "the subject of medical research."

{¶ 80} That said, the Ability Center argues in its first issue for review that this cause is governed by federal law; therefore, under R.C. 2744.09(E), appellants are not immune from "civil claims based upon alleged violations of the constitution or statutes of the United States." As previously noted by this court, the facts alleged by appellees related to medical experimentation are not supported by the record of this cause. Nor

does the record support the allegation that Educare is some type of medical research facility. The evidence in the record does support a finding that Educare is a public school operated by a political subdivision, TPS, and, as a result, falls within the parameters of R.C. Chapter 2744. Thus, the Ability Center's allegation that appellants could not seek immunity under Ohio's sovereign immunity statute is without merit.

{¶ 81} Under their first issue for review, the Ability Center also argues that R.C. Chapter 2744 is unconstitutional under Section 5, Article I, Ohio Constitution and Section 16, Article I, Ohio Constitution. Because this is a limited, statutorily authorized appeal of a denial of summary judgment on sovereign immunity grounds, we cannot consider Ability Center's constitutional arguments for the first time on appeal.

{¶ 82} In their second issue for review, Ability Center reiterates appellees' assertion that under the exception to immunity found is R.C. 2744.02(B)(5), the political subdivisions involved in this case are not immune from liability. As did appellees, the Ability Center relies on R.C. 4112.02(G) for the proposition that this statute imposes civil liability on a political subdivision. We, however, rejected this argument, finding that R.C. 4112.02(G) does not expressly impose civil liability on a political subdivision for a violation of that statutory section. Therefore, the Ability Center's second issue presented for review is without merit.

{¶ 83} The judgment of the Lucas County Court of Common Pleas is reversed. Appellees are ordered to pay the costs of this appeal pursuant to App. 24(A).

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J.
CONCUR. _____
JUDGE

Keila D. Cosme, concurs, in part,
and dissents, in part.

COSME, J.

{¶ 84} I concur with the majority opinion in finding that TPS and the City are both political subdivisions subject to sovereign immunity, and that none of the exceptions under R.C. 2744.02(B) apply. As such, TPS and the City are entitled to summary judgment as a matter of law.

{¶ 85} I also concur with the majority opinion in finding, as a matter of law, that Fuelling, Reuss, Dykyj, Knox, Spoors, and Officer Carroll were entitled to summary judgment as to the allegation of disability discrimination. Although political subdivisions and their employees may not discriminate under R.C. 4112, liability has not been expressly imposed upon them by R.C. 4112. Thus, Fuelling, Reuss, Dykyj, Knox, Spoors, and Carroll are entitled to immunity as to R.C. 2744.03(A)(6)(c).

{¶ 86} I dissent, however, from the majority's application of the Civ.R. 56(E) standard to the parties' claims arising out of R.C. 2744.03(A)(6)(a)-(b). When taken as a whole, the record includes cumulative evidence which, at the very least, creates a question of fact for a jury. The purpose of summary judgment is not to try issues of fact, but rather to determine whether triable issues of fact exist. The majority's grant of summary judgment on these claims usurps the jury's function by engaging in fact-finding and weighing of conflicting evidence. For this reason, I respectfully dissent.