[Cite as *Carelli v. Canfield Local School Dist. Bd. of Edn.*, 2019-Ohio-1096.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

DAVID W. CARELLI, et al.

Plaintiffs-Appellees,

v.

CANFIELD LOCAL SCHOOL DISTRICT
BOARD OF EDUCATION, et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0012

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CV 2873

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Reversed. Judgment Entered in Favor of Appellants.

Atty. Thomas T. Mullen, Thomas T. Mullen Co., LLC, 3500 West Market Street, Suite 4, Fairlawn, Ohio 44333, for Plaintiffs-Appellees

Atty. Kathryn Perrico, *Atty. Sara M. Markouc*, *Atty. Maria Pearlmutter*, Walter Haverfiled LLP, The Tower at Erieview, 1301 East Ninth Street, Suite 3500, Cleveland, Ohio 44114-1821, for Defendants-Appellants.

Dated: March 19, 2019

WAITE, P.J.

{¶1} Appellants Canfield Local School District Board of Education ("Board"); Gregory Cooper ("Cooper"); Matthew Koening ("Koening"); and Alex Geordan ("Geordan") appeal a January 22, 2018 Mahoning County Common Pleas Court judgment entry denying Appellants' motion to dismiss in a civil suit brought by Appellee David W. Carelli for intentional infliction and negligent infliction of emotional distress as a result of Appellee being cut from the Canfield High School baseball team during the 2013 – 2014 academic year. Based on the following, Appellee did not state a claim upon which relief could be granted. Appellants' assignment of error has merit and the judgment of the trial court is reversed and judgment entered in favor of Appellants.

Factual and Procedural History

{¶2} Because this matter was resolved using Civ.R. 12(B)(6) standards, the facts in the record are limited to those found in Appellee's complaint and the response to Appellants' motion to dismiss. Appellee was a student in the Board's district and participated on its baseball team until his sophomore year of high school when he and his family elected to transfer Appellee to Austintown Local School District, a Canfield sports rival. Appellee asserts that he was an "accomplished athlete on the Canfield school baseball team" as well as "a star athlete on numerous traveling teams." (10/30/17 Complaint, ¶ 9.) Appellee also states he successfully participated on the Austintown baseball team despite the fact that he alleges Cooper, Canfield's athletic director, sent an email to Austintown warning of Appellee's ineligibility and attempting to compromise his ability to play for Austintown. Appellee elected to return to the Canfield schools for his senior year of high school and sought to continue playing baseball in Canfield.

{¶3} On his return to Canfield, Appellee asserts he attended all baseball activities, "historically carried a batting average of .372" and "was an accomplished player for numerous travel teams." (7/9/18 Appellee's Brf., p. 2.)

{¶4} Appellee alleges Koening, the baseball coach, cut him from the team during the 2014 baseball season. Appellee does not state the exact date he was removed from the baseball team and it is not part of the record. Presumably as further evidence of retaliatory conduct, Appellee alleges that the Canfield team typically carried a 21-person roster each season and he was cut from the team even though, at the time, there were only 14 to 18 active players on the roster.

{¶5} Appellee alleges he suffered a consistent, methodical pattern of retaliation and discrimination because he previously transferred to and played for the Austintown School District, a Canfield sports rival, culminating in his dismissal from the team. Cooper allegedly condoned and supported Koening's decision to dismiss Appellee from the team. Following his dismissal, Appellee's father allegedly filed complaints with the Canfield Athletic Department and the Canfield Board of Education. Appellee also alleges another administrator, referred to as "Coach Ross" in his brief to us, gave Appellee an in-school suspension and attempted to persuade Appellee to convince his father to dismiss the complaints against the school. Coach Ross was not named as a party in this action.

{¶6} Appellee initially filed suit against Appellants on May 31, 2016, but dismissed his claims without prejudice, filing a notice of voluntary dismissal on October 31, 2016. The date listed on the certificate of service is October 27, 2016. Appellants contend this lapse of time goes beyond the three-day period enumerated in Civ.R. 5(D) which invalidates the filing. Appellee refiled the current action on October 30, 2017,

alleging both intentional and negligent infliction of emotional distress, and requesting a jury trial. Appellants filed a motion to dismiss pursuant to Civ.R. 12(B)(6) on December 7, 2017. Appellants also sought dismissal for failing to file a timely claim, and on immunity grounds. Appellee filed a response to the motion to dismiss on December 28, 2017. In a one-line judgment entry the trial court denied Appellants' motion to dismiss on January 22, 2018.

{¶7} Appellants filed this timely notice of appeal.

ASSIGNMENT OF ERROR

The Common Pleas Court erred when it overruled Defendants' Motion to Dismiss for failure to state a claim upon which relief may be granted.

{¶8} Appellants contend the trial court erred in denying their motion to dismiss, citing two issues. First, the Board and its employees are immune from all personal injury claims that do not fall under one of five exceptions enumerated in R.C. 2744.02(B)(1)-(5). Second, the allegations set forth in Appellee's complaint are not sufficient to support either a claim for intentional infliction of emotional distress or a claim for negligent infliction of emotional distress.

{¶9} A motion to dismiss filed pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted is procedural in nature and tests only the legal sufficiency of the complaint. *Youngstown Edn. Assn. v. Kimble,* 2016-Ohio-1484, 63 N.E.3d 649, ¶ 11 (7th Dist.), *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.,* 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). In order for a trial court to dismiss the action, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.,* 42

Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. When making a determination on a Civ.R. 12 (B)(6) motion, a court must accept the facts as alleged within the complaint as true and draw all reasonable inferences from those facts in favor of the plaintiff. *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). If there are facts contained in the complaint that would permit recovery under the claims, the trial court cannot grant the motion to dismiss. *York v. Ohio State Hwy. Patrol,* 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991). A reviewing court applies a *de novo* standard of review to the trial court's determination under Civ.R. 12(B)(6). *Ford v. Baska,* 2017-Ohio-4424, 93 N.E.3d 195, ¶ 6 (7th Dist.) citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

Political Subdivision Immunity

{¶10} "When a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and it is therefore a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, syllabus.

{¶11} In Ohio, a review of claims seeking governmental immunity for political subdivisions requires a three-tiered analysis. See *Greene Cty. Agricultural Soc. v. Liming,* 89 Ohio St.3d 551, 556, 733 N.E.2d 1141 (2000). First, pursuant to R.C. 2744.02(A), general immunity applies when the political subdivision or its employee is engaged in a governmental or proprietary function. If so, the political subdivision may forfeit general immunity in the second tier, based on one of the exceptions enumerated in R.C. 2744.02(B). Third, in the event one of the exceptions in R.C. 2744.02(B) is

applicable, the political subdivision must prove that one of the defenses listed in R.C. 2744.03 applies in order to maintain immunity from suit. See *Colbert v. Cleveland,* 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 9.

{¶12} Examining the first tier, a political subdivision is defined as "a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state * * *." R.C. 2744.01(F). It is undisputed that the Board is a political subdivision as defined in R.C. 2744.01(F). Cooper, Koening, and Geordan are employed by the Board as athletic director, varsity baseball coach and superintendent, respectively. It is also clear on the face of the complaint that each of the named defendants were sued in their official capacity, only, as the Board's address was utilized for each employee and it is alleged in the complaint that each employee was acting within the scope of their employment.

{¶13} Governmental and proprietary functions have been statutorily defined:

> "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:
>
> (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
>
> (b) A function that is for the common good of all citizens of the state;
>
> (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily

> engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

R.C. 2744.01(C)(1).

{¶14} R.C. 2744.01(C)(2)(a)–(x) provides a non-exhaustive list of governmental functions including R.C. 2744.01(C)(2)(c) "[t]he provision of a system of public education."

{¶15} Proprietary function is defined as:

> [A] function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:
>
> (a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;
>
> (b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

{¶16} A school athletic program has been consistently recognized as a governmental function in Ohio. *See, e.g., Elston v. Howland Local Schools,* 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10 (high school baseball was a governmental function); *Stanfield v. Reading Board of Education,* 1st Dist. No. C-160895, 2018-Ohio-405, 106 N.E.3d 197, ¶ 7 (operation of a public school athletic program is a governmental function); *Wilson v. McCormack,* 11th Dist. No. 2016-A-0039, 2017-Ohio-5510, ¶ 31 (provision of a high school basketball program is a governmental function.) Therefore, as the Board is a political subdivision which acted through its employees engaged in a governmental function, the general grant of immunity set forth in R.C. 2744.02(A)(1) applies in this matter.

{¶17} Since immunity is presumed, Appellee has the burden of demonstrating that an exception to the general rule of immunity as set forth in R.C. 2744.02(B) applies in order to expose the Board to liability. *Cooper v. Youngstown,* 7th Dist. No. 15 MA 0029, 2016-Ohio-7184, ¶ 25. The five exceptions to immunity include: (1) negligent operation of a motor vehicle by employees when engaged in the scope of their employment; (2) an employee's negligence when performing a proprietary, not a governmental function; (3) negligent repairs and negligent failure to remove obstructions from a roadway; (4) negligence of an employee occurring within or on the grounds of building used in performance of governmental functions; and (5) civil liability expressly imposed on a political subdivision by the revised code. R.C. 2744.02(B)(1)-(5). If any of these exceptions to immunity apply and no defense found in that section protects the political subdivision from liability, then we may turn to any applicable provision of the third tier. *Colbert v. Cleveland,* 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 9.

{¶18} Only if Appellee can prove that one of the five exceptions to immunity applies in this case does the court move on to a review of the third tier of the test. Under the third tier of the governmental immunity analysis, if an exception to general immunity applies, immunity may be reinstated if the political subdivision can successfully assert one of the defenses to liability set forth in R.C. 2744.03(A). Again, however, this section is irrelevant to any review of a particular matter unless a claimant can prove immunity has been lost to the political subdivision pursuant to R.C. 2744.02(B)(1)-(5).

{¶19} Conducting a *de novo* review of the legal sufficiency of the complaint filed in this matter, Appellee acknowledges that the Board is a political subdivision pursuant to statute. (10/30/17 Complaint, ¶ 4.) However, nowhere in the complaint does Appellee

raise claims pertaining to any exception to the general immunity statutorily granted to the Board. Even accepting all facts alleged by Appellee as true and drawing all reasonable inferences from those facts in Appellee's favor, as we are required, Appellee has not pleaded any facts that apply in any way to one of the exceptions to general immunity. Rather than address Appellants' immunity in any fashion, in his complaint Appellee relies only on his claims for intentional and negligent infliction of emotional distress. Within his claim for negligent infliction of emotional distress, Appellee alleges the Appellants' conduct, "individually and collectively was negligent and/or reckless and caused emotional distress to Plaintiff." (10/30/17 Complaint, ¶ 26.) Only the allegation of reckless conduct can be remotely found in the statutory language, and that reference is contained within the third-tier analysis as set out in R.C. 2744.03(A)(5) and (6) which reads:

> (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.
>
> (6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:
>
> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section 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 an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

{¶20} In his brief to this Court, Appellee attempts to aver that Appellants' conduct was not only reckless but also "wanton" (7/9/18 Appellee's Brf., p. 4.) However, in reviewing a motion to dismiss under Civ.R. 12(B)(6) we must conduct a review of Appellee's complaint only to determine if Appellee alleged any set of facts in his complaint which would entitle him to a colorable claim for relief. It is also important to note that Appellee failed to assert claims against Cooper, Koening and Geordan in their individual capacities. As such, the claims against these three school officials must be considered claims against the political subdivision itself. *Lambert v. Clancy,* 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585, ¶ 21.

{¶21} Even assuming *arguendo*, that Appellee is claiming Appellants' general immunity is pierced because of alleged reckless conduct, the portion of the immunity statute with language referencing reckless conduct is found within R.C. 2744.03(A). Again, this provision is only considered as part of the third tier of the analysis and we reach this analysis only after it is properly established that one of the five exceptions

provided in R.C. 2744.02(B) applies. It is well settled that R.C. 2744.03 does not, on its own, create a cause of action or create a separate claim for liability as to a political subdivision. *Carabello v. Cleveland Metro. School Dist.,* 8th Dist. No. 99616, 2013-Ohio-4919, ¶ 32. Moreover, while R.C. 2744.03(A)(5) provides a defense to liability, it cannot be used to establish liability for a political subdivision. *See Glover v. Dayton Pub. Schools,* 2d Dist. No. 17601, 1999 WL 958492 *10 (Aug. 14, 1999) (holding that R.C. 2744.03 does not provide a separate claim for liability against a school district and is only relevant if one of the listed exceptions to immunity set forth in R.C. 2744.02(B) has first been determined to exist.) Therefore, without Appellee having established that the general immunity of the political subdivision is pierced by one of the five statutory exceptions found in the second tier of the analysis set forth in R.C. 2744.02(B), Appellee cannot, as a matter of law, raise a colorable claim for relief against a political subdivision. As noted, Appellee failed to allege in his complaint, in any fashion, some exception to the general immunity enjoyed by Appellants. Therefore, construing Appellee's complaint and the facts alleged therein in a light most favorable to Appellee, there is no set of facts alleged in this matter entitling him to relief.

{¶22} Finally, the Ohio Supreme Court has held that "[t]here are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress." *Wilson v. Stark Dept. of Human Serv.,* 70 Ohio St.3d 450, 452, 639 N.E.2d 105 (1994). In his complaint, Appellee relies exclusively on the negligent conduct of Appellants pursuant to R.C. 2744.03(A)(6)(b) in dismissing him from the baseball team. Appellee also refers to the summary judgment standard throughout his brief, although the procedural posture of this case is grounded in the Civ.R. 12(B)(6) motion to dismiss,

requiring Appellee to have raised a viable claim for relief somewhere within the complaint in order for the action to proceed. We also note that Appellee has not raised the issue of his damages in his complaint and, conversely, he notes his overwhelming success in playing baseball during his high school career, including in Austintown, despite the alleged bad behavior of the Board's employees. Regardless, without setting forth in his complaint facts which establish that one of the R.C. 2744.02(B) exceptions to the government's general grant of immunity exist, Appellee fails to state a claim for relief. Appellee cannot bypass showing an applicable exception to general immunity exists and attempt to engage in an analysis of Appellants' alleged bad conduct pursuant to R.C. 2744.02(A) absent this prerequisite.

Statute of Limitations

{¶23} Appellants also note that, assuming Appellee had set forth facts entitling him to at least a colorable claim of relief, Appellee's second complaint was untimely filed. Appellee filed his first complaint on May 31, 2016. Appellee voluntarily dismissed that action pursuant to Civ.R. 41(A) on October 31, 2016. The instant matter was filed on October 30, 2017. Appellants contend the date on the certificate of service for the voluntary dismissal served on Appellants was October 27, 2016, and hence the filing of the voluntary dismissal on October 31, 2016 fell outside the Civ.R. 5(D) three-day period. Appellants' claim that on this basis, alone, the matter should be dismissed.

{¶24} Appellants are incorrect that this matter ran afoul of the three-day rule. A voluntary motion to dismiss made pursuant to Civ.R. 41(A)(1) is effectuated on filing by the plaintiff. Approval of the trial court is not required. Thus, the "filing of the notice of dismissal automatically terminates the case without any intervention by the court.

Absolutely no court approval is necessary." *Gardner v. Gleydura*, 98 Ohio App.3d 277, 278-279, 648 N.E.2d 537 (8th Dist.1994).

{¶25} In the instant matter, the one-year savings statute began to run on the date Appellee filed his dismissal, October 31, 2016. Appellee filed his complaint in this action on October 30, 2017, within the one-year time period.

{¶26} While Appellants also contend that the lapse of time between the certificate of service, dated October 27, 2016, and the filing of the dismissal, October 31, 2016, runs afoul of the civil rules, this assertion is also incorrect. Civ.R. 5(D) states that any paper filed after a complaint "shall be filed with the court within three days after service." The purpose of Civ.R. 5(D) is to "ensure that the opposing party is promptly served with filings." *Sovey v. Lending Group of Ohio,* 8th Dist. No. 84823, 2005-Ohio-195, ¶ 16. Appellants were served with the motion for dismissal four days before it was filed. Thus, Appellants have failed to establish they were prejudiced by any alleged violation of the Civ.R. 5(D) timing requirements, as they received notice in the certification of service that Appellee was voluntarily dismissing his complaint.

Conclusion

{¶27} In this dismissal under Civ.R. 12(B)(6), taking all of Appellee's factual allegations in his complaint as true and drawing all reasonable inferences in his favor, we conclude that Appellee did not set forth any set of facts showing the existence of an exception to the blanket governmental immunity enjoyed by Appellants. While Appellants' claims regarding the statute of limitations in this matter have no merit, the trial court erred in denying Appellants' Civ.R. 12(B)(6) motion to dismiss due to failure to state a colorable

claim. Appellants' assignment of error has merit and the judgment of the trial court is reversed. Judgment is entered in favor of Appellants.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is reversed. We hereby enter judgment in favor of Appellants. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.