[Cite as *Troutman v. Jonathan Alder Local School Dist. Bd. of Edn.*, 2010-Ohio-855.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

WILLIAM H. TROUTMAN,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-08-016
	:	O P I N I O N
- vs -	:	3/8/2010
THE BOARD OF EDUCATION FOR THE JONATHAN ALDER LOCAL SCHOOL DISTRICT, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 2007CV-07-230

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BRESSLER, P.J.

{¶1} Plaintiff-appellant, William H. Troutman, appeals a decision of the Madison County Court of Common Pleas granting summary judgment in favor of defendant-appellee, the Board of Education for Jonathan Alder Local School District.

{¶2} During the 2004-2005 school year, appellant was a minor and a student at

Jonathan Alder High School, and he participated in a tutoring program provided by the school for students with special needs. Defendant-appellee, Angela Angus-Koppes, was assigned to be appellant's tutor, with the tutoring occurring off school grounds. When the local library was unavailable for tutoring, Angus-Koppes informed the school that she would tutor appellant in his home but later refused to tutor appellant there. Eventually, Angus-Koppes began tutoring appellant at her private residence. Appellant alleges that after Angus-Koppes began tutoring him in her home, on two occasions he and Angus-Koppes engaged in sexual activity. In a separate criminal action, Angus-Koppes entered a guilty plea to sexual battery, served a six-month prison sentence, and is a registered sex offender.

{¶3} On July 6, 2007, appellant filed a complaint against the Jonathan Alder Board of Education, the Jonathan Alder Local School District, the Jonathan Alder Special Education program (collectively, "the school") and Angus-Koppes. Appellant's claims against the school are for negligent supervision, negligent retention, wrongful disclosure of confidential information, invasion of privacy, and intentional infliction of emotional distress.

{¶4} On January 15, 2009, the school moved for summary judgment on the basis of immunity pursuant to R.C. Chapter 2744. On July 23, 2009, the trial court granted the school's motion, finding that the school is protected by immunity as a political subdivision under R.C. 2744.02(A), and that appellant cannot establish an exception to immunity pursuant to R.C. 2744.02(B)(4). Appellant appeals the trial court's decision, raising two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED IN FINDING DEFENDANT IMMUNE WHEN THE PHYSICAL DEFECT LANGUAGE OF R.C. 2744.02(B)(4), ADDED BY THE APRIL

9, 2003 AMENDMENT, HAS BEEN FOUND TO BE UNCONSTITUTIONAL AND IS UNCONSTITUTIONAL."

{¶7} In appellant's first assignment of error, he argues the trial court erred in finding the school to be immune under R.C. 2744.02(B) because the exception to immunity in R.C. 2744.02(B)(4) is unconstitutional pursuant to the decisions in *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, and *Grine v. Sylvania Schools Bd. of Edn.*, Lucas App. No. L-06-1314, 2008-Ohio-1562.

{¶8} In determining whether a political subdivision is immune from liability, courts conduct a three-tiered analysis. *Fields v. Talawanda Bd. of Edn.*, Butler App. No. CA2008-02-035, 2009-Ohio-431, ¶10, citing *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, ¶10. The first tier provides a general grant of immunity to political subdivisions regarding acts or omissions of the political subdivision or its employees in connection with a governmental or proprietary function. R.C. 2744.02(A)(1).

{¶9} The second tier involves exceptions to immunity located in R.C. 2744.02(B). In particular, R.C. 2744.02(B)(4) provides that "political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function[.]"

{¶10} Appellant is misplaced in his reliance on *Hubbard* and *Grine*. Appellant incorrectly asserts that the Ohio Supreme Court has declared the "physical defect" requirement in the exception to immunity under the current version of R.C. 2744.02(B)(4) to be unconstitutional. In *Grine*, 2008-Ohio-1562 at ¶56, the Sixth Appellate District correctly stated, "[i]n *Hubbard* * * *, the Ohio Supreme court

interpreting former R.C. 2744.02(B)(4), effective July 6, 2001, held that political subdivisions are not immune from liability for injuries caused by the negligence of employees of a political subdivision within or on the grounds of a building. The court refused to interpret the statute as providing that the exception is limited to injury caused by physical defects or negligent use of the grounds or buildings." (Internal citation omitted.) Further, the court in *Grine* correctly stated that after *Hubbard* was decided, the General Assembly amended R.C. 2744.02 and added the physical defect requirement in R.C. 2744.02(B)(4). Id. However, the court in *Grine* then incorrectly stated that this amendment has been declared unconstitutional by the Ohio Supreme Court in a different case. Id.

{¶11} The current version of R.C. 2744.02(B)(4) became effective on April 9, 2003, and the Ohio Supreme Court has not declared it to be unconstitutional. In fact, as recently as March 2009, the Ohio Supreme Court conducted an analysis under R.C. 2744.02(B)(4) to determine if the absence of a required smoke detector on property owned by a metropolitan housing authority is a physical defect. See *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250.

{¶12} Further, to the extent appellant appears to seek a determination that the physical defect language in R.C. 2744.02(B)(4) is unconstitutional, the record indicates that appellant did not raise the issue of the constitutionality of the statute before the trial court. In order for a party to challenge the constitutionality of a state statute, "the issue must be raised in the complaint or the initial pleading and the Ohio Attorney General must be properly served." *M.B. v. Elyria City Bd. of Edn.*, Lorain App. No. 05CA008831, 2006-Ohio-4533, at ¶6, citing R.C. 2721.12(A). See, also, *Brooks v. Miami Valley Hosp.*, Montgomery App. No. 23361, 2009-Ohio-6813, ¶23 (appellate courts need not address constitutional issues raised for the first time on appeal).

{¶13} Appellant's first assignment of error is overruled.

{¶14} Assignment of Error No. 2:

{¶15} "THE TRIAL COURT ERRED BY DECLARING THAT THE UNDERLYING INCIDENTS, FORMING THE BASIS FOR THE COMPLAINT TO BE FILED, DID NOT OCCUR WITHIN OR ON THE GROUNDS OF BUILDINGS THAT WERE USED IN CONNECTION WITH THE PERFORMANCE OF A GOVERNMENTAL FUNCTION."

{¶16} In his second assignment of error, appellant argues the trial court erred in granting summary judgment in favor of the school on the basis of immunity pursuant to R.C. 2744.02(B) because sexual misconduct occurred on the grounds of buildings used in connection with the performance of a governmental function.

{¶17} This court reviews a trial court's decision on summary judgment de novo. *White v. DePuy, Inc.* (1999), 129 Ohio App.3d 472, 478. In applying the de novo standard, we review the trial court's decision independently and without deference to the trial court's determination. Id. at 479. A court may grant summary judgment only when: (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) it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Welco Indus., Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191.

{¶18} As stated above, R.C. 2744 .02(A)(1) sets forth the general rule that a political subdivision is immune from tort liability for acts or omissions connected with governmental or proprietary functions. The parties do not dispute that the school is a political subdivision. Further, we find that the school providing tutoring services during school hours is an act connected with a governmental function.

{¶19} Next, we must determine whether any of the exceptions to immunity provided in R.C. 2744.02(B)(1) - (5) apply. Appellant maintains that the exception in R.C. 2744.02(B)(4) applies, which provides:

{¶20} "(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

{¶21} * * *

{¶22} "(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that *occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function*, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code." (Emphasis added).

{¶23} In this case, it is undisputed the sexual misconduct took place off school premises. We agree with the trial court's assessment that Angus-Koppes' private residence was not a building used in connection with a government function. While the record indicates a factual dispute over which school employees had knowledge of Angus-Koppes using her home for the tutoring and the extent of that knowledge, there is no dispute in the record that the sexual misconduct took place in Angus-Koppes' private residence, and Angus-Koppes was not authorized to tutor appellant in her private residence. As the Fifth Appellate District stated in *Doe v. Massilon City School Dist.*,

Stark App. No. 2006CA00227, 2007-Ohio-2801, ¶34: "the exception to general immunity under former R.C. 2744.02(B)(4) is limited to situations where the injury or loss occurred on the property of the political subdivision. It is undisputed the injuries herein occurred off the premises; therefore, we find no exception from the general immunity granted by the legislature to [the school]."

{¶24} Moreover, appellant's injuries were not the result of a physical defect within or on the grounds of buildings used in connection with the performance of a governmental function. As the Tenth Appellate District stated in *Hopkins v. Columbus Bd. of Edn.*, Franklin App. No. 07AP-700, 2008-Ohio-1515, ¶18, "the version of R.C. 2744.02(B)(4) at issue in this matter is the amended version, effective April 9, 2003, pertaining to 'physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function.' As found by the trial court, none of the allegations in [appellant's] complaint include an assertion that [appellant] was injured as a result of a physical defect on school grounds, and, therefore, this exception does not apply to the school * * * for alleged conduct occurring subsequent to the effective date of the 2003 amendment."

{¶25} Based on the foregoing, we find that the school is entitled to immunity under R.C. 2744.02(A)(1), and none of the exceptions to immunity under R.C. 2744.02(B) apply. Further, we find the trial court did not err in granting summary judgment to the school.

{¶26} Appellant's second assignment of error is overruled.

{¶27} Judgment affirmed.

POWELL and HENDRICKSON, JJ., concur.