[Cite as *Hamrick v. Bryan City School Dist.*, 2011-Ohio-2572.]

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

Roger L. Hamrick, et al.	Court of Appeals No. WM-10-014
Appellants/Cross-Appellees	Trial Court No. 09 CI 158
v.	
Bryan City School District, et al.	**DECISION AND JUDGMENT**
Appellee/Cross-Appellant	Decided: May 27, 2011

* * * * *

Daniel R. Michel, for appellants.

Teresa L. Grigsby and Joan Szuberla, for appellees.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals an award of summary judgment issued by the Williams County Court of Common Pleas to a school district and its employee in a personal injury suit. For the reasons that follow, we affirm.

{¶ 2} Appellee Bryan City School District maintains a multi-bay school bus garage on its property in Bryan, Ohio. The garage is used for routine maintenance and

storage of school busses. In the area of the building where the busses are normally stored, are water spigots to facilitate washing the busses.

{¶ 3} On December 18, 2007, school officials complained to the Bryan Municipal Utilities Department about low water pressure in the bus garage. Utilities dispatched an employee, but he could not investigate because the water meter pit was covered with snow. This utilities worker eventually radioed another utilities worker, appellant Roger L. Hamrick[1], advised him of the problem and asked him to check the meter pit to see if there was something wrong there.

{¶ 4} Appellant went to the bus garage mid-afternoon. When he removed the snow and opened the meter pit, he discovered that the shutoff valve to the bus garage was closed half-way. Appellant opened the valve all the way and went to the garage to determine whether this fix had been successful.

{¶ 5} According to appellant, he went to the garage door and knocked. When no one responded, he opened the unlocked door and called out "light and water." Appellant then took "a couple" of steps into the garage. This is the last thing he remembers.

{¶ 6} A short time later, a bus driver, returning from her afternoon run, heard a noise coming from a service pit near the office of the bus garage. When she investigated, the bus driver found appellant at the bottom of the pit, seriously injured.

{¶ 7} On May 18, 2009, appellant and his wife sued appellee school, alleging that its negligence in allowing an unmarked service pit on its premises was the proximate

[1]Appellant's wife, Maria Hamrick, is also a party by virtue of a loss of consortium claim. For clarity, we shall refer to Roger Hamrick as appellant in this decision.

cause of appellant's injuries. Appellant would later add bus garage supervisor, appellee Pete Beucler, as a named defendant.[2]

{¶ 8} Following discovery, appellees moved for summary judgment on several grounds: the pit into which appellant fell was open and obvious as a matter of law, appellant could not show proximate cause between appellees' action and his injury, and the school and its employee were entitled to governmental immunity. The trial court rejected the first two grounds for judgment, but concluded that appellees were entitled to immunity from suit pursuant to R.C. Chapter 2744. On this conclusion, the court granted appellees' motion for summary judgment. It is from this judgment that appellant brings this appeal. Appellant sets forth the following single assignment of error:

{¶ 9} "The trial court failed to apply basic rules of statutory construction, and thus erred in granting summary judgment to Appellees Bryan City School District and Pete Beucler."

{¶ 10} Appellees cross-appeal, setting forth the following two assignments of error:

{¶ 11} "Cross Assignment of Error 1: The Trial Court erred in failing to find the hazard to be open and obvious as a matter of law and awarding summary judgment on that basis.

[2]Also added was the Ohio Bureau of Worker's Compensation in protection of its right of subrogation.

{¶ 12} "Cross Assignment of Error 2: The Trial Court erred in failing to find that Hamrick was incapable of establishing causation and awarding summary judgment on that basis."

{¶ 13} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 14} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 15} A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc*. (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242, 248.

{¶ 16} The legislature has classified the functions of political subdivisions as "governmental" or "proprietary." As a general rule, subject to exceptions, political subdivisions are, "* * * 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." R.C. 2744.02(A)(1). A school district is a political subdivision, R.C. 2744.01(F), performing a governmental function. R.C. 2744.01(C)(2)(c).

{¶ 17} An exception to the rule of general immunity occurs when there is personal injury, death or damage to property caused by the negligence of a political subdivision employee, "* * * 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 * * *." R.C. 2744.02(B)(4). Nevertheless, a political subdivision is immune if the injury or damage, "* * * 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." R.C. 2744.03(A)(5).

{¶ 18} In the trial court and here, appellee school district maintains that there was no "physical defect" in the maintenance pit in the bus garage. Its purpose is to permit mechanics to get beneath school busses to perform maintenance. In that regard, appellee school insists, the pit operated as it was intended. Moreover, appellee school argued, the pit was open and obvious and there is no evidence its use was malicious, in bad faith, wanton or reckless.

{¶ 19} The trial court concluded that there was no "physical defect" in the maintenance pit and that, as a result, the R.C. 2744.02(B)(4) immunity exception did not apply. Alternatively, the court concluded that, even if the pit was defective, its use was

discretionary under R.C. 2744.03(A)(5) and there was no evidence that this discretion was exercised in bad faith or recklessly. On these conclusions, the court found appellee school and, concomitantly, its employee, appellee Beucler, immune from suit and both entitled to judgment as a matter of law.

Constitutionality of R.C. 2744.02(B)(4)

{¶ 20} Appellant, relying on *Hubbard v. Canton City School Bd. of Ed.*, 97 Ohio St.3d 451, 2002-Ohio-6718, and this court's *Grine v. Sylvania City Schools Bd. of Ed.*, 6th Dist. No. L-06-1314, 2008-Ohio-1562, insists that the phrase "due to physical defects within or on the grounds" found in R.C. 2711.02(B)(4) has been declared unconstitutional. Once these words are excised, appellant argues, the statute plainly removes the present situation from governmental immunity and makes this ground for a summary judgment award erroneous. Alternatively, appellant maintains, if the "physical defects" language remains in the statute, the trial court misapplied the rules of construction to ascertain its meaning.

{¶ 21} *Hubbard* was decided in 2002 and noted the language at issue had been part of two prior court decisions that declared unconstitutional the acts in which the language was included. *Hubbard*, 2002-Ohio-6718, ¶ 16. Similarly, *Grine* applied the statute to events antecedent to the April 9, 2003 effective date of the amendment that inserted the language in the present version of R.C. 2744.02(B)(4). *Grine*, 2008-Ohio-1562, ¶ 13. But, see, *Troutman v. Jonathon Adler Loc. School Dist.*, 12th Dist. No. CA2009-08-016, 2010-Ohio-855, ¶ 10-11.

{¶ 22} Appellant has provided us with no authority that holds that the language itself is inherently unconstitutional, only cases that have found prior enactments in which the language was included were unconstitutional. Moreover, we note that recent decisions have applied R.C. 2744.02(B)(4) as written. See, *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, ¶ 25; *Speiker v. Toledo Public Schools* (July 2, 2010), N.D. Ohio No. 3:09 CV 798; *Dynowski v. Solon*, 183 Ohio App.3d 364, 2009-Ohio-3297, ¶ 19; *Coats v. Columbus*, 10th Dist. No. 06AP-681, 2007-Ohio-761, ¶ 17. Accordingly, we conclude that the statute as presently enacted is entitled to enforcement.

Statutory Construction

{¶ 23} Appellant insists that the trial court's construction of R.C. 2744.02(B)(4) is erroneous, as the court concluded that, with reference to the maintenance pit, "[t]here is no evidence of any 'physical defect'; it operated as intended. * * * The pit did not fail to function as intended." According to appellant, the pit should have been covered and the lip surrounding the pit should have been painted a different color. Appellant complains that the trial court's definition of the word defect was too narrow and skewed its interpretation.

{¶ 24} The purpose of statutory construction is to give effect to the intent of the legislature. *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶ 12. In doing so, we look first to the language of the statute. If its meaning is clear and unambiguous, there is nothing left to do but apply its terms as written. Id. "Words and phrases shall be

read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42. "When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning. Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 11, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, at ¶ 11.

{¶ 25} Contextually, as appellee properly points out, R.C. 2744.02(B)(4) abrogates the general immunity afforded political subdivisions engaged in a governmental activity only if an injury is: 1) caused by employee negligence, 2) on the grounds or in buildings used in connection that governmental activity, and 3) due to physical defects on or within those grounds or buildings. All of these characteristics must be present.

{¶ 26} As we have already noted, a public school district is a political subdivision performing a governmental activity. Operating and maintaining school busses is reasonably a part of that activity. Consequently, the bus garage in which appellant was injured was used in connection with a governmental activity. For purposes of summary judgment, we presume that appellant's injuries were caused by employee negligence.

{¶ 27} The phrase "physical defect" is not statutorily defined, neither has appellant brought to our attention authority demonstrating that the phrase has acquired any technical meaning. As a result, we must look to common usage of the words in the context of the statute as a whole to determine its meaning.

{¶ 28} The word "physical" is defined as "having a material existence: perceptible esp[ecially] through senses and subject to the laws of nature." Merriam Webster's New Collegiate Dictionary (10 Ed. 1996) 877. A "defect" is "an imperfection that impairs worth or utility." Id. at 302. It would seem then that a "physical defect" is a perceivable imperfection that diminishes the worth or utility of the object at issue.

{¶ 29} Appellant has presented no evidence that there was any discernable imperfection that diminished the utility of either the bus garage or the service pit. There is nothing of record to suggest that either did not perform as intended or was less useful than designed. Consequently, the trial court properly concluded that appellee school district was entitled to statutory governmental immunity in this instance. Since the immunities that attach to a political subdivision also encompass its employees, R.C. 2744.02(A)(2), and none of the R.C. 2744.03(A)(6) exceptions apply to appellee Beucler, he is also entitled to statutory immunity. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 30} Since we have affirmed the trial court's judgment granting summary judgment to appellees, the assignments of error in their cross-appeal are moot.

{¶ 31} On consideration, the judgment of the William County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE