[Cite as *Daniel v. Cleveland Mun. School Dist.*, 2004-Ohio-4632.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 83541

ANTHONY DANIEL,	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	AND
CLEVELAND MUNICIPAL SCHOOL DISTRICT,	:	OPINION
Defendant-Appellee	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		SEPTEMBER 2, 2004
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court Case No. CV-483301
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellant:	CARYN M. GROEDEL DAVID J. STEINER Caryn Groedel & Associates 5910 Landerbrook Drive #200 Cleveland, Ohio 44124
For Defendant-Appellee :	DOUGLAS L. WINSTON Berger & Zavesky Co., LPA 1425 Rockefeller Building

614 West Superior Ave.
Cleveland, Ohio 44113

ANNE L. KILBANE, P.J.:

{¶1} Anthony Daniel appeals from an order of Judge Ronald Suster that granted summary judgment in favor of the Cleveland Municipal School District ("CMSD") on his claim of negligent retention. He contends statutory immunity is no defense, and that there was a genuine issue of material fact about CMSD's knowledge of the aggressive tendencies of his co-employee. We affirm.

{¶2} From the record we glean the following: Daniel was employed as a custodian for CMSD's Administration Building, and was working during a board meeting in October of 2001. Daniel and another custodian were talking in a hallway outside of the auditorium when Henry Masten, employed as an internal affairs security guard for ten years, apparently left the room to investigate the noise that was disrupting the meeting. The two men were speaking loudly and, when Masten approached them, he either grabbed or somehow touched Daniel on the arm to get his attention, and warned both men to keep their voices down.

{¶3} After the meeting, Will Morris, a CMSD's Safety Coordinator, approached Masten and told him that Daniel was upset that he had been grabbed.[1] Masten found Daniel, spoke with him

[1]There is an additional assertion in the record that Daniel also told Eldridge Black about the incident and that Black spoke

about the incident, and the two laughed.

{¶4} Later that evening, Daniel claimed that, as he escorted a woman and her daughter to a restroom, Masten grabbed his left arm, but he was able to pull away and continued toward the restroom. When he returned he contended that Masten grabbed him again, held him for an undetermined length of time, told him to be quiet, and threatened to report him for not doing his job. The next day, Daniel claimed that Masten, who was armed, found him in a storage room, blocked his exit, clenched his fists and made gestures which Daniel believed was an attempt to pick a fight. Daniel alleged that Masten was distracted when someone walked past the room, and he was able to escape.[2]

{¶5} The next day Daniel filed an incident report, and later, a grievance with the Union. Approximately one year later, he filed suit against CMSD, alleging negligent retention, and against Masten, individually, for assault and battery. He claimed to have severe emotional and physical injuries proximately caused by the incidents, including high blood pressure and an aggravation of a previous shoulder injury, and that CMSD was aware of Masten's aggressive nature and security tactics but, nonetheless, retained him.

{¶6} CMSD moved for summary judgment claiming statutory

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with Masten.

[2]A similar incident purportedly occurred later in the evening, but the events surrounding it are unclear.

immunity, which was granted without any opinion, and Daniel dismissed all remaining claims against Masten. He asserts a single assignment of error set forth in the appendix to this opinion.

{¶7} Daniel claims that summary judgment was inappropriate because: (1) CMSD has no statutory immunity against his claim and, (2) he proffered sufficient evidence that CMSD facilitated Masten's assault and battery by failing to suspend or terminate his employment despite knowledge that he had acted aggressively towards others.

{¶8} We review the grant of summary judgment de novo using the same standard as the judge, and consider the evidence in the light most favorable to the non-moving party to determine whether a material dispute of fact exists.[3] Although the availability of any claimed statutory immunity raises a purely legal issue,[4] when utilizing an immunity defense to support a motion for summary judgment one "must present evidence tending to prove the underlying facts upon which the defense is based."[5] The nonmoving party must then present evidence showing the existence of a genuine issue of material fact.

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[3]Civ.R. 56(C); *Stephens v. A-Able Rents Co.* (1995), 101 Ohio App.3d 20, 26, 654 N.E.2d 1315.

[4]*Hall v. Ft. Frye Loc. School Dist. Bd. of Edn.* (1996), 111 Ohio App.3d 690, 694, 676 N.E.2d 1241, citing *Nease v. Med. College Hosp.*, 64 Ohio St.3d 396, 400, 1992-Ohio-97, 596 N.E.2d 432.

[5]*Evans v. S. Ohio Med. Ctr.* (1995), 103 Ohio App.3d 250, 255, 659 N.E.2d 326. See, also, *Vance v. Jefferson Area Local School Dist. Bd. of Edn.* (Nov. 9, 1995), Ashtabula App. No. 94-A-0041.

{¶9} R.C. 2744 outlines the conditions under which a political subdivision is liable for damages or injury to a person or property, and states in pertinent part:

> **"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 a 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."**[6]

{¶10} As held by the Ohio Supreme Court in *Hubbard v. Canton City School Board of Education*[7], "The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, requires a three-tiered analysis to determine whether a political subdivision should be allocated immunity from civil liability."[8]

{¶11} The first tier of analysis is the general rule that "political subdivisions are not liable in damages." R.C. 2744.01(F) declares public school districts to be political subdivisions, and R.C. 2744.01(C)(2)(c) states that the provision of a system of public education is a governmental function;[9]

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[6]R.C. 2744.02(A)

[7]97 Ohio St.3d, 451,453, 2002-Ohio-6718, 780 N.E.2d 543, 546.

[8]*Id.* at 453; see also *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421, 697 N.E.2d 610.

[9]R.C. 2744.01(F), R.C. 2744.01(C)(2)(c); see, also *Hubbard v. Canton City School Board of Education*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543.

therefore, CMSD meets this first requirement.

{¶12} Next comes the determination of whether any of the exceptions to immunity listed in R.C. 2744.02(B) apply. R.C. 2744.02(B)(4) states:

> **"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, 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."**[10]

{¶13} In support of its position, CMSD argues that, under this provision, it is immune from claims arising out of employee intentional torts.

{¶14} We agree that political subdivisions are not liable for the intentional torts of their employees.[11] This case, however, involves a claim of negligent retention, and as held by the Ohio Supreme Court, "the exception to political subdivision immunity in

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[10]We note that in Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 3867, new language was inserted into R.C. 2744.02(B)(4) which read, "and is due to physical defects within or on the grounds of," and was declared unconstitutional by *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062. The "physical defects" language appeared again in Am.Sub.H.B. No. 215, 147 Ohio Laws, Part I, 909, 1150; however, the H.B. version of R.C. 2744.02(B)(4) was also invalidated by the Ohio Supreme Court in *Stevens v. Ackman*, 91 Ohio St.3d 182, 2001-Ohio-249, 743 N.E.2d 901.

[11]*Chase v. Brooklyn City Sch. Dist.* (2001), 141 Ohio App.3d 9, 749 N.E.2d 798

R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with a governmental function."[12]

{¶15} It is undisputed that Daniel's encounters with Masten occurred on CMSD property, specifically in the administration building, and therefore, based on the Supreme Court's interpretation of this provision, it does not have immunity for any claims of negligence arising out of Masten's retention as a district employee.

{¶16} We must determine whether any of the statutory defenses listed in R.C. 2744.03 apply. R.C. 2744.03(A)(5) states:

> "**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.**"

{¶17} CMSD claims immunity for two reasons: first, because an employee intentional tort is not conduct that warrants an exception and, secondly, because the decision to retain Masten was not undertaken with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶18} It contends that this provision provides immunity for Masten's retention and use as an investigator, further stating

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[12] *Hubbard,* supra at syllabus.

that the issue is whether its judgment to retain, use, and supervise Masten in the manner it chose was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶19} The hiring and supervision of Masten are activities which involve CMSD's exercise of discretion in the acquisition and use of personnel.[13] Daniel does not allege that CMSD acted with malicious purpose or in bad faith, or that it acted recklessly or wantonly in retaining Masten, only alleging that it was "negligent in its supervision and retention." Even when construing the facts most favorably in Daniel's favor, we cannot find that CMSD acted with malicious purpose, in bad faith, or in a wanton or reckless manner.[14]

{¶20} R.C. 2744.03(A)(5) is not an exception to statutory immunity, but rather is a defense to liability for a political subdivision,[15] and it appears on its face to provide immunity for CMSD's discretion in personnel matters. This assignment of error lacks merit.

Judgment affirmed.

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[13]*Doe v. Jefferson Area School District* (1994), 97 Ohio App.3d 11, 13, 646 N.E.2d 187.

[14]*Drew v. Laferty* (June 1, 1999), Vinton App. No. 98CA522.

[15]*Hill v. City of Urbana*, (1997), 79 Ohio St.3d 130, 135, 1997-Ohio-400, 679 N.E.2d 1109.

APPENDIX A:

> **"I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE CLEVELAND MUNICIPAL SCHOOL DISTRICT'S ("CMSD") MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF-APPELLANT'S CLAIM OF NEGLIGENT RETENTION."**

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It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, J., And

TIMOTHY E. McMONAGLE, J., CONCUR

ANNE L. KILBANE
PRESIDING JUDGE

KEYWORDS: