[Cite as *E.F. v. Oberlin City School Dist.*, 2010-Ohio-1370.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

E. F., et al. Appellants v. OBERLIN CITY SCHOOL DISTRICT, et al. Appellees	C. A. No. 09CA009640 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 09CIV160197

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

CARR, Judge.

{¶1} Appellants, E.F., et al., appeal the judgment of the Lorain County Court of Common Pleas. This Court affirms, in part, and reverses, in part.

I.

{¶2} Appellants, E.F., by and through her mother, J.F., and father, D.F., filed a civil complaint on January 7, 2009, in the Lorain County Court of Common Pleas. The named defendants in the complaint were the Oberlin City School District, the Oberlin Board of Education, Prospect Elementary School, and two unnamed defendants, John Doe #1 and John Doe #2 ("Appellees"). The complaint identified the John Doe defendants as employees of Oberlin schools. Appellants filed an amended complaint on January 20, 2009. The amended complaint alleged that E.F. was sexually assaulted by two boys at Prospect Elementary School in Oberlin, Ohio. The appellants alleged that E.F. who has Down Syndrome, was sexually assaulted multiple times because of an "extreme lack of teacher oversight." The amended

complaint contained counts alleging negligence and recklessness; violations of the Individuals with Disabilities Act; violations of R.C. Chapter 3323; as well as intentional infliction of emotional distress.

{¶3} In addition to filing an amended complaint on January 20, 2009, appellants filed a "motion to close proceedings" because of the number of children allegedly involved in the case. On January 27, 2009, appellees requested the ability to file portions of their answer under seal because the answer necessarily included confidential information. Appellees first filed an answer to the amended complaint on February 4, 2009, and then subsequently filed the remaining portion under seal on March 3, 2009. Appellees filed a motion for judgment on the pleadings on March 12, 2009. Appellants responded to the motion on May 11, 2009, and appellees subsequently filed a reply brief on May 20, 2009. On July 2, 2009, the trial court granted appellees' motion for judgment on the pleadings.

{¶4} Appellants appeal from the trial court's order granting appellees' motion for judgment on the pleadings, raising four assignments of error. This Court has consolidated some assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR JUDGMENT ON THE PLEADINGS, AS APPELLANTS PRESENTED ENOUGH FACTS IN THE COMPLAINT TO ESTABLISH A CLAIM FOR HAZING."

{¶5} In their first assignment of error, appellants argue that the trial court erred in granting appellees' motion for judgment on the pleadings because they presented sufficient facts in the complaint to establish a claim for hazing. This Court disagrees.

{¶6} This Court has stated:

> "A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted, and the same standard of review is applied to both motions. The trial court's inquiry is restricted to the material allegations in the pleadings. Furthermore, the trial court must accept material allegations in the pleadings and all reasonable inferences as true. This court reviews such motions under the de novo standard of review." (Internal citations omitted.) *Pinkerton v. Thompson*, 174 Ohio App.3d 229, 2007-Ohio-6546, at ¶18.

When reviewing a matter de novo, this Court does not give deference to the trial court's decision. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, at ¶11. "Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570.

{¶7} "Because Ohio is a notice-pleading state, Ohio law does not generally require a party asserting a claim for relief to plead operative facts with particularity." *Rogers v. Hood*, 9th Dist. No. 24374, 2009-Ohio-5799, at ¶41, citing *Cincinnati v. Beretta U.S.A. Corp*, 95 Ohio St.3d 416, 2002-Ohio-2480, at ¶29. Civ.R. 8(A) provides, in relevant part, that "[a] pleading that sets forth a claim for relief *** shall contain *** a short and plain statement of the claim showing that the party is entitled to relief, and *** a demand for judgment for the relief to which the party claims to be entitled."

{¶8} Appellants argue that the facts alleged in the complaint put appellees on sufficient notice of the hazing claim.

{¶9} R.C. 2903.31(A) provides:

> "(A) '[H]azing' means doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person."

{¶10} R.C. 2307.44, which addresses civil liability for hazing, states:

> "Any person who is subjected to hazing *** may commence a civil action for injury or damages, including mental and physical pain and suffering, that result from the hazing ***. If the hazing involves students in a *** primary *** school *** or any other educational institution, an action may also be brought against any administrator, employee, or faculty member of the school, *** who knew or reasonably should have known of the hazing and who did not make reasonable attempts to prevent it and against the school ***. If an administrator, employee, or faculty member is found liable in a civil action for hazing, *** the school *** that employed the administrator, employee, or faculty member may also be held liable."

{¶11} The Fifth District confronted a similar issue in *Duitch v. Canton City Schools*, 157 Ohio App.3d 80, 2004-Ohio-2173, when forced to determine whether a trial court properly granted a school's motion for summary judgment. The plaintiff in *Duitch* alleged that over a period of years, freshman had been hazed and severally beaten by football players, senior band members, and upperclassmen during the first few days of school and band practice. The student in question in *Duitch* was allegedly beaten on "freshman-beating day" and sustained numerous injuries to his neck and back. Id. at ¶7. The court held that, for the purposes of R.C. 2903.31 and R.C. 2307.44, the legislature contemplated "hazing" within the context of being initiated into a student organization. Id. at ¶30. The court further clarified that the term "student organization" does not simply mean being a member of the student body at a particular school. Id. at ¶31. The initiation must be into an organization where membership is voluntary. Id. The court concluded that while the actions of the students may have constituted assault, they did not constitute hazing within the definition of R.C. 2903.31. Id. at ¶32.

{¶12} In support of their arguments, appellants cite to the Eighth District's ruling in *Vinicky v. Pristas*, 163 Ohio App.3d 508, 2005-Ohio-5196. In *Vinicky*, the court held that the plaintiff's complaint which contained a hazing claim was sufficient to survive a school's motion for judgment on the pleadings. The plaintiff in *Vinicky* alleged "civil hazing" in their complaint and asserted that students "perpetrated hazing" in "direct violation of R.C. 2903.31," and that the school failed to deter "hazing activities" which were "encouraged and facilitated on school grounds." Id. at ¶11.

{¶13} A review of the amended complaint in this case reveals that appellants did not allege sufficient facts to establish a hazing claim. Appellants captioned Count Four of the complaint "O.R.C. 2907 & 2903: Rape, Sexual Battery, Sexual Imposition, Assault, Hazing." This caption to Count Four makes two general references to the revised code and then mentions five possible causes of action. The complaint alleges that the acts of "rape, sexual[] battery, gross sexual imposition, assault, and hazing" were committed upon E.F. However, the complaint makes no mention of E.F. seeking voluntary membership into an organization. While the complaint alleges physical and emotional injuries, it does not allege that the injuries were sustained as part of any initiation ritual. Nor does the complaint identify a specific organization to which E.F. was allegedly being initiated. By merely including in the complaint several references to students committing rape, sexually battery, gross sexual imposition, assault, and hazing upon E.F., appellants have not sufficiently alleged facts which implicate R.C. 2903.31 and R.C. 2307.44. Unlike the circumstances in *Vinicky*, appellants have failed to allege facts which distinguish their hazing claim from the other causes of action contained in Count Four of the complaint. Simply including the word "hazing" in a sequence of allegations does not equate to alleging facts which established a hazing claim. In the absence of such facts, it was proper for

the trial court to grant appellees' motion for judgment on the pleadings with regard to the hazing claim.

{¶14} Appellants' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR JUDGMENT ON THE PLEADINGS, AS APPELLANTS PRESENTED ENOUGH FACTS IN THE COMPLAINT TO ESTABLISH LIABILITY AGAINST OBERLIN BOARD OF EDUCATION."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR JUDGMENT ON THE PLEADINGS, AS APPELLANTS PRESENTED ENOUGH FACTS IN THE COMPLAINT TO ESTABLISH LIABILITY AGAINST THE DOE DEFENDANTS."

{¶15} In their second and third assignments of error, appellants contend that they presented enough facts in their complaint to establish liability against the Oberlin Board of Education as well as the Doe Defendants.

{¶16} The question of whether a governmental immunity applies is a question of law and, thus, is reviewed under a de novo standard of review. *Conley v. Schearer* (1992), 64 Ohio St.3d 284, 292.

Oberlin Board of Education

{¶17} Appellants argue that they presented enough facts in the complaint to establish liability against the Oberlin Board of Education. Appellants' position is premised on the contention that the Oberlin Board of Education can be held liable because hazing occurred within the school district. This Court disagrees.

{¶18} Appellants concede that the Oberlin Board of Education is a political subdivision as defined in R.C. 2744.01(F) and, therefore, is protected from liability by a general grant of

immunity. Appellants assert that the immunity dissolves, however, under the exception to immunity outlined in R.C. 2744.02(B)(5), which states:

> "[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 ***. 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 a general authorization in that section that a political subdivision may sue or be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision."

Appellants contend that R.C. 2307.44 expressly imposes liability on a school district's board of education if hazing takes place within the district. In light of our resolution of the first assignment of error in which we held that appellants did not allege facts sufficient to prevail on a claim of hazing, the statutory exception to the general grant of immunity set forth in R.C. 2744.02(B)(5) cannot apply to the Oberlin Board of Education. Therefore, appellants' second assignment of error is overruled.

John Doe #1 and John Doe #2

{¶19} Appellants contend that the trial court erred in granting appellees' motion for judgment on the pleadings because the complaint alleged sufficient facts to establish liability against the Doe Defendants.[1] This Court agrees.

{¶20} As noted above, a political subdivision is immune from liability pursuant to R.C. 2744.02(A)(1). Five exceptions to the general liability are set forth in R.C. 2744.02(B). A third tier to the analysis exists where "immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies." *Cater v.*

[1] In rulings on appellees' motion for judgment on the pleadings, the trial court operated under the assumption that the "Doe Defendants" were employees of the Oberlin Schools. Because appellants have not taken issue with the trial court's assumption in their brief filed with

Cleveland (1998), 83 Ohio St.3d 24, 28. R.C. 2744.03(A)(6), which addresses the liability of individual employees, states:

> "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to a person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:
>
> "***
>
> "(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."

{¶21} The portions of the complaint which implicate employees of the Oberlin City Schools deal solely with the official responsibilities of the employees, namely monitoring the behavior of students. Therefore, nothing in the complaint would fall within the parameters of R.C. 2744.03(A)(6)(a) which deals with conduct which was "manifestly outside the scope of the employee's employment or official responsibilities."

{¶22} Appellants argue that they presented sufficient facts to establish liability against the Doe Defendants pursuant to R.C. 2744.03(A)(6)(b). Appellants alleged in the complaint that

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this Court, we maintain the trial court's position with regard to the identity of the "Doe

E.F. was sexually assaulted under circumstances where there was a "recklessness and an extreme lack of teacher oversight relating to the facts of these incidents." Appellants further alleged in the complaint that a substitute teacher was responsible for monitoring the classroom at the time of multiple incidents where E.F. was assaulted. Appellants also alleged that the school was aware that one of the students who attacked E.F. had "a history of *** psychological issues relating to abuse and assault." Appellants stated in the complaint that "Oberlin Schools recklessly placed these students into a class with mentally handicapped students, such as E.F, with full knowledge of such student's (sic) propensity to abuse the disabled students in the classroom." Appellants reiterated that "Defendants also acted recklessly in the monitoring of classrooms which E.F was in" and further that "[a]ll regular teachers and substitute teachers acted recklessly in monitoring the children of his/her classroom by failing to even notice when students disappeared from the classroom." The complaint also states that the recklessness of teachers "resulted in E.F. being sexually assaulted by the [s]tudents."

{¶23} We hold that these facts were sufficient to establish liability against the Doe Defendants for the purpose of overcoming a motion for judgment on the pleadings filed pursuant to Civ.R. 12(C). Appellants maintained throughout their complaint that the employees of Oberlin Schools acted recklessly in the monitoring and managing of E.F.'s classroom, particularly during the times that the alleged incidents occurred. Therefore, the trial court erred in concluding that the complaint failed to allege conduct sufficient to support a finding of immunity pursuant to R.C. 2744.03(A)(6)(b).

{¶24} It follows that appellants' third assignment of error is sustained.

ASSIGNMENT OF ERROR IV

Defendants."

"THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR JUDGMENT ON THE PLEADINGS, AS APPELLANTS PRESENTED ENOUGH FACTS IN THE COMPLAINT TO ESTABLISH A CLAIM OF DEFENDANTS' VIOLATION OF THE IDEA ACT."

{¶25} Appellants contend they presented sufficient facts in their complaint to establish a claim that appellees violated the Individuals with Disabilities Education Act ("IDEA"). This Court disagrees.

{¶26} Under the IDEA, a plaintiff must exhaust the administrative remedies set forth in the statute prior to bringing a civil action in any state court of competent jurisdiction or any federal district court. 20 U.S.C. 1415(i)(2).

{¶27} In Count Two of their complaint, appellants alleged that "Oberlin Schools were obligated to follow the proper procedures in establishing an individualized education program for E.F. as set forth in the Individuals with Disabilities Education Act 20 U.S.C. [] 1400 et seq." Appellants further alleged that the obligations of appellees under the statute with regard to E.F. included proper placement into classes, as well as proper monitoring and supervision. Appellants concluded by stating that appellees failed to follow proper procedures as set forth in the IDEA and, as a direct and proximate result of the unlawful actions, E.F. was "injured in an amount to be determined at trial." Assuming, without deciding, that appellant's claim is even cognizable under the IDEA, appellants necessarily would have had to set forth its justification for bypassing the administrative process in order to prevail on their claim. At no point in the complaint did appellants address whether they sought to exhaust administrative procedures prior to filing their lawsuit. Therefore, the trial court did not err in granting appellees' motion for judgment on the pleadings with regard to appellants' IDEA claim.

{¶28} Furthermore, both in responding to appellees' motion for judgment on the pleadings at the trial court level, as well as in setting forth arguments on appeal, appellants have

not disputed that the IDEA contains a pre-suit exhaustion requirement. Instead, appellants point to the Sixth Circuit's ruling in *Covington v. Knox Cty. School Sys.* (C.A.6, 2000), 205 F.3d 912, 917, for the proposition that pursuing administrative remedies is unnecessary when no available administrative remedy exists. Appellants also cite to *Honig v. Doe* (1988), 484 U.S. 305, 326-327, for the proposition that exhausting administrative remedies is not required if doing so would be futile or inadequate to protect the plaintiff's rights. In this case, appellants have failed to state why their specific circumstances merit bypassing administrative procedures. Appellants have not stated any reason why exhausting administrative remedies would be futile or inadequate to protect E.F.'s rights. Because appellant has not set forth why bypassing the administrative process would be futile in this case, appellants cannot prevail on their fourth assignment of error. See App.R. 16(A)(7).

{¶29} Appellants' fourth assignment of error is overruled.

III.

{¶30} Appellants' first, second, and fourth assignments of error are overruled. The third assignment of error is sustained. The judgment of the Lorain County Court of Common Pleas is affirmed, in part, and reversed, in part, and remanded for further proceedings consistent with this decision.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to all parties.

DONNA J. CARR
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

ARLENE SOKOLOWSKI-CRAFT, Attorney at Law, for Appellants.

DAVID KANE SMITH, and KATHRYN I. PERRICO, Attorneys at Law, for Appellees.