IN THE SUPREME COURT OF OHIO

THE OLENTANGY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, Petitioner, v. I.B., individually and o/b/o her Daughter, N.J. (a minor), et al., Respondents.	)	Case No. 2017-1160 On the Certified Question of Law from the District Court for the Southern District of Ohio Case No. 2:16-cv-00837

MOTION OF CLEVELAND MUNICIPAL SCHOOL DISTRICT BOARD OF EDUCATION TO INTERVENE AS PETITIONER

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Cleveland Municipal School District Board of Education ("CMSD" or "Intervenor") hereby moves this Court for permission to intervene as Petitioner in the above-captioned matter pursuant to Civ.R. 24(B) and S.Ct.Prac.R. 12.01(A)(2)(b). As set forth in the accompanying Memorandum of Law in Support, the Intervenor has a question of law in common with the main action and intervention will not unduly delay or prejudice the original parties. Intervenor, therefore, respectfully requests that this Court grant this Motion and permit Intervenor to brief on the same schedule as the parties in this case.

Dated: February 21, 2018

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The United States District Court for the Southern District of Ohio (the "Southern District") has certified the following question of state law to this Court:

> Does § 2151.421 expressly impose civil liability on a school board, either for its own or its employee's failure to report, triggering the § 2744.02(b)(5) [sic] exception to political subdivision immunity on a negligence *per se* claim based on § 2151.421?

See August 9, 2017 Opinion and Order (the "Certification Order") (Doc. No. 58). As more fully set forth below, Intervenor is the defendant in a separate state court action with nearly identical claims and defenses at issue as in the instant action. *See Molloy v. Cleveland Metro. Sch. Dist.*, Cuyahoga C.P. No. CV-17-881716 (filed June 13, 2017) ("*Molloy*"). Among other defenses, Intervenor argues in *Molloy* that the exception to political subdivision immunity found in R.C. 2744.02(B)(5) is not triggered by a claim of failure to report under R.C. 2151.421. Intervenor respectfully requests that the Court grant it permission to intervene in this matter pursuant to Civ.R. 24(B)(2), as the Court's interpretation of R.C. 2744.02(B)(5) will likely be determinative of core questions of law in *Molloy*.

II. STATEMENT OF RELEVANT FACTS

In *Molloy*, the plaintiffs are two former students of CMSD who allege that they were touched inappropriately by one of CMSD's former employees. Specifically, they allege that a former CMSD security guard rubbed one of the plaintiffs' back and buttocks on one occasion, hugged one of the plaintiffs on one occasion, and grabbed one of the plaintiffs by the arm on one occasion. *See* Compl. at ¶¶ 7, 10, *Molloy*, No. CV-17-881716 (Exh. A). The *Molloy* plaintiffs further allege that they informed a CMSD employee of the inappropriate touching, and that the employee failed to report the behavior to anyone. *Id*. at ¶¶ 8-9. Among other claims, the *Molloy*

plaintiffs assert that Intervenor is civilly liable for the employee's alleged failure to report under R.C. 2151.421. Compl. at ¶¶ 25-29 (Exh. A). Like Plaintiffs-Respondents in the instant action, the *Molloy* plaintiffs rely on this Court's decision in *Yates v. Mansfield Bd. of Educ.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, in support of their claim against Intervenor for failure to report. Compl. at ¶¶ 28-29 (Exh. A).

Intervenor moved to dismiss the *Molloy* action arguing, in part, that while R.C. 2151.421 imposes a duty on certain school employees to report concerns of abuse, CMSD cannot be liable for an employee's alleged failure to report because it is generally immune from liability under the Political Subdivision Tort Liability Act, R.C. 2744.01(A)(1) and (F). *See* CMSD Defs.' Partial Mot. to Dismiss pp. 6-10, *Molloy*, No. CV-17-881716 (Exh. B). Further, Intervenor argues that although R.C. 2744.02(B)(5) contains an exception from political subdivision immunity where another statute expressly imposes civil liability on the political subdivision, R.C. 2151.421 does not separately impose civil liability on CMSD for failure to report and thus does not trigger that exception. *Id*. In support of its position in the motion to dismiss the *Molloy* action, Intervenor points out—as did the Southern District in the Certification Order—that *Yates* concerns earlier versions of R.C. 2744.02(B) and R.C. 2151.421, which, taken together, this Court interpreted to negate the immunity of a political subdivision for only the criminal liability of its employee. *Id.* at 8-10. It is Intervenor's position in *Molloy* that the post-*Yates* version of R.C. 2744.02(B)(5) provides an exception to immunity only where a separate statute expressly imposes civil liability on a political subdivision, and the post-*Yates* version of R.C. 2151.421 does not impose civil liability on a political subdivision for any failure to report. *Id.*

In their opposition to the motion to dismiss, the *Molloy* plaintiffs argue that this Court in *Yates*, and by extension its holding in *Campbell v. Burton*, 92 Ohio St.3d 336, 750 N.E.2d 539

(2001), upon which *Yates* is based, implicitly found that R.C. 2151.421 expressly imposes civil liability on a political subdivision for failure to report, notwithstanding the revisions to both statutes. *See* Pls.' Brief in Opp. to Partial Mot. to Dismiss pp. 3-10, *Molloy*, No. CV-17-881716 (Exh. C). Although Intervenor's motion to dismiss was denied as to the claim of political subdivision immunity, the journal entry did not address the merits of Intervenor's claims.

It is Intervenor's position that the *Molloy* plaintiffs are wrong. The Southern District was equally reluctant to accept such a sweeping interpretation of this Court's precedent, stating:

> [I]t is unclear whether the Supreme Court of Ohio would apply the reasoning from *Campbell* and *Yates* and find that such *civil* liability is 'expressly imposed' on a board of education when such boards are not expressly listed in § 2151.421(A)(1)(a) as persons with mandatory reporting obligations but 'school teachers; school employees; and school authorities' are.

See Certification Order p. 12. The *Molloy* action therefore turns on whether R.C. 2151.421 imposes civil liability on a school board for its employee's failure to report, thereby triggering the R.C. 2744.02(B)(5) exception to political subdivision immunity—the identical question of law that has been certified to this Court by the Southern District in the instant action.

III. LAW AND ARGUMENT

Ohio Rule of Civil Procedure 24(B)(2) provides that any person or entity may intervene in an action when, as here, an "applicant's claim or defense and the main action have a question of law or fact in common." Ohio Civil Rule 24 is liberally construed in favor of intervention. *See State ex rel. SuperAmerica Grp. v. Licking Cty. Bd. of Elections*, 80 Ohio St.3d 182, 184, 685 N.E.2d 507 (1997); *compare State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995). Moreover, a decision whether to grant or deny a motion to intervene is left to the sound discretion of the court. *In re Stapler*, 107 Ohio App.3d 528, 531, 669 N.E.2d 77 (8th Dist.1995).

Under Ohio law, permissive intervention is appropriate when a party satisfies three factors: (1) timely application; (2) a question of law or fact in common with the main action; and (3) the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. *State ex rel. Merrill v. Ohio Dep't of Nat. Res.*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 43. Intervenor meets all three requirements, and this Court should grant this Motion.

A. <u>The Motion to Intervene is Timely.</u>

Rule 24 does not impose any specific deadlines for filing a motion to intervene. Intervention can be granted at any stage of a case. This Court has stated that the following factors should be considered in determining timeliness:

> (1) the point to which the suit has progressed, (2) the purpose for which intervention is sought, (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case, (4) the prejudice to the original parties due to the proposed intervenor's failure after he or she knew or reasonably should have known of his or her interest in the case to apply promptly for intervention, and (5) the existence of unusual circumstances militating against or in favor of intervention.

Univ. Hosps. of Cleveland v. Lynch, 96 Ohio St.3d 118, 2002-Ohio-3748, 772 N.E.2d 105, ¶ 48, citing *State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 503, 696 N.E.2d 1058 (1998).

Intervenor's Motion is timely filed. *See, e.g.*, *ICSC Partners, Ltd. P'ship v. Kenwood Plaza, Ltd. P'ship*, 116 Ohio App.3d 278, 282, 688 N.E.2d 5 (1st Dist.1996) (noting that motions to intervene should be granted liberally, even if made shortly before trial). The Intervenor has promptly sought to intervene upon this Court's lift of a stay in this case and establishment of a briefing schedule because the Court's interpretation of R.C. 2744.02(B)(5) will potentially be determinative of core questions of law in *Molloy*. The *Molloy* complaint was filed June 13, 2017, initiating the common question of law with the Southern District action. The common question of law was certified to this Court, and on August 21, 2017, the Court issued a Notice of Filing of

Certified State Law Question. This Court accepted the certified question on November 1, 2017, and stayed the proceedings on November 9, 2017. This Court lifted its stay on February 16, 2018, and the Intervenor promptly filed this Motion thereafter. Intervenor would not have reasonably known of its interest in the instant action prior to August 21, 2017, and waited only for this Court's decision to set a briefing schedule before moving to intervene. Here, there is no prejudice to the Southern District parties as Intervenor's application for intervention is timely filed after Intervenor became aware of the existence of the common question of law and the Court's desire for briefing on the question. Having been filed well before adjudication, Intervenor's Motion is timely.

B. Intervenor Has a Question of Law in Common with the Main Action.

The Court may permit an applicant to intervene "when [the] applicant's claim or defense and the main action have a question of law or fact in common." *State ex rel. Merrill*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, at ¶ 43, quoting Civ.R. 24(B)(2). The main action involves the same allegations and affirmative defense as *Molloy*: plaintiffs allege negligence for failure of school employees to report child abuse; the school board claims sovereign immunity; and plaintiffs state that the exception to immunity set forth in R.C. 2744.02(B)(5) applies to civil liability imposed under R.C. 2151.421. *See* Compl. at ¶¶ 25-29 (Exh. A). Resolution of the *Molloy* action turns on whether R.C. 2151.421 imposes civil liability on a school board for its employee's failure to report, thus triggering the R.C. 2744.02(B)(5) exception to political subdivision immunity—the identical question that has been certified to this Court by the Southern District in the instant action. A response by this Court to the certified question will likely be controlling on core issues of law in Intervenor's state court case. Intervenor has a question of law in common with the main action and, accordingly, this Court should grant intervention.

C. Intervention Will Not Unduly Delay or Prejudice the Original Parties.

When considering whether to grant intervention, the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *State ex rel. Merrill*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, at ¶ 43, quoting Civ.R. 24(B)(2). Under Ohio law, "[c]ollateral or extrinsic issues" render intervention inappropriate due to prejudice to the original parties because they "would cloud the issues having no relevance to the ultimate . . . issue before the Court." *Fisher Foods, Inc. v. Ohio Dep't of Liquor Control*, 555 F.Supp. 641, 651 (N.D.Ohio 1982). Further grounds to deny a motion to intervene include "[i]ncreases in cost and judicial time . . . hinder[ing] resolution of the present conflict." *Id.*

Here, the common question of law is nearly identical in each case. The Intervenor does not seek to introduce any extrinsic issues or irrelevant facts that would cloud the case, nor does the Intervenor seek additional briefing time beyond that which the Court has granted the parties. Permitting intervention would not increase cost or judicial time or hinder any resolution in the present case as the Intervenor merely seeks involvement on the single certified question before this Court.

Ohio courts have held that a party should be permitted to intervene under Civ.R. 24(B) when a judgment would have a binding effect on the potential intervenor. *Indiana Ins. Co. v. Murphy*, 165 Ohio App.3d 812, 2006-Ohio-1264, 848 N.E.2d 889, ¶ 23 (3d Dist.). As previously discussed, the Court's interpretation of R.C. 2744.02(B)(5) will be determinative of core legal issues in *Molloy.* This Court should grant this Motion because it is timely, Intervenor has a common question of law with the main action, and intervention will not delay the matter or prejudice the original parties.

IV. CONCLUSION

The Intervenor is entitled to permissive intervention because the Intervenor has a question of law in common with the main action, and intervention will not unduly delay the matter or prejudice the original parties. For the foregoing reasons, Intervenor respectfully requests that the Court grant its Motion to Intervene and permit Intervenor to brief on the same schedule as the parties in this case.

Respectfully submitted,

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Counsel for Intervenor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by electronic mail and U.S. Mail this 21st day of February, 2018, to the following, which includes counsel in the *Molloy* matter:

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EXHIBIT A

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Court of Common Pleas

New Case Electronically Filed:
June 13, 2017 14:46

By: JOSEPH A. DUBYAK 0025054

Confirmation Nbr. 1093007

MAKAYLA MOLLOY, ET AL.

CV 17 881716

vs.

Judge: JANET R. BURNSIDE

CLEVELAND METROPOLITAN SCHOOL DISTRICT, ET AL.

Pages Filed: 15

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MAKAYLA MOLLOY 18708 Kewanee Avenue Cleveland, Ohio 44119 and LINDY M. WOODSON 3493 Bendemeer Cleveland, Ohio 44118 Plaintiffs vs. CLEVELAND METROPOLITAN SCHOOL DISTRICT 1111 Superior Avenue East, Suite 1800 Cleveland, Ohio 44114 and CLEVELAND METROPOLITAN SCHOOL DISTRICT BOARD OF EDUCATION 1111 Superior Avenue East, Suite 1800 Cleveland, Ohio 44114 and ERIC B. SIMPKINS 1495 Sheridan Road Cleveland, Ohio 44121 and JOHN DOE Name and address unknown Defendants	)	CASE NO. JUDGE **COMPLAINT** **(A Jury Demand Is Endorsed Hereon)**

Now come the Plaintiffs, by and through undersigned counsel, and for their complaint against the Defendants state as follows:

PREAMBLE

1. At all times relevant, Plaintiffs were senior high school students at John Hay High School, a secondary school within the Cleveland Metropolitan School District which is under the control and operated by Defendant Cleveland Metropolitan School District through Defendant Cleveland Metropolitan School District Board of Education. Both Plaintiffs have at all times relevant been residents of the City of Cleveland, County of Cuyahoga and State of Ohio.

2. Defendant Cleveland Metropolitan School District is a municipal corporation which operates and maintains various public schools that receive federal funding throughout the City of Cleveland, including John Hay High School. Cleveland Metropolitan School District is located entirely within the City of Cleveland, County of Cuyahoga and State of Ohio.

3. Defendant Cleveland Metropolitan School District Board of Education is comprised of elected members who are tasked with operating and maintaining the functions of all of the public schools within Defendant Cleveland Metropolitan School District including John Hay High School. Further, this Defendant is tasked with making decisions regarding how to spend sources of funding, including, but not limited to, federal funding, decisions relating to the hiring, firing and discipline of personnel and employees, the handling of complaints, including those relating to sexual harassment,

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either at the board level or through designated individuals that are employed throughout the schools within Defendant Cleveland Metropolitan School District.

4. Defendant Eric B. Simpkins had been employed for a number of years by Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education as a security guard at John Hay High School. Said Defendant was so employed on the date of events giving rise to causes of action herein.

5. Defendant John Doe, name and address unknown, upon information and belief is a separate corporate entity or limited liability company with which Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education contract for the provision of security services at various schools located within the jurisdiction of these two Defendants including, but not limited to, John Hay High School.

FIRST CLAIM

6. Paragraphs 1 thru 5 are hereby incorporated by reference as though fully rewritten herein.

7. On or about August 17, 2016, Plaintiff was ascending a stairway within John Hay High School, a public school that receives federal funding which is operated and maintained by Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education, when Defendant, Eric Simpkins, who had previously been making suggestive advances and comments to the Plaintiffs approached the Plaintiffs Makayla Molloy and Lindy Woodson from behind and began rubbing the back and buttocks of Plaintiff Molloy.

8. Plaintiffs attempted to escape from the inappropriate physical touching administered by Defendant Simpkins by running into the classroom of one of their teachers, Elizabeth Scruggs, and informing her that they had just been physically and sexually touched in an inappropriate manner by Defendant Simpkins.

9. Scruggs, who is employed as a teacher at John Hay High School by Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education, rather than reporting the physical/sexual assault to her supervisors or the administration in accordance with both the law and school district policy, instead merely walked the girls to their next class without any report of the incident to anybody whomsoever.

10. Thereafter, on August 23, 2016, Plaintiffs were walking in an upstairs hallway when Defendant Simpkins observed them and hurried to their location and physically and sexually handled Plaintiff Lindy Woodson in an inappropriate manner by hugging her around her upper torso with his frontal area pressed against her buttocks as he bent her forward. In addition, after Plaintiff Woodson broke away, Defendant Simpkins grabbed the arm of Plaintiff Molloy and attempted to drag her to the other side of the hallway out of the view of other individuals, all the while making sexually suggestive comments.

11. Immediately thereafter, the parents of Plaintiffs made formal complaints to the principal of John Hay High School and to the administration of Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education.

12. However, despite the complaints, nothing was done to remove Defendant Simpkins and he continued to make sexually suggestive and inappropriate comments to the Plaintiffs until he was eventually transferred several months after the events. Indeed, upon information and belief, Defendant Simpkins was never terminated from his employment nor formally disciplined.

13. All of the aforementioned conduct set forth above constitutes sexual harassment in that Plaintiffs were subjected to an objectively hostile educational environment.

14. Further, at all times relevant, the conduct in which Defendant Simpkins was engaged was offensive and unwelcome by the Plaintiffs.

15. At all times relevant, the sexually harassing conduct to which Plaintiffs were subjected was pervasive and /or of a serious nature.

16. The sexual harassment to which the Plaintiffs were subject had the effect of unreasonably interfering with their ability to obtain an education.

17. Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 provides that no person in the United States shall, on the basis of sex, be excluded from participation, or denied the benefits of, or be subjected to discrimination, under any educational program or activity receiving financial assistance.

18. 20 U.S.C. Section 1681 applies to students being sexually harassed by other students, teachers and employees and contractors of school districts and boards of education.

19. At all times relevant, Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education, along with John Hay High School, have been the recipients of federal financial assistance.

20. The actions and inactions of Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education in failing to take measures to prevent ongoing sexual harassment of the Plaintiffs herein constitutes a denial of the benefits of an education program receiving federal funds and, further, they subjected the Plaintiffs to sexual harassment/sexual discrimination and thereby gives rise to a cause of action for a violation of Title IX pursuant to 20 U.S.C. Section 1681, et seq., thereby entitling Plaintiffs to the full panoply of general damages as held by the United States Supreme Court in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1991).

21. As a direct and proximate result of the violation of 20 U.S.C. Section 1681, et seq. by Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education, Plaintiffs have incurred medical expenses for the treatment of psychological injury, have had their earnings capacity diminished, and have lost wages from their place of employment, all of which will continue into the indefinite future.

22. Further, as a direct and proximate result of the violation of 20 U.S.C. Section 1681, et seq. by Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education, Plaintiffs have been deprived of educational benefits, have experienced a loss of enjoyment of life, have been greatly

inconvenienced, and have suffered great physical and emotional pain, suffering and distress, all of which will continue into the indefinite future.

23. At all times relevant, the actions and inactions of Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education have been motivated by actual malice in that these Defendants knew or reasonable should have known that their actions carried a great likelihood of causing substantial harm to the Plaintiffs, thereby giving rise to a cause of action for punitive damages.

24. Further, pursuant to 42 U.S.C. Section 1988(b), Plaintiffs are entitled to a recovery of their reasonable attorney's fees.

SECOND CLAIM

25. Paragraphs 1 thru 24 are hereby incorporated by reference as though fully rewritten herein.

26. Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education, through their employees such as Elizabeth Scruggs, a teacher at John Hay High School to whom inappropriate sexual contact was reported by Plaintiffs herein, have a duty to report physical/sexual abuse pursuant to Ohio Revised Code Section 2151.421.

27. Indeed, Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education, through its employees, were acting in their official capacity and knew or should have known or suspected that Plaintiffs herein, who were then both under 18 years of age, had suffered or faced a threat of suffering

physical or mental wound, injury or condition of a nature that reasonably indicates abuse of the child yet, nevertheless failed to immediately report that knowledge or suspicion to the administration, public children's services agency or to a municipal or county peace officer in the county in which the child resided or in which the abuse or neglect occurred.

28. Such failure gives rise to a cause of action against Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education pursuant to the Supreme Court of Ohio decision in Yates v. Mansfield Board of Education, 150 Ohio App. 3d 241 (2002).

29. As a direct and proximate result of Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education's failure to report sexual or physical abuse of the Plaintiffs at a time when they were minors and corresponding violation of the right of action created in Yates, supra., Plaintiffs are entitled to money damages for out of pocket economic loss expended for medical and/or psychological treatment, and for non-economic damages resulting from loss of enjoyment of life, great inconvenience and great physical and emotional pain, suffering and distress, all of which will continue into the indefinite future.

THIRD CLAIM

30. Paragraphs 1 thru 29 are hereby incorporated by reference as though fully rewritten herein.

31. At all times relevant, Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education knew or reasonably should

have known of the dangerous, abusive and/or inappropriate tendencies of security employee Eric Simpkins yet, nevertheless failed to do an appropriate background check on said individual and thereby were negligent in hiring said Defendant.

32. Further, at all times relevant, Defendant Simpkins was acting within the course and scope of his employment with Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education and, accordingly, these Defendants are liable to the Plaintiffs under the doctrine of respondeat superior.

33. Indeed, agents and employees of Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education acted willfully, wantonly and recklessly in hiring Defendant Simpkins.

34. As a direct and proximate result of the negligence of Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education in hiring Defendant Eric Simpkins, Plaintiffs have sustained severe and permanent damages including, but not limited to, out of pocket medical and psychological expenses, a loss of enjoyment of life, great inconvenience, and great physical and emotional injury, pain, suffering and distress, all of which will continue into the indefinite future.

FOURTH CLAIM

35. Paragraphs 1 thru 34 are hereby incorporated by reference as though fully rewritten herein.

36. At all times relevant, Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education maintained records that it

knew or reasonably should have known of evidence in any action against them for violations of Title IX and the other causes of actions stated herein.

37. However, despite such knowledge and possession of such relevant documents and other tangible items that constitute evidence in the within action, Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education willfully destroyed or otherwise spoliated this evidence in order to avoid its usage as evidence in anticipated litigation.

38. These actions by Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education give rise to the independent tort of spoliation of evidence. As a direct and proximate result of the spoliation of evidence by Defendants Cleveland Metropolitan School District and Cleveland Metropolitan School District Board of Education, Plaintiffs are entitled to compensatory damages for the resulting physical and emotional distress, economic loss and other damages set forth above that have otherwise been rendered more difficult to prove.

39. Further, Defendants' actions in spoliated evidence have been motivated by ill will and actual malice in that these Defendants knew or reasonably should have known that their actions were such that it carried a great likelihood of causing great harm both to the administration of justice and to the rights of the Plaintiffs herein, thereby giving rise to a cause of action for punitive damages.

FIFTH CLAIM

40. Paragraphs 1 thru 39 are hereby incorporated by reference as though fully rewritten herein.

41. At all times relevant, Defendant Eric B. Simpkins unlawfully and without consent touched the Plaintiffs in an inappropriate manner.

42. This unlawful and offensive touching of the Plaintiffs constitutes the tort of assault.

43. As a direct and proximate result of the assault committed by Defendant Eric B. Simpkins, Plaintiffs have lost wages from their place of employment, have had their earnings capacity diminished, have experienced a loss of enjoyment of life and have otherwise suffered great pain of both body and mind, all of which will continue into the indefinite future.

44. Further, at all times relevant, the actions of Defendant Eric B. Simpkins has been motivated by ill will and actual malice in that this Defendant knew or reasonably should have known that his actions in physically assaulting the Plaintiffs carried a great likelihood of causing great harm to the Plaintiffs.

SIXTH CLAIM

45. Paragraphs 1 thru 44 are hereby incorporated by reference as though fully rewritten herein.

46. At all times relevant, Defendant John Doe, name and address unknown, was the actual employer of Defendant Eric B. Simpkins.

47. Defendant Eric B. Simpkins was at all times relevant acting within the course and scope of his employment with Defendant John Doe, Inc. when he committed the acts described herein.

48. Defendant John Doe, Inc. is liable to the Plaintiffs for the actions of its employee, Eric B. Simpkins, under the doctrine of respondeat superior.

49. In addition, Defendant John Doe, Inc. knew or reasonably should have known of the dangerous and inappropriate propensities of its employee, Eric B. Simpkins, yet, nevertheless, hired this individual without completing or adhering to a sufficient background check with the result that Defendant John Doe, Inc. was negligent in hiring Defendant Eric B. Simpkins.

50. As a direct and proximate result of the negligence of Defendant John Doe, Inc., Plaintiffs have lost wages from their place of employment, have had their earnings capacity diminished, have experienced a loss of enjoyment of life, and have otherwise suffered great pain of both body and mind, all of which will continue into the indefinite future.

50. Further, at all times relevant, the actions of Defendant John Doe, Inc. have been motivated by actual malice in that this Defendant knew or reasonably should have known that its action or inactions carried a great likelihood of causing substantial harm to the Plaintiffs, thereby giving rise to a cause of action for punitive damages.

WHEREFORE, Plaintiffs demand judgment as follows:

As to their First Claim, each Plaintiff demands judgment in an amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as compensatory damages and greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as punitive damages together with an award of their reasonable attorney's fees.

As to their Second Claim, each Plaintiff demands judgment in an amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as compensatory damages and in an additional amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as punitive damages together with an award for their reasonable attorney's fees.

As to their Third Claim, each Plaintiff demands judgment against the Defendants in an amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as compensatory damages and in an amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as punitive damages along with an award of their reasonable attorney's fees.

As to their Fourth Claim, each Plaintiff demands judgment against the Defendants in an amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as compensatory damages and in an additional amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as punitive damages along with an award of their reasonable attorney's fees.

As to their Fifth Claim, each Plaintiff demands judgment against the Defendants in an amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as compensatory damages and in an additional amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as punitive damages along with an award of their reasonable attorney's fees.

As to this Sixth Claim, each Plaintiff demands judgment against the Defendants in an amount greatly in excess of Twenty-five Thousand Dollars ($25,000.00) as compensatory damages and in an additional amount greatly in excess of Twenty-five

Thousand Dollars ($25,000.00) as punitive damages along with an award of their reasonable attorney's fees.

Finally, each Plaintiff demands that the Defendants, jointly, be assessed the costs of this action.

Respectfully submitted,

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JURY DEMAND

Pursuant to Rule 38(B) of the Ohio Rules of Civil Procedure, a trial by jury is respectfully requested on all the issues presented herein.

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/s/ *Joseph A. Dubyak*
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Electronically Filed 06/13/2017 14:46 / / CV 17 881716 / Confirmation Nbr. 1093007 / CLKMG

EXHIBIT B

NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

MOTION TO DISMISS
July 13, 2017 16:20

By: COLIN R. JENNINGS 0068704

Confirmation Nbr. 1118440

MAKAYLA MOLLOY, ET AL.

CV 17 881716

vs.

Judge: JANET R. BURNSIDE

CLEVELAND METROPOLITAN SCHOOL DISTRICT, ET AL.

Pages Filed: 27

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Makayla Molloy, et al. Plaintiffs, vs. Cleveland Metropolitan School District, et al. Defendants.	)	Case No. CV 17 881716 Judge Janet R. Burnside **CMSD DEFENDANTS' PARTIAL MOTION TO DISMISS**

Now come Defendants Cleveland Municipal School District ("CMSD" or the "District") and Cleveland Municipal School District Board of Education (the "Board") (collectively "CMSD Defendants") and move to dismiss with prejudice the Second and Third Claims of the Complaint under Civ. R. 12(b)(6) for failure to state a claim. As set forth in the accompanying Memorandum of Law in Support, CMSD Defendants are immune from the Second and Third Claims as a matter of law and therefore respectfully request that this Court grant dismissal of these claims with prejudice.

Respectfully submitted,

/s/ Colin R. Jennings

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed electronically via the Court's electronic filing system. Notice of this filing will be sent to all parties via operation of the Court's electronic filing system. A true and accurate copy of the foregoing *CMSD Defendants' Partial Motion to Dismiss* and accompanying *Memorandum of Law in Support* was also served by email this 13th day of July, 2017, to the following:

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/s/ Colin R. Jennings
One of the Attorneys for CMSD Defendants

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Makayla Molloy, et al.	)	Case No. CV 17 881716
	)	
Plaintiffs,	)	
	)	Judge Janet Burnside
vs.	)	
	)	**MEMORANDUM OF LAW IN**
Cleveland Metropolitan School District, et al.	)	**SUPPORT OF CMSD DEFENDANTS' PARTIAL MOTION TO DISMISS**
	)	
Defendants.	)	

Defendants Cleveland Municipal School District ("CMSD" or the "District") and Cleveland Municipal School District Board of Education (the "Board") (collectively "CMSD Defendants") move to dismiss with prejudice the Second and Third Claims of the Complaint under Civ. R. 12(b)(6) for failure to state a claim.

Plaintiffs claim CMSD Defendants are liable for the alleged independent and unauthorized acts of Defendant Simpkins under the doctrine of *respondeat superior* and furthermore for the alleged negligent hiring of Defendant Simpkins. In their Second Claim, Plaintiffs allege CMSD Defendants, through their employee Elizabeth Scruggs[1] ("Ms. Scruggs"), failed to report physical or sexual abuse as required under Ohio Revised Code Section 2151.421. Plaintiffs allege Ms. Scruggs' failure to report gave rise to a cause of action against CMSD Defendants. In their Third Claim, Plaintiffs allege CMSD Defendants knew or should have known of the alleged dangerous, abusive, and inappropriate tendencies of Defendant Eric Simpkins ("Defendant Simpkins"). These claims are barred as a matter of law.

[1] Although CMSD Defendants must accept Plaintiffs' pleadings as true for the purposes of this Motion to Dismiss, they note that the District does not employ anyone named Elizabeth Scruggs.

Chapter 2744 of the Ohio Revised Code provides broad immunity to political subdivisions against liability for damages in a civil action for injury, death or loss to a person 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. As a school district and board of education, CMSD Defendants qualify as a political subdivision. Additionally, CMSD Defendants are protected from Plaintiffs' negligence claims based upon the immunity granted to political subdivisions in the exercise of judgment or discretion with regard to the use of materials, personnel and facilities. As such, Plaintiffs' Second and Third Claims should be dismissed based upon CMSD Defendants' immunity under Revised Code Chapter 2744.

FACTUAL BACKGROUND

Plaintiffs Makayla Molloy and Lindy M. Woodson (collectively "Plaintiffs") were high school students at John Hay High School during the 2016-2017 school year. Plaintiffs allege in their Complaint that Defendant Simpkins, a security guard formerly employed by CMSD and stationed at John Hay High School, had been making "suggestive advances and comments to the Plaintiffs." Compl. ¶ 7. On or about August 17, 2016, Plaintiffs claim Defendant Simpkins approached the Plaintiffs and allegedly touched one of the Plaintiffs in an inappropriate manner. *Id.* Plaintiffs claim after the incident, they went into Ms. Scruggs' classroom and informed her of what happened. *Id.* ¶ 8. The Plaintiffs allege that Ms. Scruggs then escorted the Plaintiffs to their next class and further allege that Ms. Scruggs did not report the alleged inappropriate touching to anyone. *Id.* ¶ 9. On or about August 23, 2016, Plaintiffs allege Defendant Simpkins again touched one of the Plaintiffs in an inappropriate manner. *Id.* ¶ 10.

After the second incident, Plaintiffs allege they made formal complaints to the principal of John Hay High School and to CMSD. *Id.* ¶ 11. After conducting its investigation into the matter, CMSD concluded Defendant Simpkins acted unprofessionally and violated CMSD Safety and Security Department policy. Defendant Simpkins was terminated from his position on March 7, 2017.

On June 13, 2017, Plaintiffs filed suit against the Cleveland Metropolitan School District, the Cleveland Metropolitan School District Board of Education, Eric B. Simpkins, and John Doe, Inc. Plaintiffs' Second Claim alleges a violation of Ohio Revised Code Section 2151.421, and Plaintiffs' Third Claim alleges liability under the doctrine of *respondeat superior* and a claim for negligent hiring. CMSD Defendants file this Motion for Partial Dismissal as to Plaintiffs' Second and Third Claims based upon sovereign immunity. While CMSD Defendants dispute Plaintiffs' allegations, for the purpose of this Motion for Partial Dismissal under Rule 12(B)(6), CMSD Defendants presume the truth of all appropriately-pled factual allegations in the Complaint.

STANDARD OF REVIEW

A Civ. R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). "[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991) (citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988)). However, while the factual allegations of the complaint must be taken as true, "[u]nsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v.*

Capots, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989). In order for a trial court to dismiss a complaint under Civ. R. 12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

As set forth below, Plaintiffs' Second and Third Claim do not provide grounds for relief and, as such, should be dismissed.

LAW AND ARGUMENT

I. Plaintiffs' Second Claim Fails as a Matter of Law Because CMSD Defendants Are Statutorily Immune to Plaintiffs' Claim for Failure to Report Under R.C. 2151.421.

The Complaint alleges the Plaintiffs informed Elizabeth Scruggs that Defendant Simpkins had inappropriately touched the Plaintiffs and furthermore, Ms. Scruggs failed to subsequently report the alleged assault to her supervisors or to school administration. Compl. ¶¶ 8-9. Plaintiffs further assert CMSD Defendants, "through their employees such as Elizabeth Scruggs, . . . have a duty to report physical/sexual abuse pursuant to Ohio Revised Code Section 2151.421." *Id.* ¶ 26. The leap Plaintiffs then make is that an individual employee's alleged failure to report under R.C. 2151.421 creates liability for the District.

Section 2151.421(A)(1)(a) of the Ohio Revised Code requires mandated reporters with reasonable cause to suspect that a child under eighteen years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child to report that concern. Concerns are reportable when a reasonable person in a similar position would suspect abuse based on the facts the reporter knows. Mandated reporters include, but are not limited to, teachers and school personnel acting in an official or professional capacity. *See* Ohio Rev. Code § 2151.421(A)(1)(b). While

individual school employees do have a duty to report concerns of abuse, school districts are not liable for their employees' failure to do so.

"Determining whether a political subdivision is immune from liability involves a three-tiered analysis. In the first tier, R.C. 2744.02(A) provides broad immunity to political subdivisions and states that 'a political subdivision is not liable for 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.' In the second tier of the analysis, R.C. 2744.02(B) provides five exceptions that may lift the broad immunity provided for in R.C. 2744.02(A). In the third tier, immunity may be reinstated if the political subdivision can demonstrate the applicability of one of the defenses found in R.C. 2744.03(A)(1) through (5)." *Thompson v. Buckeye Joint Voc. Sch. Dist.*, 2016-Ohio-2804, 55 N.E.3d 1, ¶ 17 (5th Dist. 2015 AP 08 0047), citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610 (1998) (internal citations omitted).

CMSD Defendants are immune from liability under R.C. 2744.02 for all acts and omissions described in Plaintiff's Second Claim for Relief. The District is a political subdivision of the State of Ohio, organized pursuant to R.C. 3311.71, *et seq*. CMSD Defendants as a "political subdivision" are immune from certain types of actions under the Political Subdivision Tort Liability Act. *See* Ohio Rev. Code 2744.01(A)(1) and (F). *See also Daniel v. Cleveland Mun. School Dist.,* 8th Dist. No. 83541, 2004-Ohio-4632, ¶ 11 (finding that CMSD is a political subdivision for the purposes of the political subdivision immunity statute). In addition, Plaintiffs' claims relate to the act or omission of a CMSD employee in connection with a governmental function. *See* Section II below. Thus, under the first tier of the sovereign immunity analysis, CMSD Defendants are entitled to immunity.

In order to avoid dismissal of their Second Claim under sovereign immunity theory, Plaintiffs would have to demonstrate that their claim fits into one of the exemptions in R.C. 2744.02(B). One of those exemptions is for motor vehicle accidents; another is for road maintenance; a third is for maintenance of physical grounds. *See* R.C. 2744.02(B)(1), (3)-(5). It is clear that none of those exemptions apply in this case. Therefore, Plaintiffs are left with two possibilities: that the alleged negligence occurred with respect to a "proprietary function" of the District (under R.C. 2744.02(B)(2)) or that civil liability is expressly imposed on the CMSD Defendants by another Ohio statute (under R.C. 2744.02(B)(5)). Their Second Claim is based on an allegation that another statute expressly imposes liability on the District.

Plaintiffs argue that civil liability is expressly applied to the CMSD Defendants through the mandatory reporter statute. As support for their claim, Plaintiffs cite the "Supreme Court of Ohio decision in *Yates v. Mansfield Board of Education*" for the proposition that the failure of a CMSD employee to report physical or sexual abuse gives rise to a cause of action against CMSD Defendants. Compl. ¶ 28; *Yates v. Mansfield Bd. of Education*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861 (2003).[2] In *Yates*, the Ohio Supreme Court held "[p]ursuant to *former* R.C. 2744.02(B), a board of education may be held liable when its failure to report the sexual abuse of a minor student by a teacher in violation of R.C. 2151.421, proximately results in the sexual abuse of another minor student by the same teacher." *Yates,* 102 Ohio St. 3d at 216 (emphasis added). However, the "former" version of R.C. 2744.02(B) referenced in *Yates* and in place at the time of the incident in that case did not impose restrictions on the meaning of "liability." In its current form, R.C. 2744.02(B)(5) has been amended to create an exception

[2] Although referencing the Ohio Supreme Court decision in the Complaint, Plaintiffs incorrectly cite to the appellate decision found in 150 Ohio App. 3d 241 (2002), rather than the Supreme Court decision found in 102 Ohio St. 3d 205 (2003).

against claims based on *civil liability* that is expressly imposed by statute on the political subdivision. Indeed, the *Yates* dissent by Justice Lundberg Stratton notes that "R.C. 2744(B)(5) was amended after [the incident at issue] occurred" and that the "amended statute restricts the meaning of 'liability' by providing that 'a political subdivision is liable for injury * * * when *civil* liability is expressly imposed upon the political subdivision by a section of the Revised Code * * *.' " *Yates,* 102 Ohio St. 3d at 219-220 (emphasis in original); *see also Bucey v. Carlisle*, 2010-Ohio-2262, ¶ 27, 2010 Ohio App. LEXIS 1858 (1st Dist. No. C-090252) (holding the exception to R.C. 2744.02(B)(5) is limited to claims based on a state statute expressly imposing civil liability on the political subdivision for the conduct).

The legislature made abundantly clear in the revised R.C. 2744.02(B)(5) language that it was acting to limit political subdivisions' liability even more than the earlier version. The section now reads:

> 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 and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

R.C. 2744.02(B)(5). The summary of Senate Bill 106, which contained the amended language, indicated that the bill "specifies when civil liability of a political subdivision . . . cannot be construed to exist under another section of the law." Summary of Sub. S.B. 106 (attached hereto as Exhibit A). Thus, the mere imposition of a mandatory duty upon a political subdivision or the employees of a political subdivision does not waive the subdivision's sovereign immunity under the current language of R.C. 2744.02(B)(5).

R.C. 2151.421 does not specifically impose liability on CMSD, a political subdivision, and therefore CMSD Defendants are protected under the Political Subdivision Tort Liability Act.

While R.C. 2151.421 does create a right to pursue civil liability for the failure to report child abuse, it does not specifically identify a political subdivision as an entity with a duty to report. *See Thompson,* 2016-Ohio-2804 at ¶ 22 (finding the trial court erred by failing to grant judgment on the pleadings to the school district and the board of education because civil liability under R.C. 2151.421 does not apply to a political subdivision or board of education and therefore the R.C. 2744.02(B)(5) exception to sovereign immunity does not apply). "Since 'political subdivision' or 'board of education' is not included in R.C. 2151.421(A)(1)(b) to whom the mandatory duty to report applies, a political subdivision or board of education cannot 'violate division (A) of this section' as required by R.C. 2151.421([N]) for liability to attach. R.C. 2151.421([N]) does not expressly, directly, or explicitly impose civil liability on a political subdivision as required by R.C. 2744.02(B)(5) for the exception to apply." *Id.*

Contrary to Plaintiffs' claim that Ms. Scruggs' failure to report gives rise to a cause of action against CMSD Defendants pursuant to the 2003 Ohio Supreme Court decision in *Yates*, as explained above, *Yates* applied an obsolete version of R.C. 2744.02(B) and the statute has since been amended. While the current version of R.C. 2744.02(B) provides an exception to immunity for civil liability, R.C. 2151.421 does not expressly, directly, or explicitly impose civil liability on a political subdivision as required for the exception to immunity to apply under R.C. 2744.02(B)(5). As such, because sovereign immunity protects CMSD Defendants from liability under Revised Code Chapter 2744, Plaintiffs' Second Claim against CMSD Defendants should be dismissed with prejudice.

II. Plaintiffs' Third Claim Fails as a Matter of Law Because CMSD is Statutorily Immune to Plaintiffs' Claim of Negligent Hiring.

In their Third Claim, Plaintiffs allege CMSD Defendants "knew or reasonably should have known of the dangerous, abusive and/or inappropriate tendencies of security employee Eric

Simpkins." Compl. ¶ 31. Plaintiffs further claim CMSD Defendants' failure to perform a background check on Defendant Simpkins amounted to negligent hiring and CMSD Defendants are liable for Defendant Simpkins' acts under the doctrine of *respondeat superior*. *Id.* ¶¶ 32-34. Notwithstanding Plaintiffs' failure to allege any facts to support their claim that CMSD Defendants failed to conduct an appropriate background check, CMSD Defendants are immune under R.C. 2744.02(A)(1) and R.C. 2744.03(B) and Plaintiffs' claim fails as a matter of law.

As noted above, the Ohio Political Subdivision Tort Liability Act sets forth the specific defenses and immunities available to political subdivisions in civil actions involving tort claims and provides exceptions to immunity in certain circumstances. *See* Ohio Rev. Code § 2744, *et seq*. Sections 2744.02(A) and 2744.03 create statutory tort immunity for governmental entities engaged in governmental functions, as opposed to proprietary functions. *See* Ohio Rev. Code § § 2744.01(C)(2)(c) and (F); 2744.02(A)(1); 2744.03. A school board is immune from liability except as provided by specific exceptions listed in Revised Code Chapter 2744. Ohio Rev. Code § 2744.02(B).

The screening of potential employees, including conducting a background check, is not a proprietary function for purposes of the exception enumerated in R.C. 2744.02(B)(2). *See Bucey*, 2010-Ohio-2262 at ¶ 28 (reversing the trial court's decision to the extent that it failed to dismiss claim of negligence against public school board for failure to screen potential employees, where such failure did not invoke the exception of R.C. 2744.02(B)(2) for negligent performance of acts by employees with respect to proprietary functions). In *Bucey*, a former student alleged the principal of her school acted as a "predator" and pursued an inappropriate relationship and raped her while she was still a student. *Id.* at ¶ 10. The student further alleged the public school board hired the principal despite the principal's criminal history and history of inappropriate

relationships with previous students. *Id.* at ¶ 11. In her suit against the school board, the student alleged that the "screening of potential employees, including the performance of a background check, was a 'propriety function' " for purposes of the exception to immunity pursuant to R.C. 2744.02(B)(2). *Id.* at ¶ 14. For purposes of the school board's motion to dismiss, the court held that even accepting "as true the allegation that school employees were negligent in the screening of [the principal]," the court could not accept as true the allegation that the screening of school employees is a proprietary function. *Id.* R.C. 2744.01(C)(2)(c) "specifically defines as a governmental function the provision of a system of public education" and that "[w]here a function is specifically defined as a governmental function, it cannot be a proprietary function," the court noted. *Id.* The court went on to hold that the screening of potential employees and staffing of a public school is an activity "so fundamental to the provision of a system of public education that it cannot be considered apart from the governmental function." *Id.* at ¶ 16. As such, the student failed to "allege any liability against the [school board] for the negligent performance of its employees with respect to a proprietary function, and [the student] failed to plead facts sufficient to trigger the exception to the political subdivision immunity set forth in R.C. 2744.02(B)(2)." *Id.* at ¶ 19. Plaintiffs' Third Claim fails the proprietary function exception for exactly the same reason.

Further, the Eight District, in applying the three-tier immunity analysis under R.C. 2744.02(B), has held that a claim on a theory of *respondeat superior* does not overcome a political subdivision's immunity. *Moya v. DeClemente*, 8th Dist. No. 96733, 2011-Ohio-5843, ¶ 19. In addition to finding none of the immunity exceptions in R.C. 2744.02(B) apply to negligent hiring, the Eight District has repeatedly held that "in the absence of any allegations that the political subdivision has exercised its discretion in hiring an employee with malicious

purpose, in bad faith, or in a wanton or reckless manner, a claim for negligent hiring and supervision is barred under the statutory defenses for immunity contained in R.C. 2744.03(A)(5)." *Moya*, 2011-Ohio-5843, ¶ 19, citing *Scott v. Dennis*, 8th Dist. No. 94685, 2011-Ohio-12; *see also Daniel*, 2004-Ohio-4632, ¶ 19 (affirming CMSD's Motion for Summary Judgment with respect to plaintiff's claim of negligent retention as the court could not "find that CMSD acted with malicious purpose, in bad faith, or in a wanton or reckless manner" in using its judgment in hiring employee accused of assault).

Plaintiffs' blanket claim of negligence against CMSD Defendants for failing to conduct a background check on Defendant Simpkins does not allege sufficient facts to fall under one of the exceptions in R.C. 2744.02 or to negate the immunity defense contained in R.C. 2744.03. Although Plaintiffs generally allege "agents and employees" of CMSD "acted willfully, wantonly and recklessly in hiring Defendant Simpkins," Plaintiffs' Third Claim specifically alleges CMSD was "negligent in hiring said Defendant [Simpkins]."[3] Plaintiffs' claim for negligent hiring does not fall within one of the immunity exceptions enumerated in R.C. 2744.02(B), nor does it defeat the defense to liability for a political subdivision in exercising its discretion in personnel matters pursuant to R.C. 2744.03(A)(5).

CONCLUSION

As a political subdivision, CMSD Defendants are protected by sovereign immunity against Plaintiffs' claims. Plaintiffs fail to present any facts to support an exception to sovereign immunity under R.C. 2744.02(B), nor do Plaintiffs allege facts sufficient to defeat the defenses to liability under R.C. 2744.03(A)(5). For the foregoing reasons, the CMSD Defendants

[3] The Eight District has made clear that political subdivisions are not liable for the intentional torts of their employees. *Daniel*, 2004-Ohio-4632, ¶ 14. Regardless, because the Complaint only states a claim for negligent hiring, the claim is clearly precluded by the sovereign immunity statute.

respectfully request that the Court grant their Partial Motion to Dismiss the Second and Third Claims of the Complaint, and dismiss those claims with prejudice.

Respectfully submitted,

/s/ Colin R. Jennings

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EXHIBIT A

Bill Analysis

Elizabeth K. Mase *Legislative Service Commission*

Sub. S.B. 106*

124th General Assembly
(As Reported by H. Local Government & Townships)

Sens. Hottinger, Wachtmann, Nein, Johnson

BILL SUMMARY

- Expands the definition of a "governmental function" in the Political Subdivision Sovereign Immunity (PSSI) Law, for purposes of a political subdivision's general immunity from tort liability, to include the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium.

- Expands the definition of a "governmental function" for similar purposes to include the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a "quiet zone" or of a supplementary safety measure at or for such a crossing.

- Expands the motor vehicle operation liability of political subdivisions to include liability for harm caused by negligent operation other than upon the public roads, highways, or streets.

- Makes changes proposed by Am. Sub. H.B. 350 of the 121st General Assembly to (1) the PSSI Law and (2) other laws (primarily pertaining to road-related issues).

- Limits a political subdivision's obligation to defend an employee to acts or omissions that occur while the employee is acting both in good faith and not manifestly outside the scope of employment or official responsibilities.

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* *This analysis was prepared before the report of the House Local Government and Townships Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Makes other changes to the PSSI Law.
- Clarifies that the requirement for school districts and nonpublic schools to have an employee trained in the Heimlich Maneuver present during periods of food service to students applies specifically to subsidized food service programs.

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CONTENT AND OPERATION

Political Subdivision Sovereign Immunity Law changes

General overall operation of the bill

The bill includes as a "governmental function" under the Political Subdivision Sovereign Immunity (PSSI) Law (1) the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium (explained in more detail below) and (2) the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a "quiet zone" or of a supplementary safety measure at or for a public road rail crossing (explained in more detail below).

In addition, the bill makes changes proposed by Am. Sub. H.B. 350 of the 121st General Assembly (the Tort Reform Act) to the PSSI Law (explained generally below). Because the Tort Reform Act was held by the Ohio Supreme Court to be unconstitutional for violation of the one-subject provision of the Ohio Constitution, those proposed changes did not operate. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451. The 124th General

Assembly, in Sub. S.B. 108, repealed the Tort Reform Act, in response to the confusion over the status of the law after *Sheward*. In Sub. S.B. 106, the 124th General Assembly seeks to re-enact the substantive changes to the PSSI Law that were originally proposed by the Tort Reform Act and did not operate because of *Sheward*.

The bill also makes changes to the PSSI Law pertaining to a political subdivision's obligation to provide a defense for an employee in relation to certain acts or omissions, and it expands the existing scope of liability of a political subdivision for employees' negligent operation of motor vehicles to include negligent operation other than upon public roads, highways, or streets (explained in more detail below). Lastly, the bill specifies when civil liability of a political subdivision or an employee of a political subdivision cannot be construed to exist under another section of law, including (among other reasons) because that section provides for a criminal penalty (explained in more detail below).

Background law--general nonliability/liability of political subdivisions

For purposes of R.C. Chapter 2744., the PSSI Law, the functions of political subdivisions are classified as *governmental functions* and *proprietary functions* (see below). Generally, except as specifically provided in statute, a political subdivision *is 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. However, subject to specific statutory defenses and immunities (see below) and to specified limitations on the damages that may be awarded, a political subdivision currently *is liable* in damages in a civil action in the following circumstances (R.C. 2744.02(A) and (B), 2744.03, and 2744.05):

(1) Generally and subject to specified defenses related to police, fire department, and emergency medical service emergency responses, if the injury, death, or loss to person or property is caused by the negligent operation of any motor vehicle by an employee of the political subdivision upon the *public* roads, highways, or streets when the employee is engaged within the scope of the employee's employment and authority (this provision is changed by the bill--see "***Political subdivision's liability for an employee's negligent operation of a motor vehicle***," below);

(2) Generally, if the injury, death, or loss to person or property is caused by the negligent performance of acts by an employee of the political subdivision with respect to *proprietary functions* of the political subdivision;

(3) Generally and subject to a specified defense, if the injury, death, or loss to person or property is caused by the political subdivision's failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivision open, in repair, and free from nuisance (this provision is changed by the bill--see "***Re-enactment of Am. Sub. H.B. 350 provisions***," below);

(4) Generally, if the injury, death, or loss to person or property is caused by the negligence of a political subdivision employee and occurs within or on the grounds of buildings that are used in connection with the performance of a *governmental function*, other than adult or juvenile detention facilities (this provision is changed by the bill--see "***Re-enactment of Am. Sub. H.B. 350 provisions***," below);

(5) If liability is expressly imposed upon the political subdivision by a section of the Revised Code. Liability is not construed to exist under another section of the Revised Code merely because that section imposes a responsibility upon a political subdivision or because of a general authorization in that section that a political subdivision may sue and be sued (this provision is changed by the bill--see "***Re-enactment of Am. Sub. H.B. 350 provisions***," below).

Definitions of "governmental function" and "proprietary function" for PSSI Law

Existing law. For purposes of the PSSI Law, "governmental function" means a function of a political subdivision that is so specified in the Law or that is any of the following (R.C. 2744.01(C)(1)):

(1) A function that is imposed upon the state as an obligation of sovereignty and is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(2) A function that is for the common good of all citizens of the state;

(3) 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 the PSSI Law as a proprietary function.

A "governmental function" includes, but is not limited to, several types of functions or activities that are specified in existing R.C. 2744.01(C)(2). Among the listed governmental functions are the design, construction, reconstruction, renovation, repair, maintenance, and operation of any recreational area or facility, such as any park, playground, or playfield; an indoor recreational facility; a zoo or

zoological park; a bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility; a golf course; a bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skateboarding, or scooter riding is engaged; a rope course or climbing walls; or an all-purpose vehicle facility in which such vehicles are contained, maintained, or operated for recreational activities (R.C. 2744.01(C)(2)(u)). The other examples of "governmental functions" are listed in **COMMENT** 1.

For purposes of the PSSI Law, "proprietary function" means a function of a political subdivision that is so specified in that Law (see **COMMENT** 2 for a list of the specified proprietary functions) or that satisfies both of the following (R.C. 2744.01(G)(1)):

(1) The function is not one that is imposed upon the state as an obligation of sovereignty and performed by a political subdivision voluntarily or pursuant to legislative requirement, is not one that is for the common good of all citizens of the state, and is not one specified as a "governmental function."

(2) 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.

New governmental functions. The bill adds to the specifically designated governmental functions of the PSSI Law (1) the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium and (2) the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a "quiet zone" or of a supplementary safety measure at or for a public road rail crossing. The effect of the bill's expansion of the definition of "governmental function" is to provide that, regarding any injury, death, or loss to person or property that allegedly is caused by any act or omission of a political subdivision or an employee of a political subdivision in connection with either (1) the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium, or (2) the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a "quiet zone" or of a supplementary safety measure at or for a public road rail crossing (see further explanation below), the political subdivision generally is not liable in damages in a civil action arising from those acts or omissions. Similarly, the political subdivision is not liable in damages in a civil action arising from those acts or omissions under the provision of existing law that generally provides for political subdivision liability for harm arising from employees' negligent acts performed with respect to proprietary functions. (R.C. 2744.02.) Thus, generally, the political subdivision will be immune from liability

in damages in a civil action arising from those acts or omissions of an employee. (R.C. 2744.01(C)(2)(u) and (w).)

Regulation of locomotive warning sounds. Current Ohio law requires locomotives to sound a warning as they approach within 1,320 and 1,650 feet of a highway grade crossing, or for some other audible warning system to be activated (secs. 4955.32 and 4955.321--not in the bill). However, neither sound warning requirement applies if it would "interfere with" compliance with a municipal ordinance regulating railroads, locomotives, and locomotive sound warnings (presumably, an ordinance prohibiting warning sounds in certain places or at certain hours of the day--often referred to as "quiet zones") (sec. 4955.32(C)--not in the bill).

Current Ohio law eventually may be preempted by federal regulations that the United States Secretary of Transportation currently is required to issue. 49 U.S.C.A. 20153. These regulations, once issued, must require locomotives to sound warnings at grade crossings unless an exception is made by the Secretary. The Secretary may grant exceptions for categories of grade crossings for which no significant risk is posed by the lack of a locomotive sound warning, for which the requirement is impractical, or for which a satisfactory "supplementary safety measure" is in place. A supplementary safety measure essentially is some means of warning persons of approaching locomotives without the use of a locomotive sound warning. To be considered for an exception from the federal sound warning requirement on the basis of a supplementary safety measure, local governments and railroad operators will have to jointly apply to the Secretary.

Until the federal regulations are finally issued, the extent to which they will preempt Ohio law remains uncertain. It is possible that the federal regulations will render every municipal "quiet zone" unlawful unless the grade crossings in a quiet zone are excepted from the federal locomotive sound warning requirements by the Secretary.

As noted under "***New governmental functions***," above, the bill generally provides immunity from liability to a political subdivision for specified actions pertaining to public road rail crossings in quiet zones. Because it is not certain when or if the Secretary of Transportation will issue locomotive sound warning regulations, the bill addresses these actions for the period before the regulations take effect and for the period after they are in effect. Before the regulations take effect, municipal corporations will have immunity in connection with the specified actions in the same manner they currently have for other governmental functions; after the regulations take effect, municipal corporations and other political subdivisions will have immunity from liability for acts or omissions in connection with the "governmental function" of the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road

rail crossing in a quiet zone or of a supplementary safety measure at or for a public road rail crossing, if, and to the extent that, the crossing is excepted from the federal sound warning requirements by the Secretary (for example, if a supplementary safety measure is in place at a crossing that has been excepted by the Secretary). (Sec. 2744.01(C)(2)(w).)

Political subdivision and employee defenses and immunities

In a civil action brought against a political subdivision or a political subdivision employee to recover damages for injury, death, or loss to 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 (R.C. 2744.03):

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved that gave rise to the claim of liability: (a) was not negligent conduct and was required or authorized by law, or (b) was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the employee's discretion with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the employee's office or position.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense or was found to be a delinquent child and who, at the time of the injury or death, was performing, in specified circumstances, community service work.

(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 paragraph (7) below and in circumstances not covered by that provision or other specified

provisions, 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, or (c) liability is expressly imposed upon the employee by a section of the Revised Code. (This provision is changed by the bill--see "***Re-enactment of Am. Sub. H.B. 350 provisions***," below.)

(7) The political subdivision, and a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of an Ohio court is entitled to any defense or immunity available at common law or established by the Revised Code.

The immunities and defenses of an employee referred to in paragraphs (6) and (7) above do not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in R.C. 2744.02, as described above.

Re-enactment of Am. Sub. H.B. 350 provisions

Most of the provisions explained in this portion of the analysis were originally proposed by Am. Sub. H.B. 350 of the 121st General Assembly, were held to be unconstitutional by the Ohio Supreme Court in *Sheward* for violating the one-subject provision of the Ohio Constitution, and were subsequently repealed by Sub. S.B. 108 of the 124th General Assembly. The provisions relate to political subdivision sovereign immunity, and Sub. S.B. 106 proposes to re-enact them (with some additional modifications as noted) as follows:

- The provision of existing law that political subdivisions are generally 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 is amended to also require that the injury, death, or loss be due to physical defects within or on the grounds of buildings that are used in connection with a governmental function (R.C. 2744.02(B)(4)).

- The provision of existing law that a political subdivision is liable for injury, death, or loss to person or property when "liability" is expressly imposed upon the political subdivision by a section of the Revised Code is amended to provide (1) that the liability must be expressly imposed "civil" liability and (2) that "civil" liability cannot be construed to exist (in addition to existing law's grounds) because the term "shall" is used in a provision of the Revised Code pertaining to a political subdivision or a section of the Revised Code imposes a mandatory duty upon a political subdivision (re-enactment of Am. Sub. H.B.

350 provisions). The bill adds that civil liability cannot be construed to exist because another statute provides for a criminal penalty (this was not proposed in Am. Sub. H.B. 350). (R.C. 2744.02(B)(5).)

- The provision of existing law that confers a qualified immunity from liability upon an employee of a political subdivision is amended (1) to provide that the immunity is forfeited (in addition to existing law's other grounds) if "civil" liability is expressly imposed upon the employee by a statute and (2) to provide that "civil" liability of an employee cannot be construed to exist merely because a responsibility or mandatory duty is imposed upon an employee, because of a general authorization that an employee may sue and be sued, or because the term "shall" is used in a provision pertaining to an employee (re-enactment of Am. Sub. H.B. 350 provisions). The bill adds that civil liability cannot be construed to exist because another statute provides for a criminal penalty (this was not proposed in Am. Sub. H.B. 350). (R.C. 2744.03(A)(6)(c).)

- The statute of limitations for actions brought against a political subdivision under the PSSI Law is made subject to the statute tolling periods of limitations on the basis of minority or unsound mind (R.C. 2744.04).

- The responsibility of a board of county commissioners with respect to guardrails is modified to require a board: (1) to erect and maintain on county roads, where not already done, guardrails on each end of a county bridge, viaduct, or culvert more than five feet high (removes the requirement that the board maintain guardrails on each side of an approach to a county bridge, viaduct, or culvert if the approach or embankment is more than six feet high), and (2) to protect, by guardrails, all embankments with a rise of more than eight feet in height and with a downward slope of greater than 70 degrees, where the embankments have an immediate connection with a county road (replaces the requirement that a board protect by suitable guardrails all perpendicular wash banks more than eight feet in height that have an immediate connection with a public highway other than a state highway) (R.C. 5591.36).

- Repealed is the existing statement that it is sufficient (in order to comply with the existing guardrail requirements) if a board causes to be erected and maintained a good stockproof hedge fence where a guardrail is required, and the requirement that guardrails or hedge fences be erected in a substantial manner, having sufficient strength to protect life and property (R.C. 5591.36).

- A county's liability for all accidents or damages that result from the county's failure to erect and maintain guardrails is changed from a strict liability standard to a negligence standard (R.C. 5591.37).

- The existing requirement that the legislative authority of a municipal corporation keep public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation open, in repair, and free from nuisance is repealed, and a provision is substituted that a municipal corporation's liability or immunity from liability for injury, death, or loss to person or property allegedly caused by a failure to perform the responsibility of having care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation is to be determined under the PSSI Law (R.C. 723.01).

- The liability of a political subdivision for failing to keep public roads, highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the political subdivision open, in repair, and free from nuisance is repealed and replaced with liability for injury, death, or loss to person or property caused by a negligent failure to keep "public roads" (defined to mean public roads, highways, streets, avenues, alleys, and bridges) within the political subdivision in repair and other negligent failure to remove obstructions from such "public roads" (R.C. 2744.01(H), 2744.02(B)(3), and 5511.01).

- The proposed definition of "public road" excludes berms, shoulders, rights-of-way, and certain traffic control devices (R.C. 2744.01(H)).

- An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability is specified as a final order (R.C. 2744.02(C)).

- The existing collateral benefits provisions are amended (1) to require a deduction of benefits from an award against a political subdivision regardless of whether a claimant is under an obligation to pay the benefits back after a recovery and (2) to specify that a claimant whose benefits are deducted from an award is not considered fully compensated and cannot be required to reimburse a subrogated claim for benefits (R.C. 2744.05(B)(1)).

- Repealed is a provision in existing law that provides specific qualified immunity from liability for port authority directors, officers, and employees for actions and omissions in the performance of their duties and provides for limited indemnification of these individuals for liability incurred in the performance of their duties, bringing these individuals under the scope of the immunity and indemnification provisions of the general PSSI Law (R.C. 4582.27).

Political subdivision's liability for an employee's negligent operation of a motor vehicle

As explained above under "***Background law--general nonliability/liability of political subdivisions***," a political subdivision currently is generally liable (subject to specified defenses for police, fire department, and emergency medical services emergency responses) in damages in a civil action if injury, death, or loss to person or property is caused by the negligent operation of any motor vehicle by an employee upon the public roads, highways, or streets when the employee is engaged within the scope of the employee's employment and authority. The bill removes the requirement for the negligent operation of a motor vehicle to occur on a public road, highway, or street, thereby expanding the scope of a political subdivision's liability to include negligent operation of a motor vehicle occurring other than upon a public road, highway, or street (sec. 2744.02(B)(1)).

Defense of an employee by a political subdivision

Under existing law, a political subdivision is required to provide for the defense of an employee in any federal or state court civil action or proceeding to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission *occurred or is alleged to have occurred* while the employee was acting in good faith and not manifestly outside the scope of employment or official responsibilities (sec. 2744.07(A)). If a political subdivision refuses to provide an employee with such a defense, the employee may file in the court of common pleas an action seeking a determination as to the appropriateness of that refusal (sec. 2744.07(C)).

The bill removes this qualified requirement for the provision of a defense for an *alleged* occurrence of an act or omission by an employee seeking the defense, and clarifies that an employee's act or omission must have occurred while the employee was acting "both" in good faith and not manifestly outside the scope of employment or official responsibilities. In addition, the bill directs a court of common pleas, in determining the appropriateness of a political subdivision's refusal to provide a defense to an employee, to determine a refusal to be appropriate unless there was an abuse of discretion on the part of the political subdivision. (Sec. 2744.07(A) and (C).)

Presence of employee trained in Heimlich Maneuver during food service at primary and secondary schools

Current law, not changed by the bill, authorizes each school district board to provide and pay certain operating costs for food services for the students enrolled in the district or provide food services, at cost, to residents of the district

who are at least 60 years old. In addition, both school districts and nonpublic schools may receive federal moneys to support school lunches, school breakfasts, milk services for children, food service equipment assistance, commodity distribution, and other special food service programs.[1]

Current law also requires any school district or nonpublic school that operates a food service program to require at least one employee who has been trained in methods to prevent choking and who has demonstrated an ability to perform the Heimlich Maneuver to be present while students are served food. The bill clarifies that this requirement applies only to periods when food is served under a food service program and not to other times that food is served to students.[2] (R.C. 3313.815(A).)

Application

The bill states that its PSSI Law and Heimlich Maneuver provisions apply only to causes of action that accrue on or after its effective date. Any cause of action that accrues before the bill's effective date is governed by the law in effect when the cause of action accrued. (Section 3.)

COMMENT

1. Examples of specified governmental functions in the PSSI Law are: police, fire, emergency medical, ambulance, and rescue services or protection; power to preserve the peace, to prevent and suppress riots, disturbances, and disorderly assemblages, to protect persons and property, and to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances; provision of a system of public education and a free public library system; regulation of the use of and the maintenance and repair of roads, highways, streets,

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[1] *R.C. 3313.81 and 3313.813 (neither section in the bill) and 42 U.S.C. 1751 et seq. and 42 U.S.C. 1771 et seq. The federal school food service programs pay moneys to the state, which then passes those moneys on to school districts and nonpublic schools based on the need of children enrolled in the schools. The state provides some state moneys to match these federal grants.*

[2] *Current law, not changed by the bill provides any nonpublic school or an employee of a nonpublic school a qualified immunity from civil liability for injury, death, or loss to person or property allegedly caused by an act or omission of the nonpublic school or its employee in the performance of the duties imposed by the requirement to have an employee trained in the Heimlich Maneuver present during periods of food service (R.C. 3313.815(B)). Any act or omission done with malicious purpose, in bad faith, or in a wanton or reckless manner falls outside the scope of this qualified immunity. This immunity is similar to that provided to school district employees under the PSSI Law.*

avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds; judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions; construction, reconstruction, repair, renovation, maintenance, and operation of buildings used in connection with the performance of a governmental function; design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or other detention facilities; enforcement or nonperformance of any law; regulation of traffic and erection or nonerection of traffic signs, signals, or control devices; collection and disposal of solid wastes; provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system; operation of a job and family services department or agency, a health board, department, or agency, mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies; provision or nonprovision of inspection services of all types; urban renewal projects and the elimination of slum conditions; flood control measures; design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery; issuance of certain revenue obligations; public defender services by a county or joint county public defender's office; and any function that the General Assembly mandates a political subdivision to perform (R.C. 2744.01(C)(2)(a) to (t), (v), and (x)).

2. The specified proprietary functions under the PSSI Law are: the operation of a hospital; the design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery; the establishment, maintenance, and operation of a utility, including a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system; the maintenance, destruction, operation, and upkeep of a sewer system; and the operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility (R.C. 2744.01(G)(2)(a) to (e)).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-08-01	p. 351
Reported, S. State & Local Gov't & Veterans Affairs	10-25-01	p. 1009
Passed Senate (22-8)	11-14-01	pp. 1122-1124
Reported, H. Local Gov't and Townships	---	---

S0106-RH.124/jc

EXHIBIT C

NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

BRIEF
July 27, 2017 16:20

By: PAUL V. WOLF 0038810

Confirmation Nbr. 1130949

MAKAYLA MOLLOY, ET AL.

CV 17 881716

vs.

Judge: JANET R. BURNSIDE

CLEVELAND METROPOLITAN SCHOOL DISTRICT, ET AL.

Pages Filed: 11

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MAKAYLA MOLLOY, ET AL.,	)	CASE NO. CV 17 881716
	)	
Plaintiffs,	)	JUDGE JANET R. BURNSIDE
	)	
vs.	)	
	)	
CLEVELAND METROPOLITAN SCHOOL DISTRICT, ET AL.,	)	**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT CLEVELAND METROPOLITAN SCHOOL DISTRICT'S PARTIAL MOTION TO DISMISS**
	)	
Defendants.	)	

Now come the Plaintiffs, by and through undersigned counsel, and respectfully move this Honorable Court for an Order overruling Defendant, Cleveland Metropolitan School District's Motion for Partial Dismissal. The rationale in support hereof revolves around the fact that when construing the allegations contained in Plaintiffs' Second Claim in the light most favorable to the Plaintiffs, it is abundantly clear that they can prove a set of facts that would entitle them to relief on that particular claim.

The rationale in support hereof is more fully set forth in the Memorandum of Law which is attached hereto.

Respectfully submitted,

/s/ Paul V. Wolf

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CERTIFICATE OF SERVICE

The foregoing has been served upon the following through the Court's electronic filing system this 28th day of July, 2017:

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MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs generally agree with both the Standard of Review and Statement of Facts as set forth in Defendants' Motion for Partial Dismissal. However, there is one blemish in these portions of moving Defendants' brief that need to be addressed. With regard to the Standard of Review, it should be noted that moving Defendant has since filed an Answer to Plaintiffs' Complaint. Accordingly, the Defendants' motion is more appropriately styled as a Civil Rule 12(C) Motion for Judgment on the Pleadings. Ohio Rule of Civil Procedure 12(C) provides as follows:

> "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. Pursuant to Civil Rule 12(C), dismissal is only appropriate where a court (1) construes the material allegations in the Complaint, with all reasonable inferences to be drawn therefrom, in favor of the non-moving 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."

In essence, the standard of review or a Civil Rule 12(C) Motion for Judgment on the Pleadings is the same as that for a Motion to Dismiss pursuant to Ohio Civil Rule 12(B)(6).

These distinctions having been made, Plaintiffs will now turn to the substantive argument made by the moving Defendants.

II LAW AND ARGUMENT

A. The Plaintiffs remain capable of proving a set of facts that would render moving Defendants liable under their second claim because any governmental immunity with which moving Defendants were originally cloaked under Ohio Revised Code Section 2744.02(A)(1) was removed by the exception contained in Ohio Revised Code Section 2744.02(B)(5) because another section of the Ohio Revised Code expressly imposes civil liability upon this political subdivision.

Ohio Revised Code Chapter 2744 grants a general cloak of immunity upon political subdivisions such as moving Defendants.[1] In Cater v. Cleveland, 83 Ohio St. 3d 24, 28 (1998), the Supreme Court of Ohio noted that the Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744, sets forth a three tiered analysis for determining whether a political subdivision is immune from liability for injury or loss to property. Hortman v. Miamisburg, 110 Ohio St. 3d 194 (2006). Accordingly, R.C. 2744.02(A)(1) states:

> 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 persons 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.

Because it is conceded that moving defendants are political subdivisions that were engaged in the governmental function of providing a system of education, Plaintiffs concede that moving Defendants are initially cloaked with the immunity granted by Ohio Revised Code Section 2744.02(A)(1).

However, Section B of Ohio Revised Code 2744 contains five exceptions. Plaintiffs herein do not contend that any of the first four exceptions to the general grant of immunity apply. However, it is with great clarity that the exception contained in Ohio Revised Code Section 2744.02(B)(5) applies so as to remove the general cloak of immunity. Ohio Revised Code Section 2744.02(B)(5) is as follows:

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[1] Plaintiffs concede that Defendant Metropolitan School District and the Cleveland Metropolitan School District Board of Education are political subdivisions within the meaning of Ohio Revised Code Section 2744.01.

> 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, including but not limited to, Sections 2743.02 and 5591.37 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.

Plaintiffs allege in their second claim that Ohio Revised Code Section 2151.421 applies in the case at bar and expressly provides civil liability upon the Defendants. Accordingly, in pertinent part, Ohio Revised Code Section 2151.421 is as follows:

> (A)(1)(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under 18 years of age or a mentally retarded, developmentally disabled, or a physically impaired child under 21 years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or person specified in this division. ..

Subsection (A)(1)(b) describes the individuals who are under the mandatory duty while acting in an official or professional capacity and know, or have reasonable cause to suspect such abuse. These individuals, in pertinent part, are as follows:

> Division (A)(1)(a) of this section applies to any person who is...a school teacher, school employee; school authority....

Based upon the above law, Plaintiffs' second claim invoked a cause of action under the Supreme Court of Ohio's decision in Yates v. Mansfield Board of Education, 102 Ohio St. 3d 2005 (2003). In Yates, the Supreme Court of Ohio held that Ohio Revised Code Section 2151.421 expressly authorized a civil action to be filed against a

school district and/or school board of education. Indeed, at paragraph 18 of the opinion, the Supreme Court of Ohio held as follows:

> Within the meaning of R.C. 2744.02(B)(5)...R.C. 2151.421 expressly imposes liability for failure to perform the duty to report known or suspected child abuse.

The holding in Yates was based upon another Supreme Court decision which was decided just two years earlier and also dealt with the issue of whether Ohio Revised Code Section 2151.421 was an applicable statute to satisfy the exception to sovereign immunity under Ohio Revised Code Section 2744.02(B)(5). Campbell v. Burton, 92 Ohio St. 3d 336 (2001). In Campbell, the Supreme Court was asked to decide whether R.C. 2151.421 expressly imposed liability on political subdivisions and their employees for purposes of the immunity exception in R.C. 2744.02(B)(5). In that case, the parents of Amber Campbell, an eighth grade student at Baker Jr. High, brought suit on behalf of their client daughter claiming that the Board of Education of Fairborn City Schools and certain school employees had violated R.C. 2151.421 when they failed to report Amber's allegations that she was sexually abused. In determining that the Defendants were not entitled to immunity as respectively granted to political subdivisions and their employees under R.C. 2744.02(A)(1) and 2744.03(A)(6), the Supreme Court held as follows:

> (1) Within the meaning of R.C. 2744.02(B)(5)...R.C. 2151.421 expressly imposes liability for failure to perform the duty to report known or suspected child abuse;
> (2) Pursuant to R.C. 2744.02(B)(5), a political subdivision may be held liable for failure to perform a duty expressly imposed by R.C. 2151.421.

Campbell, supra. at para. 1 and 2 of the syllabus.

Importantly enough, at the time that both Campbell and Yates were decided by the Supreme Court of Ohio, the version of Ohio Revised Code Section 2744.02(B)(5) in effect provided in pertinent part as follows:

> A political subdivision is liable for injury...when liability is expressly imposed upon the political subdivision by a section of the Revised Code.[2]

However, Defendant makes the argument that subsequent to the Supreme Court of Ohio decisions in Campbell and Yates that he language contained in Ohio Revised Code Section 2744.02(B)(5), the statutory exception to the blanket grant of immunity, was amended to include slightly different language. Indeed, moving Defendants go on at great lengths explaining this change in wording. Relevant portions of the brief of moving Defendants are as follows:

> In its current form, R.C. 2744.02(B)(5) has been amended to create an exception against claims based on *civil liability* that is expressly imposed by statute on the political subdivision. (Brief of Defendants at page 8-9.)

The revised language of current R.C. 2744.02(B)(5) as referred to by moving Defendants is as follows:

> A political subdivision is liable for injury...when civil liability is expressly imposed on 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 and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

[2] This language will become important infra when dealing with the second prong of moving Defendant's argument.

From this language the moving Defendants make the following argument in an attempt to render themselves immune from Plaintiffs' second claim:

> R.C. 2151.421 does not specifically impose liability on CMSD, a political subdivision, and, therefore, CMSD Defendants are protected under the political subdivision tort liability act. (Defendants' brief at pp. 9-10).

However, the argument made by Defendants that former R.C. 2744.02(B)(5) did not require *civil liability* at the time of Campbell and Yates is disingenuous, Defendants have either purposely omitted or simply failed to recognize that the statute upon which Plaintiffs rely, Ohio Revised Code Sections 2151.421, et seq., has also been amended. This amendment, which occurred in 2009, allows current Ohio Revised Code Section2151.421(M) to read, in pertinent part, as follows:

> Whoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been subject of the report that was not made.

Accordingly, the current version of Ohio Revised Code Section 2151.421(M), which was in effect in August and September of 2016 when the events herein occurred, directly provided for *civil liability*. This in large measure destroys the entire theory upon which moving Defendants have based their argument.

However, there is a second prong to moving Defendants' argument as it relates to Plaintiffs' second claim. Not only do moving Defendants argue that Ohio Revised Code Section 2151.421 fails to provide for express civil liability, which of course it has since 2009, they also argue that the liability is not expressly imposed upon the school district or the Board of Education. The only authority to which moving Defendants can cite is that of the Fifth District Court of Appeals in the 2010 Tuscawaras County case

entitled Thompson v. Buckeye Joint Vocational, 216-Ohio-2804 (2016). The problem with this lone and rogue Court of Appeals decision is that it entirely fails to acknowledge the existence of the Supreme Court of Ohio decisions in Campbell and Yates. Indeed, both Campbell and Yates imposed liability upon the school district and school district Board of Education. It is important to note that the language upon which moving Defendants rely that is contained within Ohio Revised Code 2744.02(B)(5) that the expressly imposed liability be placed upon the political subdivision is exactly the same language that was contained in Ohio Revised Code Section 2744.02(B)(5) when both Campbell and Yates were decided by the Supreme Court of Ohio. The Supreme Court of Ohio has already held that Ohio Revised Code Section 2744.02(B)(5) expressly imposed liability upon the political subdivision when that political subdivision is a school district or a school district Board of Education. These are the precise holdings of both Campbell and Yates, supra.

There has been no change in the usage of the word subdivision prior to the language requiring express liability or civil liability that immediately proceeds the word subdivision regardless of which version of Ohio Revised Code Section 2744.02(B)(5) is being invoked.

Indeed, it is ironic that even after the language of Ohio Revised Code Section 2744.02(B)(5) had been amended to require "civil liability", that the Supreme Court of Ohio once again impliedly held and had no problem with a school district losing its cloak of immunity under Ohio Revised Code Chapter 2744 as a result of the duty to report required by Ohio Revised Code Section 2151.421. In Kraynak v. Youngstown City

School District Board of Education, the Supreme Court of Ohio held that under the former version of Ohio Revised Code Section 2151.421 that a subjective standard was required with regard to the knowledge of the school teacher or school authority in order to prove a violation of the reporting requirement. Kraynak, supra., at syllabus. Judge Lumberg Stratton's opinion recognized that a later amendment to Ohio Revised Code Section 2151.421 removed the subjective standard and replaced it with a standard that was objective. Importantly, there existed no issue as to whether the school board was entitled to immunity as a "political subdivision" under Ohio Revised Code Section 2744.02(B)(5). Simply stated, it is settled law that school districts and school boards can be liable under Ohio Revised Code Section 2151.421 for failure to report abuse. As agreed by all parties herein, school districts and school Board of Educations are "political subdivisions". This was known by the Supreme Court of Ohio at the time of all three of its decisions.

It seems, that not only do moving Defendants fail to inform this Court that the applicable version of Ohio Revised Code Section 2151.421(M) expressly imposes civil liability, they also desire that this Court expressly overrule a continuous line of three Supreme Court of Ohio cases interpreting the same language of Ohio Revised Code Section 2744.02(B)(5).

Obviously, Plaintiffs have alleged sufficient facts in their second claim that sets forth a cause of action that would, if proven, entitle them to relief.

III. CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court enter an Order overruling Defendants' Motion for Partial Dismissal as it relates to Plaintiffs' Second Claim for Relief.

Respectfully submitted,

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