SUPREME COURT OF OHIO

A.J.R., et al.	**:**	**No. 2019-1355**
Plaintiffs-Appellees,	**:**	
vs.	**:**	***On Appeal from the Sixth Appellate District, No. L-2018-1004***
BOARD OF EDUCATION OF TOLEDO CITY SCHOOL DISTRICT, et al.,	**:**	
Defendants-Appellants.		

MERIT BRIEF OF *AMICI CURIAE* BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, OHIO ASSOCIATION FOR SCHOOL BUSINESS OFFICIALS, OHIO SCHOOL BOARDS ASSOCIATION, AND TOLEDO ASSOCIATION OF ADMINISTRATIVE PERSONNEL IN SUPPORT OF DEFENDANTS-APPELLANTS' POSITION

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I. STATEMENT OF FACTS

A. Case-Specific Statement of Facts

The *Amici Curiae* adopt the case-specific Statement of Facts set forth in Appellants' Merit Brief.

B. Statement of Interest of *Amici Curiae*

The Buckeye Association of School Administrators (BASA) is a statewide organization representing over 95% of school district superintendents in Ohio. BASA is a nonprofit 501(c)(6) corporation dedicated to assisting its members to more effectively serve the needs of school administrators and their school districts. BASA provides extensive informational support, advocacy, and professional development in an effort to support its professional practice.

The Ohio Association of School Business Officials (OASBO) is a statewide organization representing over 1,200 school business officials. OASBO is a nonprofit 501(c)(6) corporation dedicated to assisting its members to more effectively serve the needs of Ohio's Boards of Education and school district administration. OASBO provides extensive informational support, advocacy, professional development, business services, and search services for school business officials.

The Ohio School Boards Association (OSBA) is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter and requires that its elected school board members remain involved and accountable for the operation of their local school districts. Nearly 100% of the 713 district boards in all of the city, local exempted village, career technical school districts, and educational service center governing boards through the State of Ohio are members of the OSBA,

which provides extensive informational support, legislative advocacy and consulting activities, as well as policy service and analysis.

The Toledo Association of Administrative Personnel (TAAP) is a labor union representing principals, assistants, deans, counselors, psychologists, and other administrators within the Toledo Public Schools.

These organizations enhance Ohio's public school districts by helping shape a legislative and regulatory environment conducive to student learning. It is vital to the governing bodies of public school districts and their administrators that legal regulations impacting the daily operations of school districts are as clear as possible. When courts stray from established law or apply established rules incorrectly, they create uncertainty for school boards and their employees. That uncertainty is bad for Ohio public schools, for the employees who administer, teach and serve in those schools, and, ultimately, for the children who attend those schools.

II. LAW & ARGUMENT

A. The Sixth Appellate District's decision threatens the fiscal integrity of Ohio's public school districts.

Ohio's Political Subdivision Tort Liability Act, set forth at R.C. Chapter 2744, has been in place for more than twenty-five years and confers broad immunity on the state's political subdivisions, their departments and agencies, and their employees. *See, e.g., Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, ¶¶ 8–11. The General Assembly enacted the statute in response to the Supreme Court of Ohio's abolishment of the common-law doctrine of sovereign immunity for municipal corporations and counties. *See Haverlack v. Portage Homes,* 2 Ohio St.3d 26 (1982) (municipal corporations); *Zents v. Bd. of Comm'rs.*, 9 Ohio St.3d 204 (1984) (counties).

"The manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d

450, 453 (1994). As the legislature noted in passing the Act, "the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services to their residents." Am.Sub.H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733. The statute seeks to provide public employees with immunity from the burdens associated with litigation absent unusual circumstances. *See* R.C. 2744.03(A)(6). The Supreme Court "bear[s] this legislative purpose in mind as [it] consider[s] and appl[ies] the provisions of R.C. Chapter 2744." *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, ¶ 10.

Here, the Sixth Appellate District's decision strays from well-established Ohio case law governing the grant of immunity to public school employees. In doing so, it threatens the fiscal integrity of Ohio's public school districts and abandons the manifest statutory purpose of Ohio's Political Subdivision Tort Liability Act. The decision eschews the statutory standard for abrogating a public school employee's immunity, namely that the employee must act in a malicious, wanton, or reckless manner to fall outside the scope of the immunity statute. The Sixth Appellate District instead improperly imposes a much lower standard to abrogate that immunity, which appears to make school employees either (1) strictly liable for any injury resulting from a student-on-student interaction, or (2) at a minimum, liable for any negligence associated with supervising students.

Nearly 1.8 million students were enrolled in Ohio public school districts during the 2017–18 school year. Ohio Department of Education, Enrollment Data[1]. Traditionally, and in large part because of the statutory immunities available to schools and their employees, issues concerning

[1] Data available at: http://education.ohio.gov/Topics/Data/Frequently-Requested-Data/Enrollment-Data

student supervision and discipline resulting from student-on-student interactions have been managed by the school districts themselves, within the statutory framework established by the Ohio General Assembly. The Sixth Appellate District's departure from well-established case law, however, will open the floodgates for legal challenges concerning any manner of issues pertaining to student supervision in the context of student-on-student interactions. This increase in litigation will divert funds from educating Ohio's public school students and reroute them to defending against those legal actions.

It is anticipated that the erosion of immunities available to public school employees, including teachers, will also negatively affect the pool of individuals willing to serve in those capacities. Ohio has already experienced a recent shortage of teachers in Arts, English / Language Arts, Foreign Languages, Mathematics, Science, School Psychologist, Social Studies, Special Education, Speech / Language Pathology, and TESOL (Teaching English to Speakers of Other Languages). See U.S. Department of Education, Office of Postsecondary Education, 2017 Teacher Shortage Areas Nationwide Listing Comprehensive Compendium (May 2017)[2], pp. 140–42. The imposition of personal liability against Ohio's public school employees based on the unfeasibility of perfectly supervising students and/or anticipating and preventing every negative aspect of student-to-student interaction will serve only to make a challenging job an almost impossible one and concomitantly decrease the number of people willing to undertake it.

B. The Sixth Appellate District's decision departs from established Ohio case law concerning political subdivision immunity, and imposes a negligence and/or strict liability standard upon school employees tasked with supervising students.

Sovereign immunity for political subdivisions extends to employees of those subdivisions. Revised Code 2744.03(A)(6) provides that an employee is personally immune from liability unless

[2] The report is available at https://www2.ed.gov/about/offices/list/ope/pol/ateachershortageareasreport2017-18.pdf

"(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) Civil liability is expressly imposed upon the employee by a section of the Revised Code." For these purposes, allegations of negligence are insufficient to overcome the immunity granted to an employee of a political subdivision who acts within his or her official duties. *Lambert*, supra, at ¶ 10. Rather, Ohio courts have recognized that "the standard for demonstrating [malice, bad faith, and wanton and reckless misconduct] is high." *See Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, ¶ 23.

"**Malice**" is characterized by "hatred, ill will or a spirit of revenge." *Preston v. Murty*, 32 Ohio St.3d 334, 336 (1987). For purposes of Ohio's immunity statute, malice "can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified." *Caruso v. State*, 136 Ohio App.3d 616, 620 (2000).

"**Bad faith**" connotes a "dishonest purpose" or "conscious wrongdoing." *Canfora v. Coiro*, 11th Dist. Lake No. 2006-L-105, 2007-Ohio-2314, ¶72. Bad faith is defined by a "dishonest purpose, moral obliquity, conscious wrongdoing, or breach of a known duty through some ulterior motive or ill will." *Lindsey v. Summit Cty. Children Servs. Bd.*, 9th Dist. Summit No. C.A. 24352, 2009-Ohio-2457, ¶16.

"Wanton" misconduct is the *complete* failure to exercise *any care whatsoever*. *Hawkins v. Ivy*, 50 Ohio St.2d 114, 117–18 (1977); *see Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356 (1994). "Wanton misconduct is the failure to exercise any care toward those to whom a

duty of care is owed in circumstances in which there is great probability that harm will result." *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711 ¶ 13.

"**Recklessness**" is a "*perverse* disregard of a known risk where the actor is conscious that his conduct will probably result in injury." *Mohat v. Horvath*, 11th Dist. Lake No. 2013-L-009, 2013-Ohio-4290, ¶21 (emphasis added); *see Anderson*, at paragraph four of the syllabus (reckless conduct is "substantially greater than negligent conduct"). Recklessness is substantially greater than mere negligence in that the person "must be conscious that his [or her] conduct will in all probability result in injury." *Fabrey* at 356.

"Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk." *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, ¶ 73 (emphasis added). Given this high standard, Ohio courts consistently hold that school employees are <u>not</u> reckless for failing to perfectly supervise students. *See, e.g., Aratari v. Leetonia Exempt Village School Dist.*, 7th Dist. Columbiana No. 06 CO 11, 2007-Ohio-1567 (school district was not reckless where a student with some behavioral problems assaulted a student without provocation); *Marcum v. Talawanda City Schools*, 108 Ohio App.3d 412 (12th Dist.1996) (teacher was immune from liability where a student was left alone and assaulted another student); *Williams v. Columbus Bd. of Edn.*, 82 Ohio App.3d 18 (10th Dist.1992) (school was entitled to statutory immunity for state torts where school officials could not have anticipated that students with history of fighting would sexually assault a female student); *Doe v. Big Walnut Local School Dist. Bd. of Edn.*, 837 F.Supp. 2d 742, 757–58 (S.D.Ohio 2011) (defendants did not act with malice, bad faith, or wanton and recklessness where the school principal investigated incidents of bullying and devised a safety plan).

Likewise, Ohio courts have recognized that—while an alternative plan of supervision may have ultimately proven more effective—an imperfect plan to supervise students does not constitute bad faith, malice, or recklessness:

> Courts have not required schools to take perfect action to remedy [student misconduct] to avoid claims related to gross negligence, . . . but that they take some precautions or steps to recognize and address the issue. Both [school employee] individuals reacted to claims of student misconduct with a plan designed to address the problem, and they cannot be denied statutory immunity simply because the plan failed to protect Minor Doe from unanticipated consequences. There is no basis for withholding statutory immunity from these defendants.

Doe v. Jackson Local School Dist. Bd. of Edn., N.D.Ohio No. 5:17-cv-1931, 2018 U.S. Dist. LEXIS 211131, at *49–50 (Dec. 14, 2018) (internal quotations and citations omitted). Indeed, teachers and coaches, as employees of a political subdivision, have "wide discretion under R.C. 2744.03(A)(5) to determine what level of supervision is necessary to ensure the safety of the children in" their care. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, ¶ 20 (emphasis added).

Because the standard for "recklessness" is so high, summary judgment is appropriate "where the individual's conduct does not demonstrate a **disposition to perversity**." *O'Toole*, at ¶ 75 (emphasis added). In other words, "summary judgment is appropriate in instances where one's actions show that he did not intend to cause any harm, did not breach a known duty through ulterior motive or ill will, and did not have dishonest purpose." *Waters v. Perkins Local School Dist. Bd. of Edn.*, N.D.Ohio No. 3:12 CV 732, 2014 U.S. Dist. LEXIS 43660, at *74 (Jan. 31, 2014) (quoting *Shadoan v. Summit Cnty. Children Servs. Bd.*, 9th Dist. Summit No. 21486, 2003-Ohio-5775, ¶14).

Here, the record is devoid of a "disposition of perversity," without which the public school employees are entitled to statutory immunity. Likewise, there is no evidence that the named public

school employees intended to cause harm, acted with ulterior motive or ill will, or had a dishonest purpose. At worst, the public school employees devised and executed a plan to properly supervise and protect students, but that plan ultimately proved imperfect. Ohio courts have long recognized that an imperfect plan of student supervision does not abrogate immunity for the public school employees involved in the supervision.

Rather than properly granting immunity to the school employees, the Sixth Appellate District departs from Ohio's statutory standard for abrogating a public school employee's immunity, and—in its place—seeks to make public school employees either: (1) strictly liable for any injury resulting from a student-on-student interaction; or (2) at a minimum, liable for any negligence associated with supervising students.

C. The Sixth Appellate District's decision will result in uncertainty in school districts and other public employers concerning political subdivision immunity.

The Sixth Appellate District's decision will breed uncertainty concerning the proper standard governing political subdivision employee immunity. Not only does the decision depart from long-standing law concerning this issue, but the appellate court also fails to present a cogent explanation for its decision.

The Sixth Appellate District rendered the opinion 2-to-1, with the two judges in the majority providing different reasoning for the result. *See Decision and Journal Entry*, pp. 16–17, ¶ 48 (Hensal, J., Concurring in Judgment Only); *id.*, pp. 17–22, ¶¶ 49–61 (Schafer, J., Dissenting). The "majority" decision holds there is a genuine issue of material fact as to whether the school employees were reckless by failing to prevent the incident because there are allegations that the students involved in the incident had previously been involved in teasing and, according to the offended student's parents', "pushing in the bathroom line." *Id.*, pp. 12–13, ¶¶ 40–41. The

majority opinion states that "it might seem ***reasonable*** to attempt to keep the two children separate." *Id.*, pp. 13–14, ¶¶ 41–42 (emphasis added).

A concurring opinion agrees with the majority's conclusion, but not its reasoning. *Id.*, pp. 16–17, ¶ 48 (Hensal, J., concurring). The concurring opinion holds that the majority had failed to sufficiently "focus on the burden-shifting framework under the immunity statute." *Id.* The concurring opinion states that the proper issue is whether Plaintiffs "set forth sufficient facts to rebut the presumption of immunity under Section 2744.03(A)(6)." *Id.* Despite rejecting the majority's reasoning, the concurring opinion fails to set forth any facts in the record that constitute "recklessness" for the purpose of abrogating the school employees' immunity. *See id.*

Only the dissent follows Ohio precedent on the issue presented: "[Defendant] cannot reasonably be expected to omnisciently observe every action and interaction of each child in her classroom. Any failure on her part to observe or prevent the alleged [incident] could, at best, only plausibly amount to mere negligence. This certainly does not meet the 'substantially greater' threshold to constitute reckless conduct." *Id.*, ¶ 59 (Schafer, J., Dissenting) (quoting *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, at paragraph four of the syllabus). The dissent properly notes that school employees are not required to take "'perfect action to remedy bullying issues,'" but must only "take some precautions or steps to recognize and address the issue. *Id.*, ¶ 56 (quoting *Vidovic v. Hoynes*, 11th Dist. No. 2014-L-054, 2015-Ohio-712, ¶ 58). Indeed, the dissent properly notes that "[a]side from including the words 'recklessness' and 'reckless' in the caption of their claim of negligence, [Plaintiffs have] not adequately alleged reckless conduct on the part of any one of the three individual school employees." *Id.*, ¶ 50 (citations omitted).

As such, it is appropriate for this Court to reverse the "majority" decision and reaffirm the proper standard governing statutory immunity available to public school employees.

III. CONCLUSION

For the reasons set forth herein, *Amici Curiae* request this Court (1) reverse the Sixth Appellate District's decision, and (2) grant statutory immunity to Appellants pursuant to Ohio R.C. Chapter 2744.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served this 29th day of January, 2020, via electronic and/or regular mail, upon:

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Judge Jennings

STATE OF OHIO)
)ss:
COUNTY OF LUCAS)

IN THE COURT OF APPEALS
SIXTH JUDICIAL DISTRICT

A. J. R., et al.

Appellants

v.

BOARD OF EDUCATION OF TOLEDO CITY SCHOOL DISTRICT, et al.

Appellees

C.A. No. L-18-1004

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LUCAS, OHIO CASE No. CI-2016-2001

DECISION AND JOURNAL ENTRY

Dated: August 19, 2019

CARR, Presiding Judge.

{¶1} Plaintiffs-Appellants A.R., a minor, by and through her parent, A.J.R. ("Father, and C.R. ("Mother") appeal from the judgments of the Lucas County Court of Common Pleas. This Court reverses and remands the matter for proceedings consistent with this decision.

I.

{¶2} In the fall of 2015, A.R., who was four years old at the time, was admitted to DeVeaux Elementary School as an early entrant kindergartener. She would turn five years old in late November 2015. While A.R. was placed in Defendant-Appellee Amanda Vail Lute's class, Ms. Lute was on leave from the first day of school until early November 2015 and so A.R. was initially taught by a substitute.

{¶3} According to Mother, A.R. was consistently bullied by S., another kindergarten student, from August 2015 through March 2016. The bullying consisted of name calling,

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including calling A.R. "baby" and teasing her for being four years old. In addition, the bullying included pushing in the bathroom line and leaving A.R. out of play group at school.

{¶4} Mother discussed the early bullying with the substitute teacher. When the bullying continued, in late October 2015, Father called the assistant principal, Defendant-Appellee Cynthia Skaff, to report his concerns. Father asked Ms. Skaff to address S.'s behavior because A.R. was exhibiting signs of mental anguish and emotional injury. Father indicated he planned to withdraw A.R. due to S.'s harassment but Ms. Skaff reassured Father that A.R. would not be subject to bullying anymore.

{¶5} Mother and Father maintained that they notified the named Defendants, Ms. Lute, Ms. Skaff, and Defendant-Appellee Ralph Schade, the principal, on at least four occasions of the specific bullying and harassment of A.R. by S. Mother and Father also reported that they were assured on numerous occasions that A.R. was doing well.

{¶6} On March 3, 2016, while the two were sitting at the same table in class, S. struck A.R.'s face with a sharpened pencil. A.R. sustained a puncture wound and a scrape near her cheek. The injuries did not require emergency medical treatment. According to Ms. Lute, she did not observe the incident, did not hear screaming or crying, and no students reported the incident to her.

{¶7} While Mother and Father noticed the injury that day, A.R. asserted it happened in gym. Only later did A.R. tell Father that S. had caused the injury. On March 7, 2016, Mother and Father began the process of withdrawing A.R. from the school.

{¶8} A.R., by and through Father, filed a complaint against Ms. Lute, Ms. Skaff, Mr. Schade, and Toledo Public Schools. The counts included recklessness or reckless negligence, neglect of a child of tender years, endangering a child of tender years, vicarious liability with

regard to a tortious act, and promissory estoppel. After filing an answer, the Defendants moved for judgment on the pleadings. The trial court granted the motion as to all claims and Defendants except for the claim of recklessness or recklessness negligence against Ms. Lute, Ms. Skaff, and Mr. Schade.

{¶9} In October 2016, A.R. filed a motion in limine and/or for declaratory judgment arguing that Ms. Lute, Ms. Skaff, or Mr. Schade might try to depose her and requesting that the trial court deny any such attempt to depose her or offer her testimony at trial. The motion further asserted that A.R. should be subject to voir dire in order to determine her competence to testify at trial. The trial court denied the motion as premature, noting that Ms. Lute, Ms. Skaff, and Mr. Schade had not opposed the motion, noticed A.R.'s deposition, or identified her as a trial witness. The trial court noted that, if that were to change, A.R. could renew her motion. A.R. never raised the issue again in the trial court.

{¶10} In March 2017, an amended complaint was filed against Ms. Lute, Ms. Skaff, and Mr. Schade alleging a single count of recklessness or reckless negligence. In addition, Mother and Father were added as parties and a derivative claim for loss of consortium was raised. In their answer, Ms. Lute, Ms. Skaff, and Mr. Schade raised the affirmative defense of immunity pursuant to Chapter 2744 of the Ohio Revised Code.

{¶11} Ms. Lute, Ms. Skaff, and Mr. Schade moved for summary judgment "as to any all remaining claims filed against them[.]" Ms. Lute, Ms. Skaff, and Mr. Schade argued that they were immune from the recklessness claim brought against them based upon R.C. 2744.03(A)(6), that A.R., Mother, and Father failed to produce sufficient evidence that A.R.'s injuries were caused by S. while at school on March 3, 2016, and that A.R., Mother, and Father failed to present evidence to support all of the elements of their recklessness claim. Ms. Lute, Ms. Skaff,

and Mr. Schade presented affidavits and Mother's and Father's depositions in support of their motion. A.R., Mother, and Father opposed the motion. Inter alia, they presented affidavits in support of their position, as well as Ms. Lute's, Ms. Skaff's, and Mr. Schade's responses to interrogatories. Ms. Lute, Ms. Skaff, and Mr. Schade filed a reply brief and an accompanying affidavit.

{¶12} The trial court ultimately granted Ms. Lute's, Ms. Skaff's, and Mr. Schade's motion for summary judgment finding that they were immune as A.R., Mother, and Father failed to demonstrate an issue of fact as to whether Ms. Lute, Ms. Skaff, and Mr. Schade disregarded a known or obvious risk of physical harm to A.R. In so doing, the trial court declined to determine whether there was sufficient evidence that S. actually injured A.R. with a pencil while at school. Further, because A.R.'s claim failed, the trial court concluded that Mother's and Father's claim for loss of consortium failed as a matter of law.

{¶13} A.R., Mother, and Father have appealed, raising three assignments or error for our review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE, AT BEST, APPELLEES ACTED IN A RECKLESS MANNER.

{¶14} A.R., Mother, and Father argue in their first assignment of error that the trial court erred in granting summary judgment to Ms. Lute, Ms. Skaff, and Mr. Schade. A.R., Mother, and Father assert that Ms. Lute, Ms. Skaff, and Mr. Schade owed A.R. a heightened duty of care and that the record discloses a genuine issue of material fact with respect to whether their conduct was reckless.

{¶15} "We review a trial court's summary judgment decision on a de novo basis." *Northwest Ohio Props. v. Cty. of Lucas,* 6th Dist. Lucas No. L-17-1190, 2018-Ohio-4239, ¶ 29, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "Accordingly, we undertake our own independent examination of the record and make our own decision as to whether the moving parties are entitled to summary judgment." *Northwest Ohio Props.* at ¶ 29.

{¶16} "In order to prevail on a motion for summary judgment, the moving party must show that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party." (Internal quotations and citation omitted.) *Afjeh v. Village of Ottawa Hills*, 6th Dist. Lucas No. L-14-1267, 2015-Ohio-3483, ¶ 10.

{¶17} "Pursuant to Civ.R. 56, the moving party bears the initial burden of informing the trial court of the basis for the motion and presenting proper evidence in support thereof." *Northwest Ohio Props.* at ¶ 30, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). If the movant satisfies this initial burden, the burden then shifts to the nonmovant to present specific facts demonstrating the existence of a genuine issue for trial. *Dresher* at 293. "The nonmovant cannot avoid summary judgment by submitting an unsupported, self-serving affidavit." *Northwest Ohio Props.* at ¶ 30. "A trial court must grant the motion with caution and must be careful to resolve doubts and construe evidence in favor of the nonmoving party." (Internal quotations and citations omitted.) *Afjeh* at ¶ 10.

{¶18} In general, an employee of a political subdivision is immune from liability in a civil action. *See Afjeh* at ¶ 12, citing R.C. 2744.03(A)(6). "There are three exceptions to this immunity: (1) acts or omissions outside the scope of employment; (2) acts or omissions made

with 'malicious purpose, in bad faith, or in wanton or reckless manner'; and (3) when liability is expressly imposed by the Revised Code." *Afjeh* at ¶ 12, quoting R.C. 2744.03(A)(6).

{¶19} As A.R.'s, Mother's, and Father's argument on appeal focuses on recklessness, we will limit our analysis accordingly. "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." (Internal quotations and citations omitted.) *Id.* at ¶ 19. "In fact, the actor must be conscious that his conduct will in all probability result in injury." (Internal quotations and citation omitted.) *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, ¶ 74.

{¶20} We begin by noting that Ms. Lute, Ms. Skaff, and Mr. Schade never expressly objected or moved to strike any of the evidence submitted by A.R., Mother, and Father. While Ms. Lute, Ms. Skaff, and Mr. Schade did assert that there was insufficient evidence to demonstrate that S. poked A.R. with a pencil at school because A.R., Mother, and Father relied on A.R.'s hearsay, Ms. Lute, Ms. Skaff, and Mr. Schade did not move to strike that testimony, nor did they object to its consideration in terms of whether their conduct was reckless. Moreover, while Ms. Lute, Ms. Skaff, and Mr. Schade argued that the "incident report" was not an "incident report[,]" they did not argue it was inadmissible. Further, nothing in the trial court's decision suggests that it decided not to consider some of the evidence. In fact, the trial court specifically indicated that it did not need to decide whether there was sufficient evidence presented to demonstrate a genuine issue of material fact with respect to whether S. injured A.R. with a pencil. Accordingly, this Court will proceed to consider all of the evidence in determining whether an issue of fact exists with respect to whether Ms. Lute's, Ms. Skaff's, and Mr. Schade's conduct was reckless. *See Consumer Portfolio Servs., Inc. v. Staples*, 6th Dist. Sandusky No. S-

06-031, 2007-Ohio-1531, ¶ 30 (Noting that a trial court may consider otherwise inadmissible evidence if it is not objected to and that, "[i]f the trial court considered the otherwise inadmissible evidence in granting summary judgment, then the appellate court will also consider the evidence in its de novo review.").

{¶21} A.R.'s, Mother's, and Father's amended complaint mentions that A.R. was persistently teased for being four years old; however, the focus of the allegations is the incident during which S. stabbed A.R. in her cheek with a pencil.

{¶22} In their motion for summary judgment, Ms. Lute, Ms. Skaff, and Mr. Schade argued that they had no knowledge of S. physically harming other students or adults and had no reason to suspect that S. posed a risk of harm to other students.

{¶23} Ms. Lute averred that when she returned from leave, she was informed by the substitute teacher and Mr. Schade that students, including S., had teased A.R. for being four years old. Ms. Lute denied that Father talked to her about A.R. being bullied at A.R.'s birthday party. In fact, Ms. Lute asserted that she was not informed or aware of any other instances of A.R. being teased by S. prior to March 3, 2016. On March 3, 2016, Ms. Lute's desk was approximately 10 feet from where S. and A.R. were sitting and Ms. Lute did not hear or see A.R. get injured. Further, no students reported the incident to Ms. Lute or the student teacher. A.R. did not report the incident to Ms. Lute and she did not notice any wounds on A.R.'s face.

{¶24} Ms. Skaff averred that her duties as assistant principal included overseeing student affairs. Ms. Skaff described Ms. Lute as "an extraordinary teacher[.]" Ms. Skaff indicated that on October 29, 2015, Father called her to inform her that A.R. was "discouraged" because S. was teasing her for being four years old. Ms. Skaff spoke to A.R. and S. after the phone call. A.R. told her that no one was being mean to her and S. stated that A.R. was S.'s

friend. Ms. Skaff also averred that she periodically checked in with A.R. during lunch or in the classroom and A.R. was always "fine." Ms. Skaff opined that the October 29, 2015 phone call was the only time prior to the incident that she was ever informed of A.R. being teased or bullied by S. On March 7, 2016, Ms. Skaff was informed by Mr. Schade that Father had told Mr. Schade that A.R. was stabbed with a pencil by S. on March 3, 2016. Neither Mr. Schade nor Ms. Skaff received any reports from teachers about the incident. Ms. Skaff and Mr. Schade investigated the incident and S. did not admit to poking A.R. Due to A.R. withdrawing from school, neither Ms. Skaff nor Mr. Schade had an opportunity to interview A.R. to confirm that S. injured her with a pencil.

{¶25} Mr. Schade averred that his duties as principal included management of the building and staff and overseeing discipline. Mr. Schade was informed early in the fall that A.R. was being teased for being four years old. In response, Mr. Schade talked to the other students about it and the teasing stopped. After the report of teasing, Mr. Schade would frequently check on A.R. during lunch. She always indicated that everything was alright and she often sat with the other students who had teased her. Mr. Schade opined that, prior to March 3, 2016, he was only aware of one incident of A.R. being teased and S. was one of the students who had teased her. Mr. Schade confirmed the incident was investigated. S. did not admit to poking A.R. and, according to Mr. Schade, S. kept changing her answers.

{¶26} The trial court determined that the evidence presented by Ms. Lute, Ms. Skaff, and Mr. Schade was sufficient to meet their burden and that A.R., Mother, and Father failed to meet their reciprocal burden. Even assuming that we agree that Ms. Lute, Ms. Skaff, and Mr. Schade met their initial burden, we cannot conclude that, when viewing the evidence in a light most favorable to A.R., Mother, and Father that they failed to establish the existence of a genuine

issue of material fact with respect to whether Ms. Lute's, Ms. Skaff's, and Mr. Schade's conduct rose to the level of recklessness.

{¶27} Mother and Father also submitted affidavits of their own which were filed subsequent to their depositions. While "an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment[,]" there has been no argument below or on appeal that the affidavits at issue contradict Mother and Father's deposition testimony. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 28.

{¶28} Mother averred that from August 2015 through March 2016, S. consistently bullied A.R. Mother learned about the bullying from A.R. from multiple conversations with her. The bullying consisted of "name calling such as 'baby,' teasing for being 4 years old, pushing in the bathroom line, and leaving out of the play group." Mother confirmed and addressed this early bullying with the substitute teacher. In September and October 2015, the substitute teacher would often discuss with Mother the problems S. posed in the classroom. The substitute teacher described S. as a "troubled child with issues at home[.]" When Mother volunteered at school, she often noticed that S. was in trouble.

{¶29} Mother averred that, during this time, she "notified the Defendants either through oral or written complaints, at least four separate times, about the specific actions of S[.] bullying [A.R.]" Additionally, Mother opined that she had approximately a dozen conversations with the Defendants, during which they would confirm that A.R. was doing well.

{¶30} Father averred that he first learned that S. was bullying A.R. in late September or early October 2015. The bullying included "name calling such as 'baby,' teasing for being 4 years old, pushing in the bathroom line, and leaving out of the play group." Because of this, on

October 29, 2015, Father called and reported his concerns about A.R. to Ms. Skaff. During the conversation, Father asked that S. be addressed about her behaviors because A.R. "seemed to be exhibiting signs of mental anguish and emotional injury caused by ongoing torment." Her responses included "not sleeping[,] change[s] in personality[,] reduction of passion for education[,] reduction for want of friends[,] diminished trust for authorities/teachers." Father told Ms. Skaff that he planned to withdraw A.R. because of S.'s harassment. However, Ms. Skaff reassured Father that A.R. would not be subject to bullying anymore. Father indicated that he followed up with the substitute teacher and with all the other named Defendants throughout the year.

{¶31} According to Father and Mother, A.R. continued to experience bullying from S. As A.R.'s birthday drew closer, Father told A.R. that soon no one would be able to tease her about her age. The entire class was invited to A.R.'s birthday and Ms. Lute attended; however, S. did not. At the party, Father mentioned to Ms. Lute that he hoped that the party would eliminate the teasing. Ms. Lute's response indicated to Father that Ms. Lute was "fully aware of the bullying."

{¶32} Mother averred that when Ms. Lute returned to teach, her class included a lesson about the difference between being a "tattle-tale" and reporting problems. A.R. expressed confusion to Mother about whether talking about her being bullied was "tattling" or reporting. From November through March, Mother noticed that A.R. was not eating her lunches at school, was moody, and would not sleep well, often waking up in the middle of the night yelling or crying.

{¶33} Father indicated that in January 2016, A.R. reported that the bullying by S. continued. It included name calling, teasing, and being left out of groups. A.R. told Father that,

on one occasion, S. told A.R. she had to eat "a disgusting concoction of miscellaneous food items" if A.R. wanted to sit at the table with her classmates and be "free of torment[.]"

{¶34} Father and Mother notified the "Defendants" of the bullying of A.R. in the lunchroom. Because Mr. Schade was in charge of the lunchroom, Father followed up with him about the incident in February 2016. Mr. Schade told Father that he was checking on A.R. and she was not being subjected to bullying in the lunchroom while he was there.

{¶35} Father asserted that over the time that A.R. was enrolled at the school, Father notified the "Defendants on at least 4 occasions of specific bullying and harassment by S. towards [A.R.]" Father averred that, "prior to the March 3, 2016 incident, [he] notified the Defendants of the specific bullying instances, the escalating harassment and physical abuse, and [] notified them about [his] concerns for [his] daughter's safety and well-being."

{¶36} Mother reported that, when she went to school to help with Girl Scouts on March 3, 2016, she noticed the puncture wound on A.R.'s cheek. Mother asked A.R. about it and A.R. stated it happened in gym class. Mother did not believe A.R. Later, Father talked to A.R. about what happened and she disclosed that S. stabbed her with a pencil while they were sitting at the same table during class. Mother indicated that A.R. ultimately told her that S. walked over to A.R., told A.R. that S. did not like the way A.R. looked and stabbed A.R. with the pencil. The incident was never reported to Mother and Father by anyone from the school. In addition, photos of A.R.'s injuries accompanied A.R.'s, Mother's, and Father's response to Ms. Lute's, Ms. Skaff's, and Mr. Schade's motion for summary judgment. Those photos were also exhibits to Father's deposition.

{¶37} After withdrawing A.R. from school, Father learned that A.R. had been bullied by S. on picture day as well. When Father saw the photos from picture day, he noticed it appeared

A.R. had been crying and asked her about it. A.R. admitted that she had been crying and stated that S. told A.R. that A.R.'s "mommy was going to die." A.R. did not tell the teacher or Father because she did not want to be a "tattle-tale" but indicated that the teacher knew about it because A.R. was visibly crying.

{¶38} A.R., Mother, and Father also submitted what they described as an "Incident report" written by Mr. Schade in support of their efforts to demonstrate S. was responsible for A.R.'s injuries. That document appears to be handwritten notes, which are somewhat difficult to read, about a discussion with S. The notes seem to support the conclusion that S. injured A.R. with a pencil. The notes also state that A.R. told the teacher, the teacher was angry at S., and Ms. Lute made S. say she was sorry. Additionally, A.R., Mother, and Father pointed to an email after the incident to Father from Mr. Schade in which Mr. Schade stated that he did talk with S. and S.'s father to "confirm the actions." However, Mr. Schade added that he would not make a judgment until a full investigation was completed.

{¶39} In the affidavit filed in response to A.R.'s, Mother's, and Father's opposition to the motion for summary judgment, Mr. Schade stated that, prior to March 3, 2016, S. had no prior disciplinary or behavioral records and no history of physically harming other students or staff. Mr. Schade further clarified that the document A.R., Mother, and Father referred to as an "Incident report" was not an incident report, and, instead, was a copy of the notes he complied during his investigation of the allegations that S. stabbed A.R. Further, Mr. Schade opined that the email exchange between himself and Father was not confirmation that S. injured A.R. with a pencil.

{¶40} When considering all of the foregoing in a light most favorable to A.R., Mother, and Father, we conclude that there remains a genuine issue of material fact with respect to

whether Ms. Lute's, Ms. Skaff's, and Mr. Schade's conduct was reckless. Certainly Ms. Lute, Ms. Skaff, and Mr. Schade presented evidence that they were only aware of limited bullying, that they monitored and addressed the situation, and that they had no reason to suspect that S. would physically harm A.R. Nonetheless, A.R, Mother, and Father presented evidence that S.'s bullying of A.R. was ongoing and that it involved physical contact such as "pushing in the bathroom line," in addition to teasing and demanding that A.R. consume odd combinations of food. Father asserted that over the six month time frame, he notified the "Defendants" on at least four occasions of the "specific bullying and harassment by S[.] towards [A.R.]" Father clarified that, "prior to March 3, 2016, [he] notified the Defendants of the specific bullying instances, the escalating harassment and physical abuse, and [he] notified them about [his] concerns for [his] daughter's safety and well-being."

{¶41} Arguably, with this knowledge, it might seem reasonable to attempt to keep the two children separate, but there is nothing in the record that suggests that was done. Instead, there was evidence that S. and A.R. were still, at least on occasion, eating together in the lunchroom and were still being taught in the same classroom. More troubling, on March 3, 2016, Ms. Lute had S. and A.R. sitting at the same table in the classroom despite the ongoing bullying. Moreover, while Ms. Lute, in her affidavit, denied seeing S. injure A.R. with a pencil, Mr. Schade's notes about his conversation with S. reflect that A.R. reported the incident to Ms. Lute and Ms. Lute made S. apologize. Despite this, A.R.'s injury was not reported to her parents.

{¶42} Viewing the evidence in a light most favorable to A.R., Mother, and Father, there is evidence that Ms. Lute, Ms. Skaff, and Mr. Schade knew that A.R. was not only being verbally bullied, but she was also subjected to physical bullying, i.e. being pushed in line. They were also informed on multiple occasions that the bullying was ongoing and were informed that A.R.'s

parents were concerned for her well-being and safety. Thus, we cannot agree with the trial court's conclusion that there was no evidence that Ms. Lute, Ms. Skaff, and Mr. Schade consciously disregarded or were indifferent to a known or obvious risk of physical harm to A.R. Given that the bullying continued and had involved physical contact in the past, a reasonable trier of fact could conclude that Ms. Lute, Ms. Skaff, and Mr. Schade engaged in conduct "characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that [was] unreasonable under the circumstances and [was] substantially greater than negligent conduct." *Afjeh,* 2015-Ohio-3483, at ¶ 19. Because a genuine issue of material fact remains with respect to whether Ms. Lute, Ms. Skaff, and Mr. Schade were reckless, the trial court erred in granting summary judgment based upon immunity.

{¶43} To the extent that Ms. Lute, Ms. Skaff, and Mr. Schade assert other arguments on appeal, the trial court has yet to resolve those issues. This Court's role is that of a reviewing court. *See Cheatham v. Huntington Natl. Bank*, 6th Dist. Lucas No. L-16-1292, 2017-Ohio-9234, ¶ 29. "If we were to reach issues that had not been addressed by the trial court in the first instance, we would be usurping the role of the trial court and exceed[ing] our authority on appeal." (Internal quotations and citations omitted.) *Id.* Thus, upon remand, the trial court can consider Ms. Lute's, Ms. Skaff's, and Mr. Schade's other arguments in support of their motion for summary judgment.

{¶44} Finally, we must also conclude that the trial court likewise erred in granting summary judgment on Mother's and Father's consortium claim as it did so on the basis that A.R.'s claim failed.

{¶45} A.R.'s, Mother's, and Father's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE COURT ERRED IN CONSIDERING THE ISSUE OF SUMMARY JUDGMENT WITHOUT ADDRESSING WHETHER A.R.'S OUT-OF-COURT STATEMENTS WERE ADMISSIBLE OR WHETHER A.R.'S IN-COURT TESTIMONY WAS REQUIRED AND PROPER.

ASSIGNMENT OF ERROR III

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE IT VIOLATES APPELLANTS' RIGHT TO JURY TRIAL AND BECAUSE APPELLEES VIOLATED A.R.'S DUE PROCESS RIGHTS.

{¶46} A.R., Mother, and Father argue in their second assignment of error that the trial court erred in considering summary judgment without addressing whether A.R.'s out-of-court statements were admissible. A.R., Mother, and Father argue in their third assignment of error that the trial court erred in granting summary judgment based upon immunity because doing so violated their rights to a jury trial and due process. Given this Court's ruling on A.R.'s, Mother's, and Father's first assignment of error, these arguments are no longer properly before us and we decline to address them further.

III.

{¶47} A.R.'s, Mother's, and Father's first assignment of error is sustained and their remaining assignments of error are not properly before us. The judgment of the Lucas County Court of Common Pleas is reversed, and the matter is remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellees.

DONNA J. CARR
FOR THE COURT

HENSAL, J.
CONCURRING IN JUDGMENT ONLY.

{¶48} I agree with the majority's conclusion that this matter must be reversed and remanded, but for a different reason. The majority holds that the trial court erred by granting summary judgment to Ms. Lute, Ms. Skaff, and Mr. Schade based upon sovereign immunity because a genuine issue of material fact remains with respect to whether their conduct was reckless. I, however, would hold that the trial court erred by granting summary judgment because A.R., Mother, and Father set forth sufficient facts to rebut the presumption of immunity under Section 2744.03(A)(6). While that holding leads to the same ultimate conclusion, I write

separately to express my belief that the analysis should focus on the burden-shifting framework under the immunity statute.

SCHAFER, J.
DISSENTING.

{¶49} Because I do not agree that the trial court erred by granting summary judgment in favor of Ms. Lute, Ms. Skaff, and Mr. Schade, and finding that the three individuals school employees are statutorily immune from liability on the claim asserted in A.R.'s amended complaint, I respectfully dissent.

{¶50} A.R. has alleged that the "complete failure" of Ms. Lute, Ms. Skaff, and Mr. Schade to "provide reasonable supervision, care, protection, or support, in accordance with standards of care appropriate for [A.R.]'s age, resulted in mental and physical abuse * * *." Aside from including the words "recklessness" and "reckless" in the caption of their claim of negligence, A.R. has not adequately alleged reckless conduct on the part of any one of the three individual school employees. *See O'Toole v. Denihan,* 118 Ohio St.3d 374, 2008-Ohio-2574, ¶ 74; *see also Strayer v. Barnett,* 2d Dist. Clark No. 2016-CA-19, 2017-Ohio-5617, ¶ 40 ("Mere negligence in the performance of an employee's duties is insufficient to meet this high standard [of recklessness]."), *Vidovic v. Hoynes*, 11th Dist. Lake No. 2014-L-054, 2015-Ohio-712, ¶ 50 (holding that R.C. 2744.03(A)(6)(b) would not abrogate immunity from liability for simple negligence.) Nonetheless, A.R. contends that "recklessness" is an "interrelated factor" with regard to this claim of negligence. A.R. also asserts, without supporting authority, that special relationships and heightened duties in this case lower the hurdle to show statutory immunity. Setting aside any issue related to A.R.'s basis for claiming an exception to employee immunity, I would hold that A.R. failed to meet her summary judgment burden to demonstrate evidence of reckless conduct on the part of any one of the three individual school employees.

{¶51} "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, at paragraph four of the syllabus. "Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk." *O'Toole*, 2008-Ohio-2574 at ¶ 73. This is a "rigorous standard[] that will in most circumstances be difficult to establish * * *." *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, ¶ 8 (2016).

{¶52} "Whether a party is entitled to immunity is a question of law properly determined by the court prior to trial pursuant to a motion for summary judgment." *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, ¶ 12 (2018); *Conley v. Shearer*, 64 Ohio St.3d 284, 292 (1992). "Although the determination of recklessness is typically within the province of the jury, the standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity." *O'Toole* at ¶ 75, citing *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356 (1994). Even though a court may be required to analyze facts to consider the immunity exceptions of R.C. 2744.03(A)(6) and determine whether an employee acted recklessly, that analysis does not necessarily "transform a question of law into a [question of fact] that cannot be resolved on summary judgment." *Stachura v. Toledo*, 6th Dist. Lucas No. L-12-1068, 2013-Ohio-2365, ¶ 21, citing *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68 (1982).

{¶53} On appeal, A.R. contends that there remain issues of fact as to whether the conduct of Ms. Lute, Ms. Skaff, or Mr. Schade was reckless. However, differing views as to the level of culpability involved with the alleged breach of duty owed to A.R., and conclusory allegations that conduct was "reckless" do not create a factual dispute. *See Hackathorn v.*

Preisse, 104 Ohio App.3d 768, 772 (9th Dist.1995). A.R. contends that Ms. Lute, Ms. Skaff, and Mr. Schade acted with disregard or indifference to a known risk that S. would physically harm A.R. This contention is based on assumptions and speculation that Ms. Lute, Ms. Skaff, and Mr. Schade could or should have known that S. was likely to harm A.R.. Absent from the record, however, is evidence of any particular instance, prior to the March 3 incident with the pencil, where S. was known to have exhibited a propensity toward physical violence.

{¶54} Ms. Lute, Ms. Skaff, and Mr. Schade could only be expected to act in response to A.R.'s needs to the extent that they were aware of the nature and severity of any instances of bullying. A.R. has established that the parents reported bullying to the school on at least four occasions, and that one or more of the individual school employees were aware that: A.R. had been teased for being four years old, that A.R. had been excluded from play groups, and that children in the lunchroom tried to coax A.R. into eating odd food combinations. These reports may be indicative of verbal or relational bullying, but they do not foretell of an obvious risk that S. would persist in bullying and cause physical harm to A.R.

{¶55} The majority finds that there was evidence that A.R. was subjected to physical bullying because she was "being pushed in lines." I disagree with this conclusion because the record contains only a few vague passing references to some pushing in line. There is no evidence in the record to show that S. ever pushed A.R., that S. was ever accused of pushing A.R., or that either Ms. Lute, Ms. Skaff, or Mr. Schade were aware of any specific incident involving pushing. Further, the undisputed evidence in the record reflects that there is no evidence that S. had any record or known history of physical bullying or violent conduct. It cannot reasonably be said that Ms. Lute, Ms. Skaff, or Mr. Schade were reckless for perversely

disregarding a known risk, because there is no evidence that they knew S. posed any risk of physical harm to A.R.

{¶56} Additionally, Ms. Lute, Ms. Skaff, and Mr. Schade established the absence of any evidence to support the claim that they failed to take any action whatsoever in response to the concerns of bullying that A.R.'s parents expressed to the individual school employees. School employees are not held to a standard that would require taking "perfect action to remedy bullying issues" in order to avoid being exposed to liability for related claims, but they must "take some precautions or steps to recognize and address the issue." *Vidovic*, 2015-Ohio-712 at ¶ 58. A.R. has failed to demonstrate that any commission or omission of the three individual school employees, in response to reports of kindergarteners teasing or being teased, involved a perverse disregard of a known risk.

{¶57} There is uncontradicted evidence that Mr. Schade responded by talking with the students about teasing. He frequently visited A.R. during her lunch to check on her and inquire as to how everything was going. Mr. Schade observed A.R. sitting and eating with the students who previously teased her for being four years old.

{¶58} Ms. Skaff acknowledges that she received a phone call from A.R.'s father informing her that S. had been teasing A.R. for being four years old. Ms. Skaff responded by speaking with the children, and indicated that A.R. "told [her] that no one was being mean to her and S. said that [A.R.] was her friend." Additionally, Ms. Skaff periodically checked in with A.R. to make sure she was okay and, based on her observations, believed that A.R. "was always fine."

{¶59} After being informed of the teasing, Ms. Lute monitored A.R. and the other students. Although A.R. claims that there is a question as to whether Ms. Lute "recklessly

supervised" A.R. on the date of the pencil incident, this allegation is limited to Ms. Lute and, furthermore, is not supported by evidence. There is no suggestion that Ms. Lute left the children unsupervised in the classroom when A.R. was allegedly attacked with a pencil. School officials have "'no general duty * * * to watch over each child at all times'" and, "[a]bsent the assumption of a more specific obligation, school officials are bound only by the common-law duty to exercise that care necessary to avoid reasonably foreseeable injuries." *Ratliff v. Oberlin City Schools*, 107 Ohio App.3d 548, 550 (9th Dist.1995), quoting *Redd v. Springfield Twp. School Dist.*, 91 Ohio App.3d 88, 91 (9th Dist.1993). Ms. Lute cannot reasonably be expected to omnisciently observe every action and interaction of each child in her classroom. Any failure on her part to observe or prevent the alleged pencil incident between S. and A.R. could, at best, only plausibly amount to mere negligence. This certainly does not meet the "substantially greater" threshold to constitute reckless conduct. *Anderson*, at paragraph four of the syllabus.

{¶60} The majority concludes that "[a]rguably, with [the knowledge Ms. Lute, Ms. Skaff, and Mr. Schade possessed] it might seem reasonable to keep the two children separate, but there is nothing in the record that suggests that was done." However, there is no dispute that the school employees *did not* attempt to separate S. and A.R. A question as to whether separating S. and A.R. might, arguably, seem reasonable under the circumstances does not implicate a genuine issue of material fact. To establish recklessness in this context, A.R. would need to demonstrate that a failure to keep S. and A.R. separate constitutes a perverse disregard of a known or obvious risk that S. would harm A.R. Even assuming that Ms. Lute, Ms. Skaff, or Mr. Schade failed to act reasonably by not separating S. and A.R. in the classroom, this would be indicative of *negligence*—a substantially lesser degree of culpability than *recklessness*. Because Ms. Lute,

Ms. Skaff, and Mr. Schade are statutorily immune from liability for negligent conduct, this question is immaterial to our present analysis pursuant to R.C. 2744.03(A)(6)(b).

{¶61} Based on the foregoing, I would conclude that—regarding the issue of immunity—there are no factual disputes requiring resolution by a finder of fact. In this instance, the individual school employees established the absence of a genuine issue of material fact, and A.R. failed to meet the reciprocal burden to demonstrate the existence of material facts that could establish recklessness on the part of Ms. Lute, Ms. Skaff, or Mr. Schade. Accordingly, it was incumbent upon the trial court to determine as a matter of law, and based on evidence in the record, whether reasonable minds could conclude that Ms. Lute, Ms. Skaff, and Mr. Schade acted in a reckless manner that would preclude immunity. *See Argabrite*, 2016-Ohio-8374 at ¶ 15. The trial court correctly concluded that A.R. failed to present evidence that any of the individual school employees consciously disregarded or were indifferent to a known risk of harm to A.R., and properly found that Ms. Lute, Ms. Skaff, or Mr. Schade were entitled to summary judgment in their favor on the issue of immunity.

(Carr, J., Hensal, J., Schafer, J., of the Ninth District Court of Appeals, sitting by assignment.)

APPEARANCES:

A.J.R., II and ANTHONY J. GLASE, Attorneys at Law, for Appellants.

AMY M. NATYSHAK and SHAWN A. NELSON, Attorneys at Law, for Appellees.

THIS IS A FINAL APPEALABLE ORDER

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Atalia J. Richardson, etc., et al.,	*	Case No. CI16-2001
Plaintiffs,	*	**OPINION AND JOURNAL ENTRY**
vs.	*	Hon. Linda J. Jennings
Board of Education of Toledo City School District, et al.,	*	
Defendants.	*	
	*	

In this case, Plaintiffs Atalia J. Richardson (Atalia) and her parents, Caitlyn and Anthony Richardson (the Richardsons), seek damages for injuries that Atalia allegedly sustained when a bully at her school poked her in the face with a pencil.

Currently before the Court is the motion for summary judgment filed by Defendants Amanda Lute, Cynthia Skaff, and Ralph Schade.[1] The remaining claims against the movants are for recklessness or reckless negligence and loss of consortium.

Having reviewed the relevant pleadings, the supporting and opposing briefs, the evidence presented, and the applicable law, the Court finds that Defendants' motion is well-taken and should be granted, as discussed below.

[1] Lute is Atalia's former kindergarten teacher; Skaff is the acting Assistant Principal at Atalia's school; and Schade is the Principal.

Arguments

Defendants assert that they are immune from individual liability for Atalia's alleged injuries and damages, as well as her parents' alleged loss of consortium, pursuant to R.C. 2744.03(A)(6). In that regard, Defendants argue that there is no evidence that they acted with "malicious purpose, in bad faith, or in a wanton or reckless manner" toward Atalia. More specifically, Defendants point to a lack of evidence that they knew or had reason to know that the bully posed a risk of physical harm to Atalia or other students.

Additionally, Defendants contend that even if they are not entitled to summary judgment on immunity grounds, Atalia and her parents have not produced sufficient evidence to demonstrate that the bully poked Atalia in the face with a pencil.

Defendants' final argument is that Plaintiffs have failed to demonstrate the requisite elements of their "reckless negligence" claim.

Plaintiffs oppose Defendants' summary judgment bid, insisting that genuine issues of material fact remain for the jury's determination with respect to recklessness and whether the bully actually stabbed Atalia in the face with a pencil.

In reply, Defendants insist that the lack of any prior disciplinary or behavioral records for the bully and the absence of a history of physically harming other students or staff are fatal to Plaintiffs' claims.

Next, Defendants dispute Plaintiffs' assertions that Defendants failed to take any care whatsoever with respect to the situation between Atalia and the bully. Defendants assert that there is ample evidence demonstrating that Defendants responded appropriately to Plaintiffs' bullying claims by either monitoring Atalia and other classmates or talking to Atalia and the bully.

Defendants also reiterate their argument that Plaintiffs have failed to demonstrate that the face stabbing occurred as alleged. In that regard, Defendants posit that Plaintiffs mistakenly rely on hearsay statements in Schade's notes about the alleged incident.

Finally, Defendants attack Plaintiffs' reckless negligence claim, citing the lack of evidence of either a duty or a breach.

Law, Analysis, and Decision

1. Summary Judgment Standard

Summary judgment is proper only when (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after construing the evidence most favorably in the nonmoving party's favor, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. Civ.R. 56(C); *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998); *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511 (1994).

The party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists for trial and of informing the trial court of the basis for the summary judgment motion and identifying the portions of the record that show the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988); *Dresher v. Burt*, 75 Ohio St.3d 280, 296 (1996).

The trial court may not consider any evidence other than materials of the type listed in Civ.R. 56(C) -- "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any" -- and those materials must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *Dresher* at 292-293.

A genuine issue of material fact exists if the evidence presents "a sufficient disagreement to require submission to a jury" but not if the evidence is so "one-sided that one party must prevail as a matter of law." *Turner v. Turner*, 67 Ohio St.3d 337, 340 (1993), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986).

Doubts must be resolved in favor of the nonmoving party, and the summary judgment motion must be denied if the moving party fails to satisfy its initial burden.

Murphy v. Reynoldsburg, 65 Ohio St.3d 356, 358-359 (1992); Civ.R. 56(C); *Dresher* at 293. But once the moving party satisfies its initial burden by supporting its motion with appropriate evidentiary materials, the nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial, may not rest on the mere allegations or denials of its pleadings, and must set forth specific facts showing that there is a genuine issue for trial in order to avoid summary judgment. Civ.R. 56(E); *Dresher* at 293.

The standard for summary judgment mirrors the standard for a directed verdict. Therefore, the evidentiary material must establish that the nonmoving party's claim is more than simply colorable. *Celotex* at 323.

2. Law applicable to Plaintiffs' claims.

In their Amended Complaint, Plaintiffs label Count One "Recklessness or Reckless Negligence" and refer to "Defendants' complete failure to provide reasonable supervision, care, protection, or support, in accordance with standards of care appropriate to Plaintiff's age."[2] Plaintiffs thereby invoke the exception to immunity set forth in R.C. 2744.03(A)(6)(b)(2), under which a political-subdivision employee is not immune from liability if "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

Here, Plaintiffs do not characterize Defendants' conduct as malicious or assert that Defendants acted in bad faith. Therefore, the Court will base its analysis on the phrase "wanton or reckless manner."

The Ohio Supreme Court has defined "wanton misconduct" as "the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Anderson v. City of Massillon*, 134 Ohio St. 3d 380, 2012-Ohio-5711, at paragraph three of the syllabus. "Reckless conduct," on the other hand, is conduct "characterized by the conscious disregard of or indifference to a known or

[2] "Amended Complaint," filed March 3, 2017, at Count One, ¶¶ 25-32.

obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Id.* at paragraph four of the syllabus. "These are rigorous standards that will in most circumstances be difficult to establish." *Argabrite v. Neer,* 149 Ohio St.3d 349, 2016-Ohio-8374, ¶ 8.

3. Lute, Skaff, and Schade are immune from liability for Plaintiffs' alleged injuries and damages.

Having reviewed the record evidence in the light most favorable to Plaintiffs, the Court finds that Lute, Skaff, and Schade are statutorily immune from liability for the injuries and damages alleged by Plaintiffs.

Plaintiffs' "wanton misconduct" claim fails, as a matter, for two reasons. First, Defendants have satisfied their summary judgment burden by pointing to evidence in the record establishing the lack of any prior disciplinary or behavioral records for the bully and the absence of any history of the bully's physically harming other students or staff. Plaintiffs have not presented any evidence to the contrary. Therefore, Plaintiffs have failed to demonstrate a question of fact as to whether there was *great probability* that Defendants' conduct would result in physical harm to Atalia. Moreover, Plaintiffs' assertions that Defendants failed to take any care whatsoever with respect to the situation between Atalia and the bully are specious. The Court agrees with Defendants that there is ample evidence demonstrating that they responded appropriately to Plaintiffs' bullying claims by either monitoring Atalia and other classmates or talking to Atalia and the bully. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' wanton misconduct claim, as a matter of law, as set forth in the following Journal Entry.

Plaintiffs' failure to point to any evidence that the bully had a history of physically harming other students or staff is also fatal to their "reckless conduct" claim against Defendants. Without such evidence, there is no question of fact as to whether Defendants consciously disregarded or were indifferent to *a known or obvious risk of physical harm* to Atalia. Accordingly, Defendants are also entitled to summary judgment with respect to Plaintiffs' recklessness claim, as a matter of law, as set forth in the following Journal Entry.

In view of the above findings, the Court need not address Defendants' claim that Plaintiffs have failed to set forth evidence establishing a genuine issue of fact as to whether the bully actually poked Atalia in the face with a pencil.

4. Caitlyn and Anthony Richardson's loss of filial consortium claim against Lute, Skaff, and Schade fails as a matter of law.

Ohio has long recognized loss of filial consortium claims. A defendant's injury to a minor child gives rise to an action by the child for her personal injuries and a derivative action by the child's parents for the loss of the child's services and the child's medical expenses. The parents' losses are compensable elements of damages in the parents' derivative action against a third-party tortfeasor. *Gillmore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244 (1993).

Here, however, the Richardsons' derivative loss of filial consortium claim fails as a matter of law due to the failure of the underlying wanton misconduct, recklessness, and reckless negligence claims upon which it depends.

Accordingly, the Court will also grant summary judgment in Defendants' favor as to the consortium claim, as set forth in the following Journal Entry.

JOURNAL ENTRY

It is ORDERED that "Defendants' Motion for Summary Judgment," filed May 16, 2017, is GRANTED.

It is further ORDERED that Plaintiffs' "Amended Complaint," filed March 3, 2017, is DISMISSED WITH PREJUDICE.

It is further ORDERED that the Jury Trial scheduled to commence on Monday, January 29, 2018, is VACATED.

This is a final appealable order.

December 11, 2017

Judge Linda J. Jennings

cc: Anthony J. Glase, Esq. (Counsel for Plaintiffs)
Amy M. Natyshak, Esq. and Shawn A. Nelson, Esq. (Counsel for Defendants)

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

ATALIA J RICHARDSON, et al.,	*	CASE NO: G-4801-CI-0201602001-000
	*	
Plaintiffs,	*	
	*	JUDGE LINDA J JENNINGS
v.	*	
	*	
TOLEDO PUBLIC SCHOOLS,	*	ORDER
	*	
Defendant.	*	

* * * * *

This matter is before the Court upon "Plaintiffs' Motion for Relief from Judgment and/or Motion to Reconsider". Upon review of the record, it is noted that the August 7, 2017 Order granted Plaintiff with an extension of time to respond to Defendant's Motion for Summary Judgment on or before October 31, 2017. Therefore based upon the foregoing, said motion is found well-taken and GRANTED.

It is ORDERED that this Court's September 19, 2017 Order granting Defendants' Motion for Summary Judgment is hereby VACATED.

It is further ORDERED that Plaintiffs shall file their response to Defendants' Motion for Summary Judgment on or before October 31, 2017.

Date: 9-25-17

JUDGE LINDA J JENNINGS

Distribution: GLASE ANTHONY
AMY NATYSHAK

THIS IS A FINAL APPEALABLE ORDER

IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

Atalia J. Richardson, minor by and through parent and natural guardian, Anthony J. Richardson, II, et al.

Plaintiffs,

vs.

Amanda Marie Vail Lute, et al.

Defendants.

Case No. CI16-2001

ORDER

Hon. Linda J. Jennings

* *

This action is before the Court on the motion for summary judgment filed by Defendants Amanda Vail Lute, Cynthia Skaff and Ralph Schade (Defendants). The Defendants assert that they are entitled to summary judgment on Plaintiffs' remaining claims for "Recklessness or Reckless Negligence" against them individually.

The Plaintiffs have not filed any opposition to Defendants' motion.

The Court finds that the Defendants' supporting evidence establishes that there are no genuine issues of material fact concerning Plaintiffs' remaining claim against them. Therefore, the Defendants are entitled to summary judgment in their favor as a matter of law.

It is therefore ORDERED that "DEFENDANTS' MOTION FOR SUMMARY

JUDGMENT AND MEMORANDUM IN SUPPORT" filed May 16, 2017 is GRANTED.

It is further ORDERED that Plaintiffs' "Recklessness or Reckless Negligence" claims as set forth in Count 1 against the individual Defendants Amanda Vail Lute, Cynthia Skaff and Ralph Schade is DISMISSED WITH PREJUDICE.

September 19, 2017

Judge Linda J. Jennings

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Atalia J. Richardson, etc., et al.,	*	Case No. CI16-2001
Plaintiffs,	*	**OPINION AND JOURNAL ENTRY**
vs.	*	Hon. Linda J. Jennings
Board of Education of Toledo City School District, et al.,	*	
Defendants.	*	
	*	

This case is before the Court on the Civ.R. 12(C) motion for judgment on the pleadings filed by Defendants Amanda Lute, Cynthia Skaff, and Ralph Schade. Having reviewed the relevant pleadings, the supporting and opposing briefs, and the applicable law, the Court finds that Defendants' motion is not well-taken and should be denied, as discussed below.

Arguments

Defendants seek judgment on the loss of filial consortium claim set forth in paragraph 33 of Plaintiffs' First Amended Complaint, on the ground that they are immune from such a claim pursuant to R.C. 2744.03(A)(6). In that regard, Defendants argue that the consortium claim fails to allege that their actions were done with "malicious purpose, in bad faith, or in a wanton or reckless manner" or that the Ohio Revised Code expressly imposes liability upon them.

In opposing Defendants' motion, Plaintiffs argue that their loss of consortium claim is a derivative claim arising from the recklessness or reckless negligence claim set forth in

Count One of their Amended Complaint and that their recklessness allegations are sufficient to defeat Defendants' motion.

In reply, Defendants reiterate their argument that Plaintiffs' failure to allege any exception to the immunity afforded them under R.C. 2744.03(A)(6) is fatal to their consortium claim.

Law, Analysis, and Decision

1. Standard applicable to Civ.R. 12(C) motion for judgment on the pleadings

Civ.R. 12(C) authorizes any party to move for judgment on the pleadings "[a]fter the pleadings are closed but within such times as not to delay the trial."

A motion for judgment on the pleadings brought pursuant to Civ.R. 12(C) is effectively a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. While the motions are similar, Civ. R. 12(C) permits consideration of both the complaint and the answer, but the Court must judge a Civ.R. 12(B)(6) motion solely on the face of the complaint alone. Likewise, the standards applicable to Civ.R. 12(B)(6) and 12(C) motions are similar, but Civ.R. 12(C) motions are specifically for resolving questions of law. (Citations omitted.) *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001); *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165-166 (1973); *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-570 (1996); *Wakeman Oil Co., Inc. v. Citizens Natl. Bank of Norwalk*, 6th Dist. No. H-95-045, 1996 Ohio App. Lexis 3952, *7-8 (Sept. 13, 1996).

In considering a motion for judgment on the pleadings, a trial court must: (1) accept the material factual allegations contained in the complaint as true, (2) construe those allegations and all reasonable inferences to be drawn from them in the nonmoving party's favor, and (3) dismiss the complaint only if it finds, beyond doubt, that no provable set of facts warrants relief. Thus, dismissal under Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law. *Pontious* at 570.

When a motion for judgment on the pleadings involves a political subdivision, courts "may not avoid deciding difficult questions of immunity." *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶ 20. "As the General Assembly envisioned, the determination of immunity could be made prior to investing the time, effort, and expenses of the courts, attorneys, parties, and witnesses. (Internal citations and quotations omitted.) *Id.* at ¶ 26.

2. Lute, Skaff, and Schade are not immune from liability for the loss of filial consortium suffered by Plaintiff Atalia Richardson's parents.

Ohio has long recognized loss of filial consortium claims. A defendant's injury to a minor child gives rise to an action by the child for her personal injuries and a derivative action by the child's parents for the loss of the child's services and the child's medical expenses. The parents' losses are compensable elements of damages in the parents' derivative action against a third-party tortfeasor. *Gillmore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244 (1993).

The Court previously ruled that the allegations in Count One of the original Complaint, captioned "Reckless or Reckless Negligence," were sufficient to allege that Defendants' conduct toward Atalia Richardson was "reckless," thereby invoking R.C. 2744.02(A)(6)(B)'s exception to Lute, Skaff, and Schade's individual immunity. Accordingly, the Court denied Defendants' motion for judgment on the pleadings with respect to Count One as applied to Lute, Skaff, and Schade. *See* "Opinion and Journal Entry" journalized October 4, 2016, at pages 5-6.

Count One in Plaintiffs' Amended Complaint, which was filed after Atalia's parents, Caitlin and Anthony Jerome Richardson II were added as plaintiffs, is identical to Count One in the original Complaint, except for paragraph 32, which was expanded from "[a]s a result of the physical and mental injuries, Plaintiff has suffered damages," to the following:

> Defendants' complete failure to provide reasonable supervision, care, protection, or support, in accordance with standards of care appropriate for Plaintiff's age, resulted in mental and physical abuse and condition (sic), along with other damages, including pain and suffering, loss of consortium,

loss of companionship, loss of education and, therefore, Plaintiff is entitled to damages.

Thus, the Court finds that Plaintiffs have successfully invoked the recklessness exception to Defendants' statutory immunity.

Moreover, in paragraph 33, under the heading "Surrogated and Additional Plaintiffs" (not "Count Two" as asserted by Defendants), Plaintiffs allege that Atalia's "parents have suffered financial loss, along with loss of filial society, comfort, companionship, love and solace resulting from Plaintiff's physical and mental injuries and the effects thereof." Paragraph 33 clearly refers back to Count One, which invokes the recklessness exception to statutory immunity, and seeks an additional element of damages for Atalia's injuries. There is no need for additional allegations of recklessness in paragraph 33.

In view of the above, the Court will deny Defendants' motion for judgment on the pleadings, as set forth in the following Journal Entry.

JOURNAL ENTRY

It is ORDERED that "Defendants' Motion for Judgment on the Pleadings," filed March 21, 2017, is DENIED.

It is further ORDERED that the Final Settlement Pretrial scheduled for Thursday, August 3, 2017 at 11:00 a.m., and the Jury Trial scheduled to commence on Monday, September 18, 2017, are CONFIRMED.

April 28, 2017

Judge Linda J. Jennings

cc: Jeremy W. Levy, Esq. (Counsel for Plaintiff)
Amy M. Natyshak, Esq. and Shawn A. Nelson, Esq. (Counsel for Defendants)

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Atalia J. Richardson, etc.,	*	Case No. CI16-2001
Plaintiff,	*	**OPINION AND JOURNAL ENTRY**
vs.	*	Hon. Linda J. Jennings
Board of Education of Toledo City School District, et al,	*	
Defendants.	*	
	*	

This case is before the Court on the Civ.R. 12(C) motion for judgment on the pleadings filed by Defendants Board of Education of Toledo City School District (TPS) and TPS employees Amanda Lute, Cynthia Skaff, and Ralph Schade.

Having reviewed the relevant pleadings, the supporting and opposing briefs, and the applicable law, the Court finds that Defendants' motion is well-taken and should be granted with respect to all of Plaintiff's claims except for those asserted against Lute, Skaff, and Schade in Count One, as discussed below.

Claims and Factual Allegations

Plaintiff Atalia J. Richardson (Atalia)'s claims against Defendants, which she asserts through her parent and natural guardian, Anthony Richardson II, arise out of incidents that allegedly occurred during the 2015-2016 academic year. At that time, Atalia was an early-entrant kindergartner at DeVeaux Elementary School (DeVeaux) who "was to be accommodated, accepted and treated as a 'gifted' student, in accordance with Ohio law, as she was one of the first children to ever enter DeVeaux as an early entrant to kindergarten. Complaint, ¶¶ 8, 9.

According to the complaint, Atalia's peers teased her daily, constantly, and persistently for, among other things, being "four years old." There was one fellow kindergartner in particular who was "very envious, aggressive and problematic" and caused Atalia emotional distress. Atalia's parents informed DeVeaux of the "bullying" on several occasions, resulting in Defendants' assurances that Atalia was not the subject of bullying and that they would closely supervise the alleged bully and not give her the opportunity to bully and/or physically or emotionally harm Atalia. However, the bullying never stopped. *Id.* at ¶¶ 10-16.

Notwithstanding their knowledge that the bully was emotionally tormenting Atalia and the availability of other options, Defendants allegedly placed the bully and Atalia at the same table in their classroom. On March 3, 2016, Atalia was allegedly at her assigned table with the bully when the bully assaulted and battered her, without provocation. Specifically, Atalia alleges that the bully, "after getting close enough to whisper in Plaintiff's ear that she did not like Plaintiff or 'the way [Plaintiff] looked,' repeatedly attempted to stab Plaintiff and successfully stabbed Plaintiff in the face." *Id.* at ¶¶ 17-20.

The alleged results of the attack were "[a] puncture wound and surrounding irritation" that was treated for "the possibility of infection" and "a second noticeable graze" that resulted from another one of the bully's attempts to stab Atalia. *Id.* at ¶ 21.

Defendants allegedly supplied the "community pencils," as well as the means to sharpen them, and were responsible for supervising the students, the pencils, and the sharpening and storage of the pencils; and the stabbing incident occurred "while Defendants (including an 'aide') were supposed to be supervising, in control, and in care of [sic] Plaintiff." *Id.* at ¶¶ 22, 23.

Further addressing the injuries allegedly sustained by Atalia, the complaint's final "common fact" states that Atalia, "being a child of tender years, suffered mental anguish, psychological effects, physical injuries, and a scar resulting from the stabbing caused and allowed by Defendants' undeserved disregard and deliberate indifference for Plaintiff's well-being." *Id.* at ¶ 24.

Atalia asserts five separate causes of action against Defendants: Count One -- Recklessness or Reckless Negligence; Count Two -- Neglect of a Child of Tender Years; Count Three -- Endangering of a Child of Tender Years; Count Four -- Vicarious Liability with Regard to Tortious Act; and Count Five -- Promissory Estoppel. Complaint, ¶¶ 25-58. The prayer for relief seeks compensatory and punitive damages, as well as attorney fees, court costs, and interest.

The Parties' Arguments

Defendants argue that they are entitled to judgment on the pleadings on Counts One through Four of the complaint because they are immune from liability under R.C. Chapter 2744.

Defendants also claim entitlement to judgment on the pleadings on Count Five, arguing that promissory estoppel is inapplicable to political subdivisions and their employees engaged in a governmental function.

Plaintiff challenges the individual defendants' immunity argument on the ground that she impliedly pled that they acted in a reckless manner, rendering them liable under R.C. 2744.03(A)(6)(b)'s exception to immunity.

In reply, Defendants argue that Plaintiff has not alleged facts under any theory of recklessness above a speculative level.

Law, Analysis, and Decision

1. Standard applicable to Civ.R. 12(C) motion for judgment on the pleadings

Civ.R. 12(C) authorizes any party to move for judgment on the pleadings "[a]fter the pleadings are closed but within such times as not to delay the trial."

A motion for judgment on the pleadings brought pursuant to Civ.R. 12(C) is effectively a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted. While the motions are similar, Civ. R. 12(C) permits consideration of both the complaint and the answer, but the Court must judge a Civ.R. 12(B)(6) motion solely on the face of the complaint alone. Likewise, the standards applicable to Civ.R. 12(B)(6) and 12(C)

motions are similar, but Civ.R. 12(C) motions are specifically for resolving questions of law. (Citations omitted.) *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001); *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165-166 (1973); *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-570 (1996); *Wakeman Oil Co., Inc. v. Citizens Natl. Bank of Norwalk*, 6th Dist. No. H-95-045, 1996 Ohio App. Lexis 3952, *7-8 (Sept. 13, 1996).

In considering a motion for judgment on the pleadings, a trial court must: (1) accept the material factual allegations contained in the complaint as true, (2) construe those allegations and all reasonable inferences to be drawn from them in the nonmoving party's favor, and (3) dismiss the complaint only if it finds, beyond doubt, that no provable set of facts warrants relief. Thus, dismissal under Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law. *Pontious* at 570.

When a motion for judgment on the pleadings involves a political subdivision, courts "may not avoid deciding difficult questions of immunity." *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶ 20. "As the General Assembly envisioned, the determination of immunity could be made prior to investing the time, effort, and expenses of the courts, attorneys, parties, and witnesses. (Internal citations and quotations omitted.) *Id.* at ¶ 26.

2. TPS is entitled to judgment on the pleadings with respect to Counts One through Four of Plaintiff's complaint because it is immune from liability pursuant to R.C. 2744.02(A)(1).

Plaintiff does not challenge Defendants' claim that TPS is statutorily immune from liability for the claims asserted in Counts One through Four of Plaintiff's complaint, pursuant to R.C. 2744.02(A)(1), which states:

> Except as provided in [R.C. 2744.02(B)], 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.

Nor does Plaintiff allege, or plead facts applicable to, any of the exceptions to TPS's immunity enumerated in R.C. 2744.02(B): negligent operation of a motor vehicle, failure to keep public roads in repair, negligent performance of proprietary functions, damages caused by defects in buildings and facilities, and when civil liability is expressly imposed by a section of the Revised Code.

Accordingly, the Court finds, beyond doubt, that no provable set of facts warrants relief against TPS on Counts One through Four of Plaintiff's complaint, and that TPS is entitled to judgment on the pleadings with respect to Counts One through Four.

3. Defendants are entitled to judgment on the pleadings with respect to Count Five of Plaintiff's complaint because promissory estoppel is inapplicable to political subdivisions and their employees engaged in a governmental function.

Plaintiff does not challenge Defendants' assertion that promissory does not apply to them. Public schools are political subdivisions that provide a governmental function. *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, ¶ 11; R.C. 2744.01(F); R.C. 2744.01(C)(2)(c). The Ohio Supreme Court holds: "The doctrines of equitable estoppel and promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function." *Hartman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, syllabus. Nor do the doctrines apply to government employees when engaged in a governmental function. *State ex rel. DeFranco v. Cleveland*, 8th Dist. Cuyahoga No. 96067, 2011-Ohio-4240, ¶ 14.

Accordingly, the Court finds, beyond doubt, that no provable set of facts warrants relief on Count Five of Plaintiff's complaint, and Defendants are entitled to judgment on the pleadings with respect to Count Five.

4. Individual Defendants Lute, Skaff, and Schade are not entitled to judgment on the pleadings with respect to Count One because Plaintiff has invoked R.C. 2744.03(A)(6)(b)'s exception to their immunity by pleading that they were reckless in their actions toward her.

Pursuant to R.C. 2744.03(A)(6)(b), a political subdivision employee is not immune from liability if "[t]he employee's acts or omissions were with malicious purpose, in bad

faith, or in a wanton or reckless manner." An employee who perversely disregards a known risk and is conscious of the fact that his or her conduct "will in all probability result in injury," is "reckless." *O'Toole v. Denihan*, 118 Ohio St.3d 373, 2008-Ohio-2574, paragraph three of the syllabus, cited in *Horen v. Bd. of Educ. of Toledo. Pub. Schools*, 6th Dist. Lucas No. L-09-1143, ¶ 49.

Here Plaintiff titles Count One "Reckless or Reckless Negligence" and alleges that Defendants disregarded Atalia's well-being and placed her "in a situation where emotional or physical injury is very likely to occur" and that "[w]ith no supervision and the bully and Plaintiff sitting in close enough proximity at the assigned table, injurious consequences to Plaintiff's mental or physical well-being [were] certain to occur and * * * did indeed occur." Complaint at Count One.

The Court finds that, contrary to Defendants' assertions, Plaintiff has alleged that Defendants' conduct toward her was "reckless," thereby invoking 2744.03(A)(6)(b)'s exception to the individual immunity of Lute, Skaff, and Schade. Therefore, the Court cannot find, beyond doubt, that no provable set of facts warrants relief against Lute, Skaff, and Schade on Count One.

In view of the above, the Court will deny Defendants' motion for judgment on the pleadings with respect to Count One as it applies to Lute, Skaff, and Schade.

5. Individual Defendants Lute, Skaff, and Schade are entitled to judgment on the pleadings with respect to Counts Two through Four of the Complaint because Plaintiff does not allege any facts that invoke an exception to their immunity.

Under R.C. 2744.03(B)(6), a political subdivision employee is immune from liability unless one of the following applies:

> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
>
> (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code.

Plaintiff's failure to allege any facts in Counts Two, Three, or Four that invoke any of R.C. 2744.03(B)(6)'s exceptions to the immunity of political subdivision employees is fatal to the claims that she asserts against Lute, Skaff, and Schade in those counts. Therefore, the Court has no alternative but to find that no provable set of facts warrants relief against Lute, Skaff, and Schade on Counts Two through Four and to grant them judgment on the pleadings with respect to those counts.

* * *

The Court's decisions are set forth in the following Journal Entry.

JOURNAL ENTRY

It is ORDERED that "Defendants' Motion for Judgment on the Pleadings," filed June 16, 2016, is GRANTED with respect to all of Plaintiff's claims ***except*** those asserted against individual Defendants Amanda Lute, Cynthia Skaff, and Ralph Schade in Count One of Plaintiff's "Complaint," filed March 22, 2016.

It is further ORDERED that the Status/Initial Pretrial scheduled for Thursday, October 6, 2016, at 10:00 a.m., is CONFIRMED.

October 3, 2016

Judge Linda J. Jennings

cc: Jeremy W. Levy, Esq. (Counsel for Plaintiff)
Amy M. Natyshak, Esq. and Shawn A. Nelson, Esq. (Counsel for Defendants)

2744.01 Political subdivision tort liability definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)

(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

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

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

(c) 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 division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions, including the performance of any activity that a county land reutilization corporation is authorized to perform under Chapter 1724. or 5722. of the Revised Code;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w)

(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, county land reutilization corporation organized under Chapter 1724. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)

(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) 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.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) 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.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

Amended by 131st General Assembly File No. TBD, HB 158, §1, eff. 10/12/2016.

Amended by 130th General Assembly File No. TBD, SB 172, §1, eff. 9/4/2014.

Effective Date: 04-09-2003; 04-27-2005; 10-12-2006

2744.02 Governmental functions and proprietary functions of political subdivisions.

(A)

(1) 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 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.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

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

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in

connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, 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 and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

Effective Date: 04-09-2003; 2007 HB119 09-29-2007 .

2744.03 Defenses - immunities.

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to 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:

(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, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability 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 discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(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 and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(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 division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is 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 a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

Effective Date: 04-09-2003 .