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.	**:**	

REPLY 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. INTRODUCTION

Appellees, to begin their brief, ask: "[S]hould a jury of Ohio citizens decide to what extent Ohio public educators should have kept a child of tender years safe during class?" *Appellee Brief*, p. 7. The Ohio legislature has already answered that question in the negative; a public school employee is entitled to immunity from civil liability *unless:* "(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." *R.C. 2744.03(A)(6)*.

None of these exceptions is present in this case. As such, and despite Appellees' request to lower the "statutory immunity hurdle" in this case (see *Appellee Brief*, pp. 16–17, 22), Appellants are entitled to immunity pursuant to Ohio R.C. Chapter 2744.

II. LAW & ANALYSIS

A. Appellees ask this Court to ignore plain statutory language granting immunity to public school employees under R.C. Chapter 2744.

Ohio Revised Code 2744.03(A)(6) provides that an employee is personally immune from liability unless "(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." Appellees allege only that the "recklessness" exception applies in this case.

1. Appellees advance a negligence and/or strict liability standard to abrogate public school employee immunity.

"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). 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 v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356 (1994) (emphasis added).

Ohio courts have recognized that "the standard for demonstrating [reckless misconduct] is high." *See Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, ¶ 23. This high threshold exists because "the protections afforded to political subdivisions and employees of political subdivisions by [Ohio's political subdivision immunity statute] 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.

Appellees, in their brief, make only passing reference to the high threshold that they must satisfy to overcome the public school employees' statutory immunity. *See, e.g., Appellee Brief,* p. 16 (stating recklessness is a "level of culpability above negligence"). Instead, Appellees propose a negligence and/or strict liability standard that is inconsistent with well-established Ohio law. Appellees claim that public school employees, in this case, are not entitled to immunity because they "failed to **completely supervise** A.J.R." *Id.*, p. 11 (emphasis added). Appellees further claim that "the resulting education and school environment will be greatly diminished for students if Ohio policy allows for **faulty supervision and care** in public schools." *Id.*, p. 7 (emphasis added). Appellees also rely on the portion of the Sixth Appellate District's decision wherein the court injects a negligence standard into the immunity analysis: "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." *Id.*, p. 14 (quoting *Decision and Journal Entry*, pp. 13–14, ¶¶ 41–42) (emphasis added).

But, public school employees retain their immunity even in the face of alleged failure to "completely supervise" students, "faulty supervision and care" in public schools, or by failing to do what "might seem reasonable." Revised Code Chapter 2744 does not abrogate immunity in the case of imperfect, or even unreasonable, conduct; rather, it abrogates immunity under the "recklessness" exception only when a plaintiff demonstrates that a public school employee acted with "perverse disregard" that his/her conduct would in all probability result in injury.

2. Appellees are not entitled to lower the "statutory immunity hurdle."

When interpreting a statute, courts look first to the plain language of the statute and apply it as written when its meaning is clear and unambiguous. *Cheap Escape Co. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶ 9. If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, par. 5 of syllabus (1944). Courts "do not have the authority" to dig deeper than the plain meaning of an unambiguous statute "under the guise of either statutory interpretation or liberal construction." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347 (1994).

If a court ignores the unambiguous language of a statute, or if it finds a statute to be ambiguous only after delving deeply into the history and background of the law's enactment, that court invades the role of the legislature, which is to write the laws. *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8. "[I]t would be inappropriate for the judiciary to presume the

superiority of its policy preference and supplant the policy choice of the legislature." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 75. "The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might 'accord[] with good policy.'" *Johnson v. Montgomery*, 151 Ohio St.3d 75, 2017-Ohio-7445, ¶ 15 (quoting *Burrage v. United States*, 571 U.S. 204, 218 (2014)).

Here, Appellees ask this Court to lower the "[s]tatutory immunity hurdle" to make public school employees easier to sue. See *Appellee Brief*, pp. 16–17, 22. Appellees, however, fail to provide a cogent basis for lowering the "[s]tatutory immunity hurdle." Despite Appellees' pleas otherwise, it is not this Court's role to rewrite statutes. Nor is it this Court's objective to impose Appellees' policy preferences over those expressed by the Ohio legislature.

B. Appellees rely on inapposite statutes.

1. Ohio's mandatory reporting statute, set forth in R.C. 2151.421, has no bearing on Appellees' claims.

Ohio's mandatory reporting statute, R.C. 2151.421, does not encompass kindergartener-on-kindergartener teasing or other allegedly negative student-on-student interactions in the school context. *See* R.C. 2151.03 (negligent child defined); R.C. 2151.031 (abused child defined). Indeed, as noted by the U.S. District Court for the Southern District of Ohio, such an application would produce absurd results:

> Essentially, Plaintiffs argue that the bathroom attack by students at [the school] was an act of child abuse and the [School] Defendants failed to report that abuse to a children's services agency or law enforcement, as required.
>
> Defendants point out that putting Plaintiff's definition of child abuse into effect would lead to law enforcement or children's services being called for every incident of peer-on-peer violence. Defendants additionally note that no court has ever defined an altercation between elementary school students as child abuse.

> The Court agrees with Defendants. Plaintiffs' proposed reading of the child abuse statute is over-expansive and leads to absurd results.

Meyers v. Cincinnati Bd. of Edn., 343 F. Supp. 3d 714, 732–33 (S.D. Ohio 2018) (internal citations omitted).

2. Ohio's anti-hazing statute, set forth in R.C. 2903.31, has no bearing on Appellees' claims.

Ohio's anti-hazing statute, R.C. 2903.31, defines "hazing" as "doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any other person." *R.C. 2903.31(A).*

"The concept of a student organization, in this context, does not mean simply attending a given [] school and therefore being a member of the student body." *Duitch v. Canton City Schools*, 157 Ohio App. 3d 80, 2004-Ohio-2173, ¶ 31; see *Estate of Olsen v. Fairfield City School Dist. Bd. of Edn.*, 341 F. Supp. 3d 793, 812 (S.D. Ohio 2018) ("The allegations in the Second Amended Complaint do not describe a 'student organization' as that term has been interpreted by Ohio courts. Therefore, the peer harassment alleged in the Second Amended Complaint do not constitute hazing ***."). In addition, "initiation into an organization implies that membership in the organization is voluntary, and that the victim has, through his or her actions or otherwise, consented to the hazing." *Duitch* at ¶ 31.

Here, there is no allegation concerning hazing as defined by R.C. 2903.31(A); there is no "act of initiation into any student or other organization" at issue. Instead, Appellees base their claims only on teasing and negative student-on-student interactions in the context of the general student body. Those claims, by definition, do not come within the scope of Ohio's anti-hazing statute.

3. R.C. 3313.666, which requires school boards to establish an anti-bullying policy, has no bearing on Appellees' claims.

Revised Code 3313.666, which requires school boards to establish an anti-bullying policy, has no bearing on Appellees' claims. First, that statute "does not create a new cause of action or a substantive legal right for any person." *R.C. 3313.666(G)*; see *Waters v. Perkins Local School Dist. Bd. of Edn.*, N.D. Ohio No. 3:12 CV 732, 2014 U.S. Dist. LEXIS 43660, at *53–55 (Jan. 31, 2014) ("Plaintiffs claim that Defendants should incur some type of liability for not following their own internal bullying policies is equally unpersuasive. Ohio Rev. Code § 3313.666 requires school boards to establish an anti-bullying policy; however, the legislature went out of its way to specify that it does not create a new cause of action or substantive legal right."). *Second*, that statute does not impose duties on school employees, but only requires school boards to establish a policy. Accordingly, R.C. 3313.666 does nothing to further Appellees' claims.

C. Appellees fail to establish a genuine issue of material fact evidencing the public school employees acted in a reckless manner.

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*, supra, 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*, supra, at *74 (quoting *Shadoan v. Summit Cty. Children Servs. Bd.*, 9th Dist. Summit No. 21486, 2003-Ohio-5775, ¶14).

Here, the record is devoid of a "disposition of perversity." Without "disposition of perversity" 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. Indeed, Appellees admit that they "are not in a position to establish appellants' states of mind during their time supervising A.J.R." *Appellee Brief*, p. 31. As such, Appellees have failed to satisfy their reciprocal burden on summary judgment, and Appellants are entitled to summary judgment as a matter of law.

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

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