Supreme Court of Ohio Clerk of Court - Filed March 26, 2020 - Case No. 2020-0434

IN THE SUPREME COURT OF OHIO

JOHN HERRICK, *et al.*,	:	
	:	**Case No.**
Plaintiffs-Appellees,	:	
	:	On Appeal from the
vs.	:	Fifth District Court of Appeals,
	:	Richland County, Ohio
RICHLAND COUNTY SOLID WASTE	:	
MANAGEMENT AUTHORITY, *et al.*,	:	Court of Appeals Case No. 18CA131
	:	
Defendants-Appellants.	:	

DEFENDANTS-APPELLANTS RICHLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY, RICHLAND COUNTY COMMISSIONERS, AND CHARLES HOLMES' MEMORANDUM IN SUPPORT OF JURISDICTION

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I. STATEMENT OF APPELLEES' POSITIONS

This case presents a critical determination concerning the extent to which Ohio's General Assembly extended, and more importantly, limited the immunity afforded to political subdivisions pursuant to Chapter 2744 of the Ohio Revised Code. Given the potential ramifications that this lawsuit encompasses for political subdivisions across the state of Ohio, this lawsuit represents an issue that is of great public interest.

The Ohio legislature has generally shielded political subdivisions like Appellants from tort liability through R.C. Chapter 2744. Under the framework of Chapter 2744, courts engage in a three-tier analysis for determining whether a political subdivision is immune from liability:

> The first step sets forth the general rule that political subdivisions are entitled to broad immunity. R.C. 2744.02(A)(1) provides:
>
> 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 an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.
>
> Under the second tier of the statutory analysis, once immunity is established, a determination must be made as to whether any of the five exceptions to immunity listed under R.C. 2744.02(B) apply. If one or more exceptions apply, the third tier of analysis requires a determination of whether immunity may be reinstated because a defense applies.
>
> R.C. 2744.02(B)(4) removes the general immunity conferred on political subdivisions performing a governmental function if an injury is: "(1) caused by employee negligence, (2) on the grounds or in buildings used in connection with that governmental function, and (3*) due to a physical defect on or within those grounds or buildings. All of these characteristics must be present*." (Emphasis sic.)

See *Candidate v. Cuyahoga Metro. Hous. Auth.*, 2015-Ohio-880, ¶ 10-12 (8th Dist.) (citing *Duncan v. Cuyahoga Community College*, 2012-Ohio-1949, 970 N.E.2d 1092, ¶ 26; (8th Dist.); and *Hamrick v. Bryan City School Dist*., 2011-Ohio-2572, 2011 Ohio App. Lexis 2176, 2011 WL 2090038, ¶ 25 (6th Dist.)).

In general, Ohio courts have held that the "physical defect exception" of R.C. 2744.02(B)(4) to the immunity defenses granted to political subdivisions may apply if the instrumentality that caused the plaintiff's injury did not operate as intended due to a perceivable condition. See *Leasure v. Adena Local Sch. Dist.*, 973 N.E.2d 810, 815, 2012 Ohio 3071 (4th Dist.) (citing *DeMartino v. Poland Loc. Sch. Dist.*, 2011 Ohio App. Lexis 1259, 2011 WL 1118480, 2011 Ohio 1466 (7th Dist.)).

Under the language of R.C. 2744.02(B)(4) the physical defect must be "in or on the premises" themselves. The statute does not contemplate or permit a strict liability product defect for something that simply happens to be at the location. Rather, the statute was intended to allow liability for premises issues only. The exception was meant to cover premises claims like slip and falls, uneven surfaces, lack of handrails, and other claims where defects existed either in the buildings or on the grounds of governmental premises---not for strict liability claims for products which happen to be brought onto the premises.

Here, however, the Fifth District Court of Appeals has impermissibly broadened the scope of the physical defect exception to include claims of product defects, rather than solely premises defects, against a political subdivision. And it is not the first court to do so.

In *Jones v. Franklin County Sheriff's Dep't.* 1999 Ohio App. Lexis 2856, 1999 WL 527782 (12th Dist. 1999), the Twelfth District Court of Appeals specifically identified that the interpretation of R.C. 2744.02(B)(4) by appellate courts had diverged and set forth the following:

> . . .we note that upon a through [sic] examination of the case law, our analysis is further complicated by the fact that there are two ways to interpret R.C. 2744.02(B)(4). Some appellate courts have interpreted this subsection narrowly. ***These appellate courts read this subsection as creating a government building premises liability***; that is to say that liability is imposed *only* when the negligence which occurs is in connection with the physical maintenance of governmental property, or because of some "physical defect" in the property. Other appellate courts have interpreted R.C. 2744.02(B)(4) more broadly; they have

> imposed liability upon a showing that, due to some act of negligence, an individual has suffered injury within or on the grounds of a building that is used in connection to a governmental function.
>
> The Ohio Supreme Court may, in fact, clarify interpretations of this subsection as, in February of 1999, it accepted a motion to certify a conflict between the two lines of cases discussed above. However until such time, *we are inclined to agree with those appellate courts which have narrowly interpreted R.C. 2744.02(B)(4) and impose liability only to negligence which occurs in connection with the physical maintenance of governmental property.*

Id., at *16-18 (citing *Hubbard v. Canton City School Bd. of Ed.* (1999), 84 Ohio St. 3d 1486, 705 N.E.2d 366) (Emphasis added).

In *Hubbard*, this Court determined that a conflict amongst Ohio appellate courts' interpretations of R.C. 2744.02(B)(4) existed and requested briefing on that topic. *Id*. However, the case was subsequently dismissed, *sua sponte*, as having been improvidently allowed because R.C. 2744.02(C) has been amended and subsequently declared unconstitutional. See *Hubbard v. Canton City School Bd. of Ed.*, 88 Ohio St. 3d 14, 2000-Ohio-260 (2000). As a result, the differing interpretations of R.C. 2744.02(B)(4) have persisted despite a certified conflict identified more than twenty years ago. This Court should now resolve that conflict.

Rather than apply the narrow standard of the physical defect exception concerning premises liability to the facts of this case, the Fifth District adopted the much broader standard. See Opinion attached hereto as Appx. 1-13. The standard applied by the Fifth District makes political subdivisions liable for any machine or piece of equipment or device that is brought onto a government premises whether the political subdivision knows about the equipment (or any alleged defect) and whether or not the political subdivision has any control over that equipment, rather than simply for premises liability. This standard unintentionally creates a products liability standard for political subdivisions that was never envisioned by the Ohio legislature when enacting Chapter 2744.02(B)(4). The Fifth District's overly broad interpretation has been expressly

rejected by other Ohio Courts. See e.g., *Leausure*, at 817 ("R.C. Chapter 2744 contains nothing to indicate that the legislature indented to incorporate products liability law into R.C. 2744.02(B)(4).").

This case is of great public interest because the broadening of the physical defect exception by the Fifth District Court of Appeals unintentionally and impermissibly expands the scope of liability for all political subdivisions across the state. The standard adopted by the Fifth District is in direct contravention to the intent of the legislature that enacted R.C. 2744.02(B)(4). With this case, the Court finally has the opportunity, after waiting more than twenty years, to clarify the physical defect exception for political subdivisions and the potential liability therein – an issue that has substantial ramifications for governmental entities in Ohio and invokes great public interest, given the sheer volume of possible liability claims that the Fifth District's ruling could inadvertently welcome.

II. STATEMENT OF CASE AND FACTS

This appeal comes before the Court following a ruling wherein the lower courts have unintentionally expanded the physical defect exception to the immunity afforded to political subdivisions across the state pursuant to Chapter 2744 of the Ohio Revised Code. As a result, this case presents issues of great public interest whereby this Court may clarify the bounds and standards applicable to the physical defect exception of Chapter 2744 immunity under R.C. 2744.02(B)(4).

On July 31, 2015, John Herrick went to the composting facility operated by the Richland County Solid Waste Management Authority to unload a trailer of yard waste. He had done this many times before. During the unloading process, a grapple that is attached to a front end loader came down on Mr. Herrick's hand and he sustained injuries.

In order to unload yard waste from his trailer with the front loader, Mr. Herrick would place straps on his trailer and then load the trailer with yard waste on top of those straps. He would then travel to the yard waste facility and loop the straps onto one of the claws or forks located on the bucket of the front loader. In order secure the straps to the front loader bucket, a device known as a grapple would be brought down across the forks of the bucket and clamp the straps down, securing them to the bucket of the front loader. Once the grapple mechanism was brought down across the straps, the straps would be secured and the load of yard waste could be lifted off Mr. Herrick's trailer.

Mr. Herrick knew this procedure for securing the straps well. In fact, Mr. Herrick knew the process so well that, on the day of his injury, he did not even have to speak with employee Charles Holmes to know what steps were to be taken in order to have the straps secured and the yard waste removed from his trailer by the front loader.

On the day that he was injured, Mr. Herrick looped the straps under his load of yard waste onto the fork of the front loader bucket. He then attempted to dismount from the trailer by placing his left hand on the bucket of the front loader to balance himself. As Mr. Herrick stood on the side of the trailer, the grapple came down "the last few inches" and pinned Mr. Herrick's hand between the grapple mechanism and the bucket.

Mr. Herrick yelled to Charles Holmes to move the grapple back up in order to free his hand. Charles Holmes did so without any issue. Mr. Herrick estimated his hand was pinned for five to six seconds.

After Mr. Herrick's hand was released, employee Charles Holmes replaced the strap on the front loader, closed the grapple yet again, and lifted the load off the trailer as had previously been intended. While Charles lifted the load off the trailer, Mr. Herrick drove his truck and trailer out from underneath the load.

Later that same day, Mr. Herrick again returned to the facility with another trailer full of yard waste. He and Charles Holmes completed the same process of securing the strap to the front loader bucket with the grapple mechanism – this time without any incident because Mr. Herrick this time did not place his hand in between the grapple mechanism and the bucket.

III. ARGUMENT IN SUPPORT OF APPELLEES' POSITION

A. THE PHYSICAL DEFECT EXCEPTION APPLIES TO PREMISES LIABILITY CLAIMS, NOT STRICT LIABILITY PRODUCT CLAIMS

As set forth above, the immunity afforded to political subdivisions of Ohio may be removed if one of the exceptions enumerated under R.C. 2744.02(B) applies. Specifically, R.C. 2744.02(B)(4) provides that:

> . . . 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. . .

Id.

Further, the loader here operated as intended. Ohio courts have held that this "physical defect exception" to the immunity granted to political subdivisions may apply "if the instrumentality that caused the plaintiff's injury did not operate as intended due to a perceivable condition." See *Leasure v. Adena Local Sch. Dist.*, 973 N.E.2d 810, 815, 2012 Ohio 3071 (4th Dist.) (citing *DeMartino v. Poland Loc. Sch. Dist.*, 2011 Ohio App. Lexis 1259, 2011 WL 1118480, 2011 Ohio 1466 (7th Dist.)); see also *Jones v. Delaware City School District Board of Education*, 2013 Ohio 3907, ¶¶ 22-23 (5th Dist.).

Conversely, courts have determined that when the instrumentality that caused the plaintiff's injury operated as intended, the R.C. 2744.02(B)(4) physical defect exception does not apply. See *Leasure*, at 816 (citing *Hamrick v. Bryan City Sch. Dist.*, 2011 Ohio 2572, ¶ 29 (6th Dist.)). In *Hamrick*, the plaintiff fell into a maintenance pit of a dark bus garage and filed suit against a political subdivision claiming negligence by the political subdivision was the proximate cause of his injuries. The political subdivision asserted immunity by maintaining that there was no "physical defect" in the maintenance pit in the bus garage and, thus, immunity was not removed under the physical defect exception of R.C. 2744.02(B)(4). *Id*., at ¶ 18. Both the trial court and

the appellate court in that case found that there was no evidence that the pit had not operated as intended. As a result, the physical defect exception did not apply. *Id*., at ¶¶ 23 and 29. Upon review of the statutory construction of R.C. 2744.02(B)(4), the *Hamrick* court correctly concluded that that provision only removes immunity if an injury is: 1) caused by employee negligence, 2) on the grounds or in buildings used in connection that governmental activity, and 3) due to physical defects on or within those grounds or buildings. *Id*., at ¶ 25. All three of these factors must be present for R.C. 2744.02(B)(4) to apply. *Id*. In other words, the physical defect exception applies only if the instrumentality that caused the plaintiff's injury did not operate as intended.

Here, just like in the *Hamrick*, there is no evidence that the injury suffered was caused because the instrumentality did not operate as intended. In *Hamrick*, the pit operated as intended. It was a pit before the plaintiff fell into it, and it was a pit after the plaintiff fell into it. While the court noted that the pit Hamrick fell into could have been made safer in a variety of ways, there was no defect in the pit that caused Hamrick's injury. As a result, the court confirmed that the political subdivision in that case was immune

Similarly, the grapple mechanism and front loader involved in Mr. Herrick's injury operated as intended on the day Mr. Herrick was injured. The grapple mechanism was supposed to come down across the straps in order to secure them after Mr. Herrick placed the straps on the fork of the bucket. That was the process by which Mr. Herrick and Charles Holmes had secured loads of yard waste multiple times before. That was the procedure by which the pair later secured a subsequent load of yard waste the very same day. The grapple mechanism operated as intended both times on the day Mr. Herrick was injured. The *only* difference between the first and second loads was that Mr. Herrick placed his hand in the path of the grapple when securing the first load. This caused his hand to get caught between the grapple and the bucket.

As pointed out by the *Leasure* and *Hamrick* courts, if the instrumentality that causes the injury operates as intended, then R.C. 2744.02(B)(4) – the physical defect exception – does not apply and the political subdivision is entitled to immunity. Here, the front loader operated exactly as intended and exactly as it had during the countless times that Charles Holmes helped Mr. Herrick unload yard waste from Herrick's trailer. The grapple mechanism came down to secure the strap. That was the intention of all parties when the process to unload Herrick's trailer began. Had Mr. Herrick not placed his hand in the path of the grapple, he would not have been injured. Had the standard for the physical defect exception been applied correctly, Appellants are entitled to immunity.

B. THE FIFTH DISTRICT COURT OF APPEALS APPLIED THE WRONG STANDARD TO THE PHYSICAL DEFECT EXCEPTION, WHICH HAS CREATED AN ISSUE OF GREAT PUBLIC INTEREST

R.C. 2744.02(B)(4) provides that:

> . . . 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.

Id. (emphasis added).

The clear and unambiguous language of this statute creates an exception to political subdivision immunity within the context of *premises liability* and, even then, only under specific circumstances. However, the Fifth District Court of Appeals has impermissibly broadened the scope of this exception to include claims that are akin to products liability claims, which is wholly unrelated to premises liability for a political subdivision.

As identified *Jones v. Franklin County Sheriff's Dep't.* 1999 Ohio App. Lexis 2856, 1999 WL 527782 (12th Dist. 1999), appellate courts have been diverging in their respective

interpretations of R.C. 2744.02(B)(4). *Id.*, at *16-18. The narrow interpretation concerns government building premises liability while the broader interpretation (adopted by the Fifth District) imposes strict product liability for any injury on the grounds of a governmental building.

Back in 1999, the *Jones* court was hopeful that this Court's acceptance of *Hubbard v. Canton City School Bd. of Ed.* (1999), 84 Ohio St. 3d 1486, 705 N.E.2d 366) would rectify these diverging interpretations. Unfortunately, *Hubbard* was dismissed as improvidently allowed on grounds unrelated to the issue of interpretation of R.C. 2744.02(B)(4). See *Hubbard v. Canton City School Bd. of Ed.*, 88 Ohio St. 3d 14, 2000-Ohio-260 (2000). As a result, the differing interpretations of R.C. 2744.02(B)(4) have persisted despite a certified conflict having been identified more than twenty years ago.

The differing and conflicting standards being applied to political subdivisions alone should warrant this Court accepting jurisdiction in this case. However, this case is also of great public interest given the potential ramifications of the Fifth District's recent ruling. As applied, the Fifth District's standard now makes political subdivisions liable for any piece of equipment or device that may be brought within or onto the grounds of any property used in connection with the performance of a governmental function. Under the Fifth District's standard, an alleged defect need not even be associated with "buildings that are used in connection with the performance of a governmental function" at all, even though this is the unambiguous language of R.C. 2744.02(B)(4).

Moreover, the decision of the Fifth District has broadened the standard even further. Under the appellate court's recent interpretation, liability is to be imposed upon a political subdivision even when the instrumentality that allegedly causes the injury operates as intended, but has an inconsequential "physical defect" somewhere within it. In other words, the Fifth District's

decision removes immunity from Appellants simply because the front loader may not have been in perfect working order at the time of Mr. Herrick's injury, despite the fact that the front loader operated precisely as intended at that time that Mr. Herrick was injured. In other words, the alleged defect that the Fifth District based its removal of immunity upon had nothing to do with the mechanism that actually caused Mr. Herrick's injury.

Mr. Herrick testified in his deposition that Charles Holmes never said the hydraulics to the grapple (the mechanism of the front loader that came down on Mr. Herrick's hand) had been acting up. Rather, he testified that it was the hydraulics to the bucket that had been acting up:

Q. And did he say it was specifically the hydraulics for the grabel [sic]?

A. He said for the bucket, not the grabel [sic].

See Appendix to Appellants' Brief [to the Fifth District], at A 068-69.

Mr. Herrick was not injured because of front loader's bucket (or the hydraulic mechanisms thereof). He claims that the grapple mechanism came down and pinned his hand to the bucket. There was no malfunction of the grapple (or it's hydraulics) on the day of his injury – either at the time of the injury or when he later returned to deposit yet another trailer of yard waste. The grapple did not malfunction and had no physical defect. Nevertheless, the appellate court has removed immunity simply because part of the front loader that had nothing to do with Mr. Herrick's injury (the hydraulics of the front loader's bucket) may have had a "physical defect." That interpretation of R.C. 2744.02 is impermissibly broad based upon the clear language of the statute.

The broadened interpretation is of great public interest because it extends the scope of liability for all political subdivisions across the state in a manner that is inconsistent with the clear language of the statute and the intent of the Ohio legislature. The Fifth District's decision has

huge ramifications given the sheer volume of liability that can be imposed based upon this broad interpretation.

IV. CONCLUSION

R.C. 2744.02(B)(4) was never intended to impose liability upon political subdivisions for anything other than injuries caused by the negligence of their employees "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." This clear and unambiguous language establishes premises liability for political subdivisions, not strict product liability. Nevertheless, for more than twenty years now, some appellate courts have interpreted this exception narrowly as it is written, while other courts have broadened it to include instrumentalities, generally, whether the alleged injury was caused by a physical defect or not.

This Court was inclined to clarify R.C. 2744.02(B)(4) back in 1999, but the opportunity was taken away for unrelated reasons. The citizens of Ohio have a great interest in outlining the parameters to which liability is imposed upon their political subdivisions as the ramifications affect every governmental entity in the State. For too long, this exception has been applied with differing standards across the State of Ohio and this Court should accept jurisdiction over this matter to clarify the public's interest in such matters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by email and/or regular U.S. mail, postage prepaid, this 26th day of March, 2020, upon the following:

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COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY OHIO
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CLERK OF COURTS

JOHN HERRICK, ET AL.	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiffs-Appellees	:	Hon. Patricia A. Delaney, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
RICHLAND COUNTY SOLID WASTE	:	
MANAGEMENT AUTHORITY, ET AL.	:	Case No. 18CA131
	:	
Defendants-Appellants	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2014 CV 00475

JUDGMENT: Affirmed

DATE OF JUDGMENT:

RULE 58 (B) NOTICE
THIS JUDGMENT WAS ENTERED ON THE COURT'S JOURNAL
ON Feb. 10, 2020
BY B. Dalton
Richland County Clerk of Courts
Deputy Clerk

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Wise, Earle, J.

{¶ 1} Defendants-Appellants, Richland County Solid Waste Management Authority, Richland County Commissioners, and Charles Holmes, appeal the November 27, 2018 order of the Court of Common Pleas of Richland County, Ohio, overruling their motion for summary judgment. Plaintiffs-Appellees are John and Rebecca Herrick.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On July 31, 2015, John Herrick went to the composting facility operated by Richland County Solid Waste Management Authority to unload a trailer of yard waste. During the unloading process, a grapple attached to a front end loader came down on Mr. Herrick's hand and he sustained injuries.

{¶ 3} On July 28, 2017, Mr. Herrick, together with his wife, filed a complaint against appellants alleging negligence/respondeat superior, breach of duty, recklessness, and loss of consortium. On August 17, 2017, appellants filed a motion to dismiss, claiming immunity under R.C. Chapter 2744. By order filed September 22, 2017, the trial court denied the motion, finding if the front loader in question was the only way the composting facility could operate, then "a malfunction in the machinery could arguably be a defect in the grounds" to overcome the cloak of immunity.

{¶ 4} On September 18, 2018, appellants filed a motion for summary judgment, claiming the composting facility could be operated without the front loader, and the machine did not malfunction. By order filed November 12, 2018, the trial court denied the motion, finding genuine issues of material fact to exist regarding the front loader and the operator of the front loader.

{¶ 5} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶ 6} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING DEFENDANTS RICHLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY, RICHLAND COUNTY COMMISSIONERS, AND CHARLES HOLMES IMMUNITY PURSUANT TO OHIO REVISED CODE CHAPTER 2744."

I

{¶ 7} In their sole assignment of error, appellants claim the trial court erred in denying their motion for summary judgment as they are covered by immunity under R.C. Chapter 2744. We disagree.

{¶ 8} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 663 N.E.2d 639 (1996):

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (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) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶ 9} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35, 506 N.E.2d 212 (1987).

{¶ 10} The denial of immunity to a political subdivision under R.C. Chapter 2744 is a final, appealable order pursuant to R.C. 2744.02(C). *Hubbell v. City of Xenia,* 115 Ohio St.3d 77, syllabus, 2007-Ohio-4839, 873 N.E.2d 878.

{¶ 11} Determining whether a political subdivision is immune from liability requires a three-part analysis. *Elston v. Howland Local Schools,* 113 Ohio St.3d 314, 865 N.E.2d 845, 2007-Ohio-2070. First, R.C. 2744.02(A) provides broad immunity to political subdivisions. It is undisputed the Richland County Solid Waste Management Authority is a political subdivision and Charles Holmes is an employee thereof, and the operation of the solid waste facility was a governmental or proprietary function. Second, it must be determined if an exception applies under subsection (B). If so, then third, it must be determined whether any of the defenses in R.C. 2744.03(A) apply to reinstate immunity.

{¶ 12} R.C. 2744.02 governs political subdivisions not liable for injury, death, or loss and exceptions. Subsection (B) lists exceptions to immunity, and states the following relevant to this case:

> (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:

(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.

{¶ 13} In *Jones v. Delaware City School District Board of Education,* 5th Dist. Delaware No. 2013 CAE 01 0009, 2013-Ohio-3907, ¶ 22-23, this court discussed the meaning of "physical defects" as follows:

The phrase "physical defect" is not defined in R.C. Chapter 2744. However, in general, courts have held the R.C. 2744.02(B)(4) physical defect exception may apply if the instrumentality that caused appellee's injury did not operate as intended due to a perceivable condition or if the instrumentality contained a perceivable imperfection that impaired its worth or utility. *Leasure v. Adena Local School District,* 2012-Ohio-3071, 973 N.E.2d 810. * * *

> When an instrumentality does not operate as intended (i.e. safely) due to a perceivable condition, it loses its ability to function in a safe manner and may constitute a perceivable imperfection that diminishes the instrumentality's utility or worth. * * *

{¶ 14} R.C. 2477.03 governs defenses and immunities. Pertinent to this case are subsections (A)(5) and (6)(b) which state the following:

> (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:
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]

{¶ 15} As explained by the Supreme Court of Ohio in *Anderson v. City of Massillon,* 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 705, at ¶ 33-34:

> 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. * * *
>
> 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. * * * *see also Black's Law Dictionary* 1298-1299 (8th Ed.2004) (explaining that reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the *risk,* but the actor does not desire harm).

{¶ 16} In its order filed November 2018 overruling the motion for summary judgment, the trial court found the following genuine issues of material fact to exist appropriate for jury determination: 1) resolution of conflicting deposition testimony as to whether the front end loader malfunctioned and therefore is a "physical defect" within or on the grounds of county property [R.C. 2744.02(B)]; 2) resolution of whether the county's decisions regarding timely repair of the front end loader and whether or not to train the operator in safe operation involved the exercise of judgment or discretion [R.C. 2744.03(A)(5)]; and 3) resolution of whether the operator of the front end loader acted in a wanton or reckless manner [R.C. 2744.03(A)(6)(b)]. We concur with the trial court's analysis.

{¶ 17} Mr. Herrick owned a tree trimming/removal business and was a regular customer of the subject composting facility, taking a trailer of yard waste to the facility several times a week in the summer months. Herrick depo. at 18. On the day in

question, Mr. Herrick arrived at the facility whereupon Mr. Holmes was operating the front end loader. The two were familiar with each other as Mr. Holmes often unloaded Mr. Herrick's trailer. *Id.* at 21. As was the practice on many occasions, Mr. Herrick would loop one of his straps holding the yard waste through one of the claws on the grapple and then hook it down on the bucket. *Id.* at 20-22. The yard waste was not secure until the grapple came down. *Id.* at 20. After Mr. Herrick steps off his trailer, he signals to the operator to put the grapple down and tighten the load. *Id.* at 23. On the day of the incident, Mr. Herrick put his hand on the bucket to steady himself as he stepped off his trailer. *Id.* at 22, 24. He had not given Mr. Holmes any signal. *Id.* at 22-23. The grapple came down on Mr. Herrick's hand, causing him injuries. *Id.* at 22, 24-25.

{¶ 18} Mr. Herrick stated a couple of weeks prior to the incident, Mr. Holmes told him "the hydraulics [on the bucket] were acting up, and put a work order in on it to have it looked at." *Id.* at 30-31. Mr. Herrick testified right after the incident, Mr. Holmes told him "he did not put clamp down or the grabel (sic) down, but it came down on its own, so that tells me that the hydraulics gave." *Id.* at 31.

{¶ 19} When Mr. Holmes was hired by the county, he did not receive any training on the front end loader because he already knew how to operate it. Holmes depo. at 21-22. He never received any safety training on the front end loader during his employment with the county. *Id.* at 27. He was not trained on inspecting any of the pieces of equipment before operating them. *Id.* Mr. Holmes explained when unloading a trailer of yard waste, he usually waited "until the guy gives me the signal to tell me what to do, when they get out of the way, if they tell me to lift, that is what I do." *Id.* at 35. Mr. Holmes further explained, "[u]sually I wait until they tell me to lift or either he

gets in the truck and pulls out from underneath of it. I raise it up. When I see him, that is when I do what I got to do." *Id.* at 42. On the day of the incident, after Mr. Herrick hooked up the strap, Mr. Holmes did not see him, and the next thing he hears is "someone saying get it up, get it up, and get what up, nothing moved, and I raised the claws up, and I never moved the bucket." *Id.* From the time he put the claws down and Mr. Herrick climbed down off the pile of yard waste and disappeared from his sight, Mr. Holmes never moved any part of the equipment. *Id.* at 45. Mr. Holmes did not report any issues with the equipment that day to management. *Id.* at 57. He did not believe that he ever told Mr. Herrick that the front end loader was not working properly. *Id.* at 49. Mr. Holmes stated "there wasn't nothing going on with the loader, it's in excellent shape, good shape." *Id.* After the incident, Mr. Holmes filled out an incident report wherein he wrote: "John asked me for help to unload his trailer. The up and down sign, and I did, *John went to get off the trailer, I watched him and he got off* and his hand was stuck." (Emphasis added.)

{¶ 20} Rick Rhoades, the compost facility manager, explained it was never the intention of the compost facility to use mechanical equipment to help customers unload their yard waste, it just started as a kindness. Rhoades depo. at 18-19. After Mr. Herrick's injury, using the heavy equipment to help customers unload was stopped because "[w]e know that wasn't a good practice." *Id.* at 19. Training on operating the equipment amounted to "job site handling" and observation of the operator. *Id.* at 12-13, 15, 21. Every day, a piece of equipment prior to being operated required an overall inspection i.e., gages, hydraulics, fuel, lights. *Id.* at 21-24. Mr. Rhoades could not recollect who might have trained Mr. Holmes to inspect the equipment prior to operation. *Id.* at 26. After the incident, Mr. Holmes reported Mr. Herrick's injury to Mr.

Rhoades. *Id.* at 28. Mr. Holmes told Mr. Rhoades that Mr. Herrick had told him "to put them down" and after he did so, Mr. Herrick indicated that he had been injured. *Id.* at 29. Mr. Holmes stated he did not see Mr. Herrick. *Id.* Mr. Holmes did not report any issues with the equipment that day. *Id.* at 33. The front end loader was used on the same day after the incident without a problem. Herrick depo. at 29. An invoice was produced dated eleven days after the incident showing that a lift cylinder from the front end loader was repaired as it was leaking fluid or the piston was broken. Rhoades depo. at 34; Exhibits A and B. Also, a bucket clamp cylinder from the front end loader responsible for hydraulics of the bucket and grapples was honed out and worked on. *Id.* at 34-35. Mr. Rhoades did not have any recollection of anyone reporting problems with the front end loader prior to the incident. *Id.* at 40.

{¶ 21} As argued by appellees in their appellate brief at 6-7, we agree questions exist as to whether the front end loader malfunctioned, constituting a physical defect because the machinery did not operate as intended (i.e. safely) due to a perceivable condition (i.e. hydraulics on the front end loader had been acting up) and thus a mechanical issue could have diminished the worth or utility of the front end loader and its ability to function in a safe manner.

{¶ 22} Questions also exist as to whether any decisions to repair or timely repair any malfunction and to train the operator of the equipment on safety issues were exercised in a wanton or reckless manner, as well as whether Mr. Holmes acted in a wanton or reckless manner. There is conflicting testimony on whether Mr. Holmes knew about any malfunctions regarding the front end loader, whether he received a signal from Mr. Herrick, whether he knew of Mr. Herrick's location relative to the equipment before moving it, or whether he even moved the equipment at all.

{¶ 23} Upon review, we find the trial court did not err in finding appellants were not covered under the immunity statute and in overruling their motion for summary judgment.

{¶ 24} The sole assignment of error is denied.

{¶ 25} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Wise, Earle, J.

Delaney, J. concur and

Wise, John, P.J. concurs in part and dissents in part.

Hon. Earle E. Wise, Jr.

Hon. John W. Wise

Hon. Patricia A. Delaney

EEW/db

Wise, P.J., Concurring in part and dissenting in part

(¶26) While I concur with the majority's immunity analysis as to Richland County, I respectfully dissent from that part of the majority opinion that determined that Mr. Holmes is not entitled to immunity under R.C. §2744.03(A)(6).

(¶27) The reason for the difference being that under the third tier of the immunity analysis, R.C. §2744.03(A)(6) provides for broader immunity for employees:

> (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. * * *.

(¶28) In this case, there is no allegation that Holmes was acting outside of the scope of his employment.

(¶29) Upon review, even considering the inconsistencies in his statements, I find that Holmes actions in operating the front-end loader, including the grappling hook, at most, constitute negligence. I find no evidence these actions were undertaken with malice, bad faith, or in a wanton and reckless manner. Finally, there is no allegation that the Revised Code expressly imposes civil liability on Holmes.

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

RICHLAND COUNTY OHIO
FILED
2020 FEB 10 A 10:15
LINDA H. FRARY
CLERK OF COURTS

JOHN HERRICK, ET AL.	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
RICHLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY, ET AL.	:	
Defendants-Appellants	:	CASE NO. 18CA131

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed. Costs to appellant Richland County Commissioners.

Earle E. Wise Jr

Hon. Earle E. Wise, Jr.

Hon. John W. Wise

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served according to appellate rules and by

☑ **Regular Mail.**

☐ **Placed in Counsel's box in Clerk of Courts**

this 10th **day of** Feb. 2020

B. Dalton

Clerk of Courts

Patricia A. Delaney

Hon. Patricia A. Delaney

cc: J. Jeffrey Heck
Matthew Tector