IN THE SUPREME COURT OF OHIO

JANE DOE 1, A MINOR, et al.

Plaintiffs-Appellees,

v.

GREENVILLE CITY SCHOOLS, et al.,

Defendants-Appellants.

APPEAL FROM THE
COURT OF APPEALS, SECOND APPELLATE DISTRICT
DARKE COUNTY, OHIO
Case № 20CA00004

MEMORANDUM IN SUPPORT OF JURISDICTION OF GREENVILLE CITY SCHOOL DISTRICT BOARD OF EDUCATION, STAN HUGHES, AND ROY DEFRAIN

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I. A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Public entities, teachers, school administrators, and other governmental employees are broadly immune from the burdens of civil litigation absent certain specific and limited exceptions. R.C. 2744.01, et. seq. The law requires a presumption of immunity, and this Court has underscored the importance of resolving immunity questions at the earliest possible stage in litigation. *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 39. The current appeal presents two recurring issues involving sovereign immunity law and its interaction with the Civil Rules of Procedure, which should be resolved by this Court as matters of public or great general interest. More specifically, the Court should decide:

- Whether a civil complaint against an employee of a political subdivision must include some allegations of fact that, if believed, would establish an act or omission that was substantially greater than negligence rather than basing the claim upon statutory trigger words or legal conclusions.

- Whether the alleged absence of a device or piece of safety equipment constitutes a "physical defect" of a classroom or similar room in a government building under R.C. 2744.02(B)(4).

In reviewing the sufficiency of a civil complaint against government employees, some courts have required a party to allege operative facts that show the employee's acts were substantially greater than negligence in order to overcome immunity at the initial pleading stage. This does not mean that the plaintiff must plead his or her complaint with particularity. Rather, there must be some facts that, if believed, state a viable claim for relief. Yet other courts have concluded that a plaintiff may plead facts giving rise to an ordinary negligence claim so long as the complaint also includes the trigger language from some exception to immunity.

In this case, the allegations are that a school teacher and school principal (interchangeably) failed to install a fire extinguisher in the classroom and/or failed to enact sufficient, unspecified safety protocols to prevent an accident involving a classroom science experiment. These allegations clearly sound in negligence. Yet, both the trial court and the court of appeals concluded that the combination

of these negligence-based allegations with the conclusory use of the words "reckless" or "wanton" was sufficient to overcome immunity under Ohio's liberal notice pleading standards. In recent years, this Court has been asked on more than one occasion to clarify the pleading standards in the context of persons entitled to immunity. As such, this case presents a matter of public interest for which jurisdiction should be granted.

Similarly, there is a recognized split of authority on how to interpret the "physical defect" language of the 2744.02(B)(4) exception to immunity. Below, the appellate court found that the absence of a fire extinguisher could constitute a physical defect of a classroom under that "physical defect" exception. Other courts have concluded that the absence of a safety measure is not a "physical defect." This case presents an opportunity for the Court to resolve this question as a matter of public interest.

II. STATEMENT OF THE CASE AND FACTS

Two high school students and their parents brought this lawsuit alleging injuries arising out of a high school science experiment. They sued the Greenville City School District Board of Education, Principal Stan Hughes, teacher Roy Defrain, individual Board members, and certain unnamed Board employees. The defendants promptly filed a motion to dismiss the plaintiffs' bare-bones complaint on the basis of the immunities afforded by Chapter 2744 of the Ohio Revised Code. The plaintiffs were granted leave to file an amended complaint, but the facts included therein offered no further elucidation of the events giving rise to their legal claims. Consequently, the school defendants refiled their motion to dismiss, asserting that the plaintiffs still had not pleaded sufficient, operative facts to show they were entitled to relief when the defendants were entitled to statutory immunity.

The factual allegations were presented in the defendants' motion to dismiss exclusively from the plaintiffs' First Amended Complaint. Because the plaintiffs had included so few facts in support

of their claims, the statement of facts in this matter was and is especially brief. The plaintiffs alleged they were high school students at Greenville High School when they were injured. (Appx. - 2, Am. Complaint, ¶ 5) The principal of the high school at the time was Stan Hughes. (*Id*. at ¶ 4) On December 9, 2019, both students were attending and participating in a science class taught by teacher Roy Defrain. (*Id*. at ¶¶ 3 and 6) While the two high school students were "in the process of conducting a class-sanctioned science experiment, a bottle of isopropyl alcohol caught fire and exploded," causing them serious physical injury. (*Id.* at ¶ 7)

As to what it is that the defendants did wrong, the plaintiffs only alleged that all defendants (without differentiation) failed to provide a fire extinguisher or other, unspecified safety equipment in the classroom. (*Id.* at ¶ 12). They alleged that all defendants failed "to enact proper and appropriate protocols to adequately supervise and protect [students] during classroom activities." (*Id.*) Despite having been present for the incident, the plaintiffs did not plead any additional facts surrounding the science experiment at-issue. Rather, in conclusory fashion, the plaintiffs alleged that all defendants acted negligently, recklessly, and wantonly "in failing to properly protect" them. (*Id.* at ¶ 13).

In a transparent attempt to overcome the broad immunity afforded to political subdivisions and their employees, the plaintiffs pleaded that: "[p]ursuant to Revised Code § 2744.02(A)(5), to the extent Defendants exercised judgment or discretion in determining appropriate safety protocols for Greenville schools, that discretion was exercised maliciously, in bad faith and in a reckless and wanton manner." (Appx. - 4, Am. Complaint, ¶ 17) The plaintiffs further pleaded that their injuries were "due to a physical defect on Greenville High School grounds ***." (*Id*. at ¶ 18) The plaintiffs did not identify the purported "physical defect" giving rise to their injury despite having had the benefit of the original motion to dismiss filed by the defendants.

On September 10, 2020, the trial court denied the defendants' motion to dismiss in its entirety. (Appx. 27-35, Trial Court Decision) In the trial court's view, the alleged absence of safety equipment

in a classroom may give rise to a cognizable claim for relief under the R.C. 2744.02(B)(4) exception to immunity for political subdivisions. (Appx. – 33-34, Decision, p. 7-8) That exception generally allows a government entity to face potential liability for injury caused by "physical defects" within or on the grounds of buildings used for a governmental function. As to the individual defendants, the trial court did not consider or address in its decision whether the elements required to overcome 2744.03(A)(6) immunity had been sufficiently pleaded.

Citing R.C. 2744.02(C), the defendants appealed the trial court's denial of immunity to the Second District Court of Appeals. On June 25, 2021, the Court of Appeals affirmed the decision below. *Doe v. Greenville City Schs*, 2nd App. No. 2020-CA-4, 2021-Ohio-2127. First, the court held that the plaintiffs pleaded sufficient allegations of fact to overcome the presumption of governmental immunity for public employees because they had alleged that all defendants had failed to maintain a fire extinguisher in the classroom and had failed to enact safety protocols for supervision and protection of students. *Id*. at ¶ 5. Even when accepted as true, however, these allegations do not nearly meet the well-accepted standard or elements of "reckless" conduct in Ohio. At best, such facts would support a claim of negligence. Nevertheless, the Court concluded these negligence-based allegations were "minimally" enough to overcome the statutory presumption of immunity under Civil Rule 12(B)(6), because the plaintiffs had also used the word "reckless" in their complaint.

In Ohio, recklessness requires a showing of a perverse disregard of a known risk that individuals would in all probability be harmed. *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574. This standard requires a plaintiff to allege in the complaint some action or inaction by each governmental defendant that goes significantly beyond mere negligence. In this case, for instance, there is not a single fact alleged in the complaint that could possibly tie the school principal to any science experiment activity inside the classroom. While the plaintiffs were present

for all events leading up to the incident, they also alleged no facts that would have, in any way, given the teacher notice that the students would in all probability be harmed.

To reach its conclusions, the appellate court looked outside the complaint by stating that "the risk that a flammable liquid might catch fire in the presence of an open flame or other source of intense heat should be obvious." *Doe*, 2021-Ohio-2127, ¶ 18. Assuming the Court is correct in its assumptions, this statement offers no more explanation as to how the school district employees were reckless than did the plaintiffs' complaint. This statement of the "obvious" does not explain what action or inaction by school employees turned the possibility of combustion in a classroom science experiment into knowledge that students would "in all probability" be harmed.

The decisions of the courts below appear to stand for the proposition that any time school employees supervise a student activity involving the risk of harm (sports, shop class, science class, gym class, etc,...) and in which a student is injured, the court will infer recklessness by all school employees named by the plaintiffs at the motion to dismiss stage so long as the plaintiffs use the "magic language." This inference denies governmental employees who have been subject to conclusory allegations of misconduct an essential benefit of immunity, because it forces them to undergo the burdens of litigation even where no viable claim for relief has been alleged in the complaint.

The court of appeals also declined to grant immunity to the Board of Education on the grounds that the lack of a fire extinguisher in the science classroom could constitute a "physical defect" under R.C. 2744.02(B)(4). Both the trial and appellate courts relied upon this Court's decision in *Moore v. Lorain Metro. Hous. Auth*., 2009-Ohio-1250, 121 Ohio St. 3d 455, 905 N.E.2d 606. In *Moore*, the Court sent the question of "whether the absence of a required smoke detector was a 'physical defect'" back to the trial court to consider in the first instance. *Doe*, 2021-Ohio-2127, ¶ 25. The appellate court said, "arguably, the Court's opinion in *Moore* indicates the absence

of safety equipment could constitute a physical defect if the equipment were a legal or regulatory requirement." *Id*. at ¶ 27.

First, the appellate court's interpretation of the *Moore* decision would require consideration of allegations outside the complaint in the current case. There is no allegation in the plaintiffs' complaint that a fire extinguisher was required by a legal or regulatory requirement. Again, the plaintiffs filed two complaints in this matter and never asserted that such a requirement exists. A court cannot infer facts or requirements that are not set forth in the complaint to overcome political subdivision immunity.

Second, there is nothing in the *Moore* decision to suggest how this Court would interpret the "physical defect" language of R.C. 2744.02(B)(4). Rather, this Court had accepted *Moore* to consider a very specific immunity question having nothing to do with the definition of "physical defect." There is no dictum or language in the *Moore* decision to suggest how the Court would rule on the question of whether the absence of an added safety measure was a "physical defect" in a government building. The trial court found there to be a split of authority amongst appellate districts on whether the absence of safety equipment, alone, was sufficient to constitute a physical defect as a matter of law. *Doe*, 2021-Ohio-2127, ¶ 25. This case presents a clear opportunity for the Court to provide guidance to the district courts of appeals on this issue.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: A civil complaint against an employee of a political subdivision presumed immune from liability under R.C. 2744.03(A)(6) must include allegations of fact that, if believed, would demonstrate that the employee's act or omission was substantially greater than negligence; the conclusory use of the words "reckless" or "wanton" is insufficient.

Section 2744.03(A)(6) of the Ohio Revised Code affords broad immunity to government employees from personal 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). See also, *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008 Ohio 2574, 889 N.E.2d 505, ¶ 47; *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007 Ohio 1946, 865 N.E.2d 9.

In this case, the plaintiffs have only attempted to overcome the broad immunity afforded the individual defendants under R.C. 2744.03(A)(6)(b). In their amended complaint, the plaintiffs improperly lumped all individual government employees together, asserting that all of them failed to ensure there was sufficient protective equipment in the science class. The plaintiffs have not identified the specific role that any individual employee played in allegedly causing them harm. They have not alleged any facts as to how each individual defendant is purported to have acted in bad faith, recklessly, wantonly, or maliciously.

First, blanket allegations pertaining to "Defendants" or lumping together individual defendants in an attempt to plead a violation by any specific individual should be considered insufficient under the Rules of Civil Procedure. See *Boxill v. O'Grady*, 935 F.3d 510, 2019 WL 3849559, at *3 (6th Cir. 2019) ("Summary reference to a single, five-headed "Defendants" does not support a reasonable inference that each Defendant is liable for retaliation."). By making all defendants responsible for all acts alleged in the complaint, the plaintiffs have failed to provide sufficient notice to any of the defendants under Civil Rule 8 as to the nature of the claims against them.

Second, the plaintiffs have failed to allege facts going to the elements of reckless, wanton, bad faith, or malicious conduct under R.C. 2744.03(A)(6). Instead, they have asserted bare conclusions of law to which the Court should give no weight. Ohio courts have frequently defined the qualifying words used in Section 2744.03(A)(6)(b). "Malice" means an intentional desire to harm. *Bush v. Kelley's, Inc.*, 18 Ohio St. 2d 89, 92, 247 N.E.2d 745 (1969). Malice is "hatred, ill will or a spirit of

revenge." *Schellhouse v. Norfolk & W. Ry. Co.*, 61 Ohio St. 3d 520, 525 (1991). "Bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Burkhart v. Dayton Bd. of Educ*., 2nd App. No. 23739, 2010-Ohio-2496, ¶ 18. Wanton misconduct is the "failure to exercise any care whatsoever under circumstances in which there is a great probability that harm will result." *Hawkins v. Ivy*, 50 Ohio St. 2d 114, 119 (1977); see *Wieber v. Rollins*, 55 Ohio App.3d 106 (1988). Finally, reckless is defined as a "perverse disregard for a known risk." *Poe v. Hamilton*, 56 Ohio App. 3d 137, 138 (1990).

The current case presents a classic "failure to protect" type of claim that is frequently raised against government employees. This Court has very recently had an opportunity to consider a "failure to protect" claim in the context of the school environment. *A.J.R. v. Lute*, 2020-Ohio-5168, 2020 Ohio LEXIS 2456. In *A.J.R.*, a kindergarten student was being bullied by another child and was ultimately assaulted by the other child with a pencil to the face. *Id*. at ¶ 2-4. The parents alleged that they had told two different school principals multiple times about the bullying by the offending child, but the district employees failed to take action to protect the student and even seated A.J.R. with the offending student on the date of the incident. *Id*.

In evaluating the question of immunity for the individual defendants, the Supreme Court focused on the "reckless" component of 2744.03(A)(6)(b), explaining:

> In applying R.C. 2744.03(A)(6)(b), this court has defined "recklessness" as "a perverse disregard of a known risk." *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, paragraph three of the syllabus. "Recklessness * * * necessarily requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in injury." *Id*. This court has further explained that "[r]eckless 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, 983 N.E.2d 266, paragraph four of the syllabus.

Id. at ¶ 17 (emphasis added).

Unlike the Second District, other district courts of appeals have held plaintiffs to the burden of pleading facts that, if believed, would demonstrate that the government employee's act or omission was substantially greater than negligence. See, e.g., *Maternal Grandmother v. Hamilton Cty. Dep't of Job & Family Servs*., 2020-Ohio-1580; and *Bowman v. Downs*, 8th App. No. 1048800, 2017-Ohio-1287.

In *Maternal Grandmother*, the plaintiffs alleged that a child had suffered from a period of abuse from her parents prior to her death. *Maternal Grandmother*, 2020-Ohio-1580. They alleged that county caseworkers knew about or should have discovered the signs of abuse during an investigation into a report of neglect and malnutrition of the child. Because the county employees did not discover the abuse or take action to prevent the abuse and the child's death, the plaintiffs claimed that the employees were acting in a willful, wanton, or reckless manner or were acting in bad faith. The First District Court of Appeals dismissed the complaint, concluding that merely saying that the county employees had acted in one of those ways was insufficient to survive a motion to dismiss where these were the legal standards of proof. "Unsupported legal conclusions are not accepted as true for purposes of a motion to dismiss and are insufficient to withstand such a motion." *Maternal Grandmother*, 2020-Ohio-1580, ¶ 32.

In *Bowman, supra*, the Eight District Court of Appeals affirmed the Civil Rule 12(C) dismissal of a complaint against police officers on the basis that the plaintiff had failed to plead any facts to suggest the officers' alleged conduct was substantially greater than negligence. *Bowman v. Downs*, 8th App. No. 1048800, 2017-Ohio-1287, 88 N.E.3d 528. Bowman had alleged in his complaint that he called the police on his girlfriend, who was agitated and inebriated. She had a history of domestic violence known to the officers and an outstanding warrant. Yet, the police officers did not arrest the

woman that day and took no other action to protect the plaintiff from her. Soon thereafter, a physical altercation ensued in which the plaintiff was seriously injured.

In reviewing the factual allegations in the complaint, the court of appeals concluded that the allegations against the individual police officers sounded in negligence and were insufficient to overcome immunity. "A negligence claim is not converted to one of wanton or reckless conduct on a mere allegation in the complaint without evidence of a substantially greater risk than negligence." *Id*. at ¶ 20, quoting, *Yonkings v. Piwinski*, 10th Dist. Franklin Nos. 11AP-07 and 11AP-09, 2011-Ohio-6232, ¶ 43.

Despite this clear and straightforward analysis of the factual allegations in the Bowman complaint, the 8th District later suggested that it would have decided the *Bowman* case differently if the plaintiff had simply included an allegation in his complaint that the police officers had acted "with malicious purpose, in bad faith, or in a wanton or reckless manner." *Elliott v. Cuyahoga Cty. Exec. & Council*, 8th App. No. 105773, 2018-Ohio-1088, ¶ 29. This holding flies in the face of well-established legal precedent that unsupported legal conclusions of a complaint are not sufficient to survive a motion to dismiss. *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324 (1989). There can be no reasonable dispute that a court can dismiss a complaint that includes only a conclusory allegation that an individual acted negligently. The law requires there to be some facts as to *how* that person acted negligently. Even the Second District Court of Appeals once declined to allow a plaintiff to transform an ordinary negligence claim into one of reckless or wanton misconduct by throwing in a legal phrase pulled directly from the statute. See, e.g., *Fish v. Coffey*, 33 Ohio App. 3d 129, 131-132 (1986) (a proposed amendment to add the phrase "willful or wanton conduct" to defeat immunity under former R.C. 701.02 was insufficient without "new allegations of any operative facts which might establish willful or wanton conduct."). The defendants are only asking that these recognized

rules of civil pleading be applied to conclusory allegations of wanton or reckless conduct where questions of immunity are involved.

The plaintiffs in the current case have not alleged any facts in their complaint that would have placed any district employee on notice that not having a fire extinguisher or unspecified protective equipment would, in all probability, result in the specific harm alleged in this case. The plaintiffs have not alleged any facts that constituted a perverse disregard of a known risk to these students that a bottle of isopropyl alcohol would explode. Even if the allegations regarding protective equipment in the first amended complaint are accepted as true, those allegations would not constitute "substantially greater than negligent conduct."

Given the still inconsistent legal authority on this issue, the Court should accept jurisdiction of this matter to confirm that a civil complaint against an employee of a political subdivision presumed immune under R.C. 2744.03(A)(6) must include some allegations of fact that, if believed, would establish that the employee's act or omission was substantially greater than negligence and that the conclusory use of the words "reckless" or "wanton" is insufficient to overcome immunity at the pleading stage.

PROPOSITION OF LAW NO. 2: The alleged absence of a device or piece of safety equipment that would not be considered a "fixture" under Ohio law cannot constitute a "physical defect" of a classroom under R.C. 2744.02(B)(4).

The plaintiffs have also sued the local board of education for their injuries. Again, in Ohio, political subdivisions are broadly immune from civil liability, with limited exceptions. R.C. 2744.02(A) & (B). In evaluating questions of political subdivision immunity, courts apply the now-familiar "three-tiered" analytical framework mandated by R.C. Chapter 2744. See, *Cater v. Cleveland*, 83 Ohio St.3d 24, 28 (1998); *Campbell v. Burton*, 92 Ohio St.3d 336 (2001). The first tier asks only whether the entity sued is a political subdivision entitled to operate under the

presumption of immunity. A board of education is one such political subdivision. R.C. 2744.01(F); *Hubbard v. Canton City Schools Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718.

The second tier requires courts to consider the five limited exceptions to immunity that might subject the political subdivision to liability for civil damages, which can be summarized as follows: (1) negligent operation of a motor vehicle; (2) negligent performance of proprietary functions; (3) negligent failure to keep public roads in repair; (4) injury caused by negligence that occurs and "is due to physical defects within or on the grounds of, buildings used in connection with the performance of a governmental function"; and (5) when civil liability is expressly imposed on the government by statute. R.C. 2744.02(B)(1)-(5). If a claimant cannot satisfy one of these exceptions to immunity, the analysis comes to an end, and the political subdivision's immunity remains intact. However, if an exception applies, immunity may be restored through application of the defenses to immunity set forth in R.C. 2744.03(A), including when the act or failure to act by an employee was the result of the exercise of judgment or discretion.

As noted above, the plaintiffs' complaint attempted to invoke the "physical defect" exception to immunity found in R.C. 2744.02(B)(4) by using the "magic" language. However, the plaintiffs made no attempt to identify the physical defect alleged to have existed in the science classroom. In declining to grant the board of education immunity, the trial and appellate courts found that an allegation that a classroom lacked a fire extinguisher or other unspecified safety equipment was sufficient to meet the plaintiffs' burden at the pleading stage of the proceedings.

Most Ohio courts to have considered the issue have defined "physical defect" as "a perceivable imperfection that diminishes the worth or utility of the object at issue." *Duncan v. Cuyahoga Cmty. College*, 8th App. No. 97222, 2012-Ohio-1949, ¶ 26. The *Duncan* court determined that a lack of mats on the floor of a classroom did not constitute a physical defect. *Id., citing, Hamrick v. Bryan City Sch. Dist.*, 6th App. No. WM-10-014, 2011-Ohio-2572, ¶ 28. In *Hamrick*, the court held

that a bus garage service pit into which the plaintiff had fallen was not an imperfection that diminished the garage's utility. *Id*. *See also McCullough v. Youngstown City Sch. Dist.*, 7th App. No. 18 MA 0075, 2019-Ohio-3965, ¶ 38-40 ("[A] hill bordering a sidewalk and street does not become defective because a person decides to roll down it, just as the unfenced flat portions of the high school's grounds would not become defective because a student decides to run into the street.").

Additionally, the 10th District recently, and correctly, noted that Ohio cases addressing the physical defect exception "involve physical defects as part of the structure of buildings and the maintenance of those structures." *Douglas v. Columbus City Schools Bd. of Edn.*, 2020-Ohio-1133, ¶ 25, 10th Dist. *See also Coats v. City of Columbus*, 2007-Ohio-761, ¶ 17 ("…the exception applies only to cases where the injuries resulted from physical defects in the property."); *City of Cuyahoga Falls v. Gaglione*, 2017-Ohio-6974, ¶ 24-28 (finding that a natatorium's leaky roof could be a physical defect). The circumstances in *Douglas* are analogous to the present case and worthy of examination.

Liezl Douglas, a middle school student, participated in a science class project led by a teacher, Kirk Bardos. *Douglas, supra*, at ¶ 1-2. The project involved the design, construction, and launching of rockets. *Id*. at ¶ 10-11. During the launch process, one of the rockets went sideways and struck Liezl's leg, causing burns and scarring. The project was a part of the school's science curriculum. *Id*. The *Douglas* court rejected the argument that the rocket constituted a "physical defect." *Id.* at ¶ 26. Instead, the court determined that "the purported defect ar[ose] from activity related to the science experiment itself, including the manner in which the parts of the rocket were designed and assembled by the students, as well as the allegation that [the teacher] failed to take proper precautions to supervise the demonstration (i.e., by failing to keep the students a safe distance away from the launch.)." *Id.* The (B)(4) exception to immunity did not apply – the building structure and its maintenance were not implicated.

Like Liezl Douglas, the plaintiffs in this case sustained injury while participating in a class-sanctioned science project. One of the items used in connection with the experiment, a bottle of rubbing alcohol, caught fire. Like the rocket in *Douglas*, the bottle cannot be considered a physical defect. The injuries arose from the science experiment itself and were not due to a building or grounds defect.

The plaintiffs have not alleged the existence of a fire extinguisher in the classroom that was defective when used. Instead, to date, the case has turned on whether the absence of a fire extinguisher could render the classroom defective for purpose of the (B)(4) exception to immunity. Other Ohio courts have rejected the argument that a political subdivision's premises should be considered physically defective because modifications or improvements may have rendered them safer. *Piispanen v. Carter*, 11th Dist. Lake No. 2005-L-133, 2006-Ohio-2382, ¶ 21; *see also Duncan, supra*, at ¶ 27 (community college's failure to use mats on floors while conducting a self-defense class was not a "physical defect"); *Hamrick, supra*, at ¶ 29 (a bus-garage service pit into which the plaintiff fell was not a physical imperfection and thus not a defect for purposes of removing immunity under R.C. 2744.02(B)(4)).

Even if the plaintiffs could satisfy the (B)(4) exception to immunity (which they cannot), the Board of Education's immunity would be reinstated by R.C. 2744.03(A)(3) & (5). The plaintiffs contend that the Board failed to provide proper safety equipment and failed to enact appropriate protocols to supervise and protect students during classroom activities. (Appx.- 3, *Complaint*, ¶ 9). Determining what safety equipment to purchase and use is a discretionary policy-making and planning judgment. So, too, is the enactment and implementation of student supervision protocols. *Douglas, supra*, ¶ 27-30, *citing to, Elston v Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, ¶ 32. Political subdivision employees have wide discretion in determining what level of supervision is appropriate to promote the safety of the children in their care. *Id*. "Ohio courts have

held that 'the use or non-use of equipment or safety devices constitutes an exercise of judgment or discretion within the purview of R.C. 2744.03(A)(5).'" *Id.* And, "'the manner in which a teacher instructs a student to use a piece of school equipment, the manner in which the student is supervised and the manner in which the equipment is maintained and inspected have all been determined to be discretionary acts sheltered from liability.'" *Id.* In short, even if the plaintiffs had pleaded some facts that could establish an exception to immunity, the Board's immunity would be reinstated by R.C. 2744.03(A)(3) & (5).

Under the circumstances, the Court should take this opportunity to hold that the alleged absence of a device or piece of safety equipment that would not be considered a "fixture" under Ohio law cannot constitute a "physical defect" of a classroom under R.C. 2744.02(B)(4).

IV. CONCLUSION

For the reasons set forth herein, the Court should accept discretionary jurisdiction of the appeal filed by Greenville City School District Board of Education, Stan Hughes, and Roy Defrain as a matter of great public or general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on August 9, 2021 via electronic mail upon the following:

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APPENDIX

IN THE COMMON PLEAS COURT DARKE COUNTY, OHIO
CIVIL DIVISION

JANE DOE1, A MINOR, et al.	:	**CASE NO.: 20 CV 00239**
	:	
	:	**JUDGE JONATHAN P. HEIN**
Plaintiffs,	:	
	:	
vs.	:	
	:	
	:	**PLAINTIFFS' FIRST AMENDED COMPLAINT**
	:	
GREENVILLE CITY SCHOOLS , et al.	:	
	:	
Defendants.	:	

NOW COME, Plaintiffs, Jane Doe 1, a minor, Jane Doe 2, a minor, Patrick Eichelberger, and Cherylene Sutphin (hereinafter referred to as "Plaintiffs"), by and through counsel, and for their First Amended Complaint state as follows:

FIRST CAUSE OF ACTION
(Negligence and Gross Negligence)

1. At all times relevant herein, Defendant Greenville City Schools was an entity established to adopt, implement, delegate and/or oversee procedures, standards and guidelines, including but not limited to, insuring physical safety and well-being of students who attended the schools contained in the Greenville City Schools District, including Greenville High School, including but not limited to classroom activities on Greenville High School premises, and insuring that students were adequately protected from harm.

2. At all times relevant herein, Defendant Greenville Board of Education was an entity established to adopt, implement, delegate and/or oversee procedures, standards and guidelines, including but not limited to, insuring the physical safety and well-being of students who attended the schools contained in Greenville City Schools District, including Greenville High School, including but not limited to classroom activities on Greenville High School premises, and insuring that students were adequately protected from harm.

3. At all times relevant herein, Roy Defrain was a teacher conducting a science class both girls attended and was an employee of Greenville City School District and/or Greenville High School.

4. At all times relevant herein, Stan Hughes was the principal of Greenville High School and was an employee of Greenville City School District and/or Greenville High School.

5. On or about December 9, 2019, Plaintiffs, Jane Doe 1, a minor and Jane Doe 2, a minor, were students at Greenville High School and attended classes under the direct supervision, custody, and protection of Defendants through its employees and or agents, Roy Defrain and/or Stan Hughes and/or Jane and/or John Doe employees.

6. On or about December 9, 2019, Plaintiffs, Jane Doe 1 and Jane Doe 2, were participating in class activities on Greenville High School grounds, specifically in Roy Defrain's science class, under the supervision and protection of adult Greenville High School teachers/employees including but not limited to teacher Roy Defrain and Principal Stan Hughes.

7. Upon information and belief, during the aforementioned class and in the process of conducting a class-sanctioned science experiment, a bottle of isopropyl alcohol caught fire and exploded, dousing Jane Doe 1 and Jane Doe 2 with flaming liquid and causing Jane Doe 1 and Jane Doe 2 to suffer burn injuries.

8. Plaintiff Jane Doe 1's injury was so severe that CareFlight was called and Plaintiff Jane Doe 1 was required to undergo painful skin graft surgery.

9. Defendants owed Plaintiffs Jane Doe 1 and Jane Doe 2 a duty as minor students under Defendants' supervision and protection during school hours.

10. Defendant Stan Hughes owed Plaintiffs Jane Doe 1 and Jane Doe 2 a duty of care as the Principal of Greenville High School to ensure the proper placement of fire extinguishers in classrooms where dangerous experiments might be performed.

11. Defendants Stan Hughes and Roy Defrain owed Plaintiffs Jane Doe 1 and Jane Doe 2 a duty of care to ensure that there were proper safety procedures and protocols in place with regard to experiments performed by students in the classroom.

12. Defendants, directly and through their agents and employees, breached their duty owed to Plaintiffs Jane Doe 1 and Jane Doe 2 and other students by failing to provide proper safety equipment to minor students attending Greenville High School, especially, but not limited to, a fire extinguisher inside the classroom. Additionally, Defendants breached their standard of care to Plaintiffs Jane Doe 1 and Jane Doe 2 and other students through their failure to enact proper and appropriate protocols to adequately supervise and protect Plaintiffs Jane Doe 1 and Jane Doe 2 and other students during classroom activities.

13. As a direct and proximate result of negligence, recklessness and wantonness of Defendants in failing to properly protect the students at issue, Plaintiffs Jane Doe 1 and Jane Doe 2 were caused to suffer significant physical and emotional injuries, including, but not limited to: severe burns. Additionally, as a direct and proximate result of the negligence, recklessness and wantonness of Defendants, Plaintiffs Jane Doe 1 and Jane Doe 2 have and continue to suffer

significant psychological and emotional injury, including, but not limited to: post-traumatic stress disorder, extreme nervousness, reoccurring nightmares, and anxiety.

14. As a further direct and proximate result of the negligence, recklessness, and wantonness of Defendants, Plaintiffs Jane Doe 1 and Jane Doe 2 have been caused to suffer extreme emotional distress, were caused to incur medical expenses, and will have to accommodate their condition for the rest of their lives, with ongoing therapy, medical care, and other services.

15. As a further direct and proximate result of the negligence, recklessness and wantonness of Defendants, Plaintiffs Jane Doe 1 and Jane Doe 2 have suffered permanent injury and have suffered a diminution in their ability to earn an income in the future.

16. The provisions of political subdivision and school district immunity found in Revised Code §§2744.01, 2744.02, 2744.03, and 2744.04 are inapplicable to the facts of this case.

17. Pursuant to Revised Code §2744.02(A)(5), to the extent Defendants exercised judgment or discretion in determining appropriate safety protocols for Greenville schools, that discretion was exercised maliciously, in bad faith and in a reckless and wanton manner.

18. Pursuant to Revised Code §2744.02(B)(4), Defendants' negligence in failing to protect and keep Jane Doe 1, a minor, and Jane Doe 2, a minor, safe while they were under Defendants' supervision as students at Greenville High School was due to a physical defect on Greenville High School grounds which were being used in performance of a governmental function.

19. Pursuant to Revised Code §2744.03(A)(6), all of the Defendants' acts and omissions in this case were done in a negligent, reckless and wanton manner.

20. Revised Code §2744.05, to the extent that it imposes arbitrary and irrational damage caps that have no relationship to the injuries sustained by Plaintiffs bringing this tort action, is unconstitutional and a deprivation of Plaintiffs' rights, pursuant to the Ohio Constitution, including, but not limited to, the due process and equal protection clauses, and right to trial by jury.

21. Wherefore, Plaintiffs demand judgment against all Defendants, individually and collectively, jointly and severally, in an amount well in excess of Twenty-Five Thousand and 00/100 Dollars ($25,000.00).

SECOND CAUSE OF ACTION
(Plaintiff, Patrick Eichelberger's Loss of Consortium Claim Against Defendants)

22. Plaintiffs re-state and re-allege the preceding allegations of the Complaint as though fully rewritten herein.

23. Plaintiff, Patrick Eichelberger, further claims damages for the loss of the love and affection and support of his daughter, Jane Doe 1 and for any medical bills, expenses or other costs incurred for the care, support, and maintenance of Jane Doe 1 caused by and in light of the injuries inflicted upon her by Defendants.

THIRD CAUSE OF ACTION
(Plaintiff, Cherylene Sutphin's Loss of Consortium Claim Against Defendants)

24. Plaintiffs re-state and re-allege the preceding allegations of the Complaint as though fully rewritten herein.

25. Plaintiff, Cherylene Sutphin, further claims damages for the loss of the love and affection and support of her daughter, Jane Doe 2 and for any medical bills, expenses or other

costs incurred for the care, support, and maintenance of Jane Doe 2 caused by and in light of the injuries inflicted upon her by Defendants.

WHEREFORE, Plaintiffs pray for judgment against defendants, jointly and severally, in an amount in excess of Twenty-Five Thousand Dollars ($25,000.00) for compensatory damages against all defendants, together with all costs incurred herein, reasonable attorney fees, pre-judgment and post-judgment interest, and any other relief the court deems appropriate.

FOURTH CAUSE OF ACTION
(Subrogation Claims with regard to HCC Life Insurance Company)

23. Plaintiffs re-allege all allegations in the preceding paragraphs as if rewritten herein.

24. Defendant HCC Life Insurance Company has paid or will pay medical expenses on behalf of Plaintiff Jane Doe 1, a minor, for injuries it claims are related to the subject matter of the Complaint.

25. Plaintiffs deny that Defendant HCC Life Insurance Company may be entitled to be reimbursed or may be subrogated to the rights of the Plaintiffs for monies paid for medical expenses related to this subject lawsuit.

WHEREFORE, Plaintiffs request, as to Count Four, against Defendant HCC Life Insurance Company, the Court determine if and to what extent Defendant is entitled to recover medical benefits paid.

FIFTH CAUSE OF ACTION
(Subrogation Claims with regard to Ohio Department of Medicaid)

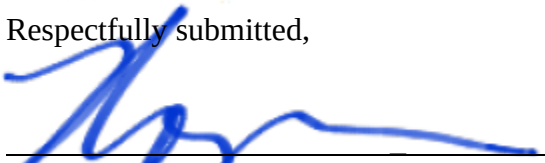
26. Plaintiffs re-allege all allegations in the preceding paragraphs as if rewritten herein.

27. Defendant Ohio Department of Medicaid has paid or will pay medical expenses on behalf of Plaintiff Jane Doe 2, a minor, for injuries it claims are related to the subject matter of the Complaint.

28. Plaintiffs deny that Ohio Department of Medicaid may be entitled to be reimbursed or may be subrogated to the rights of the Plaintiffs for monies paid for medical expenses related to this subject lawsuit.

WHEREFORE, Plaintiffs request, as to Count Five, against Defendant Ohio Department of Medicaid, the Court determine if and to what extent Defendant is entitled to recover medical benefits paid.

Respectfully submitted,



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JURY DEMAND

Plaintiffs demand a trial by jury of all issues herein.

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CERTIFICATE OF SERVICE

A copy of the foregoing was served this 3rd day of August, 2020, via First-Class United States mail, postage prepaid, and/or electronic mail to the following:

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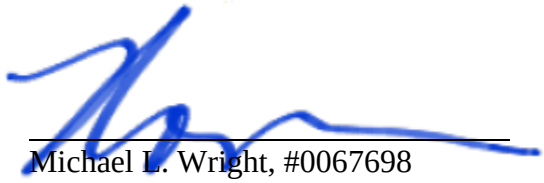

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[Cite as *Doe v. Greenville City Schools*, 2021-Ohio-2127.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

JANE DOE 1, A MINOR, et al.	:	
	:	
Plaintiffs-Appellees	:	Appellate Case No. 2020-CA-4
	:	
v.	:	Trial Court Case No. 2020-CV-239
	:	
GREENVILLE CITY SCHOOLS, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellants	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 25th day of June, 2021.

. . . . . .

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. . . . . .

TUCKER, P.J.

{¶ 1} Defendants-appellants Greenville City School District Board of Education (the "Board of Education"), Stan Hughes and Roy Defrain appeal, pursuant to R.C. 2744.02(C), from the trial court's judgment of September 10, 2020, in which the court overruled their motion to dismiss the complaint of Plaintiffs-appellees, Jane Doe 1, Jane Doe 2, Patrick Eichelberger and Cherylene Sutphin. Raising three assignments of error, Appellants argue that the trial court erred by overruling their motion to dismiss the individual defendants pursuant to R.C. 2744.03(A)(6), by determining that the absence of safety equipment might satisfy the definition of the term "physical defect" for purposes of R.C. 2744.02, and by failing to determine whether the Board of Education is immune from liability pursuant to R.C. 2744.03(A)(3) and (5).

{¶ 2} We hold that the trial court erred by overruling Appellants' motion to dismiss Appellees' claims against 10 unnamed employees of the Board of Education, and the court's judgment is reversed in that respect. Otherwise, for the following reasons, we hold that the trial court did not err, and the court's judgment of September 10, 2020, is therefore affirmed in all other respects. The matter is remanded for further proceedings consistent with this opinion.

I. Facts and Procedural History

{¶ 3} Jane Doe 1 and Jane Doe 2 were minor students at Greenville High School in December 2019. *See* Amended Complaint ¶ 5, Aug. 21, 2020. During an experiment in their science class on December 9, 2019, the two students suffered injuries when a bottle of isopropyl alcohol caught fire and exploded. *Id.* at ¶ 6-7 and 9.

{¶ 4} On May 28, 2020, Appellees filed a complaint against Appellants, five identified members of the Board of Education, ten unnamed employees of the Board of

Education, HCC Life Insurance Company, and the Ohio Department of Medicaid. *See* Complaint ¶ 1-6, 24 and 27, May 28, 2020. Appellants moved to dismiss the complaint on July 22, 2020.

{¶ 5} Prompted by Appellants' motion, Appellees voluntarily dismissed the five identified members of the Board of Education on August 3, 2020, and with leave of court, Appellees filed an amended complaint on August 21, 2020. In the amended complaint, Appellees allege that while Jane Doe 1 and Jane Doe 2 were participating in "a class-sanctioned [sic] science experiment," they were injured as a result of Appellants' "fail[ures] to provide proper safety equipment, [such as] a fire extinguisher," and "to enact * * * appropriate protocols [for the adequate] supervis[ion] and protect[ion]" of "students during classroom activities."[1] *See* Amended Complaint ¶ 7 and 12.

{¶ 6} Appellants moved to dismiss Appellees' amended complaint on August 28, 2020, arguing that the Board of Education and Roy Defrain were immune from liability under R.C. Chapter 2744, and that Appellees had not satisfied the requirements of Civ.R. 15(D) with respect to the 10 unnamed employees of the board.[2] The trial court overruled the motion in its judgment of September 10, 2020, largely in reliance on the opinion of the Ohio Supreme Court in *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-

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[1] Appellees provide no definition for the term "class-sanctioned."

[2] Appellants did not draft a motion to dismiss directed specifically to Appellees' amended complaint. Instead, Appellants merely "adopt[ed], reiterate[d], and incorporate[d] by reference" their motion of July 22, 2020, to dismiss Appellees' original complaint. Certain parts of the motion to dismiss the original complaint, however, had been rendered moot by the amended complaint, and Appellants consequently offered no argument for the dismissal of the amended complaint as it relates to Defendant-appellant, Stan Hughes. *See* Defendants' Motion to Dismiss Amended Complaint 2, Aug. 28, 2020.

Ohio-1250, 905 N.E.2d 606. Judgment Entry on Defendants' Motion to Dismiss 8-9, Sept. 10, 2020 [hereinafter *Judgment Entry*].

{¶ 7} Under R.C. 2744.02(C), "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in [R.C.] [C]hapter [2744] or any other provision of the law is a final order." Appellants timely filed a notice of appeal to this court on October 7, 2020.

II. Analysis

{¶ 8} Appellants' assignments of error all implicate Civ.R. 12(B)(6). A motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted "is [a] procedural [motion that] tests the sufficiency of [a] complaint." *State ex rel. Hanson v. Guernsey County Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). On consideration of a motion to dismiss, a trial court "must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." (Citations omitted.) *Mitchell v. Lawson Milk Co.*, 40 Ohio St. d 190, 192, 532 N.E.2d 753 (1988). For dismissal to be warranted, the trial court must find "the plaintiff [could] prove no set of facts * * * that would entitle the plaintiff to the relief sought." *Ohio Bureau of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975), and *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶ 14; *see also Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, ¶ 35-46.

{¶ 9} On appeal, a trial court's ruling on a motion to dismiss under Civ.R. 12(B)(6) is reviewed de novo. *Bennett v. Montgomery Cty. Clerk of Court*, 2d Dist. Montgomery

No. 26675, 2015-Ohio-4108, ¶ 7. Accordingly, an "appellate court must independently review the complaint," and accepting for purposes of its review that the "allegations * * * in the complaint are true," determine "whether dismissal [was or was not] appropriate" as a matter of law. *Ament v. Reassure Am. Life Ins. Co.*, 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246, ¶ 60 (8th Dist.); *see also Easterling v. Brogan*, 2d Dist. Montgomery No. 24902, 2012-Ohio-1852, ¶ 7, citing *Ament* at ¶ 60.

{¶ 10} For their first assignment of error, Appellants contend that:

> IN DENYING THE MOTION TO DISMISS OF ALL DEFENDANTS, THE TRIAL COURT ERRED BY NOT APPLYING THE SPECIFIC IMMUNITY ANALYSIS REQUIRED BY [R.C. 2744.03(A)(6)] FOR CLAIMS AGAINST INDIVIDUAL GOVERNMENT EMPLOYEES.

{¶ 11} Appellants argue that the trial court's judgment should be reversed because the court "did not consider or even address [the question of] whether [Stan Hughes and Roy Defrain] were entitled to immunity under R.C. 2744.03(A)(6)"; because Appellees "have failed to allege facts as to [Hughes and Defrain respectively that suffice under Civ.R. 8 to] support [Appellees'] conclusory assertions of bad faith, [or] malicious, reckless, or wanton conduct"; and because, pursuant to App.R. 15(D), the trial court should have dismissed Appellees' claims against ten unnamed employees of the Board of Education. Appellants' Brief 5-11; *see also* Amended Complaint ¶ 5-6. In response, Appellees argue simply that Hughes and Defrain are not entitled to immunity under R.C. 2744.03(A)(6). Appellees' Brief 10-14.

{¶ 12} R.C. 2744.03(A)(6) establishes that an employee of a political subdivision is immune from liability unless: (1) the "employee's acts or omissions are manifestly

outside the scope of the employee's employment or official responsibilities"; (2) the "employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner"; or (3) "[c]ivil liability is expressly imposed upon the employee by a section of the Revised Code." *See also Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 17. A trial court's ruling on the "issue of statutory immunity for [an employee of] a political subdivision [is] a question of law," although the underlying issue of whether the employee acted maliciously, in bad faith, or in a wanton or reckless manner, is generally a question of fact. *Pendry v. Troy Police Dept.*, 2d Dist. Montgomery No. 28531, 2020-Ohio-3129, ¶ 13, citing *Hoffman v. Gallia Cty. Sheriff's Office*, 2017-Ohio-9192, 103 N.E.3d 1, ¶ 38 (4th Dist.).

{¶ 13} In the first part of their argument, Appellants charge the trial court with error for omitting an express determination of whether Hughes and Defrain were entitled to immunity under R.C. 2744.03(A)(6). Appellants' Brief 7. Civ.R. 52, however, states that "[f]indings of fact and conclusions of law * * * are unnecessary upon all * * * motions," other than those under Civ.R. 23(G)(3), Civ.R. 41(B)(2) and Civ.R. 52 itself, "including [motions] pursuant to Civ.R. 12, Civ.R. 55 and Civ.R. 56." The trial court's omission of an express analysis of the applicability of R.C. 2744.03(A)(6) to Appellees' claims against Hughes and Defrain, therefore, is not grounds for reversal of the trial court's judgment.

{¶ 14} In the second part of their argument, Appellants maintain that the trial court erred by overruling their motion to dismiss Appellees' claims against Hughes and Defrain because Appellees "have not alleged any particular facts to explain how [Hughes and Defrain] purported[ly] * * * acted in bad faith, recklessly, wantonly, or maliciously." Appellants' Brief 7. Appellants fault Appellees for indiscriminately alleging that "all [of

the] defendants [were] responsible for all [of the reckless, wanton or malicious] acts" on which Appellees' claims for relief are predicated; for "not alleg[ing] any facts in [the amended] complaint that would have placed any district employee on notice that not having a fire extinguisher or [other,] unspecified protective equipment would, in all probability, result in the specific harm" for which Appellees seek redress; and for "not alleg[ing] any facts that constituted a perverse disregard of a known risk * * * that a bottle of isopropyl alcohol would explode." (Emphasis omitted.) *Id.* at 7 and 10.

{¶ 15} Appellees allege, in relevant part, that Roy Defrain taught "a science class [at Greenville High School, which Jane Doe 1 and Jane Doe 2] attended" at the time they were injured; that Stan Hughes "was the principal of Greenville High School"; that Jane Doe 1 and Jane Doe 2 suffered injury "in the process of conducting a[n] [in-class] science experiment, [when] a bottle of isopropyl alcohol caught fire and exploded"; that [Hughes and Defrain] breached [the] duty [of care they] owed to [Jane Doe 1 and Jane Doe 2] by failing to provide proper safety equipment * * *, especially, but not limited to, a fire extinguisher inside the classroom," and by "fail[ing] to enact * * * appropriate protocols [for the] supervis[ion] and protect[ion] [of] Jane Doe 1 and Jane Doe 2 * * * during classroom activities." Amended Complaint ¶ 3-4, 7 and 12. Appellees characterize these alleged breaches of duty as "negligent, reckless and wanton." *Id.* at ¶ 19.

{¶ 16} Notwithstanding that Appellants' criticisms of the amended complaint have some merit—given, for example, that Appellees do not allege that Hughes individually acted recklessly or wantonly, or that Defrain individually acted recklessly or wantonly—we hold that the amended complaint suffices, even if minimally, to put Appellants on notice of the nature of the claims against them. Appellees claim a right to recovery

against Hughes and Defrain under R.C. 2744.03(A)(6)(b), according to which Appellees must prove that Hughes and Defrain's "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."[3] *See* Amended Complaint ¶ 19. Here, Appellees allege that Hughes and Defrain were reckless or wanton. *Id.*

{¶ 17} The term "reckless" means "conduct 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,' " and the term "wanton" refers to " 'the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result.' " *Para v. Jackson*, 2021-Ohio-1188, ___ N.E.3d ___, ¶ 22 (8th Dist.), quoting *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraphs three and four of the syllabus. Appellees, as noted, allege that Jane Doe 1 and Jane Doe 2 were injured during an experiment in their science class when a bottle of isopropyl alcohol caught fire and exploded. Amended Complaint ¶ 7.

{¶ 18} Although a "plaintiff must plead the operative facts with particularity in some cases, the plaintiff in a sovereign immunity case does not." *Para* at ¶ 28, citing *David v. Matter*, 2017-Ohio-7351, 96 N.E.3d 1012, ¶ 8 (6th Dist.). Isopropyl alcohol is a flammable liquid, and despite the lack of allegations detailing the precise nature of the experiment at issue in this case, a reasonable inference is that the experiment involved the use of a Bunsen burner or other source of intense heat, which ignited the alcohol. In

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[3] Appellees do not allege that any of Hughes and Defrain's alleged "acts or omissions were manifestly outside the scope of [their] employment," or that "[c]ivil liability is expressly imposed upon [them] by a section of the Revised Code." *See* Amended Complaint ¶ 3-6 and 10-12; R.C. 2744.03(A)(6)(a) and (c).

the context of a science-class experiment, the risk that a flammable liquid might catch fire in the presence of an open flame or other source of intense heat should be obvious. Whether Hughes and Defrain, individually or collectively, consciously disregarded or were indifferent to the risk, and whether such disregard or indifference was a substantially greater deviation from the standard of care than ordinary negligence, are questions of fact. *Pendry*, 2d Dist. Montgomery No. 28531, 2020-Ohio-3129, at ¶ 13. Whether Hughes and Defrain, individually or collectively, failed to exercise any care at all, and whether the circumstances of the experiment gave rise to a great probability that the alcohol would be ignited, are likewise questions of fact. *Id.*

{¶ 19} In the third part of their argument, Appellants assert that the trial court erred by overruling their motion to dismiss as it related to Appellees' claims against 10 unnamed employees of the Board of Education. Appellants' Brief 11. Under Civ.R. 15(D), if plaintiffs "do not know the name of a defendant, that defendant may be designated in [the complaint] by any name and description," but the plaintiffs, "in such [a] case, must aver in [their] complaint that [they] could not discover the [defendant's] name." We hold that the trial court erred by overruling Appellees' motion to dismiss as the motion related to the unnamed defendants, because Appellees did not allege that they were unable to discover the defendants' names.

{¶ 20} For all of the foregoing reasons, Appellants' first assignment of error is overruled with respect to the trial court's omission of an express determination of whether Stan Hughes and Roy Defrain are immune from liability under R.C. 2744.03(A)(6), and with respect to Appellants' argument that Appellees' allegations against Hughes and

Defrain were insufficient to satisfy the requirements of Civ.R. 8.[4] Appellants' first assignment of error is, however, sustained with respect to the trial court's failure to dismiss the 10 unnamed defendants pursuant to Civ.R. 15(D).

{¶ 21} For their second assignment of error, Appellants contend that:

> THE TRIAL COURT ERRED IN FINDING THAT THE ALLEGED ABSENCE OF A FIRE EXTINGUISHER OR [OTHER] UNSPECIFIED PROTECTIVE EQUIPMENT MAY CONSTITUTE A "PHYSICAL DEFECT" WITHIN OR ON THE GROUNDS OF GOVERNMENT BUILDINGS.

{¶ 22} Appellees claim a right to recover against the Board of Education under R.C. 2744.02(B)(4), alleging that the lack of a fire extinguisher and other safety equipment in the classroom in which Jane Doe 1 and Jane Doe 2 were injured was a "physical defect." *See* Amended Complaint ¶ 2, 12 and 18. Relying primarily on an opinion released by the Ohio Supreme Court in 2009, the trial court found that "there exists a cause of action under the facts [alleged] by [Appellees,] which would permit the further prosecution of [Appellees'] civil claims" against Appellants. Judgment Entry 8-9. Appellants argue that the trial court thereby erred.

{¶ 23} The analysis of whether a political subdivision is immune from liability under R.C. Chapter 2744 involves a three-point analysis. *Colbert v. City of Cleveland*, 99 Ohio

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[4] In a recent opinion, we affirmed a trial court's decision to dismiss a complaint against employees of the Tecumseh Local Board of Education under R.C. 2744.03(A)(6) because the allegations "were bare assertions." *See Cline v. Tecumseh Local Bd. of Edn.*, 2d Dist. Clark No. 2020-CA-36, 2021-Ohio-1329, ¶ 16. By contrast, Appellees allege in their amended complaint that Hughes and Defrain recklessly or wantonly failed to equip the science classroom, in which Jane Doe 1 and Jane Doe 2 were injured, with a fire extinguisher or other appropriate safety equipment, and similarly, that Hughes and Defrain recklessly or wantonly failed to enact appropriate protocols for the supervision and protection of Jane Doe 1 and Jane Doe 2 during classroom activities.

St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7. First, "the general rule [is] that a political subdivision is immune from liability incurred in performing either a governmental function or [a] proprietary function." *Id.* Second, "a court [must] determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) appl[ies] to [abrogate] the political subdivision['s] [immunity from] liability." *Id.* at ¶ 8. Third, if any of the five exceptions is applicable, "and no defense [established in R.C. 2744.02(B) shields] the political subdivision from liability, then the * * * court [must] determine whether any of the defenses in R.C. 2744.03 appl[ies]." *Id.* at ¶ 9. Here, the exception on which Appellees rely is set forth in R.C. 2744.02(B)(4), according to which a political subdivision is "liable for injury * * * that is caused by the negligence of [its] employees," that "occurs within or on the grounds" of a building that is "used in connection with the performance of a governmental function," and is the result of "physical defects" within or on the grounds of the building.

{¶ 24} Appellants do not dispute that the Board of Education is a political subdivision performing a governmental function or that Jane Doe 1 and Jane Doe 2 were injured within a building used for a governmental function. *See* Appellants' Brief 12-16. Instead, Appellants argue that the absence of safety equipment cannot constitute a physical defect as a matter of law. *Id.* at 13-15.

{¶ 25} As the trial court noted in its judgment, "[t]here [is] a split [among] the appellate districts on the application of R.C. 2744.02(B)(4)," and this court has not yet issued an opinion directly on point. Judgment Entry 7-8. Yet, in the 2009 opinion on which the trial court largely based its judgment, the Ohio Supreme Court considered "whether the absence of a required smoke detector [was] a 'physical defect' occurring on

the grounds of [the Lorain Metropolitan Housing Authority's] property." *See Moore,* 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, ¶ 25; Judgment Entry 8-9. The Court concluded that it had to "remand [the case] to the trial court for further proceedings" because the trial court had "not fully consider[ed] [the] issue, which, if established, would dissolve [the housing authority's] immunity." *Id.*

{¶ 26} Appellants suggest that the trial court misplaced its reliance inasmuch as the Ohio Supreme Court "gave no hint as to how it might [have] ruled" had the issue been squarely raised in *Moore*, but Appellants thus understate the significance of the Court's rationale for remanding the case. Appellants' Brief 13. Regardless of how the Court might have ruled, remand would not have been appropriate had the absence of "required" safety equipment been insufficient, as a matter of law, to qualify as a "physical defect" for purposes of the exception to a political subdivision's immunity under R.C. 2744.02(B)(4). *See Moore* at ¶ 25.

{¶ 27} The record in the instant case, being limited to the allegations in the amended complaint, is inadequate to support a determination of what, if any, safety equipment was required in the classroom in which Jane Doe 1 and Jane Doe 2 were injured, and arguably, the Court's opinion in *Moore* indicates that the absence of fire safety equipment could constitute a physical defect if the equipment were a legal or regulatory requirement. Consequently, we hold that the trial court did not err by overruling Appellants' motion to dismiss as it related to Appellees' claims against the

Board of Education.[5] Appellants' second assignment of error is overruled.

{¶ 28} For their third assignment of error, Appellants contend that:

> THE TRIAL COURT ERRED IN NOT EVALUATING WHETHER ANY STATUTORY DEFENSES WERE AVAILABLE TO REESTABLISH IMMUNITY FOR THE BOARD OF EDUCATION.

{¶ 29} Specifically, Appellants argue that the trial court's judgment should be reversed because the court did not determine whether the Board of Education's immunity would "be restored [under] R.C. 2744.03(A)(3) and (5)," assuming that the exception to immunity under R.C. 2744.02(B)(4) is applicable. Appellants' Brief 16. Pursuant to R.C. 2744.03(A)(3), 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 subdivision is "immune from liability if the action or failure to act by the employee involved * * * 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." Under R.C. 2744.03(A)(5), the "political subdivision is immune from liability if the injury, death, or loss to person or property

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[5] To be clear, we do not hold that the absence of a fire extinguisher or other safety equipment is necessarily a "physical defect" within the meaning of R.C. 2744.02(B)(4), but merely that the absence of such equipment could be a physical defect under the statute in some circumstances. As we have indicated, the record in the present procedural posture of this case is insufficient to establish what, if any, equipment was required, and furthermore, the record in insufficient to establish what, if any, equipment was actually provided. We hold only that the question of whether the absence of certain safety equipment is a physical defect under R.C. 2744.02(B)(4) is an issue for the trial court to resolve in the first instance, once the record has been developed sufficiently to permit the trial court to make the necessary findings of fact.

resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities," or other resources, "unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 30} Citing opinions issued by the Ohio Supreme Court and the Tenth District Court of Appeals, Appellants argue that because the employees of a "[p]olitical subdivision have wide discretion in determining what level of supervision is appropriate to promote the safety of * * * children in their care," the "Board of Education's * * * immunity would be reinstated as a matter of law," even if the alleged absence of a fire extinguisher and other safety equipment constituted a physical defect for purposes of R.C. 2744.02(B)(4). Appellants' Brief 17-18, citing *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 20, and *Douglas v. Columbus City Schools Bd. of Edn.*, 10th Dist. Franklin No. 18AP-940, 2020-Ohio-1133, ¶ 27-30. Each of these cases, however, related to a trial court's ruling on a motion for summary judgment. *Elston* at ¶ 2; *Douglas* at ¶ 1. In the instant case, the trial court overruled Appellants' motion to dismiss under Civ.R. 12(B)(6).

{¶ 31} Furthermore, to demonstrate that its immunity from liability should be restored under R.C. 2744.03(A)(3), the Board of Education would have to prove that Hughes and Defrain's alleged "action[s] or failure[s] to act" were "within [their] discretion * * * with respect to policy-making, planning, or enforcement" by virtue of "the duties and responsibilities" associated with their positions. The record, in light of the procedural posture of this case, is insufficient to establish the extent, if any, of Hughes and Defrain's discretion to engage in policy-making, planning or enforcement.

{¶ 32} Similarly, to demonstrate that its immunity from liability should be restored under R.C. 2744.03(A)(5), the Board of Education would have to prove that the injuries suffered by Jane Doe 1 and Jane Doe 2 were the result of Hughes and Defrain's "exercise of judgment or discretion in determining whether to acquire, or how to use" safety equipment in the classroom in which the injuries occurred. Yet, even assuming that Hughes and Defrain had such discretion, the board's immunity would not be restored if Hughes and Defrain exercised their discretion "with malicious purpose, in bad faith," or "in a wanton or reckless manner," as Appellees allege. The question of whether Hughes and Defrain acted in a wanton or reckless manner is a question of fact beyond the scope of Appellants' motion under Civ.R. 12(B)(6).

{¶ 33} Because the record is insufficient to determine the extent of Hughes and Defrain's discretion with respect to policy-making, planning or enforcement, and because the determination of whether Hughes and Defrain acted in a reckless or wanton manner with respect to the exercise of their discretion, if any, to acquire and use safety equipment, we hold that the trial court did not err by omitting an express analysis of whether the Board of Education's immunity would be restored under R.C. 2744.03(A)(3) or (5) in the event that the court found the exception set forth in R.C. 2744.02(B)(4) to be applicable to Appellees' claims for relief. Appellants' third assignment of error is overruled.

III. Conclusion

{¶ 34} Under Civ.R. 52, the trial court was not obligated to issue findings of fact and conclusions of law as part of its ruling on Appellants' motion to dismiss, meaning that the court did not err by omitting an express determination of whether Stan Hughes and Roy Defrain are immune from liability under R.C. 2744.03(A)(6). Moreover, the trial court

did not err by finding that Appellees could, theoretically, prove a set of facts entitling it to relief against the Board of Education under R.C. 2744.02(B)(4), nor did the court err by omitting an express analysis of whether the Board of Education's immunity would be restored pursuant to R.C. 2744.03(A)(3) or (5), in the event that Appellees proved that the absence of a fire extinguisher or other safety equipment constituted a physical defect within the Greenville High School facility. The trial court, however, did err by overruling Appellants' motion with respect to the 10 unnamed employees listed as defendants in Appellees' amended complaint, because Appellees did not fulfill the requirements of Civ.R. 52.

{¶ 35} Therefore, the trial court's decision is affirmed in part and reversed in part. The case is remanded to the trial court for further proceedings consistent with this opinion, specifically, with an instruction to enter an order dismissing the 10 unnamed defendants.

. . . . . .

HALL, J. and EPLEY, J., concur.

Copies sent to:

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Kesha Q. Brooks
Brian L. Wildermuth
Tabitha Justice
Daran Kiefer
Joseph McCandlish
Hon. Jonathan P. Hein

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

JANE DOE 1, A MINOR, et al.	:	
Plaintiffs-Appellees	:	Appellate Case No. 2020-CA-4
v.	:	Trial Court Case No. 2020-CV-239
GREENVILLE CITY SCHOOLS, et al.	:	**FINAL ENTRY**
Defendants-Appellants	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 25th day of June, 2021, the judgment of the trial court is affirmed in part and reversed in part. The case is remanded to the trial court for further proceedings consistent with this opinion, specifically, with an instruction to enter an order dismissing the 10 unnamed defendants.

Costs to be paid as follows: 25% by Plaintiffs-Appellees and 75% by Defendants-Appellants.

Pursuant to Ohio App.R. 30(A), the clerk of the Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the service. Additionally, the clerk of the Court of Appeals shall send a mandate to the trial court for execution of this judgment and make a note in the docket of the service. Pursuant to App.R. 27, a certified copy of this judgment constitutes the mandate.

MICHAEL L. TUCKER, Presiding Judge

MICHAEL T. HALL, Judge

CHRISTOPHER B. EPLEY, Judge

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IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

JANE DOE 1, a minor, et. al.	:	**CASE NO. 20-CV-00239**
Plaintiffs,	:	**Jonathan P. Hein, Judge**
vs.	:	
GREENVILLE CITY SCHOOLS, et. al.	:	
Defendants.	:	**JUDGMENT ENTRY – Defendants' Motion to Dismiss**

This matter comes before the Court upon motion of the Defendants for dismissal of the complaint filed herein, the motion being based on the provisions of Civil Rule 12 (B). The Court has considered the various responsive pleadings, the amended complaint and other pleadings filed herein. The issue is ripe for decision.

The Plaintiffs are represented by Robert L. Gresham, Esq. The Defendants are represented by Brian L. Wildermuth, Esq.

Case Facts

The Plaintiffs filed their complaint claiming damages resulting from an explosion which occurred on December 9, 2019 while students in a science lab at the Greenville Senior High School. The reasons for the explosion have not been fully developed but apparently involve the use of isopropyl alcohol. The resulting fire and explosion caused serious physical harm to the Plaintiffs.

The Plaintiffs allege the following conduct by Defendants to be negligent, reckless, wanton and malicious: (1) failure to place a fire extinguisher in the class room; (2) lack of adequate safety protocols; (3) lack of proper safety equipment; and (4) physical defects in the school building.

The Defendants presently include the Board of Education, Superintendent, Principal, teacher, individual members of the Board of Education, and Jane Doe school employees. Since filing the motion to dismiss, Plaintiff voluntarily dismissed the individual members of the Board of Education.

The basis for Defendants' motion is that governmental immunity bars litigation of the claims filed herein. See R.C. 2744.02, et. seq. The Plaintiffs disagree.

Standard of Review

Various Civil Rules must be applied to determine the pending motion to dismiss. First, Civil Rule 12 (C) provides as follows: "**Motion for Judgment on the Pleadings**. After the pleadings are closed but within such time as to not delay the trial, any party may move for judgment on the pleadings."

Upon a review of case interpretations of Civil Rule 12(C), the Court notes that the non-moving parties (aka Plaintiffs) are entitled to have all material allegations in the pleadings along with all reasonable inferences taken therefrom to be construed in their favor. See *Peterson v. Teodosio* (1973) 34 Ohio St. 2d 161.

Relief should only be granted where the moving parties (aka Defendants) are entitled to judgment as a matter of law, *Brown v. Wood County Board of Elections*, 79 Ohio App. 3d 474, 607 N.E. 2d 848 (6th Dist. 1992), which means there is no set of facts which would support the Plaintiffs' allegations after construing the facts and inferences in favor of the

Plaintiffs. In essence, the trial court must decide from the pleadings if there is any cause of action set forth in the pleadings which could be construed as a valid claim by Plaintiffs against Defendants.

Next, the provisions of Civil Rule 12(B) are considered:

> RULE 12. Defenses and Objections--When and How Presented--by Pleading or Motion--Motion for Judgment on the Pleadings
>
> (B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, **(6) failure to state a claim upon which relief can be granted,** (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56. [Emphasis added.]

In this case, the Defendants rely on Civil Rule 12(B)(6), as highlighted above.

Case Analysis

The determinative issue is whether these Defendants are immune from liability due to the Ohio Political Subdivision Tort Liability Act, as codified in Chapter 2744 of the Ohio Revised Code. The Ohio legislature adopted Chapter 2744 to establish immunity for certain political subdivisions when defined conduct is the basis for the claimed damages.

Determining whether a governmental entity is entitled to immunity entails a three tier analysis. *Cater v. Cleveland*, 83 Ohio St.3d 24, 697 N.E. 2d 610, 1998-Ohio-421. The **first tier** of analysis is the general statement in R.C. 2744.02(A)(1) which provides the broad grant of immunity to political subdivisions for "damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." The **second tier** of analysis requires a consideration of R.C. 2744.02(B) which sets forth five (5) categories of conduct where the grant of immunity does not apply and, therefore, where political subdivisions may be found liable for damages in connection with governmental or proprietary functions. The **third tier** of analysis may result in the political subdivision again being protected from liability if the defenses of R.C. 2744.03 apply.

Stated another way, was the conduct of the Defendants in this case a governmental or proprietary function? Then, do any one of the five (5) categories of exemption apply? Finally, if there is no immunity, are there other available defenses which prevent the Defendants from being sued?

I.

First, this Court must determine whether the conduct of the Defendants in conducting school educational programs was a "governmental or proprietary function" for which immunity is available. Political subdivisions may be liable for the negligent acts of their employees with respect to proprietary, but not governmental, functions. *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450 at 452, 639 N.E. 2d 105, 1994-Ohio-394.

R.C. 2944.01(C)(2)(c) makes it clear that the provision of a system of public education" is a governmental function. The Court finds that the Defendants were at all times involved in governmental functions when instructing students and conducting classroom experiments.

II.

Next, the Court considers whether there is an exception to the general grant of immunity as allowed by R.C. 2944.02(B). Counsel have agreed that the following statutory section is the gravamen of the pending motion:

> (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. [Emphasis added.]

Stated another way, should the alleged negligent conduct of the Defendants be interpreted to have occurred "**within or on the grounds of, and is due to physical defects within or on the grounds of, buildings?**" If the answer is "yes," then the Defendants are not entitled to governmental immunity. If the answer is "no," then the Defendants are entitled to governmental immunity.

Counsel have diligently researched the interpretation of "physical defects within and on the grounds of, buildings" and provide citations to cases which support their respective position. For example, Defendants cite the following cases:

Duncan v. Cuyahoga Community College, 8th Dist Cuyahoga No. 97222, 2012-Ohio-1949, 970 N.E. 2d 1092, which held:

> {¶ 6} Duncan alleged in her complaint that appellants' presentation of a self-defense class " was a proprietary function" that occurred " within or on the grounds of a building that [was] used in connection with the performance of a governmental function." Duncan

> further alleged that appellants were " negligent and/or reckless and/or wanton" in their planning, in their instruction, in their supervision, and in their use of equipment of the training program, that appellants' conduct " created an unreasonable risk of physical harm" and " displayed a perverse disregard" for the participants' safety, and that appellants' " decision not to use mats was a routine, ministerial decision and not an exercise of judgment or discretion," that nevertheless appellants " exercised with malicious purpose."
>
> {¶ 27} * * * Therefore, a lack of mats on the floor of a classroom did not constitute a " defect" as that word is used in R.C. 2744.02(B)(4). * * *

Hamrick v. Bryan City School District, 6th Dist. Williams No. WM-0-014, 2011-Ohio-2572 which held:

> {¶ 27} The phrase "physical defect" is not statutorily defined, neither has appellant brought to our attention authority demonstrating that the phrase has acquired any technical meaning. As a result, we must look to common usage of the words in the context of the statute as a whole to determine its meaning.
>
> {¶ 28} The word "physical" is defined as "having a material existence: perceptible especially] through senses and subject to the laws of nature." Merriam Webster's New Collegiate Dictionary (10 Ed. 1996) 877. A "defect" is "an imperfection that impairs worth or utility." *Id.* at 302. It would seem then that a "physical defect" is a perceivable imperfection that diminishes the worth or utility of the object at issue.

Douglas v. Columbus City Schools Board of Education, 10th Dist Franklin No. 18AP-940, 2020-Ohio-1133, which held:

> {¶ 2} On October 18, 2017, appellant filed a complaint against appellees. The complaint alleged that on May 24, 2011, appellant, while a student at Wedgewood Middle School, participated in a science class project led by Bardos, a teacher at the school. According to the complaint, during the school's annual class rocket launch, one of the rockets went sideways and struck appellant on her right lower leg, causing burns and scarring.
>
> {¶ 3} The complaint alleged that Bardos "breached diverse statutory law and common law dictates" by failing to exercise proper precaution in launching the rocket. (Compl. at ¶ 5.) The complaint further alleged that the school board and the school district "negligently permitted the rocket launch to go forward without providing a safe environment" for appellant, and in failing to provide "appropriate instruction on the proper handling of the rocket launch." (Compl. at ¶ 6.)
>
> {¶ 26} As noted, appellant seeks to invoke the exception under R.C. 2744.02(B)(4) based on the contention that the rocket, constructed by students as part of a science project, constituted a "physical defect." However, as alluded to by the trial court, the purported defect arises from activity related to the science experiment itself, including the manner in which the parts of the rocket were designed and assembled by the students, as well as the allegation that Bardos failed to take proper precautions to supervise the demonstration (i.e., by failing to keep the students a safe distance away from the launch). Based on the facts presented, we find no error with the trial court's determination that the alleged defect was not a "physical defect" within or on the grounds or buildings of the political subdivision as contemplated by R.C. 2744.02(B)(4). Accordingly, we further agree with the trial court's conclusion that none of the immunity exceptions under R.C. 2744.02(B) are applicable.

On the other hand, the Plaintiffs cite the following authority in support of their interpretation that "physical defect" means more than tangible spaces but also includes the consequential use of, and conduct within, the physical space:

Moore v. Lorain Metropolitan Housing Authority, 121 Ohio St.3d 455, 905 N.E. 2d 606, 2009-Ohio-1250, which held:

> {¶ 25} The final step in the analysis of (B)(4) is to determine whether absence of a required smoke detector is a "physical defect" occurring on the grounds of LMHA's property. Because the trial court did not fully consider this issue, which, if established, would dissolve immunity, we must remand to the trial court for further proceedings.

Roberts v. Switzerland of Ohio Local School District, 7th Dist. No. 12 MO 8,2014-Ohio-78, 7 N.E.3d 526, which held:

> [¶29] The complaint in the present case states that Roberts was standing in an area designated by the Board's agents as a " safe zone." While standing in the designated safe zone, she was struck with a discus thrown by another student. The complaint states the Board's agents were negligent in informing Roberts that it was safe to be in an area where a discus could be thrown and in failing to erect a fence, cage, or other device around the rear of the discus circle.
>
> [¶30] Taking these facts as true and construing all reasonable inferences in favor of Roberts, as we are required to do, we find that the trial court properly upheld the complaint. Clearly, the complaint alleges a negligent act, the instruction by the Board's agent that it was safe for Roberts to stand in an area that was not, in fact, safe. Additionally, the complaint sufficiently alleges a physical defect on the grounds of the political subdivision. As can be seen from *Moore*, 121 Ohio St.3d 455, 2009 Ohio 1250, 905 N.E.2d 606, and Moss, 185 Ohio App.3d 395, 2009 Ohio 6931, 924 N.E.2d 401, the courts have left open the possibility that the absence of a safety feature or the existence of an unsafe area that is supposed to be safe, can be the type of defect contemplated by R.C. 2744.02(B)(4). Whether the specific defect here removes immunity from the Board is best left to summary judgment proceedings.

DeMartino v. Poland Local School District, 7th Dist. No. 10 MA19, 2011-Ohio-1466, which held:

> {5} At some point during band practice, Mashburn [lawn mower] asked Olesko [band director] for permission to mow an area near the parking lot where the band was practicing. (Compl., ¶8.) Olesko did not object. (Compl., ¶15.) Mashburn removed the bag from the commercial lawn mower but did not install the discharge chute. (Compl., ¶9.) A metal object ejected by the lawnmower struck Appellee [band member] in the head and cut an artery, which caused him to lose consciousness. (Compl., ¶15.)
>
> {43} In summary, in looking at the second tier of analysis, the complaint alleges that both Olesko and Mashburn were performing governmental functions when Appellee was injured. However, Appellee has sufficiently alleged that the exception listed in R.C. 2744.02(B)(4) may apply to the allegations against Mashburn in this case. Therefore, while the allegations in the pleadings are such that the school district and the board are,

by law, immune from suit based on the allegations involving Olesko as director of the student high school band, the district is not immune from suit based on the allegations as they appear in the pleadings involving Mashburn.

No decision on the specific issue in this case has yet been issued by the Second District Court of Appeals. There appears to be a split in the appellate districts on the application of R.C. 2744.02(B)(4) when negligent or reckless conduct on school premises causes injuries.

Decision

Civil Rule 12(B) prohibits the Court from weighing the "facts" of the case but instead the Court must analyze the "allegations" contained in the complaint and amended complaint.[1] Only the bare bone allegations in the complaint and reasonable inferences resulting therefrom are to be considered. Civil Rule 12(B) decisions do not judge the accuracy – or inaccuracy – of the conduct of the Defendants.

Civil Rule 12(B) motions are to be liberally construed toward the goal of allowing cases to proceed through the discovery process until a decision can be based on the facts, either at trial or pursuant to Civil Rule 56.

The logic of both lines of appellate decisions cited by opposing counsel is understandable. Such dichotomies frequently appear in the law - until ultimately resolved by the Court of Last Resort.

The Court finds that the authorities cited by Plaintiff are persuasive, notably *Moore v. Lorain Metropolitan Housing Authority, supra.* The Court finds that there exists a

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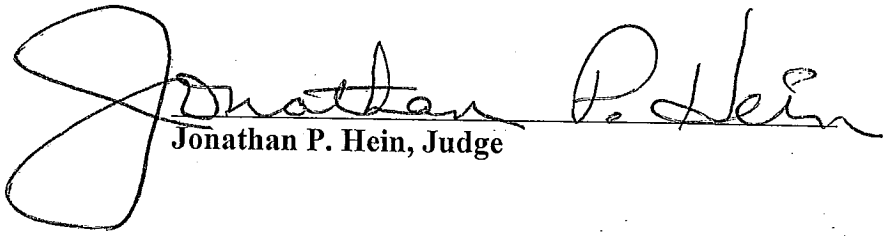
[1] Whether a fire extinguisher and fire suppression blanket were in the classroom at the time of the injury or installed later is of interest - but not subject to determination at this preliminary time. Discovery procedures, including depositions and document disclosure, may resolve this question of fact. The factual dispute between counsel highlighted in Defendants' Reply Memorandum must be resolved on another day...

cause of action under the facts presented by the Plaintiffs which would permit the further prosecution of civil claims against the remaining Defendants. The Defendants' motion to dismiss on the face of the pleading is denied.[2]

IT IS, THEREFORE, ORDERED AND DECREED that the motion to dismiss is denied. This matter will be set for telephone scheduling conference call on later notice.



Jonathan P. Hein, Judge

cc: Robert L. Gressham, Attorney for Plaintiffs (via email)
Brian L. Wildermuth, Attorney for Defendants (via email)

jph\research.govt immunity. school premises

[2] The denial of a motion to dismiss against a political subdivision or its employee under R.C. 2744 is a final, appealable order pursuant to R.C. 2744.02(C). See also *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878.