[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *A.J.R. v. Lute*, Slip Opinion No. 2020-Ohio-5168.]

SLIP OPINION NO. 2020-OHIO-5168

A.J.R. ET AL., APPELLEES, *v.* LUTE ET AL., APPELLANTS.

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Torts—Political-subdivision liability—R.C. 2744.03—Summary judgment—Bullying—School employees' liability when one student injures another in a school—An employee is not immune from liability if the employee's acts or omissions were reckless—Recklessness is a perverse disregard of a known risk—Allegation that one student pushed another while they were in line, on its own, is insufficient to show that employees should have been aware that a student might cause physical harm to another.

(No. 2019-1355—Submitted July 8, 2020—Decided November 10, 2020.)

APPEAL from the Court of Appeals for Lucas County, No. L-18-1004, 2019-Ohio-3402.

FISCHER, J.

{¶ 1} In this appeal, we are asked to determine whether a teacher and school officials acted recklessly in regard to reports that a kindergartener was being bullied. Because they did not act in perverse disregard of a known risk, we reverse the decision of the court of appeals, which held that there was a genuine issue of material fact with respect to whether the teacher and school officials were reckless, and reinstate the trial court's decision granting summary judgment in favor of the teacher and school officials.

I. Factual and Procedural Background

{¶ 2} This case arises from a lawsuit filed by appellees, A.J.R., by and through her parents, and her parents, A.R. and C.R. (collectively, "the family"). The family claims that appellants Amanda Lute (A.J.R.'s former kindergarten teacher), Cynthia Skaff (the acting assistant principal at A.J.R.'s former school), and Ralph Schade (the principal at A.J.R.'s former school) (collectively, "appellants") were reckless in addressing the alleged bullying of A.J.R. by another student, S.

{¶ 3} The family alleges that A.J.R. was subjected to various forms of bullying. A.J.R.'s father and mother identified one student, S., as a person bullying A.J.R. They each testified that the bullying consisted of name-calling, teasing, social exclusion, and physical bullying. They further testified that they repeatedly notified appellants of the bullying by S.

{¶ 4} According to A.J.R.'s mother and father, the pattern of bullying culminated in an incident in which S. assaulted A.J.R. with a sharpened pencil, resulting in a puncture wound to A.J.R.'s face. They assert that appellants failed to take any appropriate actions to address the bullying and prevent this incident. A.J.R.'s mother particularly faults appellants for allowing A.J.R. and S. to be seated at the same table on the day of the alleged incident.

{¶ 5} Appellants assert that they took various steps to address the reports of bullying they received from A.J.R.'s parents. Schade stated that after being informed that A.J.R. had been teased by other students, including S., he spoke to the other students, and the teasing stopped. He further stated that he had frequently visited A.J.R. during lunch, that he had had a positive relationship with her, and that he had felt certain that she would tell him if anything was wrong. He stated that A.J.R. had always said that things were going okay, and he added that A.J.R. had frequently sat with the student who had previously teased her. Skaff, the acting assistant principal, stated that she had spoken to A.J.R. and S. after an initial report of teasing that she had received from A.J.R.'s father and that she had found that the two children appeared to be friendly. Skaff added that she had checked in on A.J.R. periodically and that each time found that A.J.R. had seemed fine. Lute stated that after she was informed that other students had teased A.J.R., she monitored A.J.R. and the other students. She stated that if S. would have attempted to tease A.J.R. while in the classroom, she would have intervened.

{¶ 6} In response to the suit, appellants filed a motion for summary judgment in which they asserted that they were immune from individual liability pursuant to R.C. 2744.03(A)(6) because the family had failed to produce any evidence that appellants acted with malicious purpose, in bad faith, or in a wanton or reckless manner with respect to A.J.R. They argued that there was no evidence that they had known or had had reason to know that S. posed a risk of physical harm to A.J.R. or other students.

{¶ 7} The trial court granted appellants' motion for summary judgment after finding that they were immune from liability because the family had failed to demonstrate that a genuine issue of material fact existed as to whether appellants disregarded a known or obvious risk of harm to A.J.R. In its opinion, the court explained that the family failed to present any evidence that S. had a history of physically harming other students or staff and that without such evidence, there was

no question of fact regarding whether appellants consciously disregarded or were indifferent to a known risk of physical harm to A.J.R.

{¶ 8} The Sixth District Court of Appeals reversed the trial court's judgment in a split decision. The lead opinion noted that A.J.R. and her mother and father presented evidence that there had been ongoing bullying of A.J.R. involving physical contact, such as pushing in the bathroom line; that A.J.R.'s father had notified appellants of specific bullying and harassment on at least four occasions; and that prior to the alleged pencil incident, A.J.R.'s father notified appellants of escalating harassment and physical abuse to A.J.R. The lead opinion pointed to notes taken by Schade following his conversation with S. that indicate that A.J.R. reported the alleged pencil incident to Lute and that although Lute had S. apologize to A.J.R., Lute had not reported the incident to A.J.R.'s parents. The lead opinion concluded by reasoning that, viewing this evidence in the light most favorable to the family, there is evidence that appellants knew A.J.R. was being subjected to physical bullying and that appellants had been informed on multiple occasions about this bullying. 2019-Ohio-3402, ¶ 47. Thus, the lead opinion found that a genuine issue of material fact existed with respect to whether appellants had been reckless. *Id.*

{¶ 9} Judge Hensal concurred in judgment only. *Id.* at ¶ 48. She disagreed with the lead opinion's approach of analyzing the case to determine whether there was a genuine issue of material fact regarding whether appellants had been reckless. Instead, Judge Hensal concluded that the family had set forth sufficient facts to rebut the presumption of immunity in R.C. 2744.03(A)(6), and thus she concurred in the judgment reversing the trial court's judgment.

{¶ 10} Judge Schafer dissented. *Id.* at ¶ 49-61. She reasoned that the family failed to produce any evidence that S. was known to have exhibited a propensity toward physical violence prior to the alleged incident, that the reports made to appellants by the family did not foretell an obvious risk that S. would persist in

bullying and cause physical harm to A.J.R., and that there was no evidence that S. had any record or known history of physical bullying or violent conduct. She accordingly concluded that there was no evidence that appellants had known that S. posed any risk of physical harm to A.J.R. and thus determined that appellants had not perversely disregarded a known risk. Judge Schafer further concluded that the family had failed to demonstrate that any action or inaction of appellants in response to reports of A.J.R.'s being teased involved a perverse disregard to a known risk. In reaching this conclusion, she reasoned that any failure to separate A.J.R. and S. constituted negligence, rather than recklessness. For these reasons, she concluded that the trial court had properly granted summary judgment to appellants.

{¶ 11} This court accepted jurisdiction over the sole proposition of law raised in the appeal:

> There can be no finding of reckless conduct or perverse disregard of a known risk where the record establishes that in response to reports of student teasing, educators promptly speak with the students about the teasing, frequently ask the students how they are doing, and regularly monitor the students in the lunchroom and classroom. Under these circumstances, if a student with no history of violence later pokes another student with a pencil, R.C. 2744.03(A)(6) shields these educators from liability.

See 157 Ohio St.3d 1496, 2019-Ohio-4840, 134 N.E.3d 1211.

II. Analysis

{¶ 12} Pursuant to R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless one of three subsections applies. The subsection relevant to this case is R.C. 2744.03(A)(6)(b), which provides that an

employee is not immune from liability if the employee's acts or omissions were "reckless." The dispositive issue in this appeal then is whether the appellants acted recklessly.

{¶ 13} Appellants argue that the undisputed facts in this case establish that they were not reckless. They assert that even assuming that the family's allegations are true, those allegations do not meet the standards for recklessness articulated by this court.

{¶ 14} The family responds that the Sixth District correctly concluded that there are issues of material fact regarding whether appellants were reckless and that this case should proceed to a jury trial.

{¶ 15} In order to prevail on a motion for summary judgment, there must be no genuine issue of material fact, the moving party must be entitled to judgment as a matter of law, and it must appear from the evidence, when viewing the evidence in favor of the nonmoving party, that reasonable minds can come only to a conclusion adverse to the nonmoving party. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993). A decision granting or denying a motion for summary judgment is reviewed de novo. *See Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶ 16} Based on the record before us, even when viewed in a light most favorable to the family, reasonable minds can come to only one conclusion: appellants were not reckless. Thus, for the reasons explained below, appellants were entitled to summary judgment and we reinstate the trial court's order granting summary judgment in their favor.

A. Relevant law

{¶ 17} 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.

B. There was no known risk that S. would cause physical harm to A.J.R.

{¶ 18} The family's argument regarding recklessness focuses on appellants' alleged failure to take any care to protect A.J.R. from S. Notably, appellants' motion for summary judgment was premised on their assertion that the family failed to demonstrate that appellants knew S. would physically harm A.J.R. The lower courts accordingly looked to determine whether appellants had knowledge of any risk of physical harm. Given the scope of the arguments and decision below, then, we must first determine whether the family presented any evidence of a known risk that S. might cause physical harm to A.J.R. We determine that it did not.

{¶ 19} Viewing the evidence in a light favorable to the family, the family's evidence indicates that appellants were generally aware that A.J.R. had been subject to verbal bullying. The only evidence that even arguably indicates any potential risk for physical violence was the assertion that S. had pushed A.J.R. while they were in line. The record is unclear on the extent of this pushing. Beyond this general assertion that S. pushed A.J.R. while they were in line, the family failed to offer any evidence indicating that S. had a history or record of physical bullying or aggressiveness.

{¶ 20} The general assertion that S. pushed A.J.R. in line is insufficient to establish that there was a known risk that S. might cause physical harm to A.J.R. There is no evidence in the record indicating that the alleged pushing was severe enough to have the potential to result in physical harm. Nor is there evidence that prior to the alleged pencil incident, S. caused any physical harm to A.J.R.

Moreover, there is no evidence that S. caused or created the risk of causing physical harm to any other students.

{¶ 21} Based on the record before us, the allegation that S. pushed A.J.R. while they were in line, on its own, is insufficient to show that appellants should have been aware that S. might cause physical harm to A.J.R. We accordingly conclude that the family failed to establish that there was a known risk that S. might physically attack A.J.R. Because there was no known risk, appellants could not have been reckless, the trial court correctly granted appellants' motion for summary judgment, and we reverse the judgment of the court of appeals.

C. Assuming arguendo that appellants should have been aware that S. would cause physical harm to A.J.R., appellants did not perversely disregard that risk

{¶ 22} Even if we were to assume that the report of A.J.R.'s being pushed in line was sufficient to create a known risk that S. might physically harm A.J.R., the family failed to offer evidence that appellants perversely disregarded this risk.

{¶ 23} In order for us to find that appellants were reckless, we must determine that they were "conscious that [their] conduct [would] in all probability result in injury." *O'Toole*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, at paragraph three of the syllabus. In other words, for their conduct to have been reckless, appellants must have been more than negligent in regard to the risk; they must have displayed a "conscious disregard of or indifference to" the risk of physical harm to A.J.R. "that [was] unreasonable under the circumstances." *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at paragraph four of the syllabus.

{¶ 24} Just the opposite of a conscious disregard or indifference appears here. Appellants present facts indicating that they took steps to address the reports of bullying. They took the time to address A.J.R.'s class in order to curtail any bullying that might occur. Each of the appellants also took care to observe and communicate with A.J.R. to ensure that A.J.R. was doing well and was not

experiencing any further bullying. The fact that appellants paid special attention to A.J.R. and the situation shows that they neither consciously disregarded any risk nor were indifferent to any risk.

{¶ 25} Moreover, based on the record before us, seating A.J.R. at the same table as S., when sharpened pencils were on the table, did not constitute reckless conduct on the part of appellants because, in seating the two children together, appellants were not "conscious that [their] conduct [would] in all probability result in injury," the finding necessary for reckless conduct specified in *O'Toole*. *Id.* at paragraph three of the syllabus. It cannot be said that seating A.J.R. at a table with another child, who may have previously verbally teased A.J.R. and pushed A.J.R. while in line, would in all probability result in physical injury to A.J.R.

{¶ 26} The family attempts to create a genuine issue of material fact by making general, unsupported allegations that appellants "failed to take any corrective or otherwise appropriate actions to address the bullying and to prevent" the alleged pencil incident. But in responding to a motion for summary judgment, the nonmovant "must show that the issue to be tried is genuine and *may not rely merely* upon the pleadings or *upon unsupported allegations*." (Emphasis added.) *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 21, citing *Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 659, 612 N.E.2d 1295 (1992).

{¶ 27} Thus, even assuming that there was a known risk, appellants did not perversely disregard that risk. Because appellants did not perversely disregard a known risk, appellants could not have been reckless, and the trial court correctly granted appellants' motion for summary judgment.

D. Other issues raised by the family are not properly before us

{¶ 28} Finally, we note that in its brief, the family presents a number of arguments that are not properly before the court in this appeal. These include arguments that appellants owed A.J.R. a heightened duty of care, assertions that

appellants violated certain statutes, assertions that the family sustained economic and noneconomic damages, and assertions that the family's constitutional rights were violated by appellants. Given the narrow scope of the issue we accepted for review in this case—whether appellants acted recklessly—we decline to address these additional arguments.

III. Conclusion

{¶ 29} Based on the record before us, appellants did not act in perverse disregard of a known risk. It follows that their conduct was not reckless. Accordingly, we reverse the judgment of the court of appeals, and we reinstate the trial court's decision granting summary judgment in favor of appellants on the basis that they are immune from liability under R.C. 2744.03(A)(6).

Judgment reversed.

O'CONNOR, C.J., and FRENCH, DEWINE, DONNELLY, and STEWART, JJ., concur.

KENNEDY, J., concurs in judgment only.

Anthony J. Richardson II and Anthony Glase, for appellees.

Marshall & Melhorn, L.L.C., Jennifer J. Dawson, Amy M. Natyshak, and Shawn A. Nelson, for appellants.

Dale R. Emch, Toledo Law Director, and Jeffrey B. Charles, urging reversal for amicus curiae city of Toledo.

Muskovitz & Lemmerbrock, L.L.C., Susannah Muskovitz, and Arish S. Ali, urging reversal for amicus curiae Ohio Federation of Teachers.

Matthew Cooper-Whitman, urging reversal for amicus curiae Ohio Education Association.

Turley, Peppel & Christen, L.L.C., and Dawn T. Christen, urging reversal for amicus curiae Toledo Federation of Teachers Local 250.

Freund, Freeze & Arnold, Sandra R. McIntosh, and Bartholomew T. Freeze, urging reversal for amici curiae Buckeye Association of School Administrators, Ohio Association of School Business Officials, Ohio School Boards Association, and Toledo Association of Administrative Personnel.
