[Cite as *Student Doe v. Adkins*, 2021-Ohio-3389.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

MOTHER DOE, as Parent and Next Friend of STUDENT DOE, a minor,	:	
Plaintiff-Appellee,	:	CASE NO. 20CA08
v.	:	
AMY ADKINS fka LUGONES, ET AL.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Randall L. Lambert and Cassaundra L. Sark, Ironton, Ohio, for appellants.

Charles K. Gould, Huntington, West Virginia, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED:8-26-21
ABELE, J.

{¶1} This is an appeal from a Lawrence County Common Pleas Court judgment that denied a motion to dismiss filed by Fairland Local School District Board of Education (FLSB) and Troy Glenn Dillon, defendants below and appellants herein. Appellants assign two errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY DENYING DEFENDANTS/APPELLANTS FAIRLAND LOCAL SCHOOL DISTRICT BOARD OF EDUCATION AND TROY GLENN DILLON'S MOTION TO DISMISS BY HOLDING THAT

THE AFORESAID DEFENDANTS WERE NOT ENTITLED TO IMMUNITY, PURSUANT TO R.C. 2744.02, REGARDING PLAINTIFF/APPELLEE'S CLAIMS BASED ON NEGLIGENCE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY DENYING DEFENDANTS/APPELLANTS FAIRLAND LOCAL SCHOOL DISTRICT BOARD OF EDUCATION AND TROY GLENN DILLON'S MOTION TO DISMISS BY HOLDING THAT THE AFORESAID DEFENDANTS WERE NOT ENTITLED TO IMMUNITY, PURSUANT TO R.C. 2744.02, REGARDING PLAINTIFF/APPELLEE'S INTENTIONAL TORT CLAIM."

{¶2} This appeal arises from allegations of inappropriate sexual contact between a Fairland High School (FHS) Spanish teacher, Amy Adkins (fka Lugones), and Student Doe, a 15-year-old student. During the 2017-2018 school year, Adkins seduced the student through text messages, the internet, and physical contact. On Saturday, April 7, 2018, the relationship culminated in sexual intercourse.

{¶3} By Monday, April 9, 2018, rumors of the sexual encounter began to circulate throughout FHS. A few days later, after FHS Principal Troy Glenn Dillon heard the allegations, Dillon met with the student to discuss the rumor. Initially, the student denied the truth of the rumor and indicated that he actually started the rumor "simply to joke with the guys." Dillon also met with Adkins to discuss the rumor and she likewise denied the rumor was true.

{¶4} The next day, Dillon contacted the student's mother to request a meeting. During this meeting, the student admitted that he and Adkins had engaged in sexual intercourse. Law enforcement officers subsequently investigated, and FLSB terminated Adkins' employment.

{¶5} On March 17, 2020, the student's mother, as Parent and Next Friend, filed a complaint against Adkins, FLSB, and Dillon and asserted six causes of action: (1) civil assault and battery; (2) negligent hiring, retention, training, and supervision; (3) negligent supervision; (4) negligence of Principal Dillon; (5) negligence per se; and (6) intentional infliction of emotional distress.

{¶6} Appellee first asserted that Adkins' conduct constituted assault and battery that resulted in severe emotional and other compensatory damages.

{¶7} In her second claim for relief, appellee alleged that FLSB was negligent in its "hiring, retention, training, supervision, and monitoring of faculty, school staff, and students." Appellee specifically claimed that FLSB breached its duty of due care in its hiring, retention, training, and supervision in the following respects:

> a. Failed to perform an adequate background check on [Adkins];
>
> b. Failed to make adequate inquiry or

> investigation of [Adkins'] prior work and personal history and inappropriate relationships with minor students;
>
> c. Permitted [Adkins] to engage in conduct which demonstrated that she was befriending and establishing an emotional connection with Student Doe to lower his inhibitions for the purpose of an inappropriate emotional, romantic, and sexual relationship;
>
> d. Failed to take appropriate measures to prevent the sexual advances and other verbal or physical conduct of a sexual nature perpetrated by [Adkins];
>
> e. Permitted Student Doe to be alone with [Adkins] despite conduct reasonably suggesting that [Adkins] presented a substantial risk of sexual abuse and harassment to Student Doe;
>
> f. Failed to implement methods, means, or procedures to adequately monitor the social media and electronic communications policy as between staff and students;
>
> g. Failed to adequately train teachers, staff, and school administration to recognize, prevent, and/or report indications of inappropriate conduct as between staff and students;
>
> h. Failed to provide appropriate instruction to students regarding personal safety, sexual abuse, and assault prevention; and
>
> i. Failed to make adequate inquiry or investigation when evaluating [Adkins'] sexually aggressive behavior toward Student Doe.

{¶8} Appellee further claimed that FLSB was aware, or should have been aware if it had conducted an adequate investigation into Adkins' work history, that Adkins "had a history of abusive, aberrant, suspicious, improper, and inappropriate conduct making sexual abuse and harassment of Student Doe foreseeable." Appellee likewise alleged that FLSB was aware, "or could have discovered through adequate inquiry or investigation, that [Adkins] was engaging in grooming,

encouraging, or consummating an inappropriate relationship with Student Doe and committing acts of sexual abuse of Student Doe."

{¶9} In her third claim for relief, appellee asserted that FLSB negligently supervised the student. She claimed that FLSB "breached its duty to exercise over Student Doe any degree of supervision to protect Student Doe from unwanted sexual abuse and harassment at the hands of [Adkins]." Appellee further alleged that FLSB acted negligently by allowing the student to be alone with Adkins "despite conduct reasonably suggesting that [Adkins] presented a substantial risk of sexual abuse and harassment to Student Doe."

{¶10} In her fourth claim for relief, appellee claimed that Dillon acted negligently by failing to timely report and investigate Adkins' behavior. Appellee alleged that Dillon's failures "led to continued inappropriate contact between [Adkins] and Student Doe."

{¶11} Appellee's fifth claim for relief asserted that FLSB was negligent per se under R.C. 2151.421. Appellee claimed that FLSB "had a duty to timely report suspected sexual abuse, harassment, or neglect to District officials and an appropriate social services or law enforcement agency" and that FLSB "knew or should have known that [Adkins] was engaging in verbal and physical behavior that was sexually abusive to Student Doe."

Appellee alleged that FLSB "breached its duty to timely report the reasonably suspected abuse of Student Doe as required by the Ohio Revised Code and established District policies." She further claimed that FLSB's "breach [of its duties] led to the sexual abuse of Student Doe."

{¶12} In her sixth claim for relief, appellee alleged that Adkins and FLSB intentionally inflicted emotional distress upon Student Doe. Appellee asserted that FLSB "engaged in an intentional, wanton, and reckless course of unreasonable and offensive conduct by hiring a sexual pedophile to teach at FHS, and after knowing [Adkins'] employment created a substantial risk of sexual abuse and harassment to Student Doe, failed to take any appropriate remedial steps to timely report, stop, warn, prevent, or ensure the sexual advances and/or in [sic] verbal or physical conduct of a sexual nature did not continue."

{¶13} On June 8, 2020, appellants filed a Civ.R. 12(B)(6) motion to dismiss the complaint for failure to state a claim. Appellants asserted that under R.C. Chapter 2744, they are immune from liability.

{¶14} At the hearing to consider appellants' motion, appellee raised a new argument to attempt to defeat appellants' claim of political-subdivision immunity that not only did R.C. 2744.02(B)(2) and (B)(5) remove appellants' general grant of

immunity, but also the R.C. 2744.02(B)(4) physical-defect exception removes appellants' immunity. Appellee argued that a physical defect existed because surveillance cameras may not have functioned properly, and if they had, appellants would have learned about Adkins' behavior before the inappropriate sexual contact.

{¶15} The trial court overruled appellants' motion to dismiss and this appeal followed.

{¶16} In their two assignments of error, appellants assert that the trial court erred by denying their motion to dismiss the complaint on the basis of political-subdivision immunity. Because the same standard of review and general principles apply to both assignments of error, for ease of discussion we consider them together.

A

STANDARD OF REVIEW

{¶17} Appellate courts conduct a de novo review of trial court decisions that grant or deny a Civ.R. 12(B)(6) motion to dismiss.[1] *Alexander Local School Dist. Bd. of Edn. v. Village of*

[1] Trial court orders that deny Civ.R. 12(B)(6) motions do not ordinarily constitute final, appealable orders. R.C. 2744.02(C) provides that "[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 this chapter or any other provision of the law is a final

Albany, 2017-Ohio-8704, 101 N.E.3d 21, ¶ 22 (4th Dist.); *e.g., Menorah Park Ctr. for Senior Living v. Rolston*, 2020-Ohio-6658, ___ N.E.3d___, ¶ 12, citing *Lunsford v. Sterilite of Ohio, L.L.C.*, ___ Ohio St.3d ___, 2020-Ohio-4193, ___N.E.3d ___, ¶ 22. We, therefore, afford no deference to the trial court's decision, but instead, independently review the trial court's decision. *Struckman v. Bd. of Edn. of Teays Valley Local School Dist.*, 4th Dist. Pickaway No. 16CA10, 2017-Ohio-1177, ¶ 18.

{¶18} Additionally, "[w]hether a party is entitled to immunity is a question of law properly determined by the court prior to trial pursuant to a motion for summary judgment [or a motion to dismiss]." *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 12, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992). Hence, appellate courts also conduct a de novo review of a trial court's determination regarding political-subdivision immunity. *Wright v. Village of Williamsport*, 4th Dist. No. 18CA14, 2019-Ohio-2682, 140 N.E.3d 1, 2019 WL 2754103, ¶ 15 (citations omitted).

B

MOTION TO DISMISS

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order." Accordingly, a trial court decision that denies a motion to dismiss based on political-subdivision immunity under R.C. Chapter 2744 is a final, appealable order. *E.g., Para v. Jackson*, 8th Dist. Cuyahoga No. 109516, 2021-Ohio-1188, 2021 WL

{¶19} Civ.R. 12(B)(6) allows a party to file a motion to dismiss a complaint for failing to state a claim upon which relief can be granted. "[A] Civ.R. 12(B)(6) motion to dismiss tests only the sufficiency of the allegations." *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 9, citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger,* 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989); *accord State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.,* 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992) (explaining that a Civ.R. 12(B)(6) motion to dismiss tests the sufficiency of the complaint). A court that considers a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted must presume that all factual allegations contained in the complaint are true and must construe all reasonable inferences in favor of the nonmoving party. *E.g., State ex rel. Talwar v. State Med. Bd. of Ohio,* 104 Ohio St.3d 290, 2004-Ohio-6410, 819 N.E.2d 654, ¶ 5; *Perez v. Cleveland,* 66 Ohio St.3d 397, 399, 613 N.E.2d 199 (1993). A trial court may grant a motion to dismiss for failure to state a claim only if it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union,* 42 Ohio

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1310501, ¶ 17.

St.2d 242, 327 N.E.2d 753 (1975), syllabus; *e.g., LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶ 14; *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 816 N.E.2d 1061, 2004-Ohio-5717, ¶ 11; *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991).

{¶20} We observe that "the affirmative defense of immunity under R.C. Chapter 2744 may be the basis of a dismissal under Civ.R. 12(B)(6)." *Para v. Jackson*, 8th Dist. Cuyahoga No. 109516, 2021-Ohio-1188, 2021 WL 1310501, ¶ 16. A trial court may grant a motion to dismiss on the basis of political-subdivision immunity only when the complaint bears "'conclusive evidence that the action is barred by the defense.'" *Plush v. Cincinnati*, 2020-Ohio-6713, 164 N.E.3d 1056, ¶ 13 (1st Dist.), quoting *Bucey v. Carlisle*, 1st Dist. Hamilton No. C-090252, 2010-Ohio-2262, 2010 WL 2018376, ¶ 9. Thus, "unless the pleadings obviously or conclusively establish the affirmative defense," a court may not dismiss the complaint. *Id.*, quoting *Steele v. City of Cincinnati*, 1st Dist. Hamilton No. C-180593, 2019-Ohio-4853, 2019 WL 6353715, ¶ 15.

{¶21} In the case at bar, we do not believe that appellee has alleged a set of facts that, if proven, would plausibly allow for recovery against appellants. Instead, as we explain more fully below, R.C. Chapter 2744 cloaks appellants with

immunity from liability.

C

R.C. CHAPTER 2744

{¶22} R.C. Chapter 2744 establishes a three-step analysis to determine whether a political subdivision is immune from liability. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 270, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 14. First, R.C. 2744.02(A)(1) sets forth the general rule that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision * * * in connection with a governmental or proprietary function." *Accord Ayers v. Cleveland*, 160 Ohio St.3d 288, 2020-Ohio-1047, 156 N.E.3d 848; *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7. Accordingly, "[t]he starting point is the general rule that political subdivisions are immune from tort liability." *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 772 N.E.2d 129, ¶ 14 (9th Dist. 2002).

{¶23} Once the political subdivision demonstrates that it is immune from tort liability under R.C. 2744.02(A)(1), the plaintiff bears the burden to show that one of the R.C. 2744.02(B) exceptions applies and removes the general grant of immunity. *Martin v. Payne*, 3rd Dist. Paulding No. 11-20-05,

2021-Ohio-1557, 2021 WL 1736817, ¶ 40, citing *Slane v. Hilliard*, 2016-Ohio-306, 59 N.E.3d 545, ¶ 31 (10th Dist.); *Bender v. Portsmouth*, 4th Dist. Scioto No. 12CA3491, 2013-Ohio-2023, 2013 WL 2152511, *3 (paragraph numbering not available); *accord Cramer* at ¶ 15; *Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St.3d 467, 470, 2002-Ohio-2584, 769 N.E.2d 372, ¶ 25. If the plaintiff establishes that one of the R.C. 2744.02(B) exceptions applies, then the political subdivision may assert one of the R.C. 2744.03(A) defenses to re-instate immunity. *Cramer* at ¶ 16; *Colbert* at ¶ 9.

{¶24} In the case sub judice, appellants argue that the trial court erred by determining that appellee's complaint sets forth facts that, if proven, establish that appellants are not entitled to the general grant of immunity that R.C. 2744.02(A)(1) provides. Appellee counters that the complaint contains adequate facts that, if proven, demonstrate that R.C. 2744.02(B)(2), (B)(4), or (B)(5) removes appellants' immunity.

1

R.C. 2744.02(B)(2)

{¶25} Appellants assert that the trial court incorrectly concluded that appellee's complaint alleges facts that, if proven, show that R.C. 2744.02(B)(2) removes their general grant of immunity. Appellants note that under R.C. 2744.02(B)(2), a

political subdivision may be held liable for injury resulting from the negligent performance of acts by school employees with respect to proprietary functions of the school district. Appellants claim, however, that appellee's allegations concern functions related to the provision of a system of public education, a governmental function.

{¶26} Appellee, on the other hand, argues that appellants' decisions regarding various policies and procedures employed in the school district constitute a proprietary function that other nongovernmental entities also institute as a matter of standard business practices. Appellee thus claims that a school district's adoption, enforcement, or lack thereof, of these types of standard policies and procedures constitutes a proprietary function.

R.C. 2744.02(B)(2) reads as follows:

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

{¶27} R.C. 2744.01(C) and (G) explain the meaning of a "governmental function" and a "proprietary function," respectively.

{¶28} R.C. 2744.01(C)(1) discusses the meaning of "governmental function" as follows:

> (C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:
>
> (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
>
> (b) A function that is for the common good of all citizens of the state;
>
> (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

{¶29} R.C. 2744.01(C)(2) then lists specific examples of activities that constitute governmental functions. As relevant in the case at bar, R.C. 2744.01(C)(2)(c) states that a governmental function includes "[t]he provision of a system of public education."

{¶30} R.C. 2744.01(G)(1) explains the meaning of a "proprietary function." The statute reads as follows:

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

> (a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;
>
> (b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

{¶31} Ohio courts have broadly interpreted the meaning of the phrase "[t]he provision of a system of public education" set forth in R.C. 2744.01(C)(2)(c). These courts have "cautioned that if the exception in R.C. 2744.02(B)(2) is invoked too liberally, 'the balance of competing interests reflected in the structure of R.C. Chapter 2744 is undermined.'" *Fried v. Friends of Breakthrough Schools*, 8th Dist. Cuyahoga No. 108766, 2020-Ohio-4215, 2020 WL 5048559, ¶ 35, quoting *Bucey v. Carlisle*, 1st Dist. Hamilton No. C-090252, 2010-Ohio-2262, 2010 WL 2018376, ¶ 17.

{¶32} Courts have determined that school activities constitute governmental functions when they are "so fundamental to the provision of a system of public education that [they] cannot be considered apart from the governmental function of 'providing a system of public education.'" *Schmitt v. Educational Serv. Ctr.*, 2012-Ohio-2208, 970 N.E.2d 1187, ¶ 19 (8th Dist.), quoting *Bucey* at ¶ 19. Other courts have recognized that "most school activities and administrative functions of the educational process, even if not directly

comprising part of the classroom teaching process," are fundamental to the provision of a system of public education and, hence, constitute governmental functions. *Perkins v. Columbus Bd. of Edn.*, 10th Dist. Franklin No. 13AP-803, 2014-Ohio-2783, 2014 WL 2927516, ¶ 12, citing *DeMartino v. Poland Local School Dist.*, 7th Dist. Mahoning No. 10 MA 19, 2011-Ohio-1466, 2011 WL 1118480, ¶ 29; *Taylor v. Boardman Twp. Local School Dist. Bd. of Edn.*, 7th Dist. Mahoning No. 08 MA 209, 2009-Ohio-6528, 2009 WL 4758818, ¶ 3; *Doe v. Massillon City School Dist.*, 5th Dist. Stark No. 2006CA00227, 2007-Ohio-2801, 2007 WL 1651438, ¶ 18; *Bush v. Beggrow*, 10th Dist. Franklin No. 03AP-1238, 2005-Ohio-2426, 2005 WL 1177935, ¶ 37; *Coleman v. Cleveland School Dist. Bd. of Edn.*, 8th Dist. Cuyahoga No. 84274, 2004-Ohio-5854, 2004 WL 2491662, ¶ 66. "The kinds of activities deemed governmental functions by Ohio courts include extracurricular activities, personnel decisions, and a school's submission of student attendance and grade information." *Fried* at ¶ 37.

{¶33} For example, in *Wilson v. McCormack*, 2017-Ohio-5510, 93 N.E.3d 102 (11th Dist.), the court determined that "a school district's hiring, retention and/or supervision of a high school basketball coach is a governmental function for the purposes of sovereign immunity." *Id.* at ¶ 1. In *Wilson*, two assistant high

school girls' basketball coaches sued the school district and others after the high school basketball coach sexually assaulted them. The school district claimed immunity from liability under R.C. Chapter 2744. After the trial court determined that providing a basketball team is incidental to a system of public education and constitutes a proprietary function, the school district appealed.

{¶34} On appeal, the appellate court agreed with the school district that a high school basketball team is an integral part of the provision of a system of public education and constitutes a governmental function. The court noted that other courts had likewise determined that extracurricular activities are part of the provision of a system of public education and are governmental functions. *Id.* at ¶ 26, citing *DeMartino* at ¶ 29 (determining that "[s]chool bands are * * * an extension of the school's music program, and, hence, a part of the provision of a system of public education"); *Summers v. Slivinsky*, 141 Ohio App.3d 82, 90, 749 N.E.2d 854 (7th Dist. 2001) ("high school cheerleading events fall under the governmental function umbrella"); *Neelon v. Conte*, 8th Dist. Cuyahoga No. 72646, 1997 WL 711232, 2 (Nov. 13, 1997) ("the Board was engaged in a governmental function—the provision of a system of public education"—by sanctioning an event for cheerleaders at the

school principal's home).

{¶35} The *Wilson* court further noted that "the hiring of teachers and administrators is an activity without which 'the governmental function of "providing a system of public education' cannot be accomplished." *Id.* at ¶ 27, quoting *Bucey* at ¶ 16 ("the staffing of a public school with an administrator" is a governmental function). The court thus concluded that "the hiring, retention, and supervision of a high school basketball coach is an inherent part of "providing a system of public education." *Id.* at ¶ 31; *accord Schmitt v. Educational Serv. Ctr. of Cuyahoga Cty,* 8th Dist. Cuyahoga No. 97623, 2012-Ohio-2210, 2012 WL 2819401, ¶ 18 (act of hiring personnel to staff public schools cannot be considered apart from governmental function of "providing a system of public education").

{¶36} Another court determined that "the provision of lunches on school grounds facilitates the efficient provision of a system of public education," and, thus, is a governmental function. *Taylor* at ¶ 21. The *Taylor* court rejected the plaintiff's assertion that providing lunches is a proprietary function simply because nongovernmental entities also engage in the activity. *Id.* at ¶ 19.

{¶37} The Second District Court of Appeals concluded that providing security-related services at a public school likewise

is a governmental function. *Craycraft v. Simmons*, 2nd Dist. Montgomery No. 24313, 2011-Ohio-3273, 2011 WL 2585952. The court decided that "[m]aintaining order and security in the classroom and on school grounds is an integral part of providing a system of public education." *Id.* at ¶ 21. The court reasoned that "providing school security and related tasks cannot be separated from the provision of a system of public education." *Id.*

{¶38} Additionally, the court rejected the plaintiff's argument that providing school security is a proprietary function because independent contractors often provide the services. The court agreed that schools may contract with independent parties to provide services, and further explained that the nature of the services performed, "providing security for public school students on school grounds, is a governmental function." *Id.* at ¶ 22.

{¶39} In the case sub judice, we believe that all of the actions alleged in appellee's complaint fall under the umbrella of hiring, retention, or supervision of school employees, or are otherwise integral to providing a system of public education. Appellee's complaints that appellants did not undertake adequate measures to protect the student---whether due to lack of training, supervision, surveillance, monitoring, oversight,

reporting, or investigation---are claims regarding the policies and procedures of the school district in providing a safe facility for students and faculty and in hiring, supervising, and retaining school district employees. Because providing a safe facility for students and faculty is an inherent part of the provision of a system of public education, that service constitutes a governmental function. *Craycraft, supra*. Moreover, hiring, supervising, and retaining school district employees is an integral part of the provision of a system of public education, and thus, is also a governmental function. *Wilson, supra*.

{¶40} We reject appellee's attempt to characterize the actions alleged in her complaint as proprietary functions. Appellee contends that the complaint charges that appellants "disregarded policies and protocol on a number of issues beyond mere provision of a system of public education." In particular, appellee points out that the complaint alleges that appellants were negligent for the following reasons: (1) "[i]gnor[ing Adkins'] "proclivities toward minor children"; (2) "[i]gnor[ing Adkins'] prior work and personal history and inappropriate relationships with minor children"; (3) "[i]gnor[ing] methods, means, or procedures to adequately monitor the social media and electronic communications policy as between staff and students"'

(4) "[f]ail[ing] to provide appropriate instruction to teachers and staff as to the recognition of, prevention, and reporting of inappropriate conduct with minor children"; (5) "[f]ail[ing] to provide appropriate instruction to students regarding personal safety, sexual abuse, and assault prevention"; (6) "[p]ermitt[ing] Student Doe to be alone with [Adkins] despite conduct reasonably suggesting that [Adkins] presented a substantial risk of sexual abuse and harassment to Student Doe"; (7) "[p]ermitt[ing Adkins] to engage in conduct which demonstrated that she was isolating Student Doe for the purpose [of] establishing an inappropriate relationship"; (8) "[r]efus[ing] to take appropriate measures to prevent the sexual advances and other verbal or physical conduct of a sexual nature perpetrated by [Adkins]"; (9) "[f]ail[ing] to appropriately monitor teachers, staff, and students, including their failure to maintain a functioning surveillance camera system"; and (10) "[r]ecklessly disregard[ing] protocol for investigating, reporting, and responding to [Adkins] sexual abuse of Student Doe."

{¶41} Appellee claims that all of the foregoing activities fall within the meaning of a proprietary---not a governmental function---for the following reasons: (1) none of the foregoing activities are listed as governmental functions under R.C.

2744.01(C); (2) the activities "relate to the safety and welfare of the public in that they would protect minors from sexual abuse and harassment"; and (3) the activities are proprietary because nongovernmental entities customarily engage in such activities.

{¶42} As to the first point, appellee contends that a school district's "adoption and enforcement of policies pertaining to sexual abuse and sexual grooming are not 'governmental functions.'" She charges that appellants' "disregard of the sexual abuse of a minor is not an 'obligation of sovereignty.'" Appellee asserts that the activities alleged in the complaint "are much broader than functions customarily and primarily reserved for governmental entities."

{¶43} Despite appellee's attempt to characterize the allegations contained in her complaint as proprietary functions, we believe that the allegations are, at their core, fundamental to the provision of a system of public education. All allegations concern policies or procedures that a public school system may implement to provide a safe and secure environment for students and form part of the overall structure of the provision of a system of public education. See *Craycraft, supra* (stating that providing security for public school students on school grounds constitutes governmental function).

{¶44} Moreover, many allegations relate to appellants' hiring, supervision, and retention policies. As we stated earlier, the hiring, supervision, and retention of school employees is a governmental function. *Wilson, supra*; *see, e.g., Porter v. Probst*, 2014-Ohio-3789, 18 N.E.3d 824, ¶ 32 (7th Dist.) (employment decisions made in exercise of government function of operating jail fall within sovereign immunity); *Campolieti v. Cleveland*, 184 Ohio App.3d 419, 2009-Ohio-5224, 921 N.E.2d 286, ¶ 36 (8th Dist.) ("[e]mployment decisions made in the exercise of a government function fall within" the protection of sovereign immunity).

{¶45} We further disagree with appellee that functions that relate to sexual harassment and abuse policies are proprietary functions simply because nongovernmental entities also implement these types of policies. Appellee alleges that "any responsible business entity" would implement "policies, training, supervision, monitoring, oversight, and reporting protocols for sexual abuse and harassment." She thus claims that these types of functions are proprietary functions. However, *Taylor* and *Craycraft* indicate that, even if a nongovernmental entity customarily engages in the same type of activity, the overlap does not necessarily mean that the function is a proprietary function.

{¶46} Appellee nevertheless contends that *Doe v. Skaggs*, 2018-Ohio-5402, 127 N.E.3d 493 (7th Dist.), supports her view that the activities alleged in her complaint are proprietary functions. We do not agree.

{¶47} In *Skaggs*, a high school softball coach engaged in improper sexual contact with a softball player. The parents and the minor child filed a complaint against the school, the superintendent, the athletic director, and the softball coach that alleged negligence, assault and battery, negligent retention/supervision, and the intentional infliction of emotional distress. The trial court entered summary judgment in the defendants' favor.

{¶48} On appeal, the plaintiffs asserted that the defendants were not entitled to R.C. Chapter 2744 immunity because the mandatory reporting statute, R.C. 2151.421, shows that the duty to report is a proprietary function. The appellate court determined, however, that the mandatory reporting requirement does not apply to political subdivisions such as school districts. *Id.* at ¶ 27. The court thus concluded that the mandatory reporting provision did not apply to the defendant school district.

{¶49} The plaintiffs additionally claimed that the school district failed to adopt curriculum to prevent child abuse. The

appellate court determined, however, that the evidence submitted during the summary judgment proceedings showed that the district's policy was adequate. Thus, the school district could not be held liable under R.C. 2744.02(B)(2).

{¶50} Appellee contends that the *Skaggs* court's review of the school district's policies supports her argument that implementing certain school policies should constitute a proprietary function. The *Skaggs* court did not, however, specifically address whether implementing these types of school policies was a proprietary function, but, instead appears to have determined that, even if implementing policies is a proprietary function, the school district was not negligent. We therefore find appellee's reliance on *Skaggs* unavailing.

{¶51} Consequently, we believe that appellee's complaint fails to allege a set of facts that, if proven, shows that any of appellants' employees were negligent with respect to proprietary functions. Instead, the facts alleged in the complaint demonstrate that the employees were engaged in activities integral to providing a system of public education and thus, are, governmental functions. We therefore disagree with appellee that R.C. 2744.02(B)(2) removes the general grant of immunity from tort liability provided under R.C. 2744.01(A)(1).

R.C. 2744.02(B)(4)

{¶52} Appellee also contends that the R.C. 2744.02(B)(4) exception applies:

> (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.

{¶53} We first observe that appellee's complaint did not specifically allege that the injuries occurred as a result of a physical defect located on school grounds. Rather, at the motion to dismiss hearing, appellee claimed that the school's surveillance-camera system was defective and that this defect constituted a "physical defect" within the meaning of R.C. 2744.02(B)(4). While we may question the procedural propriety of appellee's claim that R.C. 2744.02(B)(4) removes appellants'

immunity, we nevertheless believe that this statutory provision is inapplicable to the case at bar..

{¶54} The R.C. 2744.02(B)(4) exception applies upon proof that an injury "(1) resulted from a political subdivision employee's negligence, (2) occurred within or on the grounds of buildings used in connection with a governmental function, and (3) resulted from a physical defect within or on those grounds." *Leasure v. Adena Local School Dist.*, 2012-Ohio-3071, 973 N.E.2d 810, ¶ 15 (4th Dist.); *accord Wright* at ¶ 20. "'All of these characteristics must be present.'" *Plush v. Cincinnati*, 2020-Ohio-6713, 164 N.E.3d 1056, ¶ 29 (1st Dist.), quoting *Parmertor v. Chardon Local Schools*, 2016-Ohio-761, 47 N.E.3d 942, ¶ 14 (11th Dist.), citing *Duncan v. Cuyahoga Community College*, 2012-Ohio-1949, 970 N.E.2d 1092, ¶ 26 (8th Dist.).

{¶55} Although R.C. Chapter 2744 does not define the term "physical defect," as a general matter "'a "physical defect" is a perceivable imperfection that diminishes the worth or utility of the object at issue.'" *Leasure* ¶ 19, quoting *Hamrick v. Bryan City Sch. Dist.*, 6th Dist. Williams No. WM-10-014, 2011-Ohio-2572, 2011 WL 2090038, ¶ 28. Ordinarily, "courts have held that the R.C. 2744.02(B)(4) physical defect exception may apply if the instrumentality that caused the plaintiff's injury did not operate as intended due to a perceivable condition or, to

put it in the words of the *Hamrick* court, if the instrumentality contained a perceivable imperfection that impaired its worth or utility." *Leasure* at ¶ 20 (citations omitted).

{¶56} Importantly, a plaintiff who seeks to remove a political subdivision's immunity from liability under R.C. 2744.02(B)(4) must establish that the plaintiff's injury resulted from a physical defect on or within the grounds of the political subdivision. Alleging that the injury resulted from a political subdivision's failure to implement better policies, security measures, or design features to prevent criminal activity is insufficient to trigger the R.C. 2744.02(B)(4) exception. *Parmertor* at ¶ 23 (political subdivision immunity not removed under R.C. 2744.02(B)(4) when plaintiffs' injuries resulted from intentional acts of third-party gunman and not from school safety measures or lack thereof); *Moncrief v. Bohn*, 2014-Ohio-837, 9 N.E.3d 508, ¶ 16 (8th Dist.) (a political subdivision's lack of adequate security when plaintiff's child murdered not a physical defect, and murder resulted from criminal act of third party); *Piispanen v. Carter*, 11th Dist. Lake No. 2005-L-133, 2006-Ohio-2382, 2006 WL 1313159, ¶ 21 (R.C. 2744.02(B)(4) inapplicable when plaintiff's injury resulted from intentional assault on school property, not result of physical defect on school grounds).

{¶57} In the case sub judice, assuming, arguendo, that appellee alleged sufficient facts that, if proven, establish that the surveillance system did not operate as intended due to a perceivable condition, appellee has not alleged sufficient facts that, if proven, demonstrate that the supposed surveillance system physical defect caused the injuries alleged in appellee's complaint. Instead, appellee's injuries resulted from the intentional acts of Adkins.

{¶58} Consequently, we believe that appellee did not allege any facts that, if proven, establish that R.C. 2744.02(B)(4) removes appellants' general grant of immunity from tort liability.

3

R.C. 2744.02(B)(5)

{¶59} Appellee next contends that she alleged sufficient facts that, if proven, demonstrate that R.C. 2744.02(B)(5) removes appellants' general grant of immunity from liability. Appellee notes that this provision indicates that a political subdivision may be liable for injury when civil liability is expressly imposed upon the political subdivision by another provision of the Revised Code.

{¶60} R.C. 2744.02(B)(5) provides as follows:

> (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:
>
> * * * *
>
> (5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

{¶61} For this provision to apply and remove a political subdivision's general grant of immunity, "another section of the Revised Code" must "expressly impose[] liability on a political subdivision." *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 20. The term "expressly" in R.C. 2744.02(B)(5) means "in direct or unmistakable terms: in an express manner: explicitly, definitely, directly." *Butler v. Jordan*, 92 Ohio St.3d 354, 357, 750 N.E.2d 554, 558 (2001). In other words, to "expressly" impose liability on a political

subdivision, a statute must state that a political subdivision is liable and not simply recite that some general category of persons is liable. *See Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, ¶ 21 (statute imposing liability upon landlords as a general matter did not expressly impose liability upon political subdivision that provided public housing); *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 67 (statute that imposed liability upon a "person" without mentioning political subdivisions did not expressly impose immunity under R.C. 2744.02(B)(5)); *Cramer* at ¶ 21-28, quoting R.C. 3721.17(I)(1) and R.C. 3721.10(A)(3) (statute imposing liability on "any * * * home" expressly imposed liability on political subdivision when statutory definition of "home" included "'[a] county home or district home'"); *accord Bonkoski v. Lorain Cty.*, 2018-Ohio-2540, 115 N.E.3d 859, 2018 WL 3212067, ¶ 9 (9th Dist.).

{¶62} In the case sub judice, appellee contends that R.C. 2151.421 expressly imposes liability upon FLSB for Dillon's failure to report suspected abuse. R.C. 2151.421 provides in part:

> No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under

> eighteen years of age * * * has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division.

R.C. 2151.421(A)(1)(a).

{¶63} R.C. 2151.421(A)(1)(b) states that a "person" includes a "school teacher; school employee; [and] school authority." R.C. 2151.421(N) provides that "[w]hoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made." R.C. 2151.421(N) thus imposes civil liability upon a "person" who violates R.C. 2151.421(A).

{¶64} A plain reading of R.C. 2151.421(A)(1)(b) shows that a political subdivision, such as a school board or a school district, is not expressly listed as a "person" subject to the reporting requirement in R.C. 2151.421(A)(1)(a). Consequently, because a political subdivision cannot violate R.C. 2151.421(A), R.C. 2151.421(N) does not expressly impose civil liability upon a political subdivision. Accordingly, we disagree with appellee that R.C. 2744.02(B)(5) removes FLSB's general grant of immunity.

{¶65} Appellee contends, however, that FLSB can be held liable for Dillon's failure to comply with R.C. 2151.421.

Appellee claims that the Ohio Supreme Court has endorsed the concept that a political subdivision, such as a school board, may be held liable for its employees' failure to report under R.C. 2151.421. To support her argument, appellee cites *Yates v. Mansfield Bd. Of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, and *Campbell v. Burton*, 92 Ohio St.3d 336, 750 N.E.2d 539 (2001).

{¶66} In *Campbell*, the Ohio Supreme Court determined that "R.C. 2151.421 expressly imposes liability for failure to perform the duty to report known or suspected child abuse" in the context of R.C. 2744.02(B)(5) and 2744.03(A)(6)(c). In *Campbell*, an eighth-grade student disclosed to a school peer-mediation coordinator that a male family friend engaged in physical contact that made the student feel uncomfortable. At the end of the mediation session, the coordinator told the student to inform the student's mother about the physical contact with the family friend and to stay away from this person if he made her feel uncomfortable. The coordinator did not, however, report the student's concerns to anyone.

{¶67} Later, the student filed a complaint against the peer-mediation coordinator, school superintendent, and board of education and alleged that the defendants failed to report the alleged abuse as R.C. 2151.421 requires. The student claimed

that, as a result of the failure to report, the student suffered psychological and other permanent injury.

{¶68} The trial court entered summary judgment in the defendants' favor on the basis of political-subdivision immunity. On appeal, the appellate court determined that R.C. 2744.02(B)(5) and 2744.03(A)(6)(c) did not remove the defendants' general grant of immunity. The court agreed with the defendants that R.C. 2151.421 did not expressly impose liability upon the defendants.

{¶69} The appellate court then certified a conflict to the Ohio Supreme Court upon the following question: "For purposes of the immunity exceptions in R.C. 2744.02(B)(5) and R.C. 2744.03(A)(6)(c), does R.C. 2151.421 expressly impose liability on political subdivisions and their employees for failure to report child abuse?" *Id.* at 339.

{¶70} The Ohio Supreme Court "answer[ed] the question in the affirmative." *Id.* The court held: "R.C. 2151.421, through its penalty statute, R.C. 2151.99, expressly imposes liability, within the meaning of R.C. 2744.02(B)(5) and 2744.03(A)(6)(c), on political subdivisions and their employees for failure to report suspected child abuse." *Id.* In reaching its conclusion, the court reviewed the language of the immunity statutes. At the time, R.C. 2744.02(B)(5) stated:

> In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code * * * . Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

Id. at 340, quoting former R.C. 2744.02(B)(5). Additionally, R.C. 2744.03(A)(6)(c) stated that a political-subdivision employee may be liable in tort if "[l]iability is expressly imposed upon the employee by a section of the Revised Code."

{¶71} The court construed these two statutes to mean that "an express imposition of liability in another section of the Revised Code negates immunity." *Id.* The court then considered whether R.C. 2151.421, through its penalty R.C. 2151.99 provision, expressly imposes liability upon the political subdivision or the employee. The court noted that R.C. 2151.421 requires certain persons to report known or suspected child abuse and that R.C. 2151.99 states that anyone who is required to report and fails to report is guilty of a fourth-degree misdemeanor.[2]

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[2] We note that at the time *Campbell* was decided, R.C. 2151.421(N) had yet to be enacted. In 2008, the General Assembly added the provision and initially included it in R.C. 2151.421(M). *See* 2008 Ohio Laws 155, Am.Sub.H.B. 280.

{¶72} The court next examined whether the board of education could be held liable under R.C. 2744.02(B)(5) and again concluded that R.C. 2151.421 "expressly imposes liability for the failure to report known or suspected child abuse." *Id.* at 343. The court determined that "if [the board] had a duty to report, then immunity pursuant to R.C. 2744.02(B)(5) is not available to [the board]." *Id.* The court ended its discussion by stating that "a political subdivision may be held liable for failure to perform a duty expressly imposed on its employee by R.C. 2151.421." *Id.*

{¶73} With respect to the political-subdivision employees, the court observed that R.C. 2744.03(A)(6)(c) "tracks the language of R.C. 2744.02(B)(5) and denies immunity if '[l]iability is expressly imposed upon the employee by a section of the Revised Code.'" *Id.* The court thus reached the same conclusion with respect to the employees' liability as it did with respect to the board and held that "an employee of a political subdivision may be held liable for failure to perform a duty expressly imposed by R.C. 2151.421." *Id.*

{¶74} Justice Cook, along with Chief Justice Moyer and Justice Stratton, dissented. In her dissent, Justice Cook noted that R.C. 2151.421(A) requires certain persons to report known or suspected abuse. *Id.* at 345 (Cook, J., dissenting). She

further stated, however, that R.C. 2151.421 does not "explicitly declare 'in direct or unmistakable terms' that either a political subdivision or its employee will be liable for failure to comply with R.C. 2151.421(A)." *Id.* Justice Cook believed that the statute must contain an "explicit declaration that the political subdivision or its employee can be held liable in a civil action for damages" in order to trigger the R.C. 2744.02(B)(5) and 2744.03(A)(6)(c) exceptions to immunity. *Id.* She thus did not agree with the majority's decision that the R.C. 2151.99 imposition of criminal liability stripped the board and employees of immunity. Justice Cook additionally observed that nothing in R.C. 2151.421 states "that a political subdivision has a duty to report." *Id.* at 346.

{¶75} A few years later, in *Yates* the court held that under "former R.C. 2744.02(B)(5), a board of education may be held liable when its failure to report the sexual abuse of a minor student by a teacher in violation of R.C. 2151.421 proximately results in the sexual abuse of another minor student by the same teacher." *Id.* at ¶ 46. In *Yates*, a ninth-grade student reported to school officials, including the principal, that another school employee, on three occasions, engaged in inappropriate sexual conduct with the student. The principal investigated the student's allegations and determined them to be

a lie. The student claimed that "she was expelled from school for harassing a staff member." *Id.* at ¶ 3. The school did not take any action against the employee and did not report the student's abuse allegations to the police or to other appropriate authority.

{¶76} Three years later, the employee engaged in sexual contact with another ninth-grade student. The student told a friend about the incident, and the friend then reported the incident to a school counselor. The principal learned of the incident and talked to both the student and employee, and both admitted the report true. The police and the parents were immediately notified, and the employee forced to resign.

{¶77} The parents later filed a complaint against the former school employee and the board of education and alleged that (1) the defendants violated R.C. 2151.421, and (2) the board was negligent for retaining the employee after the report three years earlier of inappropriate sexual contact with another student.

{¶78} The board requested summary judgment and alleged immunity under R.C. 2744.02(A)(1). The plaintiffs contended that R.C. 2744.02(B)(4) and (B)(5) applied and removed the board's general grant of immunity. The trial court concluded that neither exception applied and granted the board summary

judgment. The plaintiffs appealed.

{¶79} The court of appeals affirmed the trial court's judgment and determined that R.C. 2744.02(B)(5) did not apply because R.C. 2151.421 did not impose liability upon the political subdivision. The appellate court also concluded that "'R.C. 2151.421 creates a duty only to a specific child,' meaning that the board's failure to report the alleged abuse of Amanda could have resulted in liability for injury only to her, not to subsequent victims." *Id.* at ¶ 8.

{¶80} On appeal to the Ohio Supreme Court, the court considered the following proposition of law:

> "When a school board violates R.C. 2151.421(A)(1)(a) by not reporting a student's allegation of abuse against a school teacher, and the same school teacher sexually abuses another student, then the school board is not entitled to R.C. [Chapter] 2744 immunity pursuant to *Campbell v. Burton* (2001), 92 Ohio St.3d 336 [750 N.E.2d 539], syllabus."

Id. at ¶ 11. The supreme court reviewed the statutory language in R.C. 2744.02(B)(5), but its decision rested largely upon the underpinnings of R.C. 2151.421. The court mainly reviewed whether the appellate court had correctly determined that R.C. 2151.421 creates a duty only to a specific child and held that it had not.

{¶81} After a lengthy discussion of the purposes of the reporting statute, the court concluded that "[i]t is irrational

to suggest that the General Assembly intended to protect only the one specific minor student who is actually abused under these circumstances, and we will not interpret the statute so restrictively as to achieve an irrational result." *Id.* at ¶ 45. The court thus held that under "former R.C. 2744.02(B)(5), a board of education may be held liable when its failure to report the sexual abuse of a minor student by a teacher in violation of R.C. 2151.421 proximately results in the sexual abuse of another minor student by the same teacher." *Id.* at ¶ 46.

{¶82} Although we acknowledge that the Ohio Supreme Court has not expressly overruled *Yates* and *Campbell*, we recognize that both cases were decided before the 2009 *Moore* and 2008 *O'Toole* decisions. In those cases, the Ohio Supreme Court plainly stated that a statute must expressly impose liability on a political subdivision rather than referring to a general class of persons. R.C. 2151.421(A)(1)(b) does not include a school district or a school board within the definition of a "person" required to comply with the reporting requirement. Instead, as pertinent to schools, the statute lists only a "school teacher; school employee; [and] school authority." *Id.* None of these definitions expressly includes a school district or a school board. We therefore question whether the *Yates* and *Campbell* conclusions that R.C. 2151.421 imposes liability upon school

boards remain valid when that statute does not expressly name school boards or school districts as persons required to report known or suspected abuse. Additionally, the *Yates* court relied primarily upon *Campbell* along with the purposes underlying the reporting statute.

{¶83} Shortly after *Campbell*, the General Assembly amended R.C. 2744.02(B)(5) to permit a political subdivision to be sued only when the liability expressly imposed by a Revised Code section is civil liability. *See* 2002 Ohio Laws File 239, 2002 Am.Sub.S.B. No. 106, effective April 9, 2003. The *Yates* court did not consider the effect of the newly-amended statute, because the *Yates* complaint had been filed before the effective date of the amendment. *See Yates v. Mansfield Bd. of Edn.*, 150 Ohio App.3d 241, 2002-Ohio-6311, 780 N.E.2d 608 (5th Dist.), ¶ 5. Furthermore, when the court decided *Campbell* and *Yates*, R.C. 2151.421(N) did not exist. In 2008, the General Assembly added the provision as R.C. 2151.421(M). *See* 2008 Ohio Laws 155, Am.Sub.H.B. 280. In 2016, it was changed to R.C. 2151.421(N). *See* 2016 Ohio Laws File 129, Am. Sub. H.B. 493.

{¶84} Thus, since *Campbell* and *Yates* two statutory amendments have altered the legal landscape. R.C. 2744.02(B)(5) was amended to insert the word "civil" before liability. The effect of this amendment was to make the criminal penalty

provision that the *Campbell* court invoked to find that R.C. 2151.421 imposed express, criminal liability on the political subdivision no longer applicable to a political-subdivision immunity analysis.

{¶85} Moreover, until 2008 R.C. 2151.421 did not contain a provision that imposed civil liability. R.C. 2151.421(N) now imposes civil liability upon a person subject to the reporting requirements.

{¶86} We also note that the same year that the court considered *Yates*, it reviewed R.C. 2744.02(B)(5) in a case that involved a board of developmental disabilities and two employees. *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2. In *Ridley*, a developmentally disabled adult male died of heatstroke while inside his apartment. Before his death, caseworkers knew that during hot weather, he "would dress wearing several layers of warm clothing, close the windows in his attic apartment, and confine himself there without the benefit of air-conditioning." *Id.* at ¶ 3. During a subsequent heat wave, neither caseworker checked on Ridley. He later was discovered dead with the doors nailed shut and windows sealed.

{¶87} Ridley's estate filed a complaint against the board and the two employees and alleged that the board and employees breached both their statutory and common-law duties by abandoning Ridley during the heat wave. The board and employees later filed motions to dismiss the complaint for failure to state a claim upon which relief may be granted and the trial court granted the motions.

{¶88} On appeal, the appellate court partially affirmed the trial court's judgment. The court determined that the trial court properly dismissed the claims against the board because the estate failed to allege viable negligence claims under

> R.C. 5123.61 (duty to report abuse or neglect of a mentally retarded or developmentally disabled adult), 5123.62 (the Bill of Rights for persons with mental retardation or a developmental disability), and 5126.431 (the duty of the Department of Mental Retardation and Developmental Disabilities to adopt rules for certification of providers and establishing quality assurance standards regarding supported living for persons with mental retardation or developmental disabilities).

Id. at ¶ 6. The appellate court concluded that the statutes did not impose a duty upon the board and its employees, or, if they did, "the allegations in the complaint were insufficient to indicate a breach of that duty." *Id.*

{¶89} With respect to two other negligence claims brought under R.C. 5126.05 (duty to provide supportive home services)

and 5126.41 (duty to develop an individual service plan and ensure that the individual receives the services for which he contracted), the court determined that the board was immune from liability under R.C. 2744.02(B)(5). The court found that because neither statute expressly imposed liability upon the board, the board remained immune from liability under R.C. 2744.01(A)(1). Consequently, the court affirmed the decision to dismiss these negligence claims.

{¶90} The appellate court, however, reversed the trial court's decision to dismiss the claims against the two employees. The court concluded that the complaint alleged facts, if true, that suggested that the employees acted recklessly or wantonly. Thus, under R.C. 2744.03(A)(6) neither employee was immune from liability.

{¶91} On appeal to the Ohio Supreme Court, the court first reviewed whether the appellate court correctly determined that R.C. 5123.61 did not impose a duty upon the board or its employees, or whether, if it did, the complaint failed to allege facts to indicate that either breached that duty.

{¶92} The court examined the R.C. 5123.61(C)(1) language as amended by Am.Sub.H.B. No. 606, effective March 9, 1999. At the time, the statute provided:

"Any person listed in division (C)(2) of this

> section, having reason to believe that a mentally retarded or developmentally disabled adult has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of that adult, shall immediately report or cause reports to be made of such information to a law enforcement agency or to the county board of mental retardation and developmental disabilities, except that if the report concerns a resident of a facility operated by the department of mental retardation and developmental disabilities the report shall be made either to a law enforcement agency or to the department."

Ridley at ¶ 15, quoting 147 Ohio Laws, Part III, 4767. The court determined that the board was not a person listed in R.C. 5123.61(C)(2)(c) and, thus, it did "not have a duty to report."[3] *Id.* at ¶ 16. The court found, however, that the statute did impose a duty to report upon the board's two employees. Nevertheless, the court upheld the decision to dismiss these allegations because, the court concluded, the estate failed to allege sufficient facts to demonstrate that the failure to report contributed to Ridley's death. Thus, the estate did not set forth sufficient facts in the complaint to support a negligence claim. The court declined to consider whether R.C.

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[3] Although *Ridley* did not quote former R.C. 5123.61(C)(2)(c), the relevant provision has remained substantively unchanged since *Ridley*. The current version of R.C. 5123.61(C)(2)(c) defines a person to include "[a] superintendent, board member, or employee of a county board of developmental disabilities." The version at issue in Ridley defined a person to include "[a] superintendent, board member, or employee of a county board of mental retardation and

5123.61 expressly imposes liability within the context of R.C. 2744.02(B)(5).

{¶93} The *Ridley* court's conclusion that "person" as used in R.C. 5123.61(C)(2)(c) does not include a board of developmental disabilities appears to be at odds with the *Yates* and *Campbell* implicit conclusions that "person," as used in R.C. 2151.421(A)(1)(b), includes a school board. We further note that other Ohio appellate courts have determined that R.C. 2151.421 "does not impose civil liability on a political subdivision, such as a school district." *Doe v. Skaggs*, 2018-Ohio-5402, 127 N.E.3d 493, ¶ 27 (7th Dist.); *Thompson v. Buckeye Joint Vocational School Dist.*, 2016-Ohio-2804, 55 N.E.3d 1, ¶¶ 21-22 (5th Dist.). *Thompson* relied upon the plain language contained in R.C. 2151.421 to conclude that the statute does not impose liability upon a political subdivision like a school board or a school district.

{¶94} The *Thompson* court explained its reasoning as follows:

> In this case, R.C. 2151.421 does not specifically impose liability on political subdivisions. R.C. 2151.421 creates a right to pursue liability for the failure to report child abuse, but does not specifically identify a political subdivision as an entity with a duty to report. *See Toros v. Cuyahoga County Bd. of Dev. Disabilities*, 8th Dist. Cuyahoga No. 99637, 2013-Ohio-4601, 2013 WL 5676279; *Moore v. Lorain Metro. Housing Auth.*, 121 Ohio St.3d 455, 2009-

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developmental disabilities."

> Ohio-1250, 905 N.E.2d 606. R.C. 2151.421[N] provides, "[w]hoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made * * *." While R.C. 2151.421(A) contains an extensive list of individuals whose duty it is to report known or suspected child abuse or neglect, it does not include in the list "boards of education," "political subdivisions," or "joint vocational school districts" in those having a duty to report.
>
> Since "political subdivision" or "board of education" is not included in R.C. 2151.421(A)(1)(b) to whom the mandatory duty to report applies, a political subdivision or board of education cannot "violate division (A) of this section" as required by R.C. 2151.421[N] for liability to attach. R.C. 2151.421[N] does not expressly, directly, or explicitly impose civil liability on a political subdivision as required by R.C. 2744.02(B)(5) for the exception to apply. Accordingly, we find the trial court erred in failing to grant judgment on the pleadings to BJVSD, BCC, and their boards of education as to the claims against them in the complaint.

Id. at ¶¶ 21-22.

{¶95} We agree with these later cases that have reexamined R.C. 2744.02(B)(5) and R.C. 2151.421 in light of the amendments enacted after *Campbell* and *Yates*. We further believe that *Yates* and *Campbell* must be read in light of *Moore* and *O'Brien*, both of which stated that a statute must employ express language that imposes liability upon a political subdivision in specific terms rather than in general terms such as "landlord" or "person."

{¶96} Therefore, we agree with the *Thompson* analysis that the plain language of R.C. 2151.421 does not indicate that a

school board or a school district has a duty to report suspected or known child abuse. Neither a school board nor a school district is listed in R.C. 2151.421(A)(1)(b) as one of the "person[s]" subject to mandatory reporting. Consequently, because a school board or a school district cannot violate the duty that R.C. 2151.421(A) imposes, the imposition of R.C. 2151.421(N) civil liability for "person[s]" who violate R.C. 2151.421(A) cannot apply to a school board or a school district.

{¶97} R.C. 2151.421 does, however, require a "school teacher," a "school employee," and "school authority" to report known or suspected abuse. Dillon, as the school principal, thus ostensibly had a duty to report known or suspected abuse. Moreover, R.C. 2151.421(N) states that a person who violates the duty to report "is liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made."

{¶98} Nevertheless, appellee did not argue on appeal that Dillon lacks immunity in his individual capacity. Instead, appellee's brief states that she has sued Dillon in his "official capacity as interim principal at FHS" and seeks to hold FLSB "liable for Dillon's failure to timely report pursuant to R.C. 2151.421." Appellee's Brief at 17, fn.4. Ohio appellate courts have routinely held that when "a named

defendant officer of a political subdivision is sued in his or her official capacity, R.C. 2744.02 applies; where the employee is sued in his or her personal capacity, R.C. 2744.03(A)(6) applies." *Para v. Jackson*, 8th Dist. Cuyahoga No. 109516, 2021-Ohio-1188, 2021 WL 1310501, ¶ 16, citing *Jones v. Norwood*, 1st Dist. Hamilton No. C-120237, 2013-Ohio-350, 2013 WL 454909, ¶ 37; *Cool v. Brown-Clark*, 2020-Ohio-6968, 165 N.E.3d 734, ¶ 21 (7th Dist.) ("a suit against a political-subdivision employee in his or her official capacity is treated the same as a suit against the political subdivision itself, and a three-tiered analysis applies").

{¶99} In the case at bar, appellee sued Dillon in his official capacity and appellee did not argue that R.C. 2744.03(A)(6)(c) applies.[4] We, therefore, are limited to considering whether any of the R.C. 2744.02(B) exceptions apply in the case sub judice. *Cool* at ¶ 22. We have determined that none of the exceptions to immunity apply. Therefore, we believe the trial court erred by denying appellants' motion to dismiss the negligence claims against them.

[4] R.C. 2744.03(A)(6)(c) states that a political subdivision "employee is immune from liability unless * * * [c]ivil liability is expressly imposed upon the employee by a section of the Revised Code."

{¶100} Accordingly, based upon the foregoing reasons, we sustain appellants' first assignment of error.

D

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶101} In their second assignment of error, appellants assert that the trial court erred by denying their motion to dismiss appellee's intentional infliction of emotional distress claim. Appellants assert that R.C. 2744.02(B) does not contain any provision that excepts a political subdivision from the general grant of immunity when a complaint alleges an intentional tort. Instead, appellants contend that Ohio courts have consistently stated that political subdivisions are immune from intentional-tort claims. Appellee concedes that she cannot maintain an intentional infliction of emotional distress claim against appellants.

{¶102} We agree with the parties. "'There are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress.'" *Hubbard v. Canton City Sch. Bd. Of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 8, quoting *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 452, 639 N.E.2d 105 (1994); *e.g.*, *Fried, Admr. v. Friends of Breakthrough Schools*, 8th Dist. Cuyahoga No. 108766, 2020-Ohio-4215, 2020 WL 5048559, ¶ 24.

{¶103} Accordingly, based upon the foregoing reasons, we sustain appellants' second assignment of error, reverse the trial court's decision that denied appellants' motion to dismiss on the basis of political-subdivision immunity under R.C. 2744.02. Therefore, we remand this matter to the trial court for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and this cause remanded for further proceedings consistent with this opinion. Appellants shall recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.