[Cite as *Golden v. Milford Exempted Village School Bd. of Edn.*, 2009-Ohio-3418.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

JENNIFER GOLDEN, et al.,	:	
Plaintiffs-Appellees,	:	CASE NO. CA2008-10-097
	:	O P I N I O N
- vs -		7/13/2009
	:	
MILFORD EXEMPTED VILLAGE SCHOOL BOARD OF EDUCATION, et al.,	:	
	:	
Defendants-Appellants.		

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008-CVC-01156

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YOUNG, J.

{¶1} Defendant-appellant, Milford Exempted Village School Board of Education ("school board"), appeals a decision of the Clermont County Court of Common Pleas

denying its motion for judgment on the pleadings in connection with a complaint filed by plaintiffs-appellees, Jennifer and Dennis Golden and their minor son R. (collectively, "the Goldens").[1]

{¶2} During the 2007-2008 school year, R. was a 14-year-old student at Milford High School and a member of the ninth-grade boys basketball team. Defendant Thomas Kilgore was a physical education teacher at Milford High School and the coach of the ninth-grade boys basketball team. On February 7, 2008, R. and his teammates were at the high school waiting for a school bus to transport them to another school for basketball practice. While waiting for the bus, three of the teammates, C., J., and T. pinned R. to the ground against his will. While being held down, R. was repeatedly punched in the stomach, and T. exposed his penis to R., rubbed his penis on R.'s face, and tried to force R. to put the penis in his mouth. After eventually freeing himself, R. ran from the area of the incident, refused to board the bus, and did not attend basketball practice that day.

{¶3} On June 5, 2008, the Goldens filed a complaint against the school board, Kilgore, and T. and his parents. The complaint set forth the following claims against Kilgore and the school board: negligence per se, civil hazing, sexual harassment, negligent supervision, intentional infliction of emotional distress, and vicarious liability. In response to the complaint, Kilgore and the school board denied liability. They then moved for judgment on the pleadings on the ground they were immune from liability under R.C. Chapter 2744. Kilgore and the school board also argued that the complaint failed to properly plead an act of hazing.

{¶4} On September 25, 2008, the trial court granted the motion with regard to

1. Pursuant to Loc.R. 6(A), we sua sponte remove this appeal from the accelerated calendar.

negligence per se, sexual harassment, intentional infliction of emotional distress, and vicarious liability, but denied the motion with regard to civil hazing and negligent supervision. With regard to the civil hazing claim, the trial court found that (1) under Ohio's notice-pleading rules, the complaint properly set forth a claim of hazing; (2) the exception to immunity set forth in R.C. 2744.02(B)(5) applied; and (3) immunity could not be reinstated under R.C. 2744.03(A)(3), (5), or (6). Thus, Kilgore and the school board were not immune from liability. With regard to the negligent supervision claim, the trial court simply found that the defenses set forth in R.C. 2744.03(A)(3), (5), or (6) did not apply, and thus, Kilgore and the school board were not immune from liability.

{¶5} The school board appeals the trial court's denial of its motion for judgment on the pleadings with regard to civil hazing and negligent supervision, raising two assignments of error.[2]

{¶6} A trial court's decision on a Civ.R. 12(C) motion for judgment on the pleadings is reviewed by an appellate court de novo. *Vinicky v. Pristas*, 163 Ohio App.3d 508, 2005-Ohio-5196, ¶3. Pursuant to Civ.R. 12(C), a judgment on the pleadings is appropriate if the court finds, beyond doubt, that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. In ruling on the Civ.R. 12(C) motion, the court construes as true all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party. *Corporex Dev. & Constr. Mgt., Inc. v. Shook,* 106 Ohio St.3d 412, 2005-Ohio-5409, ¶2. Civ.R. 12(C) motions are specifically for resolving questions of law. *Whaley v. Franklin*

2. The trial court's decision granting in part and denying in part the school board's motion for judgment on the pleadings is a final appealable order. See *Sullivan v. Anderson Twp.*, Slip Opinion No. 2009-Ohio-1971 (an order that denies the benefit of an alleged immunity to a political subdivision is a final, appealable order under R.C. 2744.02(C) in a multi claim, multi party lawsuit, even when it lacks the Civ.R. 54(B) certification

Cty. Bd. of Commrs., 92 Ohio St.3d 574, 581, 2001-Ohio-1287. "The determination of a motion for judgment on the pleadings is limited solely to the allegations in the pleadings and any writings attached to the pleadings." *Vinicky* at ¶3, citing *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION FOR JUDGMENT ON THE PLEADINGS ON PLAINTIFF-APPELLEE'S [SIC] NEGLIGENT SUPERVISION CLAIM."

{¶9} With regard to the negligent supervision claim, the trial court denied the Civ. R. 12(C) motion on the ground that the school board was not immune from liability under R.C. Chapter 2744. In so holding, the trial court did not address whether an exception to the statutory grant of immunity existed under R.C. 2744.02(B), and instead focused solely on whether any of the defenses under R.C. 2744.03(A) applied. On appeal, the school board argues that given the fact that the Goldens never established an exception to immunity under R.C. 2744.02(B), and in light of the trial court's failure to address the exceptions to immunity under R.C. 2744.02(B), the trial court erred in denying the motion on the ground that the defenses set forth in R.C. 2744.03(A)(3), (5), or (6) did not apply. We agree.

{¶10} The Ohio Supreme Court has set forth a three-tiered analysis for determining whether a political subdivision is immune from liability. *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421. Under the first tier, a political subdivision is granted broad immunity for any injury arising out of its actions. R.C. 2744.02(A)(1). The immunity afforded to the political subdivision, however, is not absolute but instead is

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that "there is no just reason for delay.")

subject to five exceptions under R.C. 2744.02(B). Thus, the second tier of the analysis focuses on the exceptions to immunity set forth in R.C. 2744.02(B). Finally, in the third tier of the analysis, if an exception exists, immunity can be reinstated if the political subdivision can successfully argue that one of the defenses set forth in R.C. 2744.03(A) applies. *Cater*.

{¶11} It is undisputed that the school board is a political subdivision serving a governmental function.[3] See R.C. 2744.01(C)(2)(c); R.C. 2744.01(F). Therefore, the school board is immune from liability under R.C. 2744.02(A)(1) unless one of the five exceptions under R.C. 2744.02(B) applies. In their memorandum in opposition to the school board's motion, the Goldens never addressed whether and/or which R.C. 2744.02(B) exception to immunity applied with regard to the negligent supervision claim. In fact, their memorandum never addressed the negligent supervision claim. In turn, the trial court did not address whether and/or which R.C. 2744.02(B) exception to immunity applied, and instead focused solely on whether any of the defenses under R.C. 2744.03(A) applied. The court then determined that the defenses in R.C. 2744.03(A)(3), (5), and (6) did not apply; thus, immunity could not be reinstated.

{¶12} It is well-settled in Ohio that "R.C. 2744.03 merely provides defenses to liability in the event that an exception to immunity under R.C. 2744.02(B) applies. *** The defenses *** found in R.C. 2744.03 *** do not come into play until after it is proven that a specific exception to general immunity applies under R.C. 2744.02(B). *** [An

3. We note that while addressing sovereign immunity in general in its Civ.R. 12(C) motion, the school board asserted that "Applicable in this case is the [R.C. 2744.02(B)(2) exception] providing that 'political subdivisions are liable for injury, death, or loss to personal property caused by the negligent performance of acts by their employees with respect to proprietary functions.'" On appeal, however, the school board asserts that "The law is clear that a school board is a political subdivision *** serving a governmental function," and that none of the exceptions under R.C. 2744.02(B) apply with regard to the negligent supervision claim.

individual suing a political subdivision] must first establish an exception to immunity under R.C. 2744.02(B)." *Ziegler v. Mahoning Cty. Sheriff's Dept.* (2000), 137 Ohio App.3d 831, 836. If one of the exceptions to immunity under R.C. 2744.02(B) is applicable, the court must then look to R.C. 2744.03(A), which provides to the political subdivision and its employees certain defenses to liability. *Day v. Middletown-Monroe City School Dist.* (July 17, 2000), Butler App. No. CA99-11-186, at 5-6. In other words, "R.C. 2744.03 is the third tier. Before it is ever reached, R.C. 2744.02(A) and (B), in that order, must be gone through." *Davis v. Malvern*, Carroll App. No. 05 CA 829, 2006-Ohio-7061, ¶30.

{¶13} The Goldens failed to establish the applicability of any exception to immunity under R.C. 2744.02(B). Therefore, the defenses set forth in R.C. 2744.03(A) never came into play and could not be used to establish liability. As a result, and in light of the trial court's failure to determine which R.C. 2744.02(B) exception to immunity applied to the negligent supervision claim, the trial court erred in addressing the applicability of any defenses set forth in R.C. 2744.03(A), and in finding that the school board was not immune because the defenses in R.C. 2744.03(A)(3), (5) and (6) did not apply.

{¶14} At this juncture, an assertion in the Goldens' appellate brief warrants comment. In their brief, the Goldens repeatedly assert that allegations of recklessness with regard to Kilgore and the school board satisfy two of the "exceptions to immunity set forth in R.C. 2744.03(A)." This is incorrect. Again, "R.C. 2744.03(A)(5) *** is not an exception to immunity; it is a *defense* to liability. Only a municipality may assert the defenses *** provided in R.C. 2744.03, *in response to a claim of liability based on the*

statutory exceptions to immunity enumerated in R.C. 2744.02(B)." *Hill v. Urbana*, 79 Ohio St.3d 130, 138-139, 1997-Ohio-400. (Emphasis sic; Moyer, J., dissenting.) Likewise, any of the other defenses set forth in R.C. 2744.03(A) are not exceptions to immunity but are *defenses to liability*.

{¶15} In light of the foregoing, the school board's first assignment of error is well-taken and sustained.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S MOTION FOR JUDGMENT ON THE PLEADINGS ON PLAINTIFF-APPELLEE'S [SIC] CIVIL HAZING LIABILITY CLAIM."

{¶18} The school board challenges the denial of its Civ.R. 12(C) motion with regard to the civil hazing claim on the ground that the Goldens failed to properly state a claim of hazing in their complaint. The school board also challenges the denial of its motion on the ground it is immune from liability under R.C. Chapter 2744.

{¶19} R.C. 2307.44 provides for civil liability for hazing and states in part:

{¶20} "Any person who is subjected to hazing, as defined in [R.C. 2903.31(A)] may commence a civil action for injury or damages, including mental and physical pain and suffering, that results from the hazing. The action may be brought against any participants in the hazing, any organization whose local or national directors, trustees, or officers authorized, requested, commanded, or tolerated the hazing, and any local or national director, trustee, or officer of the organization who authorized, requested, commanded, or tolerated the hazing. If the hazing involves students in a primary, secondary, or post-secondary school, university, college, or any other educational

institution, an action may also be brought against any administrator, employee, or faculty member of the school, university, college, or other educational institution who knew or reasonably should have known of the hazing and who did not make reasonable attempts to prevent it and against the school, university, college, or other educational institution. If an administrator, employee, or faculty member is found liable in a civil action for hazing, then notwithstanding [R.C.] Chapter 2743, the school, university, college, or other educational institution that employed the administrator, employee, or faculty member may also be held liable."

{¶21} R.C. 2903.31(A) defines the criminal act of hazing as "doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person."

{¶22} The school board first argues that the Goldens failed to properly state a claim of hazing. Specifically, the school board argues that the Goldens have not properly pled an act of hazing because their complaint failed to claim that the alleged assault was done as a means of "initiating" R. into the basketball team. The school board cites *Duitch v. Canton City Schools*, 157 Ohio App.3d 80, 2004-Ohio-2173, in support of its argument.

{¶23} Because Ohio is a notice-pleading state, a plaintiff is not required to plead operative facts with particularity. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶29. Under Civ.R. 8(A), a complaint need only contain a short and plain statement of the claim showing that the party is entitled to relief. Id. Thus, a plaintiff is not required to prove his or her case at the pleading stage, *York v. Ohio State*

Hwy. Patrol (1991), 60 Ohio St.3d 143, 145, and need only give reasonable notice of the claim. *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 2008-Ohio-7042, ¶5. The simplified notice-pleading standard relies on liberal discovery rules and summary-judgment motions to define disputed facts and to dispose of nonmeritorious claims. Id. Because it is easy for the pleader to satisfy the requirements of Civ.R. 8(A), few complaints are subject to dismissal. Id. This is true even where the court doubts that the nonmoving party will prevail at trial. *Day*, Butler App. No. CA99-11-186 at 5.

{¶24} In *Duitch*, a high school freshman who was also a band member was severally beaten on "Freshman Friday" after he was lured into a restroom by two upperclass students under the pretext there was a band meeting. The common pleas court found that the attack was merely due to the student's status as a freshman and that there was no evidence of initiation. On appeal, the Fifth Appellate District upheld the lower court's decision, stating: "this behavior is not governed by R.C. 2903.31 and R.C. 2307.44. We find that the actions of the students did not constitute initiation into any student or other organization." *Duitch*, 2004-Ohio-2173 at ¶30.

{¶25} *Duitch*, however, involved a summary judgment, not a motion for judgment on the pleadings. In *Duitch*, the court examined whether genuine issues of fact existed that would preclude summary judgment. By contrast, we are merely considering whether the complaint gives sufficient notice to the school board of the Goldens' civil hazing claim and whether the allegations set forth circumstances for which the Goldens would be entitled to relief. *Vinicky*, 2005-Ohio-5196 at ¶10. We therefore find *Duitch* to be inapplicable.

{¶26} In *Vinicky*, the plaintiff brought a claim of civil hazing against his school

district board of education. The board moved for judgment on the pleadings on the grounds it was immune from liability under R.C. Chapter 2744 and that the complaint failed to claim the assault was done as a means of initiating the plaintiff into a student or other organization. The Eighth Appellate District noted that the complaint alleged a sexual attack on school grounds during a school event that was inadequately monitored, and that the attack was a hazing activity, a direct violation of R.C. 2903.31. Id. at ¶11-12. Emphasizing that the "failure to set forth each element of a cause of action with 'crystalline specificity' does not subject a complaint to dismissal," the appellate court found that "the complaint reasonably sets forth a claim of hazing, which would sufficiently put the [board] on notice that such a claim [was] being pursued." Id. As a result, the appellate court found that the complaint was sufficient to survive the board's Civ.R. 12(C) motion under Ohio's notice-pleading rules. Id. at ¶12. See, also, *Wencho v. Lakewood School Dist.*, 177 Ohio App.3d 469, 2008-Ohio-3527 (construing the allegations in the complaint in favor of the plaintiff under Civ.R. 12(C), and although the complaint only alleged that the plaintiff sustained bullying during his school year as a sixth grade student which culminated in an attack in March, the Eighth Appellate District would not say at this early juncture of the case that the plaintiff could prove no set of facts in support of his civil hazing claim that would entitle him to relief.)

{¶27} In the case at bar, the trial court noted there was "nothing in the complaint which specifically explains how the assault on 'R' constituted an initiation into the ninth-grade boys' basketball team." Nonetheless, the court found that the complaint reasonably set forth a claim of civil hazing. We agree.

{¶28} All we need to decide is whether the complaint gives the school board fair

notice of the civil hazing claim and the opportunity to respond to it. *Ogle*, 2008-Ohio-7042 at ¶9. We find it does. The complaint repeatedly refers to the assault on R. as hazing; alleges the assault occurred on school grounds during a school activity that was inadequately monitored; ties the assault to a student organization, namely the ninth-grade boys basketball team; and alleges that the hazing and bullying which gave rise to their claim of civil hazing was directly related to and predicated on R. and his fellow teammates being members of the ninth-grade boys basketball team. The Goldens will have to establish all the elements of their civil hazing claim to prevail on the merits. However, at this juncture of the proceedings, we find that their complaint sufficiently pled a claim of civil hazing under Ohio's notice-pleading rules.

{¶29} The school board next argues that the trial court erred by denying its Civ.R. 12(C) motion because the school board is immune from liability under R.C. Chapter 2744. The trial court found, and the school board agrees, that the exception to immunity set forth in R.C. 2744.02(B)(5) applies.[4] The school board, however, challenges the trial court's finding that immunity is not reinstated under R.C. 2744.03(A)(3) or (5).[5]

{¶30} R.C. 2744.03(A) provides in relevant part that:

{¶31} "(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the

4. R.C. 2744.02(B)(5) provides in part that "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[.]" R.C. 2307.44, the civil hazing statute, specifically imposes civil liability on a political subdivision.

5. The trial court also found that immunity was not reinstated under R.C. 2744.03(A)(6)(b). That statutory provision provides that "the employee is immune from liability unless *** [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." This statutory provision would apply to Kilgore, who has not filed an appeal. We therefore do not address R.C. 2744.03(A)(6)(b).

discretion of the employee with respect to policy-making, planning, or enforcement of powers by virtue of the duties and responsibilities of the office or position of the employee.

{¶32} "***

{¶33} "(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶34} "Pursuant to the R.C. 2744.03(A)(3) defense, a court must determine whether there are any policy-making, planning, or enforcement powers involved, and then look to see whether the political subdivision's employee had discretion with respect to those powers by virtue of that employee's office or position. Although both R.C. 2744.03(A)(5) and 2744.03(A)(3) concern an employee's discretionary acts, the focus of subsection (A)(3) is that the employee be engaged in policy-making, planning, or enforcement." *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, ¶27.

{¶35} We note that the trial court did not determine whether there were any policy-making, planning, or enforcement powers involved, and whether Kilgore had discretion with respect to those powers by virtue of his office or position. The school board did not allege that Kilgore's position as the coach of the ninth-grade boys basketball team involved policy-making, planning, or enforcement powers. R.C. 2744.03(A)(3), therefore, does not apply to Kilgore's actions and does not provide the

school board with a defense. Id.

{¶36} While discussing the applicability of R.C. 2744.03(A), the trial court first noted that teachers and coaches have generally wide discretion to determine the necessary level of supervision for children under their care, citing *Marcum v. Talawanda City Schools* (1996), 108 Ohio App.3d 412, and *Elston*, 2007-Ohio-2070. The trial court noted, however, that the complaint did not simply allege a failure to supervise the students by Kilgore but also alleged that Kilgore contributed to and encouraged a pattern of hazing and bullying activities which eventually led to the assault on R. The trial court found that "[e]ncouragement of and contribution to hazing among the members of a student organization is not within the discretion of any school employee or official." We agree.

{¶37} The trial court further found that while the complaint made no mention, within the civil hazing claim, of recklessness, bad faith, or malicious purpose, the complaint did in fact allege recklessness and malicious conduct with regard to all of the defendants' actions in this case, and that these allegations were incorporated into the civil hazing claim (the first paragraph of the civil hazing claim incorporates by reference the allegations of all of the preceding paragraphs into the civil hazing claim). We agree.

{¶38} The school board nonetheless argues that "the fact that the Complaint contains an allegation that an alleged extensive history of hazing and bullying taking place among members of the ninth grade basketball team *** is the grounds for the allegation of recklessness on the part of [the school board] in not monitoring or supervising the ninth grade basketball team by itself, does not meet the actual definition of recklessness" from the Ohio Supreme Court.

{¶39} In *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, the Ohio Supreme Court addressed whether a public children services agency and one of its employees were entitled to immunity under R.C. Chapter 2744 in their handling of the case of a child who died from abuse. The supreme court addressed, inter alia, whether the agency and the employee could be held liable for reckless conduct. Finding that none of the exceptions to immunity applied to the agency, the supreme court held that the agency was immune from liability. In addressing whether the employee was liable under R.C. 2744.03(A)(6)(b), the supreme court held that:

{¶40} "Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. In fact, 'the actor must be conscious that his conduct will in all probability result in injury.'" Id. at ¶73-74. (Internal citations omitted.) The supreme court further stated that "[a]lthough the determination of recklessness is typically within the province of the jury, the standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity." Id. at ¶74.

{¶41} *O'Toole* involved a summary judgment, not a Civ.R. 12(C) motion for judgment on the pleadings. Further, under Ohio's notice-pleading rules, a plaintiff is not required to prove his case at the pleading stage. *York*, 60 Ohio St.3d at 145. Construing as true all the material factual allegations in the complaint in favor of the Goldens, we find that at this juncture of the proceedings, it cannot be determined beyond doubt that the Goldens can prove no set of facts in support of their civil hazing

claim that would entitle them to relief. See *Wencho*, 2008-Ohio-3527. The trial court, therefore, properly denied the school board's motion for judgment on the pleadings with regard to the civil hazing claim on the ground the defenses set forth in R.C. 2744.03(A)(3) and (5) were not applicable at this time.

{¶42} The school board's second assignment of error is overruled.

{¶43} Judgment affirmed in part, reversed in part, and remanded the trial court for further proceedings according to law and consistent with this Opinion.

BRESSLER, P.J., and POWELL, J., concur.