[Cite as *Spencer v. Lakeview School Dist.*, 2004-Ohio-5303.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JEFFREY SPENCER, ADMINISTRATOR OF THE ESTATE OF MATTHEW SPENCER, et al.	:	**O P I N I O N**
	:	**CASE NO. 2002-T-0175**
Plaintiffs-Appellants,	:	
- vs -	:	
LAKEVIEW SCHOOL DISTRICT, et al.,	:	
Defendants-Appellees.		9/30/04

Civil Appeal from the Court of Common Pleas, Case No. 00 CV 150.

Judgment: Affirmed in part; reversed in part and remanded.

Rodger A. Pelagalli, 6659 Pearl Road, #401, Parma Heights, OH 44130 (For Plaintiffs-Appellants).

Daniel D. Mason, 5455 Detroit Road, Sheffield Village, OH 44054 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Jeffrey Spencer, administrator of the estate of Matthew Spencer; Jeffrey Spencer; and Helen Spencer, appeal from the judgment of the Trumbull County Common Pleas Court, which granted summary judgment in favor of appellees, Lakeview School District, Charlotte Tomsich, and Jeffrey Terlecky. We affirm in part, and reverse in part.

{¶2} Matthew Spencer ("Matthew") was fourteen years old on January 27, 1997. While in gym class that day, he suffered an asthma attack. Matthew asked his gym teacher, Jeffrey Terlecky ("Terlecky"), if he could go to the locker room and use his inhaler. Terlecky allowed Matthew to go to the locker room. No one accompanied Matthew and the gym class proceeded; five to ten minutes later another teacher walked through the boys' locker room and found Matthew on the locker room floor unconscious and not breathing, with his inhaler in hand. CPR was started but Matthew did not respond. Emergency medical technicians arrived and attempted to resuscitate Matthew; these attempts failed and Matthew was later pronounced dead.

{¶3} Appellants filed suit against appellees alleging survivorship, and wrongful death claims. Appellants' amended their complaint and sought a declaration that R.C. 2744 et seq. was unconstitutional. Appellants moved for summary judgment on their claim for declaratory judgment and appellees moved for summary judgment on all of appellants' claims. The trial court denied appellants' motion, granted appellees' motion, and entered judgment. Appellants timely appeal asserting three assignments of error:

{¶4} "[1.] The trial court erred in denying summary judgment to appellants as R.C. §2744 immunities are unconstitutional.

{¶5} "[2.] The trial court erred in denying summary judgment to appell[ants] as R.C. §2744.02(B)(4) allows for negligence actions against political subdivisions for acts or omissions upon public grounds utilized for governmental functions.

{¶6} "[3.] The trial court erred by granting summary judgment to appellees where evidence showed recklessness, an exception to the immunities under R.C. §2744."

{¶7} We review a grant of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Thus, we review the trial court's grant of summary judgment independently and without deference to its determination. *Lexford Prop. Mgmt., L.L.C. v. Lexford Prop. Mgmt., Inc.,* 1470 Ohio App.3d 312, 2001-Ohio-4363, ¶10.

{¶8} Summary judgment is proper when: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion is made, that conclusion is adverse to that party. *Harless v. Willis Day Warehousing, Inc.* (1978), 54 Ohio St.2d 64, 66.

{¶9} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis of the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

{¶10} If the moving party has satisfied this initial burden, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing there is a genuine issue for trial. Id. at 293.

{¶11} In their first assignment of error, appellants argue that R.C. 2744 et seq., which grants immunity to political subdivisions and their employees under certain circumstances, violates Sections 5 and 16, Article I of the Ohio Constitution. The Ohio Supreme Court has rejected this argument with respect to Section 16, Article I of the

Ohio Constitution. See, generally, *Fahnbulleh v. Strahan* (1995), 73 Ohio St.3d 666. With respect to Section 5, Article I of the Ohio Constitution, we agree with the Ninth District Court of Appeals, which stated:

{¶12} "Although we recognize that in *Butler v. Jordan* (2001), 92 Ohio St.3d 354, a plurality of the Supreme Court expressed the belief that R.C. 2744 et seq. may be unconstitutional, a majority of the court did not concur in that opinion. In fact, some of the justices expressed opposing views in a spirited dissent. Furthermore, no appellate court in this state has followed the *Butler* plurality's opinion and found R.C. 2744 et seq. unconstitutional. Thus, until the plurality's views command a majority on the Ohio Supreme Court, we will not strike down the legislation as unconstitutional." (Internal quotations and citations omitted.) *Shadoan v. Summit County Children Services Bd.*, 9th Dist. No. 21486, 2003-Ohio-5775, at ¶7. Appellants' first assignment of error is without merit.

{¶13} In their second assignment of error, appellants assert that former R.C. 2744.02(B)(4) permitted actions against political subdivisions for injury, death, or loss to person or property caused by the negligence of political subdivision employees, on the grounds of buildings used in connection with the performance of a governmental function.

{¶14} Former R.C. 2744.02(B)(4) provided:

{¶15} "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 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."

{¶16} In *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d. 451, 2002-Ohio-6710, the Ohio Supreme Court held:

{¶17} "The exception to political-subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function. The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings." Id. at syllabus.

{¶18} Thus, appellants are correct in their assertion; however, under former R.C. 2744.02(B)(4) we must still determine if there exists a genuine issue of material fact as to the negligence of Terlecky or Tomsich or if any of the defenses established by R.C. 2744.03 preclude liability.

{¶19} "To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom." *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318. "The existence of a duty in a negligence action is a question of law for the court to determine." Id.

{¶20} School officials are under no duty to watch over each child at all times. *Nottingham v. Akron Bd. of Edn.* (1992), 81 Ohio App.3d 319, 322, citing *Allison v. Field Local School Dist*. (1988), 51 Ohio App.3d 13, 14; *Miller v. Howard* (July 18, 1990), Lorain App. No. 89CA004730, 1990 WL 102448, at 2. "Unless a more specific

obligation is assumed, such personnel are bound only under the common law to exercise that care necessary to avoid reasonably foreseeable injuries." Id., citing *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98; *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217. Here, the evidence viewed in the light most favorable to appellants establishes Terlecky was aware of the dangers of an asthma attack, and thus had a duty to exercise that care necessary to avoid reasonably foreseeable injury.

{¶21} Further, Tomsich testified school policy was that students were to keep prescription medications in the nurse's office and an ill student was not to be left alone. Tomsich then testified she made the decision students could keep their inhalers with them. Thus, appellees at least had a duty to exercise that care necessary to avoid reasonably foreseeable injuries.

{¶22} Appellants then presented evidence that creates an issue of material fact as to whether appellees breached their duty to Matthew. Appellants presented evidence that Matthew was ill and was left unattended; that he had his inhaler with him; and that Terlecky was aware of the dangers of an asthma attack.

{¶23} Appellants also presented evidence that creates an issue of material fact as to whether these breaches of duty caused Matthew's death. Appellants presented the affidavit and report of an expert, Dr. Robert C. Cohn, who opined that, had Matthew not been left unattended, he would have survived his asthma attack. This evidence supports the proximate case and injury elements of the negligence claims.

{¶24} Thus, appellants have presented evidence sufficient to create a genuine issue of material fact as to whether employees of the school board were negligent.

{¶25} We must next determine whether the school board is entitled to assert any of the defenses provided by R.C. 2744.03. Specifically, the school board directs us to R.C. 2744.03(A)(3) and (5). These sections provide:

{¶26} "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶27} "(1) ***

{¶28} "(2) ***

{¶29} "(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 discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

{¶30} "(4) ***

{¶31} "(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."

{¶32} R.C. 2744.03(A)(5) provides immunity for the school board as to its level of medical staff and training. Appellants have not presented evidence to establish

appellees exercised their discretion in this respect with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶33} Appellees also argue they are entitled to immunity under R.C. 2744.03(A)(3). We disagree.

{¶34} Appellants presented evidence that the student handbook required parents to bring prescription medication to the office. The handbook then provides, "Students are not to bring the medicine to school themselves." Appellees assert that "[t]his handbook language does not say or even suggest that a student cannot carry and use a personal inhaler." We disagree. Obviously if a student brings an inhaler to school, he is violating the policy. If this policy prohibits a student from bringing an inhaler to school, then there is a genuine issue of material fact as to whether Tomsich or Terlecky violated this policy by allowing Matthew to self-medicate. Further, this policy takes any discretion away from Tomsich and Terlecky and R.C. 2744.03(A)(5) would not apply. Thus, there is a genuine issue of material fact on this issue that precludes summary judgment.

{¶35} In sum, appellants' second assignment of error has merit. R.C. 2744.02(B)(4) provides an exception to immunity for negligence occurring on school grounds. Further, there is a genuine issue of material fact as to whether Tomsich or Terlecky were negligent. While the school board is entitled to immunity under R.C. 2744.03(A)(5) for its discretionary decisions such as the level of medical staffing and training of staff, there is a genuine issue of material fact as to whether appellees are entitled to immunity under R.C. 2744.03(A)(3).

{¶36} In their third assignment of error, appellants argue the trial court erred in granting summary judgment on their claim appellees' acts or omissions were made in a wanton or reckless manner.

{¶37} R.C. 2744.03(A)(6) provides:

{¶38} "In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

{¶39} "(a) ***

{¶40} "(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]"

{¶41} In *Marchetti v. Kalish*, the Ohio Supreme Court cited with approval the following analysis from 2 Restatement of the Law 2d, Torts (1965) 587, Section 500, Comment (g):

{¶42} "Negligence and recklessness contrasted. Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm

to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind." (1990), 53 OhioSt.3d 95, at fn.3.

{¶43} "Wanton" conduct means the failure to exercise any care whatsoever toward those to whom a duty is owed. *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, at syllabus.

{¶44} Appellants have failed to present evidence sufficient to create an issue of material fact as to whether Terlecky or Tomsich were reckless. While Terlecky testified he was aware asthma causes difficulty with breathing and he assumed when Matthew asked to use his inhaler, it was because of asthma, Terlecky also testified Matthew's request seemed routine and Matthew did not appear short of breath or in distress. Terlecky testified Matthew's request seemed no different from the many other similar requests he had received during his career. There is no evidence in the record to establish Terlecky made a conscious choice of a course of action, with knowledge of the serious danger either to Matthew or with knowledge of facts that would disclose this danger to any reasonable man. Even viewed in the light most favorable to appellants, the evidence is insufficient to establish a genuine issue of material fact as to whether Terlecky acted in a reckless or wanton manner.

{¶45} With respect to Tomsich, appellants presented evidence that she took it upon herself to allow high school students to carry their inhalers rather than keep them

in the office. Tomsich testified this was the school's unwritten policy. Tomsich testified this was done so students could use their inhalers as needed. While perhaps demonstrating negligence, this evidence does not create a genuine issue of material fact as to whether Tomsich acted in a reckless or wanton manner. Appellants failed to present sufficient evidence to create a genuine issue of material fact as to whether the decision to allow asthmatic high school students to self-medicate was reckless or wanton.

{¶46} Nor have appellants presented sufficient evidence to establish a genuine issue of material fact as to whether Tomsich engaged in reckless or wanton conduct when Matthew was left unattended. Tomsich testified the unwritten policy of the school was that sick children should not be left unattended and that she informed teachers of this policy. Terlecky left Matthew unattended; Tomsich was not present when Matthew suffered his attack.

{¶47} Appellants' third assignment of error is without merit.

{¶48} Appellants' first and third assignments of error are without merit. Appellant's second assignment of error has merit. Therefore, the judgment of the Trumbull County Court of Common Pleas is affirmed in part, reversed in part, and this matter is remanded for proceedings consistent with this opinion.

DONALD R. FORD, P.J.,

JUDITH A. CHRISTLEY, J.,

concur.