[Cite as *Yeater v. LaBrae School Dist. Bd. of Edn.*, 2010-Ohio-3684.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

AMY YEATER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	
		CASE NO. 2009-T-0107
- vs -	:	
BOARD OF EDUCATION, LABRAE SCHOOL DISTRICT, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CV 2168.

Judgment: Affirmed.

Daniel G. Keating, Keating, Keating & Kuzman, 170 Monroe Street, N.W., Warren, OH 44483 (For Appellees- Amy & Gary L. Yeater).

William L. Hawley and *Matthew G. Vansuch*, Harrington, Hoppe & Mitchell, Ltd., 108 Main Avenue, S.W., #500 P.O. Box 1510, Warren, OH 44482 (For Appellee-Anthony Monty).

John D. Latchney, Tomino & Latchney, L.L.C., L.P.A., 803 East Washington Street, #200, Medina, OH 44256 (For Appellant-LaBrae School District, Board of Education).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Board of Education, LaBrae School District, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, in which the trial court denied its Motion for Summary Judgment. For the following reasons, we affirm the decision of the trial court.

{¶2} In May of 2004, Amy Yeater, an eighth grade student at LaBrae Middle School, was injured when a stanchion, a piece of equipment used to hold volleyball nets, fell on her foot in the school gymnasium, severing several of her toes. Defendant-appellee and fellow student, Anthony Monty, was moving the stanchion in preparation for a school dance when it fell on Yeater. Their teacher, Kelly Huscroft, was outside of the gymnasium when the incident occurred.

{¶3} Yeater subsequently filed suit against the LaBrae School District, Huscroft, and Monty, claiming that the negligent supervision of the School District employees and physical defects within the gymnasium caused her injury. There was also a claim for spoliation of evidence after the School District disposed of the volleyball stanchion. The School District and Huscroft moved for summary judgment, alleging they were entitled to immunity as to the claims for negligence and spoliation of evidence. Monty moved for summary judgment on the basis that the accident was not foreseeable as a matter of law.

{¶4} The trial court denied Monty's Motion for Summary Judgment, finding that there were issues of fact concerning the foreseeability of the accident. The court also denied the School District's Motion for Summary Judgment, finding that genuine issues of material fact remained. The court awarded summary judgment to all defendants on the issue of spoliation of evidence, and to Huscroft for negligence, finding the defendants were entitled to immunity for those claims.

{¶5} The School District timely appealed and raises the following assignment of error: "The trial court erred when it denied Appellant LaBrae School District Board of

Education's Motion for Summary Judgment, which was predicated upon R.C. Chapter 2744 immunity."

{¶6} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" 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 that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor."

{¶7} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336. An appellate court must independently review the record to determine if summary judgment was appropriate. Therefore, an appellate court affords no deference to the trial court's decision while making its own judgment. *Schwartz v. Bank One, Portsmouth, N.A*. (1992), 84 Ohio App.3d 806, 809; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412.

{¶8} The School District first argues that it is immune from liability under R.C. Chapter 2744. "R.C. Chapter 2744 provides nearly absolute immunity to political subdivisions in order to limit their exposure to money damages. Immunity provides a shield to the exercise of governmental or proprietary functions by a political subdivision, unless one of the exceptions specifically recognized by statute applies." *Sabulsky v. Trumbull Cty.*, 11th Dist. No. 2001-T-0084, 2002-Ohio-7275, at ¶11.

{¶9} In determining whether a political subdivision is immune from liability, courts conduct a three-tiered analysis. *Fields v. Talawanda Bd. of Edn*., 12th Dist. No. CA2008-02-035, 2009-Ohio-431, at ¶10, citing *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, at ¶10. The first tier provides a general grant of immunity to political subdivisions regarding acts or omissions of the political subdivision or its employees in connection with a governmental or proprietary function.

{¶10} The LaBrae School District is a political subdivision. See R.C. 2744.01(F) (a political subdivision is "a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state"). Moreover, "R.C. 2744.01(C)(2)(c) states that the provision of a system of public education is a governmental function. *** Further, R.C. 2744.01(C)(2)(u)(i) defines governmental function to include '[t]he design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including *** [a] park, playground, or playfield[.]'" *Mason v. Bristol Local School Dist. Bd. of Edn*., 11th Dist. No. 2005-T-0067, 2006-Ohio-5174, at ¶26 (citations omitted).

{¶11} The second tier involves exceptions to immunity located in R.C. 2744.02(B). R.C. 2744.02(A) provides in pertinent part: "Except as provided in division (B) of this section, 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 or an employee of the political subdivision in connection with a governmental or proprietary function."

{¶12} The exceptions to immunity are invoked in cases involving the negligent operation of a motor vehicle by an employee; negligent acts of an employee with respect to proprietary functions; negligent failure to keep public roads in repair; negligence of an employee relating to a physical defect in a governmental building; and/or liability imposed by another section of the Revised Code. See R.C. 2744.02(B).

{¶13} 2744.02(B)(4) states that 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 ***."

{¶14} To trigger the immunity exception, Yeater had to demonstrate that her injury was caused by the negligence of a School District Employee *and* that the injury was due to a physical defect. See *Dunfee v. Oberlin School Dist.*, 9th Dist. No. 08CA009497, 2009-Ohio-3406, at ¶13 ("to trigger the immunity exception set forth in R.C. 2744.02(B)(4), Dunfee was required to demonstrate both that (1) Nathan's injury was caused by the negligence of an Oberlin employee and (2) that the injury was due to a []physical defect within or on the grounds of the school.").

{¶15} The School District claims that there is no genuine issue of fact regarding the negligence of its employees. Further, "to the extent that the trial court's decision denying the School District's Motion for Summary Judgment was predicated upon Appellee's 'negligent supervision' argument, the trial court erred." Moreover, the School District claims that "the physical defects exception is inapplicable because Plaintiff-Appellee was unable to establish negligence in maintenance."

{¶16} Appellees assert that there is a question of fact as to whether the School District was negligent in failing to maintain its equipment in a reasonably safe condition. They claim that "the Board knew that the stanchions were dangerous: they did not allow the students to move them"; the employees could not testify as to when the last [time] the stanchions were used, let alone 'inspected' before the accident"; and "[t]he defects in the bolts could easily have been discovered".

{¶17} In the context of summary judgment, a party raising an immunity defense must present evidence tending to prove the underlying facts upon which the defense is based. *Evans v. S. Ohio Med. Ctr.* (1995), 103 Ohio App.3d 250, 255.

{¶18} "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.

{¶19} 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. "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.

{¶20} Yeater contends that Huscroft was negligent in "abandoning her duties to monitor the *** students in the gym, thereby allowing *** the stanchions to be moved in her absence," and the employees of the school were also negligent in "failing to inspect

and maintain the volleyball stanchions themselves, and in failing to secure the dangerous apparatus that is the volleyball stanchion."

{¶21} The School District contends that the third tier of the immunity analysis is applicable. The School District argues that the discretionary immunity contained in R.C. 2744.03(A)(5), which states: "[t]he 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", restores immunity. They claim Huscroft had discretion to determine what level of supervision was necessary to ensure the safety of the students in her care. Further, her conduct did not rise to the level of recklessness.

{¶22} "Since the immunity statutes generally provide that '"you're not liable," then say "you are liable" and finally say "you're not,"' it is clear that the exceptions to liability in R.C. 2744.03 must be read more narrowly than the exceptions to nonliability in R.C. 2744.02(B) in order for the legislative structure to make any sense. *** In other words, the defenses and immunities of R.C. 2744.03 cannot be read to swallow up the liability provisions of R.C. 2744.02(B) so as to render them nugatory." *Spaid v. Bucyrus City Schools* (2001), 144 Ohio App.3d 360, 365 (citations omitted).

{¶23} We agree that "[p]ursuant to R.C. 2744.03(A)(5), a political subdivision is immune from liability if the injury complained of resulted from an individual employee's exercise of judgment or discretion in determining how to use equipment or facilities ***." *Elston,* 2007-Ohio-2070, at the syllabus.

{¶24} However, the deference granted to schools and their employees does not abrogate the Board's duty to its students to maintain school premises and equipment in a reasonably safe condition. *Goldstein v. Moisse* (1989), 61 Ohio App.3d 122, 126 (the school district had an affirmative duty to inspect for dangerous conditions for known or reasonably foreseeable dangers).

{¶25} "Sovereign immunity *** protects only those charged with weighing alternatives and making choices with respect to public policy and planning characterized by a high degree of discretion and judgment. It does not protect a board of education from the negligent conduct of its employees in the details of carrying out the activity even though there is discretion in making choices. This is not the type of discretion for which there is immunity as it does not involve public policy endangering the creative exercise of political judgment." *Du Bose v. Akron Pub. Schools*, 9th Dist. No. 18707, 1998 Ohio App. LEXIS 1805, at *10.

{¶26} "[A] school district must inspect for dangerous conditions and take precautions for known or reasonably foreseeable dangers associated with the use of school property." Id. (citation omitted). "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Menifee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77 (citation omitted). The foreseeability of harm generally depends on a defendant's knowledge. *Thompson v. Ohio Fuel Gas Co*. (1967), 9 Ohio St.2d 116, 119-120.

{¶27} In *Hallett v. Stow Bd. of Edn*. (1993), 89 Ohio App.3d 309, the court held that "[t]here was evidence before the trial court from which it could be concluded that

[the plaintiff] was injured because an employee or employees of defendants' maintenance department did not properly carry out the duties that had been assigned to them." Id. at 313. The appellate court found that "[n]either R.C. 2744.03(A)(3), with its emphasis on 'discretion,' nor R.C. 2744.03(A)(5), with its emphasis on 'judgment or discretion,' relieves a political subdivision of the type of negligence alleged in this case." Id.

{¶28} There is evidence from which it could be concluded that there was a defect in the stanchion and that the accident was foreseeable due to the physical defect, i.e. loose bolts. R.C. 2744.03(A)(5) does not restore immunity for failure to inspect for dangerous conditions and take precautions.

{¶29} Furthermore, in *Du Bose,* 1998 Ohio App. LEXIS 1805, a student suffered severe rope burns on her hands when she and other students engaged in a game of tug-of-war on the playground. At the time, the teachers were on the playground but were conversing rather than watching the students and the school had a rule against playing tug-of-war on the playground. The *Du Bose* court found that the "negligent supervision of children on a playground -- does not involve the type of decision making with respect to public policy and planning that is characterized by a high degree of discretion and judgment. Therefore, the defendants are not immune pursuant to R.C. 2744.03(A)(3) or (5)." Id. at *12.

{¶30} Testimony presented revealed that the students were not allowed to move the stanchions. When a teacher was asked why students were not allowed to move them, he stated that "we thought it was probably unsafe for them to do that." The stanchions were kept outside of the gymnasium; however, the area was accessible to

the students. The gym teachers were to inspect the bolts to make sure they were functioning properly, holding the heavy base of the stanchion in place. One of the teachers testified that he had previously tightened a loose bolt on a stanchion. Testimony also indicated that if there was a problem with the bolts, the pole would be noticeably loose. The gym teacher further testified that he did not know the age of the stanchion. Moreover, testimony revealed that if the gym class was not using the stanchion, then the teachers had no reason to inspect them. The teachers had not used the stanchions for at least a month prior to Yeater's accident. Consequently, one could conclude that they had not inspected the stanchions for at least one month prior to the accident.

{¶31} Accordingly, there is a genuine issue of fact whether Yeater's injury occurred due to the negligence of a School District Employee and that the injury was due to a physical defect. See R.C. 2744.02(B)(4). As a result, the denial of summary judgment was appropriate.

{¶32} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, denying the School District's Motion for Summary Judgment, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶33} I respectfully dissent.

{¶34} The majority affirms the judgment of the trial court, holding that the trial court properly denied the School District's motion for summary judgment. I disagree.

{¶35} The Supreme Court of Ohio stated in *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, syllabus:

{¶36} "Pursuant to R.C. 2744.03(A)(5), a political subdivision is immune from liability if the injury complained of resulted from an individual employee's exercise of judgment or discretion in determining how to use equipment or facilities unless that judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner, because a political subdivision can act only through its employees."

{¶37} The Supreme Court further indicated the following in *Elston* at ¶19-20:

{¶38} "We have held and it is well recognized that a political subdivision acts through its employees. In *Spires v. Lancaster* (1986), 28 Ohio St.3d 76, ***, we stated, '"It is undeniable that the state can only act through its employees and officers."' Id. at 79, ***, quoting *Drain v. Kosydar* (1978), 54 Ohio St.2d 49, 56, ***.

{¶39} "Furthermore, teachers and coaches, as employees of a political subdivision, have 'wide discretion under R.C. 2744.03(A)(5) to determine what level of supervision is necessary to ensure the safety of the children in' their care." (Parallel citations omitted.)

{¶40} In the instant matter, although appellees complain that the students were left unattended or not properly supervised, this writer believes the School District has

immunity under *Elston*. The supervision exercised by appellees' teacher, Kelly Huscroft, over the gym decorations and the storage and maintenance of the volleyball stanchions were exercises of judgment or discretion which fall within the defense of discretionary immunity. The record establishes that the School District had no actual or constructive notice of any problem with any volleyball stanchion. There is no evidence that appellee Yeater's injury was foreseeable. As such, the School District cannot be held liable for any alleged negligence in maintaining the volleyball stanchions.

{¶41} Based upon the discretionary immunity afforded by R.C. 2744.03(A)(3) and (5), this writer believes the School District was entitled to summary judgment.

{¶42} For the foregoing reasons, I respectfully dissent.