[Cite as *Dunfee v. Oberlin School Dist.*, 2009-Ohio-3406.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

NATHAN DUNFEE, et al. Appellees v. OBERLIN SCHOOL DISTRICT Appellant	C.A. No. 08CA009497 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 05CV143719

DECISION AND JOURNAL ENTRY

Dated: July 13, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Oberlin School District, appeals from the judgment of the Lorain County Court of Common Pleas. This Court reverses.

I.

{¶2} On October 5, 2005, Appellees, Nathan Dunfee and Kim Dunfee ("Dunfee"), filed a complaint against Appellant, Oberlin School District, alleging state negligent supervision claims as well as several federal claims. The complaint arose out of injuries the minor, Nathan Dunfee, sustained on or about October 7, 2003 while attending an Oberlin elementary school. On November 15, 2005, Oberlin removed the case to federal court. On March 10, 2006, Oberlin filed a motion for judgment on the pleadings in federal court. In its motion, Oberlin alleged that pursuant to R.C. 2744.02, it was statutorily immune from the state negligent supervision claims. On April 9, 2006, Dunfee filed a brief in opposition. On April 24, 2006, Oberlin filed a reply

thereto. Dunfee voluntarily dismissed the federal claims on August 7, 2007. On September 13, 2007, the remaining state claims were remanded to the Lorain County Court of Common Pleas.

{¶3} On January 22, 2008, Dunfee filed a motion for leave to file an amended complaint. Dunfee proposed to add Oberlin City School District Board of Education to the case caption. The trial court issued an order on November 3, 2008, denying Oberlin's motion for judgment on the pleadings and granting Dunfee's motion to amend the complaint. Oberlin timely appealed the trial court's decision, and raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN DENYING [OBERLIN] THE BENEFITS OF STATUTORY IMMUNITY UNDER R.C. CHAPTER 2744."

{¶4} In Oberlin's sole assignment of error, it contends that the trial court erred by denying it the benefit of statutory immunity. In effect, Oberlin challenges the trial court's denial of its motion for judgment on the pleadings. As we further explain herein, we find that the trial court erred in denying Oberlin's motion.

{¶5} At the outset, we address Dunfee's contention that there is no final appealable order in place. R.C. 2744.02(C) states: "An 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 order." The Supreme Court has recently held that "when a political subdivision or its employee seeks immunity, an order that denies the benefit of an alleged immunity is a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at ¶2. See also *Sullivan v. Anderson Twp.*, --- Ohio St.3d ---, 2009-Ohio-1971, at syllabus (holding that the statute governing political subdivision tort liability (R.C. 2744.02) permitted an appeal from an order

denying, in part, the township's motion for judgment on the pleadings based on immunity from liability even absent a final judgment certification).

{¶6} This Court set forth the following standard of review relative to a trial court's denial of a motion for judgment on the pleadings:

> "Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted, and the same standard of review is applied to both motions. The trial court's inquiry is restricted to the material allegations in the pleadings. Furthermore, the trial court must accept material allegations in the pleadings and all reasonable inferences as true. This court reviews such motions under the de novo standard of review. We will not reverse a trial court's denial of a Civ.R. 12(C) motion unless when all the factual allegations of the complaint are presumed true and all reasonable inferences are made in favor of the nonmoving party, it appears beyond doubt that the nonmoving party cannot prove any set of facts entitling him to the requested relief." (Internal citations omitted.) *Pinkerton v. Thompson* (2007), 174 Ohio App.3d 229, 2007-Ohio-6546, at ¶18,

{¶7} Oberlin is a school district operating under the laws of the state of Ohio. A school district is a political subdivision of the state of Ohio. R.C. 2744.01(F). According to R.C. 2744.02(A)(1), a political subdivision is not liable in damages in a civil action for loss to persons or property by any act or omission in connection with governmental and proprietary functions of the political subdivision or its employees. The determination of whether governmental immunity under R.C. 2744.02 applies is a question of law to be decided by the court. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292.

{¶8} In determining whether a political subdivision is immune from liability, this Court must engage in a three-tier analysis. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28. The first tier is the premise under R.C. 2744.02(A)(1) that:

> "[e]xcept 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."

{¶9} The second tier involves the five exceptions set forth in R.C. 2744.02(B), any of which may abrogate the general immunity delineated in R.C. 2744.02(A)(1). *Cater*, 83 Ohio St.3d at 28. Lastly, under the third tier, "immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies." Id. Accordingly, Oberlin is immune from liability under R.C. 2744.02(A)(1) unless the alleged acts or omissions fall within one of the five general immunity exceptions under R.C. 2744.02(B).

{¶10} R.C. 2744.02(B) states, in pertinent part:

> "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:
>
> "(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority.
>
> "***
>
> "(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.
>
> "(3) 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 caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.
>
> "(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.
>
> "(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."

{¶11} None of the five exceptions to immunity applies to the facts as alleged in the pleadings. Dunfee has not alleged facts that even marginally relate to these exceptions. Specifically, Dunfee has not alleged that Nathan's injuries resulted from the operation of a motor vehicle, the negligent performance of a proprietary function, the failure to adequately maintain a public road or a physical defect on the school property. See R.C. 2744.02(B)(1)-(4). Lastly, Dunfee has not alleged that "civil liability is expressly imposed upon [Oberlin] by a section of the Revised Code." R.C. 2744.02(B)(5).

{¶12} Dunfee does not dispute that Oberlin is a political subdivision entitled to the general grant of statutory immunity outlined in R.C. 2744.02(A)(1). Further, Dunfee does not assert that any of the five exceptions to immunity apply to these facts. Rather, Dunfee has ignored the first two tiers of the immunity analysis and proceeded to the third tier, arguing that Oberlin is not entitled to immunity because none of the defenses to immunity set forth in R.C. 2744.03 apply. However, the defenses set forth in R.C. 2744.03, through which immunity can be reinstated, are only relevant where a plaintiff has shown that a specific exception to immunity under R.C. 2744.02(B) applies. *Cater*, 83 Ohio St.3d at 28. As no exception to the general

immunity afforded to political subdivisions applies in this matter, we do not reach the third tier of the analysis. *Cater*, 83 Ohio St.3d at 28.

{¶13} The only case Dunfee cites in support of their immunity argument – *Addis v. Howell* (2000), 137 Ohio App.3d 54 – did not involve the same statutory immunity scheme at issue here. *Addis* dealt with the pre-2003 version of R.C. 2744.02(B). The incidents at issue in this case occurred after April 9, 2003. Accordingly, 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. Dunfee did not allege the existence of such a physical defect.

{¶14} Based on the foregoing, Dunfee can prove no set of facts in support of their claims entitling them to relief from Oberlin. Accordingly, Oberlin's assignment of error is sustained.

III.

{¶15} Oberlin's sole assignment of error is sustained. The judgment of the Lorain County Court of Common Pleas is reversed.

Judgment reversed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

MATTHEW JOHN MARKLING, Attorney at Law, for Appellant.

DALE F. PELSOZY, Attorney at Law, for Appellees.