

[Cite as *Bucey v. Carlisle*, 2010-Ohio-2262.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

JORDAN BUCEY,	:	APPEAL NO. C-090252
	:	TRIAL NO. A-0805768
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
JOHN R. CARLISLE, et al.,	:	
	:	
Defendants,	:	
	:	
CINCINNATI PUBLIC SCHOOLS,	:	
	:	
CINCINNATI BOARD OF EDUCATION,	:	
	:	
and	:	
	:	
THE SCHOOL FOR CREATIVE AND PERFORMING ARTS,	:	
	:	
Defendants-Appellants.	:	
	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: May 21, 2010

Zachary S. Smith, Robert E. Blau, and Blau & Kriege, PLLC, for Plaintiff-Appellee,

Mark J. Stepaniak, Ryan M. Martin, and Taft, Stetinius & Hollister LLP, for Defendants-Appellants.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Judge.

{¶1} Plaintiff-appellee Jordan Bucey, a former student at a public school in Cincinnati, alleged that her principal at the school, John R. Carlisle, had pursued an inappropriate relationship with her while she was a student and had later raped her. In addition, Bucey alleged that various school-related defendants had been negligent or reckless in their hiring and retention of Carlisle and that school employees had breached a statutory duty to report Carlisle’s abuse of her, which they had known about or should have suspected. Bucey claimed that the defendants-appellants, the Cincinnati Public Schools (“CPS”), the Cincinnati Board of Education (“the Board”), and Bucey’s former school, the School for Creative and Performing Arts (“SCPA”), were liable to her for these torts and for the alleged denial of her constitutional rights.

{¶2} Rather than filing an answer, CPS, the Board, and SCPA, along with many of the other defendants, moved to dismiss the complaint under Civ.R. 12(B)(6), relying in part on a statutory-immunity defense. Without analysis, the trial court entered a judgment dismissing Bucey’s constitutional tort claim, but the court otherwise denied the motion as to CPS, the Board, and SCPA.

{¶3} In a single assignment of error, the appellants¹ argue that they are immune from liability on all of Bucey’s claims, and, therefore, that the trial court erred by denying their motion to dismiss in its entirety. We find their argument meritorious, and we reverse that part of the trial court’s judgment denying their motion for dismissal of the remaining claims against them. Where, as here, an order

¹ In footnote 3 of the memorandum in support of the motion to dismiss, the Board and SCPA moved for dismissal on the ground that they “are not—and are not alleged to be—distinct legal entities” from CPS. But they have not raised this issue in an assignment of error, and, therefore, we will not address it.

denies a political subdivision the benefit of immunity under R.C. 2744.02, the order is final and appealable.²

Political Subdivision Immunity

{¶4} The appellants' immunity argument involves the application of Ohio's Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744. The Act, which took effect in 1985, addresses when political subdivisions, their departments and agencies, and their employees are immune from liability for their actions.³

{¶5} The Act sets forth the specific defenses and immunities available to political subdivisions in civil actions involving tort claims and provides exceptions to immunity in specified circumstances.⁴ The Act, by its terms, does not apply to certain actions not at issue in this appeal, such as contractual disputes and actions involving the claimed violation of federal civil rights.⁵

{¶6} CPS is a political subdivision as specified in the complaint and in R.C. 2744.01(F).⁶ The Board, a body corporate and politic,⁷ manages and controls the public schools within the school district, including SCPA.⁸ The immunity granted by statute to CPS also extends to CPS's departments, agencies, and offices that implement the duties of CPS.⁹ Therefore, the same immunity analysis applies to all three appellants.¹⁰

² *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, at ¶13; R.C. 2744.02(C).

³ *Lambert v. Clancy*, ___ Ohio St.3d ___, 2010-Ohio-1483, ___ N.E.2d ___, at ¶8.

⁴ R.C. 2744.02(A)(1) and 2744.02(B).

⁵ R.C. 2744.09.

⁶ “ ‘Political subdivision’ means a * * * school district [,] or other body corporate and politic responsible for governmental activities in a geographical area smaller than that of the state.”

⁷ R.C. 3313.17.

⁸ R.C. 3313.47.

⁹ *Lambert* at ¶20, citing *Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450, 639 N.E.2d 105, paragraph two of syllabus.

¹⁰ See *Wilson*, supra.

{¶7} A three-tiered analysis is used to determine whether a political subdivision is immune from tort liability.¹¹ The first tier provides a general rule of immunity,¹² as set out in R.C. 2744.02(A)(1): “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.”

{¶8} Once immunity is established under R.C. 2744.02(A)(1), the second tier involves determining whether any of the exceptions to immunity set forth in R.C. 2744.02(B) applies.¹³ With regard to the appellants, these exceptions generally include tort claims arising from (1) the negligent operation of a motor vehicle by a school employee; (2) the negligence of a school employee with respect to “proprietary functions”; (3) the political subdivision’s negligent failure to keep the public roads in repair and free from obstruction; (4) the negligence of a school employee with respect to physical defects occurring within or on the grounds of school buildings; and (5) civil liability that is expressly imposed by statute on the political subdivision.¹⁴ If any of these five exceptions is found to apply, then a consideration of the defenses set forth in R.C. 2744.03 is required.¹⁵

{¶9} We review de novo the trial court’s denial of a motion to dismiss for failure to state a claim. To dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear “beyond doubt” that the plaintiff can prove no set of facts entitling her to recovery.¹⁶ To determine in this case whether

¹¹ *Green Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556, 2000-Ohio-486, 733 N.E.2d 1141.

¹² *Id.* at 556-557.

¹³ *Id.* at 557.

¹⁴ R.C. 2744.02(B)(1) through (5).

¹⁵ *Id.*

¹⁶ *O’Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

the plaintiff has stated a cause of action against the appellants, “we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.”¹⁷ “Although immunity is an affirmative defense, where the complaint itself bears conclusive evidence that the action is barred by the defense, a Civ.R. 12(B)(6) dismissal is proper.”¹⁸ Therefore, because of the broad grant of immunity in Ohio’s Political Subdivision Tort Liability Act, to state an actionable tort claim against a political subdivision, a plaintiff must plead facts in the complaint sufficient to trigger the application of an R.C. 2744.02(B) exception to immunity.

The Allegations

{¶10} Bucey alleged that during the 2006-2007 school year, Carlisle, the principal of SCPA, acted as a “predator” and pursued an “inappropriate, illegal, and improper” relationship with her while she was student. And on or about June 15, 2007, Carlisle had lured her to the Drawbridge Inn in Fort Mitchell, Kentucky, where he had raped her.

{¶11} Further, Bucey alleged that CPS had hired Carlisle as the principal of SCPA in the summer of 2006 despite a “criminal history” and a “history of inappropriate relationships with students” that should have rendered him unsuitable for employment. Specifically, before Carlisle’s hiring, Rosa Blackwell, the superintendant of CPS, had borne the responsibility of screening candidates, including performing background checks, and either had failed to screen Carlisle or had done so and had chosen to recklessly ignore Carlisle’s history. And SCPA’s Local School Decision Making Committee (“LSDMC”), a division of CPS, had borne the

¹⁷ *Mitchell v. Lawson Milk Co.*(1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

¹⁸ *Rich v. Erie County Dept. of Human Resources*, 106 Ohio App.3d 88, 91, 665 N.E.2d 278.

responsibility of interviewing and recommending candidates to Blackwell. LSDMC either had failed to properly interview Carlisle to learn his history or had known about but had recklessly disregarded his history and recklessly recommended him for the position. Bucey alleged that the screening of candidates was a proprietary function of school employees.

{¶12} During the 2006-2007 school year, while Bucey was a minor, SCPA teachers and other employees had allegedly known or had reasonable cause to suspect that Carlisle was pursuing an inappropriate sexual relationship with Bucey, but they had failed to report the conduct in accordance with R.C. 2151.421, to notify Bucey’s parents, or to take other action except to confront Carlisle about his pursuit of an inappropriate relationship.

Claims against the Appellants

{¶13} According to Bucey, she stated claims against the appellants that were not barred by immunity because (1) she alleged that school employees had been negligent in carrying out a proprietary function—the screening of potential employees—invoking the exception of R.C. 2744.02(B)(2); (2) she alleged that school employees had violated a statutory duty to report suspected abuse, for which the General Assembly has expressly imposed civil liability, invoking the exception of R.C. 2744.02(B)(5); and (3) she alleged that Carlisle had been acting within the scope of his employment when he established his inappropriate relationship with her.

R.C. 2744.02(B)(2)’s Immunity Exception

{¶14} R.C. 2744.02(B)(2) provides that political subdivisions are liable for “negligent performance of acts by their employees with respect to proprietary functions.” Bucey alleged that the screening of potential employees, including the performance of a background check, was a “proprietary function.” For purposes of

the motion to dismiss, we accept as true the allegation that school employees were negligent in the screening of Carlisle. But we do not accept as true Bucey's "allegation" that the screening of school employees was a "proprietary function." This is a legal characterization that the appellants have successfully challenged by reference to R.C. 2744.01(C)(2)(c). This section specifically defines as a governmental function the "provision of a system of public education." Where a function is specifically defined as a governmental function, it cannot be a proprietary function.¹⁹

{¶15} Bucey, however, contends that the "screening of employees" is a function apart from the specifically designated governmental function of the "provision of a system of public education." She is not persuasive.

{¶16} We recognize that "some activities of a political subdivision may be governmental functions, while some other activities are not."²⁰ But the governmental function of "providing a system of public education" cannot be accomplished without the activity at issue here, which we regard as simply the staffing of a public school with an administrator. This activity is so fundamental to the provision of a system of public education that it cannot be considered apart from the governmental function of "providing a system of public education."

{¶17} Moreover, courts have held that the "operation of a public school is a governmental function,"²¹ citing R.C. 2744.01(C)(2)(c), and specifically that the hiring of teachers and administrators for a public school district is a governmental function, for purposes of determining whether an employee is entitled to immunity.²²

¹⁹ R.C. 2744.01(G)(1)(a).

²⁰ See *Liming*, 89 Ohio St.3d at 560.

²¹ *Engleman v. Cincinnati Bd. of Edn.* (June 22, 2001), 1st Dist. No. C-00597; *Coleman v. Cleveland School Dist.*, 8th Dist. Nos. 84274 and 84505, 2004-Ohio-5854, ¶66; *Bays v. Northwestern Local School Dist.* (July 21, 1999), 8th Dist. No. 98CA0027.

²² *Senu-Oke v. Bd. of Edn. of Dayton School Dist.*, 2nd Dist. No. 20967, 2005-Ohio-5239, at ¶12.

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Because a school district is one of the political subdivisions specifically mentioned in R.C. 2744.01(F), and the provision of a system of public education is a specifically identified governmental function, 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.²³

{¶18} The conduct at issue here is distinguishable from conduct that has been held to be separate from the governmental function of “providing a system of public education,” such as the “provision of school meals”²⁴ and the “provision of transportation to students.”²⁵ Courts have considered these functions to be separate from the governmental function of “providing a system of public education”; ultimately, though, the courts have concluded that these functions independently satisfy the standard for a governmental function set forth in R.C. 2744.01(C)(1).²⁶

{¶19} Because the staffing of a public school with an administrator is so fundamental to the provision of a system of public education, we hold that this activity is part of the specified governmental function of providing a system of public education. Therefore, Bucey did not allege any liability against the appellants for the negligent performance of their employees with respect to a proprietary function, and

²³ Compare *Greene*, supra, at 560-561 (“when the political subdivision at issue is not one of the bodies specifically mentioned within R.C. 2744.01[F], the exceptions to immunity of R.C. 2944.02[B] should be construed in a way that leads to a finding of immunity for only the central core functions of the political subdivision * * * [or] “the balance of competing interests reflected in the structure of R.C. 2744 is undermined”).

²⁴ *Taylor v. Boardman Twp. Local School Dist. Bd. of Edn.*, 7th Dist. No. 08-MA-209, 2009-Ohio-6528, at ¶18.

²⁵ *Doe v. Dayton City School Dist. Bd. of Edn.* (1999), 137 Ohio App.3d 166, 170, 738 N.E.2d 390.

²⁶ *Taylor*, 2009-Ohio-6528, at ¶21 (the provision of school lunches is a governmental function pursuant to R.C. 2744.01[C][1][a] because it “is generally a necessary part of the provision of a system of public education” and, thus, a “part of an obligation of sovereignty imposed on the state”); *Doe*, 137 Ohio App.3d at 170 (holding that the transportation of students qualifies as a governmental function under the standard set forth in R.C. 2744.01[C][1][a]).

she failed to plead facts sufficient to trigger the exception to political subdivision immunity set forth in R.C. 2744.02(B)(2).

R.C. 2744.02(B)(5)'s Immunity Exception

{¶20} Next we review Bucey's allegations concerning the immunity exception of R.C. 2744.02(B)(5), which provides the following: "[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 * * *." The legislature has clarified the meaning of this section by adding that "[c]ivil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or a 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."²⁷

{¶21} Bucey contends that her allegations concerning the failure to report the alleged abuse invoked the exception of R.C. 2744.02(B)(5) because the reporting statute, R.C. 2151.421, imposes civil liability on those who fail to report known or suspected abuse,²⁸ including political subdivisions.²⁹ Division (M) of the current version of R.C. 2151.421 provides, "Whoever 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."

²⁷ R.C. 2744.02(B)(5).

²⁸ See R.C. 2151.421(M).

²⁹ See *Campbell v. Burton*, 92 Ohio St.3d 336, 2001-Ohio-206, 750 N.E.2d 539 (reading R.C. 2151.421 to impose a duty to report known or suspected abuse on a political subdivision and its employee) (limited by statute on other grounds).

{¶22} But division (M) of the reporting statute did not become effective until April 2009. Thus, at the time of Bucey’s alleged injuries, R.C. 2151.421 did not expressly impose any civil liability for a failure to report; it imposed only criminal liability.³⁰ As a result, a violation of the reporting provisions of the statute could not have triggered the exception to immunity of R.C. 2744.02(B)(5).³¹ Therefore, former R.C. 2151.421 did not impose liability on the appellants.

{¶23} Bucey argues additionally that the recently enacted division (M) may apply retroactively. We apply a two-part analysis to determine whether R.C. 2151.421(M) may be retroactively applied in this case.³² We first examine whether the General Assembly intended for the statute to apply retroactively.³³ If so, we then determine whether the amendments are substantive or merely remedial.³⁴ A substantive law “ ‘impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.’ * * * Procedural or remedial law prescribes methods of enforcement of rights or obtaining redress.”³⁵ The retroactive application of a substantive amendment is unconstitutional.³⁶

{¶24} The Ohio Supreme Court in *Roe v. Planned Parenthood Southwest Region*³⁷ addressed the retroactivity of the R.C. 2151.421(M) amendment. Citing the comments accompanying the legislation, the court in *Roe* held that the legislature expressly provided that the amendment was to apply retroactively to civil actions

³⁰ See R.C. 2151.99.

³¹ See *Pearson v. Warrensville Hts. City Schools*, 8th Dist. No. 88527, 2008-Ohio-1102, ¶21-22; see, also, *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61, at ¶42, citing *Campbell v. Burton*, 92 Ohio St.3d 336, 2001-Ohio-206, 750 N.E.2d 539.

³² *Roe*, supra, at ¶33.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at ¶34, quoting *Bielat v. Bielat*, 87 Ohio St.3d 350, 354, 2000-Ohio-451, 721 N.E.2d 28.

³⁶ Section 28, Article II of the Ohio Constitution; *Roe* at ¶37.

³⁷ 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61.

pending on the effective date of the amendment, April 7, 2009.³⁸ Thus, the court concluded that the amendment met the first requirement of retroactivity.³⁹ But the court held that the amendment in the case before it “add[ed] a punitive measure of damages that did not previously exist”—thus affecting a substantial right—and that “its retroactive application would violate due process.”⁴⁰

{¶25} Similarly, we conclude that the amendment in this case is substantive because it would impose new liability on the appellants with respect to a past transaction, when the appellants would otherwise be immune. Because the amendment is substantive, its retroactive application is unconstitutional,⁴¹ and Bucey cannot rely on the amendment to trigger the exception to immunity set forth in R.C. 2744.02(B)(5). Therefore, Bucey failed to state a claim for which the appellants could be liable under the exception set forth in R.C. 2744.02(B)(5).

Carlisle’s Intentional Acts

{¶26} Finally, we examine whether an exception to immunity applies to Bucey’s state-law tort claims against the appellants based on Carlisle’s acts. Bucey contends that the appellants may be held liable for Carlisle’s tortious conduct because she alleged that Carlisle was acting as her principal and performing a function of the political subdivision when he established a detrimental relationship with her. Even accepting this conclusory allegation as true, we hold that Bucey’s argument fails because these tort claims are governed by R.C. 2744.02 and no exception to immunity applies.

³⁸ Id. at ¶34, citing H.B. No. 280, Comments, Section 4.

³⁹ Id.

⁴⁰ Id. at ¶37.

⁴¹ See id.

{¶27} Bucey alleged that Carlisle’s tortious conduct was intentional, not negligent. The exceptions of R.C. 2744.02(B)(1) through (4) are limited to negligent conduct.⁴² Although the exception of R.C. 2744.02(B)(5) is not limited to negligent conduct,⁴³ the exception is limited to claims based on a state statute expressly imposing civil liability on the political subdivision for the conduct. Bucey has not identified the necessary state statute to invoke this exception. Because no exception to immunity applied to these claims, as a matter of law the appellants were immune from liability.

Summary

{¶28} After our de novo review of Bucey’s complaint, we hold that she failed to plead any set of facts that, if proved, would establish liability against the appellants. Accordingly, we sustain the assignment of error and reverse the trial court’s judgment to the extent that it failed to dismiss the remaining claims against the appellants. This cause is remanded to the trial court for the entry of an appropriate order of dismissal.

Judgment accordingly.

HILDEBRANDT, P.J., and DINKELACKER, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

⁴² See *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9,¶19.

⁴³ *Id.*