

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

HOWARD P. SEAVER	:	APPEAL NO. C-100429
		TRIAL NO. A-1000244
and	:	
		<i>JUDGMENT ENTRY.</i>
DOTTIE SEAVER	:	
Plaintiffs-Appellants,	:	
vs.	:	
THREE RIVERS LOCAL SCHOOL DISTRICT,	:	
	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In their sole assignment of error, plaintiffs-appellants, Howard and Dottie Seaver, argue that the Hamilton County Court of Common Pleas erred in granting judgment on the pleadings in favor of defendant-appellee, Three Rivers Local School District (“the School District”). For the following reasons, we agree and reverse the judgment of the trial court.

Under Civ.R. 12(C), “judgment on the pleadings is proper where the court construes as true the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the plaintiff and concludes, beyond

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

doubt, that the plaintiff can prove no set of facts to support the claim for relief.”² We review a trial court’s entry of judgment on the pleadings de novo.³

In their complaint, the Seavers alleged the following facts. On January 11, 2008, Mr. Seaver attended a high-school basketball game at which the School District provided bleachers for seating. However, School District employees did not fully extend the bleachers, and as a result, the step from the bleachers to the gymnasium floor was taller than the rest of the steps leading down the bleachers. In addition, on the taller step was a protruding metal strip. While descending the bleacher steps, Mr. Seaver failed to negotiate the taller step, tripped on the metal strip, and fell to the floor.

The Seavers sued the School District for negligence and loss of consortium. They specifically alleged that the School District had failed to exercise ordinary care by failing to (1) warn its guests of the hazards of the bleachers, (2) close off the area of the bleachers containing the protruding metal strip, (3) repair the metal strip, (4) warn its guests of the taller step, (5) warn its guests of the need to use a makeshift wooden step installed to avoid the danger of the taller step, and (6) provide its guests with safe egress and common walkways on the bleachers.

Under Ohio’s Political Subdivision Tort Liability Act, political subdivisions—including school districts⁴—are generally immune from liability for tort claims connected with a governmental or proprietary function.⁵ However, a plaintiff may defeat this immunity by establishing one of several exceptions listed under R.C. 2744.02(B). Thus, “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

² *Citicasters Co. v. Bricker & Eckler, LLP*, 149 Ohio App.3d 705, 2002-Ohio-5814, 778 N.E.2d 663, at ¶5.

³ *Amadasu v. O’Neal*, 176 Ohio App.3d 217, 2008-Ohio-1730, 891 N.E.2d 802, at ¶5.

⁴ R.C. 2744.01(F).

⁵ R.C. 2744.02(A)(1).

R.C.] 2744.02(B) exception to immunity.”⁶ Yet even if one of these exceptions applies, a political subdivision may ultimately reinstate its nonliability by successfully asserting a defense listed under R.C. 2744.03.⁷

There is no dispute that the Seavers pleaded an exception to immunity under R.C. 2744.02(B).⁸ But the School District maintains that the Seavers’ claims nevertheless are barred by R.C. 2744.03(A)(5), which states the following: “[A] 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.”

We explained which discretionary acts are protected by this provision in *McVey v. Cincinnati*.⁹ In that case, the plaintiff alleged that she was injured due to the city’s negligent maintenance and operation of an escalator. Specifically, she claimed that the city had failed to place employees near the escalator to prevent too many people from getting on at once. We rejected the application R.C. 2744.03(A)(5), holding that the decisions contemplated by the statute were those “characterized by a high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning.”¹⁰ We further held that “[i]mmunity attaches only to the broad type of discretion involving public policy made with the creative exercise of political judgment,” not “to the negligence of employees in the details of

⁶ *Bucey v. Carlisle*, 1st Dist. No. C-090252, 2010-Ohio-2262, at ¶9.

⁷ *Hacker v. Cincinnati* (1998), 130 Ohio App.3d 764, 767. 721 N.E.2d 416.

⁸ Complaint at ¶20.

⁹ *McVey v. Cincinnati* (1995), 109 Ohio App.3d 159, 671 N.E.2d 1288.

¹⁰ *Id.* at 162.

carrying out the activity even though there is discretion in making choices.”¹¹ We stressed that while the city’s decision to install the escalator may have been covered by the provision, the city’s duty to maintain and operate the escalator once it was installed was not.¹²

In moving for judgment on the pleadings in this case, the School District argued that the Seavers could prove no set facts to support their claims for relief because (1) their allegations involved only discretionary acts under R.C. 2744.03(A)(5), and (2) they had failed to allege malicious purpose, bad faith, wantonness, or recklessness.

We disagree because we are not convinced that the Seavers’ allegations are, as a matter of law, consistent only with “the broad type of discretion involving public policy made with the creative exercise of political judgment.” Furthermore, the Seavers denied that the School District was immune both in their complaint¹³ and—in response to the School District’s defense—by operation of Civ.R. 8(D).¹⁴ At this stage of the proceedings, we cannot say, beyond doubt, that the Seavers will be unable to prove a set of facts that will entitle them to relief. Their sole assignment of error is sustained.

Therefore, the judgment of the trial court is reversed, and this cause is remanded for further proceedings in accordance with law.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., HENDON and FISCHER, JJ.

¹¹ Id. at 163 (citing *Bolding v. Dublin Local School Dist.* [Jun. 15, 1995], 10th Dist. No. 94APE09-1307).

¹² Id. at 163. See, also, *Hacker* (holding that a city’s decisions concerning whether to erect warning signs, handrails, a walkway through a parking garage curb, or barriers to prevent pedestrian travel over that curb were not protected by R.C. 2744.03[A][5]).

¹³ T.d. 2 (paragraph 21 of the Complaint).

¹⁴ Civ.R. 8(D) (“Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.”).

OHIO FIRST DISTRICT COURT OF APPEALS

To the Clerk:

Enter upon the Journal of the Court on February 11, 2011

per order of the Court _____.

Presiding Judge