

PURSUANT TO RULE 58 (B) OF THE OHIO RULES OF CIVIL PROCEDURE, THE CLERK SHALL SERVE UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR NOTICE OF THE WITHIN JUDGMENT. BY ORDER OF THE COURT.

IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO
CASE NO. 01 CV 810

SARA DOUGLAS, et al.)	JUDGE DAVID TOBIN
)	
PLAINTIFFS)	
VS.)	JUDGMENT ENTRY
)	
WELLSVILLE BOARD OF EDUCATION))	
Et al.)	
DEFENDANTS)	

Before the Court is the defendant's motion for summary judgment to which the plaintiff has responded.

The issue on this motion for summary judgment is whether the defendant is immune from liability for the injuries the plaintiff sustained under O.R.C. 2744.02 and 2744.03.

The plaintiff brought suit on behalf of her son Camden. While attending a basketball game at a gymnasium owned and operated by the defendant, Camden, then four years old, fell through a handrail on the bleachers of the gymnasium and was severely injured. The gymnasium was built in 1938 and is a site for school activities and community events. According to the affidavit of Superintendent James Brown, there is no record of anyone else having been injured by falling through these railings.

In 1997 the defendant did renovations to the building the gymnasium to bring the building in compliance with The Americans with Disabilities Act. This included wheelchair accessibility to locker rooms and restrooms in the gym. The architectural firm hired to make recommendations did not make any recommendations concerning the handrails or the spectators' stands where this

accident took place.

The plaintiffs' theory of liability is that the defendant was negligent in not complying with the Ohio Basic Building Code by putting up a mesh or other device to prevent people from falling through the handrails. Defendant says that the building was grandfathered in and did not have to comply with the building code unless the entire building was being renovated.

The defendant contends that it is immune from liability because the decision to or not to change these railings was an exercise of discretion in determining whether to acquire or use equipment, materials or facilities under R.C. 2744.03(A)(5). The plaintiff counters that the Board cannot escape its negligence for failing to maintain this building and for failing to bring it into compliance with the building code.

The issue turns on whether this is a maintenance question or a discretionary decision to acquire or use equipment. Decisions concerning the construction of governmental buildings and facilities are immune from liability but maintenance of the building or facility is not immune. Hall v. Fort Frye Local School District Board, 111 Ohio App. 3d 690 (1996 Court of Appeals 4th District).

The plaintiff cites the Hall case and other cases for the proposition that the accident as it happened here is a question of maintenance not a question of discretion. Plaintiff further seems to argue that because this was an open and obvious defect that the school board an obligation to repair it when it undertook the 1997-98 renovations of the building and cannot escape liability for its negligence.

Unlike the two cases cited by the plaintiff Hall and Hallett v. Stow Board of Education (1993) 89 Ohio App. 3d 309 this is not a situation where the school performed maintenance that was negligent. In Hallett a hole had developed near football stands and a woman stepped in it breaking her leg. The groundskeepers where charged with keeping the area clean, the grass cut and inspecting for hazards. They negligently did this. There was no discretion on behalf of the school

board as to such maintenance. The same occurred in the Hall case where a sprinkler head was negligently guarded by maintenance personnel. The Court there viewed this as a maintenance function.

In the instant case, the building was built in 1938 prior to any requirement by any building code for the handrail to be meshed or in other ways constructed to as to prevent someone from sticking his head through or falling through. The renovations of the building were not a general renovation but were the school board's effort to comply with the mandates of federal law in bringing the building into compliance with The Americans with Disabilities Act. Nothing in the Ohio Building Codes or any other law required or mandated that the school board bring the railing into compliance with the Ohio Building Codes. Without such mandate, the school board had no obligation to do so and it could exercise its discretion in not doing so. At the time the building was constructed the school board did exercise its judgment and discretion in how the building was to be constructed and the construction of this rail.

Nor is this the case where there is an open and obvious defect that should have been repaired. In the 60 years of the buildings existence prior to this injury, the only evidence before this Court indicates that no one had fallen through these rails and was injured. Consequently there was no notice to the school board that this was a hazardous condition that should be remedied in the sense of a maintenance condition such as the Hall case.

Based on the foregoing analysis this Court finds that the defendant is immune from liability because the defendant was exercising its judgment and discretion in whether to acquire, use equipment, materials and facilities which was not exercised in bad faith, maliciously or with wanton and reckless manner. In accord with this Court's decision are the decisions cited by the defendant: Jolly v. City of Cleveland 1998 WL 108131; 1998 Ohio App. Lexis 997 (Ohio App. 8th District) and Police v. Twinsburg City Board of Education 2002 Ohio 3407.

Defendant's motion for summary judgment is granted. This Court finds that there is no

genuine issue of material fact and that the defendant is immune from liability. Plaintiff's complaint is dismissed at plaintiff's cost.



DAVID TOBIN, JUDGE

Dated: September 27, 2002

**Cc: Vincent S. Guerra
John T. DeFazio**