Liability Risks for After-Hours Use of Public School Property to Reduce Obesity: OHIO

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This memorandum summarizes Ohio law governing liability for after-hours recreational use of school facilities. It should be read with this project's overview memorandum, which can be found at *www.changelabsolutions.org/publications/liability-schools-50-states*. It does not provide the kind of detailed analysis necessary to support the defense of a liability action, nor is it a substitute for consultation with a lawyer. If there are important cases, statutes, or analyses that we have overlooked, please inform us by sending an email to *info@changelabsolutions.org*.

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For a negligence action in the state of Ohio, a plaintiff must prove three elements: (1) the existence of a legal duty, (2) defendant's failure to discharge that duty, and (3) an injury proximately caused by the failure.[1] For purposes of evaluating the legal rules that affect the liability risk involved in opening up schools to after-hours use, the crucial issues involve the application of the Political Subdivision Tort Liability Act.

Part A of this memorandum addresses the duty of the school system. Part B addresses issues relating to limits on damages. Part C addresses two risk management issues that involve legal questions that are susceptible to a generalized legal analysis: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers; and (2) whether a third party providing the recreational programming on school facilities would have the same duty of care as a school district.

A. Public Schools, the Duty Element, and After-Hours Use

Absent special liability protection, school districts and other providers of recreational facilities have the legal duty to take *reasonable* precautions to prevent injury. What is reasonable is very context specific and depends on many things: most important, the nature of the harm, the difficulty of preventing it, and generally accepted standards in the management of recreational facilities.

As any lawyer who has tried to explain the concept of negligence to a layperson knows, the standard of reasonable care can seem frustratingly vague and imprecise. Yet it is the standard that generally governs liability risk for organizations and individuals in the United States. On the whole, it is a flexible standard that does a good job of balancing the competing interests of the providers and users of many kinds of services.

This section explains the ways that Ohio law limits the legal duty of school districts. As we explain in subsection 1, Ohio law sometimes insulates school districts from liability, so that school districts that do not take reasonable

precautions may still be able to avoid legal responsibility for any resulting injuries. Ohio law does this through governmental immunity, as provided in the Political Subdivision Tort Liability Act[2] (Act). In our judgment, governmental immunity is likely to substantially protect school districts against liability for injuries sustained during a recreational program.

Subsection 2 discusses the liability and indemnification of school employees, a topic closely related to schools districts' overall liability risk.

Subsection 3 discusses recreational user statutes, which sometimes also offer liability protection to school districts. The Ohio version of the recreational user statute would likely provide liability protection to school districts that allow public access to school facilities, as long as the school district does not charge for access and remains open to the general public.

Subsection 4 discusses the consolidation of the traditional categories of entrants onto land and demonstrates that school districts would likely be subject to the duty of reasonable care.

Subsection 5 concludes this part of the memorandum by comparing the legal duties that a school already faces for activity during the school day with the legal duties that the school would face if it permitted after-hours use of its facilities.

1. Limited Duty Due to Governmental Immunity

The Act governs claims against government entities in Ohio. The Act provides that political subdivisions are not liable in damages for any civil action, subject to exceptions specified in the Act.[3] School districts[4] and school boards fall within the definition of "political subdivision" and, therefore, are covered by the Act.[5]

The Act sets forth a three-step analysis to determine if immunity exists. Initially, the Act grants immunity to government entities for actions connected to their governmental and proprietary functions. Second, a court can waive immunity under the Act if the alleged action falls into one of the specific exceptions to immunity. Finally, if one of the exceptions applies, a court considers whether any available defenses or other immunities apply.[6]

The Act grants immunity to school districts for an injury due to acts or omissions of the school district or their employees made in connection with their proprietary and governmental functions.[7] The Act classifies all functions of political subdivisions as either proprietary or governmental functions, both of which are subject to immunity.[8] Courts have stated, "Ohio's Political Subdivision Tort Liability Act…confers broad immunity on the state's political subdivisions."[9]

The Act generally defines governmental and proprietary functions. To be considered a governmental function, the action must either fall within one of three criteria or be expressly listed in the Act.[10] The three criteria are: (1) a function "that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement"; (2) a function "that is for the common good of all the citizens of the state"; or (3) a function "that promotes the public peace, safety, health, or welfare," which is not

normally performed by nongovernmental persons.[11] Included in the explicit list of functions are: the provision of public education; regulation of the use and repair of public grounds; and the "design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility."[12]

One recent Ohio Supreme Court decision examined the interplay between governmental functions and school districts. The Court granted immunity from liability to a school district for injuries a student suffered in a batting cage on school property, because the Act explicitly included in its definition of governmental functions the provision of public education and the operation of a school athletic facility.[13] The decision suggests that courts may consider an array of functions related to the operation and functioning of a school to be governmental and therefore protect the school district against liability.

The Act defines a "proprietary function" as a function that (1) does not fall within the definition of "government function" and (2) "promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons."[14] The Act also specifies five activities that qualify as proprietary functions.[15] Only one activity may apply to school districts: the operation and control of certain public exhibition spaces, such as a public stadiums, auditoriums, civic or social centers, exhibition halls, arts and crafts centers, bands or orchestras, or off-street parking facilities.[16] Whether an act is categorized as governmental or proprietary is significant when determining whether one of the exceptions to immunity applies.

The Act provides express exceptions to the blanket grant of immunity, three of which could apply to school districts allowing an after-hours recreational program.[17] First, the Act's broadest exception to immunity is a provision that states that political subdivisions can be liable when liability is expressly imposed by other sections of the Ohio code.[18]

Second, a government entity, such as a school district, can be liable for injury caused by a public employee's negligent performance of a proprietary function.[19] In *Copeland v. Cincinnati* the Ohio appellate court considered whether the trial court properly found that city was immune from liability for the sexual abuse of a child at a city-operated day camp.[20] The court first found that the operation of a day camp was a proprietary function, because it is not specifically listed as a governmental function in the Act and it promotes public health, safety, or welfare, but is typically engaged in by nongovernmental persons.[21] The court then held that the plaintiffs had sufficiently stated a case that the city was liable for the injury, because the employees supervising the campers were negligent while performing their proprietary function.[22] Thus, when a government entity is performing a proprietary function, the government loses its immunity if someone is injured due to the negligent performance by an employee of the function. If the government is performing a government function, it retains the much broader statutory immunity for negligent acts.

The third exception to immunity that might apply provides that a government entity receives no immunity for injury "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."[23] In *M.H. v. Cuyahoga Falls*, the court of appeal reversed a trial court's finding that the city was immune from liability for an injury to a child in city-owned pool.[24] The court found that the allegations in the complaint—that the city was negligent in the care or control of its pool or diving board, that the negligence caused the injury, and that the pool is within a building that is "used in connection with the performance of a governmental function"—was sufficient to state a case that this exception to immunity applied.[25]

The final stage in the immunity analysis is to determine whether a government entity may assert a defense that could restore immunity.[26] The Act provides seven "defenses or immunities" that can be asserted to "establish nonliability."[27] Three of the defenses could apply in this context. First, the government entity may retain immunity (or establish nonliability) if the employee's action giving rise to the claim was required or authorized by law or necessary or essential to the function of government, provided that the employee did not act negligently.[28]

Second, the government entity can retain immunity if the employee's action or inaction giving rise to the claim was a discretionary action regarding policymaking, planning, or enforcement decisions.[29] The Ohio Supreme Court considered this defense in a case brought by a student against a school district for a head injury he received during baseball practice.[30] The plaintiffs alleged that the coach had negligently instructed the players in the use of a protective screen and failed to provide batting helmets.[31] The court found this defense did not apply, stating "there is no showing that [the coach's] position as baseball coach involved policy-making, planning, or enforcement powers. His position as a baseball coach, without more, does not involve 'the exercise of a high degree of official judgment or discretion.'"[32]

Third, a government entity can retain immunity if the injury resulted from the exercise of judgment or discretion in determining whether to acquire or how to use equipment, personnel, or supplies, unless "the judgment or discretion was exercised with malicious purpose, … or in a reckless manner."[33]

The Act provides school districts with substantial protection from liability for injuries to after-school users of school property.[34] Under the Act, a school district will initially be immune from liability. Based on past case law, it is unclear whether the operation of an after-school recreational program would be considered a governmental or proprietary function. If after-school use of district property were considered a proprietary function, a school district could fall within an exception to immunity and could be held liable for injuries caused by an employee's negligence. In addition, regardless of whether a court categorized after-school recreational use of district property as a governmental or proprietary function, a school district could be liable under the exception to immunity for an injury caused by negligence that created a defect on the grounds or facilities. But, even if courts impose liability under the exceptions to immunity, school districts may assert the three applicable defenses that would reassert immunity. The additional two defenses regarding discretion appear to provide school districts with a defense depending upon the facts of the case.

2. Duties and Indemnification of Public School Employees

Under the Act, a school employee is immune from liability if the school district is immune.[35] In addition, if a court

has removed a school district's immunity, a school employee can still be immune from liability, unless the alleged acts or omissions that caused injury were blatantly outside the scope of employment, involved malice or bad faith, were made recklessly or wantonly, or unless the statute provides otherwise.[36]

Under certain conditions a school district must provide an employee with legal defense and indemnification. A school district must provide for an employee's defense, indemnify, and hold the employee harmless in any civil action "caused by an act or omission of the employee in connection with a governmental or proprietary function" if the act or omission occurred "while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities."[37] A school district is not responsible for punitive or exemplary damages awarded against an employee.[38] Finally, a board of education of any school district may indemnify, defend, and hold harmless a range of school-related employees and nonprofit organizations organized or formed to support school district programs.[39]

3. Limited Duty under Recreational User Statute

In the event that a school district is not entitled to immunity under the Act, a court could look to Ohio's recreational use immunity statute. Ohio limits the liability of landowners who open their land for recreational use.[40] The statute provides immunity by providing that the land possessor has no "duty to a recreational user to keep the premises safe for entry or use"; gives no "assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use"; and does not assume liability "for any injury to person or property caused by any act of a recreational user."[41]

The statute applies to "privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals."[42] The statute defines "premises" to include "state-owned lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon."[43] In spite of the plain language of the statute, courts have applied the statute to government-owned, state-owned, or municipality-owned land regardless of whether it is leased to a private party.[44] Courts have also held that the statute applies to school districts.[45] Ohio courts have stated that the presence of man-made improvements does not necessarily remove the property from the statutory protection,[46] but, "[t]o qualify for recreational-user immunity, property need not be completely natural, but its essential character should fit within the intent of the statute."[47]

The statute applies only to recreational users.[48] A recreational user is "a person to whom permission has been granted, without the payment of a fee or consideration" to enter property for recreational pursuits.[49] To determine who is a recreational user, courts have focused not on the activity at the time of injury, but "on the nature and scope of activity for which the premises are held open to the public."[50] Therefore, to be a recreational user a person must be on property held open for a recognized recreational activity in which the person is participating. In *Fuehrer v. Westerville City School Dist. Bd. of Edn*, the Ohio Superme Court held that a child who without permission entered a soccer field on public school property and was fatally injured while he and his friends pushed over a soccer goal was not a recreational user.[51] The Court stated, "[r]oughhousing on a soccer goal is not a recreational activity of the

type contemplated by the statute. Nor is it the kind of activity that comports with the essential character of the soccer field."[52] Accordingly, the court found that the plaintiff was not a recreational user of the property.

The statute does not definitively define the term "recreational pursuit." It recognizes specific activities, such as hunting, fishing, and camping, to be considered recreational, but also includes the phrase "other recreational pursuits," thus expanding the possible range of recognized recreational activities.[53] The Ohio courts have broadly defined the term "recreational pursuits" to include, but not be limited to, sledding, watching others swim, swinging, riding a merry-go-round, playing softball, and watching baseball.[54] The Ohio Supreme Court stated that it would recognize the immunity of an owner of a park "whether the injury is to one who is jogging in the park, tinkering with a model airplane or reading poetry to satisfy a school homework assignment."[55] But, as discussed above in the *Fuehrer* case, the injured party must be engaged in a recreational pursuit to qualify as a recreational user.[56]

The recreational user statute provides a school district with a possible defense against liability. Under the statute and judicial requirements, it appears that a school district would need to allow public access of its grounds without charge in order to be eligible for the limited liability. Payment to a sponsor of a program appears not to affect eligibility for limited liability; however, no research was conducted to determine if payment from the sponsor to the school district for insurance or other costs would affect liability. If the conditions are met, it is likely the school district would be eligible if a recreational program operated activities fit for the school property, like a softball game on a softball field.

4. Limited Duty Due to the Historical Distinctions among Entrants on Land

Ohio retains the three traditional classifications of entrants onto property: trespassers, licenses, and invitees.[57] A court could look to these classifications if it found the Act and recreational user statutes do not apply to after-school users of district property. A trespasser is a person who enters the property of another without the owner's invitation or permission, solely for her own purpose or convenience.[58] "Ordinarily, a landowner owes no duty to undiscovered trespassers other than to refrain from injuring such trespassers by willful or wanton conduct."[59]

A licensee is a person who enters the premises of another by the land possessor's permission or acquiescence for the entrant's own pleasure or benefit and not upon invitation.[60] Consent to enter or remain on premises does not need to be actual, but can be implied by the continued public use of property.[61] Courts have considered children playing on property without express consent to be licensees.[62] As discussed above in the *Fuerhrer* case, the Ohio Supreme Court found that recreational use immunity was not applicable where a boy was killed while removing soccer goals on a school soccer field and when the school was not in session.[63] The court held that the child was a licensee, and the school owed him only a duty to not cause injury by willful or wanton misconduct.[64]

A licensee enters the premises subject to any attendant perils and risks.[65] A land possessor has a duty to refrain from willfully and wantonly causing injury as well as a duty not to expose a licensee to hidden danger.[66] If a hidden danger exists, the possessor must warn the licensee of any condition if there is reason to believe the licensee does not know of or will not discover the dangerous condition.[67] The duty owed to a licensee is the same whether or not

the entrant is a child or an adult.[68]

An invitee is a visitor who enters property by invitation, express or implied, for a purpose beneficial to the owner.[69] The general rule in Ohio is that if a person enters the premises with the owner's consent for a purpose in which the owner may be interested, the entrant is considered to be expressly or implicitly invited.[70] Courts have found invitee status where a parent entered a prison under a public invitation in accordance with the purpose for which the institution was held open to the public.[71] Generally, to "qualify as an element of invitee status, an invitation is any conduct on the part of the possessor justifying another in believing that the possessor welcomes him and desires his entry."[72]

A land possessor owes to an invitee a duty of reasonable care.[73] The duty of reasonable care includes maintaining the premises in a reasonably safe condition and warning invitees of concealed defects that the owner should have knowledge of.[74] The possessor must use reasonable care in keeping the premises free from concealed dangers that a regularly prudent person would not discover.[75] There is no duty to warn invitees if the danger is open and obvious.[76]

In addition to the traditional three categories of entrants, Ohio, unlike other states, treats the category of social guest as an independent category.[77] A social guest is an entrant able to use the premises as a personal favor.[78] Courts have found social guest status where an employee extended an open invitation to a former employee to visit at any time.[79] The duty owed to a social guest is ordinary care, which includes a duty to not cause injury to the guest and to warn the guest of any dangerous condition of the premises the host knows or should have known was dangerous.[80] The reasonable person standard is context-specific; the duty owed to social guests takes into account children's ages and expected level of judgment and sensibility.[81]

Based on the current jurisprudence in Ohio, it is not clear what the status of participants in an after-hours recreation program would be. Status would likely depend on the nature of the invitation for the program. It is more likely that under an after-school program that puts forth some type if invitation, public or not, the entrants will be considered invitees. If a school merely opens access without extending any type of invitation, the entrants would likely be considered licensees.

5. Duty during the School Day and After: A Comparison

When deciding whether to open up school facilities for recreational use, it is useful to evaluate how the legal risk arising out of opening the school grounds for recreational use compares with the legal risk arising out of the use of school grounds for programs that the school already runs during the school day. As noted above, the Act provides broad immunity for government entities engaging in governmental functions, including the provision of a public education system.[82] The immunity can be overcome by the same process described above.

The Act and the recreational user statute also provide immunity or limited liability for after-school recreational users in many situations. Because a court could find that after-school recreational use of school grounds is a proprietary rather than government function, a district may have a greater risk of liability from negligent acts of employees. On the other hand, school districts have the added protection of the state's recreational use immunity statute for injuries

to after-school users of school property under the state's recreational user statute. Accordingly, Ohio law provides strong protections to school districts both during the school day and after school.

B. Limits on Damages

1. Damages Limits under the Political Subdivision Tort Liability Act

The Act limits the type and scope of damages that may be awarded against government entities. The Act does not allow punitive or exemplary damages.[83] There are no limits on compensatory damages that represent actual loss.[84] Actual loss includes only tangible losses, and does not include attorneys' fees or intangible losses like pain and suffering or loss of consortium.[85] Except in wrongful death actions, non-actual losses "that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences . . . shall not exceed two hundred fifty thousand dollars in favor of any one person."[86] Not included in this limit are court costs or interest on a judgment.[87]

Damages are further reduced if a claimant receives or is entitled to insurance or other benefits. Benefits received reduce any award against the political subdivision.[88] In addition, under the Act, no insurer or other person with a subrogation right may bring an action against a political subdivision.[89]

2. General Damages Limits for Tort Claims

Ohio has general limits for damages in tort claims, but the status of the law is somewhat uncertain. The Ohio Supreme Court held the prior version of the damage statute unconstitutional, but the legislature replaced it with a very similar statute.[90] Under the statute, there are no limits on compensatory damages.[91] The amount of compensatory damages that represents noneconomic loss may not exceed the greater of $250,000 or an amount that is three times the economic loss to a maximum of $350,000 for each plaintiff or $500,000 for each occurrence.[92] There is no limitation on noneconomic loss, however, where substantial or permanent physical disability, loss of bodily organ system, or permanent physical functional injury is the basis of recovery.[93]

Punitive damages are similarly restricted,[94] but the limits and conditions do not apply to claims against political subdivisions or the state.[95] Generally, punitive or exemplary damages are not recoverable unless the defendant's actions demonstrated malice or aggravated fraud and the court has already rendered a verdict or determined the amount of compensatory damages recoverable.[96] When awarding punitive damages, the court should not award punitive or exemplary damages in excess of two times the amount of the compensatory damages.[97] If the defendant is a small employer or individual, the court should not award more than the lesser of two times the compensatory damages or 10 percent of the employer's or individual's net worth, not to exceed $350,000.[98] Attorneys' fees do not count toward the maximum amount allowed.[99] Punitive and exemplary damages may not be awarded against a defendant if punitive or exemplary damages have already been awarded and collected, although exceptions exist to this general prohibition.[100] The limits on punitive and exemplary damages are not applicable where the defendant acted with the requisite mental state and when the defendant has been convicted of a criminal offense that is a

felony.[101]

Finally, Ohio regulates the collateral source rule by statute.[102] (The collateral source rule allows plaintiffs to include in their tort damages costs that they did not actually incur because those costs were paid by health insurers or other "collateral sources" of funds.) "In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages."[103] This does not include a source of collateral benefits that has a mandatory "self-effectuating federal right of subrogation, contractual right of subrogation, or statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment."[104] Life insurance or disability payments may be introduced if the plaintiff's employer paid for the policy and the employer is a defendant in the suit.[105] If a defendant produces this evidence, the plaintiff may introduce evidence on any amount the plaintiff has paid to secure this benefit.[106]

C. Selected Risk Management Issues

In this section we consider two risk management issues that involve legal questions that are susceptible to a generalized legal analysis: (1) whether a school district could avoid liability arising out of recreational programs by requiring the participants, or their parents or legal guardians, to sign liability waivers; and (2) whether a third party providing the recreational programming on school facilities would owe the same duty of care that a school district owes. In brief, we conclude that Ohio courts would likely enforce liability waivers protecting a school from ordinary negligence, and school districts would likely face lower liability concerns than nonprofit organizations running recreational programs face because of the application of the Act and the recreational user statute.

1. Liability Waivers

Express assumption of risk occurs when a person expressly contracts with another entity to not sue for future injuries that may be caused by the entity's negligence.[107] It involves "an affirmatively demonstrated, and presumably bargained upon, choice by the plaintiff to relieve the defendant of his legal duty toward the plaintiff."[108] To expressly assume the risk, a party waiving his or her right must make a conscious choice to accept the consequences of the other party's possible negligence.[109] An agreement to expressly assume the risk must "state a clear and unambiguous intent to release the party from liability for its negligence" for conscious acceptance to be made.[110] "With respect to adult participants, the general rule is that releases from liability for injuries caused by negligent acts arising in the context of recreational activities are enforceable."[111] In *Zivich v. Mentor Soccer Club*, the Ohio Supreme Court enforced an exculpatory agreement signed by a parent on behalf of her minor son, releasing the nonprofit sports entity from all claims.[112] Thus, there is a reasonable chance that a court would enforce a liability waiver a district employs for after-school recreation programs.

2. Providing Access through Third Parties

Aside from a narrow liability protection provided to volunteers,[113] research did not reveal any special liability protection that would apply to third parties but not to school districts. Accordingly, school districts appear to enjoy a comparative advantage over third parties, at least in terms of liability protection. School districts benefit from the

protection provided by the Act and the recreational user statute. Third parties may be able to benefit from the recreational user statute when using school district property, but the statute's application to third parties under these circumstances is far from certain.[114]

In addition to liability protections, school districts may insure school entities and nonprofits. Ohio Revised Statute § 3313.203 states that a school board of a school district may purchase insurance for the school board, teachers, other administrators, and most importantly, for school support entities.[115] A school support entity "means any nonprofit entity formed for the support of school district programs."[116] If a school board does purchase insurance for a school support entity, the board must require the entity to reimburse the board for the cost of the insurance.[117]

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[1] OHIO JUR. *Negligence* § 9 (3rd ed. 2013) [hereinafter OHIO JUR.].

[2] OHIO REV. CODE ANN. § 2744.02 et seq.

[3] OHIO REV. CODE ANN. § 2744.02.

[4] *Id.* § 2744.01(F).

[5] OHIO JUR., *supra* note 1, at *Gov't Tort Liability* § 44.

[6] *Id.* § 43; *Elston v. Howland Local Sch*., 865 N.E.2d 845 (Ohio 2007).

[7] OHIO REV. CODE ANN. § 2744.02(A)(1).

[8] "[T]he functions of political subdivisions are hereby classified as governmental functions and proprietary functions." OHIO REV. CODE ANN. § 2744.02(A)(1); *See also Wilson v. Stark Cty. Dept. of Human Serv*., 639 N.E.2d 105, 107 (Ohio 1994). "Political subdivisions are shielded from civil liability as provided by R.C. Chapter 2744. R.C. 2744.02(A)(1) creates a broad immunity, subject to enumerated exceptions." *Id.*

[9] *Coleman v. Portage Cty. Engineer*, 133 Ohio St.3d 28, 31 (Ohio 2012).

[10] OHIO REV. CODE ANN. § 2744.01(C).

[11] *Id.*

[12] *Id.* § 2744.01(C)(2)(c), (e), & (u). The Act in subparagraph (u) relating to the design, construction, reconstruction, renovation, repair, maintenance, and operation of a school facility explicitly includes, parks, playgrounds, playfields, and indoor recreational facilities. *Id.* § 2744.01(C)(2)(u)(i-ii).

[13] *Elston, supra* note 6 at 848–49.

[14] OHIO REV. CODE ANN. § 2744.01(G)(1).

[15] *Id.* § 2744.01(G)(2).

[16] *Id.* § 2744.01 (G)(2)(e).

[17] *Id.* § 2744.02(B).

[18] *Id.* § 2744.02(B)(5).

[19] *Id*. § 2744.02(B)(2).

[20] *Copeland v. Cincinnati*, 825 N.E.2d 681, 682 (Ohio App. 1st Dist. 2005).

[21] *Id.* at 683-684.

[22] *Id.* at 684.

[23] OHIO REV. CODE ANN. § 2744.02(B)(4). The legislature amended section 2744.02(B)(4), effective April 9, 2003, to add the clause "and is due to physical defects within or on the grounds of" to the section. 2002 Ohio Laws (S. 106) eff. 4-09-2003. Thus, under current law the injury must be due to a physical defect in the property. In a 1996 case, the court of appeal held that the plaintiffs had stated a case that this exception to immunity applied where the plaintiff alleged that his injury was caused by improper maintenance that caused the sprinkler heads to be exposed. *Hall v. Ft. Frye Local Sch. Bd. of Educ*., 676 N.E.2d 1241, 1245 (Ohio App. 4th Dist. 1996).

[24] *M.H. v. Cuyahoga Falls*, 979 N.E.2d 1261 (2012).

[25] *Id.* at 1262–1263.

[26] OHIO REV. CODE ANN. § 2744.03(A).

[27] *Id.*

[28] *Id.* § 2744.03(A)(2).

[29] *Id.* § 2744.03(A)(3).

[30] *Elston*, *supra* note 6.

[31] *Id*. at 315.

[32] *Id.* at 321, citing *Reynolds v. State, Div. of Parole & Community Servs.* (1984), 14 Ohio St.3d 68, 14 O.B.R. 506, 471 N.E.2d 776 at 68. Ohio courts have found discretionary activity immunity to exist for school districts in the planning of a school track meet as well as the placement of outdoor lighting. See *Mason v. Bristol Local Sch. Dist. Bd. of Educ*., 2006 WL 2796660 (Ohio App. 11th Dist. 2006), and *Lines v. Ashtabula Area City Sch*., 2004 WL 1921973 (Ohio App. 11th Dist. 2004).

[33] OHIO REV. CODE ANN. § 2744.03(A)(5).

[34] We note that the Act has superseded Ohio's common law public duty exception. In regard to political subdivisions, the public duty doctrine "has been superseded by the enactment of the [Act]." *Coleman v. Greater Cleveland Reg'l Transp. Auth.*, 884 N.E.2d 648, 652 (Ohio App. 8th Dist. 2008) (quoting *Sudnik v. Crimi*, 690 N.E.2d 925, 927 (Ohio App. 8th Dist. 1997)). The Ohio Supreme Court recently reaffirmed this proposition: "While the public-duty rule and special-relationship exception might be relevant in establishing a claim, these common-law

doctrines are irrelevant to a claim against a political subdivision unless the claim is permitted under R.C. 2744.02." *Rankin v. Cuyahoga County Dep't of Children & Family Servs.*, 889 N.E.2d 521, 526 (Ohio 2008).

[35] "In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish non-liability." OHIO REV. CODE ANN. § 2744.03(A); *see* section A1 above. An employee will be immune because the school district will be immune if none of the exceptions apply.

[36] BALDWIN'S OHIO TORT LAW, 2d. at § 8:5; OHIO REV. CODE ANN. § 2744.03(A)(6).

[37] OHIO REV. CODE ANN. § 2744.07(A)(1) and (2).

[38] *Id.* § 2744.07(A)(2).

[39] *Id.* § 3313.203.

[40] *Id.* § 1533.181.

[41] *Id.* § 1533.181(A).

[42] *Id.* § 1533.181(B).

[43] *Id.* § 1533.18(A).

[44] OHIO JUR., *supra* note 1, at *Premises* § 32. *See Opheim v. City of Lorain*, 640 N.E.2d 897, 899 (Ohio App. 9th Dist. 1994) (stating that recreational immunity has been interpreted to include lands owned by states and municipalities); *LiCause v. City of Canton*, 537 N.E.2d 1298, 1301 (Ohio 1989) (settled that the recreational immunity statute applies to private, state, and municipal property).

[45] "[A]s a political subdivision of the state . . . the property of school districts meets the definition of 'premises' under the statute." *Fuehrer v. Westerville City Sch. Dist. Bd. of Educ.*, 574 N.E.2d 448, 449 (Ohio 1991).

[46] *Ross v. Strasser*, 688 N.E.2d 1120, 1124 (Ohio App. 2d Dist. 1996).

[47] *Miller v. City of Dayton*, 537 N.E.2d 1294, 1296 (Ohio 1989).

[48] All of the provisions limiting liability include references to recreational users. OHIO REV. CODE ANN. § 1533.181(A).

[49] *Id.* § 1533.18(B).

[50] *Fuehrer*, *supra* note 45 at 450; *Miller*, *supra* note 47 at 1296.

[51] *Fuehrer*, *supra* note 45 at 488.

[52] *Fuehrer*, *Id.* at 450.

[53] "[T]o hunt, fish, trap, camp, hike, or swim . . . or to engage in other recreational pursuits." OHIO REV. CODE ANN. § 1533.18(B).

[54] *Miller*, *supra* note 47 at 1296.

[55] Miller, *Id.* at 1297.

[56] *Fuehrer*, *supra* note 45 at 450.

[57] OHIO JUR., *supra* note 1, at *Premises* § 1.

[58] *McKinney v. Hartz & Restle Realtors, Inc.*, 510 N.E.2d 386, 388 (Ohio 1987).

[59] *Id.* at 388 (quoting *Elliott v. Nagy*, 488 N.E.2d 853, 854 (Ohio 1986)).

[60] OHIO JUR., *supra* note 1, at *Premises* § 7.

[61] *Id.* § 8.

[62] *Id.* § 23; *Ramsey v. Village of Piketon*, 184 N.E.2d 482 (Ohio App. 4th Dist. 1961).

[63] *Fuehrer*, *supra* note 45 at 449–451.

[64] *Id.* at 450–51.

[65] OHIO JUR., *supra* note 1, at *Premises* § 14; *Ray v. Ramada Inn N.*, 869 N.E.2d 95, 102 (Ohio App. 2d Dist. 2007).

[66] OHIO JUR., *supra* note 1, at *Premises* § 14.

[67] *Id.* § 17.

[68] *Id.* § 21.

[69] *Id.* § 4. Economic or mutual benefit is not the sole test; an alternative test describes an invitee as anyone expressly or implicitly invited to come on the premises. *Id.*

[70] *Id.* § 5.

[71] *Blair v. Ohio Dep't of Rehab. & Corr.*, 582 N.E.2d 673 (Ohio Ct. Cl. 1989).

[72] *Id.* at 677.

[73] OHIO JUR., *supra* note 1, at *Premises* § 10.

[74] *Id.*

[75] *Id.*

[76] *Id.* § 13.

[77] OHIO JUR., *supra* note 1, at *Premises* § 31. Lower courts have treated social guests as licensees or gratuitous licensees but the Supreme Court of Ohio has never expressly placed social guests in any of the traditional categories. *Id.*

[78] *Id.*

[79] *Masi v. Ohio Dep't of Transp.*, 579 N.E.2d 552 (Ohio Ct. Cl. 1989).

[80] OHIO JUR., *supra* note 1, at *Premises* § 31.

[81] *Id.* § 25.

[82] Ohio Rev. Code Ann. § 2744.01(C)(2)(c).

[83] OHIO REV. CODE ANN. § 2744.05(A).

[84] *Id.* § 2744.05(C)(1).

[85] *Id.* § 2744.05(C)(2)(f).

[86] *Id.* § 2744.05(C)(1).

[87] *Id.*

[88] *Id.* § 2744.05(B)(1).

[89] *Id.*

[90] *Id.* § 2315.18. Held unconstitutional because it was part of a large act that in total was held unconstitutional in *State ex rel. Ohio Acad. of Trial Lawyers v. Steward*, 715 N.E.2d 1062 (Ohio 1999); BALDWIN'S OHIO TORT LAW, 2d. § 77:91.

[91] OHIO REV. CODE ANN. § 2315.18(B)(1).

[92] *Id.* § 2315.18(B)(2).

[93] *Id.* § 2315.18(B)(3).

[94] Like Ohio's statute limiting compensatory damages, Ohio's statute regarding punitive damages was similarly found unconstitutional. In *Arbino v. Johnson & Johnson,* 880 N.E.2d 420, 440-41 (Ohio 2007), the Ohio Supreme Court determined that the revised statute did not violate the state constitution.

[95] OHIO REV. CODE ANN. § 2315.21(E).

[96] *Id.* § 2315.21(C).

[97] *Id.* § 2315.21(D)(2)(a).

[98] *Id.* § 2315.21(D)(2)(b).

[99] *Id.* § 2315.21(D)(2)(c).

[100] *Id.* § 2315.21(D)(5).

[101] *Id.* § 2315.21(D)(6).

[102] *Id.* § 2315.20.

[103] *Id.* § 2315.20(A).

[104] *Id.*

[105] *Id.*

[106] *Id.* § 2315.20(B).

[107] OHIO JUR., *supra* note 1, at *Negligence* § 98. Some courts apply a three-part test to determine if primary assumption of risk applies: (1) Is the danger ordinary to the game? (2) Is it common knowledge this danger exists? (3) Did the injury occur as a result of the danger during the course of the game? *Santho v. Boy Scouts of Am.,* 857 N.E.2d 1255, 1260 (Ohio App. 10th Dist. 2006).

[108] *Zigler v. Avco Corp*., 846 N.E.2d 547, 551 (Ohio App. 6th Dist. 2005) (quoting KEETON, PROSSER & KEETON ON THE LAW of TORTS at 496 (5th ed. 1984)).

[109] *Holmes v. Health & Tennis Corp*., 659 N.E.2d 812, 813 (Ohio App. 1st Dist. 1995).

[110] *Id.*

[111] *Zivich v. Mentor Soccer Club, Inc*., 696 N.E.2d 201, 204 (Ohio 1998).

[112] *Id.* at 203.

[113] OHIO REV. CODE ANN. § 2305.38.

[114] The language of the recreational user statute states that it applies to owners, lessees, or occupants of premises, leaving open the possibility for it to apply to third parties using school district property. OHIO REV. CODE ANN. § 1533.181(B). In an unpublished decision, Sixth Circuit did not apply the recreational user statute to a construction company performing work on government land because, although the construction company had an easement on the land, it had no right of possession attaching to the property. *Herrington v. Boyas Excavating, Inc*., 992 F.2d 1216 (6th Cir. 1993) (table). The court stated that the recreational user statute "clearly envisions the owner, lessee, or occupier to be a party that has a right of title or possession." *Id* at 6. (quoting *Simmers v. Bentley Constr. Co*., 1991 Ohio App. LEXIS 2705, at 2 (May 19, 1991)).

[115] OHIO REV. CODE ANN. § 3313.203(A).

[116] *Id.* § 3313.203.

[117] *Id.* § 3313.203(A).