IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

HEATHER DUNCAN	)	CASE NO. 687796
	)	
Plaintiff	)	JUDGE DAVID MATIA
	)	
vs.	)	PLAINTIFF HEATHER DUNCAN'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE MOTION TO CONVERT DEFENDANTS' MOTION TO A MOTION FOR SUMMARY JUDGMENT.
CUYAHOGA COMMUNITY COLLEGE, et al.,	)	
	)	
Defendants.	)	
	)	

Now comes Plaintiff Heather Duncan, by and through her attorneys, Blake A. Dickson and Mark D. Tolles, II, of The Dickson Firm, L.L.C., and hereby files her Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, urging this Court to deny Defendants' Motion for Judgment on the Pleadings. In the alternative, Plaintiff moves this Honorable Court to convert Defendants' Motion for Judgment on the Pleadings to a Motion for Summary Judgment and to give Plaintiff thirty (30) days from the day Plaintiff's Motion is granted to respond to Defendants' Motion.

I. Introduction.

This case arises from the devastating injuries that Plaintiff Heather Duncan suffered while taking a self-defense class with the Defendants. Plaintiff Heather Duncan was a corrections officer with The City of Bedford Heights, working as a guard at the city jail. As a requirement of her job, she had to take and pass a class which included instruction on self-defense. On September 16, 2005, Heather Duncan was taking that class at Cuyahoga Community College. The class was being instructed on take down techniques to be used to subdue prisoners. The maneuvers were supposed to be taught on rubber mats. On the first day that the techniques were to be taught, the instructor teaching the class looked for the floor mats and could not find them. As a result, he postponed

teaching that technique until the next day. Instead, he taught techniques that did not involve taking a person to the ground. The next day, a different instructor, Robert King, taught the class. He also looked for protective mats and could not find them. Class was delayed while Robert King looked for the floor mats. He told the class that he could not find the mats and that they had to practice the take down techniques without the mats. At the start of the lesson he patted the floor with his hand and said to the class, "This is going to hurt." During the maneuver, Heather Duncan's partner fell on top of her and she came down hard on her left knee on the bare floor. Robert King forced Plaintiff Heather Duncan to perform the maneuver a second time. She told Mr. King she had been hurt. He told her that if she did not perform the maneuver again she would fail the class and lose her job. During her second attempt, Heather Duncan's leg collapsed and she fell to the floor again. Heather Duncan was evaluated by a security guard employed by Cuyahoga Community College who also worked as a paramedic. That individual told Heather Duncan that she needed to go to the hospital. Robert King, an employee of Cuyahoga Community College, acting within the course and scope of his employment for Cuyahoga Community College, told Heather Duncan that if she left the class and went to the hospital she would fail the class and lose her job. As a result, Heather Duncan finished the class.

As a result of her injuries, Heather Duncan is permanently disabled from work, she is wheelchair bound and she will be disabled for the rest of her life. Her pain is so severe she had a morphine pump surgically implanted. She has had five (5) surgeries since the subject incident, all of which were necessary given the subject incident, all in attempt to recover from the subject incident. Nearly four years later she is confined to a wheelchair and in constant pain. She is unable to work. She is unable to stand for any prolonged period of time. There is no treatment that will resolve her problems. She will be confined to a wheel chair and in pain for the rest of her life. She

is thirty-five (35) years old.

II. Procedural History.

On July 9, 2009, Defendants filed a Motion for Summary Judgment.

On April 1, 2011, Defendants withdrew their Motion for Summary Judgment.

On April 8, 2011, Defendants filed a Motion for Judgment in the Pleadings.

III. Law and Argument.

Originally, the Defendants filed a Motion for Summary Judgment arguing that they were entitled to summary judgment because they are immune from liability in this case. The Defendants recently withdrew their Motion for Summary Judgment. Thereafter, the Defendants filed a Motion for Judgment on the Pleadings, making the same argument, that they are immune from liability in this case. Defendant's Motion for Judgment on the Pleadings should either be denied or it should be converted to a Motion for Summary Judgment since it asks the Court to consider a number of matters outside the pleadings. If Defendant's Motion for a Judgment on the Pleadings is converted to a Motion for Summary Judgment, Plaintiff asks for thirty (30) days after the motion is converted in which to respond to Plaintiff's Motion for Summary Judgment.

A. If the allegations in Plaintiff's Complaint are presumed to be true then Defendants Motion for Judgment on the Pleadings must clearly be denied.

As stated in their Motion, the Defendants are seeking a dismissal pursuant to Ohio Civil Rule 12(C). Ohio Civil Rule 12(C) provides, "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." However, the basis of Defendant's Motion for Judgment on the Pleadings is their argument that they are immune from liability under Ohio Revised Code Chapter 2744.

The Defendants argue on page 3 of their motion, "It is appropriate for the Court to grant a

motion for judgment on the pleadings if it can construe all material allegations in the complaint in favor of the non-moving party, and if it finds that the plaintiff could prove no set of facts entitling it to relief. *Gawlowski v. Miller Brewing Co.* (1994), 96 Ohio App. 3d 160, 163."

The Defendants include in their motion a list of relevant facts taken from Duncan's Complaint which they argue are presumed to be true in this case for purposes of this motion only. If the allegations made in Plaintiff's complaint are presumed to be true then Defendants' Motion for Judgment on the Pleadings should clearly be denied.

In her complaint, Plaintiff alleges, among other things: that Defendant Greg Soucie was in charge and responsible for running the training program at Cuyahoga Community College; that the training program involved a self-defense class; that Heather Duncan and other members of the class engaged in a physical activity that resulted in their bodies striking the ground; that the Defendants failed to use mats on the ground or take other safety precautions; that Heather Duncan suffered injury as result of the class; that Heather Duncan entered into a contract with the Defendants; that the Defendants breached that contract; that Heather Duncan suffered harm as a result of that breach; that the Defendants were wanton, reckless, proceeded in bad faith, and operated with actual malice; that the Defendants negligently investigated, interviewed, hired, trained, placed, monitored, supervised, disciplined and retained their employees; that the Defendants are not entitled to immunity from suit; that Defendant Cuyahoga Community College is not a political subdivision; and that the defense of sovereign immunity is not available to a community college in a tort action.

The Defendants state on Page 1 at Footnote 1 that, "Given the procedural posture of this matter, the material facts are taken from Duncan's Complaint and presumed to be true for purposes of this motion only." In order to prevail on a Civil Rule 12 motion to dismiss, the Court must construe all material allegations in Plaintiff's Complaint in favor of the non-moving party, and then,

only grant the motion to dismiss if the Court finds that the Plaintiff could prove no set of facts entitling them to relief. In Plaintiff's Complaint, at Numbered Paragraph 7, Plaintiff alleges, "Defendant Cuyahoga Community College is a "Community college" as defined by O.R.C. § 3354.01(C). Plaintiff further alleges in her complaint that Defendant Cuyahoga Community College it is not a "Community college district" as defined by O.R.C. § 3354.01(A). As a result, it is not entitled to any immunity as it is not a political subdivision." If this Court is to construe the allegations in Plaintiff's Paragraph 7 as true, then Cuyahoga Community College is not a political subdivision and therefore is not entitled to any type of sovereign immunity pursuant to Chapter 2744 or otherwise, and Defendants' Motion for Judgment on the Pleadings must clearly be denied.

In Numbered Paragraph 8, Plaintiff alleges in her Complaint, "Further, the defense of sovereign immunity is not available to a community college district in a tort action for negligence. The within case is a tort action for negligence." If the Court is to construe that allegation as true then the defense of sovereign immunity is not available to the Defendants in this case and Defendant's Motion for Judgment on the Pleadings must clearly be denied.

If the allegations in Plaintiff's Complaint are to be construed as true, "the Defendants conducted a self-defense class which Heather Duncan attended. This was a proprietary function as defined by Ohio Revised Code § 2744.02(B)(2)." Further, as alleges in Numbered Paragraph 16, Plaintiff Heather Duncan suffered injuries and damages as the direct and proximate result of the negligence and/or recklessness and/or wantonness of the Defendants, individually and/or by and through their agents and/or employees." Further, pursuant to Numbered Paragraph 17, "Plaintiff Heather Duncan suffered injury on the property of and/or within or on the grounds of, a building that is used in connection with the performance of a governmental function." Further, pursuant to Numbered Paragraph 18, "the Defendants were negligent and/or reckless and/or wanton in the way

the subject training program was planned." If all these things are true, then the defense of sovereign immunity is not available to the Defendants and their Motion for Judgment on the Pleadings must clearly be denied.

B. Either Defendants' Motion for Judgment on the Pleadings should be denied, or, it should be converted to a Motion for Summary Judgment.

Plaintiff urges this Court to simply deny Defendants' Motion for Judgment on the Pleadings. Clearly, if all of the allegations made in Plaintiffs' Complaint are taken as true, then the defense of sovereign immunity is not available to the Defendants and Defendants' Motion for Judgment on the Pleadings should be denied. In the alternative, since the granting of Defendants' Motion for Judgment on the Pleadings requires the Court to consider matters outside of the Pleadings, if Defendants' Motion for Judgment on the Pleadings is not denied, it should be converted to a Motion for Summary Judgment.

On page 3 of their Motion for Judgment on the Pleadings the Defendants concede that, "a motion for judgment on the pleadings attacks the sufficiency of the pleadings and is evaluated under the same standard as a motion to dismiss. *Nelson v. Pleasant* (1991), 73 Ohio App. 3d 479, 481-82."

> In granting a dismissal of a complaint under Civ.R. 12(B)(6), "it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *LeRoy v. Allen, Yurasek & Merklin,* 114 Ohio St.3d 323, 2007 Ohio 3608, 872 N.E.2d 254, at P 14, citing *Doe v. Archdiocese of Cincinnati,* 109 Ohio St.3d 491, 2006 Ohio 2625, 849 N.E.2d 268, at P 11. **The allegations of the complaint must be construed as true, and the court may not consider any evidentiary materials outside of the complaint**. Civ.R. 12(B); *LeRoy,* at P 14, citing *Maitland v. Ford Motor Co.,* 103 Ohio St.3d 463, 2004 Ohio 5717, 816 N.E.2d 1061, at P 11. "Furthermore, the complaint's material allegations and any reasonable inferences drawn therefrom must be construed in the nonmoving party's favor." *LeRoy,* at P 14, citing *Kenty v. Transamerica Premium Ins. Co.,* 72 Ohio St.3d 415, 418, 1995 Ohio 61, 650 N.E.2d 863.

Goodwin v. Schimmoeller Trucking, (2008), 2008 Ohio 163, 2008 Ohio App. LEXIS 136, ¶ 9.

The Ohio Supreme Court held in *The State Ex Rel. the V Companies v. Marshall Cty. Aud.*, (1998) 81 Ohio St. 3d 467, 470-471, 1998 Ohio 329, 692 N.E. 2d 198, 201-202 (emphasis added)

> *Civ.R. 12(B)* provides:
> "When a motion to dismiss for failure to state a claim upon which relief can be granted **presents matters outside the pleading** and such matters are not excluded by the court, **the matters shall be treated as a motion for summary judgment and disposed of as provided in *Rule 56***. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in *Rule 56*. ***All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."*** **(Emphasis added.)**
>
> Under *Civ.R. 12(B)* and *56(C)*, **a court must notify all parties at least fourteen days before the time fixed for hearing when it converts a motion to dismiss for failure to state a claim into a motion for summary judgment** *Petrey v. Simon (1983), 4 Ohio St. 3d 154, 4 Ohio B. Rep. 396, 447 N.E.2d 1285*, paragraphs one and two of the syllabus; *Civ.R. 56(C)* ("The motion shall be served at least fourteen days before the time fixed for hearing."). "'The primary vice of unexpected conversion to summary judgment is that it denies the surprised party sufficient opportunity to discover and bring forward factual matters [that] may become relevant only in, the summary judgment, and not the dismissal, context.'" *Petrey, 4 Ohio St. 3d at 155, 4 Ohio B. Rep. at 398, 447 N.E.2d at 1287*, quoting *Portland Retail Druggists Assn. v. Kaiser Found. Health Plan (C.A.9, 1981), 662 F.2d 641, 645*, analyzing comparable provisions of *Fed.R.Civ.P. 12(b)*. The surprised party is generally the nonmoving party. *Id. at 155, 4 Ohio B. Rep. at 397-398, 447 N.E.2d at 1286-1287*.

Therefore, pursuant to the specific language of Ohio Civ.R. 12(B), "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

Since Defendants' Motion for Judgment on the Pleadings clearly requires the Court to

consider matters that are beyond the pleadings, unless it is persuaded to deny Defendants' Motion for Judgment on the Pleadings, the Court must convert Defendants' Motion for Judgment on the Pleadings to a Motion for Summary Judgment.

C. The Defense of sovereign immunity is not available to Defendant Cuyahoga Community College.

The Defendants argue on Page 4 of their motion that Ohio Revised Code § 3354.01(A) expressly defines a "community college district" (such as Tri-C) as a political subdivision of the state." However, Plaintiff expressly alleges in her complaint that Defendant Cuyahoga Community College is a "community college" as defined by Ohio Revised Code § 3354.01(C). Plaintiff further alleges that Cuyahoga Community College is not a "community college district" as defined by Ohio Revised Code § 3354.01(A). Plaintiff further alleges, "As a result, it is not entitled to any immunity as it is not a political subdivision."

Defendants state in their Motion for Judgment on the Pleadings in a rather conclusory fashion that Tri-C is a community college district. Defendants do not make any offer of proof as to why Defendant Cuyahoga Community College is a community college district as opposed to a community college. Either this Court should construe all of Plaintiff's allegations made in her Complaint as true, and therefore, for the purpose of Defendants' Motion for Judgment on the Pleadings, Defendant Cuyahoga Community College is a community college and not a community college district, and therefore it is not a political subdivision, and therefore the doctrine of sovereign immunity does not apply, and Defendants' Motion should be denied. Or, this Court must conclude that Defendants' Motion for Judgment on the Pleadings requires an inquiry of matters outside of the pleadings, and as a result should be converted into a Motion for Summary Judgment and Plaintiff should be given

an additional thirty (30) days to respond to that motion.

Defendants cite *Scott v. Dennis*, 8th Dist. No. 94685, 2011-Ohio-12, an unreported case from the Eighth District Court of Appeals in support of their argument that Cuyahoga Community College is a political subdivision and therefore enjoys blanket immunity under the first tier of the analysis. However, this argument ignores the *Ziss* case which clearly held the defense of sovereign immunity is no longer available to a community college district in a tort action for negligence. The crux of Defendants' Motion for Judgment on the Pleadings is that Defendant Cuyahoga Community College is a political subdivision and is therefore entitled to sovereign immunity pursuant to O.R.C. §2744.02(A)(1). However, in *Ziss v. Cuyahoga Community College District*, (1983), 13 Ohio App. 3d 167, 468 N.E. 2d 752, the Eighth Appellate District Court held in the Syllabus that, "The defense of sovereign immunity is no longer available to a community college district in a tort action for negligence."

In *Ziss*, the appellant, Ruth Ziss, was a student at Cuyahoga Community College (hereafter referred to as "CCC"). She sued CCC after she was robbed and beaten by an armed assailant while walking to the campus library. She claimed that CCC failed to maintain adequate security for the protection of the students, and, as a result, she suffered physical injuries and other damages. CCC moved for summary judgment, arguing that it was entitled to sovereign immunity. The trial court granted CCC's Motion for Summary Judgment. Ruth Ziss appealed the trial court's decision to the Eighth Appellate District Court of Appeals. The Eighth Appellate District Court of Appeals overruled the decision of the Trial Court and held as follows:

> The question presented for our review is whether the defense of sovereign immunity is available to a community college district in an action seeking damages for injuries allegedly caused by the college's negligence. For the reasons set forth

below, we find the defense to be no longer available, and we therefore reverse the judgment of the trial court.

Ziss, 13 Ohio App. 3d at 167, 468, N.E. 2d at 752.

The Court went on to say:

A "community college district" is statutorily defined, in part, as a "political subdivision of the state" (*R.C. 3354.01[A]*). Heretofore, sovereign immunity was available to an institution of higher learning as a defense to tort liability, at least for negligence while performing governmental functions, since, it was held, such an institution partook of the state's immunity. See *Wolf* v.. *Ohio State University Hospital* (1959), *170 Ohio St. 49 [9 O.O.2d 416]*.

However, recent decisions by the Ohio Supreme Court in which the doctrine of sovereign immunity was abrogated in certain areas lead us to conclude that an institution of higher education should no longer be able to avail itself of this defense.

In *Haverlack* v. *Portage Homes Inc*. (1982), *2 Ohio St. 3d 26*; *Enghauser Mfg. Co.* v. *Eriksson Engineering Ltd*. (1983), *6 Ohio St. 3d 31*; and *Strohofer* v. *Cincinnati* (1983), *6 Ohio St. 3d 118*, the court held that the defense of sovereign immunity is not available to a municipal corporation in an action for damages alleged to be caused by the tortious conduct of the municipality. The court in *Enghauser, supra*, at 34-35, stated:

"It would indeed be a sad commentary on our concept of justice if this court continued to endorse the belief that an individual should sustain an injury rather than the municipality be inconvenienced.

"* * *

"* * * If municipalities are to expose the people and their property to negligent acts, then they must expect to respond to suit. Municipal corporations in Ohio should no longer receive protection from a doctrine whose only claim to judicial integrity is that it is ancient."

In *Carbone* v.. *Overfield* (1983), *6 Ohio St. 3d 212, 213*, the court extended its reasoning in the previous cases to deny the defense of sovereign immunity to a board of education in a negligence action, stating:

"* * * The elimination of governmental immunity to all public bodies within the state is consistent with accepted tort principles and the reasonable expectations of the citizenry with respect to its government. Accordingly, in keeping with our prior expressions on the subject, *e.g., Haverlack, supra; Enghauser, supra; Strohofer, supra: Dickerhoof [*v. *Canton* (1983), *6 Ohio St. 3d 128]*, *supra*, boards of education are now liable for tortious acts in the same manner as private

individuals."

The court in *Carbone* supported its holding first by observing that boards of education are statutorily authorized to purchase liability insurance to protect themselves, *R.C. 3313.203*, and second by repudiating as archaic public policy the notion that an individual should suffer an injury rather than a governmental entity be inconvenienced. *Id. at 214*.

That reasoning applies with equal force and logic to the case *sub judice*. *R.C. 3354.09(M)(3)* permits the board of trustees of a community college district to purchase liability insurance. The "inconvenience" rationale has been rejected as contrary to public policy. Further, we see no real difference between a community college district and a board of education which would permit us logically to retain the defense of sovereign immunity only in favor of the former, especially in view of *Carbone's* holding that this defense is eliminated as to all public bodies. Accordingly, appellant's first assignment of error is well-taken.

Our finding that sovereign immunity is no longer available to a community college district as a defense to a tort action makes it unnecessary for us to address appellant's second assignment of error.

Ziss, 13 Ohio App. 3d at 167- 168, 468, N.E. 2d at 752-754, (emphasis added).

In Ziss the Eighth Appellate District Court of Appeals expressly held that sovereign immunity is no longer available to a community college district. This decision has never been overturned. This decision is directly on point. Defendants' Motion for Judgment on the Pleadings should clearly be denied.

D. Plaintiff Heather Duncan was injured on the property of Defendant Cuyahoga Community College. Therefore there is no immunity.

It is not in dispute that the two day self defense course was taught at CCC.

O.R.C. 2744.02(B) provides in part (emphasis added):

(B) 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:

* * *

> (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**.
>
> * * *
>
> (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.

Defendants concede that ORC §2744.02(B)(4) creates an exception to political subdivision immunity. However, the Defendants mischaracterize the exception. In *Hubbard v. Canton City School Board of Education*, (2002), 97 Ohio St. 3d 451, 780 N.E. 2d 543, the Ohio Supreme Court held in the Syllabus that (emphasis added);

> The exception to political subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of the buildings that are used in connection with the performance of a governmental function. **The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings.**

The Court went on to say;

> The plain language of the subsection supports the conclusion that the General Assembly intended to permit political subdivisions to be sued **in all cases where injury results from the negligence of their employees occurring within or on the grounds of any government building.**

Hubbard, (2002), 97 Ohio St. 3d at 454, 780 N.E. 2d at 546.

As alleged in Plaintiff's complaint, Robert King conducted the self defense class where techniques were taught regarding how to defend against an attack, on a floor with no protective mats. Reasonable minds could certainly conclude that it was negligent of Mr. King to teach these techniques without protective mats. It is not in dispute that Heather Duncan suffered serious and permanent injuries as the result of performing these techniques without using a mat.

The Ohio Supreme Court concluded in *Hubbard*;

> **We therefore hold that the exception to political-subdivision immunity in *R.C. 2744.02(B)(4)* applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function. The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings.** Since the injuries claimed by plaintiffs were caused by negligence occurring on the grounds of a building used in connection with a government function, *R.C. 2744.02(B)(4)* applies and the board is not immune from liability.

Hubbard, (2002), 97 Ohio St. 3d at 455, 780 N.E. 2d at 547. The operation of a police department and the running of a police academy are clearly governmental functions. See *McCloud v. Nimmer*, (1991), 72 Ohio App. 3d 533, 595 N.E. 2d 492; *Haas v. Akron*, (1977) 51 Ohio St. 2d 135, 364 N.E.2d 1376; *Haverlack v. Portage Homes, Inc.* (1982), 2 Ohio St. 3d 26, 442 N.E. 2d 749. The Defendants agree, as stated on page 5, that the actions of the Defendants in this case constituted a governmental function. Plaintiff alleges in Paragraph 17 of Plaintiff's Complaint that, "Plaintiff Heather Duncan suffered injury on the property of and/or within or on the grounds of, a building that is used in connection with the performance of a governmental function." Reasonable minds could clearly come to the conclusion that it was negligent to teach take down techniques on a hard class

room floor without using the protective mats that are usually used for these classes.

On Page 4 of their Motion for Judgment on the Pleadings, the Defendants argue that pursuant to the second tier of the analysis, there are five exceptions to the general grant of immunity for a political subdivision. The Defendants concede that if Heather Duncan can prove that she suffered an injury, caused by the negligence of Tri-C's employees, that occurs within or on the grounds of Tri-C, as due to physical defects within or on the grounds of buildings used in connection with the performance of a governmental function, then she is able to prove that one of the exceptions to sovereign immunity applies.

Heather Duncan clearly alleges on Page 17 of her Complaint, "Plaintiff Heather Duncan suffered injury on the property of and/or within or on the grounds of, a building that is used in connection with the performance of a governmental function." She further alleges at Paragraph 18, "the Defendants were negligent and/or reckless and/or wanton in the way the subject training program was planned." At Paragraph 23 Plaintiff Heather Duncan alleges, "as a direct and proximate result of this negligence and/or recklessness or wantonness Heather Duncan suffered serious and permanent injuries." In Paragraph 34 of her Complaint, Plaintiff Heather Duncan alleges, "on or about September 16, 2005, and at all times herein relevant, Defendants, jointly and/or severally and/or concurrently, individually and/or by and through their agents and employees and/or servants and/or officers and/or directors, were negligent and/or reckless and/or wanton in one or more of the following respects; a. In creating and/or permitting creation of and/or permitting the continuing existence of a defect and/or dangerous condition and/or nuisance on the above-described premises. b. In failing to properly and adequately warn Plaintiff Heather Duncan about a defect and/or dangerous condition and/or nuisance on the above-described premises. c. In failing to act

reasonably once Defendants knew or should have known about a defect and/or dangerous condition and/or nuisance on the above described premises. d. In failure to properly screen, interview, hire, train, monitor and/or maintain their employees and/or agents. e. In failing to have adequate and/or appropriate procedures and/or protocols. f. With respect to the instructions that were given to Heather Duncan and to the rest of her class. g. With respect to the procedures that were followed in the class."

Therefore, Plaintiff Heather Duncan has clearly alleges in her Complaint that she suffered an injury, caused by the negligence of Tri-C's employees, that occurred within or on the grounds of Tri-C, and that was due to physical defects within or on the grounds of buildings in connection with the performance of the governmental function. As result, based on the Defendants' express concession on Page 6 of their motion, and construing all of the facts alleged in Plaintiff's Complaint as true, Plaintiff is able to prove sovereign immunity. Therefore, the Court should deny Defendant's Motion for Judgment on the Pleadings, as Plaintiff has clearly made allegations that if proven true would result in an exception to sovereign immunity.

The Defendants concede that in Duncan's Complaint she alleges a defect in Numbered Paragraph 34. The Defendants continually argue that a mere recitation of statutory language in order to sidestep immunity is not enough to survive dismissal. As is obvious from Plaintiff's Complaint, she certainly does not simply recite statutory language. Plaintiff makes specific allegations throughout her Complaint. She makes specific allegations about specific individuals involved in the training programs. She makes specific allegations about the fact that she was on the property of Defendant Cuyahoga Community College, a fact that seems to be not in dispute. The parties agree that Tri-C was engaged in a governmental function at the time Heather Duncan was injured. Heather

Duncan makes specific allegations that she suffered serious and permanent injuries. Defendants have now done discovery and received numerous expert reports as well as thousands of pages of medical records documenting Heather Duncan's specific injuries. Once again, if the court requires specific proof of Heather Duncan's specific injuries relative to Defendants' Motion for Judgment on the Pleadings, then obviously the Court's consideration of Defendants' Motion for Judgment on the Pleadings requires consideration of materials outside of Plaintiff's Complaint which would compel the court to either deny Defendants' Motion for Judgment on the Pleadings or in the alternative convert Defendants' Motion for Judgment on the Pleadings to a Motion for Summary Judgment and give Plaintiff 30 days to respond. During those 30 days, Plaintiff can certainly file with this Court affidavits with her experts, copies of medical records produced in discovery, an affidavit from Plaintiff Heather Duncan detailing her injuries etc. However, it appears that Heather Duncan's serious and permanent injuries are not in dispute.

In her complaint Plaintiff Heather Duncan makes specific allegations about the actual decision which gives rise to liability in this case. Heather Duncan, in her Complaint, specifically talks about the decision not to use safety mats which led to hear injury. Plaintiff Heather Duncan specifically articulates in her Complaint that she was attending a self-defense class. (See Paragraph 12 of Plaintiff's Complaint). Then, in Paragraph 13, Plaintiff specifically alleges that the Defendants conducted a self-defense class where the participants, including Plaintiff Heather Duncan, were required to engage in physical activity that resulted in their bodies striking the ground, and the Defendants failed to use mats on the ground or take other safety precautions. Plaintiff goes on to allege at Paragraph 27 of her Complaint that, "The decision not to use mats was a routine, ministerial decision and not an exercise of judgment or discretion." Therefore, Plaintiff certainly

goes beyond a mere recitation of statutorily language in her Complaint. She specifically articulates the facts of her case. She specifically articulates in her Complaint: that she was attending a self-defense class at Cuyahoga Community College; that the class was a requirement of her job; that she was on the grounds of Cuyahoga Community College; that she was forced to engage in a particular self-defense maneuver that resulted in her body striking the ground; that the Defendants failed to use protective mats during this exercise which is what directly and proximately caused her injury. Clearly, Plaintiff has pled this case with enough specificity to survive a Motion for Judgment on the Pleadings.

The Defendants go on to argue that this Court is the entity empowered to determine whether the absence of mats constitutes a "physical defect," as a matter of law. Certainly, the determination of whether or not the absence of mats is a physical defect is not a determination of law. Instead, it is a determination of fact and should be made by a jury. If the Court assumes that all of the allegations in Plaintiff's complaint are true, then the decision not to use mats does give rise to an exception to sovereign immunity. Plaintiff has alleged that Robert King's decision not to use mats was clearly a choice between alternative courses of conduct. As a result, the Defendants are not immune. Further, if Robert King's decision was done in a wanton and reckless manner, then sovereign immunity does not apply. Clearly a determination of whether or not Robert King's conduct was done in a wanton or reckless manner is one that should be made by the jury and not a determination that the Court should make.

The Defendants argue that the absence of mats does not constitute a "physical defect." Defendant argues that Duncan raises no violations of building codes concerning the classroom's construction nor does she raise the fact that mats were required by law to be present. Defendants go

on to argue that Plaintiff does not contend that the floor functioned differently than as intended. All of these arguments ignore the Ohio Supreme Court's decision in *Hubbard v. Canton City School Board of Education*, (2002), 97 Ohio St. 3d 451, 780 N.E. 2d 543, where the Ohio Supreme Court held in the Syllabus that (emphasis added);

> The exception to political subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of the buildings that are used in connection with the performance of a governmental function. **The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings.**

The Court went on to say;

> The plain language of the subsection supports the conclusion that the General Assembly intended to permit political subdivisions to be sued **in all cases where injury results from the negligence of their employees occurring within or on the grounds of any government building.**

Hubbard, (2002), 97 Ohio St. 3d at 454, 780 N.E. 2d at 546.

As alleged in Plaintiff's complaint, Robert King conducted the self defense class where techniques were taught regarding how to defend against an attack, on a floor with no protective mats. Reasonable minds could certainly conclude that it was negligent of Mr. King to teach these techniques without protective mats. It is not in dispute that Heather Duncan suffered serious and permanent injuries as the result of performing these techniques without using a mat.

The Ohio Supreme Court concluded in *Hubbard*;

> **We therefore hold that the exception to political-subdivision immunity in *R.C. 2744.02(B)(4)* applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a**

> **governmental function. The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings.** Since the injuries claimed by plaintiffs were caused by negligence occurring on the grounds of a building used in connection with a government function, *R.C. 2744.02(B)(4)* applies and the board is not immune from liability.

Hubbard, (2002), 97 Ohio St. 3d at 455, 780 N.E. 2d at 547. As stated above, the Ohio Supreme Court in *Hubbard* clearly ruled that this exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings. There is no question that Plaintiff Heather Duncan was injured on the grounds of Cuyahoga Community College. Therefore, a determination must be made as to whether or not the Defendants were negligent. Plaintiff has clearly alleges that the employees of Cuyahoga Community College were negligent, and Plaintiff has described their negligence. Therefore, if this Court is to construe all of Plaintiff's allegations contained in her Complaint as true, then Defendants' Motion for Judgment on the Pleadings must clearly be denied. If the court must consider anything outside of Plaintiff's Complaint, then Defendants' Motion for Judgment on the Pleadings must be converted into a Motion for Summary Judgment.

Defendants argue on Page 8 that Plaintiff's claims cannot succeed because she cannot demonstrate negligence on the part of a Tri-C employee. For the purpose of Defendants' Motion for Judgment on the Pleadings, Plaintiff does not need to prove negligence on the part of the Tri-C employee, Plaintiff simply needs to allege negligence, as all of the allegations contained in Plaintiff's Complaint are construed to be true. Plaintiff has clearly alleges negligence on the part of a Tri-C employee. Plaintiff alleges negligence with specificity. Plaintiff alleges that they were negligent in the way they investigated, interviewed, hired, trained, supervised, and retained their employees. Plaintiff alleges that the Defendants were negligent in forcing the participants of the self-defense

class to do a maneuver whereby their bodies struck the ground without the use of protective mats. Clearly, reasonable minds could conclude, that forcing people to do a takedown maneuver, whereby their bodies strike the hard ground, without the use of protective mats, mats that were normally used for this maneuver, mats that the instructors looked for both days of the class, and could not find, was an act of negligence. Plaintiff's allegation of negligence is supported by the fact that the instructor on the first day decided not to teach the take down maneuver because he could not find the mats. The second day of class was delayed while the instructor looked for the mats. When he could not find them, he patted the floor and said to the class, "This is going to hurt." Plaintiff alleges that not only were the employees of Cuyahoga Community College negligent, they were reckless, they were wanton. Certainly if the court is to construe those allegations as true then Defendants' Motion for Judgment on the Pleadings should be denied.

Defendants argue that the absence of mats on a classroom floor is clearly observable and therefore the condition was open and obvious. However, Plaintiff has alleges in her Complaint that the training program was a requirement of her job. She has alleges that the Defendants were negligent and/or reckless and/or wanton in their conduct in this case. If this court converts Defendants' Motion for Judgment on the Pleadings to a Motion for Summary Judgment, Plaintiff will provide an affidavit confirming that the instructors at Cuyahoga Community College told her that she had no choice but to do the maneuver. They told her that she was to perform the maneuver, without the benefit of protective mats, or she would fail the class and lose her job. In fact, Plaintiff Heather Duncan was not only forced to perform this dangerous maneuver and strike the ground once, she was forced to do it twice. Her instructor told her that if she did not perform the maneuver twice, she would fail the class and lose her job. Reasonable minds could certainly come to the conclusion

that Heather Duncan acted reasonably and was therefore not negligent, and was therefore not contributorally negligent. Reasonable minds could likewise come to the conclusion that the actions of the Defendants, by and through their agents, were not only negligent, but reckless and/or wanton. Reasonable minds could further come to the conclusion that the actions of the Defendants by and through their agents was done with actual malice. The Defendants clearly exhibited a reckless disregard for the rights and safety of others including Plaintiff Heather Duncan such that significant harm was substantially certain to occur. Therefore, reasonable minds could certainly conclude that the Defendants acted with actual malice.

The Defendants have misconstrued the analysis of what constitutes a "physical defect" by arguing that it is limited to an actual defect with the actual property. The Ohio Supreme Court has clearly articulated that this exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings. The Ohio Supreme Court has clearly concluded that in all cases where injury results from the negligence of their employees occurring within or on the grounds of any government building, political subdivisions can be sued. Furthermore, the Defendants make the unbelievable assertion that this court should rule, on a Motion for Judgment on the Pleadings, that the Plaintiff cannot prove that the Defendants were negligent. The Plaintiff does not have to prove the Defendants were negligent to overcome Defendants' Motion for Judgment on the Pleadings, she simply needs to allege that the Plaintiffs were negligent in her complaint, which she has clearly done, with specificity.

Defendants argue that Plaintiff cannot prove that the Defendants exercised their judgment or discretion with a malicious purpose, in bad faith, or in a wanton or reckless manner. Plaintiff has clearly alleges that Defendants' conduct demonstrated malicious purpose, bad faith, and that the

employees of the Defendants acted in a wanton and reckless manner and the Plaintiff has gone beyond simply alleging the nature of Defendants' conduct by describing Defendants' conduct. Reasonable minds can certainly conclude that telling a young woman that she must perform a dangerous takedown maneuver on a hard floor without the benefit of protective mats, or she would lose her job, is conduct that was done with malice, conduct that was done with a conscious disregard for the rights and safety of others, such that significant harm was substantially certain to occur. In fact, it is entirely likely that any jury would make that conclusion since significant harm did occur in this case. Plaintiff Heather Duncan is now permanently disabled, wheelchair bound, unable to ever recover from her injuries, because the Defendants in this case, by and through their employees, intimidated her, harassed her, and forced her to perform a dangerous self-defense maneuver, in reckless disregard for her rights and safety, such that significant harm inevitably and predictably occurred to Plaintiff Heather Duncan. This Court should either deny Defendants' Motion for Judgment on the Pleadings, as Plaintiff has clearly alleged malice bad faith and wanton and reckless conduct, or this Court should convert Defendants" Motion for Judgment on the Pleadings to a Motion for Summary Judgment and give Plaintiff thirty (30) days to document these behaviors.

Defendant argues that to survive dismissal Duncan needs to come forward with some set of facts that shows that Tri-C's employees acted wantonly recklessly in bad faith or with malice. Clearly forcing people to do a dangerous takedown maneuver on a hard floor when you are supposed to use protective mats, and the facility has protective mats for that purpose, without using those protective mats, is specific conduct which is wanton, reckless, done in bad faith, and done with malice, as defined by conduct that was done with a conscious disregard for the rights and safety of others such that significant harm was substantially certain to occur. See *Barnes v. University*

Hospitals of Cleveland, (2006) 2006- Ohio- 6266 citing *Preston v. Murty* (1987), 32 Ohio State 33 34 at 336, 512 N.E.2d 1174. "Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. . . . . *Fox v. Daly* (Sept. 26, 1997), Trumbull App. No. 96-T-5453, 1997 Ohio App. LEXIS 4412, [1997 WL 663670], (quoting *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772, 663 N.E.2d 384). *Henney* at paragraphs 48-50. *Doe v. Jackson Local School Dist*, (2007) Stark App. No. 2006 CA 00212, 2007 Ohio 3258 at ¶ 38; *Sisler v. Lancaster*, Fairfield App. No. 09-CA-47, 2010 Ohio 3039." *Anderson v. City of Massillon*, 2011 Ohio 1328, ¶53 (Ohio Ct. App., Stark County Mar. 21, 2011).

"[W]hether an individual acted manifestly outside the scope of employment" and whether the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner generally are questions of fact. *Maccabee v. Mollica*, 2010 Ohio 4310, ¶17 (Ohio Ct. App., Athens County Sept. 2, 2010).

Issues regarding malice, bad faith, recklessness and wanton conduct are generally questions left to the jury to resolve. *Shadoan v. Summit Cty. Children Servs. Bd.*, 9th Dist. No. 21486, 2003 Ohio 5775, at ¶14. *Spears v. Akron Police Dep't*, 2010 Ohio 632 (Ohio Ct. App., Summit County Feb. 24, 2010).

Generally, the issue of malice, bad faith, and wanton or reckless misconduct is a question for the jury. *Johnson v. Baldrick*, (2007), Butler App. No. CA, 2007-01-013, 2008 Ohio 1794, ¶33

E. ORC §2744.03(A)(5) does not apply.

Plaintiff maintains that the Defendants are not entitled to any political subdivision immunity pursuant to *Ziss v. Cuyahoga Community College District*, (1983), 13 Ohio App. 3d 167, 468 N.E.

2d 752 as cited above. However, even if the *Ziss* case did not apply, ORC §2744.03(A)(5) would not apply to this case. ORC §2744.03(A)(5) provides:

> (5) The 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.**

In *Pope v. Trotwood-Madison City School District Board of Education*, (2004), 2004 Ohio 1314, 2004 Ohio App. LEXIS 1159, the Second Appellate District Court of Appeals held (emphasis added);

> As discussed supra, *R.C. 2744.03(A)(3)* provides that a political subdivision is immune from liability if the employee's act that gave rise to the claim of liability "was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee." We have held that "some positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved is required in order to demonstrate an exercise of discretion." *Addis v. Howell (2000), 137 Ohio App.3d 54, 60, 738 N.E.2d 37*. In *Addis*, we adopted this view with respect to the discretion exercised under *R.C. 2744.03(A)(5)*, but we believe that our analysis also applies to the discretionary decisions discussed under *R.C. 2744.03(A)(3)*. **Routine decisions requiring little judgment or discretion are not subject to immunity pursuant to *R.C. 2744.03(A)(3)*. *Perkins v. Norwood City Schools (1999), 85 Ohio St.3d 191, 193, 1999 Ohio 261, 707 N.E.2d 868*. If an act of discretion is merely a choice between alternate courses of conduct, then almost every volitional act would involve an exercise of discretion, and such a definition would encompass virtually everything that a political subdivision might do. *Addis, 137 Ohio App.3d at 60*. Thus, viewed in the context of the duties and responsibilities of the employee's position, decisions involving the exercise of judgment are discretionary, and therefore do not create liability, whereas routine, ministerial decisions may be a basis for liability. *R.C. 2744.03(A)(3)*.**
>
> Pope's ability to recover for the alleged negligence of McKinney turns on whether McKinney's decisions were discretionary or ministerial. Some of our prior decisions provide guidance in assessing the nature of McKinney's decisions, and we will discuss these decisions briefly.

> In *Addis v. Howell, 137 Ohio App.3d 54, 738 N.E.2d 37*, the school had a system in place whereby teachers supervised the students who were departing on school buses until they were actually on the buses, but children who were riding home with an adult were simply released into the school parking lot. Eight-year-old Addis had been unsupervised in the parking lot because he had believed that his mother would pick him up. As such, school personnel were unaware that Addis's mother did not arrive as expected. Addis decided to walk home and was hit by a car along a busy road. **We held that the failure of school employees to supervise Addis had not been a discretionary decision and that the school district, therefore, was not immune from liability. We found that, like routine decisions requiring little judgment or discretion, decisions that involve inadvertence, inattention, or unobservance likewise do not involve discretion and are not covered by the immunity afforded in *R.C. 2744.03(A)*.**

Robert King's decision not to use mats was clearly a choice between alternate courses of conduct. He had the choice to teach the class using the mats or to teach the class without the mats. The Instructor who taught the class the day before decided not to teach the class without the mats. Robert King decided to teach the class without the mats. Robert King's decision was a routine, ministerial decision, and as such, may be a basis for liability.

Further, even if Robert King's decision was a discretionary decision, and Plaintiff contends that it was not, liability can still be imposed pursuant to ORC §2744.03(A)(5) if Robert King's judgment or discretion was exercised with malicious purpose, in bad faith, **or** in a wanton or reckless manner. This is clearly a question for the jury, so Defendants' Motion for Summary Judgment must be denied. Issues regarding wanton or reckless behavior are questions presented to the jury. *Fabrey v. McDonald Village Police Department*, (1994), 70 Ohio St. 3d 351, 356, 639 N.E. 2d 31 as cited in *Henney v. Shelby City School District*, (2006), 2006 Ohio 1382, 2006 Ohio App. LEXIS 1251.

F. Defendant Greg Soucie is not entitled to immunity.

Defendant CCC is not entitled to any immunity pursuant to *Ziss v. Cuyahoga Community*

College District, (1983), 13 Ohio App. 3d 167, 468 N.E. 2d 752. Therefore, Defendant Greg Soucie is certainly not entitled any immunity as an employee of Defendant CCC. Further, even if Defendant CCC and Defendant Greg Soucie were entitled to political subdivision immunity, they concede on page 11 of their motion that Defendant Greg Soucie would still be liable if his acts or omissions were with malicious purpose, in bad faith or in a wanton or reckless manner. As stated above, issues regarding wanton or reckless behavior are questions presented to the jury. *Fabrey v. McDonald Village Police Department*, (1994), 70 Ohio St. 3d 351, 356, 639 N.E. 2d 31 as cited in *Henney v. Shelby City School District*, (2006), 2006 Ohio 1382, 2006 Ohio App. LEXIS 1251. Plaintiff has alleged that the Defendants acted with malicious purpose, in bad faith and in a wanton reckless manner. Since the allegations in Plaintiff's complaint are construed to be true for the purpose of ruling on Defendants' Motion for Judgment in the Pleadings, Defendants' Motion should be denied.

G. Plaintiff has plead a proper breach of contract claim.

Defendants argue that the Court should rule against the Plaintiff on her breach of contract claim, and grant their Motion for Judgment on the Pleadings. The Plaintiff has clearly properly pled a proper breach of contract claim. Defendants continue to argue that a formulaic recitation of the elements of a cause of action is wholly insufficient to state a cognizable claim. Plaintiff clearly alleges many facts with specificity in her eleven (11) page, fifty-five (55) paragraph Complaint. Plaintiff specifically alleges that she had a contract with Cuyahoga Community College. Plaintiff specifically alleges that Defendants breached this contract and as a direct and proximate result she suffered serious and permanent injuries. Plaintiff alleges the specific conduct which she describes as a breach of contract, which conduct has been discussed above. Plaintiff clearly has plead this case with sufficient specificity to survive a Motion for Judgment on the Pleadings on her breach of

contract claim.

IV. Conclusion.

It is clear that Plaintiff has pled, with great specificity, numerous exceptions to the doctrine of sovereign immunity. Therefore, Plaintiff respectfully requests that this Honorable Court either deny Defendants' Motion for Judgment on the Pleadings, since, if the allegations contained in Plaintiff's Complaint are taken as true, the Defendants are not entitled to judgment as a matter of law on the pleadings, or, Plaintiff requests that this Honorable Court convert Defendants' Motion for Judgment on the Pleadings to a Motion for Summary Judgment, and give Plaintiff thirty (30) days to respond.

Respectfully submitted,
THE DICKSON FIRM, L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Plaintiff's Brief in Opposition to Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, Motion to Convert Defendants' Motion to a Motion for Summary Judgment, was sent by ordinary U.S. Mail, this 19th day of April, 2010, to the following:

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