[Cite as *Vidovic v. Hoynes*, 2015-Ohio-712.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

DRAGAN VIDOVIC, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
- vs -	:	**CASE NO. 2014-L-054**
JACQUELINE A. HOYNES, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 13 CV 001011.

Judgment: Affirmed.

Kenneth D. Myers, 6100 Oak Tree Boulevard, Suite 200, Cleveland, OH 44131 (For Plaintiffs-Appellants).

Lindsay Ferg Gingo, David Kane Smith, and *Krista K. Keim,* Britton Smith Peters & Kalail Co., L.P.A., 3 Summit Park Drive, Suite 400, Cleveland, OH 44131 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiffs-appellants, Dragan and Celija Vidovic, appeal from the judgment of the Lake County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, Jacqueline Hoynes, Joseph Spiccia, and Pam Goss, on the Vidovics' claims for Negligence, Gross Negligence, Spoliation of Evidence, and that the defendants' conduct was committed with malice, in bad faith, and was wanton and reckless. The issues to be determined in this case are whether school employees are

grossly negligent or act in a reckless, wanton manner when a student is allegedly bullied and suicidal, and the employees devise a plan to allow the student to meet with her guidance counselor when necessary as a response, and whether evidence is spoliated when it is destroyed, as part of the employee's typical record keeping procedure, prior to a lawsuit being filed. For the following reasons, we affirm the decision of the lower court.

{¶2} On May 9, 2013, the Vidovics filed a Complaint against Hoynes, the superintendant of the Mentor Public School District; Spiccia, the Principal of Mentor High School; and Goss, a guidance counselor at Mentor High School, on their own behalf and on the behalf of their daughter, Sladjana Vidovic's, estate.[1] They contended that in 2008, Sladjana, a junior at Mentor High School, committed suicide following months of bullying and harassment by other students at the school. They asserted that the defendants knew about the harassment/bullying, failed to take action to stop it, and did not intervene to prevent Sladjana's suicide. Count One raised a claim for Negligence and Gross Negligence. Count Two raised a claim for Spoliation of Evidence, based on the claim that notes of conversations with Sladjana were destroyed. Under Count Three, the Vidovics asserted that the defendants' actions constituted malicious purpose, bad faith, and wanton and reckless conduct, from which they were not immune under R.C. 2744.03.

{¶3} On June 17, 2013, the defendants filed an Answer, in which they raised, inter alia, the defense of immunity.

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1. In August of 2010, the Vidovics filed suit in the United States District Court for the Northern District of Ohio, in which the court "decline[d] to maintain supplemental jurisdiction" over their state law claims. *Vidovic v. Mentor City School Dist.*, 921 F.Supp.2d 775, 799 (N.D.Ohio 2013). The Vidovics' federal claims, which included due process and equal protection claims, were dismissed at the summary judgment stage. *Id.*

{¶4} The defendants filed a Motion for Summary Judgment, deemed filed on November 26, 2013. They argued that the Negligence claim must be dismissed since immunity applied. They asserted that Gross Negligence and a malicious purpose, bad faith, or wanton and reckless conduct were not proven. They also contended that their conduct was not the cause of Sladjana's death, which was caused by her severe mental illness and mood disorder. Finally, they maintained that a Spoliation claim was not established.

{¶5} The Vidovics filed a response on December 27, 2013, arguing that there was at least a genuine issue of material fact as to whether they could prevail on their claims. On March 27, 2014, the defendants filed a Reply to the Vidovics' Response.

{¶6} The following pertinent testimony and evidence were presented through depositions and the summary judgment motions.

{¶7} Sladjana was a student in the Mentor School District, where she initially attended Ridge Middle School. Sladjana's friend, Angelica Moss, explained that, while at Ridge, Sladjana had conflicts with her friends and a group of boys, who later became Sladjana's friends, who made fun of her for having an accent and being too skinny. Sladjana's brother, Goran Vidovic, said Sladjana would come home from Ridge crying because of children picking on her.

{¶8} Sladjana's middle school guidance counselor, Renee Nasca, reported meeting with Sladjana's mother to help her perform better at school and to discuss her problems in "getting along" with her friends. Although Sladjana reported name-calling, Nasca found her claims to be unsubstantiated, since the friends reported that the name-calling was reciprocated. Another claim, that Sladjana was pushed, was also unsubstantiated. Nasca did not reach the conclusion that Sladjana was bullied while at

Ridge, although she helped her with strategies for getting along with her friends.

{¶9} Megan Kinsey, the Ridge Middle School principal, testified that Sladjana had reported her parents becoming physical, which prompted the involvement of Children's Services, although there was no indication that this claim was ultimately found to be with merit. Kinsey testified that Sladjana also had problems with "peer interaction."

{¶10} Timothy O'Keefe, Coordinator of Related Student Services for the Mentor School District, testified that in August 2006, Sladjana and her mother requested that she be permitted to move to a different middle school due to "issues with students" and harassing phone calls. The transfer was not allowed.

{¶11} Sladjana began attending Mentor High School as a sophomore in the 2007-2008 school year. During that time, she complained to her family and friends that she was being picked on and reported that she had informed the school of these problems.

{¶12} Moss testified that, while at Mentor High, someone threw pizza at Sladjana, which she reported to a security guard. Sladjana also received harassing phone calls and was told to go back to Croatia, which she reported to the school. Sladjana told Moss she was having problems at home and said that her dad hit her.

{¶13} Jelena Jandric, a close friend of Sladjana, described that Sladjana hung out with a group of "gangster" kids who she believed were a bad influence. She saw her being called names such as "Slutidjana," and was told that she was made fun of for being from Croatia and that someone dumped her purse. Adrian Beganovic, another friend, also witnessed Sladjana being called similar names, and saw her "shoulder checked" or bumped, in the hallway a few times. Jandric and Beganovic both believed

that Sladjana and her parents talked to the school but nothing was done to stop these incidents. Jandric knew that Sladjana spoke with Goss frequently regarding her problems and also reported issues to Spiccia.

{¶14} Courtney Nelson testified that Sladjana was involved in a few arguments and also got in a fight in which Sladjana spilled water on another girl, who then hit her. Sladjana responded to name calling with insults of her own. Nelson also indicated that Sladjana sometimes skipped class to meet with her. A copy of a Behavior Detail Report was part of the record, detailing multiple incidents where Sladjana failed to follow rules, including being tardy or involved in an incident with another student.

{¶15} Jerry Markley, who testified to being friends with Sladjana, was aware that she had some arguments with her friends but he believed they were "everyday arguments" and nothing serious.

{¶16} Several security guards testified regarding Sladjana's activities at Mentor High. Mary Ann Bunjevac had been told to keep an eye on Sladjana due to her being bullied, but did not observe any such incidents. David Bower had seen Sladjana involved in altercations with other students, including physical fights, but did not know who was the aggressor. When Sladjana reported having an issue with being picked on, he took her to Spiccia's office. Linda Dragolich stated that she was not aware Sladjana had been bullied.

{¶17} Celija Vidovic, Sladjana's mother, testified that Sladjana told her of several incidents where she was made fun of, such as how she had problems speaking English well, how she dressed, and being called names such as "Sladjana vagina." She also heard threatening messages left on Sladjana's phone, which prompted her to call the police. Sladjana's older sister, Suzana Sabljic, testified that Sladjana told her that

friends had “backstabbed” her and called her names, Sladjana received nasty phone calls at home, and people made negative comments about her being Croatian. Suzana recalled going to the school on a few occasions to speak to either Spiccia or unit principal John Diamond, describing that Sladjana was upset by the problems at school. She did not believe the school took action to remedy Sladjana’s problems with bullying.

{¶18} In November of 2007, an alleged incident that involved Sladjana being pushed down the stairs at school took place. Sladjana told Jandric that Jerry pushed her down the stairs, but the school believed it was an accident. Nelson explained that Sladjana described being pushed down a few steps by Jerry, although she did not really fall, and Sladjana said that she thought Jerry was trying to get her attention. Moss stated that Sladjana described being pushed down the stairs as a “joke.” Jerry testified that he did not push her down the stairs, and, in the year following the incident, he was invited to Sladjana’s birthday party. Bunjevac testified that Sladjana did not know the boy who had done it. Diamond also testified that Sladjana was unable to identify who pushed her. School nurse Janet Sargent explained that Sladjana told her that she “thought” someone was going to push her down the stairs and that she suffered no injuries.

{¶19} According to Mrs. Vidovic, following this incident, Sladjana threatened to kill herself, was admitted to Laurelwood Hospital, and was seeing a private counselor. She was released on Christmas Eve 2007, and returned to school in January. Prior to her return, Mrs. Vidovic and her daughter, Suzana, had a meeting with the school to discuss Sladjana’s return. At the meeting, held on January 3, 2008, which included Spiccia and Goss, Mrs. Vidovic told them Sladjana was in the hospital because of problems at school and asked them to protect her. They seemed sympathetic and

Spiccia assured her that the matter would be addressed.

{¶20} Spiccia, the principal at Mentor High School, described the January 3, 2008 meeting, where he was informed of Sladjana's admission to Laurelwood. At the meeting, a "plan" was built "to ensure Sladjana safe passage." The teachers would be informed of the plan, that if Sladjana was having problems, she would be permitted to go to her counselor, Goss, or the school social worker, Catherine Iannadrea, or her unit principal if Goss was unavailable. Iannadrea would speak with Sladjana's outside counselor as well, provided consent was received from the parents. He believed that an e-mail was to be sent from Goss to Sladjana's teachers, informing them to "pay careful attention to" Sladjana. He did not recall being aware of any bullying issues or Sladjana's suicide threats until this meeting occurred.

{¶21} After the meeting, Spiccia checked with Goss to see how Sladjana was doing, and she reported that things were "pretty much on course for her," with a few "bumps in the road." He delegated the day-to-day responsibilities of implementing the plan to Goss and relied on her to provide information on any problems.

{¶22} Spiccia had contact with Sladjana on a few occasions after the meeting. He spoke with her about the stair incident and she indicated "that [it] was no big deal." He recalled one conversation where she was having a problem with another student and he asked whether he could intervene or mediate the conflict, but Sladjana just wanted to make him aware of the problem. He spoke with the other student about the conflict. He did not believe Sladjana indicated she was being bullied.

{¶23} Sladjana also told him in approximately May or June of 2008 that she did not want to go to an event because of problems with other students. The two talked about a strategy to address the situation and he asked her to report any trouble.

Subsequently, she said she went to the event and had a great time.

{¶24} Regarding bullying in general, Spiccia explained that Mentor had an anti-bullying policy. If there was a bullying problem, this would often be discussed with the unit or grade principals and specifically documented and placed in a report. In 2005, staff attended a workshop on bullying and the core concepts were "brought * * * back" to the school for implementation. A specific anti-bullying program was implemented throughout the entire school system in August or September of 2007. In addition, the school had an anti-suicide program.

{¶25} Pam Goss, Sladjana's guidance counselor at Mentor High School, testified that she recalled Sladjana stopping in her office to discuss various topics, including academics or problems with other students, such as conflicts with her friends, which she described as "he said/she said types of things." Sladjana also complained about one of her friends calling her a "slut." Goss viewed it as a conflict with her friend and not bullying, although the incident was "mediated" at that time. Sladjana described getting harassing text messages in the fall of her sophomore year, while at home. Goss advised her to report this to the police.

{¶26} Regarding the January 3 meeting, Goss confirmed the plan discussed by Spiccia, which involved her meeting with Sladjana frequently. She ensured that things were "going okay" and helped Sladjana with "problem-solving and strategizing to help her through the day." She did not remember Sladjana reporting that she was still being bullied at that time. During January and February of 2008, she met with Sladjana once or twice a week and did so with less frequency throughout the rest of that year.

{¶27} Goss reported back to Spiccia regarding her continued meetings with Sladjana and responded to his inquiries about how things were progressing. Goss was

aware after Sladjana was hospitalized that she was seeing a private counselor. When Sladjana noted that she was not doing so anymore, Goss called her parents and Suzana, left a message, but received no return call.

{¶28} Goss believed that Sladjana was safe at school, did not complain about feeling unsafe, and had many adults she was comfortable talking to at the school, including the security guards. Goss recalled sending an e-mail to teachers about the plan after the January meeting, but she could not find a copy.

{¶29} Catherine Iannadrea, a former social worker for the Mentor School District, met with Sladjana after the aforementioned meeting and was available to see her if needed. She ultimately did not meet with Sladjana on a regular basis, due to the fact that Sladjana had a private counselor and Iannadrea was unable to obtain a release to speak with the doctors at Laurelwood. However, on one occasion where she did meet with Sladjana, Sladjana discussed a fight with her sister, and was reminded of the importance of taking her medication. Iannadrea believed that Goss had been handling the situation well.

{¶30} Dr. Jacqueline Hoynes, the superintendant of Mentor Public Schools, did not become aware of Sladjana until she met with her mother and sister before Christmas of 2007. At this meeting, Mrs. Vidovic expressed concern with her daughter's mental health and depression and wanted her to have help when she returned to school. Based on her conversations with Spiccia and Tracy Coleman, the director of secondary education, Dr. Hoynes believed that the district was being responsive to Sladjana's needs. Dr. Hoynes testified that the plan set into motion at the high school addressed what she believed was Mrs. Vidovic's main concern, that Sladjana would try to kill herself at school, since it provided her a safe place to go. She

felt comfortable with the plan and believed Spiccia would be able to handle the issue. She was aware that Sladjana had outside counseling, which would address some of her mental health issues, which were bigger than the school alone could remedy.

{¶31} Dr. Hoynes believed that some of Sladjana's issues arose from the fact that she "had trouble getting along with others." Regarding the bullying issue, she believed that much of this was a "two-way" situation, which involved Sladjana also making unkind statements to other students.

{¶32} Dr. Hoynes was to be updated by Coleman if issues arose with Sladjana. She did not meet with Sladjana or her parents after the December 2007 meeting. She did not speak with Goss about the counseling. She trusted Spiccia to bring any matters that occurred to her attention. She also described that an e-mail was sent from Goss to employees and security on September 10, 2008, explaining that Sladjana had some difficulty with feeling bullied and that any reports made by her should be taken seriously and, if she was extremely upset, she should be sent to Goss. She did not know whether an earlier e-mail had been sent regarding this situation.

{¶33} Regarding bullying in Mentor High School in general, Dr. Hoynes worked on implementing an anti-bullying program throughout the school district, beginning in 2007, which was recommended by Crossroads, a mental health agency in the community. All employees were trained in 2007. Lisa Johnson-Bowers, a teacher, explained that the bullying program was to be tested throughout the 2007-2008 school year and would be fully rolled out to students in the next school year, although it was not completed by October of 2008.

{¶34} In the summer of 2008, following a fight involving Sladjana, she became involved with the Lake County Juvenile Court. Intake officer Sandy Sisa testified that

Sladjana told her there was ongoing harassment at school that had lasted for several years, but the school had not taken action.

{¶35} In the fall of 2008, Sladjana began homeschooling. On October 2, 2008, Sladjana committed suicide. According to Suzana, Sladjana had been homeschooled for approximately a week before she died.

{¶36} Following Sladjana's death, in October, Spiccia met with Mr. Vidovic about Sladjana's school records and Spiccia requested that unit principal Diamond provide some documents. Spiccia noted that Sladjana's "permanent record" was made available. While subsequent records release forms were signed by Mr. Vidovic, Spiccia did not receive these requests, which were generally handled by the records department.

{¶37} Regarding the requested records, Goss testified that she maintains a personal file for her students, which includes handwritten notes that she keeps until the student graduates. Goss shredded Sladjana's file/her personal notes when the class graduated in June 2010, as is her policy. She was not asked by anyone for those notes and did not provide them to the Vidovics.

{¶38} An expert report was filed by the defendants, authored by psychologist Thomas Joiner, who concluded that Sladjana's suicide was caused by a combination of factors, including mood disorders, depression, and negative life events both at school and at home. He believed that the school personnel were "responsive" to Sladjana's concerns about her peer relationships.

{¶39} A report of Professor of Psychology, Dorothy Espelage, was presented by the Vidovics, in which she opined that the school district and defendants should have taken more aggressive steps to protect Sladjana.

{¶40} On May 8, 2014, the trial court filed an Order, granting summary judgment in favor of the defendants on all claims. Regarding the Gross Negligence claim, the court found that the actions taken by each of the three defendants were either appropriate or, at worst, mere negligence. The court held that their conduct did not rise to the level of gross negligence and their behavior was not reckless, with malice, or in bad faith. Regarding the Spoliation claim, the court found that there was no evidence that Goss' notes were destroyed with the intention of disrupting the Vidovics' lawsuit. It further held that no sanctions were appropriate for the failure to maintain the evidence.

{¶41} The Vidovics timely appeal and raise the following assignments of error:[2]

{¶42} "[1.] The trial court erred in granting summary judgment on the negligence/gross negligence claim.

{¶43} "[2.] The trial court erred by granting summary judgment on plaintiffs' Spoliation/Destruction of Evidence Claim."

{¶44} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor."

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2. While both parties complain in their briefs that the page limitation in this accelerated appeal did not allow them sufficient space to fully brief their arguments, they failed to request that this matter be removed from the accelerated calendar. Loc.App.R. 11.1(C) (counsel for either party may "within ten days from the time-stamped date of the notice placing the case on the accelerated calendar file a motion requesting that the appeal be removed from the accelerated calendar").

{¶45} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision." (Citation omitted.) *Peer v. Sayers*, 11th Dist. Trumbull No. 2011-T-0014, 2011-Ohio-5439, ¶ 27.

{¶46} In their first assignment of error, the Vidovics argue that the defendants failed to exercise care in dealing with Sladjana, by not enforcing the school policies and investigating and reporting bullying incidents, which ultimately led to her suicide.

{¶47} The defendants argue that they are immune from a claim for Negligence and that the Vidovics' evidence did not support a claim for Gross Negligence or demonstrate that the defendants acted maliciously, wantonly, in bad faith, or recklessly. They argue that when they became aware of the asserted incidents of bullying, along with Sladjana's admission to the hospital due to threats of suicide, they developed a plan to address the situation.

{¶48} Political subdivision immunity, which applies to entities such as a school district, extends, with three exceptions, to employees of political subdivisions under R.C. 2744.03(A)(6). *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 47. R.C. 2744.03(A)(6) is considered in determining whether an employee of a political subdivision is immune from liability. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 17.

{¶49} Under R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside of the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. * * *

{¶50} The Vidovics allege that the defendants were acting in the course of their employment at the time of their acts or omissions and did not predicate their liability on any section of the Ohio Revised Code. Under these facts, although the Vidovics argue to the contrary, the defendants are "immune from liability for simple negligence." *Mohat v. Horvath*, 11th Dist. Lake No. 2013-L-009, 2013-Ohio-4290, ¶ 20. Thus, in order for the defendants to be found liable under any theory, "it must be shown that [their] acts or omissions were committed with malicious purpose, in bad faith, or in a wanton or reckless manner." *Id.*

{¶51} While the Vidovics claimed Gross Negligence and a violation of R.C. 2744.03(A)(6)(b), these both involve a similar application of law. For Gross Negligence, a plaintiff must also show "willful and wanton conduct" as well as the intentional failure to perform a duty "in reckless disregard of the consequences as affecting the life or property of another." (Emphasis omitted.) *Id.* at ¶ 23, citing *Harsh v. Lorain Cty. Speedway, Inc.*, 111 Ohio App.3d 113, 118, 675 N.E.2d 885 (8th Dist.1996); *Tellez v. Bank One, N.A.*, 3rd Dist. Allen No. 1-92-63, 1993 Ohio App. LEXIS 250, 10 (Jan. 21, 1993).

{¶52} For the purposes of determining whether the employees' conduct falls under R.C. 2744.03(A)(6)(b), it is necessary to define its terms. "Malice" is characterized by "hatred, ill will or a spirit of revenge," or "a conscious disregard for the

rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St.3d 334, 336, 512 N.E.2d 1174 (1987). "Bad faith" connotes a "dishonest purpose" or "conscious wrongdoing." (Citation omitted.) *Canfora v. Coiro*, 11th Dist. Lake No. 2006-L-105, 2007-Ohio-2314, ¶ 72. "Wanton" misconduct is the failure to exercise any care whatsoever. *Hawkins v. Ivy*, 50 Ohio St.2d 114, 117-118, 363 N.E.2d 367 (1977). "Recklessness" includes a "perverse disregard of a known risk where the actor is conscious that his conduct will probably result in injury." *Mohat* at ¶ 21, citing *O'Toole*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, at ¶ 73-74; *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph four of the syllabus (reckless conduct is "substantially greater than negligent conduct"). This court has summarized the foregoing mental states to "impl[y] a willful and intentional design to do injury without just cause or excuse * * * or a failure to exercise any care when the probability of harm is great, and that probability of harm is known to the actor." (Citation omitted.) *Piispanen v. Carter*, 11th Dist. Lake No. 2005-L-133, 2006-Ohio-2382, ¶ 28.

{¶53} While factual questions are generally for the jury, summary judgment is still appropriate under some circumstances, especially when there are questions regarding issues such as those present in this case. *See Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, 912 N.E.2d 151, ¶ 23 (12th Dist.) (granting summary judgment and noting that, while the issues of malice, bad faith, and wantonness are often a question for the jury, summary judgment is proper under certain facts, especially given that "the standard for demonstrating such conduct is high"). This has been emphasized in cases where a party is alleged to be reckless, which appears to be the case here, since the defendants did exercise some care, did not consciously

participate in wrongdoing, and did not entirely disregard the fact that there was some risk to Sladjana. "Although the determination of recklessness is typically within the province of the jury, the standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity." *O'Toole* at ¶ 75.

{¶54} The three separate defendants in this case had different levels of involvement with Sladjana. Thus, as the trial court did, we will address them separately.

{¶55} Spiccia, as the principal of Mentor High School, testified that he was not aware of the problems Sladjana was having until the January 3, 2008 meeting held after Sladjana had been admitted to Laurelwood. While there was some testimony from Sladjana's friends that she went to Spiccia with problems on various occasions, it is unclear which particular issues were discussed and whether they involved bullying incidents. Suzana indicated that she and her father had met with Spiccia, but she could not recall all topics that were addressed, aside from the stair incident. It is hard to say that Spiccia did not properly investigate specific bullying incidents when it is not clear whether he even had knowledge of such occurrences.

{¶56} Presuming, then, that Spiccia became aware of the alleged bullying at the time of the meeting, he could not address it until that time. At the meeting, a plan was developed to help Sladjana and keep her safe. This plan included allowing her to go to Goss at any time she had a problem, and established other school employees she could report to if Goss was unavailable. Teachers were to be informed of Sladjana's problems, although it was unclear who did this or at what time this occurred. Spiccia also checked periodically with Goss to see how Sladjana was doing and did not receive feedback that further action needed to be taken. He also spoke with Sladjana on a few

occasions, giving her advice about how to handle specific problems. He was certainly involved in implementing a workable response to Sladjana's problems.

{¶57} Even if Spiccia had been aware of some of the incidents that occurred prior to this meeting, the plan began nine months before Sladjana's suicide and appears to have been in place for an adequate period of time to address her issues. While the ultimate effectiveness of the plan is unclear, it cannot be said that Spiccia acted in bad faith, maliciously, or recklessly, since he set forth a specific plan, relied on his staff to carry it out, and checked on Sladjana's progress.

{¶58} Courts have not required schools to take perfect action to remedy bullying issues to avoid claims related to gross negligence/R.C. 2744.03(A)(6)(b), but that they take some precautions or steps to recognize and address the issue. *See Waters v. Perkins Local School Dist. Bd. of Edn.*, N.D. Ohio 3:12 CV 732, 2014 U.S. Dist. LEXIS 43660, 74-75 (Jan. 31, 2014) (where there were allegations that the defendants/school employees failed to adhere to board policies, communicate with the plaintiffs, and develop a written safety plan, since they took action to remedy the problem by issuing punishments and interviewing students alleged to have bullied the student, the defendants did not act with the ill will or a dishonest purpose required to support a state law negligence claim); *Doe v. Big Walnut Local School Dist. Bd. of Edn.*, 837 F.Supp.2d 742, 757-758 (S.D.Ohio 2011) (finding no state claim under R.C. 2744.03(A)(6) when the school addressed bullying problems by developing a safety plan for the student and assisted him in finding strategies for dealing with other students).

{¶59} Goss, whose participation was critical in carrying out the plan, met with Sladjana on multiple occasions following the January 3, 2008 meeting. When an incident occurred, Sladjana discussed it with her. Goss ensured that things were "going

okay" and assisted Sladjana with "problem-solving and strategizing to help her through the day." She reported her progress to Spiccia. Several witnesses testified that Goss and Sladjana spoke often. Goss addressed issues brought to her by Sladjana after the meeting and on at least one occasion, Goss mediated a conflict that involved name-calling.

{¶60} Although Goss did not specifically communicate about Sladjana to other individuals, such as the school nurse or Sladjana's therapist, her failure to do so does not rise to the level of reckless, especially given that it is unclear how this would have had an impact in preventing the asserted bullying or her suicide. While Goss' interactions with and support for Sladjana may ultimately not have addressed her mental health issues or stopped all conflicts she had with friends or other students, this does not mean that Goss' conduct rises to the level necessary to find that her actions were reckless, wanton, or demonstrated malice.[3]

{¶61} Further, while the Vidovics assert that Goss' failure to maintain her notes of her counseling sessions with Sladjana should have an impact on the finding on this issue, there is no indication that the notes were destroyed in order to hide any information or that they would have shown Goss was acting in a reckless or wanton manner.

{¶62} Regarding the superintendant, Dr. Hoynes, there is no dispute that she was not made aware of any problems with Sladjana until December 2007, when she met with Mrs. Vidovic, prior to the January 3, 2008 meeting. There is also no question

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3. It is noteworthy that the federal court, in reviewing the same depositions filed here, also found that the only indication that the school was informed of gender related name-calling incidents, such as Sladjana being called a "slut" or a "whore" was mediated by Goss. *Vidovic*, 921 F. Supp.2d at 798 ("[t]here is no indication that the school was ever informed that such name-calling continued past the mediation either by the girl who was involved in the mediation, or by anyone else at the school").

that, as superintendant, Dr. Hoynes was generally not directly involved in the day-to-day activities of students, nor did she administer discipline or specific services to students. Instead, as she testified to, she entrusted such duties, including the enforcement of the plan to protect Sladjana, to the individual administrators and employees within the school.

{¶63} Dr. Hoynes was aware of the plan and believed it would be effective. While she was not directly involved in providing any assistance to Sladjana and did not follow up with Sladjana's progress, we cannot hold that she was reckless or acted with malice in verifying that a plan was in place to address Sladjana's problems that would be carried out by employees she trusted, especially given that she was aware Sladjana's parents had also ensured she had private counseling to address her mental health issues. This is not the case where no precautions whatsoever were taken. *See Wright v. Carroll County Bd. of Educ.*, Md. No. 11-cv-3103, 2013 U.S. Dist. LEXIS 120892, 62-63 (Aug. 26, 2013) (willful, wanton, or reckless behavior did not occur since the defendants did not fail to take any precautions at all when warned of a threat to a student's safety).

{¶64} Further, as to all of the defendants, while certain bullying incidents were highlighted by the Vidovics, such as the stair incident, the follow-up by school employees showed that Sladjana was not bullied on that occasion. Several employees explained that Sladjana did not indicate who pushed her, while her friends generally thought it either was not a big deal or was just a "joking" incident. It cannot be said that the school's interpretation of the incident as not serious, based on the facts presented to it, creates a genuine issue that the defendants were grossly negligent or reckless. *See Aratari v. Leetonia Exempt Village School Dist.*, 7th Dist. Columbiana No. 06 CO 11,

2007-Ohio-1567, ¶ 35, 76 (where the school was aware of a student's bad behavior but determined it was "horseplay," the school's failure to take action to protect other students from him was not reckless).

{¶65} While the Vidovics have also taken issue with the school's failure to address bullying in general, as has been described throughout this opinion, a bullying program was in place in 2005, was replaced in 2007, and teachers were trained in anti-bullying by the completion of the 2007-2008 school year. While this program may not be perfect, it further evidences the fact that actions were taken to prevent bullying in the schools, especially by Spiccia and Dr. Hoynes.

{¶66} The Vidovics also point to the school's failure to properly document instances of bullying in compliance with school policy as a basis for finding the defendants' actions reckless, wanton, and with malice. As thoroughly described above, the testimony of the various witnesses does not establish which specific incidents were reported to which defendants. Regardless, the failure to follow school policy alone does not rise to the level of the behavior necessary to prevail in this matter. *See Waters*, 2014 U.S. Dist. LEXIS 43660, at 74-75.

{¶67} The Vidovics assert that the Ridge Middle School employees also knew about bullying that occurred to Sladjana. The testimony of Nasca and Kinsey established that they dealt with the issues as necessary, although some were unsubstantiated. Regardless, it is not disputed that any information regarding incidents at the middle school was not given to the defendants. The Vidovics are not suing the school district in general and the individual defendants cannot be held responsible for acts of which they had no knowledge.

{¶68} Finally, the Vidovics cite *Galloway v. Chesapeake Union Exempted Village Schools Bd. of Edn.*, S.D.Ohio No. 1:11-cv-850, 2012 U.S. Dist. LEXIS 152080 (Oct. 23, 2012), in support of the proposition that the evidence of bullying in this case was sufficient to overcome a motion for summary judgment. However, this case is distinguishable from the present matter, in that not only was the student physically and sexually assaulted, the teachers also participated in publically embarrassing the student. *Id.* at 4. It was also based on the ruling on a motion to dismiss rather than a motion for summary judgment, under which a standard more favorable to the plaintiff is applied.

{¶69} We recognize that Sladjana's death is tragic. However, we are required to evaluate the matter under the appropriate standard of law and, in this case, we cannot conclude that the defendants' behavior was such that it meets the high standard of being described as reckless, wanton, or with malice. *O'Toole*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, at ¶ 96 (while the death of a child was distressing, the court could not "interject [its] judgment in hindsight" to determine what should have been done by the defendant, given "[t]he applicable legal standard in this case is recklessness, not negligence").

{¶70} We need not address the defendants' argument that the Vidovics failed to establish causation, since the Complaint was properly dismissed by the trial court on the grounds discussed above.

{¶71} The first assignment of error is without merit.

{¶72} In their second assignment of error, the Vidovics argue that the defendants are liable for destroying evidence, since Goss' counseling notes were

shredded and not provided to them, despite multiple requests for all school records related to Sladjana.

{¶73} The defendants argue that the notes were not destroyed to disrupt the Vidovics' case and, therefore a Spoliation claim is unsupportable.

{¶74} A plaintiff must prove the following elements to recover on a claim for Spoliation of Evidence: "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993).

{¶75} In the present case, it is argued that the defendants, Spiccia and Goss specifically, committed Spoliation of Evidence by failing to provide notes Goss took while counseling Sladjana. Regarding Spiccia, the Vidovics assert that he should have provided this evidence when Mr. Vidovic requested records shortly after Sladjana's death. Spiccia testified that he was not aware of those records' existence at that time. It was also not clear at that time that litigation would occur or would be probable, as there was no statement by the Vidovics that they needed the record for a lawsuit. Spiccia himself was not involved in the destruction of the evidence. The records that were known to him, i.e., Sladjana's permanent record, were provided to the Vidovics. Spiccia testified that any subsequent records requests which may have included requests for the counseling notes were not provided directly to him, and he did not receive them, a fact which the Vidovics do not dispute.

{¶76} Goss explained that she was never asked for her counseling notes. It was typically her policy to take notes when counseling students for her personal use, but she always shredded them when the students in the class graduated. This is what she did in the present case. There is no indication that she did so with notice that they would be necessary for this lawsuit, instituted in 2013, nor was there evidence that this was willful destruction of the notes in order to disrupt the Vidovics' case, especially given that she did not know of the records requests. Based on all of the evidence in the record, there are no facts to support a claim of Spoliation of Evidence against Spiccia or Goss.

{¶77} The Vidovics argue that, regardless of whether a Spoliation claim can be maintained, the court can draw an "adverse evidentiary inference" against a party where malfeasance or gross neglect are shown, citing *Schwaller v. Maguire*, 1st Dist. Hamilton No. C-020555, 2003-Ohio-6917.

{¶78} "An adverse inference may arise where a party who has control of a piece of evidence fails to provide the evidence without satisfactory explanation. * * * Under those circumstances, the jury may draw an inference that would be unfavorable to the party who has failed to produce the evidence in question." (Citations omitted.) *Id.* at ¶ 24. This allows for courts to give such a charge where there is a showing of "malfeasance" or "gross neglect." *Id.*

{¶79} The adverse inference concept addressed above relates to the inference that can be made against a party, when weighing the facts, when that party fails to provide evidence. It does not impact the claim for Spoliation raised under the Complaint, nor does it justify a request for sanctions. Thus, we fail to see how this applies to uphold the Spoliation claim dismissed by the trial court.

{¶80} Regardless, Spiccia's failure to consult Goss as to whether she took personal notes of her meetings with Sladjana before providing the Vidovics' with Sladjana's permanent record, does not amount to malfeasance or gross neglect. The same applies to Goss' failure to ask whether her personal notes would be necessary when she was not even aware that a request had been filed or that her notes would be needed for any reason.

{¶81} Regarding the issue of sanctions specifically, the trial court noted that the only authority for granting sanctions in this scenario would fall under Civ.R. 37. Civ.R. 37(A) allows for sanctions when a party fails to comply with orders and requests related to discovery. Here, the Vidovics did not file a motion for sanctions, nor can it be said that the defendants failed to comply with discovery, since the evidence did not exist when the Complaint was filed. The Vidovics did not raise a proper claim, other than Spoliation in the Complaint, and cite to no authority from this state regarding sanctioning the action that occurred here. Thus, we find no basis for awarding sanctions.

{¶82} The second assignment of error is without merit.

{¶83} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, granting summary judgment in favor of the defendants and dismissing the Vidovics' claims, is affirmed. Costs to be taxed against the appellants.

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶84} The facts in *Mohat v. Horvath*, 11th Dist. Lake No. 2013-L-009, 2013-Ohio-4290, should guide our analysis here. Although *Horvath* involved a Civ.R. 12(B)(6) motion to dismiss and the instant case deals with a Civ.R. 56 motion for summary judgment, both cases concern students at Mentor High School and center around allegations that school personnel ignored or failed to properly deal with bullying which ultimately led to student suicides.

{¶85} In *Horvath*, a high school teacher sought to dismiss a complaint filed by the deceased student's parents. *Id.* at ¶1. This court, this writer concurring, held that the trial court did not err in denying the high school teacher's motion to dismiss. *Id.* at ¶34. In the case at bar, which involves a similar bullying/suicide fact pattern at the same school, I believe the trial court erred in granting summary judgment in favor of appellees.

{¶86} "Bullying in schools is a worldwide problem that can have negative consequences for the general school climate as well as the right of students to learn in a safe environment without fear." education.com, Ron Banks, *Bullying in Schools*, Educational Resource Information Center (U.S. Department of Education) (July 15, 2013). "Bullying can also have negative lifelong consequences—both for those students who bully and for their victims." *Id.* Bullying has been an ongoing issue at Mentor High School which has gone unresolved.

{¶87} In this case, Sladjana, a junior at Mentor High School, committed suicide following months of bullying and harassment by other students. The record reveals that appellees had prior knowledge of the ongoing bullying of Sladjana yet failed to do

anything about it. At least two other Mentor High School students had committed suicide. School personnel were aware that Sladjana had suffered from depression as a result of being bullied and had threatened suicide in the past. It is devastating for this victim, and for her loved ones she left behind, that Sladjana ultimately took her life as a result of bullying.

{¶88} The trial court utilized summary judgment in this case. Judges extensively utilize summary judgment to clear their dockets of cases they deem meritless. Suja A. Thomas, *Why Summary Judgment is Unconstitutional,* 93 Va.L.Rev. 139 (2007). Summary judgment is a "very potent procedural tool" used by judges which circumvents a plaintiff's ability to proceed to trial. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases,* 34 Wake Forest L.Rev. 71 (1999). Summary judgment is cited as a cogent reason for the dramatic decline in the number of jury trials in civil cases. 93 Va.LRev. 139*, supra.*

{¶89} Summary judgment prohibits a weighing of the evidence. *DiBlasi v. First Seventh-Day Adventist Community Church*, 11th Dist. Geauga No. 2013-G-3169, 2014-Ohio-2702, ¶32. Here, the judge disposed of this case via summary judgment. In general, judges tend to be more conservative than juries. Judges who act as the finder of fact rather than of law, violate a plaintiff's right to a jury trial in civil cases which is guaranteed by the Seventh Amendment under the United States Constitution.

{¶90} Based on the facts presented, I believe the trial court erred in granting summary judgment in favor of appellees as appellants' issues should be resolved by a jury. "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Metz v.*

American Elec. Power Co., 172 Ohio App.3d 800, 2007-Ohio-3520, ¶21 (10th Dist.), quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

{¶91} For the foregoing reasons, I respectfully dissent.