[Cite as *Elliott v. Cuyahoga Cty. Executive & Council*, 2018-Ohio-1088.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105773

RUSSELL ELLIOTT

PLAINTIFF-APPELLEE

vs.

CUYAHOGA COUNTY EXECUTIVE AND COUNCIL, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-876650

BEFORE: Laster Mays, J., Keough, P.J., and Jones, J.

RELEASED AND JOURNALIZED: March 22, 2018

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ANITA LASTER MAYS, J.:

{¶1} We affirm the trial court's denial of the defendants-appellants' motion for judgment on the pleadings for the reasons set forth below.

I. Background and Facts

{¶2} Plaintiff-appellee Russell Elliott ("Elliott") was an inmate at the Cuyahoga County Corrections Center ("jail") pending a final case adjudication when he fell on an escalator during transport for proceedings, suffering a severe injury to his left hand and thumb. Elliott alleges that he should have been transported by wheelchair due to vertigo he suffered as a cancer treatment side effect.

{¶3} On February 28, 2017, Elliott filed a personal injury action, asserting that the jail employees maliciously, willfully, wantonly, and recklessly ignored orders that he be transported by wheelchair. He asserts that the failure to do so was the proximate cause of his injuries. Elliott named several defendants:

> County Executive and Counsel
> Clifford Pinkney, County Sheriff
> Lowell Bedard, County Corrections Center
> John Doe Company, employer of County Jail Nursing and Medical Staff
> Does 2 through 10
> MetroHealth Medical Center
> Janet Hodgson ("Hodgson"), LPN, Health Care Services

The county defendants are collectively referenced as the "county defendants."

{¶4} The trial court allowed Elliott to file an amended complaint on the ground that his medical records had not yet been received at the time the complaint was filed to protect the statute of limitations expiration. As it did in response to the original complaint, the county

moved to dismiss the amended complaint claiming it was time barred and asserting governmental immunity. The motion was denied.

{¶5} The county defendants answered the amended complaint on April 24, 2017 and on April 27, 2017, filed a motion for judgment on the pleadings that was opposed by Elliott on May 1, 2017. Defendants-appellants MetroHealth, jointly with Hodgson, also moved to dismiss the original and first amended complaints as time barred. Those motions were denied, and on April 26, 2017, MetroHealth and Hodgson filed a joint answer.

{¶6} On May 1, 2017, Elliott filed a motion for leave to file a second amended complaint to add a statutory claim under R.C. 3701.74(C) for the failure of "defendants" to provide Elliott with his medical records. On May 10, 2017, in a single journal entry, the trial court: (1) denied the county defendants' motion for judgment on the pleadings; and (2) granted Elliott's motion to file a second amended complaint. On May 12, 2017, the county defendants filed the instant appeal.[1]

II. Assignments of Error

{¶7} Two assignments of error are presented for our review:

I. The trial court erred in denying the county defendants' motion for judgment on the pleadings.

II. The trial court abused its discretion in granting leave to file a second amended complaint.

III. Discussion

{¶8} We preface our discussion by clarifying the issue that is jurisdictionally before this court. The question is whether the trial court properly denied the motion for judgment on the

[1] Subsequent to this appeal, MetroHealth supplied the requested records and Elliott sought to dismiss MetroHealth pursuant to Civ.R. 41(A)(2) by requesting a remand from this court. The request was denied on June 7, 2017.

pleadings in this case because "[p]laintiffs can prove no set of facts to rebut the fact that all county defendants are immune under R.C. [Chapter] 2744."[2] No other issues are ripe for appeal. *Ohio Bell Tel. v. DiGioia-Suburban Excavating, LLC*, 8th Dist. Cuyahoga Nos. 89708 and 89907, 2008-Ohio-1409, ¶ 7, fn.1. Therefore, the second assignment of error is moot.

{¶9} Civ.R. 12(C) provides in pertinent part that any party may move for a judgment based on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." *Id*. Our standard of review is de novo:

> A motion for judgment on the pleadings is to be granted when, after viewing the allegations and reasonable inferences therefrom in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *Brown v. Wood Cty. Bd. of Elections*, 79 Ohio App.3d 474, 477, 607 N.E.2d 848 (6th Dist.1992), citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165-166, 297 N.E.2d 113 (1973). A motion for judgment on the pleadings is specifically intended for resolving questions of law. *Friends of Ferguson v. Ohio Elections Comm.*, 117 Ohio App.3d 332, 334, 690 N.E.2d 601 (10th Dist.1997). Appellate review of motions for judgment on the pleadings under Civ.R. 12(C) is de novo. *Fontbank, Inc. v. CompuServe, Inc.*, 138 Ohio App.3d 801, 807, 742 N.E.2d 674 (10th Dist.2000).

Bowman v. Downs, 8th Dist. Cuyahoga No. 104880, 2017-Ohio-1287, ¶ 11.

{¶10} The county defendants rely on *Bowman* and *Moore v. Cleveland*, 8th Dist. Cuyahoga Nos. 104466, 104471, 104527, and 104529, 2017-Ohio-1156, to support their position that the motion should have been granted based on the validity of the governmental immunity defense under R.C. Chapter 2744.

{¶11} R.C. Chapter 2744 exculpates political subdivisions of tort liability when performing governmental or proprietary functions, subject to the statutory exceptions. R.C. 2744.02(A)(1). Determination of immunity involves a tripartite inquiry. The first question is

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[2] County defendants' motion for judgment on the pleadings, p. 4.

whether the political subdivision is involved in a governmental or proprietary function as defined by R.C. 2744.02(A)(1), establishing immunity.

{¶12} The second question is whether immunity is eliminated by the presence of one of the exceptions listed in R.C. 2744.02(B). In most cases, if immunity remains intact, there is no need to proceed to step three. If immunity is compromised, the final inquiry is whether immunity is reinstated by R.C. 2744.03(A). *See Maddox v. E. Cleveland*, 8th Dist. Cuyahoga No. 96390, 2012-Ohio-9, ¶ 17; *Jacobs v. Oakwood*, 8th Dist. Cuyahoga No. 103830, 2016-Ohio-5327, ¶ 9-11.

{¶13} The county defendants argue that they are entitled to immunity as employees of a governmental agency as well as in their individual capacities under R.C. Chapter 2744. It is undisputed that the county is a political subdivision under R.C. 2744.02(F) that satisfies the first step of the inquiry and that the operation of a jail is a governmental function. R.C. 2744.01(C)(2)(h). *Porter v. Probst*, 2014-Ohio-3789, 18 N.E.3d 824, ¶ 32 (7th Dist.); *Stefan v. Olson*, 497 Fed. Appx. 568, 580 (6th Cir.2012). "Providing health care services in a county jail is also a governmental function." *Ruffin v. Cuyahoga Cty.*, N.D.Ohio No. 1:16 CV 640, 2017 U.S. Dist. LEXIS 102199, at *41 (June 30, 2017).

{¶14} Moving to step two of the immunity analysis, we consider whether any of the exceptions of R.C. 2744.02 apply to jeopardize immunity.

> The exceptions to immunity are: negligent operation of a motor vehicle, negligent operation of a proprietary function, failure to keep public roads in repair, injury due to a physical defect on government property, and liability expressly imposed by the Ohio Revised Code.

Ruffin at *41-42. R.C. 2744.02. We do not find that any of the exceptions apply in this case, which serves to protect the county entity. Normally, our inquiry would end here. However, the fact that the county defendants have also been named individually requires additional scrutiny.

{¶15} *Stefan,* an appeal to the Sixth Circuit Court of Appeals from the Northern District of Ohio's grant of summary judgment in favor of the plaintiffs,[3] is instructive here. In *Stefan*, a licensed practical nurse employed by the Richland county jail who was also certified as an emergency medical technician ("nurse") was a named defendant in a case claiming a constitutional violation of the Eighth Amendment's prohibition against cruel and unusual punishment as well as state law claims for medical negligence and the wrongful death of inmate Michael Reid ("Reid").

{¶16} The nurse was named individually and officially. Richland county and several other jail officials were also named but summary judgment was granted for each individual defendant except for the nurse. *Stefan* at 574. The asserted culpability of the other defendants was based on negligence, but the nurse "was not immune under state law because sovereign immunity is not available to Ohio employees who act recklessly." *Id*.

{¶17} Reid, a chronic alcoholic, was arrested for violating probation. Reid's probation officer advised officers that Reid was subject to seizures during alcohol withdrawal. Reid registered a .349 alcohol level upon his arrest. *Id*. at 570. Reid also advised the officers who informed officers at the Richland county jail. The presiding corrections officer requested that the nurse conduct a medical examination. *Id.*

{¶18} The nurse was aware of the blood-alcohol level, racing pulse, and dehydration though Reid's blood pressure was "'within normal limits'" and he was joking with the staff.

Reid requested to go to the hospital due to his level of inebriation and history of high blood pressure. *Id.* The nurse did not check Reid's medical records from his prior incarcerations at the jail that advised of his seizures, but the nurse did assure Reid that "'we will be there for you" when the withdrawal seizures begin. *Id*. at 570. The nurse changed her initial assessment that Reid should be transported to the hospital and decided to admit Reid to jail, advised that Reid be provided a bottom bunk due to his condition and directed that he be checked at 30-minute intervals. *Id*. at 572.

{¶19} Several hours thereafter, Reid suffered a violent seizure, hitting his head on the concrete bunk so severely that "'it sounded like a gun shot.'" *Id*. at 573. Reid was transported to the hospital with serious injuries, was pronounced brain dead in spite of emergency surgery, and was removed from life support five days later. *Id*. at 574.

{¶20} The appellate court noted that a jail employee is protected by sovereign immunity except where:

> "(a) The employee's acts or omissions were manifestly outside 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; [or]
>
> (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code."

Id. at 580, citing R.C. 2744.03. The trial court's denial of summary judgment for the nurse was affirmed "[b]ecause a reasonable jury could find that [the nurse] was aware of a probable injury to Reid." *Id*. at 581.

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[3] *Stefan v. Olson*, N.D.Ohio No. 1:10 CV 671, 2011 U.S. Dist. LEXIS 71761 (July 5, 2011).

{¶21} The county defendants offer that the first amended complaint ("FAC") fails to sufficiently plead facts demonstrating that the employees' acts or omissions were reckless, wanton, in bad faith, with malicious purpose or were manifestly outside the scope of the employment or official responsibilities under R.C. 2744.03(A)(6)(a)-(b), which would subject employees to personal liability. "Taking the allegations in the amended complaint as true, no facts were pleaded to suggest that Elliot's alleged injuries were anything more than accidental." Appellant's brief, p. 8.

{¶22} The FAC lists the county defendants, states that the individual defendants are named in both their individual and official capacities, and recounts the alleged acts or omissions that contributed to Elliott's injuries. The FAC further provides that the medical orders specified that Elliott was to be transported by wheelchair, but that the county defendants failed to comply "in reckless disregard for Elliott's health and safety." This failure caused Elliott's injuries.

{¶23} Elliott charges that the county defendants acted recklessly, willfully, and wantonly.

> 17. Defendants, individually and/or vicariously by and through agents or employees, were negligent, reckless, willful and wanton in transporting Plaintiff without a wheelchair on March 4, 2015, for the reasons set forth above.
>
> 18. The [c]ounty is liable for the reckless, willful, and wanton misconduct of their employee nurses, other medical staff, and corrections officers, for the reasons set forth above.

FAC, ¶ 17 and 18.

{¶24} Ohio is a notice-pleading state. A plaintiff is not required to plead specific facts that refute affirmative defenses:

> Ohio follows the "no set of facts" pleading standard, recognizing that a complaint "should not be dismissed for failure to state a claim unless it appears beyond

> doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc*., 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975), quoting *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Mangelluzzi v. Morley, 2015-Ohio-3143, 40 N.E.3d 588, ¶ 12, 13 (8th Dist.), citing *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 29, and *Kerr v. Logan Elm School Dist*., 4th Dist. Pickaway No. 14CA6, 2014-Ohio-5838, ¶ 13.

{¶25} As we also noted in *Mangelluzzi,* the subject matter of the case before us is not one where the Ohio Supreme Court, by opinion or rule, requires that the complaint contain operative facts that are stated with particularly, such as: (1) an employee's intentional tort claims against an employer;[4] (2) negligent hiring claims against religious institutions;[5] (3) S.Ct.Prac.R. 12.02(B)(1), which requires that the complaints in original actions filed in the Supreme Court contain "specific statements of facts upon which the claim for relief is based"; and (4) pleading with particularity complaints alleging fraud or mistake pursuant to Civ.R. 9(B). *Mangelluzzi* at ¶ 13, fn. 1.

{¶26} Elliott argues that the county, in addition to the individuals, must also remain a party to the case as the result of the duty of defense and indemnification under R.C. 2744.07:

> [I]f the employee acted in good faith and not manifestly outside the scope of his or her employment or official responsibilities, the political subdivision has a duty to provide a defense for the employee if a civil action or proceeding against the employee for damages is commenced. R.C. 2744.07(A)(1); *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 576, N.E.2d 267 (2001). The political subdivision has a further duty to indemnify and hold harmless an employee if a

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[4] *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.,* 72 Ohio St.3d 106, 109-110, 647 N.E.2d 799 (1995), quoting *York* [*v. Ohio State Hwy. Patrol*], 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991), and citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1988) (employee's intentional tort claim against employer).

[5] *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991).

> judgment is obtained against the employee for acts or omissions in connection with a governmental or proprietary function, provided the employee acted in good faith and within the scope of his or her employment or official responsibilities. R.C. 2744.07(A)(2); *Whaley*, 92 Ohio St.3d at 578, 752 N.E.2d 267.

Lambert v. Clancy, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585, ¶ 11.

{¶27} The county entity concedes that "the county will remain a party to this case even if the trial court's decision is overturned only as to appellant Cuyahoga county, because its employees would remain active litigants 'in their official capacities.'" Appellant's reply brief at p. 6, quoting *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008). Thus, we need not reach the question of whether the county must be retained as a party to an action for purposes of R.C. 2744.07 where the immunity of the codefendant employees is in question.

{¶28} Finally, we briefly distinguish the county defendants' cited cases of *Bowman*, 8th Dist. Cuyahoga No. 104880, 2017-Ohio-1287, and *Moore*, 8th Dist. Cuyahoga Nos. 104466, 104471, 104527, and 104529, 2017-Ohio-1156.

{¶29} In *Bowman*, we upheld the trial court's grant of the city of North Olmsted's Civ.R. 12(C) motion. The *Bowman* appellant conceded that the motion as to the city was properly granted. *Id.* at ¶ 10, fn. 3. As to the city employees, the appellant failed to complain that the city employees acted "with malicious purpose, in bad faith, or in a wanton or reckless manner." *Id.* at ¶ 19. The complaint merely asserted that the employees were negligent and failed to exercise ordinary care, required to allege an actionable claim. *Id.*

{¶30} In *Moore*, we entertained the grant of summary judgment pursuant to Civ.R. 56 in favor of certain police personnel involved with a serial murder investigation. We focused on R.C. 2744.03(A)(6) precluding immunity for employees who engage in wanton or reckless conduct in connection with a governmental function. *Id.* at ¶ 27. Our examination was not

based solely on the pleadings under Civ.R. 12(C) as in the instant case, but involved de novo review of the entire record including witness and expert depositions and evidence.

{¶31} We find that, in viewing the reasonable inferences and allegations in a light most favorable to Elliott, the trial court correctly denied the county defendants' motion. The first assignment of error is overruled.

IV. Conclusion

{¶32} The trial court's order is affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
LARRY A. JONES, SR., J., CONCUR