[Cite as *Main v. Lima*, 2015-Ohio-2572.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

RICK MAIN, ET AL.,

PLAINTIFFS-APPELLANTS, **CASE NO. 1-14-42**

v.

CITY OF LIMA, ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Allen County Common Pleas Court
Trial Court No. CV-2014-0293

Judgment Affirmed

Date of Decision: June 29, 2015

APPEARANCES:

Michael J. Zychowicz **for Appellants**

Jared A. Wagner **for Appellee, City of Lima**

PRESTON, J.

{¶1} Plaintiffs-appellants, Rick Main ("Rick") and Dorothy Main ("Dorothy") (collectively, the "Mains"), appeal the August 13, 2014 judgment of the Allen County Court of Common Pleas dismissing their complaint against defendant-appellee, City of Lima, Ohio (the "City"), under Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted. On appeal, the Mains argue that the trial court erred in dismissing their complaint against the City because, in their complaint, they allege facts that invoke an exception to the political-subdivision immunity statute. For the reasons that follow, we affirm.

{¶2} On May 6, 2014, the Mains filed their complaint against the City, defendant-appellee, 1127 Construction Company, Inc. ("1127 Construction"), and four John Doe defendants. (Doc. No. 1). The Mains alleged that Rick was walking along a city sidewalk in a construction area when he was injured:

> 3. On or about June 29, 2012, [Rick] was walking along a city sidewalk on Baxter Street near the intersection of Baxter and Market Streets in Lima, Ohio.
>
> 4. While [Rick] was walking on the sidewalk he stepped on a circular metal plate which was covered by rocks so that it could not be readily seen.
>
> 5. The metal plate on which [Rick] stepped was covering a circular hole in the sidewalk.

> 6. The metal plate was not properly secured and when [Rick] stepped on the plate, the plate moved and [Rick's] right leg entered the hole causing him to fall down and sustain bodily injuries.
>
> **COUNT I**
>
> 7. The City of Lima undertook a construction project whereby they ordered, completed and supervised work being done to the sidewalk and street, near the corner of Baxter and Market Streets in Lima Ohio [sic]. This construction was ongoing at the time [Rick] fell and injured himself.
>
> 8. As a part of this project, a metal plate, covering a hole in the sidewalk on Baxter Street was placed on top of the hole and was not secured.
>
> 9. The metal plate was not properly secured and when [Rick] stepped on the plate, the plate moved and [Rick's] right leg entered the hole causing him to fall down and sustain bodily injuries.

(*Id.* at ¶ 3-9). Based on these allegations, the Mains asserted a count of negligence against the City, and Dorothy alleged a count of loss of consortium against the City. (*Id.* at ¶ 13, 33). The Mains also asserted counts of negligence, and Dorothy also asserted counts of loss of consortium, against 1127 Construction and the John Doe defendants. (*Id.* at ¶ 21, 29, 33).

{¶3} On June 2, 2014, 1127 Construction filed its answer to the complaint and cross-claim against the City. (Doc. No. 6).

{¶4} On June 16, 2014, the City filed a motion to dismiss the Mains' complaint and 1127 Construction's cross-claim under Civ.R. 12(B)(6). (Doc. No. 10). The City argued that the allegations in the complaint, when taken as true, "are still insufficient, as a matter of law, to abrogate [the City's] statutory immunity as set forth in R.C. 2744 et seq." (*Id.*). The City also argued that, because it is immune from the Mains' claims, it is also entitled to immunity as to 1127 Construction's cross-claim. (*Id.*). On July 8, 2014, 1127 Construction filed a memorandum in opposition to the City's motion to dismiss. (Doc. No. 19). On July 15, 2014, the Mains filed a memorandum in opposition to the City's motion to dismiss. (Doc. No. 23). On July 28, 2014, the City filed a reply memorandum in support of its motion to dismiss. (Doc. No. 25).

{¶5} On June 23, 2014, the Mains moved for leave to file an amended complaint to add defendant-appellee, The East Ohio Gas Company ("East Ohio"), as a defendant. (Doc. No. 11). On July 7, 2014, the trial court granted the Mains leave to file an amended complaint. (Doc. No. 17). The Mains filed their amended complaint on July 21, 2014. (Doc. No. 24). The factual allegations excerpted above from the original complaint remained unchanged in the amended complaint. (*Id.* at ¶ 3-9).

{¶6} On August 8, 2014, the City filed a motion to dismiss the Mains' amended complaint. (Doc. No. 29). In it, the City incorporated the arguments it made in its June 16, 2014 motion to dismiss the complaint and its July 28, 2014 reply memorandum, noting that "[t]he only substantive difference between the Amended Complaint and the initial complaint is the addition in the Amended Complaint of [East Ohio] as a defendant in place of a John Doe defendant." (*Id.*).

{¶7} On August 13, 2014, 1127 Construction filed its answer to the amended complaint. (Doc. No. 32).

{¶8} Also on August 13, 2014, the trial court granted the City's motion to dismiss, dismissed the amended complaint as to the City and 1127 Construction's cross-claim against the City, and determined "that there is no just reason for delay." (Doc. No. 33).

{¶9} On September 10, 2014, the Mains filed a notice of appeal.[1] (Doc. No. 39). They raise one assignment of error for our review.

Assignment of Error

The trial court erred in granting Appellee's Civ.R. 12(B)(6) motion (Judgment Entry, generally).

{¶10} In their assignment of error, the Mains argue that the trial court erred in granting the City's Civ.R. 12(B)(6) motion. Specifically, the Mains contend

[1] 1127 Construction did not appeal the trial court's dismissal of its cross-claim against the City.

that they allege facts in their amended complaint that invoke an exception to political-subdivision immunity under R.C. 2744.02(B)(2).

{¶11} "An appellate court reviews de novo the trial court's decision to grant or deny a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted." *Doe v. Bath Local School Dist.*, 3d Dist. Allen No. 1-14-12, 2014-Ohio-4992, ¶ 4, citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. In reviewing the trial court's decision, "we accept all factual allegations in the complaint as true." *Miller v. Van Wert Cty. Bd. of Mental Retardation & Dev. Disabilities*, 3d Dist. Van Wert No. 15-08-11, 2009-Ohio-5082, ¶ 7, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). "Additionally, we must construe any reasonable inferences in favor of the party opposing the motion to dismiss." *Bath Local School Dist.* at ¶ 4, citing *Arnett v. Precision Strip, Inc.*, 3d Dist. Auglaize No. 2-11-25, 2012-Ohio-2693, ¶ 9. *See also Miller* at ¶ 7, citing *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶ 14. To sustain a trial court's dismissal 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.'" *Miller* at ¶ 7, quoting *LeRoy* at ¶ 14. *See also Bath Local School Dist.* at ¶ 4, quoting *LeRoy* at ¶ 14.

{¶12} R.C. Chapter 2744 governs political subdivision liability and immunity. *Miller* at ¶ 14. "To determine whether a political subdivision is

entitled to immunity under Chapter 2744, a reviewing court must engage in a three-tiered analysis." *Id.*, citing *Hubbard v. Canton City School Bd. Of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, ¶ 10, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28 (1998). "The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function." *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St.3d 357, 2013-Ohio-989, ¶ 15, citing *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶ 7. *See also Miller* at ¶ 14, citing R.C. 2744.02(A)(1) and *Hubbard* at ¶ 10. "The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability." *Riffle* at ¶ 15, citing *Colbert* at ¶ 8. *See also Miller* at ¶ 14, citing *Hubbard* at ¶ 12, citing *Cater* at 28. "If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply" to provide "the political subdivision a defense against liability." *Riffle* at ¶ 15, citing *Colbert* at ¶ 9. *See also Miller* at ¶ 14, citing *Cater* at 28.

{¶13} Statutory immunity, including political-subdivision immunity, is an affirmative defense. *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, ¶ 17, citing *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 98 (1999). Ohio is a notice-pleading state, so "a

plaintiff need not affirmatively dispose of the immunity question altogether at the pleading stage." *Scott v. Columbus Dept. of Pub. Utils.*, 192 Ohio App.3d 465, 2011-Ohio-677, ¶ 8 (10th Dist.), citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-145 (1991) and *Fink v. Twentieth Century Homes, Inc.*, 8th Dist. Cuyahoga No. 94519, 2010-Ohio-5486, ¶ 29. Indeed, "'complaints need not anticipate and attempt to plead around defenses.'" *Savoy v. Univ. of Akron*, 10th Dist. Franklin No. 11AP-183, 2012-Ohio-1962, ¶ 8, quoting *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir.2004). "[A] plaintiff must merely allege a set of facts that, if proven, would plausibly allow for recovery." *Scott* at ¶ 8, citing *Fink* at ¶ 29.

{¶14} Because affirmative defenses typically rely on matters outside the complaint, they normally cannot be raised successfully in a Civ.R. 12(B)(6) motion.[2] *See Cristino v. Bur. of Workers' Comp.*, 10th Dist. Franklin No. 12AP-60, 2012-Ohio-4420, ¶ 21, citing *Reasoner v. Columbus*, 10th Dist. Franklin No. 02AP-831, 2003-Ohio-670, ¶ 12. "If, however, the existence of an affirmative defense is obvious from the face of the complaint, a court may grant a Civ.R.

[2] The dissent suggests that we "recognize[ ] that 'normally' affirmative defenses should not be asserted in a Civ.R. 12(B)(6) motion." The dissent also suggests that we believe that a party's ability to assert an affirmative defense in support of a Civ.R. 12(B)(6) motion is based on a judicially created "exception" to the Rules of Civil Procedure. The dissent misstates our position. The point is simply that, while a party may assert an affirmative defense in support of a Civ.R. 12(B)(6) motion, the party will rarely prevail because affirmative defenses typically rely on matters outside the complaint. Rarely prevailing when arguing an affirmative defense in support of a Civ.R. 12(B)(6) motion does not mean it takes an "exception" to assert the argument in the first place.

12(B)(6) motion on the basis of the affirmative defense."[3] *Id.*, citing *Reasoner* at ¶ 12, *Bucey v. Carlisle*, 1st Dist. Hamilton No. C-090252, 2010-Ohio-2262, ¶ 9, *Altier v. Valentic*, 11th Dist. Geauga No. 2003-G-2521, 2004-Ohio-5641, ¶ 31, and *Loyer v. Turner*, 129 Ohio App.3d 33, 35 (6th Dist.1998). *See also Thomas v. Bauschlinger*, 9th Dist. Summit No. 26485, 2013-Ohio-1164, ¶ 12, citing *Pierce v. Woyma*, 8th Dist. Cuyahoga No. 94037, 2010-Ohio-5590, ¶ 38. In other words, if it is obvious from the face of the complaint that a political-subdivision defendant is immune, then the complaint "fail[s] to state a claim *upon which relief can be granted*" as to that political-subdivision defendant. (Emphasis added.) Civ.R. 12(B)(6). *See also Thomas* at ¶ 12. In that scenario, though the complaint may state a claim, it is not one on which relief can be granted because, based on the plaintiff's allegations, the political subdivision is immune. In sum, "unless the face of the complaint obviously or conclusively establishes the affirmative defense, a court may not dismiss the complaint for failure to state a claim." *Cristino* at ¶ 21.

{¶15} It is the law of this court that the affirmative defense of immunity under R.C. Chapter 2744 may serve as the basis of a dismissal under Civ.R.

[3] The dissent apparently views Civ.R. 12(B)(6) and Civ.R. 8(C) as mutually exclusive, such that asserting an affirmative defense in a Civ.R. 12(B)(6) motion is incompatible with asserting that affirmative defense in a responsive pleading under Civ.R. 8(C). Civ.R. 12(B)(6) and Civ.R. 8(C) are not mutually exclusive. A defendant may file a pre-answer Civ.R. 12(B)(6) motion on the basis of immunity and, if the trial court denies the motion, assert the affirmative defense of immunity in its answer (i.e. responsive pleading), in full compliance with Civ.R. 12(B)(6) and Civ.R. 8(C). Indeed, by its own language, Civ.R. 8(C) applies only "[i]n pleading to a preceding pleading," and, as the dissent acknowledges, a motion, such as a Civ.R. 12(B)(6) motion, is not a pleading. *Snyder v. Gleason Constr.*, 6th Dist. Lucas No. L-12-1187, 2013-Ohio-1930, ¶ 19 ("'Pleadings' include only complaints, answers and replies.'"), citing Civ.R. 7(A).

12(B)(6). *See Miller*, 2009-Ohio-5082, at ¶ 14-26 (reversing the trial court's judgment denying a political subdivision's Civ.R. 12(B)(6) motion to dismiss under R.C. Chapter 2744). In addition, the Supreme Court of Ohio has, in no fewer than three cases, addressed immunity arguments on their merits in appeals involving Civ.R. 12(B)(6) motions to dismiss on the basis of immunity. *Marrek v. Cleveland Metroparks Bd. of Commrs.*, 9 Ohio St.3d 194, 195, 198 (1984) (affirming the appellate court's affirmance of a Civ.R. 12(B)(6) dismissal on the basis of immunity); *Mathis v. Cleveland Pub. Library*, 9 Ohio St.3d 199, 200-201 (1984) (reversing the appellate court's affirmance of a Civ.R. 12(B)(6) dismissal on the basis of immunity); *York* at 143-145 (affirming the appellate court's reversal of a Civ.R. 12(B)(6) dismissal on the basis of immunity).[4]

{¶16} In this case, the parties do not dispute that the City is a political subdivision generally immune from liability. Rather, their dispute lies in the second tier of the analysis. Specifically, the parties dispute whether the Mains' amended complaint alleges a set of facts under which the Mains might plausibly demonstrate that the exception found in R.C. 2744.02(B)(2) applies. In granting the City's Civ.R. 12(B)(6) motion to dismiss, the trial court concluded that the

[4] The dissent relies on *State ex rel. Freeman v. Morris* as indirect support for the proposition that "[m]atters designated by Civ.R. 8(C) as affirmative defenses and not specifically enumerated in Civ.R. 12(B) may not be raised by a motion to dismiss under Civ.R. 12(B)." The Court's holding in *Freeman* is not so sweeping and applies only to the affirmative defense of res judicata: "[W]e hold that the defense of *res judicata* may not be raised by motion to dismiss under Civ.R. 12(B)." (Emphasis sic.) 62 Ohio St.3d 107, 109 (1991). Moreover, in addition to addressing immunity arguments on their merits in the context of Civ.R. 12(B)(6) dismissals, the Supreme Court of Ohio has held, for example, that a Civ.R. 12(B)(6) dismissal may be based on a statute of limitations, which is one of the affirmative defenses listed in Civ.R. 8(C). *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 11; *Mills v. Whitehouse Trucking Co.*, 40 Ohio St.2d 55, 58 (1974).

City "is immune from the tort liability alleged by" the Mains because "the repair of city sidewalk was a governmental function, not a proprietary function." (Doc. No. 33 at 5).

{¶17} R.C. Chapter 2744 "recognizes that political subdivisions act in two defined capacities—'governmental functions' and 'proprietary functions.'" *State ex rel. Rohrs v. Germann*, 3d Dist. Henry No. 7-12-21, 2013-Ohio-2497, ¶ 34. The R.C. 2744.02(B)(2) "exception provides that '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.'" (Emphasis sic.) *Wanamaker v. Bucyrus*, 3d Dist. Crawford Nos. 3-12-02 and 3-12-03, 2012-Ohio-5232, ¶ 14. Therefore, in a case such as this one, the central issue resolves to whether the action for which the plaintiff seeks to hold the political subdivision liable is part of a governmental function or part of a proprietary function. *Scott*, 192 Ohio App.3d 465, 2011-Ohio-677, at ¶ 11, citing *Burns v. Upper Arlington*, 10th Dist. Franklin No. 06AP-680, 2007-Ohio-797, ¶ 10, 12; *Rohrs* at ¶ 33-34. Specifically in this case, the City's entitlement to immunity depends on whether the negligent act alleged in the Mains' amended complaint—failing to properly secure a circular metal plate covering a circular hole in the sidewalk—relates to the maintenance of the sidewalk or to the maintenance of some proprietary function. *Scott* at ¶ 11. If the face of the complaint obviously and conclusively establishes that the City engaged

in a governmental function, then it is not liable under the R.C. 2744.02(B)(2) exception and is immune. *See Thomas*, 2013-Ohio-1164, at ¶ 12; *Michaels v. Cincinnati Waste Services, Inc.*, 62 Ohio Misc.2d 379, 383 (C.P.1992).

{¶18} A "proprietary function" includes, among other functions, "The establishment, maintenance, and operation of a utility, including, but not limited to, * * * a municipal corporation water supply system * * *," and, "The maintenance, destruction, operation, and upkeep of a sewer system * * *." R.C. 2744.01(G)(2)(c) and 2744.01(G)(2)(d). A "governmental function" includes, among other functions, "The regulation of the use of, and the maintenance and repair of, * * * streets [and] sidewalks * * *." R.C. 2744.01(C)(2)(e).

{¶19} The face of the Mains' amended complaint obviously and conclusively establishes that the City is immune because it engaged in a governmental function, for which it cannot be liable under the R.C. 2744.02(B)(2) exception. The Mains allege in their amended complaint that Rick "was walking along a city *sidewalk*" when he "stepped on a circular metal plate which was covered by rocks so that it could not be readily seen." (Emphasis added.) (Doc. No. 24 at ¶ 3, 4). "The metal plate on which [Rick] stepped was covering a circular hole *in the sidewalk*." (Emphasis added.) (*Id.* at ¶ 5). "The metal plate was not properly secured," and "when [Rick] stepped on the plate, the plate moved and [Rick's] right leg entered the hole causing him to fall down and sustain bodily injuries." (*Id.* at ¶ 9). At the site of Rick's fall, the City "undertook a construction

project whereby they ordered, completed and supervised work being done to the *sidewalk* and *street*." (Emphasis added.) (*Id.* at ¶ 7).

{¶20} Under R.C. 2744.01(C)(2)(e), the maintenance and repair of sidewalks and streets is a governmental function. To conclude that the Mains allege sufficient facts to overcome to City's immunity argument, we would need to infer that the construction project encompassed more than "work being done to the sidewalk and street." (Doc. No. 24 at ¶ 7). We would also need to infer that the City's alleged negligent act of improperly securing a "circular metal plate" over a "circular hole in the sidewalk" related to the establishment, maintenance, or operation of something other than just the sidewalk and that the establishment, maintenance, or operation of this "other thing" was a proprietary function of the City. (*Id.* at ¶ 4, 5). It is true that, in our review of a Civ.R. 12(B)(6) dismissal, we construe any reasonable inferences in favor of the party opposing the motion to dismiss; however, "stacking these inferences upon one another" is improper. *Ins. Co. of N. Am. v. Reese Refrig.*, 89 Ohio App.3d 787, 791-792 (3d Dist.1993), citing *Hurt v. Charles J. Rogers Transp. Co.*, 164 Ohio St. 329, 332 (1955). Here, we decline to base inferences on inferences to conclude that, based on the amended complaint, the Mains can prove a set of facts in support of their claims that would entitle them to relief against the City. Rather, we hold that, because it appears beyond doubt that the Mains can prove no set of facts in support of their claims against the City that would entitle them to relief, the trial court did not err

by granting the City's Civ.R. 12(B)(6) motion to dismiss the Mains' claims against the City.[5] We hasten to add that this holding is narrow—it is based on the particular allegations contained in the amended complaint in this case and the reasonable inferences drawn from those allegations.

{¶21} In support of their position, the Mains cite three cases, all of which are distinguishable. The Mains rely heavily on *Scott*, in which the plaintiff alleged that "while walking on a sidewalk * * *, he stepped on an 'improperly attached' manhole cover, causing his leg to drop into the manhole." 192 Ohio App.3d 465, 2011-Ohio-677, at ¶ 2, 11. The plaintiff also "alleged that the city 'negligently allowed the manhole cover to become improperly anchored where a pedestrian * * * would be likely to injure himself.'" *Id.* The Tenth District Court of Appeals inferred that the plaintiff alleged "negligence with respect to the city's maintenance of the underlying support for the manhole cover" and held that the trial court erred by granting the city's motion to dismiss because "it is not beyond doubt that [the plaintiff] could prove a set of facts, consistent with his complaint, establishing liability on the part of the city for negligence with respect to a proprietary function." *Id.* at ¶ 16, 18.

[5] Because dismissal of the Mains' negligence claim against the City is proper under R.C. Chapter 2744, dismissal of Dorothy's loss-of-consortium claim is also proper. *DiGiorgio v. Cleveland*, 8th Dist. Cuyahoga No. 95945, 2011-Ohio-5878, ¶ 51. "'[A] claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury.'" *Grassia v. Cleveland*, 8th Dist. Cuyahoga No. 93647, 2010-Ohio-2483, ¶ 26, fn. 8, quoting *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93 (1992).

{¶22} The Mains also cite *Fedarko v. Cleveland*. 8th Dist. Cuyahoga No. 100223, 2014-Ohio-2531. In that case, the plaintiffs "alleged that the city negligently failed to inspect, maintain, or repair the defective and dilapidated manhole cover." *Id.* at ¶ 7. Central to the determination in that case was "whether maintaining the manhole cover and water meter vault fall under the proprietary water system or the 'governmental function of maintaining a sidewalk.'" *Id.* at ¶ 9. The Eighth District Court of Appeals concluded that the trial court did not err in denying the city's motion for summary judgment, in part because "the water meter vault and cover fall within the R.C. 2744.02(B)(2) exception to immunity as they would be part of the city water's system and, therefore, a proprietary function." *Id.* at ¶ 28. In reaching its holding, the court distinguished a case that involved R.C. 2744.02(B)(3) and "only dealt with a trip and fall on a sidewalk due to an alleged defect in the sidewalk; there was no manhole." *Id.* at ¶ 27.

{¶23} Finally, the Mains cite *Parker v. Distel Construction, Inc.*, in which the plaintiff "fell into an approximately twenty-five inch hole. The hole is located at the side of [the political subdivision's] water meter * * *." 4th Dist. Jackson No. 10CA18, 2011-Ohio-4727, ¶ 2. On appeal, the political subdivision argued "that the R.C. 2744.02(B)(2) exception does not apply to its failure to place a lid on the water meter pit." *Id.* at ¶ 14. The Fourth District Court of Appeals held that the trial court properly denied the political subdivision's motion for summary judgment because "the maintenance of the water meter lid is part of the

maintenance of the water supply system—a proprietary function for which appellant may be liable under R.C. 2744.02(B)(2)." *Id.* at ¶ 24. In reaching that conclusion, the court noted that the plaintiff "allege[d] not a failure to maintain a sidewalk or other walkway, but instead, a failure to properly maintain part of an underground water system—a water supply system * * *." *Id.* at ¶ 23.

{¶24} Unlike the allegations in *Scott*, *Fedarko*, and *Parker*, the Mains' allegations in their amended complaint relate only to an improperly secured "circular metal plate" covering a "circular hole in the sidewalk." The Mains' amended complaint refers only to a sidewalk and a street. Unlike in *Scott*, *Fedarko*, and *Parker*, the Mains make no allegations concerning a manhole, a manhole cover, a water-meter vault, a water-meter-vault lid, or a sewer system. In *Scott*, for example, the plaintiff's allegation that the manhole cover was improperly attached was critical, because it allowed the Tenth District to infer "negligence relating to the underlying portion of the *sewer* supporting the *manhole* cover." (Emphasis added.) 192 Ohio App.3d 465, 2011-Ohio-677, at ¶ 16. Judging by the allegations in the Mains' amended complaint and reasonable inferences based on those allegations, the alleged defect concerns only the sidewalk, not a proprietary function.

{¶25} For the reasons above, we overrule the Mains' assignment of error.

{¶26} Having found no error prejudicial to the appellants herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

WILLAMOWSKI, J., concurs in Judgment Only.

ROGERS, P.J., dissents.

{¶27} The holding of the majority, allowing statutory immunity to be considered on a Civ.R. 12(B)(6) motion, is totally illogical. They acknowledge that Ohio is a notice pleading state and that "complaints need not anticipate and attempt to plead around defenses." (Majority Opin., ¶ 13). They acknowledge that in considering a Civ.R. 12(B)(6) motion the trial court may not look outside the complaint. Yet they insist that it is permissible to consider statutory immunity, which is not mentioned in the complaint, and has not been pled. Where then did this defense of statutory immunity arise, if not from something outside the complaint?

{¶28} To reach its holding, the majority rejects notice pleading and relies on an affirmative defense that has not been pled as required by Civ.R. 8(C). If the defense has not been raised by separate pleading and is waived if not affirmatively raised, how can the trial court consider it?

{¶29} As I have previously expressed in my separate concurrences in *Finn v. James A. Rhodes State College*, 191 Ohio App.3d 634, 2010-Ohio-6265 (3d

Dist.), and *Miller v. Van Wert Cty. Bd. of Mental Retardation & Dev. Disabilities*, 3d Dist. Van Wert No. 15-08-11, 2009-Ohio-5082, I believe it is important to distinguish between a proper Civ.R. 12(B)(6) motion to dismiss and a ruling on sovereign immunity, which I believe must always be asserted in a responsive pleading as an affirmative defense.

{¶30} Civ.R.12(B) governs motions to dismiss and provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1.

Additionally, Civ.R. 8(C) governs the pleading of affirmative defenses and provides, in pertinent part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

{¶31} The clear, unambiguous, and unequivocal requirement of this language is that any affirmative defense, and any defense that constitutes an avoidance of liability, must be specifically pleaded as an affirmative defense.

Civ.R. 8(C) ("[A] party *shall set forth affirmatively* * * * any other matter constituting an avoidance or affirmative defense."); Civ.R. 12(B) ("Every defense * * * *shall be asserted* in the responsive pleading * * *.").[6] If it is not properly and affirmatively set forth in a responsive pleading, then the defense is waived.

{¶32} I further note that the Supreme Court of Ohio has defined an affirmative defense as:

> a new matter which, assuming the complaint to be true, constitutes a defense to it * * * [and] "any defensive matter in the nature of a confession and avoidance. It admits that the plaintiff has a claim (the 'confession') but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the 'avoidance')."

State ex rel. The Plain Dealer Publishing Co. v. City of Cleveland, 75 Ohio St.3d 31, 33 (1996), citing *Davis v. Cincinnati, Inc.*, 81 Ohio App.3d 116, 119 (9th Dist.1991), *Black's Law Dictionary* 60 (6th Ed.1990), 1 Klein, Brown & Murtaugh, Baldwin's Ohio Civil Practice 33, T. 13.03 (1988). Logically, because the affirmative defense includes the *confession*, it is incompatible with the Civ.R. 12(B)(6) defense of failure to state a claim. It in fact admits that the plaintiff has stated a claim and that the plaintiff may be successful on that claim should the opposing party fail to properly plead the affirmative defense. A motion to dismiss

[6] " 'Shall' " is defined as "will have to' " and is "used to express a command or exhortation' " and " 'to express what is mandatory.' " *State v. Swihart*, 3d Dist. Union No. 14-12-25, 2013-Ohio-4645, ¶ 61, quoting *Webster's Third New International Dictionary* 2085 (2002); *see also State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, ¶ 28 ("We have repeatedly recognized that use of the term 'shall' in a statute or rule connotes a mandatory obligation unless other language evidences a clear and unequivocal intent to the contrary."). Thus, the defendant has a mandatory obligation to raise the affirmative defense in a responsive pleading—not in a motion. The only "clear and unequivocal" language in the rules that allow otherwise is if the defense is one listed in Civ.R. 12(B)(1)-(7). Sovereign immunity is not listed in Civ.R. 12(B)(1)-(7); therefore, the City of Lima had a mandatory obligation to raise the defense in its responsive pleading—not in a Civ.R. (12)(B) motion.

pursuant to Civ.R. 12(B)(6) is, therefore, irreconcilable with the confession included in an affirmative defense.

{¶33} I believe the trial court and the majority in this court have ignored the obvious distinction between the "failure to state a claim upon which relief can be granted" and matters "constituting an avoidance or affirmative defense." *See* Civ.R. 12(B)(6); Civ.R. 8. In the former, no set of facts proven by the claimant will give rise to a proper claim for relief. In the latter, the plaintiff's allegations will give rise to a claim for relief and liability, unless the opposing party can demonstrate some statute or other defense which neutralizes or nullifies the responsibility of that party. *See Davis* at 119, citing *Black's Law Dictionary* 55 (5th Ed.1979). This is a substantial difference, and the proper methods of presenting these issues are separate and distinct.

{¶34} Civ.R. 12(B)(6) specifically provides that certain enumerated defenses may be raised in a motion prior to the filing of a responsive pleading. However, there is no such provision allowing for an affirmative defense to be raised by motion. In fact, Civ.R. 8(C) specifically requires that an affirmative defense be "set forth affirmatively" and, if not affirmatively raised in the pleading, it is waived. *Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 20 (1998) (holding that "[a]ffirmative defenses other tha[n] those listed in Civ.R. 12(B) are waived if not raised in the pleadings or in an amendment to the pleadings").

{¶35} Matters designated by Civ.R. 8(C) as affirmative defenses and not specifically enumerated in Civ.R. 12(B) may not be raised by a motion to dismiss under Civ.R. 12(B). *See State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109 (1991)[7]; *see also Marok v. Ohio State Univ.*, 10th Dist. Franklin No. 07AP-921, 2008-Ohio-3170, ¶ 13; *Post v. Caycedo*, 9th Dist. Summit No. 23769, 2008-Ohio-111, ¶ 7; *Stutes v. Harris*, 2d Dist. Greene No. 21753, 2007-Ohio-5163, ¶ 10-12, 18-19. Furthermore, an affirmative defense may not be raised for the first time in a motion for summary judgment. *Eulrich v. Weaver Bros., Inc.*, 165 Ohio App.3d 313, 2005-Ohio-5891, ¶ 12 (3d Dist.), citing *Carmen v. Link*, 119 Ohio App.3d 244, 250 (3d Dist.1997). *See also Kritzwiser v. Bonetzky*, 3d Dist. Logan No. 8-07-24, 2008-Ohio-4952; *Midstate Educators Credit Union, Inc. v. Werner*, 175 Ohio App.3d 288, 2008-Ohio-641 (10th Dist.).

{¶36} Moreover, statutes and other relevant circumstances are seldom contained in a complaint. Obviously, if the trial court may only consider the

[7] While the majority believes I misstate the holding in *Morris*, I feel it supports my position. In *Morris*, the Ohio Supreme Court used the same logic that I use in this dissent. The court found that, "Civ.R. 8(C) designates *res judicata* an affirmative defense. Civ.R. 12(B) enumerates defenses that may be raised by motion and does not mention *res judicata*. Accordingly, we hold that the defense of res judicata may not be raised by motion to dismiss under Civ.R. 12(B)." *Morris*, 62 Ohio St.3d at 109. Here, political subdivision immunity is an affirmative defense, which the majority recognizes. *See* (Majority Opin., ¶ 13). Civ.R. 12(B) enumerates defenses that may be raised by motion and does not mention political subdivision immunity. How is the affirmative defense of political subdivision immunity different than the affirmative defense of res judicata? Further, the majority states that the Supreme Court of Ohio has addressed immunity arguments on their merits in appeals involving Civ.R. 12(B)(6) motions to dismiss on the basis of immunity. However, the issue of whether a Civ.R. 12(B)(6) motion is a proper way to raise an affirmative defense has never been explicitly addressed by the Supreme Court of Ohio. Nor has the Court offered an explanation as to how to reconcile its holding in *Morris*, which states you cannot raise the affirmative defense of res judicata in a Civ.R. 12(B)(6) motion, with *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 11 and *Mills v. Whitehouse Trucking Co.*, 40 Ohio St.2d 55, 58 (1974), which state you can raise the affirmative defense of statute of limitations in a Civ.R. 12(B)(6) motion.

pleadings when ruling on a Civ.R. 12(B)(6) motion to dismiss made prior to the filing of an answer, then it does not have before it any affirmative defense. Civ.R. 7(A) defines pleadings, and only includes complaints and answers (and a reply if ordered). A motion is not included in that definition.

{¶37} "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings, and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Millhon*, 104 Ohio App.3d 614, 617 (10th Dist.1995).

{¶38} While a court cannot adjudicate the merits of an affirmative defense of political subdivision immunity by way of a Civ.R. 12(B)(6) motion, there are several other methods a court can dispose of a case before trial in order to promote judicial economy. A defendant should raise his or her affirmative defense by answer, and either party could move for judgment on the pleadings pursuant to

Civ.R. 12(C).[8] The court also has the ability to adjudicate the affirmative defense before trial by way of a motion for summary judgment, which would allow for the additional discovery necessary to distinguish between governmental and proprietary functions. Thus, there are several options for a court to swiftly resolve a case in order to avoid costly litigation while still protecting the plaintiff's right to notice pleading and discovery. Civ.R. 12(B)(6), however, is not a proper way to adjudicate an affirmative defense.

{¶39} In essence, the majority recognizes that "normally" affirmative defenses should not be asserted in a Civ.R. 12(B)(6) motion. (Majority Opin., ¶ 14). However, the majority, along with other sister appellate courts, have judicially created an "exception" to this rule. *See* (*id.*); *Cristino v. Bur. of Workers' Comp.*, 10th Dist. Franklin No. 12AP-60, 2012-Ohio-4420, 2012-Ohio-4420, ¶ 21 ("[N]ormally [affirmative defenses] cannot be raised in a Civ.R. 12(B)(6) motion. If, however, the existence of an affirmative defense is obvious from the face of the complaint, a court may grant a Civ.R. 12(B)(6) motion on the

[8] Although not controlling, I find the case of *Richards v. Mitcheff*, 696 F.3d 635, 637-638 (7th Cir.2012), to be persuasive. In *Richards*, the court found that a plaintiff does not need to anticipate affirmative defenses. Specifically, the court stated,

> A plaintiff whose allegations show that there is an airtight defense has pleaded himself out of court, and the judge may dismiss the suit on the pleadings under Rule 12(c). This comes to the same thing as a dismissal under Rule 12(b)(6), and opinions, including some by this court, often use the two interchangeably. But in principle a complaint that alleges an impenetrable defense to what would otherwise be a good claim should be dismissed (on proper motion) under Rule 12(c), not Rule 12(b)(6). *After all, the defendants may waive or forfeit their defense, and then the case should proceed.*

(Emphasis added.) *Id.* at 637-638.

basis of an affirmative defense."); *Pierce v. Woyma*, 8th Dist. Cuyahoga No. 94037, 2010-Ohio-5590, ¶ 38 ("An affirmative defense, such as statutory immunity, may be asserted through a motion to dismiss so long as the basis for the defense is apparent from the face of the complaint."). Under this "exception," an affirmative defense can be raised by way of Civ.R. 12(B)(6) so long as the complaint "obviously" or "conclusively" establishes the affirmative defense. However, there has been no amendment to the Ohio Rules of Civil Procedure to allow such an "exception." Instead, the majority and other courts have taken it upon themselves to edit and amend the rules as they see fit.

{¶40} If amendments are to be made to the Ohio Rules of Civil Procedure, they must be made through the proper procedure. In 1968, the citizens of Ohio passed the Modern Courts Amendment to Article IV of the Ohio Constitution. *See* O'Connor, *The Ohio Modern Courts Amendment: 45 Years of Progress*, 76 Alb.L.Rev. 1963, 1964 (2013). Pursuant to this amendment, the Supreme Court of Ohio created the Commission on the Rules of Practice and Procedure, which reviews and recommends amendments to the Rules of Civil Procedure. These proposed amendments go through two separate rounds of public comments before the Supreme Court can approve the amendments. The General Assembly then has the opportunity to enact a concurrent resolution of disapproval for all, or a portion of, the amendments the Supreme Court has proposed. Ohio Constitution, Article IV, Section 5(B).

{¶41} Perhaps the result of the trial court might be the same if the affirmative defense is pleaded and reargued. However, that does not negate the fact that the Rules of Civil Procedure specifically prohibit the procedure followed in this case. While I can understand arguments to impose an additional pleading requirement on plaintiffs in this context, it is the judge's duty to construe the Rules of Civil Procedure, not to make them better. *See Jones*, 549 U.S. at 216. "The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.' " *Id.*, quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 533 (1947). "However hurried a court may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment." *Miller v. Lint*, 62 Ohio St.2d 209, 215 (1980).

{¶42} Even if this judicially created "exception" exists, I would find that the complaint does not "obviously" or "conclusively" establish that the City is entitled to political subdivision immunity. It must be reiterated that Ohio is a notice-pleading state. *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 2008-Ohio-7042, ¶ 5 (4th Dist.). Consequently, "Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 29. Further, "a plaintiff 'is

not required to prove his or her case at the pleading stage' because many plaintiffs lack access to relevant evidence, which can be obtained only through discovery from materials in the defendant's possession." *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947, ¶ 7, quoting *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 145 (1991), and citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 549 (1992).

{¶43} A plaintiff is not required to anticipate all possible defenses, let alone affirmative defenses. *See Richards v. Mitcheff*, 696 F.3d 635, 637 (7th Cir.2012) ("What a complaint must plead is enough to show that the claim for relief is plausible. Complaints need not anticipate defenses and attempt to defeat them."); *see also Owner Operator Indep. Drivers Assn., Inc. v. Comercia Bank*, 540 F.Supp.2d 925, 929 (S.D. Ohio 2008) ("Ordinarily, dismissing claims * * * under Rule 12(b)(6) is disfavored because plaintiffs have no duty to plead facts negating an affirmative defense * * *."). Therefore, a plaintiff is not required to include in the complaint all circumstances which might negate potential affirmative defenses; and which can also be waived by failure to plead them. *See Reed v. Multi-Cty. Juvenile Sys.*, 7th Dist. Columbiana No. 09 CO 27, 2010-Ohio-6602, ¶ 94 (finding that employees waived immunity defense by failing to raise it in their answer and amended answer); *O'Brien v. City of Olmstead Falls*, 8th Dist. Cuyahoga Nos. 89966, 90336, 2008-Ohio-2658, ¶ 13 (finding that under Civ.R. 8(C) a defendant is required to set forth affirmative defenses which would effectively preclude

liability and failure to do so waives the defense, including immunity); *Eulrich*, 2005-Ohio-5891 at ¶ 13 (finding that the defendant waived affirmative defense of statutory immunity by failing to plead the defense in answer or amended pleadings). For the trial court to consider a Civ.R. 12(B)(6) motion to dismiss on the basis of an alleged affirmative defense that has not been included in a responsive pleading, and to which a plaintiff has not had the opportunity to respond, is improper and highly prejudicial to the plaintiff.

{¶44} Here, the Mains alleged that a circular hole in a city sidewalk caused Rick to fall, causing him injuries. It is possible that this hole in the sidewalk was an access point to the water supply system, which would be a proprietary function and an exception to the political subdivision immunity statute. This set of facts would be consistent with what was pleaded in the complaint and was sufficient to put the City on notice of the Mains' allegations.

{¶45} The majority holds that the Mains' complaint was properly dismissed because it did not state "manhole cover" anywhere within its complaint. (Majority Opin., ¶ 24). However, the complaint describes a "manhole cover" without explicitly stating it was a "manhole cover." While I agree that the complaint could have been worded better, it does not "obviously" or "conclusively" establish that the hole in the sidewalk that Rick fell into was not a manhole cover and became unattached due to the negligent upkeep of the City's sewer system. Indeed, the

trial court did not explain what evidence it considered that made it conclude that the circular hole was irrefutably *not* a manhole cover.

{¶46} The obvious advantage to the City in relying on a Civ.R. 12(B)(6) motion to dismiss, as opposed to a legitimately pleaded affirmative defense, is that it deprives the Mains of the opportunity for discovery. This is also the extreme prejudice the trial court and the majority would impose on the Mains and all similarly situated plaintiffs. Could it be that the City knows what such discovery would reveal and is fighting to avoid exposing the true extent of its culpability?

{¶47} Under the current standard of review, we construe all reasonable inferences in favor of the party opposing the motion to dismiss. I think it is reasonable to infer that something described as a circular metal plate is a "manhole cover," and I also think it is reasonable to infer that such plate became unattached due to some sort of negligent upkeep of the City's water system. It does not appear beyond doubt that the Mains cannot prove these facts at a later stage in the proceedings. Nor do I think it was necessary for the Mains to anticipate an affirmative defense in its complaint that could have very well been waived by the City.

{¶48} Lastly, I note that the majority has raised the issue of this court's precedent, and similar holdings of other courts. To that I respond that my oath of office commits me to support the Constitution of the United States, and the Constitution of the State of Ohio. Nowhere in my oath have I committed to

blindly follow poorly conceived and illogical precedents of this court, or any other court. Because I am pledged to uphold the Constitution of the State of Ohio I cannot and will not accept a judicial bastardization of the Ohio Rules of Civil Procedure.

{¶49} In conclusion, it is my position that an affirmative defense cannot be raised by a Civ.R. 12(B)(6) motion, and thus, the ruling on such an affirmative defense was not ripe for consideration. Even if it was proper to raise the affirmative defense in a motion to dismiss, I do not think it is "obvious" or "conclusive" from the face of the complaint that the City is entitled to political subdivision immunity at this stage in the proceedings. The majority has unfairly prejudiced the Appellants by depriving them of the right of notice pleading and discovery, and by considering an affirmative defense which was neither raised by the language of the complaint nor properly pled by the City. For these reasons, I dissent.

/jlr