[Cite as *Helfrich v. Branstool*, 2009-Ohio-2865.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES HELFRICH, pro se.,	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08 CA 0072
W. DAVID BRANSTOOL, et al.,	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Licking County Court Of Common Pleas Case No. 08 CV 0050
JUDGMENT:	Affirmed In Part, Reversed and Remanded In Part
DATE OF JUDGMENT ENTRY:	June 16, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee - W. David Branstool
JAMES HELFRICH, Pro Se P.O. Box 921 Pataskala, Ohio 43062	LISA M. ZARING 36 E. Seventh Street, Suite 2100 Cincinnati, Ohio 45202
For Defendant-Appellee - Licking County	For Defendant-Appellee Ginna Smith and City of Newark
ANTHONY W. STOCCO 20 South Second Street, 4th Floor Newark, Ohio 43055	PAUL MICHAEL LA FAYETTE 65 East State Street, Suite 400 Columbus, Ohio 43215

Edwards, J.

{¶1} Plaintiff-appellant, James Helfrich, appeals from the March 21, 2008, April 28, 2008, and May 21, 2008, Entries of the Licking County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} In 2002, appellant, James Helfrich, assisted appellee, Judge W. David Branstool, in his campaign for Common Pleas Court Judge. When, in 2003, appellee Judge Branstool asked appellant for his support again, appellant refused, and the two engaged in a heated letter writing campaign. The letters ended up being published in the newspaper.

{¶3} At the time, a forcible entry and detainer case was pending in the Licking County Municipal Court before appellee Judge Branstool, titled *Helfrich v. Mellon.* The defendant in such case had filed a counterclaim against appellant alleging breach of the covenant of quiet enjoyment, trespass and violations of R.C. 5321.04 and 5321.15, sexual harassment and retaliation.

{¶4} The case proceeded to trial on May 17, 2005. On May 20, 2005, the jury returned a verdict in favor of appellant in the amount of $569.56, but also a verdict in favor of the defendant in the amount of $2,500 on her counterclaim.

{¶5} On June 3, 2005, appellant filed a motion to reverse the jury verdict. On June 15, 2005, appellant filed a motion to disqualify appellee, Judge Branstool. After appellee Judge Branstool recused himself, Judge Douglas James Bennett was assigned by the Supreme Court of Ohio to the case on September 8, 2005. Judge Bennett denied appellant's motion.

{¶6} Appellant then appealed. Pursuant to an Opinion filed on June 27, 2007, in *Helfrich v. Mellon*, Licking App. No. 06-CA-69, 2007-Ohio-3358, this Court held, in relevant part, that appellant was estopped from arguing that the trial court had erred in denying his motion to reverse the jury verdict because appellant had failed to provide Judge Bennett with the trial transcript.

{¶7} Subsequently, on January 8, 2008, appellant filed a complaint against appellee Judge W. David Branstool, Ginna Smith (nka Walker), the City of Newark, who appellant alleged employed both appellee Judge Branstool and appellee Smith, and Licking County, who appellant alleged employed appellee Judge Branstool. Appellant, in his complaint, alleged that in May of 2005, he had contacted appellee Ginna Smith, who was the court reporter for appellee Judge Branstool, and asked her to transcribe excerpts of the trial transcript in *Helfrich v. Mellon*. Appellant alleged that he provided appellee Smith with a deposit for the transcript and that, on or about June 1, 2005, when he was discussing transcripts with her, appellee Judge Branstool "abruptly barged in to the room screaming that [appellant] could not have a copy of the transcript." Appellant further alleged that on August 8, 2005, appellee Smith informed him that she would not transcribe partial transcripts and that, during the next few months, he renewed his request for excerpts of the trial transcript to no avail. Appellant, in his complaint, further alleged that he was not permitted to take part in bench conferences and conferences in appellee Judge Branstool's chambers during the pendency of *Helfrich v. Mellon* and that he never received a copy of a motion in limine filed by the opposing counsel in such case and was never permitted to argue the merits of the motion.

{¶8} Appellant, in his complaint, stated as follows under "Cause of Action":

{¶9} "Plaintiff brings this action as a result of Defendants' intentional abuse of process, violations of Ohio Revised Code, Plaintiff's State and Federal Constitutional rights, violations of Plaintiff's freedom of speech, and right to pursue legal action pro se, whereby the Defendants were negligent, acting in bad faith, and acting in a clear absence of all jurisdiction, and failed to perform duties."

{¶10} On February 4, 2008, appellee Judge Branstool filed a Motion to Dismiss pursuant to Civ.R. 12(B)(6), arguing, in part, that he was absolutely immune from all liability, that appellant had failed to state a claim under 42 U.S.C. Section 1983 and that such claim failed on the merits. On February 6, 2008, appellee Licking County filed a Motion to Dismiss pursuant to Civ.R. 12(B)(6), arguing that appellee Judge Branstool had immunity for the acts that are alleged to have occurred and that appellee Licking County was not his "employer."

{¶11} Pursuant to an Entry filed on March 21, 2008, the trial court granted the motions filed by appellees Judge Branstool and Licking County, finding that appellee Judge Branstool was immune from liability because the conduct that appellant "complains of are judicial acts" and were taken in his official capacity as Judge. The trial court further held that appellee Judge Branstool was not an "employee" of appellee Licking County.

{¶12} Thereafter, on April 24, 2008, appellees Smith and Newark filed a Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C). Such appellees, in their motion, argued that appellee Smith was immune from liability under the doctrine of judicial immunity and also that because neither appellee Judge Branstool nor appellee

Smith were liable to appellant, appellee City of Newark could not be liable under a theory of respondeat superior.

{¶13} Appellant filed a Motion to Strike the Motion for Judgment on the Pleadings, arguing that the same was untimely. As memorialized in an Entry filed on April 28, 2008, the trial court denied appellant's Motion to Strike.

{¶14} Pursuant to an Entry filed on May 21, 2008, the trial court granted the Motion for Judgment on the Pleadings filed by appellees Smith (nka Walker) and City of Newark. The trial court found that appellee Smith was immune from liability and that since she was immune, appellee City of Newark could not be held liable under the doctrine of respondeat superior.

{¶15} Appellant now raises the following assignments of error on appeal:

{¶16} "I. THE TRIAL COURT ERRED ON MARCH 21, 2008 AND MAY 21, 2008 WHEN IT GRANTED APPELLEES' MOTION TO DISMISS, BECAUSE IT DID NOT CONSIDER ARGUMENTS AND VIOLATIONS OF HELFRICH'S STATE AND FEDERAL CONSTITUTIONAL AND CIVIL RIGHTS.

{¶17} "II. THE TRIAL COURT ERRED ON MAY 21, 2008, WHEN IT GRANTED SMITH'S MOTION TO DISMISS, BECAUSE, AMONG OTHERS, THE TRIAL COURT MISINTERPRETED *LOYER V. TURNER* AND IMMUNITY.

{¶18} "III. THE TRIAL COURT ERRED IN GRANTING LICKING COUNTY AND THE CITY OF NEWARK'S MOTION TO DISMISS.

{¶19} "IV. THE TRIAL COURT ERRED IN GRANTING ABSOLUTE IMMUNITY TO BRANSTOOL, WHO ACTED OUTSIDE THE SCOPE OF HIS JUDICIAL RESPONSIBILITIES.

{¶20} "V. THE TRIAL COURT ERRED IN APPLYING IMMUNITY FOR A PERIOD THAT BRANSTOOL WAS NOT EVEN THE PRESIDING JUDGE.

{¶21} "VI. THE TRIAL COURT ERRED IN DISMISSING HELFRICH'S PLEADING WITHOUT PREJUDICE.

{¶22} "VII. THE TRIAL COURT ERRED WHEN IT RELIED UPON ARGUMENTS OUTSIDE OF THE PLEADING."

I [As to Appellee Judge Branstool], IV, V

{¶23} Appellant, in his first, fourth and fifth assignments of error, argues that the trial court erred in granting appellee Judge Branstool's Motion to Dismiss pursuant to Civ.R. 12(B)(6). We disagree.

{¶24} The standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362 at paragraph 5. Therefore, this Court applies the same standard of review to the motion to dismiss as the trial court. When a trial court rules on a motion to dismiss for failure to state a claim, the complaint's factual allegations must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182; *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756. A motion to dismiss can only be granted where the party opposing the motion is unable to prove any set of facts that would entitle the party to the relief requested. *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 418, 650 N.E.2d 863, 865-866; *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063.

{¶25} Appellant, in his brief in the case sub judice, specifically argues that appellee Judge Branstool denied or interfered with appellant's request for a transcript and is not immune from liability. The trial court, in the case sub judice, granted appellee Judge Branstool's Motion to Dismiss, finding that appellee Judge Branstool was immune from liability.

{¶26} "When a judge acts in an official judicial capacity and has personal and subject-matter jurisdiction over a controversy, the judge is exempt from civil liability even if the judge goes beyond, or exceeds, the judge's authority and acts in excess of jurisdiction. Civil liability attaches only if the judge acts in an absence of all jurisdiction." *Borkowski v. Abood*, 117 Ohio St.3d 347, 2008-Ohio-857, 884 N.E. 2d 7, paragraph one of the syllabus, following *Wilson v. Neu* (1984), 12 Ohio St.3d 102, 465 N.E.2d 854. This broad grant of immunity protects even acts "done maliciously, or * * * in excess of * * * authority," so long they are judicial acts. *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 477 N.E.2d 1123 at paragraph one of the syllabus.

{¶27} The doctrine of judicial immunity is applicable to suits brought under Section 1983 , and judges are absolutely immune from any liability pursuant to Section 1983 unless they act in the "clear absence of jurisdiction." *Hogan v. South Lebanon* (1991), 73 Ohio App.3d 230, 236, 596 N.E.2d 1092, citing *Stump v. Sparkman* (1978), 435 U.S. 349, 356-357, 98 S.Ct. 1099.

{¶28} Appellee Judge Branstool acted within the jurisdiction of the Licking County Municipal Court. He had jurisdiction over appellant's underlying case pursuant to R.C. 1901.02(A)(7) and 1901.02(B).[1] Appellant has failed to provide any support for his allegation that appellee Judge Branstool acted in the clear absence of jurisdiction.

[1] Such sections outline the territorial jurisdiction of the Licking County Municipal Court.

The question thus becomes whether he acted in a judicial capacity in allegedly interfering with appellant's right to a transcript. "[T]he factors determining whether an act by a judge is judicial relate to the nature of the act itself (whether it is a function normally performed by a judge), and the expectation of the parties (whether they dealt with the judge in his judicial capacity)." *State ex rel. Fisher v. Burkhardt* (1993), 66 Ohio St.3d 189, 191, 610 N.E.2d 999, citing *Stump v. Sparkman* (1978), 435 U.S. 349, 362, 98 S.Ct. 1099.

{¶29} The trial court, in its March 21, 2008, Entry, found that the ordering of a transcript was a judicial act. While not on point, we find the cases of *Eades v. Sterlinske*, 810 F.2d 723, 725-26 (7th Cir.1987), cert. denied, 484 U.S. 847, 108 S.Ct. 143, 98 L.Ed.2d 99 (1987) and *Green v. Maraio,* 722 F.2d 1013 (2d Cir.1983) to be instructive. In *Eades*, supra, the court held that the judge's action in deliberately altering a trial transcript and the docket, while reprehensible, was nevertheless a judicial act. In *Green*, supra, the court held that a judge who instructed a court reporter to alter a trial transcript was immune from liability.

{¶30} Additionally, in *Wochna v. Kimbler*, 163 Ohio App.3d 349, 2005-Ohio-4802, 837 N.E. 2d 1226, the Ninth District Court of Appeals held that a judge's alleged misconduct in chambers that resulted in a plaintiff settling her case without trial constituted a judicial act. In such case, the judge, in the midst of a trial, had threatened to exclude certain critical evidence and withhold certain issues from the jury. The court, in *Wochna*, stated in relevant part, as follows: "Wochna also averred that Judge Kimbler was motivated by personal malice towards her and her husband. Even accepting these allegations as true for the purpose of this review, we find that they are not so far beyond

the scope of Judge Kimbler's jurisdiction that they would abrogate judicial immunity. See *Kelly,*[2] 17 Ohio St.3d at 94, 17 O.B.R. 213, 477 N.E.2d 1123 and paragraph one of the syllabus. Specifically, encouraging parties to settle is 'a function normally performed by a judge,' and there can be little dispute that an in-chambers conference during the midst of trial prompted these parties to deal 'with the judge in his judicial capacity.' *Burkhardt,* 66 Ohio St.3d at 191, 610 N.E.2d 999."[3] Id at paragraph 7.

{¶31} We find, based on the foregoing, that appellee Judge Branstool's actions in denying appellant's request for a transcript was a judicial act. As noted by the trial court, "[t]he court reporter works at the direction of the court." Appellant, with respect to such matter, was dealing with appellee Judge Branstool in his judicial capacity.

{¶32} Appellant also argues that the trial court erred in applying immunity to appellee Judge Branstool for a period when he was not the presiding judge over appellant's case, having recused himself. On August 26, 2005, appellant alleges that, even after appellee Judge Branstool recused himself, appellant still did not receive the requested transcripts.

{¶33} In *Borkowski,* supra, the Ohio Supreme Court held that a judge's continuation of an eviction proceeding during the interval between removal of the eviction proceeding to federal court and remand took place in the absence of jurisdiction as to part of the proceedings. The Court held that while the judge temporarily lost jurisdiction during such period, "we cannot say that [he] acted in absence of all jurisdiction." Id at paragraph 15. The Ohio Supreme Court held that although the judge's conduct during such period was in error, the judge was not deprived of his

[2] The complete citation is *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 477 N.E.2d 1123.
[3] The complete citation is *State Ex rel. Fisher v. Burkhardt*, 66 Ohio St.3d 189, 1993-Ohio-187, 610 N.E.2d 999.

immunity from civil liability. We find, based on the foregoing, that appellee Judge Branstool was not deprived of judicial immunity for civil liability after he recused himself from the underlying case.

{¶34} Based on the foregoing, we find that the trial court did not err in granting appellee Judge Branstool's Motion to Dismiss pursuant to Civ.R. 12(B)(6) because such appellee was immune from liability.

{¶35} Appellant's first [as to appellee Judge Branstool], fourth and fifth assignments of error are, therefore, overruled.

I [As to Appellee Ginna Smith], II, VII

{¶36} Appellant, in his first, second and seventh assignments of error, argues that the trial court erred in granting appellee Ginna Smith's Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C). We agree.

{¶37} Motions for judgment on the pleadings are governed by Civ.R. 12(C), which states: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Pursuant to Civ.R. 12(C), "dismissal is [only] appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious,* 75 Ohio St.3d 565, 570, 1996-Ohio-459, 664 N.E.2d 931. The very nature of a Civ.R. 12(C) motion is specifically designed for resolving solely questions of law. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166, 297 N.E.2d 113, 117. Reviewing courts will reverse a judgment on the pleadings if plaintiffs can prove

any set of facts that would entitle them to relief. *Flanagan v. Williams* (1993), 87 Ohio App.3d 768, 772, 623 N.E.2d 185, 188. The review will be done independent of the trial court's analysis to determine whether the moving party was entitled to judgment as a matter of law. *Id.*

{¶38} In *Loyer v. Turner* (1998), 129 Ohio App.3d 33, 716 N.E.2d 1193, cited by appellant, the court held that a court reporter is not absolutely immune from liability. The appellee, in *Loyer*, had filed a complaint against a court reporter, alleging that the court reporter failed to completely transcribe a section of a trial, hindering the appellee's appeal. The court reporter filed a motion to dismiss the appellee's complaint for failure to state a claim upon which relief can be granted, arguing that she was entitled to absolute immunity.

{¶39} After the trial court denied such motion, the appellant appealed. In affirming the decision of the trial court, the court, in *Loyer*, held, in relevant part, as follows: "In *Antoine v. Byers & Anderson, Inc.* (1993), 508 U.S. 429, 113 S.Ct. 2167, 124 L.Ed.2d 391, the United States Supreme Court decided that a court reporter was not absolutely immune from civil liability for failing to produce a transcript of a federal criminal trial. *Id.* at 430, 113 S.Ct. at 2168-2169, 124 L.Ed.2d at 396. In reaching its decision, the court engaged in the following analysis.

{¶40} "The *Antoine* court noted that the functions of a court reporter and a judge are significantly different. *Id.* at 435, 113 S.Ct. at 2171, 124 L.Ed.2d at 399. A court reporter at the federal level is required, by statute, to 'record verbatim' court proceedings in their entirety. *Id.* Thus, the reporter is afforded no discretion in carrying out his or her duty but must record, as accurately as possible, what transpires in court.

Id. On the other hand, even the notes taken by judges during court proceedings involve discretionary decision making. *Id.* at 435, 113 S.Ct. at 2171, 124 L.Ed.2d at 399. The court added that judges do not have absolute immunity from suit when acting in their administrative capacity. *Id.,* citing *Forrester v. White* (1988), 484 U.S. 219, 229, 108 S.Ct. 538, 545, 98 L.Ed.2d 555, 566-567. The *Antoine* court concluded that because a court reporter's task is ministerial, and not discretionary, the reporter is not entitled to absolute immunity from suit. *Id.* at 436-437, 113 S.Ct. at 2171-2172, 124 L.Ed.2d at 399-401." Id at 36-37. The court in *Loyer*, based on the United States Supreme Court decision in *Antoine,* found that the trial court did not err in denying the court reporter's motion to dismiss for failure to state a claim upon which relief can be granted.

{¶41} Based on the foregoing, we find that appellee Smith is not entitled to absolute judicial immunity.[4]

{¶42} However, appellee, in her brief, argues, alternatively, that she is entitled to immunity under 2744.03.

{¶43} Appellant has alleged in his complaint that appellee Smith is an employee of appellee City of Newark. Appellee City of Newark, as a municipal corporation, is a political subdivision as defined in R.C. 2744.01(F). Pursuant to R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless (a) the employee's acts or omissions were manifestly outside the scope of the employment or official responsibilities, or (b) the employee's acts or omissions were with a malicious purpose, and in bad faith, or in a wanton or reckless manner; or (c) when the Revised Code expressly imposes civil liability.

[4] Appellee Smith, in her brief, cites to a number of cases for the proposition that the principle of judicial immunity applies to the acts of court reporters who act in their official capacities. However, such cases were decided before the *Antoine and Loyer* decisions.

{¶44} Appellant, in his complaint, alleged that appellee Smith acted in bad faith. In the case sub judice, appellant, in his complaint, specifically alleged as follows with respect to appellee Smith:

{¶45} "On May 20, 2005, Helfrich contacted the Court Reporter, Smith, and requested excerpts of the trial. Smith accepted Helfrich's handwritten request, and declined a deposit for the work. In the next few weeks, Helfrich contacted Smith and asked about the progress. Each time, Smith made promises that she was working on the requested transcript to avert any future delays. Helfrich provided Smith with a deposit for the transcripts, which Smith now requested. On or about June 1, 2005, Smith and Helfrich were discussing the transcripts, and Branstool abruptly barged in to the room screaming that Helfrich could not have a copy of the transcript. He continued to scream and yell and order Helfrich out of the office. Later that day, Helfrich contacted persons who were present, and was informed that Branstool demanded his staff not discuss the incident.

{¶46} "On August 8, 2005, Smith informed Helfrich she would not transcribe partial transcripts. The letter was cc'd to Branstool. Helfrich followed that letter up with a response letter to Branstool and Smith, informing them that Helfrich still wanted excerpts of the transcript, and it was the duty of the Court to provide the same.

{¶47} "Throughout the next few months, Helfrich reasserted his request for excerpts of the trial."

{¶48} We find that, construing the allegations of the complaint in favor of the nonmoving party as true, we cannot say that appellant could prove no set of facts entitling him to recover. Appellant, in his complaint, has not alleged facts supporting his

allegation that appellee Smith initially acted in bad faith when she denied his request for a transcript on June 1, 2005. Appellant, in his complaint, alleged that appellee Smith acted at the direction of the Judge, who was her superior, in failing to provide appellant with a transcript on such date. However, appellant, in his complaint, further alleged that appellee Smith denied his repeated requests for transcript that were made over the next few months. Appellant also asserted that, on August 8, 2005, appellee Smith informed him that she would not transcribe partial transcripts. Appellant does not allege that she did so at the direction of the Judge. Construing the allegation in appellant's complaint in favor of appellant, the non-moving party, as true, we cannot find beyond a reasonable doubt that appellant could prove no set of facts entitling him to relief.

{¶49} Based on the foregoing, we find that the trial court erred in granting appellee Smith's motion with respect to her state law claims.

{¶50} As is cited above, appellant, in his complaint, also alleged that his constitutional rights were violated, including his right to free speech, right to have access to public records, and right to pursue legal action. In short, while appellant, in his complaint does not cite Section 42 U.S.C. 1983, his claims were based on such section.

{¶51} As noted by the court in *Spratt v. Rickey*, Adams App. No. 97 CA 639, 97 CA 642, 1998 WL 144432, R.C. 2744.03(A)(6) immunity does not apply to 42 U.S.C. Section 1983 claims. See also *Wohl v. Cleveland Bd. of Educ.* (N.D. Ohio 1990), 741 F. Supp. 688, in which the court held that Ohio's sovereign immunity statute does not bar actions brought under federal civil rights laws such as 42 U.S.C. Section 1983 .

{¶52} Appellees argue that appellant's Section 1983 claims against appellee Smith are barred by the two year statute of limitations set forth in R.C. 2305.10. As noted by the court in *Nadra v. Mbah*, 119 Ohio St.3d 305, 2008-Ohio-3918, 893 N.E.2d 829, the two year statute of limitations in R.C. 2305.10 is applicable to claims under Section 1983 filed in State Court.

{¶53} Appellant, in his complaint, alleged that he was denied the transcript by appellee Smith on August 8, 2005. Appellees contend that appellant's claims filed pursuant to 42 U.S.C. section 1983 are time-barred because appellant did not file his complaint until January 8, 2008, which is more than two years after August 8, 2005. However, appellant, in his complaint, also alleged that throughout the next "few" months after August 8, 2005, his repeated requests for the transcript were denied. It is unclear what appellant means when he refers to a "few" months. We find, that construing the allegations in appellant's complaint in favor of appellant as the non-moving party, we cannot find beyond doubt that appellant's 1983 claims are time-barred.

{¶54} Appellant's first, [as to appellee Smith] second and seventh assignments of error are, therefore, sustained.

III

{¶55} Appellant, in his third assignment of error, argues that the trial court erred in granting appellee Licking County's Motion to Dismiss pursuant to Civ.R. 12(B)(6) and appellee City of Newark's Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C).

{¶56} Appellant, in his complaint, alleged that appellee City of Newark employed both appellees Judge Branstool and Smith. He did not allege any causes of action

against appellee City of Newark. Appellant's claims against appellee City of Newark were based on the doctrine of respondeat superior.

{¶57} The Supreme Court of Ohio in *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 329, noted the following:

{¶58} "The doctrine of *respondeat superior* is expressed in the Restatement of the Law 2d, Agency (1958) 481, Section 219(1), which states as follows: 'A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.'"

{¶59} Having found that the trial court erred in granting appellee Smith's Motion for Judgment on the Pleadings, we cannot say as a mater of law that appellee City of Newark cannot be liable to appellant under the doctrine of respondeat superior for her actions. We find, therefore, that the trial court erred in granting appellee City of Newark's Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C) as to appellee Smith. We find the trial court did not err in granting appellee City of Newark's judgment on the pleadings pursuant to Civ.R. 12(C) as to Judge Branstool because he has been found to be immune from liability.[5]

{¶60} As is stated above, appellant, in his complaint, also alleged that appellee Judge Branstool, who is a Judge with the Licking County Municipal Court, is an employee of appellee Licking County. However, the Licking County Municipal Court is a municipal court that has been established in Newark pursuant to R.C. 1901.01(A). In accordance with R.C. 1901.02(B), the Licking County Municipal Court has jurisdiction in Licking County. It is not a "county-operated municipal court" as defined in R.C. 1901.03.

[5] Because appellee City of Newark has not argued that it is immune from liability under R.C. Chapter 2744, we shall not address it at this time.

"The judges and clerk of the Licking County Municipal Court are not "employees" of Licking County for purposes of R.C. 2744.07(A)(1)." Ohio Attorney General Opinion No. 92-070 at syllabus. Appellee Judge Branstool, therefore, is not an employee of appellee Licking County. We find, therefore, that the trial court did not err in granting appellee Licking County's Motion to Dismiss pursuant to Civ.R. 12(B)(6).

{¶61} Appellant's third assignment of error is, therefore, overruled in part, and sustained in part.

VI

{¶62} Appellant, in his sixth assignment of error, argues that the trial court erred in dismissing his complaint with prejudice.[6] Appellant contends that a dismissal for failure to state a claim is a dismissal without prejudice.

{¶63} As is stated above, the trial court granted appellee Judge Branstool's Motion to Dismiss pursuant to Civ.R. 12(B)(6) for failure to state a claim. Appellee Licking County also filed a 12(B)(6) motion.

{¶64} However, because the court's decision on the Motion to Dismiss for failure to state a claim pursuant to Civ.R. 12(B)(6) was a decision on the merits, we find that the trial court did not err in dismissing the claims against Judge Branstool and Licking County with prejudice. See *Customized Solutions, Inc. v. Yurchyk & Davis, CPA's*, *Inc.,* Mahoning App. No. 03 MA 38, 2003 -Ohio- 4881 at paragraph 27 ("the Civ.R. 12(B)(6) dismissal operated as dismissal with prejudice under Civ.R. 41(B)(3) because it failed to state that it was without prejudice. As such, the dismissal is considered to have been on the merits.")

[6] While appellant, in his stated assignment of error, argues that the trial court erred in dismissing his complaint without prejudice, he actually argues that the court erred in dismissing the same with prejudice.

{¶65} We find, therefore, that the dismissal of appellees Judge Branstool and Licking County was on the merits.

{¶66} Appellant's sixth assignment of error is, therefore, overruled.

{¶67} Accordingly, the judgment of the Licking County Court of Common Pleas is affirmed in part and reversed and remanded in part.

By: Edwards, J.

Delaney, J., concurs and

Farmer, P.J. dissents

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JUDGES

JAE/d1125

Farmer, J., dissenting

{¶68} I respectfully dissent from the majority's opinion that the allegations against Smith, the Court reporter, were not covered R.C.2744.03(A)(6). There is no evidence of malice, bad faith, ---- and reckless acts on the part of Smith, nor that she did anything outside the scope of her employment.

{¶69} There is evidence that everything Smith did was within her scope of employment and at the direction of her appointing authority, Judge Branstool. I would affirm the trial court's dismissal of the claims against Smith and any claims against the City for their employment of Smith.

_____

Judge Sheila Farmer

[Cite as *Helfrich v. Branstool*, 2009-Ohio-2865.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JAMES HELFRICH, pro se.,	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
W. DAVID BRANSTOOL, et al.,	:	
Defendants-Appellees	:	CASE NO. 08 CA 0072

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed in part and reversed and remanded in part. Costs assessed 50% to appellant, 25% to appellee Ginna Smith and 25% to the City of Newark.

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JUDGES