[Cite as *Haas v. Stryker*, 2013-Ohio-2476.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

Josh Haas, et al.	Court of Appeals No. WM-12-004
Appellees	Trial Court No. 11 CI 138
v.	
Village of Stryker, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: June 14, 2013

* * * * *

George C. Rogers, for appellees.

Jane M. Lynch, Jared A. Wagner and Maria Armstrong,
for appellants.

* * * * *

SINGER, P.J.

{¶ 1} Appellants, village of Stryker and Peggy St. John, appeal from the May 30, 2012 judgment of the Williams County Court of Common Pleas denying their motion to dismiss the 42 U.S.C. 1983 and malicious prosecution claims filed against them. For the reasons which follow, we affirm the decision in part and reverse in part.

{¶ 2} Josh Haas, appellee, filed a 42 U.S.C. 1983 action against the village of Stryker and Peggy St. John, individually and as the village tax administrator, alleging violations of Haas' civil rights protected by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Haas sought compensatory damages of $50,000 from the village and St. John, jointly and severally, and punitive damages of $50,000 from St. John. Haas also alleged a state law cause of action of malicious prosecution and sought damages of $50,000 for compensatory and $50,000 for punitive damages from St. John. Sheila Haas, appellee, sought consortium damages of $5,000 with respect to each claim.

{¶ 3} These allegations arise out of an alleged village policy, implemented by St. John, of swearing out a criminal complaint against village residents who do not file a village tax return even when it is known that the residents had not earned any income nor incurred any tax liability. St. John swore out such a criminal complaint against Josh Haas, which was filed in the Bryan Municipal Court. The clerk was unable to serve the complaint upon Haas, and a warrant was issued for his arrest. Haas was arrested and released the next day after posting an appearance bond. Haas' motion to dismiss/ suppress the complaint for lack of probable cause was granted, as well as the prosecution's motion to dismiss the complaint. After the case was dismissed, appellees filed the current action against appellants.

{¶ 4} Appellants moved to dismiss the complaint for failure to state a claim for relief. Appellees opposed the motion.

{¶ 5} With respect to the civil rights claims, the trial court relied upon the analytical framework and policy considerations set forth in our decision in *Stevens v. Cox*, 6th Dist. No. WD-08-020, 2009-Ohio-391. The trial court determined that 42 U.S.C. 1983 permits a local governing body and a local government official to be sued for the actions of the official when the official's actions were based on the customary policies of the local government, even if the policies were never formally approved through official decision-making. The court also found that there were sufficient allegations of fact to support a malicious prosecution claim under Ohio law. The trial court never specifically addressed all of the other issues raised in the Civ.R. 12(B)(6) motion, but denied the motion to dismiss the claims. The court included Civ.R. 54(B) language to permit an immediate appeal of this issue even though such additional language is not required for an immediate appeal of an order denying immunity to a political subdivision or its employees. *See* R.C. 2744.02(C) and *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, syllabus.

{¶ 6} Appellants assert the following assignments of error on appeal.

First Assignment of Error: The trial court applied the incorrect standard of review to Appellants' Motion to Dismiss.

Second Assignment of Error: The trial court committed reversible error in failing to find that Defendant/Appellant Peggy St. John is entitled to absolute immunity from 42 U.S.C. Sec. 1983 claims filed against her in

her individual capacity because she was acting in her official capacity and was engaged in a quasi-judicial function of initiating a criminal complaint.

Third Assignment of Error: The trial court committed reversible error in failing to find that Defendant/Appellant Peggy St. John is entitled to qualified immunity as to the individual capacity Fourth Amendment claim against her.

Fourth Assignment of Error: The trial court committed reversible error in failing to find that Defendant/Appellant Peggy St. John is entitled to qualified immunity as to the individual capacity Fifth and Fourteenth Amendment Due Process claims against her.

Fifth Assignment of Error: The trial court committed reversible error in failing to find that the official capacity claims against Defendant/ Appellant Peggy St. John are subsumed within the constitutional claim against Defendant/Appellant Village of Stryker.

Sixth Assignment of Error: The trial court committed reversible error in failing to dismiss the constitutional claims against Defendant/ Appellant Village of Stryker.

Seventh Assignment of Error: The trial court committed reversible error in failing to dismiss the loss of consortium claims of Plaintiff/ Appellant Sheila Haas.

Eighth Assignment of Error: The trial court committed reversible error in failing to find that Defendant/Appellant Peggy St. John is entitled to absolute immunity pursuant to R.C. 2744.03(A)(7) as to the state law claims against her.

Ninth Assignment of Error: The trial court committed reversible error in failing to find that Defendant/Appellant Peggy St. John is entitled to statutory immunity pursuant to R.C. 2744.03(A)(6) as to the state law claims against her.

Tenth Assignment of Error: The trial court committed reversible error in failing to dismiss Plaintiffs'/Appellants' (sic) punitive and exemplary damages claims.

Eleventh Assignment of Error: The trial court committed reversible error in finding that the ruling in *Stevens v. Cox*, 6th Dist. No. 2006 CV 0730, 2009-Ohio-391, was determinative of Appellants' Motion to Dismiss.

CIV.R. 12(B)(6) STANDARD

{¶ 7} Appellants argue in their first assignment of error that the trial court erred by applying an outdated standard for determining whether to dismiss the action for failure to state a claim for relief.

{¶ 8} A complaint may be dismissed, pursuant to Civ.R. 12(B)(6), for "failure to state a claim upon which relief can be granted." Civ.R. 8(A), and correspondingly Fed.R.Civ.P. 8(a), require notice pleading: "a short and plain statement of the claim

showing that the pleader is entitled to relief." Therefore, the plaintiff need not allege in the complaint every fact he intends to prove since many facts are not available until after discovery. But, plaintiff must allege a set of facts that would support a cause of action. *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 5.

{¶ 9} The Ohio Supreme Court has held that the trial court should not grant the motion to dismiss "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). If the court can determine from the face of the complaint that the action is barred by the statute of limitations, the court may dismiss the complaint pursuant to Civ.R. 12(B)(6). *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11. The court must accept all of the factual allegations of the complaint as true and construe all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). We review the trial court's ruling on this type of motion under a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶ 10} Appellants assert that the trial court should have applied a new, allegedly heightened, standard for determining whether to grant a motion to dismiss, which courts now identify as the "plausibility test." This "test" was first applied by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556, 127 S.Ct.

1955, 167 L.Ed.2d 929 (2007) and was further developed in *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). These cases outline a two-step process for evaluating a motion to dismiss. First, the trial court should separate the allegations based upon legal conclusions and those based upon factual allegations. Only factual allegations are presumed to be true and only claims supported by factual allegations can avoid dismissal. Second, the trial court must determine whether the claims supported by factual allegations plausibly suggest that the plaintiff is entitled to relief. *Ashcroft* at 681-682 and *Twombly* at 555.

{¶ 11} Federal courts have been inconsistent in their application of the *Twombly-Iqbal* standard. *Compare Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc.*, 648 F.3d 452, 456-457 (6th Cir.2011) and *CBT Flint Partners, LLC v. Goodmail Systems, Inc.*, 529 F.Supp.2d 1376, 1379 (N.D.Ga.2007). While some Ohio courts have cited to the *Twombly-Iqbal* plausibility standard, none of these cases actually applied it. *See Sacksteder v. Senney*, 2d Dist. No. 24993, 2012-Ohio-4452, ¶ 14-46 (which discusses the cases which have considered this issue). We find that the "plausibility test" was not intended to be a heightened standard, but another method of determining whether the allegations of the complaint were supported by sufficient allegations of fact. Therefore, we find that the trial court did not apply an incorrect standard for determining the motion to dismiss. Appellants' first assignment of error is not well-taken.

ABSOLUTE IMMUNITY FROM CIVIL LIABILITY UNDER 42 U.S.C. 1983

{¶ 12} In their second assignment of error appellants argue the trial court committed reversible error in failing to find that appellant St. John is entitled to absolute immunity from 42 U.S.C. 1983 claims filed against her in her individual capacity.

{¶ 13} It is not clear from the trial court's judgment whether the court attempted to address the issue of immunity or not. The court relied upon our decision in *Stevens*, 6th Dist. No. WD-08-020, 2009-Ohio-391, to support its finding that summary judgment was not appropriate.

{¶ 14} The underlying facts in the *Stevens* case are similar to those before us. In the *Stevens* case, the Pemberville tax administrator filed criminal charges against two individuals, Stevens and Kukla, for failure to file a village income tax return pursuant to a custom of the village to file criminal charges without investigating or determining whether the persons charged were residents and had earned any taxable income. Both individuals were arrested, but the charges were dismissed when it was discovered that neither individual owed any tax. Both Stevens and Kukla sued the village and the tax administrator alleging a Sec. 1983 federal civil rights violation claim and a state malicious prosecution claim.

{¶ 15} But the issues raised in the *Stevens* case are different from the issues before us. In the *Stevens* case, the issue was whether there was a question of fact as to whether either party's constitutional rights were violated by the village custom of filing charges

without investigation. We reversed the judgment finding there were sufficient questions of fact raised to make summary judgment inappropriate. We never addressed the issue of whether the defendants were immune from civil liability.

{¶ 16} In the case before us, the trial court determined that a Sec. 1983 claim had been sufficiently asserted against the tax administrator and the village to avoid a Civ.R. 12(B)(6) dismissal. However, the court never specifically addressed in its judgment entry the immunity issue which was raised in the Civ.R. 12(B)(6) motion.

{¶ 17} The question of whether a defendant is entitled to an absolute or qualified immunity from liability under 42 U.S.C. 1983 is a question of law and, therefore, we may address it on appeal de novo. *Mitchell v. Forsyth*, 472 U.S. 511, 529, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), fn. 9, and *Adams v. Hanson*, 656 F.3d 397, 401 (6th Cir.2011). Both the absolute and qualified immunity defenses are recognized as a "result of the application of historical principles which reflect a proper balance between the protection of the rights of individuals to be free from constitutionally violative harm and the very real need of persons charged with governmental duties to get on with its business without harassment or intimidation." *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir.1986). The determination of whether an absolute or qualified immunity exists turns not on the office the person holds, but on the nature of the function performed and "the immunity historically accorded the relevant official at common law and the interests behind it." *Rehberg v. Paulk*, ___ U.S. ___, 132 S.Ct. 1497, 1503, 182 L.Ed.2d 593 (2012). *See also Forrester v. White*, 484 U.S. 219, 225-229, 108 S.Ct. 538, 98 L.Ed.2d

555 (1988). Absolute immunity is rarely recognized. *Dorman v. Higgins*, 821 F.2d 133, 136 (2d Cir.1987).

{¶ 18} The absolute immunity defense has been recognized for only a few executive officials "whose special functions or constitutional status requires complete protection from suit." *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In such cases, there are other checks to prevent abuses of authority or provide redress. *Mitchell v. Forsyth*, 472 U.S. 511, 522, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

{¶ 19} Absolute immunity has also been recognized as a defense for judges and other participants in the judicial process who have taken action necessary to the judicial process, even if the actions are done maliciously or in excess of the person's judicial authority, because the nature of the function involves controversy and the judicial officer must be able to act without having to consider the negative reaction of an opposing party. *Id*. at 522-525, and *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The absolute immunity afforded to judges has also been extended to administrative judicial officers. *Butz v. Economou*, 438 U.S. 478, 512-515, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

{¶ 20} Courts have extended absolute immunity to prosecutors, as quasi-judicial officers, for claims arising out of their initiation of a prosecution and advocating the state's case. *Imbler* at 431 and *Van de Kamp v. Goldstein*, 555 U.S. 335, 342, 129 S.Ct. 855, 172 L.Ed.2d 706 (2009). Prosecutors, however, do not have absolute immunity for

every action they undertake. A prosecutor has only a qualified immunity when carrying out administrative or investigative functions. *Economou* at 513-514 and *Imbler* at 430. Likewise, a witness at trial (even when the witness is an executive official) has absolute immunity. *Briscoe v. LaHue*, 460 U.S. 325, 335-336, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). A "complaining witness" whose false information is relied upon to procure an arrest or initiate the criminal process, however, is not entitled to absolute immunity. *Kalina v. Fletcher*, 522 U.S. 118, 127, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (this rule applies even to prosecutors who function as a complaining witness by presenting a judge with a complaint and supporting affidavit to establish probable cause); *Malley v. Briggs*, 475 U.S. 335, 340-341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (police officers applying for an arrest warrant); *Llerando-Phipps v. City of New York*, 390 F.Supp.2d 372, 383 (S.D.N.Y.2005) (police officers providing information which leads to arrest); and *White v. Frank*, 855 F.2d 956, 957 (2d Cir.1988) (police officers testifying before the grand jury). Instead, the complaining witness has only a qualified immunity, which was built into the common law tort of malicious prosecution by way of the prima facie elements of malicious behavior and a lack of probable cause.

{¶ 21} Appellants argue that because St. John was acting in her official capacity as the tax administrator and she was engaged in a quasi-judicial function as a quasi-prosecutor initiating a criminal complaint, she is entitled to absolute immunity. Appellees argue that St. John acted more in the capacity of a police officer enforcing the law by filing a criminal complaint.

{¶ 22} The quasi-prosecutor or advocate function has been recognized in some limited contexts. Some courts have recognized that social workers, when they are advocates for the benefit of children, serve a quasi-prosecutorial function because they file petitions to initiate the juvenile proceedings and testify at hearings. *Pittman v. Cuyahoga Cty. Dept. of Children and Family Servs*., 640 F.3d 716, 724-725 (6th Cir.2011) and *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir.1984) (guardian ad litem protected as well). The absolute immunity defense is justified on the same grounds used for judicial officials that the officials need the freedom to act without the threat of harassment and intimidation. *Id*. Justice Ginsberg raised a similar argument in her concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 279, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (Ginsberg, J. concurring) and suggested there is a possibility that the court could find a police officer engaged in the function of initiating and pursing a criminal prosecution acted as a quasi-prosecutor and would be entitled to absolute immunity. *Id*., fn. 5. However, the Ninth District appellate court has held that a tax official who initiated a criminal proceeding was protected by only a qualified immunity. *Miller-Wagenknecht v. City of Munroe Falls*, 9th Dist. No. 20324, 2001 WL 1545626, *7-8 (Dec. 5, 2001) (although the court was not asked to consider whether an absolute immunity applied).

{¶ 23} Police officers generally have only a qualified immunity. *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (qualified immunity for false arrest claim); *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271

(1986) (officer's function of seeking an arrest warrant was similar to that of a complaining witness and therefore only a qualified immunity was warranted); and *DeBoer v. Martin*, 537 F.Supp. 1159, 1163 (N.D.Ill.1982) (law enforcement officials not entitled to absolute immunity for executing arrest warrant unless the arrest warrant is for an individual to appear and testify at a judicial proceeding).

{¶ 24} Because we are reviewing the denial of a Civ.R. 12(B)(6) motion, we may only consider the four corners of the complaint for the facts alleged in this case. It is alleged that St. John is the village tax administrator; St. John acted in her official capacity when she swore out a criminal complaint against Josh Haas asserting that he had failed to file a tax return; St. John did not conduct any investigation as to whether Haas owed any taxes; St. John acted pursuant to a village custom; and, based on the criminal complaint, the clerk of courts sent a summons to Josh Haas.

{¶ 25} Based upon these facts, we conclude that a village tax administrator filing a criminal complaint is functioning as a complaining witness. Therefore, the tax administrator is entitled to only a qualified immunity from civil liability arising from the filing of the complaint. We find appellants' second assignment of error not well-taken.

CONSTITUTIONAL INJURY

{¶ 26} In their third assignment of error, appellants argue that the trial court erred in failing to find that St. John is entitled to a qualified immunity from individual liability for the 42 U.S.C. 1983 claims based on the Fourth Amendment. Appellants argue the trial court failed to dismiss the malicious prosecution claim under 42 U.S.C. 1983 on the

grounds that St. John's action of filing a criminal complaint does not constitute a seizure under the Fourth Amendment. They argue appellee Josh Haas was not seized until he was arrested pursuant to a bench warrant issued as a result of his failure to appear pursuant to the summons. Without a constitutional injury, appellants argue the complaint fails to set forth a claim for malicious prosecution under 42 U.S.C. 1983.

{¶ 27} Appellees rely upon *Stevens*, 6th Dist. No. WD-08-020, 2009-Ohio-391, to support their argument that they have presented a sufficient Sec. 1983 claim. Once again, we find that the *Stevens* case is not applicable to the issues raised in the case before us. Although appellees appear to argue the *Stevens* case implicitly holds that the Sec. 1983 claim was valid because the case proceeded to the summary judgment stage, this argument would be meritless. As an appellate court, we address only the issues assigned as error. Since the issue of the sufficiency of the claim was never raised in the *Stevens* case, we did not address it.

{¶ 28} In order to establish a Sec. 1983 action, two requirements must be met: (1) the conduct at issue must have been committed by a person acting under color of state law, and (2) the conduct must have deprived the plaintiff of a federally-protected constitutional or statutory right. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). While there is no substantive due process right under the Fourteenth Amendment to be free from criminal prosecution except upon probable cause, *Oliver*, 510 U.S. at 271, fn. 4, 114 S.Ct. 807, 127 L.Ed.2d 114, there could be a procedural due process basis for a Sec. 1983 claim based upon a violation of the person's Fourth

Amendment rights. *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir.2010) and *Mott v. Mayer*, 6th Cir. Nos. 11-3853, 11-3855, 11-3996, 2013 WL 1663219, *7 (Apr. 17, 2013). *Compare Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir.2001) ("malicious prosecution by itself is not punishable under § 1983 because it does not allege a constitutional injury"). Generally, such claims are based upon a Fourth Amendment violation which results in the plaintiff being arrested or "seized" without probable cause as was first suggested in *Oliver*, 510 U.S. at 271, fn. 4, 114 S.Ct. 807, 127 L.Ed.2d 114, and recognized by the Sixth Circuit in *Sykes* and *Gregory v. City of Louisville*, 444 F.3d 725, 748 (6th Cir.2006).

{¶ 29} Appellants argue that St. John's action of filing a complaint merely caused the issuance of the summons and did not directly cause Josh Haas to be seized. Therefore, there was no constitutional violation. Appellants rely upon several cases which hold that there is no constitutional guarantee to be free from being summoned into court and prosecuted without probable cause and merely being summoned into court does not equal a seizure under the Fourth Amendment.

{¶ 30} We agree. There are numerous federal cases holding that a person does not state a Sec. 1983 malicious prosecution case where the defendant actor did nothing more than issue a citation or file a complaint and affidavit which resulted in the plaintiff being summoned into court to answer the charges. *See Tully v. Barada*, 599 F.3d 591, 594-595 (7th Cir.2010) (malicious prosecution case not allowed because no constitutional violation occurred where plaintiff was summoned into court and prosecuted without

probable cause); *Burg v. Gosselin*, 591 F.3d 95 (2d Cir.2010) (arrest for failure to appear following a canine-control officer issuing a non-felony summons does not constitute a Fourth Amendment seizure); *Bielanski v. County of Kane*, 550 F.3d 632, 637-643 (7th Cir.2008) ("summons alone does not equal a seizure for Fourth Amendment purposes * * * false accusation is not a seizure."); *DiBella v. Borough of Beachwood*,407 F.3d 599 (3d Cir.2005) (no seizure occurred where an officer issued a summons for a petty disorderly offense because the person's freedom was restricted only after trial had begun and the Fourth Amendment does not extend beyond pretrial proceedings); *DePiero v. City of Macedonia*, 180 F.3d 770, 789 (6th Cir.1999) (arrest for failure to appear on parking ticket summons; officer giving the citation was not part of the determination of whether to issue an arrest warrant). Our court has also found that an arrest for failing to appear in court following the issuance of a summons was caused by the individual's actions, not the person who filed the complaint. *Gonzales v. Dickson*, 6th Dist. No. WD-09-071, 2010-Ohio-2792, ¶ 24.

{¶ 31} In this case, St. John filed the complaint which led to the issuance of a summons, not a seizure. It was Josh Haas' action of failing to appear that led to his arrest. We find that appellees have failed to state a Sec. 1983 claim of malicious prosecution based upon a Fourth Amendment violation. Appellant's third assignment of error is well-taken.

QUALIFIED IMMUNITY FROM CIVIL LIABILITY UNDER 42 U.S.C. 1983

{¶ 32} In their fourth assignment of error, appellants again argue that the trial court erred in failing to find that St. John is entitled to a qualified immunity from individual liability for the 42 U.S.C. 1983 claim based on the Fifth and Fourteenth Amendment.

{¶ 33} Appellants assert that appellees have failed to set forth a claim of violation of due process under the Fifth and Fourteenth Amendments. Appellees' claimed due process violation was St. John's actions of filing a complaint without probable cause pursuant to a village policy to file complaints without investigating whether the resident owed any tax.

{¶ 34} The Fifth Amendment protects individuals from the deprivation of life, liberty, or property without due process of law. It is not, however, applicable to state action. *Dusenbery v. United States*, 534 U.S. 161, 167, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002). The Due Process Clause of the Fourteenth Amendment, however, prohibits states from depriving any person of property without due process of law.

{¶ 35} A deprivation of due process can be the basis for a Sec. 1983 claim, except where there is an available state due process remedy. *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled in part by *Daniels v. Williams*, 474 U.S. 327 (1986), and expanded by *Hudson v. Palmer*, 468 U.S. 517, 532, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). The exception is not applicable, however, when the state

action is the result of an established state procedure because under that circumstance post-deprivation remedies would not satisfy due process. *Id.* at 533, and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). "The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

{¶ 36} In the case before us, the only deprivation of due process appellees have alleged is the filing of a complaint without due process. There was no allegation that Josh Haas was denied an opportunity for a hearing before an impartial judge where he could raise his defense that he was falsely accused and the charges should be dismissed. Instead, appellees alleged at most a Fourth Amendment claim, which we have already held is not actionable. Furthermore, even if we recognized appellees' due process claim as such, there is a state remedy for the constitutional deprivation, the tort of malicious prosecution. While appellees alleged the state action was the result of an established village policy, they did not allege the state law remedy was inadequate. *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir.1983), and *Adams v. Spencer*, S.D.Ohio No. C-3-96-102, 1997 WL 1774878, *23 (Sept. 3, 1997). Therefore, we find appellants' fourth assignment of error well-taken.

SUING A GOVERNMENT EMPLOYEE IN THEIR OFFICIAL CAPACITY

{¶ 37} Appellants' fifth and sixth assignments of error are considered together. In their fifth assignment of error, appellants argue that the trial court committed error by

failing to dismiss the claims against St. John in her official capacity because they are subsumed within the claims against the village of Stryker. *Hiles v. Franklin Cty. Bd. of Commrs*., 10th Dist. No. 05AP-253, 2005-Ohio-7024. In their sixth assignment of error, appellants argue that the trial court erred by failing to dismiss the constitutional claims against the village.

{¶ 38} To the extent that appellants argue St. John cannot be sued in her official capacity, we do not agree. However, we do agree that all the findings that warrant a dismissal of the claims against the village also warrant a dismissal of the claims against St. John. As we have already discussed, appellees did not sufficiently plead a Sec. 1983 claim because they did not identify a federally-protected constitutional or statutory right. Therefore, the Sec. 1983 claim against St. John and the village should have been dismissed. Appellants' fifth assignment of error is found not well-taken and their sixth assignment of error is found well-taken.

VIABILITY OF A CONSORTIUM CLAIM IN A 42 U.S.C. 1983 ACTION AS A PENDANT DERIVATIVE CLAIM

{¶ 39} In their seventh assignment of error, appellants argue the trial court erred by failing to dismiss the loss of consortium claim of Sheila Haas as pendant derivative claim to Josh Haas' Sec. 1983 claim. Appellants rely upon *Stallworth v. City of Cleveland*, 893 F.2d 830 (6th Cir.1990). However that holding has been called into doubt by *Robinson v. Johnson*, 975 F.Supp. 950, 955 (S.D.Tex.1996), which held that the *Stallworth* holding has been superseded by 28 U.S.C. 1367. We need not reach the issue,

however, because the consortium claim fails for the same reason as the main action. Appellees have failed to state a claim under Sec. 1983 by failing to identify a federally-protected right that was infringed. Therefore, we find appellants' seventh assignment of error well-taken.

ABSOLUTE IMMUNITY FROM LIABILITY FROM STATE LAW CLAIMS UNDER R.C. 2744.03(A)(7)

{¶ 40} In their eighth assignment of error, appellants argue that the trial court failed to find that St. John is entitled to absolute immunity pursuant to R.C. 2744.03(A)(7) with respect to malicious prosecution claim.

{¶ 41} R.C. 2744.02(A)(1) generally provides that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." The parties do not dispute that the village of Stryker is a political subdivision or the collection of taxes is a governmental or proprietary function. Statutory immunity is extended to political subdivision employees unless one of the exceptions listed in R.C. 2744.03(A)(6) apply. There is no dispute that the tax administrator is a government employee.

{¶ 42} However, appellants contend that St. John is entitled to absolute immunity pursuant to R.C. 2744.03(A)(7), which provides that the "county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled

to any defense or immunity available at common law or established by the Revised Code." This court has determined that prosecutors have absolute immunity from malicious prosecution suits. *Woodley v. Anderson*, 6th Dist. No. L-99-1093, 2000 WL 426190, *3 (Apr. 21, 2000).

{¶ 43} Based upon our conclusion above that a village tax administrator filing a criminal complaint is not functioning as an advocate or quasi-prosecutor for the village, we find that the tax administrator would not have absolute immunity against a state law action for malicious prosecution pursuant to R.C. 2744.03(A)(7). We find appellants' eighth assignment of error not well-taken.

FAILURE TO STATE A CLAIM OF AN EXCEPTION TO THE DEFENSE OF STATUTORY IMMUNITY

{¶ 44} In their ninth assignment of error, appellants argue that the trial court erred by failing to find that St. John is entitled to statutory immunity pursuant to R.C. 2744.03(A)(6) with respect to the state law claims against her as an employee of a political subdivision. Appellants assert that appellees' complaint failed to allege sufficient facts to state a claim that the exception to statutory immunity set forth in R.C. 2744.03(A)(6)(b) applied. That exception provides for a loss of immunity if the "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 45} We find appellants' argument lacks merit. The claim of immunity is a defense which may be raised in a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6). *Thomas v. Bauschlinger*, 9th Dist. No. 26485, 2013-Ohio-1164, ¶ 12, and

Reasoner v. City of Columbus, 10th Dist. No. 02AP-831, 2003-Ohio-670, ¶ 12. Appellees had no duty to assert an exception to the defense until the defense was asserted by appellants. Therefore, appellants' ninth assignment of error is not well-taken.

PUNITIVE DAMAGES

{¶ 46} In their tenth assignment of error, appellants argue that the trial court erred by failing to dismiss the punitive and exemplary damages claims because they are prohibited under R.C. 2744.05(A).

{¶ 47} Appellees only sought punitive damages against St. John. While punitive and exemplary damages cannot be awarded in an action against a political subdivision performing a governmental or proprietary function, there is no such limitation for actions against governmental employees who act outside the scope of their employment by acting with a malicious purpose. *Hope Academy Broadway Campus v. Integrated Consulting & Mgt.*, 8th Dist. Nos. 96100, 96101, 2011-Ohio-6622, ¶ 21. Therefore, we find appellants' tenth assignment of error not well-taken.

APPLICATION OF PRECEDENT

{¶ 48} In their eleventh and final assignment of error, appellants argue that the trial court erred in finding that our holding in *Stevens*, 6th Dist. No. WD-08-020, 2009-Ohio-391, was determinative of appellants' Civ.R. 12(B)(6) motion to dismiss. As discussed above, we agree. However, finding that the trial court relied upon a case that did not support its decision does not necessarily constitute reversible error. Since we

have specifically discussed and resolved each of the other assignments of error without applying the *Stevens* case, we find this assignment of error is moot.

{¶ 49} Having found that the trial court committed error prejudicial to appellants in part, the judgment of the Williams County Court of Common Pleas is affirmed in part and reversed in part. The judgment is reversed as to the denial of the motion to dismiss the 42 U.S.C. 1983 claims against appellants. Appellants and appellees are ordered to equally share the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE