

[Cite as *Sims v. Cleveland*, 2009-Ohio-4722.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92680

JOHNETTA SIMS

PLAINTIFF-APPELLANT

VS.

CITY OF CLEVELAND

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-671962

BEFORE: Kilbane, P.J., Blackmon J., and Jones, J.

RELEASED: September 10, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANTS

Daniel A. Starett
Seaman Garson, LLC
614 West Superior Avenue
Suite 1600
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Robert J. Triozzi
Director of Law
William F. Gibson
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue - Room 106
Cleveland, Ohio 44114-1077

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant Johnetta Sims (“Sims”) appeals the decision of the trial court that granted appellee City of Cleveland’s (“the City”) motion to dismiss based on sovereign immunity. After a review of the record and pertinent law, we affirm.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} Sims alleged that, on October 4, 2006, she exited her vehicle on East 134th Street, in Cleveland, and stepped into a hole in the tree lawn, resulting in significant injuries. On September 29, 2008, Sims filed suit against the City alleging that it was negligent in digging and maintaining the hole in the tree lawn. On October 14, 2008, the City filed an answer, asserting several affirmative defenses that included sovereign immunity.

{¶ 4} On November 13, 2008, the City filed its motion to dismiss arguing that Sims’s claims were precluded by sovereign immunity. On November 19, 2008, Sims filed a brief in opposition. On December 31, 2008, the trial court granted the City’s motion and concluded that Sims’s claims were barred by sovereign immunity pursuant to Ohio Revised Code Chapter 2744.

{¶ 5} Sims appeals, asserting two assignments of error for our review. As both assignments of error relate to the trial court’s granting of the motion to dismiss pursuant to sovereign immunity, we will address them together.

“Pursuant to Rev. Code §2744.02, Defendant-Appellee City of Cleveland has failed to establish that the acts giving rise to the Plaintiff-Appellant’s Complaint were the result of a propriety or governmental function.”

“Pursuant to Rev. Code §2744.02, Defendant-Appellee City of Cleveland has failed to establish that the facts alleged in the Complaint do not qualify for one of the exceptions to the doctrine of sovereign immunity.”

{¶ 6} Sims argues that the City has the burden of demonstrating that it is entitled to sovereign immunity. Sims contends this issue was not appropriate for a motion to dismiss because this issue requires the court to look at evidence outside of the pleadings. The City argues that it is presumed to be immune from liability, unless the appellant can demonstrate a statutorily defined exception applies. For the following reasons we agree with the City.

{¶ 7} An appellate court reviews the trial court’s decision on a motion to dismiss de novo. *Mackey v. Luskin*, Cuyahoga App. No. 88874, 2007-Ohio-5844, at ¶13. Therefore, we are not bound to defer to the determination of the trial court. *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 104, 661 N.E.2d 218. This court must review the complaint and reevaluate whether dismissal was appropriate. *Id.*

{¶ 8} Before the trial court can grant a motion to dismiss “it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recover.” *Garofalo*, *supra*, citing *York v. Ohio State*

Hwy. Patrol (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063. The trial court is required to presume all factual allegations in the complaint as true and to make all reasonable inferences in favor of the nonmoving party. *Perez v. Cleveland* (1993), 66 Ohio St.3d 397, 613 N.E.2d 199; *Walsh v. Village of Mayfield*, Cuyahoga App. No. 92309, 2009-Ohio-2377, at ¶8.

{¶ 9} When reviewing the City's motion to dismiss, we will assume the allegations surrounding Sims's injuries as outlined in the complaint to be true. The complaint alleged Sims fell in a hole created by the City, which negligently maintained it and failed to warn individuals of its danger. Even assuming these facts as true, Sims cannot maintain a claim entitling her to relief.

{¶ 10} In *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 557, 2000-Ohio-486, 733 N.E.2d 1141, the Ohio Supreme Court outlined a three-tier analysis required for determining sovereign immunity when it stated:

“R.C. Chapter 2744 sets out the method of analysis, which can be viewed as involving three tiers, for determining a political subdivision's immunity from liability. First, R.C. 2744.02(A)(1) sets out a general rule that political subdivisions are not liable in damages. In setting out this rule, R.C. 2744.02(A)(1) classifies the functions of political subdivisions into governmental and proprietary functions and states that the general rule of immunity is not absolute, but is limited by the provisions of R.C. 2744.02(B), which details when a political subdivision is not immune. Thus, the relevant point of analysis (the

second tier) then becomes whether any of the exceptions in R.C. 2744.02(B) apply. Furthermore, if any of R.C. 2744.02(B)'s exceptions are found to apply, a consideration of the application of R.C. 2744.03 becomes relevant, as the third tier of analysis.”

{¶ 11} In order to meet the first tier, the defendant must establish that it is a political subdivision. *Young v. Genie Industries United States*, Cuyahoga App. No. 89665, 2008-Ohio-929, at ¶13, citing *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 317, 2007-Ohio-2070, 865 N.E.2d 845. R.C. 2744.01(F) defines a political subdivision as a “municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.” The City obviously qualifies as a political subdivision, and Sims does not argue otherwise.

{¶ 12} Under the first tier of the analysis, it is presumed that if the defendant is a political subdivision immunity applies. Immunity is construed broadly and limited only by the specific statutory exceptions enumerated in R.C. 2744.02. *Sims v. Cleveland Mun. School Dist.*, Cuyahoga App. No. 79785, 2002-Ohio-2135, at ¶9, citing *Carrington v. Cleveland Bd. of Ed.* (Dec. 9, 1999), Cuyahoga App. No. 74624. Revised Code Chapter 2744 provides immunity to political subdivisions and their employees for their acts or failure to act, if it is in the performance of a government function. *Sims* at ¶9.

{¶ 13} Sims argues that in order for the City to be entitled to immunity it must demonstrate that it was performing either a governmental or proprietary function. This is inaccurate because if a defendant qualifies as a political subdivision, immunity is presumed under the statute. *Walsh v. Village of Mayfield*, Cuyahoga App. No. 92309, 2009-Ohio-2377, at ¶11-12. Further, political subdivisions are immune from governmental functions but can still be liable for proprietary functions, therefore, Sims's reasoning is flawed. As immunity is clearly presumed to the City, Sims must demonstrate that an exception to the general rule of immunity as outlined in R.C. 2744.02(B) applies. *Id.*

{¶ 14} R.C. 2744.02(B) enumerates five circumstances in which sovereign immunity does not apply. "The five exceptions include: negligent operation of a motor vehicle by the political subdivision's employee; negligent performance of acts by an employee of a political subdivision with respect to the political subdivision's 'proprietary functions'; the political subdivision's negligent failure to keep public roads in repair; negligent creation or failure to remove physical defects in buildings and grounds; and where another section of the Ohio Revised Code expressly imposes civil liability on a political subdivision." *Young* at ¶17.

{¶ 15} Sims argues that the City has failed to demonstrate that none of the exceptions to sovereign immunity are applicable. However, R.C.

2744.02(A) specifically states sovereign immunity applies, unless an exception is applicable. The statute does not place the burden on the City to demonstrate that no exceptions apply; rather, once the first tier has been met, the plaintiff must demonstrate one of the statutorily defined exceptions apply in order to proceed. *Walsh, supra; Maggio v. City of Warren*, Trumbull App. No. 2006-T-0028, 2006-Ohio-6880, at ¶38, citing *Ramey v. Mudd*, 154 Ohio App.3d 582, 2003-Ohio-5170, 798 N.E.2d 57.

{¶ 16} Sims fails to state which exception to sovereign immunity would be applicable in this case. Instead, she argues that because the City failed to warn individuals of the dangerous hole in the tree lawn, its conduct was wanton or reckless as specified in R.C. 2744.03(A)(5). However, R.C. 2744.03 does not impose liability; rather, it lists defenses for political subdivisions once an exception to sovereign immunity has already been established. *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 33, 1998-Ohio-421, 967 N.E.2d 610. As Sims has failed to establish an exception to sovereign immunity under R.C. 2744.02 exists, the analysis does not proceed to the third tier, which is defenses pursuant to R.C. 2744.03.

{¶ 17} Taking all of Sims's allegations in the complaint as true, she has still failed to state a claim on which relief can be granted. The City is immune from liability absent a showing from Sims that one of the five enumerated exceptions apply, which Sims has failed to do

{¶ 18} Appellant's assignments of error are overruled.

{¶ 19} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
LARRY A. JONES J., CONCUR