[Cite as *Wade v. Stewart*, 2010-Ohio-164.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93405

CASSANDRA WADE, ETC.

PLAINTIFF-APPELLEE

vs.

WILLIAM E. STEWART

DEFENDANT-APPELLEE

APPEAL BY CUYAHOGA METROPOLITAN HOUSING AUTHORITY

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-500629

BEFORE: Cooney, P.J., Gallagher, A.J., and Kilbane, J.
RELEASED: January 21, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Hilary S. Taylor
Shawn W. Maestle
Julius Trombetto
Weston Hurd, L.L.P.
The Tower at Erieview
1301 East 9th St., Suite 1900
Cleveland, Ohio 44114

ATTORNEY FOR APPELLEES

For Cassandra Wade, etc.

Michael J. O'Shea
Ronald A. Annotico
O'Shea & Associates Co., L.P.A.
Beachcliff Market Square
19300 Detroit Rd., Ste. 202
Rocky River, Ohio 44116

For William E. Stewart

Henry R. Freeman
P.O. Box 288
Tallmadge, Ohio 44278

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, the Cuyahoga Metropolitan Housing Authority ("CMHA"), appeals the trial court's denial of its motion to dismiss. For the following reasons, we dismiss for lack of a final appealable order.

{¶ 2} This appeal arises from a lawsuit initially filed in May 2003 by plaintiff, Cassandra Wade ("Cassandra"), as parent and next friend to Cindy Wade ("Cindy"), against William Stewart ("Stewart"), alleging that Cindy, a minor, was exposed to lead paint while living in Stewart's rental property from February 2001 to February 2002. In August 2003, Stewart filed his notice of petition for bankruptcy and the matter was stayed until November 2008, when the court reactivated the case.

{¶ 3} In January 2009, the complaint was amended to substitute plaintiff-appellee, Lawrence Wade, as parent and next friend to Cindy Wade. Plaintiff also added CMHA as a new-party defendant, alleging that CMHA was negligent in failing to inspect the property before issuing "Section 8" financial subsidy payments to Stewart. Plaintiff sought compensatory and punitive damages.

{¶ 4} CMHA moved to dismiss the complaint under Civ.R. 12(B)(6), arguing that: (1) plaintiff is not entitled to punitive damages; (2) the parents' claims are barred by the statute of limitations; (3) there is no private right of action under the federal law cited by plaintiff; and (4) it is immune under Chapter 2744 of

the Ohio Revised Code. The trial court denied CMHA's motion without opinion in May 2009.

{¶ 5} CMHA now appeals, raising three assignments of error for our review. In the first assignment of error, it argues that the trial court erred in denying its motion to dismiss because CMHA is immune under R.C. 2744.01, et seq. In the second assignment of error, CMHA argues that trial court erred in denying its motion to dismiss because the derivative parental claims are barred by the statute of limitations. In the third assignment of error, it argues that the trial court erred in denying its motion to dismiss because punitive damages may not be awarded against CMHA as a political subdivision.

{¶ 6} "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266. "Generally, an order denying a motion to dismiss is not a final order." *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 103, 616 N.E.2d 213.

> "The reason is that a motion to dismiss is a procedural mechanism that tests the sufficiency of the allegations in the complaint. When considering a Civ.R. 12(B)(6) motion, 'a trial court must examine the complaint to determine if the allegations provide for relief on any possible theory.' '[T]he movant may not rely on allegations or evidence outside the complaint; otherwise, the motion must be treated, with reasonable notice, as a Civ.R. 56 motion for summary judgment.'"

State Auto. Mut. Ins. Co. v. Titanium Metals Corp., 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, ¶8. (Internal citations omitted.)

{¶ 7} Plaintiff argues that the denial of CMHA's motion to dismiss is not a final appealable order. Plaintiff further argues that R.C. 2744.02(C) is inapplicable because the injuries occurred prior to April 9, 2003, the effective date of the statute.[1] We agree with plaintiff that R.C. 2744.02(C) does not apply to the instant case, which alleges that the injuries occurred between 2001 and 2002, clearly before the effective date of the statute.

{¶ 8} The Ohio Supreme Court has held that there is no final appealable order when the trial court provides no explanation for its decision to deny a motion to dismiss. *Titanium* at ¶10. In *Titanium*, a third-party complaint was filed against the Oakwood Village Fire Department ("Oakwood") and Oakwood filed a motion to dismiss based on immunity under R.C. Chapter 2744. The trial court denied the motion without opinion. On appeal, the third-party plaintiff moved to dismiss the appeal, arguing that R.C. 2744.02(C) did not apply because the underlying incident occurred in November 2002. This court denied the motion to dismiss the appeal and

[1]R.C. 2744.02(C), as amended effective April 9, 2003, provides that: "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order."

decided the case on the merits. See *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 159 Ohio App.3d 338, 2004-Ohio-6618, 823 N.E.2d 934.

{¶ 9} Without deciding whether R.C. 2744.02(C) applied, the Ohio Supreme Court reversed our decision to reach the merits, stating:

> "[T]here is no final, appealable order. The trial court provided no explanation for its decision to deny the motion to dismiss. The court made no determination as to whether immunity applied, whether there was an exception to immunity, or whether R.C. 2744.05(B)(1) precludes contribution as the basis for its decision. The court did not dispose of the case.
>
> "At this juncture, the record is devoid of evidence to adjudicate the issue of immunity because it contains nothing more than Ohio Briquetting's third-party complaint and Oakwood's Civ.R. 12(B)(6) motion to dismiss. No fact-finding or discovery has occurred. The trial court's denial of the motion to dismiss merely determined that the complaint asserted sufficient facts to state a cause of action." *Titanium* at ¶10-11.

{¶ 10} The supreme court further stated that, "[t]he record below must be developed in order to reach [the] issue" of immunity, and the court remanded the matter to the trial court. Id. at ¶12.

{¶ 11} CMHA also asserts that appellate jurisdiction exists under a more recent case, *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878. It relies on the syllabus in *Hubbell*, which provides that: "[w]hen a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit

of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C)."

{¶ 12} In *Hubbell*, the Ohio Supreme Court considered whether the denial of a governmental entity's motion for summary judgment on the issue of sovereign immunity is a final appealable order under R.C. 2744.02(C). Id. at ¶6. After examining the plain meaning of the statute and how appellate districts apply R.C. 2744.02(C), the court concluded that the denial of a governmental entity's motion for summary judgment on the issue of sovereign immunity is a final appealable order under R.C. 2744.02(C). Id. at ¶27.

{¶ 13} We note that in its analysis in *Hubbell*, the supreme court specifically noted that the procedural posture of *Titanium* distinguished it from *Hubbell*. Id. at ¶18. "In *Titanium,* the third-party defendant appealed from a trial court decision denying a motion to dismiss based on immunity without opinion." Id. In contrast, in *Hubbell* "the record contain[ed] evidence upon which the trial court denied the motion for summary judgment, so as to deny Xenia 'the benefit of an alleged immunity from liability.'" Id. at ¶20, quoting R.C. 2744.02(C).

{¶ 14} Moreover, this court in *Grassia v. Cleveland*, Cuyahoga App. No. 91013, 2008-Ohio-3134, dismissed the city of Cleveland's ("City") appeal for lack of final appealable order, relying on the Ohio Supreme Court decision in *Titanium*. In *Grassia*, the plaintiffs brought an intentional tort action against the City. The City filed a Civ.R. 12(B)(6) motion to dismiss, arguing

immunity under R.C. 2744.02. The trial court denied the City's motion without opinion. Relying on *Titanium*, we found that:

> "Because the court denied the City's motion in this case without elaboration and there is * * * no record on the issue of immunity, * * * there is no final appealable order and we must dismiss." *Grassia* at ¶11.

{¶ 15} In the instant case, just as in *Titanium* and *Grassia*, the record is devoid of evidence to adjudicate the issue of immunity because it contains nothing more than the plaintiff's complaint and CMHA's Civ.R. 12(B)(6) motion to dismiss. Under the facts of the instant case that arose prior to the effective date of R.C. 2744.02(C), we find that there is no final appealable order and we lack jurisdiction to consider the merits of this appeal.

{¶ 16} Accordingly, this appeal is dismissed.

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

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

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COLLEEN CONWAY COONEY, PRESIDING JUDGE

MARY EILEEN KILBANE, J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION).

SEAN C. GALLAGHER, A.J., CONCURRING IN JUDGMENT ONLY:

{¶ 17} I agree with the judgment of the majority that there is no final appealable order because the complaint alleges that plaintiff's injuries occurred between 2001 and 2002, before the effective date of R.C. 2744.02(C). Nevertheless, I do not agree entirely with the majority analysis concerning the applicability of R.C. 2744.02(C) to a decision denying a motion to dismiss based on immunity. Therefore, I write separately to address this issue.

{¶ 18} The Ohio Supreme Court has made clear that "when a political subdivision or its employee seeks immunity, an order that denies the benefit of an alleged immunity is a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878. In *Hubbell*, the Ohio Supreme Court distinguished its earlier decision in *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, which was not based on R.C. 2744.02(C). In contrast, the court's decision in *Hubbell* specifically dealt with R.C. 2744.02(C). The court recognized that a plain reading of R.C. 2744.02(C) supports "[e]arly resolution of the issue of whether a political subdivision is immune from liability" and that "[a]s the General Assembly envisioned, the determination of immunity could be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses[.]" *Hubbell*, supra at 82, quoting *Burger v. Cleveland Hts*., 87 Ohio St.3d 188, 199-200, 1999-Ohio-319, 718 N.E.2d 912 (Lundberg Stratton, J., dissenting). The court's decision was not limited to summary judgment rulings,

and the court specifically found that "the plain language of R.C. 2744.02(C) does not require a final denial of immunity before the political subdivision has the right to an interlocutory appeal." Id. at 79.

{¶ 19} Because of its decision in *Hubbell*, the Ohio Supreme Court reversed the judgments of the courts of appeals in several cases. *In re Ohio Political Subdivision Immunity Cases*, 115 Ohio St.3d 448, 2007-Ohio-5252, 875 N.E.2d 912. One of the decisions the Ohio Supreme Court reversed was *Stevenson v. ABM, Inc.*, Medina App. No. 07CA0009-M, 2008-Ohio-3214, which found that the trial court's denial of a county's motion to dismiss seeking immunity under R.C. Chapter 2744 was not a final order. Further, the Ohio Supreme Court recently held in *Sullivan v. Anderson Twp*., 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, syllabus, that R.C. 2744.02 permits an appeal from an order denying, in part, a township's motion for judgment on the pleadings based on immunity from liability, even absent a final judgment certification.

{¶ 20} Additionally, following the Ohio Supreme Court's decision in *Hubbell*, appellate courts have acknowledged jurisdiction to review a trial court's denial of a motion to dismiss on the grounds of statutory immunity. See, e.g., *Miller v. Van Wert Cty. Bd. of Mental Retardation & Dev. Disabilities*, Van Wert App. No. 15-08-11, 2009-Ohio-5082; *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517, 913 N.E.2d 997; *Myrick v. Cincinnati*, Hamilton App. No. C-080119, 2008-Ohio-6830; *Slonsky v. J.W. Didado Elec., Inc*., Summit App.

No. 24228, 2008-Ohio-6791; *Dubree v. Klide*, Cuyahoga App. No. 89673, 2008-Ohio-2178; *Lowery v. Cleveland*, Cuyahoga App. No. 90246, 2008-Ohio-132; see, also, *Rucker v. Village of Newburgh Hts.*, Cuyahoga App. No. 89487, 2008-Ohio-910; but, see, *Grassia v. Cleveland*, Cuyahoga App. No. 91013, 2008-Ohio-3134.

{¶ 21} Accordingly, in cases where the statute applies, the denial of a motion to dismiss does constitute a final, appealable order under R.C. 2744.02(C) when the order denies a political subdivision the benefit of an alleged immunity from liability.

{¶ 22} Nevertheless, because this court's appellate jurisdiction is dependent on the applicability of R.C. 2744.02(C), I believe the majority properly found that there was a lack of a final appealable order in this matter. Subsection C of R.C. 2744.02 was not enacted until January 8, 2003, and did not go into effect until April 9, 2003. It has been recognized that "the General Assembly did not expressly provide for the statute to apply retroactively, and numerous courts of appeals have examined the issue, and concluded R.C. 2744.02(C) does not apply retroactively where the cause of action accrued prior to the effective date of the statute section." *Wright v. Peyton*, Perry App. No. 04CA17, 2005-Ohio-5468; see, also, *Sobiski v. Cuyahoga Cty. Dept. of Children and Family Servs*., Cuyahoga App. No. 84086, 2004-Ohio-6108 (Karpinski, J., dissenting). Because

plaintiff's alleged injuries occurred prior to the effective date of R.C. 2744.02(C), there is no final appealable order herein.

{¶ 23} For the foregoing reasons, I concur in judgment only.