[Cite as *Parsons v. Greater Cleveland Regional Transit Auth.*, 2010-Ohio-266.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93523

CHARLES PARSONS, ET AL.

PLAINTIFFS-APPELLEES

vs.

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-688451

BEFORE: Kilbane, J., Gallagher, A.J., Cooney, P.J.

RELEASED: January 28, 2010

JOURNALIZED:

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MARY EILEEN KILBANE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. The Greater Cleveland Regional Transit Authority ("appellant" or "RTA"), appeals the trial court's denial of their motion to dismiss pursuant to Civ.R. 12(B)(6). RTA argues that it is statutorily immune from liability based upon its status as a political subdivision under Chapter 2744 et seq., and the trial court erred when it failed to grant their motion on this basis. After reviewing the pertinent law and facts, we affirm.

Facts and Procedural History

{¶ 2} On January 3, 2008, appellee Charles Parsons ("Parsons") slipped and fell on the walkway while boarding a train at the RTA rapid station, located at the corner of Green Road and Shaker Boulevard, in Shaker Heights, Ohio. The parties disagree about the exact location of the incident. RTA claims that Parsons fell on the sidewalk, thus making RTA statutorily immune under Chapter 2744. Parsons claims that the accident happened in a common area, within the Green Road Rapid Station, on the walkway approaching the train platform, and that RTA is liable as the owner/landlord/keeper of the common entrance property.

{¶ 3} On March 26, 2009, Parsons and his wife, Mary Parsons

(collectively "appellees"), filed the instant lawsuit against RTA, alleging negligence in allowing a hazardous condition to exist, negligent removal of ice and snow, respondeat superior, and loss of consortium.

{¶ 4} On April 20, 2009, RTA filed an answer asserting several affirmative defenses, including the defense of statutory immunity under Chapter 2744. Concurrent with the filing of its answer, RTA also filed a motion to dismiss under Civ.R. 12(B)(6), arguing that it was statutorily immune from liability as a government entity under Chapter 2744.

{¶ 5} On June 5, 2009, the trial court denied RTA's motion to dismiss pursuant to R.C. 2744.02(C) stating:

> **"Defendant Greater Cleveland Regional Transit Authority's Motion to Dismiss, filed 4/20/2009, is denied. Final order pursuant to R.C. 2744.02 (C)."**

{¶ 6} On June 24, 2009, RTA filed the instant appeal, asserting one assignment of error:

> **"The trial court erred in denying defendant-appellant Greater Cleveland Regional Transit Authority's Motion to Dismiss because no provision of the Ohio Revised Code Chapter 2744 confers liability upon a political subdivision for sidewalk maintenance."**

Analysis

A. Whether the trial court's denial of RTA's motion to dismiss is a final appealable order.

{¶ 7} For purposes of this appeal, there is no question that RTA is a political subdivision of the state of Ohio, created pursuant to R.C. 306.31 et seq. *Drexler v. Greater Cleveland Regional Transit Auth.* (1992), 80 Ohio App.3d 367, 609 N.E.2d 231.

{¶ 8} R.C. 2744.02(C) provides that "[a]n order that denies 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." See, also, *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878. *Hubbell* states 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[.]" Id. at 82, distinguishing *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199.

{¶ 9} Because the trial court's entry denied RTA the benefit of an alleged immunity under R.C. 2744.02(C), it was a final appealable order.

B. Whether the trial court properly denied RTA's motion to dismiss.

{¶ 10} An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to

de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶5. In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. When granting a motion to dismiss under Civ.R. 12(B)(6), "it must appear beyond doubt that the plaintiff can prove no set of facts entitling [plaintiff] to relief." *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 1995-Ohio-187, 649 N.E.2d 182. (Internal citation omitted.)

{¶ 11} While Parsons cannot survive a motion to dismiss through the mere incantation of an abstract legal standard, he can defeat such a motion if there is some set of facts consistent with the complaint that would allow him to recover. See *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584; *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063. However, the claims set forth in the complaint must be plausible, rather than conceivable. *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 127 S.Ct. 1955. While a complaint attacked by a Civ.R. 12(B)(6) motion to dismiss does not need detailed factual allegations, the appellees' obligation to provide the grounds for their entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Id. Factual allegations must be enough to raise a right to relief above the speculative level. Id.

{¶ 12} RTA argues that it is statutorily immune under R.C. 2744.02(B)(2) and (B)(3),[1] which only confer liability upon political subdivisions for negligent acts in performing proprietary functions. According to RTA, sidewalk maintenance is not a proprietary function under R.C. 2744.02(B)(2) and (3), but a "governmental function" as defined by R.C. 2744.01(C)(2), which states:

> **"A 'governmental function' includes, but is not limited to, the following: * * * (e) the regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts and public grounds."**

{¶ 13} In support of its arguments, RTA relies on several cases for the proposition that sidewalk maintenance is not a proprietary function under R.C. 2744.02(B)(2) and (3). These cases include: *Howard v. Miami Twp. Fire Div.,* 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311, at ¶26 (holding that an accumulation of ice on a roadway is not an "obstruction" within the meaning of R.C. 2744.02(B)(3), where the accumulation resulted from a local fire

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[1]R.C. 2744.02(B)(2) and (B)(3) state in pertinent part:

"(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge."

department's training exercises); *Gordon v. Dziak*, Cuyahoga App. No. 88882, 2008-Ohio-570 (holding that because the General Assembly removed the word "sidewalk" from the list of proprietary functions in R.C. 2744.02(B)(3), a municipality could not be held liable where a pedestrian tripped and fell on a broken piece of sidewalk); *Snider v. Akron*, Summit App. No. 23994, 2008-Ohio-2156, at ¶13-14 (holding that the General Assembly's amendment of R.C. 2744.02(B)(3) to remove reference to sidewalks [means that] the failure to keep sidewalks in repair is no longer an exception to the blanket immunity set forth in R.C. 2744.02(A)(1)); and *Levenson v. Orange City School Dist.* (1997), Cuyahoga App. No. 71470 (holding that a school district's maintenance of its sidewalks was a governmental function under R.C. 2744.01(C)(2)(e)). Id. at 5.

{¶ 14} Putting aside the question of whether the cases cited by RTA are factually distinguishable from the case sub judice, the cases cited by RTA each contain one common element standing in the way of their full analysis for our purposes here — each was decided on factual questions raised by summary judgment motions under Civ.R. 56. None of the cases were decided upon the sufficiency of the claims stated in the complaint, as required by Civ.R. 12(B)(6). Further, the court's decision in *Hubbell* 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 82.

{¶ 15} Thus, while the court denied RTA the benefit of an alleged immunity when it denied its Civ.R. 12(B)(6) motion, thus triggering its right to an interlocutory appeal under R.C. 2744, that does not necessarily mean that RTA is barred from proving it is immune from liability. At this stage of the proceedings, we must decide whether, when viewing all factual allegations as true in the complaint, there is any doubt appellees can prove any set of facts entitling them to relief. See Civ.R. 12(B)(6); *Mitchell*, supra; *Vail*, supra. When viewing appellees' complaint in this light, we cannot say beyond doubt that they can prove no set of facts entitling them to relief. That is all that is required at this stage of the proceedings. Whether appellees will prove they are entitled to relief remains to be seen through the discovery process. However, the adequacy of appellees' complaint and the facts as alleged and accepted to be true under Civ.R. 12(B)(6) do make a colorable claim for relief under the rule.

{¶ 16} If the disputed area where Parsons is alleged to have fallen is proven not to be a traditional "sidewalk," as appellees claim, thereby taking it within RTA's governmental functions, as opposed to proprietary functions under R.C. 2744.02, RTA may be immune. If the discovery process reveals facts demonstrating otherwise, then RTA may not be immune. From the bare record before us and the parties' vehement factual disagreement about the location of the alleged fall, it cannot be determined at this stage of the proceedings whether RTA is immune. Therefore, under *Hubbell*, although the trial court's denial of

their motion constituted a final appealable order, it does not constitute a "final denial of immunity." Id. Further discovery must bear that out.

{¶ 17} We therefore affirm the trial court's denial of RTA's motion to dismiss.

Judgment affirmed.

It is ordered that appellees recover from appellants 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, JUDGE

SEAN C. GALLAGHER, A.J., and
COLLEEN CONWAY COONEY, P.J., CONCUR