

[Cite as *Roberts v. Nationwide Mut. Fire Ins. Co.*, 2011-Ohio-1101.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 95495

---

**JANET R. ROBERTS, ET AL.**

PLAINTIFFS-APPELLEES

vs.

**NATIONWIDE MUTUAL FIRE INS. CO., ET AL.**

DEFENDANTS-APPELLEES

**[APPEAL BY CUYAHOGA COUNTY BOARD OF  
MENTAL RETARDATION]**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
AFFIRMED**

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-714612

**BEFORE:** Rocco, J., Cooney, P.J., and Keough, J.

**RELEASED AND JOURNALIZED:** March 10, 2011

**ATTORNEYS FOR APPELLANT**

**Cuyahoga County Board of Mental Retardation**

Matthew J. Markling  
Patrick Vrobel  
McGown & Markling Co., L.P.A.  
1894 North Cleveland-Massillon Road  
Akron, Ohio 44333

**ATTORNEYS FOR APPELLEES**

**Janet R. Roberts, et al.**

Mark R. Koberna  
Stephen B. Doucette  
Sonkin & Koberna, Co., L.P.A.  
3401 Enterprise Parkway, Suite 400  
Cleveland, Ohio 44122

**Nationwide Mutual Fire Insurance Co., et al.**

Joyce V. Kimbler  
50 S. Main Street, Suite 502  
Akron, Ohio 44308

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, the Cuyahoga County Board of Mental Retardation and Developmental Disabilities<sup>1</sup> (referred to herein as “the board”), appeals from the trial court order that denied its Civ.R. 12(C) motion for judgment on the pleadings.

{¶ 2} The board presents one assignment of error. It asserts it is immune from liability on the complaint filed by plaintiff-appellee Janet R. Roberts;<sup>2</sup> therefore, the trial court wrongly denied its motion.

{¶ 3} Upon a review of the record, this court cannot agree with the board’s assertions. Consequently, the trial court’s order is affirmed.

{¶ 4} According to Roberts’s original complaint, she sustained injuries on January 7, 2008. Roberts alleged that she was driving her vehicle northbound on Ansel Road in the city of Cleveland, and that a vehicle proceeding in the southbound direction, negligently operated by the board’s employee Shirley A. Rembert, crossed the center line and went into Roberts’s path.

{¶ 5} Roberts’s complaint presented claims against the board of: 1) negligence attributable to the board “under the doctrine of respondeat superior,” and, 2) negligent entrustment. Roberts also presented a claim against her insurance company, Nationwide

---

<sup>1</sup>Now known as the Cuyahoga County Board of Developmental Disabilities.

<sup>2</sup>Janet Roberts’s husband Melvin originally also presented claims in the underlying action; however, he subsequently voluntarily dismissed his claims.

Mutual Fire Insurance Company (“Nationwide”), seeking a declaratory judgment that it had a duty to provide coverage for the accident.

{¶ 6} After Nationwide filed an answer to the complaint, the board filed its answer. The board denied Rembert had been negligent, but made several pertinent admissions therein.

{¶ 7} The board admitted that 1) it was a political subdivision, 2) Rembert had been named in the complaint only “in her official capacity” as the board’s employee, and 3) Rembert was operating a board-owned vehicle and was performing her duties as an employee at the time the accident occurred. The board also set forth several affirmative defenses; in particular, the board asserted it was immune from liability pursuant to R.C. 2744.01 et seq.

{¶ 8} Shortly after the board filed its answer, it filed a Civ.R. 12(C) motion for judgment on the pleadings. In its brief in support of its motion, the board allowed that Rembert was operating its vehicle in the course and scope of her employment. The board also conceded for purposes of its motion that Rembert’s negligent driving caused the accident, in spite of the fact that its concession abrogated the board’s immunity pursuant to R.C. 2744.02(B)(1), which provides in pertinent part:

{¶ 9} “(B) Subject to section[ ] 2744.03 \* \* \* of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its

employees in connection with a governmental or proprietary function, as follows:

{¶ 10} “(1) \* \* \* [P]olitical subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority.”

{¶ 11} The board’s concession was strategic; it argued that, since Rembert was acting within her capacity as a board employee and had acted only negligently rather than wantonly, as an individual, she was entitled to immunity. Working from this premise, the board asserted it, too, was entitled to immunity.

{¶ 12} The board based its assertion on R.C. 2744.03(A)(3) and (5). Those subsections provide in pertinent part:

{¶ 13} “(A) In a civil action brought against *a political subdivision or an employee of a political subdivision* to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶ 14} “ \* \* \*

{¶ 15} “(3) The political subdivision is immune from liability if the action \* \* \* *by the employee involved* that gave rise to the claim of liability was *within the discretion of the employee* with respect to policy-making, planning, or enforcement powers by virtue

of the duties and responsibilities of the office or position of the employee.

{¶ 16} “ \* \* \*

{¶ 17} “(5) The political subdivision is immune from liability if the injury, death, or loss to person or property *resulted from the exercise of judgment or discretion in determining* whether to acquire, or *how to use, equipment*, supplies, materials, personnel, facilities, and other resources *unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.* (Emphasis added.)”

{¶ 18} From the foregoing, the board argued Rembert’s operation of the vehicle, whether negligent or not, came only as a result of her own exercise of discretion. The board extended that premise to an assertion that it, too, was entitled to immunity because: 1) it exercised its discretion with respect to its planning and enforcement powers in hiring her, and 2) it exercised its judgment in determining whether to acquire personnel when it hired her.

{¶ 19} Roberts and Nationwide each filed a brief in opposition to the board’s motion for judgment on the pleadings. They argued the board’s assertions had been rejected in two cases, viz., *Griner v. Minster Bd. of Edn.* (1998), 128 Ohio App.3d 425, 715 N.E.2d 226, and *Siders v. Reynoldsburg School Dist.* (1994), 99 Ohio App.3d 173, 650 N.E.2d 150.

{¶ 20} Although the trial court granted the motion as to Rembert “in her individual capacity,” the trial court denied the board’s motion for judgment on the pleadings. The

board filed its appeal from that order pursuant to R.C. 2744.02(C).<sup>3</sup>

{¶ 21} The board presents one assignment of error.

{¶ 22} **“The trial court erred in denying Defendant Cuyahoga County Board of Mental Retardation and Developmental Disabilities the benefits of statutory immunity under R.C. Chapter 2744.”**

{¶ 23} The board asserts the trial court should have granted its Civ.R. 12(C) motion. The board bases its assertion on two arguments. First, the board argues neither of Roberts’s two claims against it fell within the purview of R.C. 2744.02(B)(1), because that section applies only to a claim of “negligent operation of a motor vehicle”; it does not apply to a claim of either respondeat superior or negligent entrustment. Since a review of the record, however, demonstrates the board never raised this argument below, this court need not address it. *Terry v. Ottawa Cty. Bd. of Mental Retardation*, 151 Ohio App.3d 234, 2002-Ohio-7299, 783 N.E.2d 959, ¶12; *M.B. v. Elyria City Bd. of Edn.*, Lorain App. No. 05CA008831, 2006-Ohio-4533, ¶20.<sup>4</sup>

---

<sup>3</sup>R.C. 2744.02(C) states: “*An 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.*” (Emphasis added.) The Ohio Supreme Court has determined that a political subdivision may immediately appeal an order denying it immunity pursuant to this section. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶23-27; see, also, *Parsons v. Greater Cleveland Regional Trans. Auth.*, Cuyahoga App. No. 93523, 2010-Ohio-266.

<sup>4</sup>If this court were inclined to address this argument, this court would note that, in effect, the

{¶ 24} Alternatively, the board argues it possessed full defenses to the liability imposed by R.C. 2744.02(B)(1), i.e., the pleadings demonstrated either: 1) Rembert was operating the bus only as a result of the board’s exercise of its “policy making, planning or enforcement powers” pursuant to R.C. 2744.03(A)(3), or 2) the board’s decision to permit Rembert to operate the bus resulted from the board’s “exercise of judgment or discretion in determining whether to acquire \* \* \* personnel, \* \* \* and other resources” pursuant to R.C. 2744.03(A)(5). This court disagrees.

{¶ 25} Judgment on the pleadings pursuant to Civ.R. 12(C) is appropriate only if, “after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief.” *Bozeman v. Cleveland Metro. Hous. Auth.*, Cuyahoga App. Nos. 92435 and 92436, 2009-Ohio-5491, fn. 3, citing *Tenable Protective Servs., Inc. v. Bit E-Technologies, L.L.C.*, Cuyahoga App. No. 89958, 2008-Ohio-4233, ¶26. This court reviews the ruling de novo. *Williams v. Cuyahoga Metro. Hous. Auth.*, Cuyahoga App. No. 92964, 2009-Ohio-6644, ¶5.

---

board calls for an anatomized review of Roberts’s complaint, in spite of Civ.R. 8(A)(1), which indicates that a plaintiff’s claim states one for relief if it contains “a short and plain statement of the claim.” Moreover, this court has rejected the argument that, when a political subdivision is involved, plaintiff must meet a heightened pleading standard. *Diaz v. Cuyahoga Metro. Hous. Auth.*, Cuyahoga App. No. 92907, 2010-Ohio-13. See, also, *Bowlander v. Ballard*, Sandusky App. No. S-02–29, 2003-Ohio-2907; cf. *Gould v. Britton* (Jan. 30, 1992),



{¶ 26} The board admitted it is a political subdivision engaging in a governmental function. R.C. 2744.01(C)(2)(o). Therefore, it is entitled to immunity pursuant to R.C. 2744.02(A) unless an exception to immunity, as set forth in subsection (B), applies. R.C. 2744.02(A)(1). Roberts’s complaint clearly sought to allege the exception to immunity set forth in R.C. 2744.02(B)(1).

{¶ 27} The board admitted in its answer that Rembert was operating its vehicle in the course and scope of her employment. For purposes of its motion for judgment on the pleadings, the board further conceded that Rembert’s negligent driving caused the accident. Under these circumstances, an exception existed to the immunity conferred by R.C. 2744.02(A), viz., the employee’s negligent operation of a motor vehicle. *Griner*; *Siders*.

{¶ 28} In order to escape the application of *Griner* and *Siders*, the board argues that if “any” of the defenses set forth in R.C. 2744.03(A) conceivably could apply to the claims put forward in the complaint, it cannot be liable; the board asserts that to hold otherwise “is antithetical” to the legislature’s “scheme.”

{¶ 29} The board’s argument, however, creates an exception that would swallow the rule. To argue the legislature intended to absolve a political subdivision’s employees from their negligent operation of a motor vehicle defies logic in light of the express language of R.C. 2744.02(B)(1); it possesses its own specific “full defenses.”

{¶ 30} Since the board may be liable for injuries caused by its employee's negligence in operating a motor vehicle, the trial court correctly denied the board's motion for judgment on the pleadings. *Griner; Siders*.

{¶ 31} The board's assignment of error, accordingly, is overruled.

{¶ 32} The trial court's order is affirmed. This case is remanded for further proceedings.

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.

---

KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, P.J., and  
KATHLEEN ANN KEOUGH, J., CONCUR