

[Cite as *Scott v. Dennis*, 2011-Ohio-12.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94685**

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**CHRISTINE E. SCOTT**

PLAINTIFF-APPELLEE

vs.

**MICHAEL DENNIS, ET AL.**

DEFENDANTS

**[APPEAL BY CUYAHOGA COMMUNITY COLLEGE]**

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Common Pleas Court  
Case No. CV-598000

**BEFORE:** Boyle, J., Blackmon, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** January 6, 2011

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Cuyahoga Community College (“Tri-C”), appeals the trial court’s decision denying its motion to dismiss the complaint of plaintiff-appellee, Christine Scott, on statutory immunity grounds. Finding merit to the appeal, we reverse and remand.

Procedural History and Facts

{¶ 2} On August 4, 2006, Scott commenced the underlying action against Michael Dennis and Donald Dennis, asserting claims for undue influence regarding property/CD-ROMs; fraudulent misrepresentation regarding property/CD-ROMs; negligent misrepresentation regarding property/CD-ROMs; and breach of contract. Two years later, Scott obtained leave of court to amend her complaint and add Tri-C as a defendant. In her amended complaint, Scott alleged the following.

{¶ 3} In the fall of 2004, while enrolled at Tri-C, Scott took a class entitled “Real Estate I and II” taught by Michael Dennis, an employee of Tri-C. According to Scott, Dennis “supplied false information to [her] in order to deceive her and induce her to purchase property” and he “fraudulently and negligently misrepresented the nature and value of CD-ROMs” that he sold to her. Scott asserted two claims against Tri-C as a result of these alleged tortious acts: (1) negligent hiring and supervision of Dennis, and (2) a claim for respondeat superior.

{¶ 4} Tri-C subsequently moved to dismiss the complaint against it on the grounds that it was a political subdivision, entitled to statutory immunity under R.C. 2744.02(A)(2). The trial court initially granted the motion but subsequently reconsidered its ruling, holding that “the function of a community college is a proprietary function and therefore not immune from tort liability.”

{¶ 5} Tri-C appeals that order, raising the following two assignments of error:

{¶ 6} “[I.] The trial court erred when it reversed its original order granting appellant Cuyahoga Community College’s motion to dismiss which was based on the liability immunity conferred upon political subdivisions under R.C. 2744, the Political Subdivision Tort Liability Act.

{¶ 7} “[II.] The trial court erred when it ruled that community colleges do not provide a system of public education, a statutorily identified governmental function, under R.C. 2744.01(C)(1) of the Political Subdivision Tort Liability Act.”

{¶ 8} Although identified as two assignments of error, Tri-C relies on the same arguments and authority for both, so we will address them together.

#### Standard of Review

{¶ 9} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 605 N.E.2d 378. It is well settled that “when a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

{¶ 10} While the factual allegations of the complaint are taken as true, “[u]nsupported conclusions of a complaint are not considered admitted \* \* \* and are not sufficient to withstand a motion to dismiss.” *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324, 324, 544 N.E.2d 639. In light of these guidelines, in order for a court to grant a motion to dismiss for failure to state a claim, it must appear “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.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753.

#### Three-Tiered Analysis for Determining Immunity

{¶ 11} To determine whether a political subdivision enjoys immunity under the Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, we employ the three-tiered analysis set forth in *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

{¶ 12} “The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. [*Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 2000-Ohio-486, 733 N.E.2d 1141]; R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B); *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610.” *Colbert* at ¶7.

{¶ 13} “The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to

expose the political subdivision to liability.” *Id.* at ¶8, citing *Cater* at 28. The express exceptions under R.C. 2744.02(B) are: (1) the negligent operation of a motor vehicle by an employee, R.C. 2744.02(B)(1); (2) the negligent performance of proprietary functions, R.C. 2744.02(B)(2); (3) the negligent failure to keep public roads open and in repair, R.C. 2744.02(B)(3); (4) the negligence of employees occurring within or on the grounds of, and due to physical defects within or on the grounds of, certain buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); (5) express imposition of liability by statute, R.C. 2744.02(B)(5).

{¶ 14} “If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense to that section protects the political subdivision from liability, \* \* \* the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability.” *Colbert* at ¶9.

A. *Political Subdivision Established*

{¶ 15} Applying the first tier, we must determine whether Tri-C is a political subdivision. Scott maintains that Tri-C is not a political subdivision for purposes of enjoying immunity under R.C. Chapter 2744. Although Scott recognizes that R.C. 3354.01(A) expressly defines a “community college district,” such as Tri-C, as a political subdivision of the state, she argues that this definition is inapplicable and irrelevant. We, however, disagree. As we have previously

recognized, Tri-C is a political subdivision and therefore enjoys blanket immunity under the first tier. See *Spafford v. Tri-C*, 8th Dist. No. 84786, 2005-Ohio-1672.

B. *Exceptions to Immunity*

{¶ 16} While Tri-C qualifies as a political subdivision, the immunity established under R.C. 2744.02(A) is not absolute; the second tier of analysis requires us to determine whether any of the five enumerated exceptions to immunity applies. Scott contends that two exceptions apply: (1) the proprietary-function exception to immunity under R.C. 2744.02(B)(2), and (2) the exception stated under R.C. 2744.02(B)(4) for the negligence of employees occurring within the grounds of certain buildings used in connection with the performance of a governmental function. Tri-C counters that both exceptions are inapplicable and that the trial court erred in finding that the proprietary-function exception applied, thereby negating Tri-C's immunity. We agree.<sup>1</sup>

{¶ 17} We first address Scott's claim that R.C. 2744.02(B)(4) applies, which states in relevant part that "political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within

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<sup>1</sup>We further note that Scott's respondeat superior claim is not addressed by any of the five enumerated exceptions to immunity. Tri-C's immunity conferred under the first tier, therefore, is not abrogated by any of the exceptions, and it is entitled to immunity on this claim.

or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses \* \* \*.” Relying on *Hubbard v. Canton City School Bd.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, Scott argues that the exception stated in R.C. 2744.02(B)(4) “is not confined to injury resulting from physical defects or negligent use of grounds or buildings.” She therefore contends that Tri-C is not immune because the underlying tort occurred in a building used in connection with the performance of a governmental function.

{¶ 18} Scott’s reliance on *Hubbard*, however, is misplaced. *Hubbard* dealt with former R.C. 2744.02(B)(4), prior to its amendment, effective April 9, 2003, which expressly added the “physical defect” requirement. R.C. 2744.02(B)(4)’s “physical defect” requirement has not been deemed unconstitutional and is regularly upheld by Ohio courts. See *Troutman v. Jonathan Alder Local School Dist. Bd. of Edn.*, 12th Dist. No. CA2009-08-016, 2010-Ohio-855, ¶11; *Yeater v. LeBrae School Dist.*, 11th Dist. No. 2009-T-0107, 2010-Ohio-3684, ¶14. Therefore, because Scott does not allege any physical defect on the premises that gave rise to the purported torts, this exception does not apply in this case.

{¶ 19} We now turn to the exception that the trial court found controlling — R.C. 2744.02(B)(2), the proprietary-function exception. This provision states that, with certain exceptions, “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.” R.C. 2744.02(B)(4). Scott contends that Tri-C’s operation of a community college, including its offering of classes, is a proprietary function, not a governmental function. Scott, however, fails to cite any authority on point in support of this argument.

{¶ 20} The mutually exclusive definitions of “governmental function” and “proprietary function” are set out in R.C. 2744.01. R.C. 2744.01(C)(2) lists functions expressly designated as governmental functions, and R.C. 2744.01(G)(2) lists specific functions that are expressly designated as proprietary functions. Relying on R.C. 2744.01(C)(2)(c), which recognizes “[t]he provision of a system of public education” as a governmental function, Tri-C argues that its function falls squarely within one of the designated governmental functions. At least one Ohio federal court has agreed with this proposition, noting that “the provision of higher education is a governmental, rather than a proprietary, function.” *Dvorak v. Wright State Univ.* (Sept. 3, 1997), S.D.Ohio No. C-3-96-109, unreported. And the Sixth Circuit has also observed that “higher education has long been recognized as a governmental function.” *Hutsell v. Sayre* (C.A.6, 1993), 5 F.3d 996.

{¶ 21} But even if we assume without deciding that the actions giving rise to the torts were proprietary, we find that the third tier of the immunity analysis is dispositive of this case.

C. *Available Defenses*

{¶ 22} The third tier of the immunity analysis requires us to determine whether any of the statutory defenses listed in R.C. 2744.03 apply. R.C. 2744.03(A)(5) states as follows:

{¶ 23} “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.”

{¶ 24} This court has already found that this defense applies in the context of torts arising out of the hiring and supervision of a political subdivision’s employees. See *Daniel v. Cleveland Metro. School Dist.*, 8th Dist. No. 83541, 2004-Ohio-4632. Scott does not allege that Tri-C acted with malicious purpose or in bad faith, or that it acted recklessly or wantonly in hiring or retaining Dennis.

Instead, she alleged that she would not have been injured but for “Tri-C’s negligence in hiring, supervising, and retaining Defendant Michael Dennis.” Furthermore, even when construing the facts most favorably in Scott’s favor, we cannot find that Tri-C acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 25} Accordingly, we find that Tri-C is entitled to immunity under the facts of this case. Tri-C's assignments of error are sustained.

{¶ 26} Judgment reversed and case remanded for further proceedings consistent with this opinion.

It is ordered that Tri-C recover from appellee 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.

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MARY J. BOYLE, JUDGE

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