

[Cite as *Cohen v. Bedford Hts.*, 2015-Ohio-1308.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101739

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**EARL COHEN**

PLAINTIFF-APPELLEE/  
CROSS-APPELLANT

vs.

**CITY OF BEDFORD HEIGHTS, ET AL.**

DEFENDANTS-APPELLANTS/  
CROSS-APPELLEES

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-14-820060

**BEFORE:** E.A. Gallagher, J., Jones, P.J., and McCormack, J.

**RELEASED AND JOURNALIZED:** April 2, 2015

**ATTORNEYS FOR APPELLANTS/CROSS-APPELLEES**

**For City of Cleveland**

John Mills  
City of Cleveland Law Department  
601 Lakeside Avenue  
Room 106  
Cleveland, Ohio 44114

**For City of Bedford Heights**

Ross S. Cirincione  
5306 Transportation Blvd.  
Garfield Heights, Ohio 44125

**ATTORNEYS FOR APPELLEE/CROSS-APPELLANT**

Jonathan W. Winer  
5276 Rome-Rock Creek Road  
Rome, Ohio 44085

James M. Lyons  
240 East Main Street  
Painseville, Ohio 44077

EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant the city of Cleveland (“the city”) appeals the Cuyahoga County Court of Common Pleas’ partial denial of its motion for judgment on the pleadings. The city argues that the trial court erred in denying it political subdivision immunity against plaintiff-appellant Earl Cohen’s negligence claim based on the allegations in the complaint. Cohen cross-appeals, arguing that the trial court erred in granting the city’s motion in part and dismissing his claim against the city for unjust enrichment. For the following reasons, we affirm the judgment of the trial court.

{¶2} Cohen filed a complaint against the city and the city of Bedford Heights on January 13, 2014, alleging that the two cities negligently failed to take reasonable measures to prevent a catastrophic spike in water usage at a Bedford Heights residence that he had purchased at a foreclosure sale in February 2013. The property is served by a water supply system operated by the city and a sanitary sewage disposal system operated by the city of Bedford Heights.

{¶3} At the time Cohen purchased the property, he paid as part of the purchase price, delinquent taxes reflecting \$12,894.61 in delinquent water charges and \$1,796.89 in delinquent sanitary sewer charges. After purchasing the property, Cohen was charged an additional \$8,543.08 in delinquent sewer charges.

{¶4} Cohen’s complaint alleges that the charges stem from a “catastrophic spike” in water usage that occurred from October 2010 to April 2011 and represents an increase of approximately 4,000% over the historical water usage for the residence. Cohen

alleges that the city knew or should have known that the residence was unoccupied during the subject time period and knew or should have known that the spike in water usage was attributable to a catastrophic water leak. Cohen alleges that the city negligently failed to take reasonable measure to prevent the catastrophic water usage and that said negligence resulted in the enormous increase in water and sewer charges assessed against the property. Cohen further alleges that as a result of the city's negligence, the cities of Cleveland and Bedford Heights were unjustly enriched by the amounts of the above water and sewer charges.

{¶5} The city answered the complaint and filed a motion for judgment on the pleadings arguing that Cohen's claims were barred by the two-year statute of limitations set forth in R.C. 2744.04(A), that it was entitled to political subdivision immunity on Cohen's claims and that it could not be sued under a theory of unjust enrichment. The trial court granted the city's motion in part, dismissing only Cohen's unjust enrichment claim against the city. The city appealed the trial court's denial of the remainder of its motion on the basis of political subdivision immunity. Cohen cross-appeals, arguing that the trial court erred in dismissing his unjust enrichment claim.

{¶6} The city's first assignment of error provides:

The trial court erred in not granting judgment on the pleadings in favor of the city of Cleveland on all claims against it on the basis of the expiration of Plaintiff's claims under the statute of limitations at R.C. 2744.04(A).

{¶7} A motion for judgment on the pleadings presents only questions of law, which this court reviews de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79,

2004-Ohio-4362, 814 N.E.2d 44, ¶ 5; *Dearth v. Stanley*, 2d Dist. Montgomery No. 22180, 2008-Ohio-487, ¶ 24. Further, because the motion was based on the defense of failure to state a claim upon which relief could be granted, we apply the standard for analyzing a motion to dismiss under Civ.R. 12(B)(6). *Pinkerton v. Thompson*, 174 Ohio App.3d 229, 236, 2007-Ohio-6546, 881 N.E.2d 880 (9th Dist.); *Black v. Coats*, 8th Dist. Cuyahoga No. 85067, 2005-Ohio-2460, ¶ 6.

{¶8} Accordingly, we must accept as true all the material factual allegations of the complaint and construe any inferences to be drawn from those allegations in favor of the nonmoving party. *Brown v. Carlton Harley-Davison, Inc.*, 8th Dist. Cuyahoga No. 99761, 2013-Ohio-4047, ¶ 12, citing *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 104, 661 N.E.2d 218 (8th Dist.1995). In order to prevail on a Civ.R. 12(B)(6) motion, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling plaintiff to recover. *Hester v. Dwivedi*, 89 Ohio St.3d 575, 230, 733 N.E.2d 1161 (2000); *O'Brien v. Univ. Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶9} The city argues that the trial court erred in failing to find that Cohen's claims against it were barred pursuant to R.C. 2744.04(A) that provides in pertinent part: "[a]n action against a political subdivision to recover damages for \* \* \* loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function \* \* \* shall be brought within two years after the cause of action accrues \* \* \* ."

{¶10} Although the alleged negligence occurred between October 2010 and April 2011, Cohen argues that despite reasonable diligence, he could not have known about the negligence of the city or investigated the matter until after he purchased the property in foreclosure in February of 2013 and gained access to the residence. Cohen argues that the civil discovery rule should apply to determine the accrual date of his claims.

{¶11} “The discovery rule provides that a cause of action does not arise until the plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has been injured by the conduct of the defendant.” *Flagstar Bank, F.S.B. v. Airline Union’s Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, ¶ 14, citing *Collins v. Sotka*, 81 Ohio St.3d 506, 507, 692 N.E.2d 581 (1998). “The rule entails a two-pronged test—i.e., actual knowledge not just that one has been injured but also that the injury was caused by the conduct of the defendant.” *Id.*, citing *O’Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 447 N.E.2d 727 (1983). A statute of limitations does not begin to run until both prongs have been satisfied. *Id.*

{¶12} The city argues that the discovery rule is a common law doctrine that is inapplicable to the statute of limitations provided in R.C. 2744.04. We disagree and find that prior decisions of both this court and other districts in the state have concluded that the discovery rule applies to R.C. 2744.04 for the purpose of determining when a cause of action accrues under the statute.

{¶13} In *W. 11th Street Partnership v. Cleveland*, 8th Dist. Cuyahoga No. 77327, 2001-Ohio-4233, this court noted that R.C. 2744.04 does not discuss when a cause of

action accrues. *W. 11th* involved a continuous trespass and although we found that R.C. 2744.04, the more specific two-year statute of limitations for actions against a political subdivision, prevailed over the four-year statute of limitations for trespass actions set forth in R.C. 2305.09, we held that, for the purpose of determining when the action accrued, the provision of R.C. 2305.09 stating that a cause of action does not accrue until the wrongdoer is discovered, controlled. In support of this conclusion, we noted that “[c]ase law indicates that the discovery rule can apply to an action against a political subdivision.” *Id.*, citing *Hollo v. Cleveland Mun. Court*, 8th Dist. Cuyahoga No. 65116, 1994 Ohio App. LEXIS 1787 (Apr. 24, 1994). Our decision in *Hollo* presupposed the applicability of the discovery rule to R.C. 2744.04 without analysis, but noted that it was of no use to the plaintiff in that instance because he discovered his injury nearly simultaneous to the act that caused it and more than three years passed before he filed his civil suit.

{¶14} Consistent with our statement in *W. 11th*, Ohio courts have applied the discovery rule to determine when an action accrues for the purposes of R.C. 2744.04. *See, e.g., Hutchison v. Lehigh*, 5th Dist. Tuscarawas No. 2005AP020013, 2005-Ohio-6215, ¶ 21-23; *Fifth Third Bank v. Cope*, 162 Ohio App.3d 838, 2005-Ohio-4626, 835 N.E.2d 779 ¶ 38-42 (12th Dist.), *Al-Mosawi v. Plummer*, 2d Dist. Montgomery No. 24985, 2012-Ohio-6034.

{¶15} We conclude that the trial court did not err in applying the discovery rule to the allegations in Cohen’s complaint.

{¶16} The city’s first assignment of error is overruled.

{¶17} The city’s second assignment of error provides:

The trial court erred in not granting judgment on the pleadings in favor of the city of Cleveland on all claims against it on the basis of the statutory immunity provided to the city as a political subdivision by Chapter 2744 of the Ohio Revised Code.

{¶18} R.C. Chapter 2744 sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability for injury or loss to property. *See Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶ 8. The first tier of the analysis is found in R.C. 2744.02(A)(1) and provides the general grant of immunity as follows: “a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.” Once immunity is established, the second tier of the analysis asks whether any of the five exceptions to immunity set forth in R.C. 2744.02(B) apply. Relevant to the present case is the exception in R.C. 2744.02(B)(2) that subjects a political subdivision to liability for “the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.” The parties agree that pursuant to R.C. 2744.01(G)(2)(c), “[t]he establishment, maintenance, and operation of a utility, including, but not limited to, \* \* \* a municipal corporation water supply system[,]” is a proprietary function.

{¶19} The city argues that under the third tier of immunity analysis, even if Cohen has properly plead an action for negligence pursuant to R.C. 2744.02(B)(2), it is still entitled to immunity pursuant to the defense in R.C. 2744.03(A)(5) that states:

(5) The political subdivision is immune from liability if the \* \* \* 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.

{¶20} The city argues that Cohen’s theory of negligence in this case is that the city failed to monitor water usage at the property, detect an aberration based on the property’s historical water usage and prevent a leak. The city argues that the Cleveland Division of Water has no process or procedures in place to so monitor and prevent leaks at a private property. The city further argues that the Cleveland Division of Water’s decision not to implement such a policy is an exercise of judgment or discretion regarding the use of limited resources and thus protected by immunity pursuant to R.C. 2744.02(B)(2). The city’s argument is persuasive, and it may well be entitled to political subdivision immunity if the facts are revealed to be consistent with the city’s theory. However, regarding a Civ.R. 12(B)(6) motion involving political subdivision immunity, this court in *Srokowski v. Shay*, 8th Dist. Cuyahoga No. 100739, 2014-Ohio-3145, stated:

“In Ohio, a notice-pleading state, the plaintiff need not prove his or her case at the pleading stage. \* \* \* Thus, a plaintiff need not affirmatively dispose of the immunity question altogether at the pleading stage. \* \* \* Requiring a plaintiff to affirmatively demonstrate an exception to immunity at this stage would be tantamount to requiring the plaintiff to

overcome a motion for summary judgment at the pleading stage. \* \* \*  
Instead, a plaintiff must merely allege a set of facts that, if proven, would  
plausibly allow for recovery.”

*Id.* at ¶ 14, quoting *Scott v. Columbus Dept. of Pub. Utils.*, 192 Ohio App.3d 465,  
2011-Ohio-677, 949 N.E.2d 552, ¶ 8 (10th Dist.).

{¶21} At this stage of the proceedings, an appeal from a motion for judgment on  
the pleadings, our analysis is restricted only to the facts alleged in the complaint.  
Cohen alleges that the city “knew or should have known” that the property was  
unoccupied and that the spike in water usage was due to a water leak. Cohen alleges  
that despite this purported knowledge the city failed to act to prevent the leak. Ohio  
case law indicates that, depending on the facts, it is possible for a political subdivision to  
be sued for negligence in relation to its failure to prevent a water leak where that  
subdivision possessed knowledge that a property was vacant. *See, e.g., Franklin v.*  
*Columbus*, 130 Ohio App.3d 53, 719 N.E.2d 592 (10th Dist. 1998) (denying summary  
judgment in favor of the city of Columbus because a genuine issue of fact existed as to  
whether the city was negligent in its operation of a water service where the homeowner  
allegedly notified the city that the property was vacant, the city failed to terminate  
service as requested and a water leak occurred).

{¶22} Cohen’s complaint does not explain how the city allegedly possessed  
knowledge of the property’s vacancy and, more importantly, the water leak. Because  
the precise facts underlying Cohen’s negligence claim are unclear, the trial court did not  
err in denying the city’s motion for judgment on the pleadings.

{¶23} The city's second assignment of error is overruled.

{¶24} Cohen's cross-appeal provides the following sole assignment of error:

The trial court erred in dismissing cross-appellant's claims against the city of Cleveland which are based upon the theory of unjust enrichment.

{¶25} Cohen argues that the trial court erred in dismissing his unjust enrichment claim against the city. We disagree. Municipal corporations cannot be made liable on the basis of an implied contract or for claims based upon the theory of quantum merit or unjust enrichment. *Cleveland Hts. v. Cleveland*, 8th Dist. Cuyahoga No. 79167, 2001 Ohio App. LEXIS 5010 (Nov. 8, 2001), citing *Eastlake v. Davis*, 94 Ohio App. 71, 74, 114 N.E.2d 627 (11th Dist.1952); *Wellston v. Morgan*, 65 Ohio St. 219, 228, 62 N.E. 127 (1901); *Cuyahoga Cty. Hosp. v. Cleveland*, 15 Ohio App.3d 70, 72, 472 N.E.2d 757 (8th Dist.1984); *Cincinnati Ins. Co. v. Cleveland*, 8th Dist. Cuyahoga No. 92305, 2009-Ohio-4043, ¶ 25.

{¶26} Cohen argues that this rule is not an absolute bar to an unjust enrichment action but offers no argument in support of an exception applicable to the facts of this case as alleged in the complaint. *See, e.g., Pilot Oil Corp. v. Ohio Dept. of Transp.*, 102 Ohio App.3d 278, 656 N.E.2d 1379 (10th Dist.1995) (acknowledging that the doctrine of promissory estoppel may be applied where a municipality makes a representation in the context of a contractual relationship with another party, so long as the representation was within the municipality's power to make, the subject matter of the contract was not illegal or ultra vires, and the representation induced reliance); *Cooney v. Independence*, 8th Dist. Cuyahoga No. 66509, 1994 Ohio App. LEXIS 5290 (Nov. 23, 1994) (holding

that the doctrine of promissory estoppel applies to municipalities where the promisor's representations or statements are authorized.)

{¶27} Instead, Cohen relies upon this court's decision in *Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio App.3d 33, 713 N.E.2d 1075 (8th Dist. 1998), wherein we found that a verdict against a county on the theory of unjust enrichment was not against the manifest weight of the evidence. However, *Kraft* is distinguishable from the present case because, in *Kraft*, we noted that the government waived its legal defense prohibiting recovery under the theory of unjust enrichment by failing to raise the matter before trial court or on appeal.

{¶28} Cohen's sole assignment of error is overruled.

{¶29} The judgment of the trial court is 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.

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EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., and  
TIM McCORMACK, J., CONCUR