[Cite as *Grybosky v. Ohio Civ. Rights Comm.*, 2011-Ohio-6843.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

HELEN GRYBOSKY, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2010-A-0047**
- vs -	:	
OHIO CIVIL RIGHTS COMMISSION, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2009 CV 1153.

Judgment: Affirmed in part; reversed in part, and remanded.

Tarin S. Hale, 6085 Waterloo Road, Centerville, OH 45459 (For Plaintiffs-Appellants).

Mike DeWine, Attorney General, and *Patrick M. Dull*, Assistant Attorney General, State Office Tower, 15th Floor, 30 East Broad Street, Columbus, OH 43215-3428 (For Defendants-Appellees).

MARY JANE TRAPP, J.

{¶1} Appellants, Helen Grybosky and Gary Grybosky ("the Gryboskys"), appeal from the Ashtabula Court of Common Pleas' judgment entry dismissing their complaint for declaratory judgment and monetary damages. On October 28, 2009, the Gryboskys filed a complaint in the Ashtabula County Court of Common Pleas against appellees, Principal Senior Attorney General Marilyn Tobocman, as well as Robert Krosky, Iris Choi, Desmond Martin, and Vera Boggs, each of whom are employed by OCRC ("OCRC Defendants"). The complaint sought declaratory judgment, preliminary and

permanent injunctions, and damages, which allegedly resulted from the prosecution of fair housing discrimination charges filed against the Gryboskys. For the reasons below, we affirm the trial court's judgment in part and reverse in part, remanding for further proceedings consistent with this opinion.

{¶2} **Substantive Facts and Procedural History**

{¶3} On September 17, 2008, the Gryboskys received two notification letters from OCRC indicating that the Fair Housing Resource Center ("FHRC") had filed "housing discrimination charges" against them relating to a rental home they owned in Conneaut, Ohio. Attached to the charging documents were the formal complaints filed by the FHRC, and a summary of the circumstances supporting the allegations.

{¶4} In case number 39116, the FHRC alleged that it sent a paid "tester" to the home seeking rental accommodations. The Gryboskys have a no-pets policy at this residence. The tester, however, notified the Gryboskys that he required the assistance of a live-in "therapy dog," due to a severe anxiety disorder from which he suffers. In response, the Gryboskys stated they would permit the prospective tenant to have the dog, but they would require an additional $100 security deposit. The FHRC memorandum indicated that the Gryboskys told the tester the deposit would be refunded when he moved out, if the dog did no damage to the home. From this test, the FHRC filed a charge alleging the Gryboskys made statements or inquiries in violation of established laws prohibiting discrimination against individuals with disabilities.

{¶5} In case number 39125, the FHRC again sent a paid tester to the residence to conduct a "familial status test." During this test, the Gryboskys declined to rent the upstairs of the house to the tester because she had a five-year-old son. According to the FHRC's formal memorandum, the Gryboskys indicated the second

floor of the home "would be a problem" because children "make too much noise." As a result, the FHRC filed a charge alleging that, during "systematic testing," the Gryboskys refused to allow a tester the opportunity to rent the property based on their preference to rent to individuals without children.

{¶6} The Gryboskys were subsequently provided with a "Notice of Right of Election and Notice of Hearing." The notice informed them that they had a right to elect to have the charges addressed via a civil action in the Ashtabula County Court of Common Pleas, or proceed with an administrative hearing process under R.C. 4112.05. As no civil action was filed, the Gryboskys apparently elected, either by act or omission, to move forward through the administrative hearing process.

{¶7} After further discussion, OCRC attempted to resolve the charges by proposing that the Gryboskys, inter alia, (1) pay the FHRC $6,500 in monetary damages; (2) attend three hours of "fair housing training"; (3) establish written policies regarding non-discrimination in their provision of housing, which must be incorporated into their rental agreements; and (4) purchase a quarter page ad in a local newspaper acknowledging their illegal conduct, and emphasizing the value of the services provided by the FHRC.

{¶8} The Gryboskys did not accept OCRC's conciliation offer, and the underlying complaint was filed. The complaint set forth five claims:(1) an action seeking a declaratory judgment ruling the statutory administrative hearing process unconstitutional; (2) a declaratory action premised upon the OCRC's lack of jurisdiction; (3) civil rights violations pursuant to 42 U.S.C. Section 1983; (4) civil rights violations pursuant to 42 U.S.C. Section 1985; and (5) intentional infliction of emotional distress ("IIED"). The Gryboskys ultimately dismissed the IIED cause.

{¶9} Appellees filed a motion to dismiss the complaint pursuant to Civ.R. 12(B)(1) and Civ.R. 12(B)(6), to which the Gryboskys filed a memorandum in opposition. On September 3, 2010, the trial court filed its judgment entry dismissing the complaint for declaratory action and monetary damages. The court determined that a declaratory judgment was not an available remedy under the circumstances of the case, because the Gryboskys possessed an adequate remedy at law under R.C. 4112.05 and R.C. 4112.06. The trial court further determined that each named defendant enjoyed absolute immunity from civil liability, as they were functioning in a prosecutorial capacity in moving forward with the allegations submitted by the FHRC. The Gryboskys timely appealed, raising the following assignments of error:

{¶10} "[1.] The trial court erred to the prejudice of plaintiffs-appellants by granting defendants-appellees' Motion to Dismiss based on the application of immunity to the conduct of the individual defendants-appellees Cordray, Tobocman, Krosky, Choi, Martin, and Boggs.

{¶11} "[2.] The trial court erred to the prejudice of the plaintiffs-appellants by dismissing their claims for declaratory and injunctive relief based on its determination that plaintiffs-appellants have an adequate remedy at law."

{¶12} **The Sections 1983 and 1985 Actions**

{¶13} Under their first assigned error, the Gryboskys argue the trial court erred in granting appellees' motion to dismiss their civil rights claims for relief, because their complaint included factual allegations that render the application of absolute immunity to the listed governmental officials and agents legally inappropriate. We agree in part.

{¶14} **Standard of Review**

{¶15} A court of appeals reviews a trial court's judgment dismissing a complaint pursuant to Civ.R. 12(B)(6) de novo. *Goss v. Kmart Corp.*, 11th Dist. No. 2006-T-0117, 2007-Ohio-3200, ¶17. In general, "[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, 548. In considering the propriety of the dismissal, "we accept all factual allegations in the complaint as true and draw all reasonable inferences in the non-moving party's favor." *Transky v. Ohio Civil Rights Comm.*, 193 Ohio App.3d 354, 2011-Ohio-1865, ¶11. Exhibits and other materials incorporated into the complaint may be considered as part of the complaint in the course of appellate review of a Civ.R. 12(B)(6) dismissal. *State ex rel. Keller* (1999), 85 Ohio St.3d 279. If, after considering the complaint accordingly, there is no set of facts consistent with appellants' allegations that would permit recovery, the judgment of dismissal will be affirmed. *Transky*, supra.

{¶16} **The Section 1983 Action**

{¶17} We shall first consider the Gryboskys' allegations as they relate to then Ohio Attorney General Richard Cordray and Principal Senior Attorney General Marilyn Tobocman. The Gryboskys assert their complaint presents a question regarding whether these officials were functioning in an administrative or investigative capacity in moving forward with the complaint filed by the OCRC. To the extent the Gryboskys' allegations were sufficient to raise this question, they claim the officials are entitled only to qualified, not absolute immunity. If so, they maintain that their complaint sets forth facts that, if proven, would permit recovery and, as a result, the trial court erred in dismissing their civil claims.

{¶18} **Prosecutorial Immunity Shields the Attorneys General**

{¶19} In *Transky*, supra, a case with facts strikingly similar to this case, this court highlighted the law and the policy supporting prosecutorial immunity:

{¶20} "It is well-settled that prosecutors are considered 'quasi-judicial officers.' *Willitzer v. McCloud* (1983), 6 Ohio St.3d 447, 448; see, also, *Imbler v. Pactman* (1976), 424 U.S. 409, 430. In executing duties 'intimately associated' with the 'judicial phase' of a particular proceeding, e.g., initiating a prosecution, a prosecutor is entitled to absolute immunity from civil liability. Id. at 424 (holding prosecutor was absolutely immune from liability under Section 1983 where conduct at issue was related to the prosecution of a murder case). Affording a prosecutor complete immunity in such situations is premised upon the public's compelling interest in protecting the integrity of the judicial process. *Willitzer* at 448; see, also, *Imbler* at 427. Without full immunity, a prosecutor would be discouraged from the vigorous and fearless performance of his or her duties that is necessary to the proper function of the judicial system at large. Id. at 428. Thus, although a genuinely wronged defendant (or respondent) may be without a civil remedy, '*** it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.' Id., quoting *Gregoire v. Biddle* (1949), 177 F.2d 579, 581." *Transky* at ¶13.

{¶21} Alternatively, if a prosecutor engages in actions that can be considered merely investigative or administrative, he or she is entitled only to qualified immunity. Id. at ¶14; citing *Willitzer*, supra. In considering whether a prosecutor is absolutely immune, or merely qualifiedly immune, courts utilize a "functional analysis" of the conduct in question. *Willitzer* at 449.; see, also, *Transky*, supra.

{¶22} In this matter, the attorneys general named as defendants were engaged to prosecute an administrative complaint filed by OCRC. "Administrative proceedings

are considered 'quasi-judicial' in nature." *Transky* at ¶15. The issue therefore becomes whether the prosecutors' conduct was "intimately associated" with a quasi-judicial phase of the proceedings, or merely ancillary to that phase. After a review of the Gryboskys' allegations and the materials appended to their complaint, we hold the trial court did not err in ruling the named attorneys general were entitled to absolute immunity.

{¶23} The complaint does not allege the named attorneys general acted in an administrative or investigative capacity in the course of their involvement in the underlying case. The Gryboskys' complaint initially alleged that both then Attorney General Cordray and Principal Senior Attorney General Tobocman were simply carrying out their duties under R.C. Chapter 4112 concerning the matters set forth in OCRC's complaint. The complaint further indicates that Ms. Tobocman, in her capacity as an agent of the Ohio Attorney General Civil Rights Division, attempted to resolve the case by offering the Gryboskys specific conciliation options.

{¶24} Although the complaint alleges that Ms. Tobocman's proposal was outside the scope of her duties as a prosecutor, she, as counsel for OCRC, possessed the legal authority to initiate conciliation negotiations. See R.C. 4112.10; OAC 4112-3-10(B)(3). In *Transky*, supra, this court compared such negotiations to plea negotiations in a criminal matter and are therefore "fundamentally and intimately part of an attorney general's role in prosecuting and disposing of an administrative complaint." Id. at ¶16.

{¶25} We therefore hold that, even accepting the Gryboskys' factual allegations as true, there is no set of facts that permits recovery against the named attorneys general in this case. Consequently, the trial court did not err in concluding these officials were absolutely immune as a matter of law.

{¶26} **Prosecutorial Immunity Does Not Shield the OCRC Defendants**

{¶27} Next, we shall consider whether the OCRC defendants were entitled to absolute immunity.

{¶28} In *Butz v. Economou* (1978), 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895, the Supreme Court of the United States compared administrative officers to prosecutors insofar as they "initiate administrative proceedings against an individual or corporation [ ] very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought." Id. at 515.

{¶29} Therefore, the *Butz* Court determined that administrative officers "performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts." Id. at 515.

{¶30} The inferences that may be drawn from the Gryboskys' allegations and the materials attached to the complaint do not support the conclusion that the OCRC defendants were acting in a manner akin to a prosecutor. Put differently, viewing the allegations in the complaint as true, we cannot conclude that these defendants were acting strictly in a quasi-judicial or prosecutorial capacity while processing the complaints that precipitated the underlying proceedings. We therefore hold the trial court erred in ruling the OCRC defendants were entitled to absolute immunity as a matter of law.

{¶31} **The Section 1983 Action Survives a Civ. R. 12(B)(6) Attack**

{¶32} Having determined that the OCRC defendants were not entitled to immunity, we further find that the trial court erred in dismissing the Section 1983 action

against them. The Gryboskys adequately pled a claim for which relief can be granted against defendants who are not entitled to absolute immunity.

{¶33} We make no judgment as to whether the Gryboskys would ultimately prevail in their Section 1983 action, but we do find that they have met all the requirements to proceed with further adjudication of their claims.

{¶34} In Ohio, a party may only prevail on a motion to dismiss under Civ.R. 12(B)(6) if it "'appear[s] beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.' *O'Brien v. Univ. Comm. Tenants Union, Inc*. (1975), 42 Ohio St.2d 242, *** syllabus. A court 'must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.' *Mitchell v. Lawson Milk Co*. (1988), 40 Ohio St.3d 190, 192." *Estate of Ridley v. Hamilton Cty. Bd. of MRDD* (2004), 102 Ohio St.3d 230, 232. "Under these rules, a plaintiff is not required to prove his or her case at the pleading stage. *** Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 144-145.

{¶35} The Gryboskys allege that the OCRC defendants, individually and/or collectively, deprived them of federal rights in violation of a statute that makes susceptible to suit "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State *** subjects, or causes to be subjected, any citizen of the United States *** to the deprivation of any rights, privileges or immunities secured by the Constitution and laws." 42 U.S.C. §1983.

{¶36} "To state a claim for relief in an action brought under §1983, respondents must establish that they were deprived of a right secured by the Constitution or laws of

the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan* (1999), 526 U.S. 40, 49-50, 119 S.Ct. 977, 143 L.Ed.2d 130. See, also, *Cooperman v. Univ. Surgical Assoc., Inc.* (1987), 32 Ohio St.3d 191; *Dep't of Taxation v. Smith* (Mar. 29, 1996), 11th Dist. No. 95-T-5309, 1996 Ohio App. LEXIS 1347.

{¶37} Under Ohio's liberal pleading rules, all that is required of a plaintiff bringing suit is "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Civ.R. 8(A). As such, the Gryboskys' complaint satisfies the two requirements of Civ.R. 8(A). Further, the Gryboskys allege facts that could entitle them to recovery under Section 1983.

{¶38} As related to the first prong of a Section 1983 action, the Gryboskys allege that the OCRC defendants violated their constitutional rights by not providing them with enough information related to the incidents in question to meet procedural requirements, and they further assert that the OCRC defendants "conspired to demand [the Gryboskys] pay in excess of $2,000.00 under color of law as alleged 'damages' *** without legal authority." The amount of requested damages was allegedly increased to $6,500. The OCRC defendants are alleged to have made those demands "with no explanation or itemization for the money to be paid to FHRC, [and] no accounting or explanation for why the amount of the demand greatly increased."

{¶39} In connection with the second prong of the Section 1983 analysis, the Gryboskys also sufficiently asserted that the OCRC defendants were acting on behalf of the state when they allegedly violated their constitutional rights. The OCRC defendants were all employees of the state of Ohio at the time the alleged violations occurred, and

presented themselves as acting on behalf of the OCRC and the state of Ohio when they demanded a settlement amount to avoid further legal action. Therefore, the Gryboskys met both prongs required to bring a Section 1983 action.

{¶40} In *Transky*, supra, this court faced an almost identical set of claims as those brought by the Gryboskys. In finding that the trial court erred in dismissing the Section 1983 action, the *Transky* court went on to characterize the Section 1983 claim as an unripe claim of malicious prosecution. That step, however, was unnecessary to the resolution of the case, and we will refrain from construing the Gryboskys' claims for them.

{¶41} A malicious prosecution claim and a Section 1983 claim are two distinct and independent claims for relief. Section 1983 is a federal statutory claim, which addresses constitutional violations of an individual's rights by state actors. A claim of malicious prosecution, on the other hand, is a common law tort action. Although malicious prosecution is certainly a claim available against a state actor and may be joined with a Section 1983 claim, its pleading requirements are entirely different.

{¶42} The apparently strained characterization by the *Transky* majority is unnecessary because the Gryboskys' complaint should have survived a Civ. R. 12(B)(6) attack. As noted earlier, we make no judgment as to whether the Gryboskys would ultimately prevail in their Section 1983 action, but we do find that they met all the requirements to proceed with further adjudication of their claims.

{¶43} Assuming, as the court must in evaluating a Civ. R. 12(B)(6) motion, that all factual allegations in the complaint are true, and making all factual inferences in favor of the Gryboskys, as the non-moving party, the Gryboskys sufficiently pled their claims under Civ.R. 8(A) and Section 1983 to withstand a Civ. R. 12(B)(6) challenge.

{¶44} As we will explain more fully, infra, the Gryboskys' Section 1983 action must be reinstated; the trial court, however, has the discretion to stay further proceedings pending the conclusion of the administrative proceedings.

{¶45} **The Section 1985 Action**

{¶46} The Gryboskys also allege the OCRC defendants violated 42 U.S.C. Section 1985 when they "individually and collectively conspired to deprive [appellants] equal protection of the law."

{¶47} Although Section 1985 provides three separate causes of action, subsection (3) appears to set forth the legal basis for the allegations in the Gryboskys' complaint. Specifically, that section provides a private, civil remedy for individuals injured by conspiracies to deprive them of their right to equal protection under the laws. See, e.g., *Roe v. Franklin Cty* (1996), 109 Ohio App.3d 772, 781. The Supreme Court of the United States has held "that [there must be] some racial, or perhaps other class-based, invidiously discriminatory animus behind the conspirators' action" to state a claim under Section 1985(3). *Bray v. Alexandria Women's Health Clinic* (1993), 506 U.S. 263, 268-269, 113 S.Ct. 753, 122 L.Ed.2d 34, quoting *Griffin v. Breckenridge* (1971), 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338. To state a claim, therefore, "a claimant must prove both membership in a protected class and discrimination on account of it." *Estate of Smithers v. Flint* (C.A. 6, 2010), 602 F.3d 758, 765, citing *Bartell v. Lohiser* (C.A. 6, 2000), 215 F.3d 550, 559.

{¶48} Keeping these points in mind, federal courts have routinely underscored that Section 1985 was enacted to protect groups historically subject to pervasive discrimination. See, e.g., *Lake v. Arnold* (C.A. 3, 1997), 112 F.3d 682, 688. The Gryboskys' complaint fails to set forth any facts alleging they are members of such a

protected class. Assuming, however, for purposes of notice pleading, the Gryboskys' class is defined as "owners of rental properties investigated by a governmental agency for discriminatory conduct," members of such a class have not been historically subject to pervasive or systematic discrimination. See *Transky* at ¶24. Because the complaint contains no operative facts to support an allegation that the Gryboskys are members of a protected class, their claims, as a matter of law, are outside the scope of Section 1985. The trial court, therefore, properly concluded, albeit for the wrong reason, the Section 1985 claim must be dismissed.

{¶49} The Grybosky's first assignment of error is meritorious in part.

{¶50} **Dismissal of the Declaratory Action**

{¶51} In their second assignment of error, the Gryboskys challenge the trial court's dismissal of their declaratory action. They contend the trial court erred in ruling they have an adequate remedy at law, because an administrative hearing officer lacks authority to resolve the constitutional issues contesting the constitutional and statutory authority of the administrative process itself. They further assert the trial court erred in concluding the underlying declaratory action was an attempt to bypass the administrative hearing process.

{¶52} **Standard of Review**

{¶53} This court reviews a trial court's dismissal of a declaratory action for an abuse of discretion. *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶13-14 (rejecting the argument that the dismissal of a declaratory action should be reviewed de novo and "reaffirm[ing] that declaratory judgment actions are to be reviewed under an abuse-of-discretion standard"). A court abuses its

discretion when its judgment is neither reasonable nor supported by the record. *LCD Videography, LLC v. Finomore*, 11th Dist. No. 2009-L-147, 2010-Ohio-6571, ¶53.

{¶54} Because an abuse of discretion standard requires significant deference to the trial court's judgment, and because law exists to support the dismissal of a declaratory action either for a failure to exhaust administrative remedies or due to the existence an adequate alternative remedy, we find no error in the trial court's dismissal of the Gryboskys' declaratory action. See, *State ex rel. Toledo Metro Fed. Credit Union v. Ohio Civil Rights Comm.* (1997), 78 Ohio St.3d 529.

{¶55} It must be noted that case law exists, however, to support the opposite determination – in which dismissal is neither required nor appropriate. The trial court could have chosen not to dismiss the declaratory action and its judgment would have been equally supported under the case law. See, e.g., *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456 (holding that failure to exhaust administrative remedies is not a jurisdictional bar to bringing a declaratory action); *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263 (holding that judgment for declaratory relief in appropriate circumstances is not precluded by the existence of administrative proceedings and that a declaratory action is independent from any administrative proceedings).

{¶56} **An Adequate Remedy at Law is Available**

{¶57} Contrary to the Gryboskys' assertions, the administrative process affords a party the ability to raise constitutional challenges. We acknowledge that an administrative agency may not declare a statute unconstitutional on its face; it may, however, consider whether a statute is unconstitutional "as applied" to a particular set of facts. See, e.g., *Reading v. Pub. Util. Comm. of Ohio*, 109 Ohio St.3d 193, 195, 2006-Ohio-2181. Indeed, to preserve such a challenge for review on appeal, the objection

must be raised during the initial hearing before the board to develop a factual record. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, paragraph three of the syllabus.

{¶58} Furthermore, a court of common pleas' appellate jurisdiction under R.C. 4112.06 is not limited to a review of the board's findings. *Transky* at ¶31. Rather, "other issues, including constitutional questions or the commission's jurisdiction to issue a complaint may be raised on appeal." Id., citing *Bd. of Edn. v. Kinney* (1986), 24 Ohio St.3d 184, 185. Accordingly, once the commission issues a determination on the merits of OCRC's complaint, the Gryboskys have the ability to raise their constitutional challenges, even those which contest the legal authority of the administrative process in general, before the court of common pleas in an administrative appeal. See, e.g., *Transky*, at ¶31. Next, the trial court did not specifically find that the Gryboskys' declaratory action was an attempt to bypass the administrative process. In concluding that they could not avail themselves of a declaratory action, the court stated:

{¶59} "The Court finds that an equally serviceable remedy is available to Plaintiffs under R.C. 4112.05 and 4112.06. Plaintiffs advance no circumstances or facts that are sufficiently compelling to avoid the legally adequate appellate remedy available to them and warrant the requested declaratory judgment. Plaintiffs have not shown that the administrative remedies available to them are overly burdensome or more time consuming than the declaratory action at bar. Accordingly, declaratory judgment is not available."

{¶60} Assuming, however, we could glean from that statement a conclusion that the Gryboskys' complaint for declaratory judgment was an attempt to bypass the administrative process, such a conclusion would not be erroneous. The Supreme Court

of Ohio has proclaimed that "*** actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed." *State ex rel. Albright v. Delaware Cty. Court of Common Pleas* (1991), 60 Ohio St.3d 40, 42 (citations omitted). Further, in *Transky*, supra, this court observed:

{¶61} "R.C. Chapter 4112 appears to be the exclusive means by which OCRC can take action if allegations of discrimination are formally charged. To wit, when allegations are made, the statutory scheme specifically outlines all procedures required for processing a discrimination complaint, e.g., the filing of a charge of discrimination; the preliminary investigation phase; the actions available to OCRC; the issuance of complaint; the mechanics of a hearing; the order awarding relief or dismissing complaint; and the process of appeal of an unfavorable ruling. Given these characteristics, we therefore hold the trial court drew a reasonable inference in treating the mechanisms codified under R.C. 4112 as 'special statutory proceedings.'" *Transky* at ¶35. In this case, the Gryboskys had an opportunity to "elect" to have OCRC's complaint processed via civil action. By failing to exercise their election right, the complaint automatically became a subject of the administrative hearing process. Although the Gryboskys now find this process undesirable, they picked their poison, and the trial court did not err in determining they may not bypass the administrative process simply because a declaratory action could be a more expedient means to an end. The Gryboskys' second assignment of error is overruled.

{¶62} For the reasons stated in this opinion, we affirm in part and reverse in part, and remand to the Ashtabula County Court of Common Pleas for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

_____

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶63} I concur with the majority's decision regarding the Section 1985 claim, the claim for declaratory relief, and the Section 1983 claim as to defendants Krosky, Choi, Martin, and Boggs. I dissent, however, from the majority's decision with respect to the dismissal of the plaintiffs' claims against the Ohio Attorney General Cordray and Senior Attorney General Tobocman. As written in my dissent in *Transky v. Ohio Civil Rights Comm.*, 193 Ohio App.3d 354, 2011-Ohio-1865, and now in this case, based on the facts alleged in the Complaint, it cannot be said that the Ohio Attorney General and Senior Attorney General are entitled to immunity.

{¶64} This court must consider whether the trial court erred in granting the defendant-appellee's Civ.R. 12(B)(6) motion to dismiss based on the defense of absolute immunity raised by the defendants, the Ohio Attorney General, the Senior Attorney General, Krosky, Choi, Martin, and Boggs.

{¶65} "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ. R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc*. (1975), 42 Ohio St.2d 242, syllabus. In making this determination, the trial court "must presume that all factual allegations of the

complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co*. (1988), 40 Ohio St.3d 190, 192. Immunity is an affirmative defense. *State ex rel. Koren v. Grogan*, 68 Ohio St.3d 590, 594, 1994-Ohio-327. Since, in ruling on a Civ.R. 12(B)(6) motion to dismiss, the trial court is limited to the allegations made in the complaint, "unless the complaint on its face demonstrates the existence of a defense that conclusively bars the plaintiff's claim, a Civ.R.12(B)(6) motion based on an affirmative defense cannot result in the dismissal of a complaint." *Huffman v. Willoughby*, 11th Dist. No. 2007-L-040, 2007-Ohio-7120, at ¶23.

{¶66} In the present case, the individual defendants are alleged to have acted outside of the scope of their authority as state agents, by demanding payment of monies to the Fair Housing Resource Center in order to avoid prosecution under Ohio's housing discrimination statutes, and to have threatened further prosecution in the event their demand was not met.

{¶67} The trial court found the defendants, "as administrative officers of the OCRC and the Ohio Attorney General's Office, are immune from individual liability in the course of performing investigatory and prosecutorial functions." However, the trial court errs by overlooking the fact that, while the Ohio Attorney General and the Senior Attorney General enjoy absolute immunity when acting in a certain capacity, such as when conducting conciliation negotiations, the plaintiffs' Complaint does not seek to impose liability for actions taken in such a capacity. The plaintiffs instead argue that the defendants were performing acts that are outside the scope of their quasi-prosecutorial duties. In other words, the finding that the Ohio Attorney General and the Senior Attorney General are immune because they participated in acts sheltered by immunity does not take into account the facts alleged by the plaintiffs in the Complaint or the

possibility that activities outside of the scope of immunity occurred. See *State ex rel. Fatur v. Eastlake*, 11th Dist. No. 2009-L-037, 2010-Ohio-1448, at ¶29 (a trial court properly denies a 12(B)(6) motion to dismiss when a review of the complaint shows that the claims would fall outside of the immunity provided by the statute); *Bratton v. Couch*, 5th Dist. No. CA02-012, 2003-Ohio-3743, at ¶34 (when a claim is "outside the protective shield of *** immunity," that claim cannot be dismissed on a 12(B)(6) motion).

{¶68} Although the defense of immunity could ultimately bar the plaintiffs from recovery, it does not follow that the plaintiffs can prove no set of facts entitling them to recovery, such that dismissal under Civ.R. 12(B)(6) is appropriate. "As long as there is a set of facts consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Huffman*, 2007-Ohio-7120, at ¶18, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, at ¶5; *State ex rel. McKinney v. McKay*, 11th Dist. No. 2011-T-0039, 2011-Ohio-3756, at ¶19.

{¶69} Determining whether the defendants were acting within the scope of quasi-prosecutorial authority requires knowledge of facts and circumstances not before the court until proper discovery has been done. See *Scott v. Columbus Dept. of Pub. Utils.*, 192 Ohio App.3d 465, 2011-Ohio-677, at ¶8 (a plaintiff "need not *** dispose of the immunity question altogether at the pleading stage," because such a requirement in a 12(B)(6) proceeding "would be tantamount to requiring the plaintiff to overcome a motion for summary judgment at the pleading stage"). During discovery, facts may be found to support the contention that the defendants committed acts outside of their judicial or quasi-judicial functions and, therefore, may not be entitled to absolute immunity.

{¶70} To dismiss a Section 1983 claim prematurely, without considering whether a prosecutor or related agent truly has immunity, would go against the purposes of 1983 and prevent plaintiffs from obtaining relief. Under Section 1983, Title 42, U.S. Code, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ***, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." Section 1983 "seeks 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights' and to provide related relief." *Richardson v. McKnight* (1997), 521 U.S. 399, 403, citing *Wyatt* v. *Cole* (1992), 504 U.S. 158, 161 (emphasis omitted). Allowing an action to proceed for the plaintiff to conduct discovery to determine the nature of the acts taken by the prosecutor and whether they fall outside of the scope of immunity prevents improper and premature dismissals of Section 1983 actions.

{¶71} Based on the foregoing, it would be improper to dismiss the appellants' Complaint against the Ohio Attorney General and the Senior Attorney General at the 12(B)(6) stage based on prosecutorial immunity.

{¶72} Regarding the plaintiffs' claim against defendants Krosky, Choi, Martin, and Boggs, the allegations in the Complaint were insufficient to conclude that they were functioning in a manner similar to prosecutors. However, the plaintiffs alleged sufficient facts to state a claim under the Section 1983 cause of action pled in their Complaint, and, therefore, the claim should not be dismissed.

{¶73} I recognize that this finding is incompatible with this court's holding in *Transky*. In *Transky*, the court interpreted the appellants' claim of alleged violations of

Section 1983, Title 42 of the United States Code to be a claim for malicious prosecution. However, as I noted in my *Transky* dissent, this interpretation is contrary to the substance of the appellants' allegations. In the Complaint, the plaintiffs' Third Claim for Relief states, in pertinent part:

> **{¶74}** 72. The individually named Defendants in their individual capacities acting individually, collectively and/or in furtherance of a conspiracy, all while under color of state law, deprived Plaintiffs of rights secured by the United States Constitution and other Federal laws in violation of 42USC§1983.
>
> **{¶75}** 73. Defendant's [sic] violations of 42USC§1983 were committed with actual and/or implied malice in conscious disregard of Plaintiffs' rights.

{¶76} If the pleading requirements of a Section 1983 claim are met, there is no reason to construe a Section 1983 claim as a malicious prosecution claim. "A complaint alleging Section 1983 as the basis for the action must meet two requirements. First, there must be an allegation that the conduct in question was performed by a person under color of law. Second, the conduct must have deprived appellee of a federal right." *Cooperman v. Univ. Surgical Assoc., Inc*. (1987), 32 Ohio St.3d 191, 199, citing *Gomez v. Toledo* (1980), 446 U.S. 635, 640, ("[b]y the plain terms of § 1983, two - and only two - allegations are required in order to state a cause of action under that statute").

{¶77} Regarding Section 1983, the plaintiffs' Complaint satisfies these two basic requirements under Ohio's standards for notice pleading. Civ.R. 8(A) ("[a] pleading *** shall contain *** a short and plain statement of the claim showing that the party is entitled to relief"). The Complaint contains a short statement that the conduct was performed by the various named defendants who were acting under the color of law. Moreover, the Complaint states that the plaintiffs were deprived of federal rights. Based on these allegations, it cannot be said, "beyond doubt," that the plaintiffs can prove no

set of facts entitling them to relief based on the face of the Complaint when both requirements for pleading have been met. It is unnecessary to construe the plaintiffs' Third Claim of Right as a malicious prosecution claim, as the elements of a Section 1983 claim have been met.

{¶78} Although Judge Rice argues that the 1983 claim is not yet ripe, this argument is unsupported by the law. Regardless of the pending administrative proceedings, the claim raised by the appellants was that the defendants conspired to improperly require payments of funds and that they were without authority to do so. This aspect of the claim will not change in the future, as the defendants are alleged to have already taken the actions that violated Section 1983. As noted previously, the Complaint filed by the plaintiffs meets the minimal notice pleading requirements by alleging such misconduct and it was improper for the trial court to dismiss the Section 1983 action as it relates to defendants Krosky, Choi, Martin, and Boggs. See Civ.R. 8(A).

{¶79} Judge Rice also asserts that, under the foregoing analysis, it will be difficult to determine the commencement of the accrual of a cause of action, and, therefore, to apply the statute of limitations. However, a cause of action arising at the time of the improper offer or act is a clear timeframe that will not provide confusion. Generally, in 1983 actions, the statute of limitations "commences to run as soon as the injurious act complained of is committed." *Union Sav. Bank v. Lawyers Title Ins. Corp.*, 191 Ohio App.3d 540, 2010-Ohio-6396, at ¶29, citing *Dublin v. Bansek*, 10th Dist. No. 10AP-14, 2010-Ohio-2372, at ¶8 (citation omitted). This applies to all claims under Section 1983. See *Nadra v. Mbah*, 119 Ohio St.3d 305, 2008-Ohio-3918, at syllabus. It logically follows that the statute of limitations would begin to run on the date that the

actors improperly acted without legal authority, which is alleged to have occurred in this case, not on the later date when the administrative process has been concluded. As noted above, the appellants are not alleging that they were injured by the entire administrative process but instead by the specific improper act of being required to pay certain damages by actors who did not have the authority to make such demands.

{¶80} With respect to the plaintiffs' claim of alleged violations of Section 1985, Title 42, of the United States Code, the trial court's dismissal of the plaintiffs' claim was proper, as the plaintiffs have failed to state a cause of action. "[I]n order to prove a private conspiracy in violation of the first clause of § 1985(3), a plaintiff must show, *inter alia*, *** that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action.'" *Bray v. Alexandria Women's Health Clinic* (1993), 506 U.S. 263, 267-268 (citation and footnote omitted). The plaintiffs made no allegation that the alleged conspiracy was motivated by a racial or class-based animus.

{¶81} Regarding the plaintiffs' claim for declaratory relief, the administrative hearing process allows the plaintiffs the opportunity to make constitutional challenges upon administrative appeal, and, therefore, the plaintiffs have an adequate remedy at law. *Bd. of Edn. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 185. Since the plaintiffs have an adequate remedy at law, they cannot pursue a claim for declaratory relief. See *State ex rel. Lorain v. Stewart,* 119 Ohio St.3d 222, 2008-Ohio-4062, at ¶50 (actions for declaratory judgment are inappropriate where special statutory proceedings would be bypassed).

{¶82} Accordingly, I dissent from the majority's decision to affirm the dismissal of the plaintiffs' claims for violations of Section 1983 as to the Ohio Attorney General and

the Senior Attorney General and concur as to the remaining three claims, for the reasons discussed above.

_____

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part with Concurring/ Dissenting opinion.

{¶83} I agree with the writing judge and the concurring/dissenting judge on the disposition of appellants' second assignment of error. I further agree with the writing judge regarding the disposition of the claims against the named attorneys general as well as the writing judge's and concurring/dissenting judge's disposition of the Section 1985 claims as they relate to the named OCRC defendants. I additionally agree with each of my colleagues that the named OCRC defendants are not entitled to absolute immunity. Because, however, I disagree with the writing judge's and the concurring/dissenting judge's disposition of the Section 1983 claims as they relate to the named OCRC defendants, I respectfully dissent.

{¶84} As the writing judge aptly observes, this court was recently faced with a case procedurally and substantively similar to the matter sub judice. In *Transky v. Ohio Civ. Rights Comm.*, 193 Ohio App.3d 354, 2011-Ohio-1865, the action arose from the OCRC's investigation and preparation of a complaint that alleged a housing discrimination charge against the plaintiffs. As in this case, the plaintiffs in *Transky* did not elect to have the matter processed in a civil judicial proceeding and, thus, the case proceeded through administrative channels. After declining to accept the OCRC's

proposed conciliation offer, the plaintiffs filed a complaint in the court of common pleas alleging claims identical to those alleged in this matter.

{¶85} As the writing judge notes, the majority in *Transky* affirmed the trial court's dismissal of the substantive causes of action. In arriving at this conclusion, the majority in *Transky* specifically found that the Section 1983 claim, as it pertained to the OCRC's officials, was unripe at the time the complaint was filed to the extent it appeared to allege the plaintiffs were deprived of their constitutional rights by virtue of the OCRC's conduct.

{¶86} Stare decisis compels adherence to past precedent unless "(1) the challenged decision was wrongfully decided at the time or changes in circumstances no longer justify continued adherence to the decision, (2) the challenged decision defies practical workability, and (3) overruling the decision would not create an undue hardship for those who have relied upon it." *State ex rel. Internatl. Paper v. Trucinski*, 106 Ohio St.3d 203, 204, 2005-Ohio-4557, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, syllabus, 2003-Ohio-5849. Because the instant matter mirrors the allegations in *Transky* and I believe my colleagues' rationale for upsetting this precedent fails to meet the foregoing criteria, I would affirm the trial court's dismissal of appellants' Section 1983 claim as unripe.

{¶87} The writing judge and concurring/dissenting judge each maintain appellants' Section 1983 claim against the OCRC's officials was adequately pleaded without recourse to an "apparently strained" and "unnecessary" characterization of the claim as a common law, malicious prosecution cause of action. The writing judge and concurring/dissenting judge note that construing the claim as such was not required because the Section 1983 claim met the minimal standards of notice pleading and, in

any event, malicious prosecution is a wholly separate cause of action from a Section 1983 claim.

{¶88} With respect to the latter point, I am aware that a Section 1983 claim and a common law, malicious prosecution claim are independent, self-sufficient causes of action that need not be linked. Nevertheless, an alleged violation of a claimant's constitutional rights, for purposes of Section 1983, *may be* pleaded by way of, inter alia, a malicious prosecution allegation. The factual allegations in this case, like those in *Transky*, would support such a characterization. The point of the *Transky* characterization is that the causes of action are analogous as both require a successful result in an underlying criminal or administrative proceeding. As I will discuss further below, appellants' failure to succeed at the administrative level would fatally impact their Section 1983 claim. Regardless of how the cause of action is characterized, however, a review of the complaint in this case demonstrates appellants simply cannot prove a set of facts that would permit their Section 1983 claim to go forward as it fails to allege a real and substantial controversy that is appropriate for judicial determination at this time.

{¶89} Appellants' Section 1983 claim specifically charges, in relevant part:

{¶90} "The individually named defendants in their individual capacities acting individually, collectively and/or in furtherance, all while under color of state law, deprived Plaintiffs of rights secured by the United State[s] Constitution *** in violation of 42USC[Section]1983."

{¶91} The factual basis for this claim alleged the OCRC defendants conspired with other state actors to extort money from appellants under the aegis of a facially legitimate administrative proceeding. This allegation attacks both the basis of the administrative complaint as well as the pre-hearing settlement procedures employed by

the OCRC defendants. At the time the complaint in this case was filed, the administrative proceedings were incomplete and appellants had declined to enter a conciliation agreement or pay the purported "damages" for which the OCRC claimed they were responsible. Appellants, however, have alleged that they were deprived of their rights when the OCRC "demanded," as the writing judge characterizes the allegation, that they enter an unreasonable and ill-conceived conciliation agreement.

{¶92} A review of the record demonstrates that the conciliation efforts, no matter how unreasonable or arbitrary appellants perceived them to be, were offers, not demands. Such offers are part of a statutory complaint resolution process that requires the OCRC to "endeavor to eliminate the [unlawful discriminatory] practice by informal methods of conference, conciliation, and persuasion." R.C. 4112.05(B)(4). Appellants acknowledge this point in paragraph 39 of their complaint.

{¶93} Moreover, even if the OCRC's conciliation offers were unreasonably excessive under the circumstances, the conciliation process did not preclude appellants from defending themselves against the substantive charges and prevailing at the administrative hearing. In other words, appellants were not forced to accept the purportedly unreasonable offer and were still able to vindicate themselves by following the administrative channels, which they elected at the post-investigative stage of the proceedings. Because they were not coerced into settlement, they must prove the invalidity of the charges before their Section 1983 claim is viable. If appellants successfully defend against the underlying charges, their allegations that the OCRC defendants were attempting to collect money in bad faith under the color of state law during an otherwise legitimate, statutorily-authorized administrative process will have matured.

{¶94} A claim is generally not ripe if it is premised upon "future events that may not occur as anticipated or may not occur at all." *Texas v. United States* (1998), 523 U.S. 296, 300; see, also, *Reiling v. Smith*, 11th Dist. No. 2006-G-2705, 2007-Ohio-3370, at ¶36. If appellants prevail during the administrative process, their claim that the OCRC conspired to extort money to settle an otherwise invalid charge will have ripened. As of the filing of the civil complaint, however, the viability of the claim is based upon a future event that may not occur. Regardless of Ohio's liberal pleading rules and irrespective of how the complaint is construed or characterized, the allegations, at this point, are non-justiciable, and to rule otherwise requires a court to keep an inchoate cause of action on its docket unnecessarily. I would therefore hold that until and unless appellants prevail in the administrative process, there is simply no controversy for the trial court to resolve.

{¶95} As an ancillary point, I believe it is important to draw attention to a foreseeable procedural issue that will likely arise in the application of my colleagues' analysis. Namely, future similarly-situated litigants will have difficulty finding certainty as to when their cause of action actually accrued. Following my colleagues' reasoning, the commencement of the statute of limitations is a subject of vagary. An action, in their estimation, will evidently accrue when a potentially unreasonable, yet statutorily mandated, conciliation offer is made, rather than the date the administrative process is resolved in a respondent's favor. Thus, a potential plaintiff's ability to seek redress for allegations such as those leveled in the underlying complaint will depend on various coincidental factors, one of which could simply be the duration of the administrative process itself.

{¶96} As a final note, in reinstating the Section 1983 claim, I find it peculiar that the writing judge uses an advisory reminder to alert the trial court of its discretion to stay this cause of action. The statement suggests that, despite the writing judge's firm conviction that the complaint was sufficient to withstand a motion to dismiss, she may have lingering concerns about the claim's ripeness while the administrative case remains open. Although the reminder, as worded, is not inherently inconsistent with the writing judge's position, it nevertheless causes me to raise a quizzical eyebrow. After all, if the claim is an unambiguous, justiciable legal controversy, as my colleagues maintain, then advising the trial court of its obvious authority to stay the matter until the administrative proceedings conclude sends a mixed message regarding the stability of the substantive conclusion.

{¶97} Because I disagree with the writing judge and the concurring/dissenting judge regarding their disposition of the Section 1983 action against the OCRC defendants, I would affirm the trial court's judgment entry dismissing appellants' complaint in its entirety.