[Cite as *Yankovitz v. Greater Cleveland Regional Transit Auth.*, 2023-Ohio-2584.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

RUSSELL YANKOVITZ,	:	
Plaintiff-Appellee,	:	No. 112040
v.	:	
GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, DISMISSED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: July 27, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-927878

Appearances:

Consolo Law Firm Co., LPA, Frank Consolo, and Horace F. Consolo, *for appellee*.

Janet E. Burney and Brian R. Gutkoski, *for appellants*.

EILEEN T. GALLAGHER, J.:

{¶ 1} Defendants-appellants, Greater Cleveland Regional Transit Authority ("GCRTA"), Scott Ferraro ("Ferraro"), and Lisa Stanko ("Stanko") (collectively "appellants") appeal the denial of their motion to dismiss for lack of subject-matter

jurisdiction or, alternatively, for judgment on the pleadings. They claim the following errors:

> 1. The trial court erred by insufficiently detailing its journal entry denying defendants-appellants' motion to dismiss or alternatively, for judgment on the pleadings.
>
> 2. The trial court erred in denying defendants-appellants' motion to dismiss for lack of subject matter jurisdiction.
>
> 3. The trial court erred in failing to grant defendants-appellants' dispositive motion relative to the intentional infliction of emotional distress claim because, if the trial court had subject matter jurisdiction over the claim, appellants are immune.
>
> 4. The trial court erred in failing to grant defendants-appellants' dispositive motion relative to the R.C. 4112.02(J) "aiding and abetting" claim because, if the trial court had subject matter jurisdiction over this claim, Ferraro and Stanko are immune.

{¶ 2} We find that the order appealed from is a final appealable order to the extent that it involves political-subdivision-immunity defenses under R.C. Chapter 2744. Other issues unrelated to political-subdivision immunity are not appealable at this time and are dismissed. We also find that appellants are immune from Yankovitz's claim for intentional infliction of emotional distress but they are not immune from his claims for disability discrimination brought pursuant to R.C. Chapter 4112. We, therefore, affirm the trial court's judgment in part, dismiss it in part, reverse it in part, and remand the case to the trial court for further proceedings.

I. Facts and Procedural History

{¶ 3} Plaintiff-appellee, Russell Yankovitz ("Yankovitz"), has worked in GCRTA's operations division since November 2006. Yankovitz held the position of

Maintainer 458 ("Maintainer") within GCRTA's operations division from 2015 until the events giving rise to this case. Due to the nature of his work, GCRTA classified Yankovitz as a "safety-sensitive employee."

{¶ 4} Sometime prior to 2015, Yankovitz began suffering chronic back pain, and his physician prescribed him opioid painkillers. Yankovitz became dependent on the painkillers, and he subsequently participated in a drug-addiction rehabilitation program. As part of the program, he was prescribed Suboxone, a medication used to treat opioid addiction.

{¶ 5} In April 2019, Yankovitz took a leave of absence from GCRTA for medical reasons unrelated to his Suboxone use. Upon his return to duty, Yankovitz was required to submit to a fitness-for-duty evaluation, which included a drug test and physical examination administered by defendant Occupational Health Centers of Ohio, P.A. ("Concentra"), GCRTA's third-party medical provider. During the examination, health care providers at Concentra learned that Yankovitz was taking Suboxone and determined that the side effects of the drug prevented him from safely performing his job as a Maintainer. Relying on Concentra's medical opinion, GCRTA refused to allow Yankovitz to return to work as a Maintainer even though his treating physician provided documentation establishing that he did not suffer any side effects from Suboxone that would impair his ability to safely operate a commercial vehicle.

{¶ 6} Yankovitz asked GCRTA to provide him reasonable accommodations in accordance with R.C. Chapter 4112 (Ohio's version of the Americans with

Disabilities Act) because he was prevented from working as a Maintainer due to his disability. GCRTA offered Yankovitz two comparable positions, one as an electric-equipment maintainer and one as material handler, but he failed the tests required for the positions. GCRTA later offered him a janitorial position, but he declined the offer.

{¶ 7} In January 2020, Yankovitz filed a complaint against appellants, asserting four claims (1) disability discrimination against GCRTA in violation of R.C. 4112.02(A); (2) "regarded as" disability discrimination against GCRTA in violation of R.C. 4112.02(A); "aiding and abetting" discrimination against Ferraro and Stanko in violation of R.C. 4112.02(J); and intentional infliction of emotional distress against all defendants. Yankovitz later amended the complaint to name Concentra as a defendant and alleged that Concentra,[1] Ferraro, and Stanko aided and abetted the disability discrimination of GCRTA in violation of R.C. Chapter 4112.02(J). Yankovitz stated his claims against Ferraro and Stanko in both their individual and official capacities.

{¶ 8} Appellants filed a motion to dismiss for lack of subject-matter jurisdiction or alternatively, for judgment on the pleadings. Appellants argued the trial court lacked subject-matter jurisdiction over Yankovitz's claims because Yankovitz was a union employee subject to a collective-bargaining agreement and, therefore, the State Employment Relations Board ("SERB") had exclusive

[1] Concentra is not a party to this appeal.

jurisdiction over his discrimination claims. Appellants also asserted the trial court lacked jurisdiction over his intentional-infliction-of-emotional-distress claim because it was governed by the collective-bargaining agreement that provided a mandatory grievance procedure requiring binding arbitration. Finally, appellants asserted that Yankovitz's claims against Ferraro and Stanko should be dismissed because liability against supervisors and managers for alleged discrimination claims was expressly abolished in Ohio in April 2021 and, in any event, appellants are immune from liability pursuant to the Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744. The trial court denied appellants' motion to dismiss or, in the alternative, for judgment on the pleadings without explanation. This appeal followed.

II. Law and Analysis

A. Final Appealable Order

{¶ 9} Prior to briefing, Yankovitz filed a motion to dismiss this appeal, arguing that it lacks a final appealable order. Yankovitz also argues that to the extent appellants claim the denial of the motion is a final appealable order because they are immune under R.C. 2744.03(A)(6), their argument lacks merit because this court held, in *Johnson-Newberry v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 107424, 2019-Ohio-3655, that R.C. 4112.02(J) expressly imposes liability on individual political-subdivision employees.

{¶ 10} The Ohio Constitution limits appellate jurisdiction to the review of final judgments. Article IV, Section 3(B)(2), Ohio Constitution. "If an order is not

final and appealable, then an appellate court has no jurisdiction to review the matter and the appeal must be dismissed." *Assn. of Cleveland Firefighters, # 93 v. Campbell*, 8th Dist. Cuyahoga No. 84148, 2005-Ohio-1841, ¶ 6.

{¶ 11} Ordinarily, a trial court order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Madfan, Inc. v. Makris*, 8th Dist. Cuyahoga No. 102179, 2015-Ohio-1316, ¶ 6, citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). However, R.C. 2744.02(C) provides that "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of any alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." Thus, "R.C. 2744.02(C) carves out an exception and permits a political subdivision or an employee of a political subdivision to appeal an order that denies it the benefit of an alleged immunity under R.C. Chapter 2744, 'even when the order makes no determination that there is no just cause for delay pursuant to Civ.R. 54(B).'" *Johnson-Newberry* at ¶ 8, quoting *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, syllabus. Therefore, despite Yankovitz's argument to the contrary, a judgment denying a political subdivision and/or its employees immunity is immediately appealable even if we ultimately determine that an exception to immunity applies that deprives the political subdivision or its employees of the general blanket of immunity.

{¶ 12} Appellate review pursuant to R.C. 2744.02(C) is limited to review of only alleged errors involving the denial of "'the benefit of an alleged immunity from

liability' and does not authorize appellate courts to otherwise review alleged errors that do not involve claims of immunity." *Johnson-Newberry* at ¶ 9, quoting *Windsor Realty & Mgt., Inc. v. N.E. Ohio Regional Sewer Dist.*, 2016-Ohio-4865, 68 N.E.3d 327, ¶ 15 (8th Dist.), citing *Riscatti v. Prime Properties Ltd. Partnership*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 20. Therefore, alleged errors that do not involve claims of immunity are not final appealable orders.

1. Insufficient Explanation

{¶ 13} In the first assignment of error, appellants argue the trial court erred by failing to detail its reasons for denying their motion to dismiss or, alternatively, for judgment on the pleadings. Appellants made several arguments for dismissal of Yankovitz's amended complaint, including an argument that they are immune from liability under R.C. Chapter 2744 and an argument that the trial court lacked subject-matter jurisdiction because SERB has exclusive jurisdiction to hear Yankovitz's claims. The trial court rejected all of appellants' arguments when it overruled the motion in toto, including the immunity issues. However, because the court's decision denied appellants' the benefit of alleged immunity under R.C. Chapter 2744, it involves a final appealable issue and we have jurisdiction to address it. We address the merits of the first assignment of error in Section B of this opinion.

2. Exclusive Jurisdiction of SERB

{¶ 14} In the second assignment of error, appellants argue the trial court lacked subject-matter jurisdiction and thus should have dismissed the amended complaint because Yankovitz's claims are governed by a collective-bargaining

agreement that provides a grievance procedure and mandatory arbitration pursuant to R.C. 4117.10(A). Appellants further assert that SERB has exclusive jurisdiction over matters governed by R.C. Chapter 4117. Finally, appellants argue the trial court lacked subject-matter jurisdiction over Yankovitz's claims because he failed to exhaust his administrative remedies. These alleged errors do not involve the question of whether appellants are immune pursuant to R.C. Chapter 2744. This portion of the appeal cannot be addressed for lack of jurisdiction. Lack of jurisdiction requires this court to dismiss the second assignment of error.

3. Intentional Infliction of Emotional Distress

{¶ 15} In the third assignment of error, appellants separately argue that the trial court lacked jurisdiction to consider Yankovitz's intentional-infliction-of-emotional-distress claim because it is governed by the grievance procedure in the parties' collective-bargaining agreement and that it, therefore, should also have been dismissed. Appellants further argue that even if the trial court had jurisdiction over the intentional-infliction-of-emotional-distress claim, it should have been dismissed because appellants are immune from liability for that claim since none of the exceptions to immunity set forth in R.C. 2744.04(B) apply to intentional conduct. (Appellant's brief p. 29.)

{¶ 16} The immunity raised in appellants' second argument is a final appealable issue. R.C. 2744.02(C); *Johnson-Newberry*, 8th Dist. Cuyahoga No. 107424, 2019-Ohio-3655, at ¶ 8. However, Yankovitz argues that because he voluntarily dismissed the intentional-infliction-of-emotional-distress claim with

prejudice, the issue is now moot. Appellants, on the other hand, contend the notice of voluntary dismissal is a nullity because it was filed after Yankovitz filed the notice of appeal. Appellants assert that the notice of appeal stripped the trial court of jurisdiction such that the notice of dismissal was ineffective.

{¶ 17} It is well settled that "'once an appeal is perfected, a trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment.'" *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 13, quoting *State ex rel. Rock v. School Emps. Retirement Bd.*, 96 Ohio St.3d 206, 2002-Ohio-3957, 772 N.E.2d 1197, ¶ 8. In other words, once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal. *Black v. Hicks*, 8th Dist. Cuyahoga No. 105248, 2018-Ohio-2289, ¶ 25, citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978).

{¶ 18} Within appellants' third assignment of error, they argue they are immune from liability for Yankovitz's intentional-infliction-of-emotional-distress claim because none of the exceptions to immunity set forth in R.C. 2744.04(B) apply to intentional conduct and intentional infliction of emotional distress involves intentional conduct. Thus, Yankovitz's voluntary dismissal of the claim, which was filed after the notice of appeal, relates to an alleged error in the appeal. Where a voluntary dismissal clearly relates to an aspect of the case on appeal, the filing of the notice of appeal divests the trial court of jurisdiction and the voluntary notice is a

nullity. *See Huntington Natl. Bank v. Syroka*, 6th Dist. Lucas No. L-09-1240, 2010-Ohio-1358, ¶ 6. Therefore, Yankovitz's voluntary dismissal of the intentional-infliction-of-emotional-distress claim is a nullity and has no effect on the immunity arguments presented by appellants with respect to this claim. We discuss the merits of the immunity arguments relative to the intentional-infliction-of-emotional-distress claim in subsection C of this opinion.

4. Aiding and Abetting Discrimination

{¶ 19} In the fourth assignment of error, appellants argue the trial court erred in denying their motion to dismiss or in the alternative for judgment on the pleadings because Ferraro and Stanko are immune from liability pursuant to pursuant to R.C. Chapter 2744. Because this assigned error involves only the immunity issue, it is a final appealable issue.

B. Judgment Without Explanation

{¶ 20} As previously stated, appellants argue the trial court erred by failing to explain its reasons for denying their motion to dismiss or, alternatively, for judgment on the pleadings. They contend that because the judgment entry denying their motion lacks any explanation, it does not allow meaningful appellate review.

{¶ 21} We strongly encourage trial courts to explain a decision in a written opinion. Nevertheless, there is no legal requirement that the trial court in this case detail its reasons for denying the motion to dismiss or motion for judgment on the pleadings. In *Ferguson v. Univ. Hosps. Health Sys.*, 8th Dist. Cuyahoga No. 111137,

2022-Ohio-3133, ¶ 72, we addressed this issue in the context of a motion for summary judgment and explained:

> "'Meaningful' appellate review occurs through resolution of the appellate arguments based on the applicable standard. * * * The trial court's decision, even if reasons for it were offered in the record, cannot be considered persuasive, much less dispositive, since we provide the trial court's decision no deference."
>
> To hold otherwise would cut against longstanding appellate practice in the state. Outside of our district, panels in the Fourth, Fifth, Ninth, Tenth and Eleventh Districts have also held that there is no general requirement under Civ.R. 56 or 52 that a trial court provide reasons for granting summary judgment. See, e.g., *Shafer v. Russ Newman Ins. Agency*, 4th Dist. Highland No. 12CA11, 2013-Ohio-885, ¶ 8; *Portfolio Recovery Assocs., L.L.C. v. Dahlin*, 5th Dist. Knox No. 10-CA-000020, 2011-Ohio-4436, ¶ 57; *Medina ex rel. Jocke v. Medina*, 9th Dist. Medina No. 20CA0044-M, 2021-Ohio-4353, ¶ 22; *Ferdinand v. Hamilton Local Bd. of Edn.*, 17 Ohio App.3d 165, 172, 17 Ohio B. 296, 478 N.E.2d 835 (10th Dist.1984); *Birmingham Assocs., L.L.C. v. Strauss*, 11th Dist. Geauga No. 2012-G-3111, 2013-Ohio-4289, ¶ 24.

{¶ 22} Although Ferguson and the cases cited therein involved judgments on motions for summary judgment, the reasoning applies equally to motions to dismiss and motions for judgments on the pleadings, which are also reviewed de novo and without any deference to the trial court's judgment. *DiGiorgio v. Cleveland*, 8th Dist. Cuyahoga No. 95945, 2011-Ohio-5878, ¶ 19 (appellate review of Civ.R. 12(C) motions for judgment on pleadings is de novo); *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5 (appellate review of Civ.R. 12(B)(6) motions to dismiss is de novo).

{¶ 23} Appellants cite several cases in support of their argument that the trial court must provide reasons for its ruling. However, the cited cases are

distinguishable from the facts of this case. For example, appellants cite *Cross v. A-Best Prods. Co.*, 8th Dist. Cuyahoga No. 90388, 2009-Ohio-2039, wherein this court sua sponte remanded the case to the trial court because the trial court failed to provide a sufficiently detailed judgment entry. However, in *Cross*, the trial court was required by statute to make a specific determination and failed to do so. There is no such statutory requirement involved in this case. *Cross* is, therefore, distinguishable and inapplicable.

{¶ 24} Appellants also cite *St. Lawrence O'Toole Gardens, L.L.C. v. Lawrence Cty. Aud.*, 4th Dist. Lawrence No. 19CA15, 2020-Ohio-4320, in support of its argument. However, *St. Lawrence O'Toole* involved an administrative appeal of a tax valuation. The Fourth District reversed the trial court's judgment due to its failure to provide a detailed valuation in its final judgment. The Fourth District explained, "The valuation review system requires that the court show its work." In other words, the trial court was expressly required by statute to provide a detailed explanation of its judgment. Again, this case is distinguishable from the situation involved in this case that does not involve a statute requiring the trial court to make specific findings.

{¶ 25} Appellants nevertheless argue that the trial court erred in failing to specify which particular defendant's motion was denied. However, the motion was filed by all the defendants, and the court did not grant the motion with respect to any one of the defendants. Therefore, the motion was denied as to all defendants

because if the court had intended to grant the motion on behalf of any of the defendants, it would have indicated so in its judgment entry.

{¶ 26} Therefore, a trial court's failure to provide a detailed, written explanation for its denial of a motion to dismiss or for judgment on the pleadings is not a basis for reversal. Accordingly, the first assignment of error is overruled.

C. Political Subdivision Immunity

{¶ 27} As previously stated, the trial court denied appellants' motion to dismiss or, alternatively, for judgment on the pleadings. Appellants filed the motion to dismiss pursuant to Civ.R. 12(B)(6) and for judgment on the pleadings pursuant to Civ.R. 12(C).

1. Standard of Review

{¶ 28} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim on which relief can be granted "is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992), citing *Assn. for Defense of Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).

{¶ 29} A trial court's review of a Civ.R. 12(B)(6) motion to dismiss is limited to the four corners of the complaint along with any documents properly attached to, or incorporated within, the complaint. *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38. In our review of a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Jenkins v.*

Cleveland, 8th Dist. Cuyahoga No. 104768, 2017-Ohio-1054, ¶ 8, citing *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6. For a party to ultimately prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a trial court granting relief. *Id.*, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

{¶ 30} Motions for judgment on the pleadings are governed by Civ.R. 12(C). Civ.R. 12(C) states that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "In ruling on a Civ.R. 12(C) motion, the court is permitted to consider both the complaint and the answer as well as any material attached as exhibits to those pleadings." *Bank of Am., N.A. v. Michko*, 8th Dist. Cuyahoga No. 101513, 2015-Ohio-3137, ¶ 37, citing *Schmitt v. Educational Serv. Ctr.*, 2012-Ohio-2208, 970 N.E.2d 1187, ¶ 10 (8th Dist.).

{¶ 31} Judgment on the pleadings is appropriate where it appears "beyond doubt that [the nonmovant] can prove no set of facts warranting the requested relief, after construing all the material factual allegations in the complaint and all reasonable inferences therefrom in [the nonmovant's] favor." *State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 74, 765 N.E.2d 854 (2002).

{¶ 32} As previously stated, we review Civ.R. 12(B)(6) motions to dismiss and Civ.R. 12(C) de novo. *DiGiorgio*, 8th Dist. Cuyahoga No. 95945, 2011-Ohio-5878, ¶ 19 (Appellate review of Civ.R. 12(C) motions for judgment on pleadings is de

novo.); *Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5 (Appellate review of Civ.R. 12(B)(6) motions to dismiss is de novo.).

2. Immunity Analysis

{¶ 33} Only alleged errors involving appellants' immunity defenses under R.C. Chapter 2744 are final appealable issues. Indeed, an affirmative defense of immunity under R.C. Chapter 2744 may be the basis of a dismissal under Civ.R. 12(B)(6) and/or Civ.R. 12(C). *Riveredge Dentistry Partnership v. Cleveland*, 8th Dist. Cuyahoga No. 110275, 2021-Ohio-3817, ¶ 21, citing *Para v. Jackson*, 2021-Ohio-1188, 171 N.E.3d 452, ¶ 17 (8th Dist.).

{¶ 34} The Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744, sets forth a three-tier analysis for determining whether a political subdivision is immune from liability for injury or loss to property. *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7. First, the court must determine whether the entity claiming immunity is a political subdivision and whether the alleged harm occurred in connection with either a governmental or proprietary function. *Id.*; R.C. 2744.02(A)(1). Under R.C. 2744.02(A)(1), a political subdivision is generally "not liable for 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 * * * in connection with a governmental or proprietary function."

{¶ 35} The second tier of the analysis requires the court to determine whether any of the five exceptions to immunity enumerated in R.C. 2744.02(B) apply to reinstate liability to the political subdivision. *Cater v. Cleveland*, 83 Ohio

St.3d 24, 28, 697 N.E.2d 610 (1998). If the court finds any of the R.C. 2744.02(B) exceptions applicable, and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires the court to determine whether any of the defenses set forth in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability. *Colbert* at ¶ 9.

{¶ 36} There is no dispute that GCRTA is a political subdivision pursuant to R.C. 2744.01(F) or that its operation of a busline and transit company is a proprietary function pursuant to R.C. 2744.01(G)(2)(c). Thus, GCRTA is generally immune from liability for tort claims unless one of the five exceptions in R.C. 2744.02(B) applies.

3. Intentional Infliction of Emotional Distress

{¶ 37} In the third assignment of error, appellants argue they are immune from intentional tort liability under R.C. 2744.03(A)(6) and are, therefore, immune from liability for Yankovitz's intentional-infliction-of-emotional-distress claim. And, because GCRTA is a political subdivision engaged in a proprietary function, it is generally immune from liability for tort claims under R.C. 2744.02(A)(1). We have already determined that appellants have established they are entitled to the general blanket of immunity provided in R.C. 2744.02(A)(1). We, therefore, now turn to the second tier of the analysis and determine whether any of the exceptions to immunity apply.

{¶ 38} R.C. 2744.02(B) provides the following enumerated exceptions to immunity:

(B) Subject to sections 2744.03 and 2744.05 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:

(1) Except as otherwise provided in this division, political 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. * * *

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

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

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property 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 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, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the

> Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

{¶ 39} None of the enumerated exceptions deal with intentional conduct. Indeed, "'[i]t is well established that under R.C. 2744.02, political subdivisions are immune from intentional torts.'" *Fried v. Friends Breakthough Schools*, 8th Dist. Cuyahoga No. 108766, 2020-Ohio-4215, ¶ 24, quoting *Wingfield v. Cleveland*, 8th Dist. Cuyahoga No. 100589, 2014-Ohio-2772, ¶ 9, citing *Walsh v. Mayfield*, 8th Dist. Cuyahoga No. 92309, 2009-Ohio-2377, ¶ 12. *See also Yoby v. Cleveland*, 2020-Ohio-3366, 155 N.E.3d 258, ¶ 85 (8th Dist.), quoting *Hubbard v Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 8 ("There are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress.").

{¶ 40} Therefore, the trial court erred in failing to grant appellants' motion to dismiss Yankovitz's intentional-infliction-of-emotional-distress claim.

4. Discrimination Claims

{¶ 41} In the fourth assignment of error, appellants argue the trial court erred in failing to find that appellants were immune from liability for all the claims alleged in the complaint. In first and second causes of action of the amended complaint, Yankovitz alleges that GCRTA discriminated against Yankovitz because of his disability and failed to reasonably accommodate him despite his disability in

violation of R.C. 4112.02(A) and 4112.99. (Amended complaint ¶ 33-36.) In the third cause of action, Yankovitz alleges that Ferraro, Stanko, and Concentra aided, abetted, incited, compelled, and/or coerced discriminatory actions against Yankovitz by directly or indirectly committing discriminatory acts against him violation of R.C. 4112.02(J) and 4112.99.

{¶ 42} As noted above, R.C. 2744.02 provides an exception to immunity "when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code[.]" R.C. Chapter 4112, the Ohio Civil Rights Act, provides a comprehensive statutory scheme creating a cause of action for discrimination based on one's disability. R.C. 4112.02(A) provides that it is

> an unlawful discriminatory practice * * * [f]or any employer, because of the race, color, * * * [or] disability * * * to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

{¶ 43} The term "employer" is defined, in relevant part, as "any political subdivision of the state, or a person employing four or more persons within the state, and any agent of the state, political subdivision, or person." R.C. 4112.01(A)(2). Thus, because a political subdivision and any agent of a political subdivision is an "employer" for purposes of R.C. Chapter 4112, R.C. Chapter 4112 expressly imposes liability on political subdivisions and their agents for violations of the statute.

{¶ 44} In addition, R.C. 4112.02(J) makes it unlawful for

> any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to

> obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

{¶ 45} In *Johnson-Newberry*, 8th Dist. Cuyahoga No. 107424, 2019-Ohio-3655, ¶ 21, we explained that to "aid and abet" an unlawful discriminatory practice, the person "must actively participate in, or otherwise facilitate, another's discriminatory act in violation of R.C. 4112.02." *Id.*, citing *Pittman v. Parillo*, 6th Dist. Lucas No. L-16-1140, 2017-Ohio-1477, ¶ 25. R.C. 4112.01(A)(1) defines "person" and states that the term includes, but is not limited to, "the state and all political subdivisions, authorities, agencies, boards, and commissions of the state." Therefore, pursuant to R.C. 2744.02(B)(5), R.C. Chapter 4112 creates an exception to the general blanket of immunity provided to political subdivisions in R.C. 2744.02(A)(1).

{¶ 46} Having determined that an exception to immunity applies, we must now determine, in the third tier of our analysis, whether any of the defenses set forth in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability. *Colbert*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, at ¶ 9. R.C. 2744.03(A)(6) reinstates political subdivision immunity from tort liability, with three exceptions:

> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

> (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

{¶ 47} Yankovitz did not allege that Ferraro or Stanko acted "manifestly outside the scope" of their employment. Therefore, the first exception is inapplicable. However, Yankovitz alleged that Ferraro, Stanko, and GCRTA's "acts and omissions" of unlawful discrimination "were intentional, willful, extreme and outrageous * * *." (Amended complaint ¶ 34, 36, 38.) Appellants argue that "[w]hile a supervisor's intent can sometimes be a question of fact, an employee's claims must be dismissed as a matter of law where there is no set of facts under which relief can be granted." They further assert that the complaint merely alleges that Stanko informed Yankovitz that he was not medically cleared by Concentra and that such a statement "is a far cry from the kind of ill will and hatred required to support individual liability under the Political Subdivision Immunity statute." (Appellant's brief p. 30.)

{¶ 48} However, in reviewing a Civ.R. 12(B)(6) motion to dismiss or a Civ.R. 12(C) motion for judgment on the pleadings, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Jenkins*, 8th Dist. Cuyahoga No. 104768, 2017-Ohio-1054, at ¶ 8, citing *Johnson*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, at ¶ 6.

{¶ 49} Viewing the allegations in a light most favorable to Yankovitz, we cannot assume, particularly at this stage of the litigation, that Stanko's statement that he was not cleared by Concentra was not made in bad faith, or in a wanton or reckless manner. The amended complaint alleges that the defendants refused to allow Yankovitz to return to work or to accommodate him in any way and that they "willfully" and unlawfully committed these "extreme and outrageous" acts even though Yankovitz's treating physicians provided documentation confirming that he did not suffer from side effects of Suboxone that would impair his ability to safely perform his job. (Complaint ¶ 29-30.) Therefore, the exception set forth in R.C. 2744.03(A)(6)(b) applies and precludes reinstatement of immunity.

{¶ 50} Appellants argue, citing *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636, 17 N.E.3d 554, that Stanko and Ferraro, as individuals, are not subject to the exceptions to immunity provided in R.C. 2744.03(A)(6)(c). In *Hauser*, the Ohio Supreme Court held that "R.C. 4112.01(A)(2) and 4112.02(A) does not 'expressly impose' civil liability on political subdivision employees so as to trigger the immunity exception in R.C. 2744.03(A)(6)(c)." *Johnson-Newberry*, 8th Dist. Cuyahoga No. 107424, 2019-Ohio-3655, 25, citing *Hauser* at ¶ 6. Thus, the *Hauser* Court concluded that political-subdivision employees could not be held individually liable for discrimination because they are immune under R.C. 2744.03. *Hauser* at ¶ 6.

{¶ 51} The *Hauser* Court expressly stated that its decision was "limited to provisions dealing with 'employer' discrimination, R.C. 4112.01(A)(2) and

4112.02(A)" *Id.* at ¶ 15. Moreover, the *Hauser* Court further stated, in dicta, that "[a]n individual political subdivision employee still faces liability under other provisions of R.C. 4112.02 that expressly impose liability, including the aiding-and-abetting provision in R.C. 4112.02(J)." Id.

{¶ 52} In *Johnson-Newberry*, we held, in accordance with Hauser, that

> R.C. 4112.01(A)(2) and 4112.02(A), which concern the discriminatory acts of an employer, do not expressly impose civil liability on political subdivision employees so as to trigger the immunity exception set forth in R.C. 2744.03(A)(6)(c). R.C. 4112.02(J), however, specifically applies to a "person," making it unlawful for "any person to aid, abet, incite, compel, or coerce the doing of any" discriminatory act. That provision therefore expressly imposes liability upon an individual that would include an employee of a political subdivision. While the statutory provision may not have intended to encompass a supervisor as a person that "aids and abets" their employer in an alleged discriminatory act, if the legislature intended to exempt political subdivision employees, including superiors, from civil liability pursuant to R.C. 4112.02(J), the legislature could have narrowed the definition of a "person." Accordingly, we are constrained to find the exception to immunity set forth in R.C. 2744.03(A)(6)(c) applies to [the employee] for alleged violations of R.C. 4112.02(J).

Thus, construing the allegations of the complaint as true, we find that neither the employer, GCRTA, nor the individual employees, Stanko and Ferraro, are entitled to immunity under R.C. Chapter 2744 for the discriminations claims alleged in the amended complaint.

{¶ 53} Finally, we note that the General Assembly amended R.C. Chapter 4112 when it passed the Employment Law Uniformity Act, H.B. 352, which went into effect on April 15, 2021. The amended version of the statute eliminates individual liability for discriminatory practices in the workplace. Appellants argue the trial

court should have applied the amended version of the statute retroactively and found that Stanko and Ferraro could not be held liable for employer discrimination as a matter of law. (Appellant's brief p. 36.)

{¶ 54} However, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. 1.48. In *State v. Hubbard*, 167 Ohio St. 3d 77, 2021-Ohio-3710, 189 N.E.3d 720, ¶ 2, the Ohio Supreme Court explained that the Ohio Constitution generally prohibits retroactive application of new laws. Thus, to overcome the presumption of retroactivity, the new statute must satisfy two requirements: (1) the legislature must have expressly made the statute retroactive, and (2) the statute must be remedial rather than substantive. *Williams v. Barton Malow Co.*, 581 F.Supp.3d 923 (N.D.Ohio 2022), citing *Hubbard* at ¶ 14.

{¶ 55} There is no language in H.B. 352 indicating that the legislature intended it to apply retroactively. Therefore, the presumption against retroactivity cannot be overcome. Indeed, this court has held that the amendment to R.C. Chapter 4112 in April 2021, "does not have retroactive effect." *Bostick v. Salvation Army*, 8th Dist. Cuyahoga No. 111916, 2023-Ohio-933, ¶ 66, fn. 2, citing *Williams*, 581 F.Supp.3d 923; *Whitman v. Internatl. Paper Co.*, N.D. Ohio No. 5:20-CV-02781, 2021 U.S. Dist. LEXIS 116684 (June 23, 2021). Therefore, the amendment to R.C. Chapter 4112 does not apply in this case.

{¶ 56} The third assignment of error is sustained and the fourth assignment of error is overruled.

{¶ 57} The trial court's judgment is affirmed in part, reversed in part, and dismissed in part as to the second assignment of error. The judgment denying appellants' motion to dismiss or, alternatively, for judgment on the pleadings, is reversed with respect to Yankovitz's intentional-infliction-of-emotional-distress claim. The second assignment of error is dismissed for lack of jurisdiction. However, we affirm the trial court's judgment in all other respects and remand the case to the trial court to proceed on the discrimination claims.

It is ordered that appellee and appellants share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas 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.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR