

[Cite as *Diaz v. Cuyahoga Metro. Hous. Auth.*, 2010-Ohio-13.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92907**

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**DARLIN DIAZ**

PLAINTIFF-APPELLEE

vs.

**CUYAHOGA METROPOLITAN  
HOUSING AUTHORITY**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-651053

**BEFORE:** Celebrezze, J., Rocco, P.J., and Sweeney, J.

**RELEASED:** January 7, 2010

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, the Cuyahoga Metropolitan Housing Authority (“CMHA”), takes this interlocutory appeal<sup>1</sup> from the trial court’s denial of CMHA’s motion for judgment on the pleadings. CMHA claims it is immune from suit under the grant of governmental immunity embodied in R.C. 2744 et seq. After a thorough review of the record, and for the following reasons, we affirm the decision of the trial court.

{¶ 2} Plaintiff-appellee, Darlin Diaz, filed suit on February 15, 2008 against CMHA for injuries sustained by her daughter while the two were visiting an apartment complex that CMHA owned and operated as public housing in Cleveland, Ohio. On May 24, 2007, Ms. Diaz and her daughter were at 4258 West 123<sup>rd</sup> Street, when Ms. Diaz’s daughter was allegedly “struck by a window.” Appellee claims in her complaint that CMHA negligently failed “to properly keep and maintain the premises \* \* \* and that such conditions constituted a physical defect on the CMHA property, imposing liability on CMHA.” Appellee claims that her daughter sustained severe and permanent injury as a result of this incident. She sought remedy

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<sup>1</sup> R.C. 2744.02(C) states: “An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.” A political subdivision may immediately appeal an order denying it immunity. See *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88.

for personal injury to her daughter, for loss of parental consortium, reimbursement for medical expenses incurred, and for psychological injuries.

{¶ 3} CMHA's answer raised defenses, including that it was immune from suit as outlined in R.C. 2744 et seq. On September 26, 2008, CMHA filed a motion for summary judgment, which was later amended to a motion for judgment on the pleadings. This motion was denied on February 3, 2009, and CMHA timely filed its notice of appeal.

### **Law and Analysis**

{¶ 4} CMHA claims that "[t]he trial court committed error prejudicial to CMHA by denying CMHA's Motion for Judgment on the Pleadings, in which CMHA asserted its entitlement to immunity pursuant to Ohio Revised Code §2744.01, et seq."

### **Standard of Review**

{¶ 5} 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." An appellate court is required to construe the pleadings "liberally and in a light most favorable to the party against whom the motion is made, and every reasonable inference in favor of the party against whom the motion is made should be indulged. *Vaught v. Vaught* (1981), 2 Ohio App.3d 264, 2 OBR 293, 441 N.E.2d 811; *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 63 O.O.2d 262, 297 N.E.2d 113. The motion should be denied if it

cannot be determined from the face of the pleadings that the pleading does not state a claim upon which relief can be granted. *Calhoun v. Supreme Court of Ohio* (1978), 61 Ohio App.2d 1, 15 O.O.3d 13, 399 N.E.2d 559.” *Case W. Reserve Univ. v. Friedman* (1986), 33 Ohio App.3d 347, 348, 515 N.E.2d 1004.

### **Political Subdivision Immunity**

{¶ 6} CMHA claims it is entitled to judgment on the pleadings because it is immune from suit under Ohio’s Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744. There is a three-tiered analysis to determine whether immunity applies. Under R.C. 2744.02(A)(1), the first tier requires that the defendant be a political subdivision. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 317, 2007-Ohio-2070, 865 N.E.2d 845. The second tier focuses on exceptions to immunity under R.C. 2744.02(B). *Id.* Finally, under the third tier, if an exception was found to exist, immunity may be restored if the political subdivision asserts a defense under R.C. 2744.03. *Id.*

{¶ 7} Under R.C. 2744.02(A)(1), “a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.”

{¶ 8} R.C. 2744.01(F) states that a “[p]olitical subdivision’ or ‘subdivision’ means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.” A public housing authority is a political subdivision. See *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, at ¶8. Appellee concedes that CMHA is a political subdivision as well. R.C. 2744.01(C)(2) defines “governmental function,” and the Ohio Supreme Court has held that the operation of a public housing authority is a governmental function because it accomplishes “[u]rban renewal projects and the elimination of slum conditions[.]” *Moore*, at ¶13, quoting R.C. 2744.01(C)(2)(q). Also, R.C. 2744.01(C)(2)(g) defines “governmental functions” to include the “maintenance, and operation of buildings that are used in connection with the performance of a governmental function[.]”

{¶ 9} Under R.C. 2744.02(B), five exceptions exist that would make a political subdivision, otherwise eligible for immunity, liable for damages. The five exceptions include: (1) negligent operation of a motor vehicle by the political subdivision’s employee; (2) negligent performance of acts by an employee of a political subdivision with respect to the political subdivision’s “proprietary functions”; (3) the political subdivision’s negligent failure to keep public roads in repair; (4) negligent creation or failure to remove physical

defects in buildings and grounds; (5) and where another section of the Ohio Revised Code expressly imposes civil liability on a political subdivision.

{¶ 10} The supporting memoranda filed in relation to CMHA's motion for judgment on the pleadings dealt heavily with whether CMHA is engaging in a proprietary or governmental function when it operates public housing. Courts in Ohio are split on this issue. See *Rhoades v. Cuyahoga Metro. Hous. Auth.*, Cuyahoga App. No. 84439, 2005-Ohio-505; *McCloud v. Nimmer* (1991), 72 Ohio App.3d 533, 595 N.E.2d 492 (Eighth District); *Jones v. Lucas Metro. Hous. Auth.* (Aug. 29, 1997), 6th Dist. No. L-96-212; and *Country Club Hills Homeowners Assn. v. Jefferson Metro. Hous. Auth.* (1981), 5 Ohio App.3d 77, 449 N.E.2d 460 (Seventh District).

{¶ 11} On one hand, a public housing authority fulfills the governmental function of urban renewal and eliminating blight, but on the other, much of what a public housing authority does is no different from that of a private landlord. See *Moore* at ¶32, (Cupp, J., dissenting).

{¶ 12} On March 25, 2009, the Ohio Supreme Court spoke on this exact issue. In *Moore*, supra, the Court found that the operation of a public housing authority is a governmental function. The *Moore* court did not leave injured parties out in the cold, however, because it also held that "a unit of public housing is a building 'used in connection with the performance of a governmental function' within the meaning of R.C. 2744.01(C)(2)." *Id.* at

¶24. This holding directly addresses many of the issues argued to the lower court in the case before us. CMHA is engaging in a governmental function, which means the removal of immunity under R.C. 2744.02(B)(2) is not applicable, but the units of public housing that CMHA operates are buildings used in connection with its governmental function, meaning immunity can be removed should R.C. 2744.02(B)(4) apply. This section, if applicable, means that “[a housing authority] is therefore liable for negligence if the [injuries or] deaths \* \* \* were due to physical defects occurring on its property[.]” *Moore* at ¶24.

{¶ 13} The question yet to be resolved in this case is whether the defect in the window that caused this incident was a “physical defect” that occurred on the grounds of the CMHA property. *Id.* at ¶25. Therefore, judgment on the pleadings in favor of CMHA based on a claim of political subdivision immunity would be inappropriate at this stage of litigation. Appellee has alleged that the window constitutes a physical defect in the property. There remains an unresolved issue of whether the window in question constituted a physical defect on the property.

### **Heightened Pleading Standard**

{¶ 14} CMHA also challenges the trial court’s denial on the grounds that appellee’s complaint is not sufficiently definite to comply with Ohio’s notice



pleading standards, and it argues for a heightened pleading standard when bringing suit against a political subdivision.

{¶ 15} CMHA argues that appellee must plead with specificity how CMHA is not immune from suit. Ohio Civil Rules require “notice pleading” rather than “fact pleading.” *Salamon v. Taft Broadcasting Co.* (1984), 16 Ohio App.3d 336, 338, 475 N.E.2d 1292. “Notice pleadings” under Civ.R. 8(A) and 8(E) merely require that a claim concisely set forth only those operative facts sufficient to give “fair notice of the nature of the action[.]” *DeVore v. Mutual of Omaha Ins. Co.* (1972), 32 Ohio App.2d 36, 38, 288 N.E.2d 202. Except in very narrow circumstances, such as fraud, a plaintiff is not required to plead the operative facts of his or her case with particularity. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063. A plaintiff is not required to prove his or her case at the pleading stage. *Asefi v. Ellet Neon Sales & Serv., Inc.* (Apr. 5, 1995), Summit App. No. 16931.

{¶ 16} We decline to extend pleading with specificity to an area it has not traditionally been applied. Appellee’s complaint is sufficient to put CMHA on notice as to the facts and circumstances surrounding the complained of injury. Discovery is the appropriate method to further ascertain the series of events that led to the injury of appellee’s daughter. Appellee has alleged that CMHA is not immune from suit based on the

operation of a building in furtherance of a governmental function, which would remove governmental immunity under R.C. 2744.02(B)(4). CMHA's references to case law regarding workers' compensation claims and religious hiring practices do not establish a heightened pleading requirement when bringing suit against a political subdivision.

{¶ 17} CMHA relies on *Hodge v. City of Cleveland* (Oct. 22, 1998), Cuyahoga App. No. 72283, for the proposition that appellee is under a heightened pleading obligation based on important policy considerations; *Hodge* actually held that the plaintiff pled no facts that would remove immunity from a political subdivision. The *Hodge* court went through the three-step analysis of the plaintiff's complaint and determined that the plaintiff had not alleged any "operative facts whatsoever concerning [the employee]: for example, it did not even allege that he had a position or any responsibility for hiring or supervising employees of Cleveland, did not assert that he was an employee at the recreation center, and did not identify or refer to any act or omission by him." *Id.* at 6.

{¶ 18} CMHA also relies on *Thomas v. Byrd-Bennett*, Cuyahoga App. No. 79930, 2001-Ohio-4160, in support of its argument that appellee has some heightened pleading requirement. In *Thomas*, the plaintiff failed to "allege the time, type, manner or substance of the complaints." *Id.* at 1. The complaint merely alleged that Thomas was attacked by ten unknown

individuals between August 1998 and January 19, 1999. The *Thomas* court held this was insufficient, even if true, to prove any set of facts that “would demonstrate the involvement or role [the defendants] had in the failure to control the students[.]” *Id.* at 3.

{¶ 19} In the instant case, appellee has asserted a claim that CMHA is not immune from suit because the injury in question was caused by a defect in a building used for a governmental function. This would remove the cloak of immunity bestowed by R.C. 2744. The complaint also sets forth the date, location, and nature of the injury. Therefore, the trial court did not err when it denied CMHA’s motion for judgment on the pleadings. Although “[s]implified pleading under Rule 8 does not mean that the pleader may ignore the operative grounds underlying a claim for relief[.]” appellee’s complaint set forth enough facts to put CMHA on notice as to the nature of the injury complained of and established a question of fact as to immunity. Staff Notes to Civ.R. 8(A). CMHA’s citations to *Hodge* and *Thomas* do not establish a heightened burden of pleading. In those cases, the respective plaintiffs’ complaints failed under the normal requirements imposed under Civ.R. 8. See *Hitchcock v. Akron City Schools Bd. of Education*, Summit App. No. 23632, 2008-Ohio-2668, at ¶11 (discussing *Hodge*, *supra*).

### **Conclusion**

{¶ 20} The decision of the lower court denying CMHA's motion for judgment on the pleadings was proper. Construing the pleadings most favorably to the non-moving party, there remain issues of fact, including whether political subdivision immunity is available to CMHA.

Judgment affirmed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and  
JAMES J. SWEENEY, J., CONCUR