

[Cite as *McKee v. Univ. Circle, Inc.*, 2015-Ohio-2953.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102068

EDWARD McKEE

PLAINTIFF-APPELLEE

vs.

UNIVERSITY CIRCLE, INC., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-827925

BEFORE: Kilbane, J., Jones, P.J., McCormack, J.

RELEASED AND JOURNALIZED: July 23, 2015

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MARY EILEEN KILBANE, J.:

{¶1} This appeal involves a single issue — the trial court’s denial of defendants-appellants’, University Circle, Inc., Mark Laubenthal (“Laubenthal”), Arthur Chenevey (“Chenevey”), Kenji Kurokawa (“Kurokawa”), John Pavelich (“Pavelich”), Scott Ford (“Ford”), and Chris Ronayne (collectively referred to as “UCI”), motion to dismiss on the basis of political subdivision immunity. Plaintiff-appellee, Edward McKee (“McKee”), responds as the trial court concluded — UCI is not entitled to political subdivision immunity at this initial pleading stage. After our de novo review of the matter, we agree with the trial court in that it is not clear beyond dispute, at this early stage in the proceedings, that UCI is a political subdivision entitled to immunity.

{¶2} The facts giving rise to this appeal are as follows.

{¶3} On June 10, 2012, McKee was moving from one apartment to another in Cleveland’s Little Italy neighborhood. He was using a metal shopping cart he had found to transport his belongings, which were in trash bags and grocery bags. He left the shopping cart on the sidewalk in front of a store owned by defendant-Kathy Vanduzer (“Vanduzer”). Vanduzer called the police to complain about the shopping cart, which appeared to be abandoned. University Circle Police Department (“UCPD”) officers Laubenthal and Chenevey responded to the scene.¹ They asked McKee for his personal information and social security number. McKee provided the officers his state

¹UCPD is owned by University Circle, Inc.

identification card and said he did not have to give them his social security number. Laubenthal confirmed McKee's personal information, ran a routine background check with dispatch, and completed an internal field interview card regarding the incident, which is retained in UCPD's computer system. The field interview card included the following note: "Persisted in abandoning a shopping cart in front of the doorway of 2190 Murray Hill, across from his apartment building, impeding traffic and despite being asked by the business to cease and desist."

{¶4} The officers advised McKee that he could not leave his shopping cart in a position that would block the sidewalk. They further advised him to leave his shopping cart behind his apartment building. The officers did not issue McKee a citation.

{¶5} One week later, on June 17, 2012, McKee submitted a misconduct complaint against Laubenthal. Kurokawa (UCPD's deputy chief) replied to McKee via email on June 26, 2012, advising him that the information is with human resources and he will be contacted once a resolution has been reached. Almost five months later, in November 2012, Kurokawa advised McKee that the investigation was complete and Laubenthal was counseled and disciplined for his conduct during their encounter. McKee, however, was still concerned about the fact that his personal information remained in UCPD's computer system. He wanted to know who could access this information. He told Kurokawa that he did not consent to his information being retained in UCPD's records.

{¶6} McKee continued to follow up with Kurokawa through January 2013, at which point Ford (UCI's legal counsel and human resources manager) emailed McKee

and asked to meet with him so they could discuss his concerns. McKee declined to meet with Ford at UCPD, stating that he felt uncomfortable meeting him “in the presence of UCPD officers.” In June 2013, John Pavelich (“Pavelich”) (UCPD’s police chief) emailed McKee advising him that his personal information is stored in UCPD’s in-house computer system and the information is not shared with other outside agencies.² McKee continued on his “multi-month effort to pressure” UCPD to delete his personal information from its internal computer system.

{¶7} McKee’s efforts culminated in the instant complaint, which he filed in June 2014. In his pro se complaint, McKee alleged breach of contract, intentional infliction of emotional distress, conspiracy to commit a tort, slander, libel, invasion of privacy, negligence, and violation of equal protection. He seeks injunctive relief and money damages for his mental distress and public humiliation.³ In response, UCI filed a motion to dismiss under Civ.R. 12(B)(6), claiming immunity. On September 26, 2014, the trial court denied UCI’s motion to dismiss.

{¶8} It is from this order that UCI appeals, raising the following single assignment of error for review.

Assignment of Error

The lower court erred by denying [UCI’s] motion to dismiss because they are immune under R.C. Chapter 2744.

²At some point in time, McKee realized that UCI also had his social security number in its records.

³McKee amended his complaint in September 2014.

{¶9} UCI argues the trial court erred when it denied its motion to dismiss because UCI is a political subdivision entitled to immunity because the provision of police services is a governmental function.

{¶10} We apply a de novo standard of review to the trial court's ruling on a motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. Under this standard of review, we must independently review the record and afford no deference to the trial court's decision. *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. Cuyahoga No. 85467, 2005-Ohio-5985, ¶ 13.

{¶11} In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975).

{¶12} In resolving a Civ.R. 12(B)(6) motion, a court's factual review is confined to the four corners of the complaint. *Grady v. Lenders Interactive Servs.*, 8th Dist. Cuyahoga No. 83966, 2004-Ohio-4239, ¶ 6. Within those confines, a court accepts as true all material allegations of the complaint and makes all reasonable inferences in favor of the nonmoving party. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667,

1995-Ohio-295, 653 N.E.2d 1186. “[A]s 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 Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

{¶13} UCI’s motion to dismiss was premised on the argument that it was entitled to political subdivision immunity.⁴ In cases involving a Civ.R. 12(B)(6) motion based on political subdivision immunity, we note that

[i]n Ohio, a notice-pleading state, the plaintiff need not prove his or her case at the pleading stage. * * * Thus, a plaintiff need not affirmatively dispose of the immunity question altogether at the pleading stage. * * * Requiring a plaintiff to affirmatively demonstrate an exception to immunity at this stage would be tantamount to requiring the plaintiff to overcome a motion for summary judgment at the pleading stage. * * * Instead, a plaintiff must merely allege a set of facts that, if proven, would plausibly allow for recovery.

(Citations omitted.) *Scott v. Columbus Dept. of Pub. Utils.*, 10th Dist. Franklin No. 10AP-391, 2011-Ohio-677, ¶ 8.

{¶14} In McKee’s extremely detailed 53-page complaint, he has alleged that the responding officers mishandled the investigation, falsely accused him of abandoning the shopping cart, and falsely stated that the cart obstructed pedestrian traffic. He claimed that UCPD gave Vanduzer special treatment. He wanted his personal information

⁴We note that whether a political subdivision is immune from liability is a question of law that should be resolved by the trial court, preferably on a motion for summary judgment. *Sampson v. Cuyahoga Metro. Hous. Auth.*, 188 Ohio App.3d 250, 2010-Ohio-3415, 935 N.E.2d 98, ¶ 21 (8th Dist.), citing *Sabulsky v. Trumbull Cty.*, 11th Dist. Trumbull No. 2001-T-0084, 2002-Ohio-7275, at ¶ 7.

deleted from UCPD's database. He further alleged that UCI's actions were intentional, malicious, and willful and wanton when Laubenthal acted belligerently and insultingly toward him during their encounter.

{¶15} When we look at the four corners of the complaint and our standard of review, it does not “appear beyond doubt” that McKee can prove no set of facts in support of his claim that would entitle him to relief. In this early stage of the proceedings, accepting as true all material allegations of the complaint and making all reasonable inferences in McKee's favor, it is not clear beyond dispute that UCI is a political subdivision entitled to immunity.

{¶16} While the dissent describes this incident as trivial, it is evident from McKee's extensive complaint that this matter is not trivial to him. We are mindful of a deep-rooted historic tradition in our jurisprudence that provides that “everyone is entitled to their day in court.” This principle is guaranteed by the due process rights set forth in the Fifth and Fourteenth Amendments of the United States Constitution and the Ohio Constitution. Indeed, the “access-to-the-courts” provision found in Section 16, Article I of the Ohio Constitution provides that “[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”

{¶17} In the instant case, UCI appealed a single issue — the denial of its motion to dismiss on immunity grounds. The trial court concluded that UCI is not entitled to political subdivision immunity at this initial stage of the proceedings. We agree with the

trial court. Based on the allegations in McKee's extensive complaint, we find that he has meet his burden of merely alleging a set of facts that, if proven, would plausibly allow for recovery.

{¶18} Therefore, we affirm the trial court's order denying UCI's motion to dismiss.

{¶19} The sole assignment of error is overruled.

{¶20} Judgment is affirmed.

It is ordered that appellee recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing 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.

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., CONCURS;
TIM McCORMACK, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

TIM McCORMACK, J., DISSENTING:

{¶21} I respectfully dissent.

{¶22} This minority opinion is put forward with full and open respect for my colleagues and the determination that they have made herein. Ordinarily, I would vote

upon but refrain from writing on such a matter. The impact here though is real enough and consequential enough to require a robust response.

{¶23} McKee used a shopping cart to move his belongings from one apartment to another in the University Circle area in Cleveland. While moving, he left the shopping cart unattended in front of a retail shop. The shop owner complained to the police about the seemingly abandoned, unsightly shopping cart. Two police officers responded. They chose not to cite him for any criminal offense but advised McKee to park the cart behind his own apartment building. McKee, however, felt such grievance from the shop owner's involvement of the police that he waged a two-year battle, culminating in the instant lawsuit. Based on this trivial incident, he sued not only the shop owner but also University Circle Inc. ("University Circle" hereafter), a nonprofit organization in Cleveland's University Circle area that operates its own police department pursuant to an agreement with the city of Cleveland. He also sued six of University Circle's employees. He claimed breach of contract, intentional infliction of emotional distress, conspiracy to commit a tort, slander, libel, invasion of privacy, negligence, and violation of equal protection.

{¶24} This minor neighborhood dispute should never have survived University Circle's motion to dismiss based on its political subdivision immunity. No legitimate claim could be made upon which relief can or should be granted. Therefore, I would reverse the trial court's judgment denying the motion to dismiss.

{¶25} It is recognized that Ohio is a notice-pleading state. We do not require a plaintiff to plead operative facts with particularity at this stage of the proceedings. Here, however, McKee filed a most unusual complaint, 50 pages in length and containing over 200 paragraphs of factual allegations. Within the four corners of the complaint, he transcribed his entire encounter with the two University Circle police officers, recorded with a camera in his pocket. He also described in great detail his communications with University Circle's police department over the course of the two years he pursued this matter. Thus, unlike in a typical Civ.R.12(B)(6) proceeding, our review of the Civ.R. 12(B) motion in this case is aided greatly by plaintiff's own meticulous accounting of the events giving rise to his claims.

{¶26} Here is what can be gleaned from McKee's allegations. He, at some point in time, appropriated a shopping cart that he said had been discarded. On the day of the incident involving the police department, he said he used the shopping cart to move his belongings, which were placed in garbage bags and grocery bags, from one apartment building to another along Murray Hill Road in Cleveland. He placed and then left the shopping cart in front of a small operating retail shop fronting Murray Hill Road, while he made trips across the street to his new apartment. The shop owner objected to the unsightly shopping cart being parked and seemingly abandoned directly in front of her walk-in business. She confronted McKee. The two exchanged words. He left with the shopping cart, but he soon returned with the cart carrying more belongings, and again

he left the cart in the same location while transporting more of his belongings to his new apartment.

{¶27} McKee suspected the shop owner called the local police department, the University Circle police department, to complain about the shopping cart. For their part, the officers asserted they themselves had noted the cart during patrol. In any event, the police responded to the shopping cart issue. After McKee finished transporting his belongings, he stood on his third floor balcony and saw a police officer beckoning him to come down.

{¶28} The sum total of the police department's response was they first noted a condition in a retail area, viewed the seemingly abandoned shopping cart, interviewed the shop owner and subsequently McKee, asked for and received identifying information from him, and then peacefully resolved the dispute. Or at least they thought so. The police advised McKee that instead of parking the shopping cart on a city sidewalk, in a retail district, in front of a walk-in business, the shopping cart should be parked behind his own apartment building. Most noteworthy, this advisory police response resulted in no citation being issued to McKee.

{¶29} McKee did not like how the police officers handled their investigation of the shop owner's complaint about his shopping cart. He insisted that his shopping cart in no way obstructed the shop's doorway or impeded the pedestrian traffic. A week after the shopping cart incident, he filed a misconduct complaint at UCPD against Officer Laubenthal, one of the two officers who responded. Although he did not receive a

citation, he felt falsely accused of obstructing pedestrian sidewalk traffic and insisted on an investigation into the officer's conduct. McKee also began a two-year campaign to have information about him, including a field interview card, removed from University Circle police department's computer. University Circle police chief Pavelich assured McKee in an email that the information provided by him during the shopping cart incident was entered into the department's in-house computer system only and would not be shared with any other agencies. McKee found this response unacceptable. University Circle's legal counsel Ford offered to meet with him in person to discuss his concerns. McKee, however, declined the offer; he felt "uncomfortable" about such a meeting, because of "distorted and outright false statements that have already been told * * *."

{¶30} McKee also complained that the shop owner received special treatment from the police department: McKee claimed that the police officers responded to the shop owner's complaint about his shopping cart yet ignored his complaints about the shop owner's barking dog and illegally parked car. He alleged University Circle employees and the shop owner were targeting him because of his "appearance of poverty." He suspected the shop owner frequently called the police to complain about him regarding his various activities.

{¶31} In McKee's own words, he "embarked on a multi-month effort to pressure [University Circle police department] into complying with [his] demands. [McKee] emailed governments and nonprofit organizations that [he] felt might hold influence with

[University Circle police department].” His two-year battle culminated in the instant lawsuit. He sought declaratory judgment (that his shopping cart did not obstruct either the pedestrian traffic or the shop owner’s doorway), injunctive relief (for deletion of information about him from University Circle’s computer), and money damages for mental stress and public humiliation. In addition, he requested \$1,000 for every disclosure of his state ID card number, \$5,000 for every occasion University Circle falsely states that his shopping cart obstructed traffic, and \$10,000 for every disclosure of his social security number.

{¶32} University Circle and its employees filed a motion to dismiss based on political-subdivision immunity. The trial court, without explanation or analysis, summarily denied University Circle’s motion.

{¶33} This simmering grudge should have been dissolved away by common sense and mutual courtesy. Instead, the neighborhood quarrel escalated into a challenge of the legal status of the University Circle police department and its authority to perform police duties under the same legal umbrella that applies to all other properly chartered Ohio safety forces.

{¶34} For cases implicating immunity, “[w]hile immunity is an affirmative defense, where the complaint itself bears conclusive evidence that the action is barred by the defense, a Civ.R. 12(B)(6) dismissal is proper.” *Rich v. Erie Cty. Dept. of Human Resources*, 106 Ohio App.3d 88, 91, 665 N.E.2d 278 (6th Dist.1995), citing *Goad v. Cuyahoga Cty. Bd. of Commrs.*, 79 Ohio App.3d 521, 523, 607 N.E.2d 878 (8th

Dist.1992). *See also Pierce v. Woyma*, 8th Dist. Cuyahoga No. 94037, 2010-Ohio-5590, ¶ 38.

Immunity of Political Subdivisions and their Employees

{¶35} Under R.C. Chapter 2744, the Political Subdivision Tort Liability Act, political subdivisions are not liable for damages in civil actions 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. R.C. 2744.02(A)(1). The court applies a three-tier analysis to determine whether a political subdivision is entitled to sovereign immunity granted in Chapter 2744. *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

{¶36} In the first tier of the analysis, the court applies the general rule provided in R.C. 2744.02(A)(1) that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function.

{¶37} However, that immunity is not absolute. In the second tier of the analysis, the court determines whether any of the five exceptions enumerated in R.C. 2744.02(B) applies to expose the political subdivision to liability.

{¶38} If any of the exceptions enumerated in R.C. 2744.02(B) applies, then the analysis proceeds to the third tier, and we determine whether any of the defenses enumerated in R.C. 2744.03 apply to shield the political subdivision from liability. *Colbert* at ¶ 7-9.

{¶39} As for the liability of the individual employees of political subdivisions, we apply a different analysis. Pursuant to R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless (1) the employee’s actions or omissions are manifestly outside the scope of employment or official responsibilities, (2) the employee’s actions or omissions are malicious, in bad faith, or wanton or reckless, or (3) the employee’s liability is expressly imposed upon the employee by a section of the Revised Code. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 17, citing R.C. 2744.03(A)(6).

University Circle and Its Police Department

{¶40} University Circle is a significant nonprofit organization with over 40 fellow nonprofit institutions in the University Circle area as its members. Pursuant to R.C. 1702.80, an organization such as University Circle may establish its own police department to provide police services. R.C. 1702.80(D).

{¶41} Under R.C. 1702.80, the police department so established shall “preserve the peace, protect persons and property, enforce the laws of the state, and enforce the charter provisions, ordinances, and regulations of the political subdivisions of the state that apply within that territory.” The statute further provides that

each police officer who is employed by a police department established by a qualified nonprofit corporation * * * is vested, while directly in the discharge of that police officer’s duties as a police officer, with the same powers and authority as are vested in a police officer of a municipal corporation under Title XXIX of the Revised Code and the Rules of Criminal Procedure, and with the same powers and authority * * * as are vested in a police officer of a municipal corporation under Chapter 4511. of the Revised Code.

{¶42} As authorized by the statute, University Circle entered into an Authorization Agreement in 1992 with the city of Cleveland to establish its own police department, which was to supplement the police service provided by the city of Cleveland.⁵ Under the agreement, UCPD is to “preserve the peace, protect persons and property and enforce the laws of the State of Ohio and the City.”

Body Corporate and Politic

{¶43} Pursuant to R.C. 2744.01(F), University Circle is a political subdivision for immunity purposes. “Political subdivision” is “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.” (Emphasis added.) R.C. 2744.01(F). University Circle is a “body corporate and politic responsible for governmental activities” entitled to immunity granted to a political subdivision.

{¶44} In *Uricich v. Kolesar*, 132 Ohio St. 115, 5 N.E.2d 335 (1936), the Supreme Court of Ohio considered the meaning of the term “body politic.” Looking to the commonly accepted meaning of the term, and the derivation of the word “politic” from a root signifying “citizen,” the court concluded the phrase “body politic” denoted “simply a group or body of citizens organized for the purpose of exercising governmental functions.” *Id.* at 118.

⁵The Authorization Agreement is attached to McKee’s complaint as exhibit No. 2. In entertaining a Civ.R. 12(B)(6) motion to dismiss, the court may consider exhibits attached to plaintiff’s complaint. *Thomas v. Progressive Cas. Ins. Co., Inc.*, 2011-Ohio-6712, 969 N.E.2d 1284 (9th Dist.).

{¶45} In *Greene Cty. Agric. Soc. v. Liming*, 89 Ohio St.3d 551, 733 N.E.2d 1141, the Supreme Court of Ohio looked to Black’s Law Dictionary 167 (7th Ed.1999). There, a “body politic” was defined as “[a] group of people regarded in a political (rather than private) sense and organized under a single governmental authority.” *Greene* at 555. In *Greene*, the court reasoned that, because the primary purpose of a county agricultural society was education, which has been traditionally regarded an appropriate governmental activity, such an entity would be a body corporate and politic and therefore a political subdivision entitled to immunity. *See also Sampson v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 418, 2012-Ohio-570, 966 N.E.2d 247 (a metropolitan housing authority created pursuant to R.C. 3735.31 is a body corporate and politic entitled to invoke immunity). *Compare Cunningham v. Star Academy of Toledo*, 6th Dist. Lucas No. L-12-1272, 2014-Ohio-428 (a private for-profit community school management company was not a “body corporate and politic” within the meaning of R.C. 2744.01(F)).

{¶46} University Circle established its police department and provided police services under the authority of R.C. 1702.80 and the Authorization Agreement. Under the statute and the agreement, its police department is to “preserve the peace, protect persons and property, enforce the laws of the state” and the police officers employed are vested with the same powers and authority as are vested in a police officer of a municipal corporation.

{¶47} The provision of police services and law enforcement is an activity traditionally reserved for the government. As such, University Circle is a “body

corporate and politic responsible for governmental activities” and therefore a political subdivision entitled to invoke immunity granted in R.C. Chapter 2744. *Studer v. Seneca Cty. Humane Soc.*, Third Dist. Seneca No. 13-99-59, 2000-Ohio-1823 (as a county humane society is authorized to prosecute persons guilty of cruelty to animals, its primary purpose is law enforcement, and therefore, it is a body corporate and politic entitled to political-subdivision immunity).

Claims Against University Circle

{¶48} McKee’s tort claims against University Circle are considered first. Under the first tier of the immunity analysis, University Circle is a political subdivision and therefore immune from liability in its performing of a governmental function or proprietary function.

{¶49} Under the second tier, the immunity could be defeated if one of the five exceptions enumerated in R.C. 2744.02(B)(1)-(5) applies. Those exceptions are: (1) the negligent operation of a motor vehicle by an employee; (2) the negligent performance of proprietary functions; (3) the negligent failure to keep public roads open and in repair; (4) the negligence of employees occurring on certain buildings used in connection with the performance of governmental functions; and (5) any express imposition of liability by statute. R.C. 2744.02(B)(1)-(5).

{¶50} The only potential exception that could be applicable here is R.C. 2744.02(B)(2): negligent performance of a proprietary function. The question is whether the conduct complained of involved a governmental or proprietary function.

R.C. 2744.01(C)(1) defines a governmental function as a function that satisfies any one of the following:

- (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
- (b) A function that is for the common good of all citizens of the state;
- (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.⁶

⁶ R.C. 2744.02(G)(2) states:

- (2) A “proprietary function” includes, but is not limited to, the following:
 - (a) The operation of a hospital by one or more political subdivisions;
 - (b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;
 - (c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
 - (d) The maintenance, destruction, operation, and upkeep of a sewer system;
 - (e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

{¶51} The statute goes on to enumerate certain functions as governmental functions, one of them being the provision of “police, fire, emergency medical, ambulance, and rescue services or protection.” Thus, the provision of police services is a governmental function subject to statutory immunity. *Hall-Pearson v. S. Euclid*, 8th Dist. Cuyahoga No. 73429, 1998 Ohio App. LEXIS 4796 (Oct. 8, 1998); *McCloud v. Nimmer*, 72 Ohio App.3d 533, 538, 595 N.E.2d 492 (8th Dist.1991). Here, the officers’ activity in responding to a citizen’s complaint and performing a routine investigation is undoubtedly a provision of police service, and therefore a governmental, not a proprietary, function. None of the R.C. 2744.02 exceptions to immunity applies. There is therefore no need to reach the third tier of the immunity analysis.

{¶52} Having determined University Circle is entitled to immunity provided in R.C. 2744.02(A)(1), potential liability of the individuals employed by University Circle is considered next.

Employees’ Liability

{¶53} Employees of a political subdivision are entitled to a general grant of immunity but may be liable if one of the exceptions described in R.C. 2744.03(A)(6) applies. Pertinent to this case, University Circle’s employees are liable if they acted outside the scope of their employment, with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A)(6).

{¶54} “Malicious purpose encompasses exercising ‘malice,’ which can be defined as the willful and intentional design to do injury, or the intention or desire to harm

another, usually seriously, through conduct that is unlawful or unjustified.” *Caruso v. State*, 136 Ohio App.3d 616, 620, 737 N.E.2d 563 (10th Dist.2000). “‘Bad faith’ connotes ‘a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.’” *Jackson v. Butler Cty. Bd. of Cty. Commrs.*, 76 Ohio App.3d 448, 454, 602 N.E.2d 363 (12th Dist.1991), quoting *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962).

{¶55} Wanton conduct is “the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result.” *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 33. Reckless conduct means “the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances.” *Id.* at ¶ 34.

{¶56} McKee claimed negligence, intentional infliction of emotional distress, conspiracy to commit a tort, and libel against various individuals employed by University Circle. When the court reviews a Civ.R. 12(B)(6) motion to dismiss, “‘the obligation to accept factual allegations in a complaint as true does not extend to unsupported legal conclusions.’” *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106, ¶ 38 (8th Dist.), quoting *Hodge v. Cleveland*, 8th Dist. Cuyahoga No. 72283, 1998 Ohio App. LEXIS 4963, * 22 (Oct. 22, 1998). Although all factual allegations of the complaint must be taken as true in considering a motion to dismiss, unsupported conclusions of a

complaint are not sufficient to withstand a motion to dismiss. *U.S. Bank Natl. Assn. v. Perry*, 8th Dist. Cuyahoga No. 99608, 2013-Ohio-3814, ¶ 7, citing *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639 (1989).

{¶57} McKee's complaint is rife with legal conclusions but the factual allegations, even if given the benefit of the doubt, did not reflect operative facts for his claims that University Circle employees acted outside the scope of their employment, with malicious purpose, in bad faith, or in a wanton or reckless manner. Officers Laubenthal and Chenevey responded to a citizen complaining about a shopping cart, with garbage bags in it, seemingly abandoned on the sidewalk. After a routine investigation, during which the officers requested and verified McKee's identifying information, McKee was advised to park the cart behind his own apartment building and not to leave the cart unattended in front of others' property. No citation was issued. When McKee pursued University Circle for a deletion of his personal information and the officers' notations about the incident from University Circle police department's computer system, University Circle's legal counsel offered to meet with McKee in person to alleviate his concerns. McKee was also assured in writing that his identifying information will not be shared with any outside agencies. Allegedly, in the midst of what appears to be ultimately a strained exchange between McKee and the responding police officers, personal, derogatory phrases were directed at McKee. Although this breakdown in civility is troubling, I find frustration. I do not find any employees' actions rose to the

level of malice, bad faith, wantonness, or recklessness to defeat the broad immunity afforded to employees of a political subdivision.

Breach-of-Contract Claim

{¶58} McKee also raises a breach-of-contract claim. He alleges he was an intended third-party beneficiary of the 1992 Authorization Agreement between University Circle and the city of Cleveland. He claims the responding officers' "dismissive treatment of Plaintiff breached University Circle's contractual obligation to protect the cart, which is a property in the [subject area]."

{¶59} It is well-established that "private citizens have no right to enforce government contracts on their own behalf, unless a different intention is 'clearly manifested' in the contract." (Citations omitted.) *Duncan v. Cuyahoga Community College*, 8th Dist. Cuyahoga No. 101644, 2015-Ohio-687, ¶ 32. McKee's complaint failed to allege sufficient operative facts showing such a clear manifestation in the Authorization Agreement between the city of Cleveland and University Circle to allow a breach-of-contract claim by a private citizen.

Conclusion

{¶60} Many allegations were made by McKee in his filings about his rights being violated. There is, however, a distinct absence in his writing and argument of any acknowledgment of the countervailing need for individuals to abide by uniform basic safety and health standards designed for the public good of the urban neighborhoods covered by University Circle — to work together for the collective safety, upkeep, and prosperity of the neighborhoods.

{¶61} I note with particular interest that at the very time that America’s justice system is calling for the adoption of “community-based policing,” the police department in University Circle is practicing proactive community policing and demonstrated responsive policing in Cleveland’s University Circle jurisdiction. The department timely responded to a condition where intervention was needed: it gathered information and requested cooperation from the subject who was identified as being responsible for an abandoned shopping cart. From a police department’s perspective, an abandoned shopping cart full of garbage bags on a public walkway is a condition of legitimate concern. The police asked that the cart be removed to McKee’s premises. He objected to their advice. All the rest of this flows from that.

{¶62} The multiple legal claims filed by McKee against University Circle, its employees, and a local businesswoman are way beyond frivolous. They are deleterious, expensive, and time consuming to litigate, and intentionally harassing in nature. All of these offensive actions need to be dismissed forthwith with prejudice.

{¶63} Certainly the carefully protected right of citizens to address their legitimate grievances in a court of law must and will be vigorously protected. This access to our courts, however, does not provide a remedy for every perceived woe. The form of grudge found here does not belong in any court. It needlessly and selfishly clogs it. This dispute should have enjoyed a quiet passing away courtesy of the trial court. It should have been summarily disposed of below — if not, certainly here.