[Cite as *Howard v. Girard,* 2011-Ohio-2331.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

SAMUEL HOWARD, JR., et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2010-T-0096**
- vs -	:	
THE CITY OF GIRARD, OHIO, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2010 CV 476.

Judgment: Affirmed.

Percy Squire, Percy Squire Co., L.L.C., 514 South High Street, Columbus, OH 43215 (For Plaintiffs-Appellants).

John T. McLandrich and *Frank H. Scialdone*, Mazanec, Raskin, Ryder & Keller Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Solon, OH 44139 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Samuel Howard, Jr., and his mother, Kimberly Howard, appeal from a judgment of the Trumbull County Court of Common Pleas which dismissed his lawsuit against the city of Girard and its emergency personnel for negligent infliction of emotional distress and gross negligence. Because none of the exceptions to political subdivision immunity provided in R.C. 2744.02(B) apply to the circumstances of this

case, we conclude the trial court properly granted the city's motion to dismiss pursuant to Civ.R. 12(B)(6).

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

{¶3} The tragic facts surrounding the litigation are not disputed. In November 2007, Samuel Howard, Jr., then a 17-year-old, was locked out of the apartment he shared with his father in Girard, Ohio. After being unable to contact his father and sleeping in the hallway outside of the apartment for several days, he went to the apartment complex's office and called 9-1-1 for help. The emergency personnel arrived and forcibly entered the apartment. Mr. Howard ran inside and discovered his father's naked body sprawled across the bed. His father had apparently shot himself in a suicide attempt but was still alive at the time. Mr. Howard tried to put clothes on his father, who was transported to the hospital, where he later died from the self-inflicted gunshot wound.

{¶4} On February 19, 2010, Samuel Howard, Jr., filed a complaint in the Trumbull County Court of Common Pleas against The City of Girard and John Does 1–4, four members of the city's emergency medical squad involved in the incident. Also named as a plaintiff was his mother, Kimberly Howard.[1]

{¶5} The Howards alleged the city's emergency personnel should have limited access to the apartment and properly surveyed it before allowing Mr. Howard to enter. They alleged the emergency personnel acted in a wanton and reckless manner in gross

1. The plaintiffs had previously filed a 42 U.S.C. section 1983 claim in the District Court for the Northern District of Ohio. The trial court dismissed the action pursuant to Civ.R. 12(B)(6) and the dismissal was affirmed by the Sixth Circuit in *Howard v. City of Girard*, 346 Fed. Appx. 49. In the first paragraph of the instant complaint, the plaintiffs stated the claims were filed in light of the recent decision from the Supreme Court of Ohio, *Estate of Graves v. City of Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168.

indifference to Mr. Howard's well-being. They also alleged the city failed to train its emergency personnel for proper responses to a situation such as this. They claimed the emergency personnel should have known there was a risk Mr. Howard's father may have been inside the apartment, either deceased or seriously ill or injured. They alleged the city's failure to properly train its personnel amounted to a deliberate indifference to the rights of individuals coming into contact with its EMS staff. Because of the trauma, Mr. Howard suffered psychological injury which required psychiatric care.

{¶6} The Howards' complaint set forth three claims: (1) negligent infliction of emotional distress; (2) gross negligence resulting from the wanton and reckless conduct by the "John Doe" employees and gross negligence on the part of the city for failing to train its employees; and (3) loss of consortium suffered by the mother, Mrs. Howard.

{¶7} The city filed a motion to dismiss pursuant to Civ.R. 12(B)(6), which the trial court granted. The trial court held that the city was entitled to immunity pursuant to R.C. Chapter 2744. The court also dismissed the claims against the "John Doe" employees because they were not properly named and served.

{¶8} The Howards now appeal, raising the following assignment of error:

{¶9} "The trial court erred when it granted Appellee's motion to dismiss predicated on municipal immunity."

{¶10} **Standard of Review**

{¶11} Pursuant to Civ.R. 12(B)(6), a complaint may be dismissed for failure to state a claim when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Cleveland Elec. Illuminating Co. v. PUC* (1996), 76 Ohio St.3d 521, 524, citing *O'Brien v. Univ. Community Tenants Union, Inc.*

(1975), 42 Ohio St.2d 242, 245. "As long as there is a set of facts consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Huffman v. City of Willoughby*, 11th Dist. No. 2007-L-040, 2007-Ohio-7120, ¶18, citing *Cincinnati v. Beretta U.S.A. Corp.* (2002), 95 Ohio St.3d 416, 418, 2002-Ohio-2480.

{¶12} "[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the non-moving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60. Our review of a trial court's ruling on a Civ.R. 12(C) motion is de novo. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St. 3d 79, 2004-Ohio-4362.

{¶13} Regarding a Civ.R. 12(B)(6) motion involving governmental political subdivision immunity, the Tenth District noted:

{¶14} "In Ohio, a notice-pleading state, the plaintiff need not prove his or her case at the pleading stage. Thus, a plaintiff need not affirmatively dispose of the immunity question altogether at the pleading stage. Requiring a plaintiff to affirmatively demonstrate an exception to immunity at this stage would be tantamount to requiring the plaintiff to overcome a motion for summary judgment at the pleading stage. Instead, *a plaintiff must merely allege a set of facts that, if proven, would plausibly allow for recovery*." (Emphasis added.) *Scott v. City of Columbus Dept of Pub. Utils.*, 10th Dist. No. 10AP-391, 2011-Ohio-677, ¶8 (internal citations omitted).

{¶15} **The Statutory Framework for Political Subdivision Immunity**

{¶16} Chapter 2744 of the Ohio Revised Code, the Political Subdivision Tort Liability Act, contains a comprehensive statutory scheme for the tort liability of political

subdivisions and its employees. The statutory framework begins with R.C. 2744.02(A)(1), a general grant of immunity to a political subdivision from civil liability. R.C. 2744.02(A)(1) provides:

{¶17} "(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, 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."

{¶18} **The Exceptions to Immunity**

{¶19} The statute then enumerates five exceptions to the general grant of immunity. These five exceptions are provided in R.C. 2744.02(B):

{¶20} "(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:

{¶21} "(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. ***

{¶22} "***

{¶23} "(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.

{¶24} "(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.

{¶25} "(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.

{¶26} "(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."

{¶27} **The Defenses**

{¶28} Finally, R.C. 2744.03 provides several defenses for political subdivisions and their employees:

{¶29} "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶30} "(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

{¶31} "(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

{¶32} "(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the

discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

{¶33} "(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

{¶34} "(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶35} "(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and

3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

{¶36} "(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

{¶37} "(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶38} "(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.

{¶39} "(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code."

{¶40} **The Three-Tier Analysis for Political Subdivision Immunity**

{¶41} In *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, the Supreme Court of Ohio interpreted the immunity statutes as setting forth a three-tier analysis. The court stated:

{¶42} "Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis. *Greene Cty.*

Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 556-557, 2000 Ohio 486, 733 N.E.2d 1141. The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. Id. at 556-557, 733 N.E.2d 1141; R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B); *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28, 1998 Ohio 421, 697 N.E.2d 610.

{¶43} "The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. Id. at 28, 697 N.E.2d 610. At this tier, the court may also need to determine whether specific defenses to liability for negligent operation of a motor vehicle listed in R.C. 2744.02(B)(1)(a) through (c) apply.

{¶44} "If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability." Id. at ¶7-9.

{¶45} Under the three-tier analysis, the end of inquiry is reached when the acts or omissions of a political subdivision do not fit under any of the five exceptions enumerated in R.C. 2744.02(B). In other words, the courts do not engage in the third-tier analysis regarding available defenses provided in R.C. 2744.03, if no exception under R.C. 2744.02(B) can be found to remove the general grant of immunity.

{¶46} This point, crucial to the instant case, was reiterated by the Supreme Court of Ohio as recently as 2008, in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-

Ohio-2574. "Our precedent regarding the three-tiered analysis to determine a political subdivision's immunity is well settled." Id. at fn. 2, citing *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, ¶14; *Colbert*. "As our jurisprudence in the area of immunity has made clear, a political subdivision's immunity can be removed only through one of the enumerated exceptions found in R.C. 2744.02(B)(1) through (5). [*Colbert at ¶8*] As appellee relied solely on R.C. 2744.02(B)(5), which has been shown to be inapplicable, and as none of the other exceptions apply, [appellant social service agency] retains its immunity. *It is not necessary, therefore, to advance to the third tier of analysis as it pertains to [appellant agency]*." *O'Toole* at ¶71.

{¶47} In this case, it is undisputed that the city's emergency personnel was performing a governmental function when responding to plaintiff's 9-1-1 call. The trial court correctly determined that the alleged act or omission by the city does not fit under any of the exceptions enumerated by R.C. 2744.02(B): (1) negligent operation of a vehicle by the employees; (2) negligent performance regarding a proprietary function by the employees; (3) negligent failure to keep the public roads in repair; (4) negligent conduct by the employees occurring on the grounds of public buildings relating to their physical defects; and (5) express statutory imposition of liability.

{¶48} Thus, as the Howards are unable to state an exception to the immunity granted to the city of Girard as a political subdivision under R.C. 2744.02, our inquiry regarding the city's liability ends here.

{¶49} **"John Doe" Employees**

{¶50} As to the liability of the "John Doe" employees involved in the incident, initially, we note the Supreme Court of Ohio has pointed out that the immunity enjoyed

by the political subdivisions is "extended, with three exceptions, to employees of political subdivisions under R.C. 2744.03((A)(6)." *O'Toole* at ¶47. However, for the individual employees of political subdivisions, the immunity analysis differs. "Instead of the three-tiered analysis described in *Colbert*, R.C. 2744.03(A)(6) states that an employee is immune from liability unless the employee's actions or omissions are manifestly outside the scope of employment or the employee's official responsibilities, the employee's acts or omissions were malicious, in bad faith, or wanton or reckless, or liability is expressly imposed upon the employee by a section of the Revised Code." *Cramer* at ¶17. "[E]mployees can lose their immunity for acting 'with malicious purpose, in bad faith, or in a wanton or reckless manner.'" *O'Toole* at ¶48, citing R.C. 2744.03(A)(6)(b).

{¶51} In this case, however, it is unnecessary to engage in an analysis regarding the liability or immunity of the four members of the emergency team involved in the incident. This is because plaintiffs never properly named and/or served the summons and complaint on these "John Doe" defendants.

{¶52} Civ.R. 15(D) states:

{¶53} "When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant."

{¶54} Regarding Civ.R. 15(D), the Supreme Court of Ohio recently stated the following in *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Oho-2202:

{¶55} "A claimant may use Civ.R. 15(D) to file a complaint designating a defendant by any name and designation when the plaintiff has identified but does not know the name of that party, provided that the plaintiff avers in the complaint that the name of the defendant could not be discovered and a summons containing the words 'name unknown' is issued and personally served on the defendant. Although a plaintiff may designate a defendant whose name is unknown by any name and description, the complaint must nonetheless sufficiently identify that specific party so that personal service may be made upon its filing." Id. at ¶40.

{¶56} None of the requirements of Civ.R. 15(D) are met in this case regarding the "John Doe" defendants. The plaintiffs' only reference to these defendants in the complaint was: "Defendants John Doe 1-4 are members of the City's safety forces who engaged in this conduct described herein below." The plaintiffs failed to allege the fact that these defendants' names could not be discovered, as required by Civ.R. 15(D). Moreover, no attempts made to serve the summons on these individuals containing the words "name unknown." Thus, the trial court properly dismissed the claims against these individual defendants pursuant to the authority of *Erwin*. In any event, on appeal the Howards do not challenge the trial court's dismissal of the employees on the authority of *Erwin*.

{¶57} **R.C. 2744.03(A)(6)(b)**

{¶58} In their brief, the Howards make *no* mention of the five exceptions to immunity enumerated in R.C. 2744.02(B), or the three-tier analysis for political subdivision immunity. Rather, a careful reading of their brief shows that they rely exclusively on R.C. 2744.03(A)(6)(b) for *the city's* liability. They also cite a recent

decision from the Supreme Court of Ohio, *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, for the proposition that the *employees* do not enjoy immunity when they acted in a reckless and wanton manner; they claim the emergency personnel acted recklessly and wantonly when they disregarded the reasonably foreseeable risk that Mr. Howard's father may be in distress and improperly allowed Mr. Howard to enter the apartment.

{¶59} The Howards assert that the city is liable for failing to properly train its EMT personnel. For the basis of the liability, they cite R.C. 2744.03(A)(6)(b). As we point out above, R.C. 2744.03 provides several defenses for political subdivisions and their employees. Section (A)(6)(b), in particular, states that the *employees* are generally immune from liability, with three exceptions: (1) when the employees act manifestly outside the scope of the employment; (2) when the employees act with malicious purpose, in bad faith, or in wanton or reckless manner; or (3) when civil liability is expressly imposed on the employees by a statute. In *Cramer*, the Supreme Court of Ohio explained that, for the *employees* of political subdivisions, the immunity analysis would involve those three factors. Thus, *even if* the city had failed to train its emergency personnel regarding the proper response in a situation such as the instant case, the Howards' reliance on R.C. 2744.03(A)(6)(b) for his claim of *the city's* liability is misplaced.

{¶60} In *Graves v. City of Circleville*, plaintiff estate sued the police officers who authorized the release of a vehicle which had been impounded after its driver was arrested for DUI. After retrieving his vehicle, the driver proceeded to operate it while intoxicated, colliding with another vehicle and killing its driver. To claim immunity, the

defendant police officers invoked the "public-duty" rule,[2] which was adopted by the Supreme Court of Ohio in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222 as a defense for municipal liability for matters that occurred after the judicial abrogation of the doctrine of sovereign immunity and *before* the enactment of Chapter 2744 in 1981. Id. at ¶13. Because the incident in *Graves* occurred outside the narrow time frame under which *Sawicki* was decided, the *Graves* court held that the public-duty rule would not apply to immunize the officers in that case. Id. at ¶20. See, also, *Bush v. Cty. of Ashland*, 5th Dist. No. 09-CA-25, 2010-Ohio-1732, ¶30 (the public duty rule, as set forth in *Sawicki*, does not apply to cases which arose after the passage of R.C. 2744, pursuant to *Graves*).

{¶61} Instead, the Supreme Court of Ohio held that when there was an allegation of wanton or reckless conduct, the officers' immunity must be analyzed under the wanton and reckless conduct exception to immunity set forth in R.C. 2744.03(A)(6)(b). *Graves* is not helpful to the Howards, however, because they never properly named the "John Doe" employees. Therefore, even though they allege the conduct was wanton and reckless in their complaint, the trial court's dismissal of the claims against these individual employees of the city was proper.

{¶62} While we are sympathetic to the trauma Mr. Howard experienced in this very tragic incident, we must analyze the city's liability within the statutory construct set

2. "Under the public-duty rule, a municipality owes a duty only to the general public when performing functions imposed on it by law, and therefore it is not liable for a breach of that duty resulting in harm to an individual absent a special duty owed to the injured person." *Graves* at ¶9. However, the courts have also adopted a "special-duty" exception to the rule. Under the following circumstances, the municipal would be held liable: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." Id. at ¶10.

forth in Chapter 2744. Taking all the factual allegations of the complaint as true and drawing all reasonable inferences in his favor, we conclude the Howards can prove no set of facts entitling them to recovery, because of the statutory immunity enjoyed by the city. Accordingly, the trial court properly granted the city's motion to dismiss. The assignment of error is overruled.

{¶63} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.