[Cite as *Dornal v. Cincinnati Metro. Hous. Auth.*, 2010-Ohio-6236.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

TABITHA DORNAL, Individually and as next friend of ELIJAH DORNAL,	:	APPEAL NO. C-100172 TRIAL NO. A-0904139
Plaintiff-Appellant,	:	*D E C I S I O N.*
vs.	:	
THE CINCINNATI METROPOLITAN HOUSING AUTHORITY,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 17, 2010

Kenneth G. Hawley and *Richard Gabelman,* for Plaintiff-Appellant,

Adams, Stepner, Woltermann & Dusing, P.L.L.C., Jeffrey C. Mando, and *Claire E. Parsons,* for Defendant-Appellee.

SYLVIA SIEVE HENDON, Judge.

{¶1} Plaintiff-appellant Tabitha Dornal appeals the trial court's judgment granting the Civ.R. 12(B)(6) motion to dismiss filed by the Cincinnati Metropolitan Housing Authority ("CMHA"). We affirm.

{¶2} Dornal participated in the federally subsidized Section 8 Housing Choice Voucher ("HCV") program[1] administered by CMHA, and she rented her home from a private landlord. She filed a complaint against CMHA, alleging that its negligence had caused her son Elijah to suffer lead poisoning as a result of lead contamination in the home. CMHA filed a motion to dismiss on the grounds that it was immune from liability under R.C. 2744.02(A). The trial court granted the motion.

{¶3} In a single assignment of error, Dornal now argues that the trial court erred by granting CMHA's motion to dismiss. An appellate court's review of a ruling on a motion to dismiss under Civ.R. 12(B)(6) is conducted de novo.[2] In determining whether a motion to dismiss should be granted, a court must accept as true all factual allegations in the complaint.[3]

{¶4} To decide whether a political subdivision is immune from liability under R.C. 2744.02, courts use a three-tiered analysis.[4] In the first tier, a general grant of immunity is provided: "[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."[5] In the second tier of the analysis, a

[1] See generally, Section 982, Title 24, C.F.R.
[2] *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5.
[3] *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.
[4] *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶10.
[5] R.C. 2744.02(A)(1).

court must determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) applies.[6] If any exception applies, thereby exposing a political subdivision to liability, the third tier of the analysis focuses on whether any of the defenses to liability contained in R.C. 2744.03 applies to reinstate immunity.[7]

{¶5} In this case, there is no dispute that CMHA is a political subdivision entitled to a general grant of immunity under R.C. 2744.02(A)(1). However, the parties disagree as to whether an exception to the general grant of immunity applies.

{¶6} Dornal argues that the exception contained in R.C. 2744.02(B)(4) applies to deprive CMHA of its immunity. That statute provides, "[P]olitical 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."

{¶7} Dornal argues that the home she rented from a private landlord through CMHA's HCV program was a building "used in connection with" CMHA's governmental function. Therefore, she contends, CMHA was liable for injuries caused by the negligence of its employees in inspecting or in failing to inspect her home for lead-paint contamination.

[6] *Elston*, supra, at ¶11.
[7] Id. at ¶12.

{¶8} There is no question that CMHA performs a governmental function by operating a public housing authority.[8] But we must determine whether a home owned by a private landlord participating in the Section 8 HCV program constitutes a building "used in connection with the performance of a governmental function" under R.C. 2744.02(B)(4).

{¶9} Where the language of a statute is clear and unambiguous, a court must apply the statute as it is written.[9] An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.[10]

{¶10} In *Hubbard v. Canton City School Bd. of Edn.*,[11] the Ohio Supreme Court applied this rule of statutory construction in interpreting former R.C. 2744.02(B)(4).[12] The former statute contained an identical phrase, "buildings that are used in connection with the performance of a governmental function," and was later amended to include the "physical defects" language that is present in its current version.[13] The court held that the statute was unambiguous in its limitation of liability to injuries or losses that occurred in public buildings or on their grounds.[14] The court stated that "[t]he plain language of [former R.C. 2744.02(B)(4)] supports the conclusion that the General Assembly intended to permit political subdivisions to be sued in all cases where injury results from the negligence of their employees occurring within or on the grounds of any *government* building." (Emphasis added.)

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[8] *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606.
[9] *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶14; *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶52.
[10] *Portage*, supra; *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 1997-Ohio-310, 676 N.E.2d 519, ¶81.
[11] 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543.
[12] See former R.C. 2744.02(B)(4), S.B. No. 221, eff. Sept. 28, 1994.
[13] See S.B. No. 106, eff. Apr. 9, 2003, later amended by H.B. No. 119, eff. Sept. 29, 2007.
[14] *Hubbard*, supra; see, also, *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324.

{¶11} Like former R.C. 2744.02(B)(4) as it was applied in *Hubbard*, the current version of the statute lists types of buildings to which the exception may apply, including office buildings and courthouses. But the statute is not limited to buildings frequented by the public for the purpose of transacting business. In *Moore v. Lorain Metro. Hous. Auth.*, the Ohio Supreme Court held that a unit of public housing is a building "used in connection with the performance of a governmental function" for purposes of R.C. 2744.02(B)(4).[15] The court stated that the critical phrase in the statute was not its listing of examples of buildings to which the exception applied, but the preceding phrase, "buildings that are used in connection with the performance of a governmental function."[16]

{¶12} In *Moore*, the plaintiff's children died in a fire in an apartment owned by the Lorain Metropolitan Housing Authority ("LMHA"). The plaintiff alleged that LMHA had negligently failed to replace a smoke detector. The court held that LMHA was liable for negligence if the injuries in that case "were due to physical defects occurring *on its property*."[17] (Emphasis added.) The court remanded the case to the trial court to determine "whether absence of a required smoke detector is a 'physical defect' *occurring on the grounds of LMHA's property*."[18] (Emphasis added.) Similarly, other courts have held that R.C. 2744.02(B)(4) limits liability to losses or injuries that occur on the property of the political subdivision.[19]

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[15] *Moore*, supra, at ¶26.
[16] Id. at ¶24.
[17] Id.
[18] Id. at ¶25.
[19] See *Doe v. Massillon City School Dist.*, 5th Dist. No. 2006CA00227, 2007-Ohio-2801 (sexual molestation of students by the school's chess coach that occurred off the property of the political subdivision); *Vento v. Strongsville Bd. of Edn.*, 8th Dist. No. 88789, 2007-Ohio-4172 (excessive water drainage from school grounds caused damage to an adjacent property).

{¶13} But with respect to private residences, several courts have held that even where a governmental function occurred there, the residence did not qualify as a building "used in connection with the performance of a governmental function."[20] The performance of a governmental function at a privately owned facility does not transform that building into one that is "used in connection with the performance of a governmental function."[21]

{¶14} R.C. 2744.02(B)(4) reflects a legislative intent to restrict a political subdivision's liability to losses or injuries that occur in government buildings or on their grounds. So in this case, the fact that the premises was privately owned precluded liability. Consequently, we hold that the exception in R.C. 2744.02(B)(4) does not apply to remove CMHA's general grant of immunity.

{¶15} Because Dornal failed to state a claim upon which relief could be granted, the trial court properly granted the Civ.R. 12(B)(6) motion to dismiss by CMHA. Therefore, we overrule the assignment of error and affirm the court's judgment.

Judgment affirmed.

CUNNINGHAM, P.J., and **DINKELACKER, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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[20] See *Hackathorn v. Springfield Local School Dist. Bd. of Edn.* (1994), 94 Ohio App.3d 319, 640 N.E.2d 882 (vocational class project at the decedent's private residence); *Perry v. E. Cleveland* (Feb. 16, 1996), 11th Dist. No. 95-L-111 (maintenance of a police dog in a private home); *Neelon v. Conte* (Nov. 13, 1997), 8th Dist. No. 72646 (school party at principal's private home); *Troutman v. Bd. of Edn.*, 12th Dist. No. CA2009-08-016, 2010-Ohio-855 (school tutoring services in the tutor's private residence).

[21] See *McBrayer v. Laidlaw Environmental Servs., Inc.* (Dec. 28, 1999), 10th Dist. No. 99AP-115 (city's enforcement of environmental standards at a privately owned and operated facility).