

[Cite as *Maclin v. Cleveland*, 2015-Ohio-2956.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102417

LISA MACLIN, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-822384

BEFORE: Stewart, J., Kilbane, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 23, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant the city of Cleveland appeals the trial court's denial of its Civ.R. 12(B)(6) motion to dismiss plaintiffs-appellees Lisa Maclin and Michael D. Maclin's civil complaint for damages as a result of injuries sustained by Lisa after being shot by a Cleveland police officer. For the following reasons, we reverse.

{¶2} On February 23, 2014, the Maclins filed their complaint against the city, also naming as defendants Mayor Frank G. Jackson; the Director of Public Safety, Michael McGrath; Cleveland Police Officer Michael Butler; and John Does I–X. On April 30, 2014, the city, mayor, and safety director filed a joint motion to dismiss the complaint based on R.C. Chapter 2744 immunity from civil liability. The court held the motion in abeyance following the grant of the Maclins' motion for leave to amend the complaint. On July 10, 2014, the Maclins filed their first amended complaint.

{¶3} The amended complaint attempted to substitute Cleveland Police Sgt. Paul Baeppler for Cleveland Police Officer Michael Butler. Sgt. Baeppler filed a motion to strike, or in the alternative, motion to dismiss the complaint as to him. On November 4, 2014, the trial court denied the motion, and granted the Maclins leave to amend their complaint once more to add Sgt. Baeppler as a defendant. On the same day, the trial court also granted the April 30, 2014 pending motion to dismiss as to Mayor Jackson and Safety Director McGrath, but denied the motion as to the city.

{¶4} On November 13, 2014, the city filed a motion to dismiss the second amended complaint, once again arguing that it is immune from civil liability. The trial court denied the motion, and it is from this order that the city now appeals.

{¶5} The second amended complaint alleges that on August 12, 2014,¹ the Maclins were walking two leashed dogs when one of their dogs was attacked by another dog. One of their dogs broke loose of its leash and as the attack progressed, Sgt. Baeppler approached the scene, took out a shotgun from his police cruiser and fired at the Maclins' dog, killing him. Lisa Maclin was also hit by the shotgun fire and suffered injury. The amended complaint goes on to state that Sgt. Baeppler was an employee of the city of Cleveland Police Department at the time of the shooting and that he was acting in the course and scope of his employment. The Maclins state that as a direct result of Sgt. Baeppler's negligent and reckless conduct, Lisa Maclin sustained severe and permanent bodily injuries.

¹ It is clear from our review of the docket that the date of the incident cannot be August 12, 2014 because the initial complaint was filed February 23, 2014. Nevertheless, this date will remain the date of the incident for purposes of this appeal because our review is limited to the face of the second amended complaint.

{¶6} The Maclins also allege in their complaint that defendants John Doe I–X, as well as other employees of the city of Cleveland, negligently and recklessly provided guns, including the shotgun involved in this case, to Sgt. Baeppler when they knew, or should have known, that he was not qualified to have such guns and not properly trained in their use. Lastly, the amended complaint alleges that the city negligently failed to provide rules and policy for the use of deadly force by its employee Sgt. Baeppler.

{¶7} In its sole assignment of error, the city of Cleveland contends that the trial court erred in denying its motion to dismiss for failure to state a claim because it is immune from civil liability pursuant to R.C. 2744.02, Ohio’s political subdivision immunity statute.

{¶8} A Civ.R. 12(B)(6) motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the sufficiency of a complaint. In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond a doubt that the plaintiff can prove no set of facts in support of the claim that would entitle her to the relief sought. *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶ 14. “The allegations of the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party’s favor.” *Antoon v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 101373, 2015-Ohio-421, ¶ 7.

{¶9} While ordinarily we do not have appellate jurisdiction over the denial of a Civ.R. 12(B)(6) motion to dismiss because such orders are interlocutory in nature, the denial of a motion to dismiss based on political subdivision immunity is a final and appealable order subject to appellate court review. *See Slonsky v. J.W. Didado, Elec., Inc.*, 9th Dist. Summit No. 24228, 2008-Ohio-6791, ¶ 8, 11, citing *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878; R.C. 2744.02(C). We review the denial of the motion to dismiss de novo. *Id.*

{¶10} In Ohio, political subdivision immunity is governed by R.C. Chapter 2744. This chapter sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability for injury or loss to property. *See Rankin v. Cuyahoga Cty. Dept. of Children & Family Serv.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶ 8.

{¶11} The first tier of the analysis, located in R.C. 2744.02(A)(1), sets forth the general rule that political subdivisions are not liable in damages for causing personal injuries. R.C. 2744.02(A)(1) states:

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 an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

{¶12} Once immunity is established, the second tier requires an analysis of R.C. 2744.02(B), that lays out exceptions to the general rule. These exceptions occur when: (1) the injuries are caused by the negligent operation of a motor vehicle by an employee; (2) the injuries are caused by the negligent performance of an employee with respect to a proprietary function; (3) the injuries are caused by the failure to keep public roads, highways, and streets open, in repair, and free from nuisance; (4) the injuries are caused by negligence of an employee and is on the grounds of a building used for governmental purposes; or (5) the injuries are those for which liability is expressly imposed by the Ohio Revised Code. R.C. 2744.02(B)(1)-(5).

{¶13} If any of the exceptions contained in subsection (B) are applicable, then, under the third tier in the analysis, immunity may be reinstated if the political subdivision can demonstrate that any of the defenses set forth in R.C. 2744.03 apply. *Rankin*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521 at ¶ 27.

{¶14} Under R.C. 2744.02(A)(1), political subdivisions are not liable in damages for injuries caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental function. Governmental functions include “the provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection.” R.C. 2744.01(C)(2)(a). Because the Maclins’ complaint against the city alleges only claims of negligence involving the governmental function of providing police services and protection (i.e. negligently failing to provide rules and policy for the use of deadly force by its police officers), it is clear that the city has general statutory immunity under the first tier of the analysis.

{¶15} In the next tier of the analysis, none of the exceptions to immunity contained in R.C. 2744.02(B)(1)-(4) apply, and the Maclins have not stated a revised code section for which liability is expressly imposed upon the city for Sgt. Baeppler’s actions — nor have we been able to find one. Thus, we also find that the exception contained in subsection (B)(5) does not apply.

{¶16} Likewise, the city is not liable for the alleged negligent or reckless actions of Sgt. Baeppler and defendants John Does I–X. R.C. 2744.02(A)(1) is clear that statutory immunity applies to the political subdivision for both its own acts or omissions *and* that of its employees, in connection with a governmental function. *See also Hubbard v. Cleveland Metro. School Dist. Bd. of Edn.*, 195 Ohio App.3d 708, 2011-Ohio-5398, 961 N.E.2d 722, ¶ 16 (stating, ““with respect to governmental functions, political subdivisions retain their cloak of immunity from lawsuits stemming from employees’ negligent or reckless acts.”” citing *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 639 N.E.2d 105 (1994)).

{¶17} Having found that the city is immune and that no exception to immunity applies, we find that the Maclins have failed to state a claim against the city upon which relief may be granted. Accordingly, the trial court erred by denying the city’s Civ.R. 12(B)(6) motion to dismiss.

{¶18} The judgment of the trial court is reversed and the case is remanded with instructions to grant the city’s motion to dismiss.

It is ordered that appellant recover of appellees its 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.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
ANITA LASTER MAYS, J., CONCUR