

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

SHIRLENA MATHIS,	:	APPEAL NO. C-090613
Plaintiff-Appellee,	:	TRIAL NO. A-0905441
vs.	:	<i>JUDGMENT ENTRY.</i>
CITY OF CINCINNATI,	:	
CITY OF CINCINNATI FIRE DIVISION,	:	
WILLIAM E. CHENAULT,	:	
HUGH V. HAINS,	:	
HOLLIS STEWART,	:	
DERRYL W. TURNBO,	:	
ELTON B. BRITTON,	:	
JUSTIN CAMPBELL,	:	
JOHN DOE,	:	
and	:	
JOHN DOE II,	:	
Defendants-Appellants,	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

On June 7, 2007, plaintiff-appellee Shirlena Mathis called 911 to request transportation to a hospital for medical attention pertaining to an ankle injury

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Mathis had suffered the previous evening. A city of Cincinnati (“the City”) ambulance responded and transported Mathis to University Hospital in Cincinnati. During transport to the hospital, the gurney carrying Mathis allegedly collapsed, and Mathis sustained injuries to her back. Mathis filed a complaint against the City, the City’s fire division, and six individual employees of the City’s fire division, seeking damages for pain and suffering, medical expenses, and lost wages.

In response, the defendants filed a motion to dismiss under Civ.R. 12(B)(6) based upon a political subdivision’s statutory tort immunity under R.C. 2744.02. The trial court overruled the defendants’ motion, holding that Mathis had alleged sufficient facts in her complaint to state a claim. The defendants have timely appealed, asserting one assignment of error: that the trial court erred when it overruled the defendants’ motion to dismiss. Specifically, the City argues that dismissal was warranted as to it because Ohio law provides general immunity for a political subdivision when it is conducting governmental or proprietary functions.² The individual defendants argue that dismissal was appropriate for them because Ohio law provides a statutory defense against tort liability for employees of a political subdivision.³

R.C. 2744.02(C) states that “[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability * * * is a final order.” An appellate court’s review of a ruling on a motion to dismiss under Civ.R. 12(B)(6) is conducted de novo.⁴ To dismiss a complaint 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 claim which would

² R.C. 2744.02(A)(1).

³ R.C. 2744.03(A)(6).

⁴ *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶15.

entitle him to relief.”⁵ Additionally, a court must “presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the nonmoving party.”⁶

But to establish the sufficiency of a complaint, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”⁷ Further, “only a complaint that states a plausible claim for relief survives a motion to dismiss.”⁸ “Determining whether a complaint states a plausible claim for relief will * * * be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”⁹

Both Mathis and the defendants agree that a three-tiered analysis governs whether a political subdivision is immune from tort liability.¹⁰ First, R.C. 2744.02(A)(1) provides a general grant of immunity to political subdivisions against civil lawsuits for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or its employees in connection with a governmental or proprietary function.¹¹ It is undisputed that the City is a political subdivision. Second, R.C. 2744.02(B) provides certain exceptions to a political subdivision’s general grant of immunity.¹² Finally, in cases where an exception to immunity may apply, immunity may be regained if any defenses to liability under R.C. 2744.03 are applicable.¹³

⁵ *O’Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753, quoting *Conley v. Gibson* (1957), 355 U.S. 41, 45, 78 S.Ct.99.

⁶ *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

⁷ *Ashcroft v. Iqbal* (2009), ___ U.S. ___, 129 S.Ct. 1937, 1949, citing *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 555, 127 S.Ct. 1955.

⁸ *Id.* at 1950, citing *Twombly*, *supra*, at 556.

⁹ *Id.*

¹⁰ *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, at ¶10.

¹¹ *Id.*

¹² *Id.* at ¶11.

¹³ *Id.* at ¶12.

In its assignment of error, the City argues that, as a political subdivision, it is entitled to the general grant of immunity provided by R.C. 2744.02(A)(1). The City asserts that its “emergency medical, ambulance, and rescue services” are governmental functions as defined by R.C. 2744.01(C)(2)(a), and, therefore, that its transportation of Mathis by ambulance to the hospital qualified for immunity from civil liability.

Mathis argues that Ohio law provides five exceptions to a political subdivision’s general grant of immunity, two of which are applicable in this case. The first exception, commonly known as the “motor vehicle exception,” states that “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.”¹⁴ The second exception, known as the “proprietary function exception,” states that “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.”¹⁵

After examining Mathis’s complaint and the applicable immunity statutes, we hold that the two exceptions do not apply to remove the City’s general grant of immunity. The motor-vehicle exception does not apply because R.C. 2744.02(B)(1)(c) provides a statutory defense for a political subdivision for the negligent operation of motor vehicles by the subdivision’s emergency medical employees. R.C. 2744.02(B)(1)(c) states that as long as the emergency medical service employee is responding to an emergency medical call, and the employee’s conduct does not constitute willful or wanton misconduct, the City has immunity

¹⁴ R.C. 2744.02(B)(1).

¹⁵ R.C. 2744.02(B)(2).

from civil liability. While Mathis argues that the City's employees were not responding to an emergency, "R.C. 2744.02(B)(1)(c) is intended to extend immunity based on the initial nature of the call, regardless of whether EMS personnel subsequently learn that immediate assistance is unnecessary."¹⁶ And as we will discuss *infra*, Mathis's complaint does not sufficiently plead facts that demonstrate willful and wanton conduct by the employees. Further, the proprietary-function exception does not apply because the plain language of R.C. 2744.01(C)(2)(a) specifically lists ambulance services as a "governmental function," which enables the City to retain the general grant of immunity from civil liability.¹⁷ Therefore, because Mathis did not plead sufficient facts to enable her to overcome the City's motion to dismiss, the City's first assignment of error is sustained.

Next, the City's employees argue that R.C. 2744.03(A)(6) applies to them, and that they should therefore have been granted immunity from Mathis's claims. R.C. 2744.03(A)(6) provides a general defense to the liability of a political subdivision's employees for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function. Mathis, however, argues that the defense against liability provided by R.C. 2744.03(A)(6) is negated if the employees' acts or omissions occur with malicious purpose, in bad faith, or in a wanton or reckless manner.¹⁸ Mathis states that her complaint was sufficient to overcome a Civ.R. 12(B)(6) motion because she alleged that the City's employees engaged in willful and wanton misconduct.

Willful misconduct "involves an intent, purpose or design to injure."¹⁹ Wanton misconduct involves the "fail[ure] to exercise any care whatsoever toward

¹⁶ *Bostic v. Cleveland*, 8th Dist. No. 79336, 2002-Ohio-333.

¹⁷ R.C. 2744.02(A)(1).

¹⁸ R.C. 2744.03(A)(6)(b).

¹⁹ *Denzer v. Terpstra* (1934), 129 Ohio St. 1, 193 N.E. 647, paragraph two of the syllabus.

those to whom [one] owes a duty of care, and [the] failure occurs under circumstances in which there is great probability that harm will result[.]”²⁰ Mathis’s complaint alleges that “[d]uring the transport, one or more of the named Defendants negligently operated the gurney that was used to transport Plaintiff Mathis, causing the gurney to collapse to the ground.” The complaint goes on to conclude that “[t]he Defendants [sic] actions identified above constitute willful and wanton misconduct.” But we have previously noted, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” and will not overcome a motion to dismiss.²¹ We hold that when the facts and all reasonable inferences in the complaint are construed in a light most favorable to Mathis, Mathis has failed to sufficiently plead willful and wanton conduct. Therefore, because Mathis did not plead sufficient facts to overcome the City’s employees’ motion to dismiss, the second assignment of error is also sustained.

We hold that the trial court erred when it failed to grant the motion to dismiss under Civ.R. 12(B)(6). Therefore, the judgment of the trial court is reversed, and based upon the authority given to us by App.R. 12(B), we hereby enter judgment for the appellants and dismiss Mathis’s complaint.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 7, 2010

per order of the Court _____
Presiding Judge

²⁰ *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 363 N.E.2d 367, syllabus.

²¹ *Iqbal*, supra, at 1949.