

IN THE SUPREME COURT OF OHIO

DANIELLE MOORE, *et al.*,

Plaintiffs-Appellees,

-vs-

LORAIN METROPOLITAN HOUSING
AUTHORITY, *et al.*,

Defendant-Appellant.

On Appeal from the Lorain
County Court of Appeals,
Ninth Judicial District

Court of Appeals
Case No. 06CA008995

07-2106

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT
LORAIN METROPOLITAN HOUSING AUTHORITY

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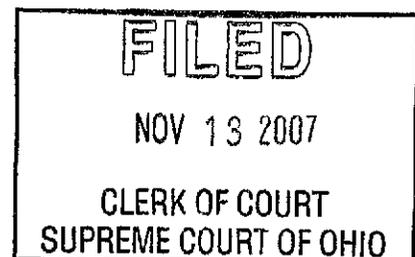


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST

This is a matter of public or great general interest. The State of Ohio has 74 housing authorities, providing public housing to approximately 114,000 of Ohio's citizens in over 50,000 housing units. The Lorain Metropolitan Housing Authority itself provides public housing to over 3100 low income residents of Lorain County in over 1400 housing units. These housing authorities would like to know whether the provision of public housing is a governmental function or a proprietary function under R.C. Chapter 2744 inasmuch as their potential liability for injuries, deaths, or loss is contingent upon this distinction. Up to now, the answer to that question depends on in which appellate district the housing authority resides.¹

The following courts have determined that the operation of a public housing authority to be a proprietary function under Chapter 2744:

- 1) Ninth District Court of Appeals:
Danielle Moore v. Lorain Metro. Hous. Auth. (September 28, 2007), 2007 - Ohio - 5111.
- 2) Second District Court of Appeals:
Parker v. Dayton Metro. Hous. Auth. (May 31, 1996), C.A. No. 15556.

The following courts have held it to be a governmental function under Chapter 2744:

- 1) Eighth District Court of Appeals:
Rhoades v. Cuyahoga Metro. Hous. Auth. (2005), 2005 - Ohio - 505.
McCloud v. Nimmer (1991), 72 Ohio App.3d 533.
- 2) Sixth District Court of Appeals:

¹A motion to certify a conflict was filed with the Ninth District Court of Appeals but has not yet been ruled upon.

Jones v. Lucas Metro. Hous. Auth. (Aug. 29, 1997), 6th Dist. No. L - 96 - 212.

- 3) Seventh District Court of Appeals:
Country Club Hills Homeowners Assn. v. Jefferson Metro. Hous. Auth. (1981), 5 Ohio App.3d 77, 78.

These conflicting opinions extend to this case as well: the Trial Court judge and the dissenting judge in the Court of Appeals believed the operation of a public housing authority is a governmental function; the majority opinion disagreed. Revised Code Chapter 2744 went into effect in 1985. After over two decades of jurisprudence, Ohio's judges are still in disagreement whether the operation of a PHA is a governmental or proprietary function under Chapter 2744. This Court is now in a position to resolve this controversial issue of widespread significance.

The second controversial holding of the Court of Appeals in the decision herein was its holding that liability will adhere under R.C. 2744.02(B)(5). This exception to immunity applies "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." The Court of Appeals erroneously held that R.C. 5321.01, et seq., which imposes duties on landlords in general, also imposes duties and civil liability on political subdivisions that violate a landlord's duties under 5321.04(A). R.C. 5321 does not mention political subdivisions and certainly does not expressly impose liability on them.

The Court of Appeals' decision on this issue – if it was applied generally – would completely eviscerate political subdivision immunity. From now on, any Ohio statute of general application that imposes liability on an entity or person for violating that statute will result in liability against a political subdivision even where said statute does not expressly impose liability against a political subdivision. Apparently, the Court of Appeals majority did

not realize the implication of their holding. Based on the foregoing, we ask the Court to accept jurisdiction of this case and resolve these far-reaching issues of importance.

STATEMENT OF THE CASE AND FACTS

This matter was filed in the Lorain County Court of Common Pleas on October 12, 2004. In the First Amended Complaint, Plaintiff-Appellee Danielle Moore, individually and as Administratrix of the Estates of D'Angelo Macarthy and Dezirae Macarthy and as the Parent and Next Friend of Jamar Moore and Delaini Macarthy, named as Defendants the Lorain Metropolitan Housing Authority ("LMHA") and Homer Virden, the Executive Director of LMHA. The Amended Complaint alleged that in October of 2003, Danielle Moore was a tenant at a public housing project known as "the Pagodas" located in Oberlin, Ohio. The Amended Complaint further alleged that Appellee Moore resided at the Pagodas with her two sons and two daughters pursuant to a lease agreement with LMHA.

On October 19, 2003, at approximately 10:00 p.m., a fire was started in the back bedroom of the residence by one of the children who had access to a lighter. The fire spread through the residence; as a tragic result, D'Angelo and Dezirae Macarthy died. Plaintiff-Appellee alleges that two weeks prior to this accident LMHA Maintenance personnel and an LMHA inspector removed the only hard-wired smoke detector in the dwelling. Both parties conducted extensive discovery and filed dispositive motions. On August 9, 2006, the Trial Court granted the Motion for Summary Judgment filed by Defendant-Appellant LMHA and then-defendant Homer Virden. The Trial Court denied a motion for summary judgment filed by Plaintiff-Appellee. The Trial Court ruled that LMHA was entitled to political subdivision

immunity pursuant to R.C. 2744.02(A)(1) inasmuch as the operation of a public housing authority is a governmental function and no exception to immunity exists under R.C. 2744.02(B)(1)-(5). Plaintiff-Appellee filed an appeal on August 17, 2006. After briefing and oral argument, the Ninth District Court of Appeals, in a split decision, ruled in favor of Plaintiff-Appellant Moore and reversed the Trial Court's decision as to the immunity of LMHA. The Court of Appeals ruled that the ownership and operation of a public housing facility is a proprietary function. This appeal followed.

PROPOSITION OF LAW NO. 1

Ownership and operation of a public housing facility is a governmental function under R.C. Chapter 2744.

If the operation of a public housing facility, e.g., the Pagoda units herein is deemed a "proprietary function" under Chapter 2744, then a lawsuit brought against an Ohio PHA will fall under R.C. 2744.02(B)(2), which is an exception to immunity for conduct by a political subdivision when it is carrying out a proprietary function. If, however, the operation of a PHA is deemed a "governmental function", then there is no exception to the immunity granted to political subdivisions under R.C. 2744.02(A)(1), and PHA's will not be liable for lawsuits involving the operation of public housing units in the same manner as private landlords.²

²This leaves open the question of other applicable exceptions, specifically the (B)(4) and (B)(5) exceptions, which will be addressed below.

Appellee is arguing that LMHA's provision of public housing is a "proprietary function". However, according to the definition section of R.C. 2744, it is a governmental function.

R.C. 2744.01(G)(1) states:

"Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

- (a) The function is not one described in division (C)(1)(a) or
- (b) of this section and is not one specified in division (C)(2) of this section;

In this case, the housing authorities' functions are specified under (C)(2), specifically 2744.01(C)(2)(w), which states that "governmental function" includes "a function that the general assembly mandates a political subdivision to perform."

Public housing authorities are creatures of statute mandated by the General Assembly "To clear, plan and rebuild slum areas...[and] to provide safe and sanitary housing accommodations to families of low income within that district..." R.C. 3735.31. Thus, by definition, when a housing authority created under Chapter 3735 provides public housing, it is engaging in an act mandated by the general assembly and therefore a governmental function.

The Court of Appeals incorrectly held that the function of a PHA is not mandated by the General Assembly but at the discretion of Ohio's Director of Development. This distinction misses the point. The Department of Development was created by the General Assembly R.C. 121.02(N). Its director is appointed by the governor with the advice and consent of the senate. R.C. 121.03. The General Assembly has mandated that said director shall create housing

authorities in areas that the director deems them necessary. R.C. 3735.27; see, also, R.C. 122.011.

If this state's highest developmental official orders the creation of housing authority in a particular community, that PHA is created. R.C. 3735.27(A). It is then mandated to carry out the functions listed in 3735.31, which are to provide public housing for low-income families and to "employ a police force to protect the lives and property of the residents of housing projects within the district..." R.C. 3735.31(B) and (D).

Thus, while the creation of a PHA is not mandated by the General Assembly, once the director of the state agency created by the General Assembly to make the decisions for it decides to create a PHA, then that PHA is thereafter mandated to carry out its statutory duties under R.C. 3735.31. The Court of Appeals misses the mark in asserting that "LMHA is not obligated to operate a public housing facility but rather, LMHA voluntarily maintains the facility." (Decision, ¶20). Although a PHA has discretion in what manner to carry out its mandated duties, its only purpose is "To clear, plan, and rebuild slum areas... [and] to provide safe and sanitary housing accommodations to families of low income..." R.C. 3735.31. If it does not "voluntarily" operate public housing, it would have no other function.

Moreover, R.C. 2744.01(C)(2)(q) states that "Urban renewal projects and the elimination of slum conditions" are governmental functions. R.C. 3735.31 clearly mirrors this function that PHA's shall "clear, plan and rebuild slum areas... [and] provide safe and sanitary housing to families of low income within that district."

Ohio courts have clearly recognized that the statutorily mandated provision of low income housing by public housing authorities is in fact a “governmental function”. In Rhoades v. Cuyahoga Metropolitan Housing Authority, 2005 WL 315422 (Eighth Appellate District, February 10, 2005), the Eighth District Court of Appeals not only found that a housing authority was a “political subdivision”, but also, that a housing authority’s provision of low income housing was a “governmental function”. Further, although the court did not have an immunity issue before it, the federal Northern District of Ohio recognized that metropolitan housing authorities are political subdivisions of the state which perform “governmental functions”:

Public corporations like the plaintiff CMHA are created for the sole purpose of carrying out their assigned public purposes. The plaintiff’s public purpose is to provide decent, safe and sanitary housing for persons of low income. (See Ohio Revised Code, §3735.31.)

* * *

In carrying forward with its statutorily imposed duties under state and federal law, CMHA must continue to pursue the development of low rent public housing projects within its jurisdictional area.

Cuyahoga Metrop. Housing Auth. v. City of Cleveland, 342 F.Supp.250, 263 (N.D. Ohio 1972).

Likewise in McCloud, et al. v. Nimmer, et al. (1991), 72 Ohio App.3d 533, the Eighth District Court of Appeals also recognized that a housing authority’s provision of low income housing, as mandated by statute, was a “governmental function”.

This finding that a housing authority serves a governmental function is not only mandated by the express terms of the statute but also quite logical. The political entity in question, LMHA, is established by the General Assembly to perform one function - to clean slum areas and provide public housing for low income citizens. This task is LMHA’s sole

reason for existence and cannot be compared, for example, to a municipality that, as simply one of its many functions, also operates a symphony orchestra or provides a hospital.

The idea that LMHA's reason to exist – to clear slums and to provide housing for low-income families – is proprietary because landlords also provide housing misses the point. Private businesses sell and rent property to whomever will pay the best price. They are trying to make a profit. A PHA, on the other hand provides rental property only to low-income families and subsidizes them. Most residents pay little or no rent; and some even receive subsidies to assist with utility payments. Do private businesses do this? PHA's provide public housing. Private landlords do not.

PROPOSITION OF LAW NO. 2

The exception to political subdivision immunity of R.C. 2744.02(B)(5) only applies where another section of the Ohio Revised Code expressly imposes civil liability upon a political subdivision.

The current version of R.C. 2744.02(B)(5) states:

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 of mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because that section provides for a criminal penalty, because of 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.

This exception to immunity only applies where another section of the Revised Code “expressly” imposes civil liability upon the political subdivision. The statute cites R.C. 2743.02 and 5591.37 of the Revised Code as examples. Both of these code sections impose duties on political subdivisions and expressly state that civil liability will adhere for the failure to perform said duties.

In the instant case, Appellee Moore does not cite any statute that imposes a duty or obligation upon LMHA and states civil liability will adhere for the failure to perform said duty or obligation. Accordingly, the (B)(5) exception does not apply.

In lieu of making a citation to a statute imposing civil liability on a political subdivision, Appellee merely cites to code sections that impose duties on landlords, not on political subdivisions. Clearly, this falls well short of the showing needed to implicate the (B)(5) exception. If we accept Appellee’s argument as the Court of Appeals did, then a political subdivision would be liable for statutory violations to the same extent as private entities. Obviously, this would go against the manifest intent of the (B)(5) exception specifically and Chapter 2744 generally.

Moreover, to accept this argument would ignore the rules of statutory construction. By citing examples of two statutes where “civil liability is expressly imposed upon the political subdivision”, under the principle of eiusdem generis, it is the manifest intent of the General Assembly that only statutes similar to 2743.02 and 5591.37 shall be construed as falling under the (B)(5) exception to immunity.

A comparison between the two example statutes and the code sections relied upon by Appellee Moore shows no similarities. R.C. 2743.02 and R.C. 5591.37 expressly reference

political subdivisions, expressly impose a duty upon them, and expressly impose civil liability for a failure to perform that duty. Appellee's statutes involve landlords and do not reference political subdivisions.

Based on the foregoing, it is clear that R.C. 2744.02(B)(5) is not an exception to immunity.

PROPOSITION OF LAW NO. 3

A residential unit of a public housing facility is not similar to an office building or courthouse and therefore the exception to immunity of R.C. 2744.02(B)(4) does not apply to injuries, death, or loss occurring on the grounds of said residential units.

It is the general rule that political subdivisions are immune from liability unless a case is brought under one of five exceptions. Assuming the exceptions of 2744.02(B)(2) and (B)(5) do not apply, the only other arguable exception is 2744.02(B)(4)³, which provides:

(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. (Emphasis added)

³The applicability of exception (B)(4) was extensively briefed below. The Trial Court found the exception did not apply, but the Court of Appeals did not address the issue. If this Court finds the exceptions at (B)(2) and (B)(5) inapplicable, it should review (B)(4) also.

The only possible exception to immunity in this case comes under R.C. 2744.02(B)(4), which permits a recovery for negligence if it is due to 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...” By citing examples of the types of buildings where liability may arise, the General Assembly has expressly clarified that not all governmentally owned property falls under the (B)(4) exception to immunity. Rather, buildings and grounds like office buildings and courthouses may give rise to liability, but other governmental property not of this type will not fall under (B)(4).

We must presume that the General Assembly knows and appreciates the rules of statutory construction when it drafts its legislation. Cf. Denlinger v. Lancaster, 1997 WL 674633, Ohio App.2 District. One of the fundamental rules of statutory construction is “expressio unius est exclusive alterius”, which means an “expression of one or more items of a class implies that those not identified are to be excluded.” Rajeh v. Steel City Corp. (2004), 157 Ohio App.3d 722, 728. In other words, if the General Assembly wanted to include all governmental property it would not have listed examples of the types of governmental property where liability may adhere. By listing examples, the above rule perforce comes into play.

Thus, only governmental property with similar characteristics to office buildings and courthouses falls within (B)(4). What are the basic characteristics of governmental office buildings and courthouses? The public frequents such places; the political subdivision controls them on a daily basis; public business is transacted in such places. Schools, libraries, and stadiums share many of these same characteristics.

There are other governmentally owned properties that do not share these characteristics, e.g., warehouses where governmental equipment is stored. More germane to this case, the pagoda, separate site units where the accident herein occurred is not similar to an office building or courthouse.

The units herein are property owned by LMHA. But, they have a nonpossessory interest. Hendrix v. Eighth and Walnut Corp. (1982), 1 Ohio St.3d 205, 207, citing Pitts v. Housing Authority (1953), 160 Ohio St.129. They are limited to conducting inspections upon 24-hour notice and receiving a possessory interest only upon termination of the lease. Hendrix at citing Cooper v. Rose (1949), 15 Ohio St.316. The tenant has possessory interest and controls the premises on a day-to-day basis.

Moreover, unlike office buildings and courthouses, no public business is conducted at these residential units. And the public cannot enter upon these places any more than upon any privately owned home. Manifestly, the residential units herein are not like office buildings, courthouses, or similar governmental properties and, therefore, according to the rules of statutory construction, are not part of the (B)(4) exception to immunity. This Court came to the same conclusion regarding an indoor pool in Cater v. City of Cleveland (1998), 83 Ohio St.3d 24, 31-32.

This was the finding of the appellate court in McCloud v. Nimmer in which it held as follows:

Therefore, we must interpret “buildings that are used in connection with the performance of a governmental function” as limited to the class similar to office buildings and courthouses. Office buildings and courthouses are buildings in which the business of government is conducted and which are open to the

public. They are not similar in kind to a private residence subsidized by the government.

McCloud v. Nimmer (1991), 72 Ohio App.3d 533, 539. See also, Hackathorn, Ex. rel. v. Springfield Local District Board of Education (1994), 94 Ohio App.3d 319 (a private residence is unlike the excluded class of buildings, office buildings and courthouses which are open to the public and such a residence is not similar to those buildings and therefore does not fall within the exception to immunity found in O.R.C. 2744.02(B)(4).)

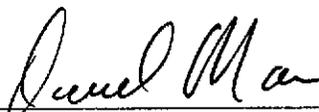
CONCLUSION

Based on the foregoing, we ask the Court to accept jurisdiction of this case and review these issues of public and great general interest.

Respectfully submitted,

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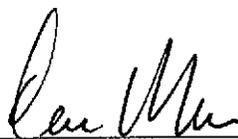
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum in Support has been furnished via regular U.S. mail this 9th day of November, 2007 to:

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Daniel D. Mason

STATE OF OHIO

LORAIN COUNTY

IN THE COURT OF APPEALS

)ss:

NINTH JUDICIAL DISTRICT

COUNTY OF LORAIN SEP 28 P 2:45

CLERK OF COMMON PLEAS

DANIELLE MOORE RON WABAKOWSKI

C. A. No. 06CA008995

Appellant

v.

LORAIN METROPOLITAN HOUSING AUTHORITY, et al.

Appellees

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 04 CV 139881

DECISION AND JOURNAL ENTRY

Dated: September 28, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Judge.

{¶1} Appellant, Danielle Moore, appeals from the judgment of the Lorain County Court of Common Pleas granting summary judgment in favor of Appellees, Lorain Metropolitan Housing Authority, et al. This Court reverses.

I.

{¶2} On October 19, 2003, Appellant and her four children were residing in an apartment owned and operated by Lorain Metropolitan Housing Authority, et al. ("LMHA"), located at 106 South Park Street, Oberlin, Ohio ("the apartment").

After putting her children to bed, Appellant left the apartment to run some errands. Appellant's former boyfriend, Derek Macarthy, remained at the apartment to watch the children while she was away. During this time, one of her children started a fire in one of the bedrooms. Mr. Macarthy helped two of the children escape the flames. Tragically, Appellant's other two children, Dezirae Anna Nicole Macarthy and D'Angelo Anthony Marquez Macarthy, did not survive.

{¶3} On August 17, 2004, Appellant filed a complaint against LMHA, LMHA's Executive Director, Homer Verdin, and John Does, alleging the wrongful death of her two minor children. More specifically, Appellant alleged that LMHA was negligent in removing the only working smoke detector from the apartment without replacing it with a functional smoke detector. Appellant alleged that because LMHA failed to provide a functional smoke detector, Mr. Macarthy was not awakened in time to rescue Dezirae and D'Angelo. On August 8, 2006, the trial court granted summary judgment in favor of LMHA. Appellant timely appealed the trial court's order, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT IMPROPERLY APPLIED THE REVISED CODE §2744 ANALYSIS."

{¶4} In her first assignment of error, Appellant contends that the trial court improperly applied R.C. 2744 to the within matter. We agree.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} Pursuant to Civil Rule 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶7} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶8} In determining whether a political subdivision is immune from liability, this Court must engage in a three-tier analysis. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28. The first tier is the premise under R.C. 2744.02(A)(1) that:

“[e]xcept 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.”

{¶9} The second tier involves the five exceptions set forth in R.C. 2744.02(B), any of which may abrogate the general immunity delineated in R.C. 2744.02(A)(1). *Cater*, 83 Ohio St.3d at 28. Lastly, under the third tier, “immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies.” *Id.*

Proprietary or Governmental Function

{¶10} In its decision granting summary judgment in favor of LMHA, the trial court held that “the provision of low-income housing is a governmental function[.]” The trial court cited no case law in support of this conclusion. Upon review of relevant Ohio case law, we find conflicting decisions regarding whether the operation of a public housing project is a governmental function. We begin our analysis by examining the definitional provisions of governmental and proprietary functions set forth in R.C. 2744.01. R.C. 2744.01(C)(1) states:

“‘Governmental function’ means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any 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.”

{¶11} Ownership and operation of a public housing facility is not specifically identified in R.C. 2744.01(C)(2). However, R.C. 2744.01(C)(2)(q) lists “[u]rban renewal projects and the elimination of slum conditions” as governmental functions. Notably, R.C. 2744.01(C)(2) does not provide an exhaustive list of governmental functions.

{¶12} Proprietary functions of political subdivisions are defined in R.C. 2744.01(G)(1) as

“a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

“(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

“(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.”

Ownership and operation of a public housing facility is not identified in R.C. 2744.01(G)(2). However, as with R.C. 2744.01(C)(2), the list of proprietary functions is not limited to functions identified under R.C. 2744.01(G)(2).

{¶13} LMHA relies on *Rhoades v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. No. 84439, 2005-Ohio-505, and *McCloud v. Nimmer* (1991), 72 Ohio App.3d 533, to support its contention that the provision and maintenance of public housing is a governmental function. *Rhoades* involved a suit brought by a resident of a public housing facility, Maurice Rhoades, against the housing authority. In his suit, Rhoades filed several claims including defamation, employment discrimination and a 42 U.S.C. 1983 action arising out of his arrest for menacing the housing authority's staff. On appeal, the Eighth District Court of Appeals affirmed the trial court's decision that the housing authority was entitled to immunity. The *Rhoades* court held that the provision of public housing is a governmental function and that none of the exceptions listed under R.C. 2744.02(B)(1) applied.

{¶14} *McCloud* involved an action commenced by a shooting victim against, among others, Eric Nimmer, a Cleveland police officer, and the City of Cleveland for negligence in its training of police officers. *McCloud* was accidentally shot by Nimmer while Nimmer was visiting him at his home, a metropolitan housing unit. The trial court granted summary judgment in favor of Nimmer and Cleveland. On appeal, *McCloud* argued that Cleveland should be held liable for Nimmer's actions because he was shot while at his residence, a unit

of the Cleveland Metropolitan Housing Authority. *McCloud*, 72 Ohio App.3d at 538. Without citation to authority, *McCloud* asserted that the housing unit is used in connection with the performance of the governmental function of providing housing to the indigent and that, therefore, liability should be imposed under R.C. 2744.02(B). *Id.* at 538-39. R.C. 2744.02(B)(4) imposes liability on political subdivisions for injury “caused by the negligence of their employees and that occurs 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[.]” The *McCloud* court found the R.C. 2744.02(B)(4) exception inapplicable, concluding that the city was immune from liability because a government housing unit does not constitute a building used in connection with the performance of a government function. *Id.* at 539.

{¶15} The only analysis the Eighth District undertook in *McCloud* with regard to governmental versus proprietary functions was its discussion of the city’s act of training police officers. *Id.* at 536-38. The *McCloud* court concluded that the city’s act of training police officers constituted a governmental function because police services are specifically defined as a governmental function under R.C. 2744.01(C)(2)(a). *Id.* at 538.

{¶16} Appellant relies on the Second District Court of Appeals’ decision in *Parker v. Dayton Metro. Hous. Auth.* (May 31, 1996), 2d Dist. No. 15556, to support her assertion that the provision of public housing is a proprietary function.

Parker involved an appeal from a grant of summary judgment in favor of a public housing authority in an action brought by one of its tenants for injuries suffered by her minor child when he fell from an open window in her apartment. Parker filed claims for negligence, recklessness and willful and wanton misconduct of the housing authority for its failure to make repairs on or alterations to the window from which her son fell. Parker alleged that the housing authority knew the window was in need of repair and was accessible to small children.

{¶17} The trial court found that the operation of a public housing facility is a governmental function for which the housing authority could not be held liable under R.C. 2744.02(B)(4). The Second District Court of Appeals carefully analyzed the definitions of governmental and proprietary functions and classified ownership and operation of a public housing authority as a proprietary function. *Id.* at *3. The *Parker* court noted that in *McCloud* the plaintiffs argued that “the activity of the public housing authority which gave rise to their claims for relief is governmental, without supporting authority or analysis.” (Emphasis omitted.) *Id.* at *2. In reaching its decision to the contrary, the *Parker* court applied the definition of “governmental function” set forth in R.C. 2744.01(C)(1), analyzing each element of the definition as follows:

“Maintenance of a public housing facility is voluntary but it is not a function that is imposed on the state as an obligation of sovereignty. Its benefits are conferred only on the limited part of the population that uses it. The activity promotes the public peace, health, safety, and welfare; however, it is a function which involves activities that are customarily engaged in by nongovernmental persons, in this

instance private landlords who rent residential premises to tenants.”
 Id.

However, the *Parker* court ultimately affirmed summary judgment, finding that the housing authority had discretion to forego installation of window screens and could not be held liable for this discretionary decision.

{¶18} Subsequently, the Sixth District Court of Appeals examined this issue in *Jones v. Lucas Metro. Hous. Auth.* (Aug. 29, 1997), 6th Dist. No. L-96-212. *Jones* involved a complaint brought by tenants of a subsidized housing complex who were burglarized shortly after asking the housing authority to change the locks on their apartment. The Sixth District, relying on *Country Club Hills Homeowners Assn. v. Jefferson Metro. Hous. Auth.* (1981), 5 Ohio App.3d 77, 78, in which the Seventh District stated that ““a metropolitan housing authority is a political subdivision of the State of Ohio which by delegation performs state functions which are governmental in character[,]”” held that the housing authority’s operation of the housing unit is a governmental function. *Jones*, at *4. However, Judge Sherck wrote a concurrence in which he agreed with the Second District’s decision in *Parker*, stating:

“LMHA is a landlord. As such, it is involved in an activity which is customarily engaged in by nongovernmental persons. Moreover, even though LMHA may be a governmental entity, being a landlord is not one of the statutorily defined governmental functions. Consequently, I agree with the opinion of the Second District Court of Appeals which held that, ‘* * * ownership of and operation of a residential public housing facility is not a governmental activity but a proprietary function * * *’ subject to the same liability for civil

wrongs as any other landlord.” *Id.*, at *6 (Sherck, J. concurring), quoting *Parker*, *supra*.

{¶19} LMHA contends that public housing facilities are mandated by the General Assembly. However, R.C. 3735.27, which governs the creation of a housing authority, establishes that the decision to create a housing authority is discretionary:

“(A) *Whenever the director of development has determined that there is need for a housing authority in any portion of any county that comprises two or more political subdivisions or portions of two or more political subdivisions but is less than all the territory within the county, a metropolitan housing authority shall be declared to exist, and the territorial limits of the authority shall be defined, by a letter from the director. The director shall issue a determination from the department of development declaring that there is need for a housing authority within those territorial limits after finding either of the following[.]*” (Emphasis added.)

{¶20} The statute cited by LMHA, R.C. 3735.31, provides the powers of metropolitan housing authorities; it does not mandate the creation of a housing authority. LMHA is not obligated to operate a public housing facility but rather, LMHA voluntarily maintains the facility. R.C. 2744.01(C)(1)(a). The provision of public housing is a function that “promotes or preserves the public peace, health, safety, or welfare[.]” R.C. 2744.01(G)(1)(b). The housing facility provides a benefit to a limited portion of the population. R.C. 2744.01(C)(1)(b). Most notably, the service provided by LMHA is a service customarily engaged in by nongovernmental persons, i.e. landlords. R.C. 2744.01(C)(1)(c) and (G)(1)(b). Like tenants in a private rental relationship with a private landlord, Appellant

signed a lease agreement with LMHA. R.C. 2744.01(G)(1)(b). The agreement contained the same types of terms as those contained in private lease agreements including a lease term, Appellant's obligations with regard to utilities, occupancy terms, and LMHA's obligations with regard to the apartment. *Id.*

{¶21} We are also persuaded by the Second District Court of Appeals decision in *Parker*. In contrast to the *Parker* decision, the *McCloud* and *Rhoades* courts did not rely on the definitions set forth in R.C. 2744.01(C)(1) and (G)(1) to make their determinations. Although operation of a housing authority is not specifically identified in 2744.01(C)(2) or R.C. 2744.01(G)(2), under our analysis of the criteria set forth in R.C. 2744.01(C)(1) and (G)(1) and pertinent case law, we find that ownership and operation of a public housing facility is a proprietary function.

R.C. 2744.02(B)(5) Exception to Political Subdivision Immunity

{¶22} Appellant argues that the only exception to political subdivision immunity applicable in this case arises out of R.C. 2744.02(B)(5), which states that political subdivisions are liable for injury or death

“(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.”

{¶23} Appellant contends that LMHA was her landlord and as such, it was subject to the requirements set forth in R.C. 5321.04(A)(4), the Ohio Landlord/Tenant Act, and R.C. 3735.40, which sets forth definitions regarding housing projects. R.C. 5321.04(A)(4) enumerates the statutory obligations for a landlord and mandates that a landlord “[m]aintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him[.]” Appellant also contends that LMHA is subject to the requirements set forth in O.A.C. 4101:2-89-04, which requires smoke detectors within private areas.

{¶24} This Court has implicitly found R.C. 5321.04 applicable to housing authorities. See *Robinson v. Akron Metro. Hous. Auth.* (Aug. 1, 2001), 9th Dist. No. 20405, and *Wayne Metro. Hous. Auth.* (Oct. 12, 1988), 9th Dist. Nos. 2369, 2403. In *Robinson*, this Court examined whether R.C. 5321.04 requires that a landlord receive notice of a defective condition in order to be liable. As in this case, the landlord in *Robinson* was a metropolitan housing authority. We found that R.C. 5321.04 requires such notice to impose liability on a landlord. *Robinson*, at *4.

{¶25} R.C. 5321.04(A)(1) requires a landlord to comply with the requirements of all applicable housing, building, health and safety codes. O.A.C.

4101:2-89-04 states that smoke detectors are required within private areas. O.A.C. 4101:2-89-04(A) provides, in part, that “[e]ach dwelling unit, apartment, and condominium unit shall have at least one smoke detector installed in the immediate vicinity but outside of all sleeping rooms.” While the decision to create a housing authority is discretionary, if a governmental entity chooses to create a housing authority, the entity is bound by the requirements of all applicable housing, building, health and safety codes. R.C. 5321.04(A)(1).

{¶26} Homer Verdin, Executive Director of LMHA, testified that a smoke detector was installed in the apartment on October 22, 1998. Mr. Verdin testified that LMHA is required to meet building codes, housing codes and HUD regulations. Mr. Verdin agreed that LMHA is required by state and federal law to provide smoke detectors. He explained that LMHA is obligated to make sure there is an operable smoke detector present. Mr. Verdin stated that LMHA contracted with The Inspection Group, a private company, who performed the required HUD inspections for them.

{¶27} Mr. Verdin testified that LMHA protocols for work orders in LMHA housing units required residents or maintenance personnel to call the work order center in order to have work performed. Mr. Verdin acknowledged, however, that situations arise wherein maintenance work is performed without a work order.

{¶28} Michael Burnley, a maintenance worker for LMHA, also provided deposition testimony. Mr. Burnley also agreed that he occasionally performed

work without a work order. Mr. Burnley testified that he accompanied The Inspection Group employee when he conducted the yearly HUD safety inspections at the Oberlin housing facility in October of 2003. The inspection of the apartment was conducted on October 6, 2003 and The Inspection Group generated a report regarding this inspection on October 8, 2003. Mr. Burnley testified that he remembered testing the smoke detector in the apartment and that it worked. He did not recall having any conversations with Appellant regarding the smoke detector not working. He also conducted a follow-up inspection of the apartment. Mr. Burnley could not recall all the work he did during the follow-up inspection and had not seen a document that identified the work he performed during the follow-up inspection.

{¶29} Appellant testified that on the day of the fire, there was no smoke detector present in the apartment. Specifically, Appellant testified as follows:

“Q: When did they take it out?

“A: It was on a Saturday, on Sweetest Day, which would make it the 17th.

“***

“Q: Who took it out?

“A: Mike [Burnley] came in with a man. And *** he *** asked about things that were needed to be done in the house. And the first thing I mentioned was about the smoke detector. And the guy checked it, and then he asked Mike if he had one out on the truck. Mike went outside and looked on the truck and said he didn't have one. And then the guy said that he will replace it later.

“Q: And again under oath, your testimony is that this was done on October 17, 2005, is that correct, Sweetest Day, I thought that’s what you said?”

“A: October 17th of 2003.

“Q: 2003. I’m sorry.”

Appellant later testified that no one ever replaced the smoke detector.

{¶30} Derrick Macarthy also testified. Mr. Macarthy testified that on the night of October 17, 2003, he relaxed on the couch while Appellant ran errands. He testified that all the children were in bed at this time. He testified that he had not consumed any alcoholic beverages nor taken any drugs on October 17, 2003. Mr. Macarthy eventually fell asleep. Mr. Macarthy testified that he was awakened by the fire. Upon seeing the fire, he grabbed his two oldest children, who were standing by the couch, and took them to the neighbor’s house. He testified that he “tried to go back in the house, the flames were right there behind the door that [he] just came out of.” Mr. Macarthy testified that he is certain that he did not hear a smoke alarm.

{¶31} All the firefighters that testified stated that they did not hear a smoke alarm at any time during their fire suppression efforts. Steven John Chapman, an Oberlin fireman who responded to the fire, testified that he did not hear a smoke alarm when he entered the apartment. He testified that there have been other times that he has responded to house fires where he heard the smoke alarm upon entering the home. Benedict John Ryba, another Oberlin fireman that responded to

the scene, testified that he did not hear a smoke alarm. Like Mr. Chapman, he also testified that he has heard smoke alarms when responding to other house fires.

{¶32} Dennis Kirin, Oberlin Fire Chief, similarly testified that he did not hear a smoke alarm when he entered the apartment. He also stated that he recalled other instances where he heard smoke alarms during his fire suppression efforts. Mr. Kirin testified that during his inspection of the apartment after the fire, he found some plastic debris on the floor that could possibly have been the smoke detector. However, because of the significant fire damage, he could not confirm that it was actually a piece of the smoke detector. He did not find anything during his investigation that “resembled any remnants of the mechanical or electronic portion of what might be considered a detector.” Mr. Kirin also stated that he located the carbon monoxide detector and that it was fully intact. Mr. Kirin testified that in the investigation report, he indicated that he could not determine whether there had been a smoke detector at the apartment. He explained that “after we did the investigation of the interior and we did as much debris searching and removal that we could, we could not ascertain positively that there was a smoke detector in the debris.”

{¶33} Viewing the testimony in the light most favorable to Appellant, the nonmoving party, we find that Appellant met her reciprocal burden by offering specific evidence to demonstrate a genuine issue of material fact as to whether LMHA complied with statutory requirements that it provide a working smoke

detector. *Dresher*, 75 Ohio St.3d at 292-93; *Henkle*, 75 Ohio App.3d at 735. There is conflicting testimony regarding whether the smoke detector was removed and/or replaced. No one testified that he heard a smoke alarm either during the fire or during the suppression efforts. Furthermore, no one who inspected the apartment after the fire could definitively determine whether there was a smoke detector in the apartment at the time of the fire. This is a matter for resolution by the finder of fact. Accordingly, Appellant's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN ITS DETERMINATION OF FACTS, RELYING UPON THE CREDIBILITY OF WITNESSES, HEARSAY AND EVIDENCE WHICH WAS IMPROPER PURSUANT TO RULE 56(C) OF THE OHIO RULES OF CIVIL PROCEDURE."

{¶34} In light of our disposition of Appellant's first assignment of error, Appellant's second assignment of error is rendered moot.

III.

{¶35} Appellant's first assignment of error is sustained. Appellant's second assignment of error is moot. The judgment of the Lorain County Court of Common Pleas is reversed and the cause remanded for further proceedings.

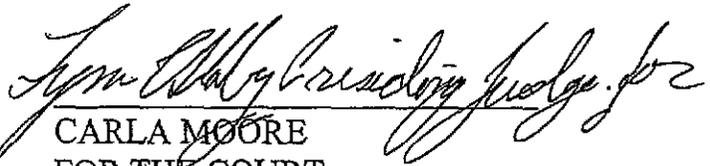
Judgment reversed
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.


 CARLA MOORE
 FOR THE COURT

WHITMORE, J.
CONCURS

SLABY, P. J.
DISSENTS SAYING:

{¶36} I respectfully dissent. I believe that the operation of the Lorain Metropolitan Housing Authority is clearly a governmental function. It is created by the legislative branch of the government. It only exists because of the government's declaration that it may exist. It is operated by a political subdivision

if the subdivision chooses to operate it on a voluntary basis, pursuant to legislative requirements. It functions to promote health, safety, and welfare of its citizens. Because it exists, it functions for the common good of all citizens by providing housing for those that would otherwise be living on the streets.

{¶37} Therefore, I would affirm the trial court's decision finding the Lorain Metropolitan Housing Authority to be protected by governmental immunity.

APPEARANCES:

GREGORY A. BECK and MEL L. LUTE, JR., Attorneys at Law, for Appellant.

TERRANCE P. GRAVENS, Attorney at Law, for Appellees.