

IN THE SUPREME COURT OF OHIO

DANIELLE MOORE, *et al.*,

Plaintiffs-Appellees,

-vs-

LORAIN METROPOLITAN HOUSING
AUTHORITY, *et al.*,

Defendant-Appellant.

CASE NOS. 2007-2106
2008-0030

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

Court of Appeals
Case No. 06CA008995

**MERIT BRIEF OF APPELLANT
LORAIN METROPOLITAN HOUSING AUTHORITY**

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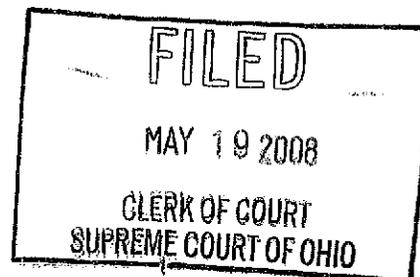


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STATEMENT OF FACTS

PROCEDURAL 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 alleged 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). Although LMHA moved for summary judgment on the merits of this matter, the Trial Court limited its ruling to the statutory immunity issues.

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.

The Court of Appeals certified that a conflict existed between the appellate districts as to whether a public housing authority is a proprietary or a governmental function. This Court accepted this case for discretionary review and as one involving a certified conflict. Both matters were consolidated for unified briefing.

FACTS OF RECORD

LMHA is a governmental housing authority created for the purpose of providing housing to low income citizens who would otherwise not be able to find suitable housing. In the present matter, LMHA provided Appellee Moore with subsidized housing, wherein she lived for several years. (Trial Court Journal Entry, Finding of Fact No. 1) At the time of the fire, Appellee Moore resided at a one-floor, four-bedroom Pagoda, after having received a requested transfer from a smaller Pagoda home in the same town of Oberlin, Ohio. (*Id.*) Appellee Moore lived at the Pagoda with her four children. (*Id.*) Her boyfriend, Derrick Macarthy, who had been removed from the lease at her request, frequently stayed there. (*Id. at* No. 4,5) The record is clear that throughout her residence in subsidized housing, Appellee Moore entered into leases with LMHA, which clearly set forth LMHA's duties, as well as those

of the tenant. (*Id. at No. 1*) Further, Appellee Moore read the terms of the leases and attended the orientation sessions that explained the terms of the leases and LMHA rules. (*Id.*)

On the evening of the fire Appellee Moore left her minor children with Derrick Macarthy while she ran an errand and visited with friends. (*Id. at No. 7*) During that time Derrick Macarthy dozed off; he admitted that he never checked on the children. (*Id. at No. 9*) In the absence of any supervision, four year old D'Angelo Macarthy lit fires in multiple areas of the residence and the undisputed evidence is that the cause and origin of the fire was the "unattended" four year old, as noted in the Fire Department Report. (*Id. at No. 10*) Further, Derrick Macarthy remained asleep until awoken by minor child Jamar Moore after multiple fires had been ignited. (*Id. at No. 11*)

The evidentiary record in this case is undisputed that LMHA provided a functional smoke detector to Appellee Moore's residence and that during the annual H.U.D. inspection less than two weeks before the fire, it was noted there was a working smoke detector at the residence. (Trial Court Journal Entry *at No. 22*) Although Appellee Moore alleged in her Complaint that the smoke detector had been removed from the residence, nothing was ever mentioned to any of the investigating authorities regarding the absence of a smoke detector until long after the fire and indeed after Appellee Moore received the fire department report. (*Id. at No. 14, 24*) The evidentiary record undisputedly demonstrates that it remained the policy of LMHA to provide smoke detectors at the residential units and that LMHA complied with all procedures for providing detectors and conducting annual H.U.D. inspections, as well as regular housing manager inspections. (*Id. at 20, 21*) Finally, LMHA's lease required Appellee Moore to test the smoke detector and report any problems, which she failed to do. (*Id. at No. 20*)

ARGUMENT

CERTIFIED CONFLICT QUESTION

Whether operation of a public housing authority is a proprietary or a governmental function?¹

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”, and if there is no other exceptions to the immunity granted to political subdivisions under R.C. 2744.02(A)(1), then PHA’s will not be liable for lawsuits involving the operation of public housing units in the same manner as private landlords.²

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:

¹The argument regarding the certified question will be contained within the argument related to Proposition of Law No. 1.

²The “other exceptions”, specifically the (B)(4) and (B)(5) exceptions, will be addressed below.

(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)(x), 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 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-Ohio-505, 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; 595 N.E. 2d 492, 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.

Should the Court find that the operation of a public housing authority is a governmental function, then we must analyze whether there are any other exceptions to immunity. Chapter 2744 involves a three-tiered analysis. *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St. 3d 551, 556-557, 2000-Ohio-486, 773 N.E. 2d 1141. If we determine that immunity applies under R.C. 2744.02(A)(1), we then must determine if an exception to immunity applies under 2744.02(B)(1)-(5); *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 270, 2007-Ohio-1946, 865 N.E. 2d 9. In the courts below, Plaintiffs relied on the proprietary exception of (B)(2), discussed above, and the exception to immunity found at 2744.02(B)(5).

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 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)

R.C. 2744.02(B)(4) 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

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.

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*, (Oct. 31, 1997) Clark App. No. 96 CA 87, unreported. 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.*, 157 Ohio App.3d 722, 728, 2004-Ohio-3211, 813 N.E. 2d 697. 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, 438 N.E. 2d 1149, citing *Pitts v. Cincinnati Metro. Hous. Auth.* (1953), 160 Ohio St.129, 113 N.E. 2d 869. They are limited to conducting inspections upon 24-hour notice and receiving a possessory interest only upon termination of the lease. *Hendrix* at 207, citing *Cooper v. Roose* (1949), 15 Ohio St. 316, 85 N.E. 2d 545. 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, 697 N.E. 2d 610.

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, 595 N.E. 2d 492. See also, *Hackathorn, Ex. rel. v. Springfield Local District Board of Education* (1994), 94 Ohio App.3d 319, 640 N.E. 2d 882, (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).)

There is further authority for this result. The Tenth District Court of Appeals addressed a similar situation where a statute employed specific examples of “recreational pursuits” but added the “catch all” phrase “or engage in other recreational pursuits.” *Sells v. Ohio Historical Center*, (Nov. 30, 1982), Franklin App. No. 82-AP-508, unreported. The court explained that, by listing examples, the “catch all” phrase was being modified to include only those types of recreational pursuits of a similar nature, and not all recreational pursuits. In the instant case, similarly, specific examples are cited followed by a more general “but not limited to” language. Accordingly, only governmental property like office buildings and courthouses are subject to the (B)(4) exception to the general law of immunity.

The court held:

The trial court’s decision turned on whether plaintiff was a “recreational user” as that term is used in R.C. 1533.18 and 1533.181, which grant to the owner, lessee, or occupant of land certain immunities from liability to persons injured while on the land:

“1533.18 Definitions.

“As used in sections 1533.18 and 1533.181 of the Revised Code:

* * *

“(B) ‘Recreational user’ means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency thereof, to enter upon

premises to hunt, fish, trap, camp, hike, swim, or engage in other recreational pursuits.”

* * *

Since plaintiff had not entered the Center to hunt, fish, trap, camp, hike, or swim, she must have entered to “engage in other recreational pursuits” if she is to be regarded as a recreational user. Because the parties are unable to point to anything in the legislative history of the statutes which gives a clear indication of the scope of meaning intended by the General Assembly when it included the phrase “or engage in other recreational pursuits”, we must turn to general rules of statutory construction for guidance.

This appears to be a classic instance for application of the doctrine of ejusdem generis as an aid to ascertaining the intent of the General Assembly.

“Under the rule of ejusdem generis, where in a statute terms are first used which are confined to a particular class of objects having well known and definite features and characteristics, and then afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms.” [State v. Aspell (1967), 10 Ohio St.2d 1, second syllabus.]

Thus, in the absence of a clear legislative manifestation to the contrary, where the statute enumerates specific subjects or things of a similar nature, kind, or class, followed by general words prefaced by “or other”, the meaning of the general words ordinarily will be construed as restricted by the specific designations and as including only things of the same nature, kind, or class as those specifically enumerated. See, *The Glidden Co. v. Glander* (1949), 151 Ohio St.344; *Rarey v. Schmidt* (1926), 115 Ohio St.518; *Shultz v. Cambridge* (1883), 38 Ohio St.659.

* * *

Accordingly, we are of the opinion that the General Assembly intended that the doctrine of ejusdem generis should apply to the interpretation of the words “or engage in other recreational pursuits”; had it not been so intended, it would have been a simple matter for the General Assembly to omit the enumeration of

specifics and to, instead, utilize only the compendious term “any recreational pursuit”. Applying the doctrine, we conclude that plaintiff was not a recreational user within the contemplation of R.C. 1533.18 and 1533.181, and that the trial court therefore erred in granting summary judgment to defendant solely on the basis that plaintiff was a recreational user. The first assignment of error is sustained.

Id. at pp. 1-3.

Likewise, in the instant case, if the (B)(4) exception applied to all governmental property, the General Assembly would not have included examples of governmental property to which it does apply. The examples must be there for a reason. Otherwise, the examples are mere excess verbiage. And it is a well-established rule of statutory construction that all portions of an enactment be given meaning and effect. *East Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299, 530 N.E. 2d 875. Under the doctrine of eiusdem generis, only governmental property similar to office buildings or courthouses fall within (B)(4) and permit a finding of liability. As shown above, a residential dwelling is not like an office building or courthouse, and therefore, the (B)(4) exception to immunity is not applicable. Thus, the general rule of immunity of 2744.02(A)(1) prevails.

The paramount consideration in construing statutory language is legislative intent. *State ex rel. Phelps v. Columbiana Cty. Commrs.* (1998), 125 Ohio App.3d 414, 419, 708 N.E. 2d 784. In the event that a statute is found to be subject to various interpretations, a reviewing court may implement the rules of statutory construction and interpretation to arrive at the intent of the legislature. *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 96, 573 N.E. 2d 77.

The April 2003 amendment to 2744.02(B)(4) added language limiting causes of action to premises defects under the (B)(4) exception, whereas liability before the amendment was for any

negligence claim. See, e.g., *Hubbard v. Canton City School Bd. of Edu.* 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543. It is therefore the manifest intent of the legislature to limit political subdivision liability, not to expand it.

This Court should apply the rules of statutory construction and further the ends of legislative intent by holding that the (B)(4) exception applies to office buildings, courthouses, and the like, and not to residential dwellings.

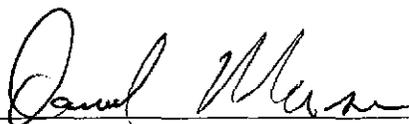
CONCLUSION

Based on the foregoing, we ask the Court to rule that the operation of a public housing authority is a governmental function under R.C. 2744.01 and that none of the exceptions to immunity found at R.C. 2744.02(B)(1)-(5) apply to the circumstances of this case. We ask this Court to reverse the appellate court's decision herein and reinstate the decision of the trial court granting summary judgment.

Respectfully submitted,

STUMPHAUZER, O'TOOLE, McLAUGHLIN,
McGLAMERY & LOUGHMAN CO., L.P.A.

By:



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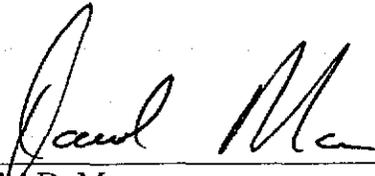
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Merit Brief of

Appellant has been furnished via regular U.S. mail this 16th day of May, 2008 to:

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Daniel D. Mason
Attorney for Appellant

APPENDIX

IN THE SUPREME COURT OF OHIO

07-2106

Daniel Moore,

Plaintiff-Appellee,

v.

Lorain Metropolitan Housing Authority, et al.,

Defendant-Appellant.

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

Court of Appeals Case No. 06CA008995

NOTICE OF APPEAL OF APPELLANT LORAIN METROPOLITAN HOUSING AUTHORITY

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FILED NOV 13 2007 CLERK OF COURT SUPREME COURT

APPENDIX A Pages 1-2 ALL-STATE LEGAL

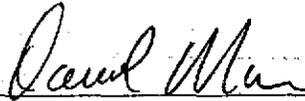
Notice of Appeal of Appellant
Lorain Metropolitan Housing Authority

Appellant Lorain Metropolitan Housing Authority Virden hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District, entered in Court of Appeals case no.06CA008995 on September 28, 2007, reversing the judgment of the Lorain County Court of Common Pleas.

This case is one of public or great general interest.

Respectfully submitted,

Daniel D. Mason, Counsel of Record



Daniel D. Mason
COUNSEL FOR APPELLANT,
LORAIN METROPOLITAN HOUSING
AUTHORITY

Certificate of Service

I certify that a copy of the Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Gregory A. Beck and Mel L. Lute, Jr., Baker, Dublikar, Beck, Wiley & Mathews, 400 S. Main Street, North Canton, OH 44720 on November 9, 2007.



Daniel D. Mason
COUNSEL FOR APPELLANT,
LORAIN METROPOLITAN HOUSING
AUTHORITY

IN THE SUPREME COURT OF OHIO

Danielle Moore, :
 : 08-0030
 :
 Plaintiff-Appellee, : On Appeal from the Lorain
 : County Court of Appeals,
 v. : Ninth Appellate District
 :
 Lorain Metropolitan Housing :
 Authority, et al., : Court of Appeals
 : Case No. 06CA008995
 :
 Defendant-Appellant. :
 :

NOTICE OF CERTIFIED CONFLICT
OF APPELLANT LORAIN METROPOLITAN HOUSING AUTHORITY

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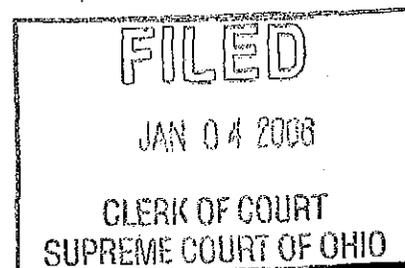
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Attorneys for Appellant



Notice of Certified Conflict of Appellant
Lorain Metropolitan Housing Authority

Appellant Lorain Metropolitan Housing Authority hereby gives notice of filing a notice of certified conflict to the Supreme Court of Ohio.

The Court of Appeals order certifying a conflict is attached hereto as attachment "A". Copies of the conflicting court of appeals opinions for finding the operation of a public housing authority to be a proprietary function are attached as attachment "B" and copies of the conflicting court of appeals opinions finding the operation of a public housing authority to be a governmental function are attached as attachment "C".

A Discretionary Appeal is pending with this Court; Case No. 2007-2106.

Respectfully submitted,

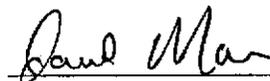
Daniel D. Mason, Counsel of Record



Daniel D. Mason
COUNSEL FOR APPELLANT,
LORAIN METROPOLITAN HOUSING
AUTHORITY

Certificate of Service

I certify that a copy of the Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Gregory A. Beck and Mel L. Lute, Jr., Baker, Dublikar, Beck, Wiley & Mathews, 400 S. Main Street, North Canton, OH 44720 on January 3, 2008.



Daniel D. Mason
COUNSEL FOR APPELLANT,
LORAIN METROPOLITAN HOUSING
AUTHORITY

STATE OF OHIO) IN THE COURT OF APPEALS
) NINTH JUDICIAL DISTRICT
)ss:
COUNTY OF LORAIN) SEP 28 P 2:45

CLERK OF COMMON PLEAS
DANIELLE MOORE RON NABAKOWSKI 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.

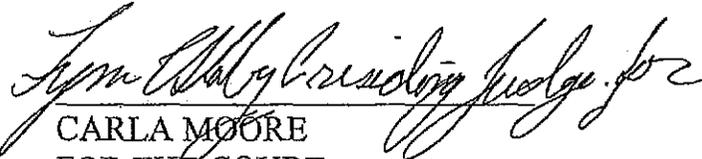
Judgment reversed
and cause remanded.

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.

COURT OF APPEALS

STATE OF OHIO FILED)
LORAIN COUNTY) ss:

COUNTY OF LORAIN)
2007 DEC 12 A 11: 39

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DANIELLE MOORE COMMON PLEAS
RON NABAKOWSKI

C.A. No. 06CA008995

9th Appellate District
Appellant

v.

LORAIN METROPOLITAN
HOUSING AUTHORITY, et al.

JOURNAL ENTRY

Appellees

Appellees have moved, pursuant to App.R. 25, to certify a conflict between the judgment in this Case, which was journalized on September 28, 2007, and a decision relied on by this Court in this matter from the Second District Court of Appeals in *Parker v. Dayton Metro. Hous. Auth.* (May 31, 1996), 2d Dist. No. 15556, and the judgments of the Eighth District Court of Appeals in *Rhoades v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. No. 84439, 2005-Ohio-505 and *McCloud v. Nimmer* (1991), 72 Ohio App.3d 533, the Sixth District Court of Appeals in *Jones v. Lucas Metro. Hous. Auth.* (Aug. 29, 1997), 6th Dist. No. L-96-212 and the Seventh District Court of Appeals in *Country Club Hills Homeowners Assn. v. Jefferson Metro. Hous. Auth.* (1981), 5 Ohio App.3d 77, 78. Appellant has responded in opposition.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment.*** is in conflict with the judgment pronounced upon the same question by any other court of

appeals in the state[.]” “[T]he alleged conflict must be on a rule of law -- not facts.”

Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St. 3d 594, 596.

In our case, in which we relied on *Parker*, supra, we determined that ownership and operation of a public housing authority is a proprietary function. In *Rhoades*, *McCloud*, *Jones* and *Country Club Hills Homeowners Assn.*, our sister courts determined that ownership and operation of a public housing authority is a governmental function. Appellees have proposed that a conflict exists between the districts on whether the operation of a public housing authority is a proprietary or governmental function. This Court agrees. Therefore, the motion to certify is granted on the following issue:

Whether operation of a public housing authority is a proprietary or a governmental function.



Judge



Judge



FILED
LORAIN COUNTY

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CLERK'S
ENDORSEMENT

CLERK OF COMMON PLEAS
RON NABAKOWSKI

COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

Ronald L. Nabakowski, Clerk

To the Clerk: THIS IS A FINAL
APPEALABLE ORDER.

Please serve upon all parties not
in default for failure to appear;
Notice of the Judgment and its
date of entry upon the Journal

JOURNAL ENTRY

Christopher R. Rothgery, Judge

Date August 8, 2006

Case No. 04CV139881

Danielle Moore et al.

Plaintiff

VS.

Plaintiff's Attorney

Lorain Metropolitan Housing Authority et al.

Defendant

Defendant's Attorney

JUDGMENT ENTRY

This matter comes before the Court upon the cross-motions for summary judgment of the parties. The Court has given due consideration to the briefs in support and opposition to the cross-motions for summary judgment and the Civil Rule 56 evidence submitted by the parties. Further, the Court has carefully considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties. The Court incorporates into this order the Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment, which is attached hereto.

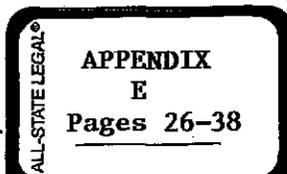
Pursuant to the standards set forth in Rule 56 of the Ohio Rules of Civil Procedure, the Court hereby denies the Plaintiffs' Motion for Summary Judgment and grants the Defendants' Motion for Summary Judgment. Costs to the plaintiffs.

IT IS SO ORDERED.

VOL _____ PAGE _____

Christopher R. Rothgery, Judge

cc: Attorney Gregory A. Beck
Attorney Terrence P. Gravens
Attorney Dennis M. O'Toole



FILED
LORAIN COUNTY

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CLERK OF COMMON PLEAS
RON NABAKOWSKI



CLERK'S
ENDORSEMENT

COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

Ronald L. Nabakowski, Clerk

JOURNAL ENTRY

Christopher R. Rothgery, Judge

Date August 8, 2006

Case No. 04CV139881

Danielle Moore et al.

Plaintiff

VS.

Plaintiff's Attorney

Lorain Metropolitan Housing Authority et al.

Defendant

Defendant's Attorney

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

This matter came before the Court on the parties' cross-motions for summary judgment, the briefs in support and opposition to the same and the Civil Rule 56 evidence submitted by the parties.

After due consideration, the Court finds as follows:

FINDINGS OF FACT

1. Plaintiff, Danielle Moore, had been a tenant at a number of properties owned and managed by defendant, LMHA, since 1997. At the time of the incident in question, she and her children

resided at a scattered site, single housing unit, known and referred to as a "pagoda" at 106 South Park in Oberlin, Ohio, pursuant to a written lease entered into with LMHA on October 7, 2002. She had read the terms of those leases and had attended the orientation session that explained the terms of the leases and the rules of LMHA.

2. Derrick Macarthy, the father, and next of kin for purposes of the probate estates of the decedents herein, had also been a tenant listed on leases with Danielle Moore prior to the incident at issue. He was likewise familiar with the terms of the lease and the rules of LMHA.

3. It was at the request of plaintiff, Danielle Moore, and Derrick Macarthy, that LMHA provided them with this residential unit. Initially, the only residents permitted to live at the household were the plaintiff and Derrick Macarthy, her son, Jamar Moore (03/16/98), and their children D'Angelo Macarthy (09/09/99), Delaini Macarthy (08/30/01) and Dezirae Macarthy (07/12/02).

4. In May of 2003, the plaintiff, Danielle Moore, requested LMHA to delete Derrick Macarthy from the lease as a person allowed to live at the premises because of acts of domestic violence he had committed and because of arguments with him.

5. Although the lease, LMHA rules and the warnings of the LMHA Housing Manager all precluded Derrick Macarthy from residing at the residence, the plaintiff and Macarthy have admitted that he stayed frequently at the residence up to and including the time of the incident at issue.

6. On the evening of Sunday, October 19, 2003, the plaintiff, Danielle Moore, Derrick Macarthy and the four minor children were at the residence at 106 South Park.

7. At one point in the evening, Derrick Macarthy asked Danielle Moore to go to the store for him. She then left the residence for a period of time and went and visited two different friends before attempting to go to the store.

8. She left the minor children with a man whom she knew had used illegal drugs, drank alcohol, had committed many acts of domestic violence against her in their presence and who had intimidated the two male minors both verbally and physically by "whooping them".

9. While the plaintiff was "visiting" friends that evening, Derrick Macarthy testified he was "relaxing" on the couch with the radio on. He admits he never once checked on the young minors in his care. He testified he "dozed" off on the couch.

10. During the interval in which the plaintiff was "visiting" friends and Derrick Macarthy was "dozing", four year old D'Angelo Macarthy took a lighter or lighters kept in the residence by Derrick Macarthy and started fires in the home in two locations in the one floor residence. The undisputed evidence in this case is that the cause and origin of the fire was the "unattended" four year old starting the fire in two locations with his father's lighter(s).

11. This was disclosed and admitted to fire investigators and the first adult to whom he spoke - the next door neighbor - by minor plaintiff - Jamar Moore. He further admitted that he was aware of the fire and that he was able to get his step-sister, Delaini to go with him, but that D'Angelo, afraid of his father, hid in his room and refused to leave. He also advised investigators and the plaintiff that after some effort he was able to "awaken" Derrick Macarthy to the fire.

12. The evidence is undisputed that Derrick Macarthy was alerted to the fire. By his own admission, he made no effort, when initially alerted to the fire, to get the infant, Dezirae from her crib or D'Angelo from his room. The undisputed evidence is that he took the two minors, Jamar and Delaini, who had already been alerted to the fire, out a door that

was in close proximity, and then took them all the way to the neighbor's home, where he waited for the neighbor to come to the door before making any effort to return to the home for the other minors.

13. Eight year part-time firefighter and seven year police officer, Steven J. Chapman, testified, based upon his professional experience and his observation of Derrick Macarthy at the scene that his highly agitated state, his dilated pupils, as well as his prior arrest for cocaine possession, caused Officer Chapman to believe that Derrick Macarthy was under the influence of cocaine at the time of the fire.

14. Neither the plaintiff, Danielle Moore, nor Derrick Macarthy said anything to the investigating authorities, the Oberlin Fire Department or the State Fire Marshall, nor to anyone at LMHA about the smoke detector in this residential unit until after Danielle Moore obtained the fire department report.

15. The Fire Department Report listed for statistical purposes regarding the "presence of detectors", "undetermined". Likewise, for "detector operation", the report listed "undetermined".

16. Fire Chief Dennis Kirin testified under oath that in fact the fire investigation did reveal the location at which a smoke detector had been mounted on the wall and the presence of an open electrical work box with wires coming out of the same. Further, he indicated that LMHA representatives had shown the firefighters the location of the smoke detector and provided documentation that a smoke detector had been inspected and was found to be working properly in the unit prior to the fire.

17. The evidence was undisputed that flames from the fire extended to the area in which the smoke detector had been located and that on two occasions the firefighters had applied their high power hoses to that area to extinguish the fire and later a rekindle.

18. Chief Kirin testified that the reason "undetermined" was listed for statistical purposes on the report regarding "presence of detector" and "detector operation" was because they had been unable to ascertain positively that there had been a smoke detector in the extensive fire debris.

19. Chief Kirin further testified that just because they could not find remnants in the extensive debris does not mean that there had not been a working smoke detector. Further, he testified that the fire could have destroyed much of the smoke detector, that the fire hoses could have dislodged it from the wall and that the fire could have affected the detector to the extent the alarm would not have sounded.

20. The evidence is that it was the policy, procedure and practice of LMHA to provide smoke detectors to the residential units and that the lease at issue placed the following obligations on the tenant:

G. To provide reasonable care (including changing batteries) and perform interim testing of smoke detectors to assure they are in working order.

* * *

R. To promptly report to LMHA any needed repairs to the leased unit.

These were set forth to the tenant at orientation as well as in the lease.

21. The policy, procedure and practice of LMHA was to conduct annual H.U.D. inspections and regular housing manager inspections of smoke detectors. Further, smoke

detectors were to be inspected for each work order and the results of the inspection noted thereon. Further, the repair and/or replacement of smoke detectors was a priority one item.

22. The evidence in this case was undisputed that LMHA had in fact provided a functional smoke detector to the unit at issue and that during the annual H.U.D. inspection conducted by an outside agency between October 6 and October 7, 2003, less than two weeks before the fire, it was noted that there was a working smoke detector in the residential unit.

23. Mike Burnley, the maintenance person responsible for the unit at issue, has testified in this case under oath that a smoke detector was never removed from the unit at issue and there was no documentation demonstrating a removal of a smoke detector from the unit at issue.

24. Although the plaintiffs' Complaint alleged that the smoke detector was removed on October 6, 2003, the plaintiff Danielle Moore and Derrick Macarthy have given inconsistent testimony about the smoke detector being removed by an LMHA employee a day or two days before the fire. Both admitted that they never took any steps to inspect the smoke detector and that neither reported this alleged removal of the smoke detector to LMHA prior to the fire. Further, both admitted that they never said anything to the investigating authorities about the alleged removal of the smoke detector at the time of the fire investigation.

CONCLUSIONS OF LAW

This Court is of the opinion that the threshold issue before it is whether the Defendants, specifically the Lorain Metropolitan Housing Authority and its Director, are

immune from liability by virtue of the Ohio Sovereign Immunity Statute as set forth in Ohio Revised Code Chapter 2744. If the defendants are immune, then the issues of negligence, and the attendant issues of duty, breach, proximate cause and damages need not be considered.

Generally stated, ORC 2744 provides that political subdivisions of the State are immune from liability in the performance of their governmental duties and responsibilities, subject to certain exceptions. Because the provision of low-income housing is a governmental function, we look to R.C. 2744.02(B)(4) for a possible exception to immunity, which reads:

(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)

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.”

It is undisputed that plaintiff Moore and her children resided in a scattered site housing unit pursuant to a written lease agreement that vested possession of that unit with

Ms. Moore and her children. The issue is whether that scattered site housing unit is the type of building or grounds that falls within the meaning of the statutory exception. This Court has determined, as a matter of law, that it does not fall within the meaning of the statutory exception.

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. 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 207, 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 unit here is 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.

Further analysis of the language of (B)(4) supports the view that it does not apply to the residential dwelling herein. The injury, death, or loss must occur "within or on the grounds of, buildings that are used in connection with the performance of a governmental function..." (R.C. 2744.02(B)(4)). The injury must occur where a governmental function is performed. The providing of housing to lower and moderate income persons is indeed a "governmental function." R.C. 2744.01(C)(1)(a).¹ But the function of providing housing occurs in the administrative buildings of LMHA, most often in its office building on Kansas Avenue in Lorain, where units are assigned and most of the LMHA employees work.

¹Housing authorities are established pursuant to R.C. Chapter 3735 for the provision of housing to low and moderate income citizens of Ohio.

The living in the residential units is not a “governmental function.” The residents of the scattered site pagodas are not performing a “governmental function” by living there. This analysis clearly supports the contention that the (B)(4) exception is not intended to apply to the type of residential dwellings herein.

There is further authority for this result. The Tenth District Court of Appeals addressed a similar situation where a statute employed specific examples of “recreational pursuits” but added the “catch all” phrase “or engage in other recreational pursuits.” *Sells v. Ohio Historical Center*, 1982 WL 4535 (Ohio App.10 Dist.). The court explained that, by listing examples, the “catch all” phrase was being modified to include only those types of recreational pursuits of a similar nature, and not all recreational pursuits. In the instant case, similarly, specific examples are cited followed by a more general “but not limited to” language. Accordingly, only governmental property like office buildings and courthouses are subject to the (B)(4) exception to the general law of immunity.

If the (B)(4) exception applied to all governmental property, the General Assembly would not have included examples of governmental property to which it does apply. The examples must be there for a reason. Otherwise, the examples are more excess verbiage. And it is a well-established rule of statutory construction requiring all portions of an enactment to be given meaning and effect. *East Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299.

Based on the foregoing, there is no exception to immunity applicable to this case. Therefore, summary judgment is properly granted to LMHA and its Director Homer Virden.

Additionally, the Court holds that Summary judgment is properly granted to defendant, Homer Virden, by virtue of the fact that under Ohio law, Executive Director Virden could only be held liable to the plaintiffs for acts or omissions manifestly out of the scope of his employment or acts or omissions that are with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 2744.03. Based upon the undisputed facts in this case, there is no genuine issue of material fact and defendant Homer Virden by law is entitled to summary judgment.

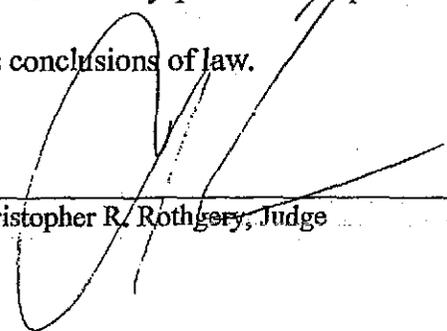
The Court further concludes as follows:

Count Seven and the claim for punitive damages is barred against the defendants as a matter of Ohio law. R.C. 2744.05; *Ranells Admx., et al. v. City of Cleveland* (1975), 41 Ohio St.2d 1.

Count Eight - Public Records Request Violation is properly disposed of by law by virtue of the undisputed facts that plaintiffs' counsel were given pre-suit access to the records for inspection and that during discovery in this suit all records were properly presented to plaintiffs' counsel. Further, plaintiffs have failed to comply with R.C. 149.43(C) and summary judgment is properly granted as to Count Eight.

This Court, having determined the applicability of the sovereign immunity statutes to the defendants, does not consider the merits of the other claims asserted by plaintiff except as set forth above, the same being rendered moot as a result of this Court's conclusions of law.

VOL. _____ PAGE _____



Christopher R. Rothgery, Judge

35 of 63 DOCUMENTS

PAGE'S OHIO REVISED CODE ANNOTATED
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*** ARCHIVE MATERIAL ***

*** CURRENT THROUGH LEGISLATION APPROVED THROUGH MARCH 29, 2004 ***
*** ANNOTATIONS CURRENT THROUGH DECEMBER 31, 2003 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2744. POLITICAL SUBDIVISION TORT LIABILITY

ORC Ann. 2744.01 (2004)

§ 2744.01. Definitions

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 [3319.30.1] of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C) (1) "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.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or

protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with

buildings or structures;

- (q) Urban renewal projects and the elimination of slum conditions;
- (r) Flood control measures;
- (s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;
- (t) The issuance of revenue obligations under section 140.06 of the Revised Code;
- (u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:
 - (i) A park, playground, or playfield;
 - (ii) An indoor recreational facility;
 - (iii) A zoo or zoological park;
 - (iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;
 - (v) A golf course;
 - (vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;
 - (vii) A rope course or climbing walls;
 - (viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.
- (v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
- (w) (i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;
- (ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.
- (x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 [713.23.1] of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 [307.05.2] of the Revised Code, fire and ambulance district created pursuant to section 505.375 [505.37.5] of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 [343.01.2] of the Revised Code, and community school established under Chapter 3314. of the Revised Code.

(G) (1) "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;

(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.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

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*** ARCHIVE MATERIAL ***

*** CURRENT THROUGH LEGISLATION APPROVED THROUGH MARCH 29, 2004 ***
*** ANNOTATIONS CURRENT THROUGH DECEMBER 31, 2003 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2744. POLITICAL SUBDIVISION TORT LIABILITY

ORC Ann. 2744.02 (2004)

§ 2744.02. Classification of functions of political subdivisions; liability; exceptions

(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.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(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:

(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. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to

Chapter 4507, of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(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.

(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.

(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.

(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.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.