

IN THE
SUPREME COURT OF OHIO

08-2183

CYNTHIA C. LAMBERT

NO.

Plaintiff-Appellee

On Appeal from the Hamilton County
Court of Appeals, First Appellate District

vs.

Court of Appeals

GREG HARTMANN, HAMILTON
COUNTY CLERK OF COURTS

Case Number C-0700600

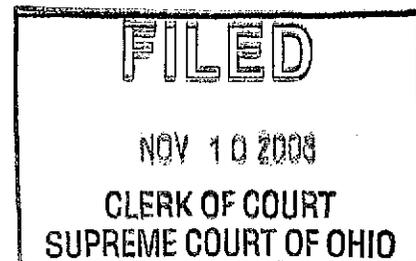
Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION

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IN THE
SUPREME COURT OF OHIO

CYNTHIA C.. LAMBERT	:	NO. C-0700600
Plaintiff-Appellant	:	
vs.	:	
GREG HARTMANN, HAMILTON COUNTY CLERK OF COURTS,	:	<u>MEMORANDUM IN SUPPORT OF JURISDICTION</u>
Defendant-Appellee	:	

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

The decision of the court of appeals eliminates immunity for each public official sued in his or her official capacity. The court of appeals failed to find immunity for a public official made a party to the lawsuit in his official capacity under R.C. 2744.02 even though no exception to immunity as set forth in R.C. 2744.02 was plead in the Complaint. The court of appeals acknowledged that immunity under R.C. 2744.02 applies to political subdivisions, but concluded that immunity is not available to elected officials sued in their official capacities. The court of appeals reasoned that because elected officials are by definition employees under R.C. 2744.01(B), the analysis of immunity must begin with R.C. 2744.03(A)(6). The court of appeals held:

“Generally, political subdivisions are granted immunity from suit under R.C. 2744.02 for governmental or proprietary functions. But the immunity granted under the statute does not apply to elected officials or individual employees of a political subdivision.” 2008 WL 4367891 (Ohio App. Dist. 1, Sept. 26, 2008) 2008 -Ohio- 4905

The interpretation by the court of appeals eviscerates immunity for political subdivisions and obviates the analysis under *Cater v. City of Cleveland*¹. Ohio law provides immunity for decisions of elected officials that involve the exercise of executive or planning functions or involve making basic policy decisions which are characterized by the exercise of a high degree of official judgment or discretion. Pursuant to R.C. 2744.02, an elected official in his official capacity has the same immunity of a political subdivision.

Further, this interpretation of R.C. 2744.02 by the court of appeals has the unintended consequent of vitiating Ohio R. Civ. P. 25(D). Rule 25(D)(1) states, "When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party." Rule 25 recognizes that the offices of certain elected official are not *sui juris*.² In order to bring an action against such offices, a plaintiff must make the elected official a party in his official capacity.³ The court of appeals failed to recognize that on the face of the Complaint there were no allegations against Hartmann in his individual capacity, but rather the Complaint alleged wilful, wanton and purposeful conduct on the part of the office of the clerk of courts.⁴

¹ (1998) 83 Ohio St. 3d 24, 697 N.E.2d 610

² See, *Hunter v. Lipps*, 2007 WL 2029043 (S.D. Ohio) (court dismissed action where plaintiff failed to name defendant in official capacity). Also, *Burton v. Hamilton County Juvenile Court*, 2006 WL 91600 (S.D. Ohio) (court dismissed action where plaintiff failed to name a party who is *sui juris*)

³ *Id.*, and See also, Ohio R. Civ. P. 25(D)

⁴ See also Lambert's Complaint in Case No. 1:04-cv-837 in the United States District Court, Southern District of Ohio, which mirrors the Complaint filed in the instant case and which Hartmann is sued only in his official capacity.

The logical result of leaving the First District's decision undisturbed, would be the inability to automatically substitute parties as provided in Ohio R. Civ. P. 25. Rather every elected official made a party in his official capacity would also automatically be sued individually because he is by the definition an employee of the political subdivision.⁵

The court of appeals' interpretation that R.C. 2744.02 immunity is not available to elected officials sued in their official capacities will exact a costly toll on Ohio citizens who are elected to serve or who are contemplating such service. This interpretation will force officials to defend themselves individually for decisions they make as executives and policy makers in their official capacities. Consequently, more than vitiating R.C. 2744.02 immunity for individuals serving as an elected office, the court of appeals decision will effectively discourage citizens of Ohio from seeking elected office.

Hartmann, the Hamilton County Clerk of Courts, requests this Court to accept jurisdiction to clarify whether R.C. 2744.02 immunity is available to elected officials when sued in their official capacities.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

Lambert filed her first action against Hartmann in the United States District Court, Southern District of Ohio on December 20, 2004, alleging constitutional violations to her right to privacy. The United States District Court held that Lambert had no right to privacy in her name, social security number, address, driver's license number, physical description, birth date and signature, all of which were on the traffic ticket

⁵ R.C. 2744.01(B) See, also *Dolan v. City of Glouster*, (4th Dist. 2007 Athens County) 173 Ohio App. 3d 617, 879 N.E. 2d 838

available on the Clerk's website.⁶ Lambert appealed this decision to the United States Court of Appeals for the Sixth Circuit where her appeal was denied⁷.

Subsequent to the dismissal of her federal case, Lambert filed Case No. A 0700787 in the Hamilton County, Ohio Court of Common Pleas. Lambert alleged that the publication of a traffic ticket she received on the Hamilton County Clerk of Courts website, www.courtclerk.org, on or about September 25, 2003, caused damages for which Hartmann is responsible. Hartmann filed a Motion to Dismiss for failure to state a claim alleging among other defenses, that the Clerk of Courts was immune from suit pursuant to R.C. 2744.02. On August 2, 2007, the trial court granted the Motion to Dismiss. The court of appeals reversed and remanded the case on September 26, 2008.

B. Statement of Facts:

On September 25, 2003 Lambert received a ticket for causing an automobile accident. The Uniform Traffic Ticket #00-8601833 (a form mandated and promulgated by the Ohio Supreme Court) was fully completed by the citing officer. The ticket listed Lambert's name, address, telephone number, date of birth, driver's license number and social security number and bore her signature. Lambert failed to pay the ticket in Case No. C03TRD40258 and a capias warrant issued for her arrest. Lambert ultimately paid the ticket on October 7, 2003 and the capias warrant was withdrawn.

On October 12, 2004 Traci Lynn Southerland was charged with obtaining two credit cards in Lambert's name in Case No. C04CRA407325. Lambert's name, address and phone number were listed

⁶ *Lambert v. Hartmann*, 2006 WL 3833529 (S.D. Ohio)

⁷ *Lambert v. Hartmann*, (2008) 517 F.3d 433 (6th Cir. 2008), *reh en banc denied*, (September 26, 2008)

on the Complaint filed in the clerk's office as Lambert was a witness in the criminal case. On or about October 26, 2004 Southerland was indicted in Case No. B 0410225. On March 15, 2005 the felony case was dismissed for want of prosecution.⁸

On December 20, 2004 Lambert filed an action in the United States District Court, Southern District of Ohio, Case No. 1:04-cv-837 against Hartmann in his official capacity. On or about September 2, 2005, Hartmann filed a motion to dismiss the federal case alleging that the District Court had no jurisdiction and the complaint failed to state a cause of action. On December 29, 2006 District Court Judge Watson dismissed Lambert's Complaint ruling that she did not have a constitutional right to privacy in her personal identifying information, including her social security number. Consequently, the District Court concluded that Lambert was not entitled to relief under 42 U.S.C. § 1983. Lambert appealed Judge Watson's decision to the United States Sixth Circuit Court of Appeals which affirmed the district court⁹.

Prior to any lawsuits brought by Lambert, Hartmann convened the Hamilton County Privacy Task Force in February of 2004 to study and to make recommendations on resolving the tension between the clerk's duty to make public, court documents filed with the clerk available to the public and informational privacy concerns of persons whose information is contained in such filings. Hon. Mark Schweikert, presiding judge of the Hamilton County Court of Common Pleas, was co-chair of the task force. After more than a year of study, the Privacy Task Force recommended the adoption of a local rule to address remote public access via the Internet of court filings on www.courtclerk.org. The recommendation was

⁸Traci Lynn Southerland was prosecuted and convicted in a several count indictment of conspiracy to defraud in the United States District Court, Southern District of Ohio, Case No. 1:06 CR 033.

⁹ Supra, fn. 7

accepted by the Hamilton County Courts and on July 1, 2005 Local R. 11(K) went into effect. Among other things the rule denies remote public access on the Clerk's website of any court filings which routinely contain social security numbers. Subsequent to the creation of Local R. 11(K), the Ohio Supreme Court held that social security numbers were records for purposes of the Ohio Public Records Act. R.C. 149.43.

ARGUMENT

FIRST PROPOSITION OF LAW: IMMUNITY FROM SUIT PURSUANT TO R.C. 2744.02 IS AVAILABLE TO ELECTED OFFICIALS SUED IN THEIR OFFICIAL CAPACITIES.

A. Hartmann named as a party in his official capacity is immune under R.C. 2744.02.

Hartmann argued to the court of appeals that as he was made a party to the lawsuit in his official capacity and as Lambert did not allege any of the exceptions to immunity set forth in R.C. 2744.02 that he was immune suit. Hartmann argued immunity under *Cater v. City of Cleveland*¹⁰. Lambert's complaint against the clerk's office is, in fact, a complaint against a political subdivision; therefore, the lower court must analyze the Hartmann's immunity under R.C. 2744.02 and not R.C. 2744.03(A)(6).

The court of appeals, however, veered off course in its *Cater* analysis. The court of appeals found that because Hartmann is by definition an employee of Hamilton County pursuant to R.C. 2744.03(A)(6), he was not entitled to immunity under R.C. 2744.02. Even though, the Complaint alleged that the office of the clerk of courts, and not Hartmann individually, was "wanton, wilful and purposeful" in its publication of her traffic ticket on its website, the Clerk's immunity as an elected official had to be analyzed under R.C.

¹⁰(1998) 83 Ohio St. 3d 24, 697 N.E.2d 610

2744.03(A)(6). The court of appeals cited *Cramer v. Auglaize Acres*¹¹ and *Thorp v. Strigari*¹² in support of its reasoning that R.C. 2744.02 immunity is not available to elected officials made parties to lawsuits in their official capacity.

Neither *Cramer* or *Strigari* support the court's ruling however. In *Cramer*, the Court held that, "R.C. 3721.17(I)(1) specifically abrogates governmental immunity [under R.C. 2744] and grants a cause of action to residents of unlicensed county nursing homes against a political subdivision for violations of R.C. 3721.10 through 3721.17, the Ohio Nursing Home Patients' Bill of Rights." There is no statute abrogating R.C. 2744.02 immunity for elected officials. The *Strigari* court, in fact, specifically noted that the public defender in that case was being sued as an individual lawyer who represented the client and not in his policy making role as the Hamilton County Public Defender.

The court of appeals analysis renders R.C. 2744.02 meaningless. A thorough analysis of R.C. 2744 as it relates to the instant case is required. R.C. Chapter 2744 sets forth a three-tiered analysis for determining immunity from liability of the political subdivision and its employees. R.C. 2744.02(A) sets forth the general rule of immunity for political subdivisions. R.C. 2744.02(A)(1) states as follows:

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 persons 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. (Emphasis added.)

¹¹ (2007) 113 Ohio St. 3d 266, 865 N.E.2d 9

¹² (2003) 155 Ohio App. 3d 266, 800 N.E.2d 392

Second, there are exceptions to this statutory immunity. R.C. 2744.02(B) contains five specifically enumerated exceptions. These exceptions are subject, however, to the limitations of liability in R.C. 2744.03 and 2744.05. The exceptions to immunity in R.C. 2744.02(B) include: (1) the negligent non-emergency operation of a motor vehicle by a government employee within the scope of employment; (2) the negligent act of a government employee with respect to proprietary functions of the political subdivision; (3) the failure to keep public roads in repair; (4) negligence by governmental employees that causes injury within or on the grounds of, and is due to physical defects within or on the grounds of, buildings used in the performance of a governmental function; and (5) liability that is expressly imposed upon the political subdivision by other sections of the Revised Code including R.C. 2743.02 and 5591.37. In addition, R.C. 2744.02(B)(5) states that liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

Under the third tier of analysis, even if a political subdivision is potentially liable under any of the R.C. 2744.02(B) exceptions to immunity, the immunity for the political subdivision can arise pursuant to applicable defenses contained in R.C. 2744.03(A). Further, employees enjoy additional immunities pursuant to R.C. 2744.03(A)(6) when any of the R.C. 2744.02(B) exceptions to political subdivision immunity apply.

If none of the exceptions to political subdivision immunity in R.C. 2744.02(B) apply, absolute immunity is afforded the political subdivision for state law claims pursuant to R.C. 2744.02(A)(1) for which

liability cannot arise.¹³ Furthermore, under Ohio law, when a plaintiff makes an employee of a political subdivision in his official capacity a party to a lawsuit, that employee enjoys the immunity of the political subdivision itself.¹⁴

B. Lambert failed to make Hartmann a party in his individual capacity.

By naming the Clerk, Lambert did not intend to make Hartmann a party in his individual capacity.

None of the allegations in her complaint suggest otherwise.

Paragraph 5 of the Complaint states

Defendant Greg Hartmann has served as the Clerk of Courts for Hamilton County since February 10, 2003. Part of Mr. Hartmann's **official duties** include the filing and preserving of all papers delivered to the Clerk's Office for that purpose. **His Office maintains a website that has been in operation since approximately February 1999.**¹⁵

(Emphasis added).

Paragraph 11 of the Complaint states

¹³ See *Sudnik v. Crimi*, (1997) 117 Ohio App.3d 394, 690 N.E.2d 925; *Nagorski v. Valley View* (1993), 87 Ohio App.3d 605, 622 N.E.2d 1088, (1993), motion to certify the record overruled in (1993) 67 Ohio St.3d 1455, 619 N.E.2d 423. In accord, *Abdalla v. Olexia*, 1999 WL 803592 (7th Dist. Jefferson County).

¹⁴ *Dolan v. City of Glouster*, (2007 4th District, Athens County) 173 Ohio App. 3d 617, 879 N.E. 2d 838 (court of appeals held county's 911 emergency coordinator could not be liable for tortious interference, in his official capacity, with respect to plaintiffs' business relationship with county's 911 emergency service) See, also, *Oswald v. Lucas County Juvenile Detention Center, et al.*, 234 F.3d 1269 (6th Cir. 2000) (6th circuit held that county director and county administrator of juvenile detention center were immune from liability in their official capacities).

¹⁵Complaint

Defendant has been aware since at least 2002 that persons have been using information gained from traffic tickets published on www.courtclerk.org in order to steal identities and commit crimes of identity theft or crimes of a similar nature.¹⁶

Lambert then cites to Exhibit 5, attached to the Complaint, which is an article appearing in the New York Times on or about September 5, 2002 in which former clerk James Cissell, not Hartmann, is quoted. There is no mention in the article of Hartmann. Further, in Paragraph 5 of the Complaint Lambert alleges that Hartmann became the clerk in February, 2003. Accordingly, when referring to “Defendant” in paragraph 11 Lambert is referring to the office of the clerk and not Hartmann individually.

Paragraph 14 of the Complaint states

After the current Clerk took office, he was advised in 2003 that “the most common complaint” about his practices was that “social security numbers are available” on the website.¹⁷

Lambert does not ascribe the advisement to any particular person or allege the context in which the advisement was directed or received by Hartmann individually as an employee. This conclusory statement is not sufficient as a matter of law to withstand a Motion to Dismiss under Civ. R. 12(b)(6). “The Supreme Court [of the United States] has recently clarified the pleading standard necessary to survive a Rule 12(b)(6) motion.¹⁸ Factual allegations “contained in a complaint must ‘raise a right to relief above the speculative

¹⁶Complaint

¹⁷Complaint

¹⁸*Basset v. National Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *CGH Transport Inc. v. Quebecor World, Inc.*, 261 Fed.Appx. 817, citing *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007)) (when a court is presented with a 12(b)(6) it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant’s motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein).

level.’”¹⁹ A court is not bound to accept the bare assertion of legal conclusions as true when couched as factual allegations.²⁰

Paragraph 15 of the Complaint states

The Clerk was specifically warned of the great risk he was creating for the public in a series of emails in 2003. These emails, which were forwarded to the Clerk’s counsel, are attached in their entirety and warned, among other things, that the website “is fertile ground for identity theft,” “anyone can access this information demand and “[i]n this day and age when identity theft happens, there is no reason to give someone the data they need.”²¹

The Complaint then cites Exhibits 6-9, which are a series of emails directed to employees of the Hamilton County Clerk’s Office which Lambert secured in the discovery process in the federal case. Only one of the emails is addressed to Hartmann individually. In that email the author asks Hartmann whether his administration contemplates a change in policy from the previous administration which had the opinion that if a social security number were in a public record then the number “had to be on the document” as is.²² This email certainly does not include the warning of “great risk” to Hartmann individually as Lambert alleges.

Paragraph 16 of the Complaint states

Despite the known, obvious and expressly warned of risk associated with publishing traffic tickets and other documents online containing personal and private information including, but not limited to individual social security numbers, the **Clerk of Court’s Office** recklessly, willfully and purposefully continued its practice of publishing personal

¹⁹*Id.*

²⁰*Ferron v. Zoomego, Inc.*, 276 Fed.Appx. 473 (6th Cir. 2008).

²¹Complaint

²²Complaint

information on the internet. As a direct and proximate result of this practice, Defendant published Ms. Lambert's traffic ticket on **its** website.²³

(emphasis added). Lambert makes no factual allegations concerning Hartmann individually and certainly makes no factual allegations concerning Hartmann's individual acts toward her that support her claim of recklessness, willfulness or purposefulness. Further the allegations of recklessness, willfulness and purposefulness are ascribed to the "Clerk of Court's Office" and not to Hartmann personally.

Paragraph 23 of the Complaint states

... In addition, the Clerk unreasonably and without any justifiable privilege to do so, exposed Ms. Lambert to an on-going risk of identity theft.

Lambert does not set forth any factual allegations regarding Hartmann individually as an employee in support of this conclusion. This conclusory statement without more is insufficient to withstand a motion to dismiss under 12(b)(6).²⁴

Paragraph 24 of the Complaint states

The risk of identity theft to which Ms. Lambert was exposed is the direct result of the **knowing, reckless, willful and wanton policy, practice and custom of the Hamilton County Clerk of Courts** who, with deliberate indifference to the known risk posed, indiscriminately published on the internet personal information, including citizens' social security numbers, by means of **its** website www.courtclerk.org.

(emphasis added). Lambert makes no factual statements concerning Hartmann's individual actions as an employee in support of this allegation. Further although Lambert refers to the Hamilton County Clerk of Courts she uses the pronoun "its" when referring back to the entity operating the website. This reference is not to Hartmann as an individual as is apparent when one reads the allegations in the Complaint

²³Complaint

²⁴*Bassett*, 528 F.3d at 430.

contextually. Further Lambert's allegations of recklessness, willfulness, and purposefulness in this paragraph refer directly to the policy, practice and custom of the "Hamilton County Clerk of Courts" and not to actions of Hartmann individually as an employee.

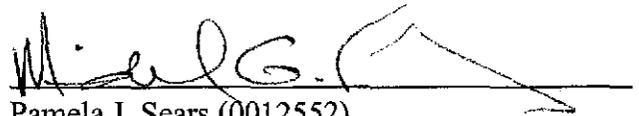
To read R.C. 2744.02 other than as immunity for Hartmann in this case, would create a new class of defendants unintended by the law. Additionally, the interpretation by the court of appeals would prevent the automatic substitution of parties as provided in Ohio R. Civ. P. 25(D). Every elected official made a party in his official capacity would also automatically be sued individually because he is by the definition an employee of the political subdivision. For the foregoing reasons, the Court should accept jurisdiction.

CONCLUSION

Appellant submits that jurisdiction should be granted.

Respectfully,

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Prosecuting Attorney



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Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Support of Jurisdiction, by United States mail, addressed to Marc Mezibov and Stacy Hinnens, Attorney at Law 401 East Court Street, Suite 600, Cincinnati, Ohio 45202, counsel of record, this 7 day of November, 2008.



Michael G. Florez 0010693
Assistant Prosecuting Attorney

APPENDIX

ENTERED
SEP 26 2008

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



D80341034

CYNTHIA C. LAMBERT,
Plaintiff-Appellant,

APPEAL NO. C-070600
TRIAL NO. A-0700787

vs.

JUDGMENT ENTRY.

GREG HARTMANN, HAMILTON
COUNTY CLERK OF COURTS,

Defendant-Appellee.

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on September 26, 2008

By:

Presiding Judge

STATE OF OHIO, COUNTY OF HAMILTON
COURT OF APPEALS

THIS IS TO CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE
DOCUMENT ON FILE IN THIS OFFICE ENTERED

9.26.08
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 11.7.08

GREGORY HARTMANN, CLERK OF COURTS
BY
DEPUTY CLERK

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

CYNTHIA C. LAMBERT,	:	APPEAL NO. C-070600
	:	TRIAL NO. A-0700787
Plaintiff-Appellant,	:	
	:	<i>DECISION.</i>
vs.	:	
	:	PRESENTED TO THE CLERK
GREG HARTMANN, HAMILTON	:	OF COURTS FOR FILING
COUNTY CLERK OF COURTS,	:	
	:	SEP 26 2008
Defendant-Appellee.	:	

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: September 26, 2008

Law Office of Marc Mezibov, Marc Mezibov, and Stacy A. Hinnners, for Plaintiff-Appellant,

Joseph Deters, Hamilton County Prosecutor, Michael G. Florez, and Pamela J. Sears, Assistant Hamilton County Prosecutors, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Plaintiff-appellant Cynthia Lambert, on behalf of herself and others similarly situated, sued defendant-appellee Greg Hartman, the Hamilton County Clerk of Courts, for violations of Ohio's Privacy Act (R.C. Chapter 1347), invasion of privacy, the unlawful publication of private facts, and public nuisance. In her complaint, Lambert alleged that she was harmed when her identity was stolen after the clerk had published her social-security number and other personal, private information on the clerk's public website, despite knowing that identity theft was a probable result. The trial court dismissed Lambert's complaint under Civ.R. 12(B)(6) and (C), without opinion. Lambert now appeals, asserting in a single assignment of error that the trial court erred by dismissing her complaint. We agree.

{¶2} Lambert alleged sufficient facts to survive a Civ.R. 12(B)(6) and (C) motion. The facts alleged, if determined to be true, supported a cause of action for invasion of privacy, public nuisance, and violations of Ohio's Privacy Act. Furthermore, Lambert's claims were not barred by the Political Subdivision Tort Liability Act.

1. Speeding Ticket Leads to Identity Theft

{¶3} The following factual background is based on the allegations in Lambert's complaint. Lambert alleged that in September of 2003 she was issued a speeding ticket. The officer issuing the ticket used the Ohio Uniform Traffic Ticket, which included Lambert's name, signature, home address, birth date, driver's license number, and social-security number. The ticket was filed with the Hamilton County Clerk's Office and was then published on the clerk's website.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶4} Approximately a year after Lambert had received the speeding ticket, she received a call from a Sam's Club store regarding a large purchase made by an individual purporting to be her. Using a driver's license with Lambert's personal identifying information, the individual was able to purchase over \$8,000 in electronics. The next day, Lambert received a call from a Home Depot store regarding a credit-card account opened in her name. An individual using a driver's license with Lambert's personal information charged approximately \$12,000 in purchases to this account. Lambert learned that the driver's license number used on the identification produced by the individual purporting to be her was wrong by one digit. Lambert found the speeding ticket on the clerk's website and noted that the officer had recorded her driver's license number with one erroneous digit. Subsequently, Lambert learned that the Blue Ash Police had arrested a woman who the police believed had stolen Lambert's identity. The woman who had stolen Lambert's identity pleaded guilty to federal felony charges.

{¶5} Lambert alleged that the clerk's office began publishing traffic tickets, without redacting social-security numbers, in February 1999 and continued to do so until December 22, 2004, despite learning in 2002 that identity theft had been committed by using information obtained on the clerk's website, and despite being warned by other county officials in electronic correspondence to the clerk's legal counsel that the clerk's website provided "fertile ground for identity theft."

{¶6} Lambert sued the clerk and others in federal court in December 2004, alleging federal constitutional violations as well as pendent state-law claims for violation of her right to privacy under Ohio common law and for publication of private facts under Ohio common law. She later moved to amend her complaint to

add a claim under Ohio's Privacy Act, R.C. Chapter 1347. While this motion was pending, the clerk moved to dismiss Lambert's complaint. The federal court dismissed Lambert's federal claims with prejudice and dismissed Lambert's remaining state claims without prejudice. A month later, Lambert sued the clerk in the Hamilton County Court of Common Pleas.

II. Standard of Review

{¶7} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural in nature and tests the sufficiency of the complaint.¹ “[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the non-moving party.”² In resolving a Civ.R. 12(B)(6) motion, courts are confined to the allegations in the complaint and cannot consider outside materials.³

{¶8} For a court to grant a motion to dismiss for failure to state a claim, it must appear “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴ As long as there is a set of facts, consistent with the plaintiff's complaint, that would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.⁵ Finally, an appellate court's review of a trial court's ruling on a motion to dismiss is *de novo*.⁶

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{¶9} Under Civ.R. 12(C), a court may grant judgment on the pleadings where no material issue of fact exists and the moving party is entitled to judgment as a matter of law. Similar to a motion under Civ.R. 12(B)(6), the court may only consider the allegations in the pleadings. It must construe all material allegations in the complaint, along with all reasonable inferences, as true and in favor of the nonmoving party. We review the trial court's entry of judgment on the pleadings de novo.⁷

III. Political Subdivision Tort Liability Act

{¶10} The clerk maintains that the trial court properly dismissed all of Lambert's claims because he was immune from liability under R.C. Chapter 2744. The clerk may well be immune from liability, but that is unclear from the state of the pleadings, as Lambert sufficiently alleged facts that, if true, provided an exception to that immunity.

{¶11} Generally, political subdivisions are granted immunity from suit under R.C. 2744.02 for governmental or proprietary functions. But the immunity granted under the statute does not apply to elected officials or individual employees of a political subdivision.⁸ Because the clerk is an "employee" of a political subdivision and an elected official,⁹ our analysis of the immunity issue begins with R.C. 2744.03(A)(6).¹⁰

{¶12} R.C. 2744.03(A)(6) creates a presumption of immunity for employees and elected officials of a political subdivision. It provides that an individual employee is immune from liability in performing his job unless (1) his acts or

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¹⁰ *Thorp*, supra, at ¶31.

omissions are manifestly outside the scope of his employment; (2) his acts or omissions are malicious, in bad faith, or wanton or reckless; or (3) liability is expressly imposed upon the employee by another statute.

{¶13} In her complaint, Lambert alleged that the clerk had acted “recklessly, willfully, and purposefully” in publishing Lambert’s personal and private information and many others’ personal and private information on his public website. Lambert also alleged that the clerk was aware as early as 2002 that his website was being used to facilitate identity theft and was repeatedly warned about this particular risk of harm in 2003. These allegations, if true, state a possible exception to the immunity granted to elected officials and employees of a political subdivision. Accordingly, we are constrained to hold that if the trial court dismissed Lambert’s claims because it believed that the clerk had immunity, the trial court erred.

{¶14} We briefly note that the clerk refers to evidence outside the pleadings to argue that Lambert knew that the clerk’s actions were not reckless, wanton, or willful. While this evidence may be persuasive, we cannot consider it. Again, in reviewing a motion to dismiss, we cannot consider evidence outside the pleadings, and we must presume that the allegations in the complaint are true.

IV. Ohio’s Privacy Act as Codified in R.C. Chapter 1347

{¶15} Lambert argues that she adequately pleaded a cause of action under Ohio’s Privacy Act. We agree.

{¶16} R.C. Chapter 1347 sets forth requirements that “local agencies” must follow in collecting and maintaining personal information. For example, local agencies must “[t]ake reasonable precautions to protect personal information in the

OHIO FIRST DISTRICT COURT OF APPEALS

system from unauthorized modification, destruction, use, or disclosure.”¹¹ The statutory definition of “local agency” includes “any elected officer * * * of a county.”¹² Accordingly, Hartman, as the clerk of courts, is subject to R.C. Chapter 1347.¹³

{¶17} R.C. 1347.10 provides the following in pertinent part:

{¶18} “(A) A person who is harmed by the use of personal information that relates to him and that is maintained in a personal information system may recover damages in a civil action from any person who directly and proximately caused the harm by doing any of the following:

{¶19} “(1) Intentionally maintaining personal information that he knows, or has reason to know, is inaccurate, irrelevant, no longer timely, or incomplete and may result in such harm;

{¶20} “(2) Intentionally using or disclosing the personal information in a manner prohibited by law;

{¶21} “* * *

{¶22} “(B) Any person who, or any state or local agency that, violates or proposes to violate any provision of this chapter may be enjoined by any court of competent jurisdiction.”

{¶23} In her complaint, Lambert alleged that the clerk had maintained an online database of traffic citations that contained personal, private information such as social-security numbers, and that the clerk provided unfettered public online access to

¹¹ R.C. 1347.05(G).

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¹³ The clerk maintains that he is exempt from R.C. Chapter 1347. He relies on R.C. 1347.04(A)(1)(a), which exempts from the requirements of R.C. Chapter 1347 any state or local agency that performs as its principal function any activity relating to the enforcement of criminal laws. The clerk argues that a traffic ticket is a “criminal complaint” and, thus, that his office engages in some activity related to law enforcement. But for an agency to be exempt, law enforcement must be the agency’s principal function. See *Patrolman “X” v. Toledo* (1999), 132 Ohio App.3d 374, 390, 725 N.E.2d 291. Because law enforcement is not the principal function of the county clerk’s office, the clerk is subject to R.C. Chapter 1347. See R.C. 2303.08 and 2303.09.

this information even after learning that the database was being used to facilitate identity theft. Lambert also alleged that, as a direct and proximate result of the publication of her social-security number on the clerk's website, "she [had] suffered serious and significant emotional distress, anxiety, disruption of her personal affairs, loss of time and actual expense." She also alleged that the clerk had failed to eliminate information such as social-security numbers that were irrelevant to the function of the clerk's office. Construing the facts as true, we hold that Lambert's allegations were sufficient to state a cause of action under Ohio's Privacy Act.¹⁴

{¶24} Hartman argues that the only possible claim that Lambert could have would be one under R.C. 1347.10(A)(2), which prohibits the clerk from "intentionally using or disclosing personal information in a manner prohibited by law." Hartman argues that, at the time of the publication of Lambert's traffic ticket, there was no law that prevented or limited the dissemination of Lambert's ticket. Hartman is correct. There was no law in place preventing the dissemination of Lambert's traffic ticket as a public record, but there was arguably law in place that required that Lambert's social-security number be redacted prior to publishing the traffic ticket.¹⁵ Furthermore, as we noted earlier, the clerk had a duty to prevent personal, private information from being misused.¹⁶ The allegations in Lambert's complaint, if true, sufficiently pleaded a cause of action under R.C. Chapter 1347.

¹⁴ See *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365, 367, 725 N.E.2d 1144.

¹⁵ See *Beacon Journal Publishing Company v. Akron* (1994), 70 Ohio St.3d 605, 640 N.E.2d 164 (holding that city employees had a legitimate expectation of privacy in their social-security numbers and that they were not subject to mandatory disclosure under Ohio's Public Records Act); *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53, 1998-Ohio-444, 689 N.E.2d 25 ("there is nothing to suggest that Wadd would not be entitled to public access of the preliminary, unnumbered accident reports following prompt redaction of exempt information such as social-security numbers").

¹⁶ See *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365, 367, 725 N.E.2d 1144, citing *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 188, 610 N.E.2d 997 ("To the extent that an item is not a public record and is 'personal information,' as defined in R.C. 1347.01(E), a public

{¶25} Last, the clerk argues that Lambert's claim under R.C. Chapter 1347 was properly dismissed because it was filed after the two-year limitations period had run.¹⁷ Lambert maintains that her claim under R.C. Chapter 1347 related back, under Civ.R. 15(C), to the time that she had filed her original complaint in federal court. The clerk argues that Lambert's motion to amend her complaint to add a claim under R.C. Chapter 1347 was never granted by the federal court before it dismissed Lambert's complaint. But this is not accurate.

{¶26} We hold that Lambert's motion to amend her complaint to add a claim under R.C. Chapter 1347 was implicitly granted by the federal district court when the court's decision specifically mentioned "[Lambert's] proposed claim" under Ohio's Privacy Act and then stated that "the Court has supplemental jurisdiction over these state law claims. * * *." Accordingly, Lambert's claim was timely filed because it related back to her original lawsuit filed in federal court.¹⁸

V. Invasion of Privacy: Publication of a Private Fact

{¶27} To establish a claim for invasion of privacy, specifically the publication of private facts, a plaintiff must allege (1) a private fact; (2) a public disclosure of that private fact; and (3) that the fact made public is one that would be highly offensive and objectionable to a reasonable person.¹⁹ Upon review of the complaint, we hold that Lambert sufficiently pleaded a claim for invasion of privacy. Lambert alleged in her complaint that the clerk had published her private information on a public website and that this had caused her harm. The clerk argues that Lambert's traffic ticket was a

office 'would be under an affirmative duty, pursuant to R.C. 1347.05(G), to prevent its disclosure'").

¹⁷ R.C. 1347.01(E).

¹⁸ See *Osborne v. AK Steel/Armco Steel Co.* (2002), 96 Ohio St.3d 368, 370, 775 N.E.2d 483.

¹⁹ *Geenwood v. Taft, Stettinius and Hollister* (1995), 105 Ohio App.3d 295, 303, 663 N.E.2d 1030.

public record and, thus, that its publication could not, as a matter of law, have constituted the tort of publication of private facts. But the Ohio Supreme Court has held that public-records custodians should redact social-security numbers from otherwise public records before disclosing them under R.C. 149.43.²⁰

VI. Public Nuisance

{¶28} A public nuisance involves the invasion of public rights that are common to all members of the public. Generally, public nuisances are subject to abatement only by the state or by individuals who can “show particular harm of a different kind from that suffered by the general public.”²¹ Here, Lambert alleged that the clerk had knowingly, willfully, and recklessly continued to publish the personal information of thousands of individuals on the Internet, despite being aware of the risk of harm that was created by the publication. Lambert also alleged that this practice had infringed upon several rights common to the general public, including an invasion of privacy, and that she had suffered special, actual harm in the form of identity theft as a result. Construing these allegations as true, as we are required to do for a motion to dismiss, we hold that Lambert sufficiently pleaded a claim for public nuisance.

VII. Lis Alibi Pendens

{¶29} The clerk also argues that the trial court lacked subject-matter jurisdiction to hear Lambert’s causes of action under the doctrine of lis alibi pendens. This doctrine is “a preliminary defense that a case involving the same parties and the

²⁰ *State ex rel. Office of Montgomery Cty. Public Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, 842 N.E.2d 508, at ¶18, citing *Wadd*, supra.

²¹ *Kenwood Plaza Ltd. Partnership v. Stephens* (Aug. 1, 1997), 1st Dist. No. C-961106.

same subject is pending in another court.”²² Essentially, the clerk contends that because Lambert had originally filed her complaint in federal court and has appealed the dismissal of her federal case (including possibly her state claims, although this is unclear), Lambert should have been prevented from asserting her state claims in state court. We disagree. Lambert’s state claims were dismissed without prejudice. If Lambert prevails in her federal appeal and her state claims are revived in federal court, the clerk may raise the issue of *lis alibi pendens* in the federal action to prevent the district court from hearing the state claims.

VIII. Conclusion

{¶30} Based on the foregoing, we sustain Lambert’s assignment of error. This court, same as the trial court, is bound by law to treat as true all the *allegations* of the complaint and draw all reasonable inferences on behalf of Lambert. Because of this high legal standard, the allegations in the complaint live for another day.

{¶31} Accordingly, we reverse the judgment of the trial court and remand this case for further proceedings consistent with the law and this decision.

Judgment reversed and cause remanded.

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

Please Note:

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

²² Black’s Law Dictionary (8 Ed.2004) 950.



D80338233

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

FILED
COURT OF APPEALS
SEP 26 2008
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

CYNTHIA C. LAMBERT,

Plaintiff-Appellant,

vs.

GREG HARTMANN, HAMILTON
COUNTY CLERK OF COURTS,

Defendant-Appellee.

APPEAL NO. C-070600

TRIAL NO. A-0700787

DECISION.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

SEP 26 2008

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: September 26, 2008

Law Office of Marc Mezibov, Marc Mezibov, and Stacy A. Hanners, for Plaintiff-Appellant,

Joseph Deters, Hamilton County Prosecutor, Michael G. Florez, and Pamela J. Sears, Assistant Hamilton County Prosecutors, for Defendant-Appellee.

FILED

2008 SEP 26 A 10:02

GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH.

STATE OF OHIO, COUNTY OF HAMILTON
COURT OF APPEALS

THIS IS TO CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE
DOCUMENT ON FILE IN THIS OFFICE ENTERED

9-26-08

WITNESS MY HAND AND SEAL OF SAID COURT
THIS 11-07-08

GREGORY HARTMANN, CLERK OF COURTS

BY *[Signature]*
DEPUTY CLERK

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{¶24} Hartman argues that the only possible claim that Lambert could have would be one under R.C. 1347.10(A)(2), which prohibits the clerk from "intentionally using or disclosing personal information in a manner prohibited by law." Hartman argues that, at the time of the publication of Lambert's traffic ticket, there was no law that prevented or limited the dissemination of Lambert's ticket. Hartman is correct. There was no law in place preventing the dissemination of Lambert's traffic ticket as a public record, but there was arguably law in place that required that Lambert's social-security number be redacted prior to publishing the traffic ticket.¹⁵ Furthermore, as we noted earlier, the clerk had a duty to prevent personal, private information from being misused.¹⁶ The allegations in Lambert's complaint, if true, sufficiently pleaded a cause of action under R.C. Chapter 1347.

¹⁴ See *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365, 367, 725 N.E.2d 1144.

¹⁵ See *Beacon Journal Publishing Company v. Akron* (1994), 70 Ohio St.3d 605, 640 N.E.2d 164 (holding that city employees had a legitimate expectation of privacy in their social-security numbers and that they were not subject to mandatory disclosure under Ohio's Public Records Act); *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53, 1998-Ohio-444, 689 N.E.2d 25 ("there is nothing to suggest that Wadd would not be entitled to public access of the preliminary, unnumbered accident reports following prompt redaction of exempt information such as social-security numbers").

¹⁶ See *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St.3d 365, 367, 725 N.E.2d 1144, citing *State ex rel. Fant v. Enright* (1993), 66 Ohio St.3d 186, 188, 610 N.E.2d 997 ("To the extent that an item is not a public record and is 'personal information,' as defined in R.C. 1347.01(E), a public

{¶25} Last, the clerk argues that Lambert's claim under R.C. Chapter 1347 was properly dismissed because it was filed after the two-year limitations period had run.¹⁷ Lambert maintains that her claim under R.C. Chapter 1347 related back, under Civ.R. 15(C), to the time that she had filed her original complaint in federal court. The clerk argues that Lambert's motion to amend her complaint to add a claim under R.C. Chapter 1347 was never granted by the federal court before it dismissed Lambert's complaint. But this is not accurate.

{¶26} We hold that Lambert's motion to amend her complaint to add a claim under R.C. Chapter 1347 was implicitly granted by the federal district court when the court's decision specifically mentioned "[Lambert's] proposed claim" under Ohio's Privacy Act and then stated that "the Court has supplemental jurisdiction over these state law claims. * * *." Accordingly, Lambert's claim was timely filed because it related back to her original lawsuit filed in federal court.¹⁸

V. Invasion of Privacy: Publication of a Private Fact

{¶27} To establish a claim for invasion of privacy, specifically the publication of private facts, a plaintiff must allege (1) a private fact; (2) a public disclosure of that private fact; and (3) that the fact made public is one that would be highly offensive and objectionable to a reasonable person.¹⁹ Upon review of the complaint, we hold that Lambert sufficiently pleaded a claim for invasion of privacy. Lambert alleged in her complaint that the clerk had published her private information on a public website and that this had caused her harm. The clerk argues that Lambert's traffic ticket was a

office 'would be under an affirmative duty, pursuant to R.C. 1347.05(G), to prevent its disclosure').

¹⁷ R.C. 1347.01(E).

¹⁸ See *Osborne v. AK Steel/Armco Steel Co.* (2002), 96 Ohio St.3d 368, 370, 775 N.E.2d 483.

¹⁹ *Geenwood v. Taft, Stettinius and Hollister* (1995), 105 Ohio App.3d 295, 303, 663 N.E.2d 1030.

public record and, thus, that its publication could not, as a matter of law, have constituted the tort of publication of private facts. But the Ohio Supreme Court has held that public-records custodians should redact social-security numbers from otherwise public records before disclosing them under R.C. 149.43.²⁰

VI. Public Nuisance

{¶28} A public nuisance involves the invasion of public rights that are common to all members of the public. Generally, public nuisances are subject to abatement only by the state or by individuals who can “show particular harm of a different kind from that suffered by the general public.”²¹ Here, Lambert alleged that the clerk had knowingly, willfully, and recklessly continued to publish the personal information of thousands of individuals on the Internet, despite being aware of the risk of harm that was created by the publication. Lambert also alleged that this practice had infringed upon several rights common to the general public, including an invasion of privacy, and that she had suffered special, actual harm in the form of identity theft as a result. Construing these allegations as true, as we are required to do for a motion to dismiss, we hold that Lambert sufficiently pleaded a claim for public nuisance.

VII. Lis Alibi Pendens

{¶29} The clerk also argues that the trial court lacked subject-matter jurisdiction to hear Lambert’s causes of action under the doctrine of lis alibi pendens. This doctrine is “a preliminary defense that a case involving the same parties and the

²⁰ *State ex rel. Office of Montgomery Cty. Public Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, 842 N.E.2d 508, at ¶18, citing *Wadd*, supra.

²¹ *Kenwood Plaza Ltd. Partnership v. Stephens* (Aug. 1, 1997), 1st Dist. No. C-961106.

same subject is pending in another court.”²² Essentially, the clerk contends that because Lambert had originally filed her complaint in federal court and has appealed the dismissal of her federal case (including possibly her state claims, although this is unclear), Lambert should have been prevented from asserting her state claims in state court. We disagree. Lambert’s state claims were dismissed without prejudice. If Lambert prevails in her federal appeal and her state claims are revived in federal court, the clerk may raise the issue of *lis alibi pendens* in the federal action to prevent the district court from hearing the state claims.

VIII. Conclusion

{¶30} Based on the foregoing, we sustain Lambert’s assignment of error. This court, same as the trial court, is bound by law to treat as true all the *allegations* of the complaint and draw all reasonable inferences on behalf of Lambert. Because of this high legal standard, the allegations in the complaint live for another day.

{¶31} Accordingly, we reverse the judgment of the trial court and remand this case for further proceedings consistent with the law and this decision.

Judgment reversed and cause remanded.

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

Please Note:

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

²² Black’s Law Dictionary (8 Ed.2004) 950.