

**In the Court of Common Pleas
Cuyahoga County, Ohio**

SHI'DEA LANE,)	CASE NO. CV 13-803061
)	
)	JUDGE PAMELA BARKER
Plaintiff,)	
)	
v.)	Journal Entry:
)	Decision and Order on
GREATER CLEVELAND REGIONAL)	Defendant GCRTA's Motions to Dismiss
TRANSIT AUTH., et al.)	Complaint and Cross-Claim
)	
Defendants)	
)	

On April 25, 2013, Defendant Greater Cleveland Regional Transit Authority (hereinafter "GCRTA") filed a Motion to Dismiss Plaintiff Shi'Dea Lane's Amended Complaint against it pursuant to Ohio Civil Rule 12(B)(6), citing and relying upon the Ohio Revised Code provisions for political subdivision immunity from civil liability (hereinafter "GCRTA's Motion").¹ In GCRTA's Motion, it argues that based upon the allegations set forth in Plaintiff's Complaint,² it is statutorily immune from liability for any injuries or damages sustained by Plaintiff. On April 24, 2013, Plaintiff filed her Reply to the Original Motion ("Plaintiff's Reply") and on May 3, 2013, Plaintiff filed a Supplemental Response To GCRTA's Refiling of 12(B)(6) Motion (hereafter "Plaintiff's Response"). In each of these pleadings, Plaintiff cited

¹ On April 15, 2013 GCRTA had filed a Motion To Dismiss the original Complaint filed on March 14, 2013 ("the Original Motion"). However, Plaintiff filed an Amended Complaint on April 24, 2013 and in GCRTA's Motion, it is asking this Court to dismiss that part of the Amended Complaint that seeks damages from it.

² The Complaint alleges that on 9/18/12, Defendant Artis Hughes, while in the course and scope of his employment as a GCRTA bus driver and while engaged in the furtherance of GCRTA's interest, and after an escalating verbal altercation, "wantonly, willfully and recklessly approached Plaintiff and struck her in the face, kicked and choked her, and physically assaulted her by throwing her off of the bus" causing Plaintiff to incur approximately \$50,000 in needed dental work and pain and suffering. Plaintiff further alleges that GCRTA negligently hired and trained Defendant Artis Hughes. Plaintiff is seeking compensatory and punitive damages, plus attorney fees and costs.

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two cases to support her argument that GCRTA's Motion should be denied.³ On June 7, 2013, Plaintiff filed a Notice of Supplemental Authority (hereinafter "Plaintiff's Notice") to apprise this Court of the recent Ohio Supreme Court decision in *Riffle v. Physicians & Surgeons Ambulance Service, Inc*, 135 Ohio St.3d 357, which Plaintiff argued supported her position that GCRTA's Motion must be denied.

On June 14, 2013, Defendant GCRTA filed a Reply to Plaintiff's Notice, restating its original arguments set forth in GCRTA's Motion (hereinafter "GCRTA's Reply"). On June 24, 2013, Plaintiff filed yet another reply to GCRTA's Reply and on July 10, 2013, GCRTA filed yet another response to Plaintiff's Notice, and argued that *Riffle* is distinguishable and does not warrant denial of GCRTA's Motion.⁴

Defendant Artis Hughes filed an Answer, Counterclaim and Cross-Claim⁵ on July 17, 2013. Defendant GCRTA filed a Motion to Dismiss Defendant Artis Hughes' Cross-Claim on August 8, 2013 ("GCRTA's Motion To Dismiss Cross-Claim), arguing that: Hughes' claim for indemnification must fail as it was not plead under R.C. 2744.07(A)(2);⁶ the allegations of Hughes' cross-claim can be construed as alleging that Mr. Hughes and GCRTA are joint tortfeasors and that as such, Mr. Hughes is entitled to contribution, but since Mr. Hughes is an intentional tortfeasor he is not entitled to contribution from

³ *Korner v. Cosgrove* (1923), 108 Ohio St. 484, discussion on employer's liability for its employee's acts; and *Hancock v. Ashenhurst*, 2004 Ohio 3319 (Ohio Ct. App., Franklin County June 24, 2004), case rejecting sovereign immunity doctrine for an employee's acts.

⁴ GCRTA argues that *Riffle's* holding is factually distinguishable as it hinged upon the application of R.C. Section 4765.49(B), which imposed civil liability on EMS personnel and agencies.

⁵ In his Cross-Claim, Defendant Artis Hughes alleges that GCRTA owed a duty to him as its employee to provide him with adequate protection and safety from hostile passengers, and to provide him with sufficient training to deal with them; that CGRTA breached that duty or was negligent in failing to provide him with such protection and/or training; and as a result, he is entitled to indemnification from GCRTA for any amounts adjudged against him in favor of Plaintiff.

⁶ GCRTA argues that any right for Hughes to claim indemnification arises exclusively under this code section, and as such, the argument must fail as it is a statutory claim Hughes did not plead. Indeed, R.C. 2744.07(A)(2) provides in relevant part that "****a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment....that is obtained in a state or federal court...and that is for damages for injury...to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities."

GCRTA;⁷ and GCRTA is immune from liability for any alleged negligent failure to train and protect Hughes since training so as to protect Hughes or lack thereof constituted its exercise of judgment or discretion in determining whether to acquire or how to use its resources.⁸

On August 19, 2013, Defendant Hughes filed a Reply In Opposition to GCRTA's Motion To Dismiss Cross-Claim ("Hughes' Reply"). In Hughes' Reply, Defendant Hughes relies upon R.C. 2744.09(B), which provides that political subdivision immunity does not apply to civil actions by employees relative to "any matter that arises out of the employment relationship between the employee and the political subdivision." Defendant Hughes argues that his cross-claim arises out of a matter that arose from his employment relationship with GCRTA, specifically its negligent failure to train and protect him, and therefore, Chapter 2744 does not apply to afford GCRTA political subdivision immunity.

DEFENDANT GCRTA'S MOTION TO DISMISS COMPLAINT OF SHI'DEA LANE:

The standard of review on a Motion to Dismiss is as follows:

A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010 Ohio 2057, ¶11, 929 N.E.2d 434. An order granting a motion to dismiss under Civ.R. 12(B)(6) is subject to de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004 Ohio 4362, ¶15, 814 N.E.2d 44. When reviewing such an order, an appellate court must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Volbers-Klarich* at ¶12; [***975] *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004 Ohio 5717, ¶11, 816 N.E.2d 1061. To sustain a dismissal of a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323,

⁷ R.C. 2307.25(A) and (D), provide in relevant part, respectively: "****There is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been alleged and established;" and "[t]his section does not impair any right of indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation."

⁸ R.C. 2744.03(A)(5) provides: "The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

2007 Ohio 3608, ¶14, 872 N.E.2d 254; *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002 Ohio 2480, ¶5, 768 N.E.2d 1136.

Roberts v. Columbus City Police Impound Div., 195 Ohio App. 3d 51, 56 (Ohio Ct. App., Franklin County 2011).

In GCRTA's Motion, GCRTA focuses on the argument that Plaintiff's Amended Complaint alleges an intentional tort of assault upon Plaintiff by Defendant Hughes, or wanton, willful and reckless misconduct, and therefore, such misconduct is well outside the scope of his employment with it, rendering Defendant Hughes solely liable for his actions. GCRTA argues that Plaintiff has not established any exception to the political subdivision immunity of GCRTA.

In analyzing Plaintiff's opposition pleadings, the Court finds that the cases relied upon are not on point. First, *Korner v. Cosgrove*, references the "public duties" owed to passengers by a privately owned cab company; political subdivision immunity was not at issue in that case.

In analyzing any such public duty, the Eighth District Court of Appeals has held as follows:

The "public duty rule" was created in response to the judicial abrogation of common law principles of sovereign immunity. *Id.* at 225. This court, however, has determined the doctrine, as it applies to political subdivisions, "**has been superseded by the enactment of the Political Subdivision Tort Liability Act**, codified at R.C. Chapter 2744, et seq." *Sudnick v. Crimi* (1996), 117 Ohio App. 3d 394, 397, 690 N.E.2d 925. This act is the reinstatement, in statutory form, of the common law doctrine of "sovereign immunity." *Id.*

The Ohio Supreme Court has indicated a **lack of intent to overturn the foregoing determination**. *Wallace v. Dept. of Corrections*, 96 Ohio St. 3d 266, 2002 Ohio 4210, footnote 13, 773 N.E.2d 1018.

Coleman v. Greater Cleveland Reg'l Transit Auth., 174 Ohio App. 3d 735, 740 (Ohio Ct. App., Cuyahoga County 2008).⁹

⁹ While the 8th District did find that a genuine issue of material fact remained as to GCRTA's immunity in the *Coleman* case, it is factually distinguishable from the present matter. *Coleman* involved a bus operator engaged in the duty of driving who ignored the calls for help by passengers in jeopardy on his bus. In the present matter, Plaintiff's Amended Complaint alleges an assault by the bus operator upon a passenger or willful, wanton and reckless misconduct by the employee; and alleges negligence on the part of GCRTA.

The second case cited by Plaintiff, *Hancock v. Office James Ashenhurst*, does not speak to a political subdivision's immunity but rather discusses the liability of the employee himself. The third and final case that Plaintiff relies upon, *Riffle*, is legally distinguishable, since the holding centers around a revised code section that creates specific liability for EMS workers and agencies, and creates a clear statutory exception in the law to the political subdivision immunity statute.

In support of their Motion, GCRTA relies upon Ohio Revised Code § 2744.02, which discusses political subdivision immunity and clarifies the extent of liability and exceptions.¹⁰

Specifically, § 2744.02(B)(2) reads, in pertinent part:

(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.**

(Emphasis added by bold print.)

Additionally, Ohio R.C. § 2744.03 delineates the defenses or immunities of the political subdivision and employee. R.C. § 2744.03(A)(6) reads:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

¹⁰ § 2744.02 (A)(1) provides 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 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." The exceptions are found, generally, in Ohio Revised Code §2744.02(B).

- (a) The employee's acts or omissions were **manifestly outside the scope of the employee's employment or official responsibilities;**
- (b) **The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;**

(Emphasis added by bold print.)

Ohio R.C. § 2744.03(B) also clarifies that even if the employee has certain liabilities or defenses, that does not impact the liabilities or defenses of the employer political subdivision:

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

Thus, the analysis on the status of GCRTA's immunity turns on whether the actions of Artis Hughes can be classified as a "negligent performance of his acts as an employee". In applying the standard of review in evaluating a Motion to Dismiss, and assuming the allegations in the Plaintiff's Amended Complaint to be true, the Court finds as follows: the Amended Complaint includes allegations made against Defendant Hughes amounting to an intentional tort of assault and not negligence in the performance of his operation of the bus and therefore, the conduct alleged against Defendant Hughes clearly falls outside the scope of Hughes' role as a bus operator.¹¹ Courts in Ohio have routinely found that an employee can be liable for his actions when they are committed "with malicious purpose, in bad faith, or in a wanton or reckless manner"¹², and have further held that this liability would only apply to "individual employees and not to political subdivisions". *Fabrey v. McDonald Village Police Dep't*, 70 Ohio St. 3d 351, 355-356 (Ohio 1994). Just because Defendant Hughes may be subject to liability, this does not create an exception for the employer political subdivision GCRTA.¹³

¹¹ R.C. § 2744.03(A)(6)(a)

¹² R.C. § 2744.03(A)(6)(b)

¹³ R.C. § 2744.03(B)

Finally, Plaintiff Lane's allegations against GCRTA involve negligence in personnel matters, training or hiring Defendant Hughes. GCRTA argues this claim is also barred by political subdivision immunity as Ohio Revised Code § 2744.03(A)(5) provides the following defense:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(5) The political subdivision is **immune from liability** if the injury, death, or loss to person or property resulted **from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources** unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(Emphasis Added).

The Eighth District Court of Appeals has held that § 2744.03(A)(5) will provide immunity to political subdivisions on hiring, training and personnel matters barring some showing of "malicious purpose", "bad faith", or recklessness by the subdivision:

This court has already found that this defense applies in the context of torts arising out of **the hiring and supervision of a political subdivision's employees**. See Daniel v. Cleveland Metro. School Dist., 8th Dist. No. 83541, 2004 Ohio 4632. **[**11]** Scott does not allege that Tri-C acted with malicious purpose or in bad faith, or that it acted recklessly or wantonly in hiring or retaining Dennis. Instead, she alleged that she would not have been injured but for "Tri-C's negligence in hiring, supervising, and retaining Defendant Michael Dennis." **Furthermore, even when construing the facts most favorably in Scott's favor, we cannot find that Tri-C acted with malicious purpose, in bad faith, or in a wanton or reckless manner.**

[*P25] Accordingly, we find that Tri-C is entitled to immunity under the facts of this case.

Scott v. Dennis, 2011 Ohio 12 (Ohio Ct. App., Cuyahoga County Jan. 6, 2011).

As relates to GCRTA, the Amended Complaint is like or analogous to the complaint in the *Scott* case in that it includes only allegations of negligence and does not include allegations that the political subdivision acted with malicious purpose, bad faith or recklessness in the hiring, training or supervision

of Defendant Hughes. Accordingly, the Court finds that Defendant GCRTA's Motion to Dismiss Plaintiff's Complain to be **well-taken and is granted**.

DEFENDANT GCRTA'S MOTION TO DISMISS CROSS-CLAIM OF ARTIS HUGHES:

Defendant Artis Hughes alleges in his Cross-claim that GCRTA was negligent in its failure to train him and protect him from unruly passengers like Plaintiff Lane. In support of his position, Hughes relies heavily upon Ohio Revised Code Section § 2744.09(B),¹⁴ which provides as follows:

This chapter does not apply to, and **shall not be construed to apply to**, the following:

- (B) **Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision.**

(Emphasis Added)

Defendant Hughes argues that the cross-claim alleges matters that are relative to an altercation with Lane that arose out of his employment relationship with GCRTA. As such, Hughes argues that GCRTA cannot claim immunity from his actions. Much like the arguments presented in Plaintiff Lane's Complaint, the crux of Hughes' claim centers around allegations that GCRTA was *negligent in personnel matters or training* of Defendant Hughes. As with the analysis above with the Motion to Dismiss Plaintiff Lane's claim, the Court again relies on Ohio Revised Code § 2744.03(A)(5) Again the discretionary decisions of GCRTA are subject to political subdivision immunity.

Importantly, similar to Plaintiff Lane's allegations against GCRTA in her Amended Complaint, Hughes' allegations against GCRTA in his cross-claim are of, or amount to, negligence on the part of GCRTA. Defendant Hughes' cross-claim does not include any allegations of the requisite malicious purpose, bad faith or recklessness so as to impose liability upon GCRTA to indemnify Defendant Hughes.

¹⁴ Ohio Revised Code Section § 2744.09 generally provides exceptions to the employer political subdivision's immunity when an employee is the one who is filing suit.

Accordingly, the Court finds that Defendant GCRTA's Motion to Dismiss Defendant Hughes' Cross-Claim to be well-taken and is granted.

IT IS SO ORDERED.

Pamela A. Barker 9-23-13
JUDGE PAMELA A. BARKER DATED

RECEIVED FOR FILING

SEP 23 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By: *[Signature]* Deputy