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IN THE FRANKLIN COUNTY MUNICIPAL COURT

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Veronica Covatch, et al.,
Plaintiffs,
v.
Central Ohio Sheltie Rescue, Inc., et al.,
Defendants.

Case No. 14 CVF 24571
Judge James O'Grady
FRANKLIN COUNTY
MUNICIPAL COURT
J. M. TYACK

REPLY IN SUPPORT OF MOTION TO DISMISS

The Franklin County Defendants are not "seeking judgment on factual grounds which have not yet been established in this case" as Plaintiffs suggest. Rather, as is completely proper under Civ. R. 12(B)(6), the Franklin County Defendants are seeking dismissal based on the actual facts alleged in Plaintiffs' Complaint. These facts, even if true, entitle the Franklin County Defendants to dismissal as a matter of law as to all claims asserted against them. To be clear, the Franklin County Defendants are not conceding these facts, as Plaintiffs seem to suggest. Rather, for the purposes of their Motion to Dismiss, the Franklin County Defendants are bound by the standard applicable to such motions, i.e., that all factual allegations must be presumed as true and that the Court's decision can be based only on these allegations.

Plaintiffs assert their dog was released by dog shelter employees in contravention of state law and internal regulations. Plaintiffs assert that their dog is currently in the possession of Defendants Central Ohio Sheltie Rescue, Inc. and seek replevin from this Defendant. Plaintiffs assert that they contacted the Commissioners after the dog's release who have refused to take action. Plaintiffs allege no personal involvement by the Commissioners in the dog's release. They make no allegation that any of the Franklin County Defendants are in possession of the dog. Plaintiffs allege that their dog bore a microchip but fail to allege that any of the Franklin

County Defendants knew the identity of the dog's owners. Even if all of Plaintiffs' allegations of fact are assumed to be true, they establish only that Plaintiffs' dog was released prematurely, nothing more.¹

- **All claims against Franklin County, the Dog Shelter and against the Defendants in their official capacities must be dismissed.**

Plaintiffs acknowledge they are suing the Commissioners in their official capacity only. Plaintiffs also acknowledge official capacity claims against Ms. Finelli. (Plaintiffs' Memorandum Contra, p. 6). Thus, there is no dispute, based on the well-settled law discussed in the Franklin County Defendants' Motion to Dismiss, that, as to these claims, the Commissioners and Ms. Finelli are entitled to the same statutory immunity as Franklin County itself. Likewise, the dog shelter, as an agency of Franklin County, is entitled to this same immunity. Again, R.C. 2744.02(A) provides:

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.

There are only five exceptions to this immunity. Plaintiffs assert, without citation to any legal authority, that two of these exceptions apply. Plaintiffs also assert other arguments, which are devoid of merit, as to why statutory immunity does not apply in this case.

Seeking to avail themselves of the exception contained in R.C. § 2744.02(B)(5), Plaintiffs first cite to a number of Ohio revised code sections and even to a federal animal welfare statute in asserting that liability is expressly imposed by statute. None of these statutes, which are absent from Plaintiffs' Complaint, actually impose liability. They simply

¹ The Franklin County Defendants appreciate and agree with the position set forth by other Defendants that the dog at issue was not released in contravention of law. However, the Franklin County Defendants acknowledge, for the purpose of the present motion, that this fact must be construed in Plaintiffs' favor.

set forth a number of duties and obligations. In fact, the federal statute upon which plaintiff relies has no application to the Franklin County Defendants.²

As stated in the Franklin County Defendants' Motion to Dismiss, a statute must contain language expressly imposing liability, not just impose general obligations or duties. *Jamison v. Stark Cty. Bd. of Commrs.*, 2014-Ohio-4906, ¶¶ 18, 22 In fact, *Jamison* rejected the notion that portions of R.C. § 955.01, *et seq.* expressly imposed liability.

In *Bell v. Franklin Cnty. Comm'rs*, No. 92AP-872, 1992 WL 369615, at *2 (Ohio Ct. App. Dec. 10, 1992), the 10th District rejected an argument identical to that raised by Plaintiffs in this case. The plaintiff in *Bell* sought recovery for injuries sustained at the Franklin County Correctional Facility and attempted to invoke R.C. § 2744.02(B)(5) through citation to numerous statutes imposing duties with regard to the operation of a jail. The 10th District, in finding immunity proper, stated:

The statutes cited by plaintiff do not expressly impose liability upon the county but, instead, merely establish responsibility and standards regarding the maintenance of jails and are silent on the issue of liability. No cases have been cited that interpret these statutes to impose liability upon the county and we find that they do not impose liability.

The same is true here. Plaintiffs cite to revised code sections which set forth obligations in regard to animal control and the operation of a dog shelter. None of them speak to liability. Lacking any basis in law, the Court should reject Plaintiffs' attempt to rely on R.C. § 2744.02(B)(5).³

² 7 U.S.C. § 2131, *et seq.*, clearly applies to dealers, research facilities, and exhibitors of dogs. The statute makes no mention of local governmental animal agencies. Plaintiffs cite no specific portions of this code chapter nor any case law which indicates, in any way, that it applies to the Franklin County Defendants.

³ Plaintiffs cite their claim for Replevin as subject to this exception. However, Plaintiffs have not asserted this claim against the Franklin County Defendants.

Plaintiffs also assert that there is no immunity for administrative acts. Plaintiffs cite no authority for this proposition because none exists. R.C. § 2744.02(A) provides immunity for all claims of damages. Again, there are only five exceptions, none of which apply to “administrative acts.” Having no basis in law, this argument should also be rejected.

Plaintiffs next cite to R.C. § 2744.09(A). This section has no application to the present case. Plaintiffs are not suing the Franklin County Defendants on a contract. Plaintiffs allege the existence of no contract with any of the Franklin County Defendants. In fact, this provision could only apply to claims based on written contracts, the only type of contractual claim possible against a political subdivision. *See, Schmitt v. Educ. Serv. Ctr. of Cuyahoga Cty.*, 2012-Ohio-2208, ¶ 18, 970 N.E.2d 1187, 1192 (“But in Ohio, political subdivisions cannot be bound by contract unless the agreement is in writing and formally ratified through proper channels. As a result, political subdivisions cannot be made liable upon theories of implied or quasi contract.”).

Plaintiffs also assert that R.C. § 2744.09(E) allows them to proceed with their claims. Plaintiffs cite no federal law or constitutional provision in their Complaint. The Animal Welfare Act, 7 U.S.C. § 2131 provides for no private right of action and, as already indicated, has no application to the Franklin County Defendants anyway. Plaintiffs cannot simply mention some federal statute in response to a Motion to Dismiss in order to avoid state law immunity.

Plaintiffs allege no policy or custom as a basis for their claims which all stem from the release of their dog. Rather, their claims are based on the release of their dog by dog shelter employees for which Plaintiffs seek to impose vicarious liability. Despite mentioning the term “due process,” it is clear that Plaintiffs are not asserting a federal constitutional claim. The following discussion from *Campbell v. City of Youngstown*, 2007-Ohio-7219, ¶¶ 15-16 is illustrative of this point:

When deciding whether the exception in R.C. 2744.09(E) applies to a particular claim, courts have distinguished between cases which involve constitutional issues and cases which have a claim for relief based on a federal constitutional or statutory violation. Thus, Ohio's courts have recognized that R.C. Chapter 2744 does not apply to a claim raised under Title 42, U.S.Code, Section 1983, which provides a remedy to those persons whose federal rights have been violated by government officials. See *Patton v. Wood Cty. Humane Soc.*, 154 Ohio App.3d 670, 2003-Ohio-5200, at ¶ 32-33. Likewise, R.C. Chapter 2744 does not apply to a lawsuit brought under the federal Fair Labor Standards Act of 1938. *Dick v. Merillat* (2000), 139 Ohio App.3d 716, 721.

In contrast, courts have not treated a claim as falling under R.C. 2744.09(E) if those cases merely raise constitutional issues. For instance, in *Bram v. Cleveland* (1993), 97 Ohio App.3d 718, the plaintiff was making a claim similar to one Campbell is making in this case, the court concluded that a claim of wrongful demolition did not become a constitutional claim merely because due process issues were part of the case; the "essential nature" of the claim was still a tort claim for wrongful demolition. *Id.* at 721; see also *Browning v. Chillicothe* (Dec. 20, 1995), 4th Dist. No. 95-CA-2086; *Broadview Mtg. Co. v. Cleveland* (Mar. 18, 1993), 8th Dist. No. 61939.

The same is true here; Plaintiffs may have raised due process issues but their claims are ones for damages based on alleged violation of state law. Plaintiffs assert no policies or customs which could serve as a basis for liability under federal law. *Id.* at ¶ 19 (As the plaintiff's complaint alleged no policy or custom as the basis for liability, R.C. § 2744.09(E) did not apply).

Plaintiffs have alleged no federal claim. They do not mention any federal statute or any provision of the federal constitution. They invoke the term due process but nothing more. Again, Plaintiffs should not be allowed to circumvent immunity through the mere, amorphous, mention of a term sometimes associated with federal constitutional claims.

Finally, Plaintiffs simply ignore *Jamison* and assert nonetheless that the operation of the dog shelter is a proprietary function. This is simply not true and the Franklin County Defendants have provided case law otherwise. In addition to a case that has directly held that the provision of animal control services is a governmental function, the Franklin County Defendants would also direct the Court to R.C. § 2744.01(C)(1) which defines governmental functions as follows:

(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.

The provision of animal control services and the operation of a county dog shelter is clearly for the common good of all citizens and also promotes health, safety, and welfare. Plaintiffs cannot seriously contend otherwise. Further, the Ohio Revised Code, as Plaintiffs themselves point out, imposes a number of obligations on the Franklin County Defendants related to the handling of dogs and the operation of a dog shelter.

In *Blankenship v. Enright*, 67 Ohio App. 3d 303, 311-312, 586 N.E.2d 1176 (1990), the 10th District considered immunity in the context of the failure of the Clerk of Courts to properly record a *capias*. The 10th District, in finding the Clerk's actions to be governmental functions, and, therefore, immunity to be proper reasoned:

With these provisions in mind, we turn to the determination of whether defendant Franklin County's employees or agents were engaged in a "proprietary act" when they failed to withdraw the *capias* from plaintiff's file which subsequently led to plaintiff's unfortunate arrest. Only if that act is properly classified as "proprietary," pursuant to R.C. 2744.02(B)(2), can defendant Franklin County be liable making summary judgment inappropriate.

However, the facts even as alleged in the complaint do not support such a conclusion. The facts alleged fall within none of the definitions of "proprietary" contained in R.C. 2744.01(G)(2). The acts or functions contained within that section are akin to former case law definitions of proprietary acts which gave rise to municipal liability. These acts are performed by the political subdivision under no obligation to perform them. They are performed solely for the benefit of the political subdivision's own citizens, not the citizens of the entire state.

The act of recording a capias and docketing it accordingly is properly classified (under either the common or the statutory law) as being governmental. R.C. 1907.20(A) provides that accurately keeping such records is a duty imposed upon the clerk of courts. Thus, pursuant to R.C. 2744.01(C)(1)(a), this is clearly a “governmental” function.

The same reasoning applies here. The Franklin County Defendants, in operating the dog shelter, are acting pursuant to a legislative duty for the benefit of Ohio’s citizens. The acts which form the basis of Plaintiffs’ Complaint all stem from this governmental function.

Quite simply, there is no question that the operation of the dog shelter is a governmental function. In addition to being established through case law, such conduct meets the general definition of a governmental function under R.C. § 2744.02(C)(1). Therefore, the exception to immunity for the negligent performance of proprietary functions, contained within R.C. § 2744.02(B)(2), does not apply.

The application of immunity to the facts alleged in Plaintiffs’ Complaint is completely appropriate. Political subdivisions, their agencies, and those sued in their official capacity enjoy blanket immunity from damages claims except for five exceptions, none of which apply to this case. These exceptions, pursuant to a vast amount of well-settled case law, are to be strictly construed and are not subject to judicial expansion. The official capacity claims and the claims against Franklin County itself and the Commissioners should all be dismissed pursuant to R.C. § 2744.02(A).

- **The facts alleged as to Ms. Finelli fail to rise to the level of culpability necessary to defeat employee immunity provided by R.C. § 2744.03(A)(6).**

Plaintiffs have conceded that the only individual capacity claims they attempt to assert are against Ms. Finelli. Ms. Finelli would again point out that, despite applying this label to their claims, Plaintiffs are naming her and seeking recovery from her based purely on her position as Assistant Director of the Dog Shelter and not based on actions taken in her individual capacity.

Nevertheless, for the purpose of seeking dismissal, Ms. Finelli will address the attempt to assert individual capacity claims.

In seeking dismissal pursuant to Civ. R. 12(B)(6), the Court must accept as true all *facts* as pled in the Complaint. The Court need not accept as true formulaic recitations of legal elements or legal conclusions. *See, Hodge v. City of Cleveland*, 8th Dist. No. 72283, 1992 WL 742171 at *6 (Oct. 22, 1998) (Utilizing “magic word” of reckless is insufficient to withstand Motion to Dismiss where no operative facts support the allegation); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-56, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (A plaintiff must allege facts which raise a right to relief above a speculative level and labels, conclusions, and formulaic recitations of elements will not do.).

The facts pled in Plaintiff’s Complaint are rather simple: Plaintiffs allege their dog was released by employees of the Dog Shelter and/or by Ms. Finelli in violation of Ohio law and/or in violation of Dog Shelter policies. As indicated in the Franklin County Defendants’ Motion to Dismiss, the violation of policies amounts to, at most, negligence. Plaintiffs do not dispute this point of law and allege no other wrongful conduct apart from the alleged violation of policies and/or state law related to the impoundment of dogs. Plaintiffs allege no facts indicating a motive, the existence of animus, any relationship between Ms. Finelli and Plaintiffs, or any other facts which even remotely establish that Ms. Finelli acted with malice, in bad faith, wantonly or recklessly. Rather, Plaintiffs state the simple facts as noted above and state, in the most conclusory way, that Ms. Finelli acted recklessly, etc.

Rather than exhaustively discuss the point, Ms. Finelli would point out that the *facts* alleged in Plaintiffs’ Complaint come nowhere close to the level of culpability required to demonstrate malice, bad faith, wanton or reckless actions. Quite frankly, Plaintiffs persistence in

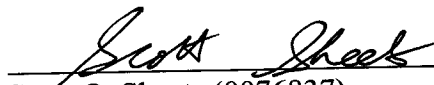
asserting that a simple mistake in the release of their dog (a fact which will be contested and quickly established to the contrary if necessary as the litigation progresses) is frivolous. Plaintiffs have no good faith basis for making this unwarranted and offensive accusation against Ms. Finelli. The claims against Ms. Finelli, even if Plaintiffs' *facts* are considered true, must be dismissed.

- **Conclusion**

For the reasons set forth above as well as in the Franklin County Defendants' Motion to Dismiss, the Franklin County Defendants are entitled to immunity and all claims against them should be dismissed.

Respectfully submitted,

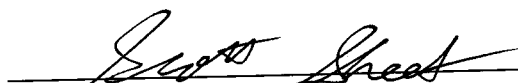
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing will be served on all counsel of record via regular U.S. Mail at their address of record this ²⁶~~15~~ ^{fore}~~15~~ day of ~~April~~, 2015.



Scott O. Sheets (0076837)