[Cite as *Ganzhorn v. R & T Fence Co.*, 2011-Ohio-6851.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STEVE GANZHORN,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-P-0059**
- vs -	:	
R & T FENCE CO., INC., et al.,	:	
Defendants,	:	
CITY OF AURORA,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 1018.

Judgment: Reversed and remanded.

Richard L. Demsey, Richard L. Demsey Co., L.P.A., 1550 U.S. Bank Centre, 1350 Euclid Avenue, Cleveland, OH 44115 (For Plaintiff-Appellant).

John T. McLandrich, *Frank H. Scialdone*, *James A. Climer*, and *John D. Pinzone*, Mazanec, Raskin, Ryder & Keller Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, OH 44139 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Steve Ganzhorn, appeals the judgment of the Portage County Court of Common Pleas granting appellee's, city of Aurora ("Aurora"),[1] motion for judgment on the pleadings finding Aurora immune from suit for injury.

1. R & T Fence Co., Inc. is not a party to this appeal. Ganzhorn filed a notice of voluntary dismissal pursuant to Civ.R. 41(A)(1)(a) on July 9, 2010.

{¶2} The instant appeal arises from an incident occurring at Sunny Lake Park, a park open to the public and owned by Aurora. It is alleged that Aurora organizes a recreational softball league where individuals may participate for a small fee.

{¶3} Ganzhorn, one of the players in a softball league, was attempting to catch a foul ball when he collided with a chain link fence that was allegedly installed incorrectly along the foul line of the softball field. Upon impact, the protective plastic cover of the fence cracked and shattered, exposing metal spikes. In his complaint, Ganzhorn alleged that this protective cover was "improperly maintained *** such that it was caused to dry out and shatter[.]" Further, Ganzhorn alleged that due to this protective cover, he was unable to observe the top of the chain link fence. Ganzhorn suffered lacerations to both of his arms.

{¶4} Aurora filed an answer to Ganzhorn's complaint asserting, among other affirmative defenses, immunity pursuant to R.C. Chapter 2744 and R.C. 1533.181, Ohio's recreational user statute.

{¶5} Aurora then filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C). The motion maintained Aurora was immune from Ganzhorn's claim pursuant to R.C. Chapter 2744 and that it did not owe a duty to Ganzhorn as he was a recreational user.

{¶6} Ganzhorn filed a response asserting that an exception to the immunity statute is applicable, as he suffered injuries at the park allegedly due to a defect on the premises. Further, Ganzhorn claimed that the recreational user statute does not eliminate Aurora's liability for his injuries.

{¶7} In a September 23, 2009 judgment entry, the trial court granted Aurora's motion for judgment on the pleadings. The trial court stated that:

{¶8} "Aurora is immune from suit for injury caused by the construction, repair, and maintenance of a playfield such as the one where [Ganzhorn] was injured. See, R.C. 2744.01(C)(2)(u). As pleaded, [Ganzhorn's] complaint does not state a viable claim for relief against Aurora.

{¶9} "Upon review and consideration of the motions and pleadings filed herein, and construing the factual allegations of the complaint as true in favor of [Ganzhorn], the Court concludes that Aurora is entitled to judgment as a matter of law."

{¶10} Ganzhorn filed a timely notice of appeal and, as his first assignment of error, states:

{¶11} "The trial court erred in granting Defendant-Appellee's, City of Aurora, motion for judgment on the pleadings by finding that Defendant-Appellee is entitled to sovereign immunity pursuant to Chapter 2744 of the Ohio Revised Code."

{¶12} "'Because Civ.R. 12(C) motions test the legal basis for the claims asserted in a complaint, our standard of review is de novo. In ruling on the motion, a court is permitted to consider both the complaint and the answer as well as any material incorporated by reference or attached as exhibits to those pleadings. In so doing, the court must construe the material allegations in the complaint, with all reasonable inferences drawn therefrom, as true and in favor of the non-moving party. A court granting the motion must find that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief.'" (Internal citations omitted.) *JTO, Inc. v. State Auto Mut. Ins. Co.*, 11th Dist. No. 2010-L-062, 2011-Ohio-1452, at ¶11, citing

Frazier v. Kent, 11th Dist. Nos. 2004-P-0077 and 2004-P-0096, 2005-Ohio-5413, at ¶14.

{¶13} The distinction in this analysis is clear: while we construe all of the allegations as true in the complaint, and we may *consider* the responses and affirmative defenses raised in the answer, those are not entitled to any inferences. In other words, the assertion of an affirmative defense does not place a burden on the non-moving party to affirmatively demonstrate or plead the absence of, or any exception to, immunity. In the complaint of appellant in this case, it is clear there are factual issues that relate to the applicability of the immunity defenses asserted by Aurora.

{¶14} R.C. Chapter 2744 provides a three-step test to determine whether a political subdivision enjoys immunity. First, R.C. 2744.02(A) provides broad immunity to political subdivisions: "'political subdivisions are not liable generally for injury or death to persons in connection with a township's performance of a governmental or proprietary function.'" *Cosimi v. Koski Constr. Co.*, 11th Dist. No. 2008-A-0075, 2009-Ohio-5892, at ¶64. (Citation omitted.) Second, exceptions to immunity are listed in R.C. 2744.02(B). Third, where one of the exceptions enumerated in R.C. 2744.02(B) is applicable, "a political subdivision or its employee can then 'revive' the defense of immunity by demonstrating the applicability of one of the defenses found in R.C. 2744.03." *Walker v. Jefferson Cty. Bd. of Commrs.*, 7th Dist. No. 02JE14, 2003-Ohio-3490, at ¶22. (Citation omitted.)

{¶15} It is undisputed that Aurora is a political subdivision as defined in R.C. 2744.01(F). Further, a "governmental function" includes "[t]he design, construction, reconstruction, renovation, repair, maintenance, and operation of any recreational area

or facility, including, but not limited to, *** (I) [a] park, playground, or playfield." R.C. 2744.01(C)(2)(u)(i). Therefore, the general grant of immunity contained in R.C. 2744.02(A)(1) is applicable in this case.

{¶16} Ganzhorn, however, claims the trial court erred in granting immunity to Aurora, as one of the exceptions enumerated in R.C. 2744.02(B) is applicable. Ganzhorn cites to R.C. 2744.02(B)(4), which provides:

{¶17} "(B) Subject to section 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:

{¶18} "***

{¶19} "(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."

{¶20} Aurora maintains this exception is not applicable because Ganzhorn did not allege in his complaint that "the alleged physically defective fence at Sunny Lake Park was located on the grounds of any building, let alone the grounds of a building

similar to an office or courthouse that conducts government business." Further, Aurora contends that based upon the rulings in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24 and *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517, outdoor recreational facilities are excluded from the exception to immunity in R.C. 2744.02(B)(4). *Hopper*, supra, overruled by *Hawsman v. Cuyahoga Falls*, 9th Dist. No. 25582, 2011-Ohio-3795, at ¶20.

{¶21} Conversely, Ganzhorn claims that since his injury occurred on park grounds in connection with a governmental function, an exception to immunity is applicable.

{¶22} R.C. 2744.02(B)(4) requires two separate elements to be met in this case: employee negligence and a physical defect within or on the grounds of buildings that are used in connection with the performance of a governmental function.

{¶23} With respect to the first issue, employee negligence, Ganzhorn alleges in his complaint that Aurora improperly maintained the fence at issue and failed to warn him of the hazards associated with the fence. "Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 2002-Ohio-2480. "Civ.R. 8(A)(1) only requires a complaint to include a 'short and plain statement of the claim showing that the party is entitled to relief.' As recognized by the Ohio Supreme Court: 'Under [the Ohio Rules of Civil Procedure], a plaintiff is not required to prove his or her case at the pleading stage. Very often, the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant's possession. If the plaintiff were required to prove his or her case in the complaint, many valid claims

would be dismissed because of the plaintiff's lack of access to relevant evidence. Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.' ***." (Internal citation omitted.) *Williams v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. No. 92964, 2009-Ohio-6644, at ¶11.

{¶24} Some political subdivisions have argued for a heightened pleading standard by requiring a plaintiff to assert how or why the political subdivision is *not* immune from suit. However, this court will not adopt such a standard. Effectively, adoption of such a standard would require a plaintiff to anticipate affirmative defenses and exceptions at the inception of the litigation. The Eighth District Court of Appeals and other courts have rejected the "heightened pleading" standard, stating:

{¶25} "CMHA argues that appellee must plead with specificity how CMHA is not immune from suit. Ohio Civil Rules require 'notice pleading' rather than 'fact pleading.' *** 'Notice pleadings' under Civ.R. 8(A) and 8(E) merely require that a claim concisely set forth only those operative facts sufficient to give 'fair notice of the nature of the action[.]' *** Except in very narrow circumstances, such as fraud, a plaintiff is not required to plead the operative facts of his or her case with particularity. *** A plaintiff is not required to prove his or her case at the pleading stage. ***

{¶26} "We decline to extend pleading with specificity to an area it has not traditionally been applied. Appellee's complaint is sufficient to put CMHA on notice as to the facts and circumstances surrounding the complained of injury. Discovery is the appropriate method to further ascertain the series of events that led to the injury of appellee's daughter. Appellee has alleged that CMHA is not immune from suit based

on the operation of a building in furtherance of a governmental function, which would remove governmental immunity under R.C. 2744.02(B)(4). ***" (Internal citations omitted.) *Diaz v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. No. 92907, 2010-Ohio-13, at ¶15-16.

{¶27} There is no question that Aurora is a municipal corporation in Ohio. This fact is alleged in the complaint. Therefore, it is entitled to any of the applicable immunities afforded by law. However, before judgment on the pleadings can be granted, it is necessary to consider the applicable law and determine if there are any facts that would afford Ganzhorn recovery based on the allegations in the complaint.

{¶28} As previously stated, a "governmental function" includes "[t]he design, construction, reconstruction, renovation, repair, maintenance, and operation of any recreational area or facility, including, but not limited to, *** (l) [a] park, playground, or playfield." R.C. 2744.01(C)(2)(u)(i). In examining the applicability of this exception, i.e., a physical defect within or on the grounds of buildings that are used in connection with the performance of a governmental function, this court must ascertain the meaning of "within or on the grounds of *** buildings."

{¶29} In *Cater v. Cleveland*, 83 Ohio St.3d 24, the Supreme Court of Ohio, in a plurality opinion, addressed the applicability of the R.C. 2744.02(B)(4) exception to general political subdivision tort immunity for injuries or deaths resulting from negligence 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." In *Cater*, the Supreme Court held that "[t]he operation of a municipal swimming pool, although defined as a governmental function in R.C.

2744.01(C)(2)(u), is subject to the exceptions to immunity set forth in former R.C. 2744.02(B) and to the available defenses enumerated in R.C. 2744.03." Id. at syllabus. The lead opinion, authored by Justice Francis Sweeney, reasoned:

{¶30} "Although former R.C. 2744.02(B)(4)[2] may be applicable to other governmental functions, not specifically listed in the statute, we believe that it does not apply to an indoor swimming pool. *** Unlike a courthouse or office building where government business is conducted, a city recreation center houses recreational activities. Furthermore, if we applied former R.C. 2744.02(B)(4) to an indoor swimming pool, liability could be imposed upon the political subdivision. However, there would be no liability if the injury occurred at an outdoor municipal swimming pool, since the injury did not occur in a building. We do not believe that the General Assembly intended to insulate political subdivisions from liability based on this distinction." Id. at 31-32.

{¶31} In *Cater*, former Chief Justice Thomas Moyer, in a concurring opinion joined by two other justices, stated:

{¶32} "Rather, I believe that the city's potential liability is based in former R.C. 2744.02(B)(4), which provided at the time of Cater's drowning: 'Political subdivisions are liable for injury, death, or loss to persons or property 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* ***.' (Emphasis added.)

2. Former R.C. 2744.02(B)(4) did not require the injury be "due to physical defects within or on the grounds of" the buildings. It provided: "Political subdivisions are liable for injury, death, or loss to persons or property that is 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, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code."

{¶33} "As the lead opinion acknowledges, operation of a swimming pool has been expressly designated a governmental function. R.C. 2744.01(C)(2)(u). It follows that liability potentially exists where death is caused by the negligence of city employees on swimming pool property. Although I acknowledge the existence of case law from the courts of appeals to the contrary, in my view both indoor and outdoor pools exist 'within or on the grounds' of buildings used in connection with the performance of the governmental function of operating a pool. Indoor pools clearly are 'within' buildings. Outdoor pools, while not located within buildings themselves, invariably are located on land that includes buildings, such as bathhouses, shelters, restrooms, storage areas, and offices. I therefore do not accept the conclusion of the majority that application of (B)(4) to this case would result in our creation of an artificial distinction between indoor and outdoor pools in applying the relevant immunity statutes." Id. at 34-35. (Moyer, C.J., concurring in syllabus and judgment.)

{¶34} Based on the reasoning employed by *Cater*, appellate courts have varied interpretations of the application of the R.C. 2744.02(B)(4) exception to general political subdivision tort immunity. For example, the Sixth Appellate District, in *O'Connor v. Fremont*, 6th Dist. No. S-10-008, 2010-Ohio-4159, held the exception of R.C. 2744.02(B)(4) is not applicable to the outdoor recreational municipal pool at issue. The court stated, "we likewise determine that pursuant to the controlling Ohio Supreme Court *Cater* case, the damages sustained at the Fremont outdoor recreational swimming pool at issue in this case do not fall within the sovereign immunity exception of R.C. 2744.02(B)(4)." Id. at ¶14.

{¶35} Conversely, the Third Appellate District, in *Thompson v. Bagley*, 3d Dist. No. 11-04-12, 2005-Ohio-1921, questioned the validity of *Cater* based upon the subsequent ruling by the Supreme Court of Ohio in *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718. The plaintiff in *O'Connor* cited to *Thompson* to support the argument that the reasoning employed by *Cater* is no longer applicable. Discretionary appeal not allowed by *Thompson v. Bagley*, 106 Ohio St.3d 1544, 2005-Ohio-5343. The *Thompson* court stated:

{¶36} "Initially, we note that this Court has serious doubts regarding the continuing validity of *Cater* in light of the Supreme Court's more recent ruling in *Hubbard* [*v. Canton City School Bd. of Edn*., 97 Ohio St.3d 451, 2002-Ohio-6718]. In *Cater* the Supreme Court found that municipal swimming pools were not subject to the R.C. 2744.02(B)(4) exception based on the fact that the governmental function being performed by municipal pools was recreational in nature and not the kind of 'government business' being conducted in a courthouse or government office building. [*Cater*] at 31-32. The Court made this finding despite having recognized in the same opinion that 'the General Assembly has already classified the operation of a municipal swimming pool as a governmental function under R.C. 2744.01(C)(2)(u).' [*Cater*] at 28. No such distinction has been made by the Court since *Cater*. In fact, in *Hubbard* the Court stressed that the only relevant inquiry in such a case is whether 'the injuries claimed by plaintiffs were caused by negligence occurring on the grounds of a building used in connection with a government[al] function ***.' *Hubbard* at ¶18. There was no discussion regarding whether the governmental function in the building involved was

recreational in nature." *Thompson*, supra, at ¶34. See, also, *Contreraz v. Bettsville*, 3d Dist. No. 13-10-48, 2011-Ohio-4178, at ¶26-30.

{¶37} The Supreme Court of Ohio then released *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250. *Moore* observed that the ruling in *Cater*, supra, seems to ignore the plain language of R.C. 2744.02(B)(4), stating, "[i]f the General Assembly did not intend to include buildings that are used in connection with the performance of a recreational government function, it could have said so." Id. at ¶30.

{¶38} After the release of *Moore*, supra, the Fourth Appellate District decided *Mathews v. City of Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-347. A tree limb fell on Ms. Mathews while she stood in the parking lot of Canal Park, which is owned and operated by the city of Waverly. The city argued that it was immune from liability for Ms. Mathews' injuries under R.C. Chapter 2744. Moreover, her injuries did not occur "within or on the grounds of buildings used in connection with the performance of a governmental function, within the meaning of R.C. 2744.02(B)(4), so as to except [the city] from the general grant of immunity under R.C. 2744.02(A)(1)." Id. at ¶4. In arguing that R.C. 2744.02(B)(4) is not applicable, the city reasoned that the shelter houses, roofed pagodas, playground structures, and bathrooms located within the park do not constitute "'buildings used in connection with the performance of a governmental function.'" Id. at ¶20. The *Mathews* court analyzed the litany of cases interpreting this provision noting that under the plain language of the statute, it would appear that these structures are within the exception of R.C. 2744.02(B)(4); however, based on the holding of *Cater*, supra, buildings that are used for recreational governmental functions

are excepted from the definition of R.C. 2744.02(B)(4). Further, *Mathews* cites to the Supreme Court's ruling in *Moore*, supra, which seems to limit the holding in *Cater*. The *Mathews* court stated:

{¶39} "*Moore* stands in contrast to *Cater*. *Moore* does not interpret R.C. 2744.02(B)(4) so as to require that the building house the actual, physical operations, maintenance, etc., of a governmental body performing a governmental function. For example, in *Moore* the political subdivision did not literally 'operate' or 'maintain' the public housing from the building where the injury occurred - a requirement that *Cater* seems to imply. The political subdivision's base of operations or maintenance was not physically located in the public housing, yet *Moore* did not find this absence to remove the building from the definition of a building used in connection with the performance of a governmental function. Instead, *Moore* applies a plain, common sense definition - one that asks whether the building is logically, not literally, connected to the performance of a governmental function.

{¶40} "***

{¶41} "Due to the apparent conflict between *Moore* and *Cater*, we choose to follow the recent *Moore* ruling that more broadly defines 'buildings used in connection with the performance of a governmental function' as used in R.C. 2744.02(B)(4). Under the *Moore* rationale, buildings used in connection with the performance of the operation or maintenance of a park fall within R.C. 2744.02(B)(4), even though those buildings may not house the physical location of the governmental body operating or maintaining the park. Rather, under *Moore*, it is sufficient that the building bears a logical

connection to the performance of a governmental function, i.e., the operation or maintenance of a park." Id. at ¶32-35.

{¶42} Therefore, the *Mathews* court determined:

{¶43} "[T]hat the buildings in Canal Park bear a logical connection to the performance of the operation or maintenance of the park. Community members apparently use the shelter houses for various events. They are part and parcel of the park. The city obviously holds them out as available for public use. Although the city does not literally 'maintain' or 'operate' the park from the shelter houses or the roofed pagodas, those buildings are used in connection with the performance of the operation of the park. The city maintains those structures as part of its governmental function of operating the park. Consequently, R.C. 2744.02(B)(4) applies to the facts of the case at bar to except appellant from R.C. 2744.02(A)(1)'s general grant of immunity." Id. at ¶36.

{¶44} We note, however, that in footnote 3, the *Mathews* court observed the result under R.C. 2744.02(B)(4) would be different if the tree limb fell on the plaintiff while she was standing on grounds that did not contain a building.

{¶45} Aurora alleges that based on *Hopper*, 2009-Ohio-2517, and *Cater*, 83 Ohio St.3d 24, outdoor recreational facilities are excluded from the R.C. 2744.02(B)(4). While the instant appeal was pending, however, the Ninth Appellate District in *Hawsman v. Cuyahoga Falls*, 9th Dist. No. 25582, 2011-Ohio-3795, at ¶20, overruled *Hopper*, which relied on *Cater*. In overruling *Hopper*, the Ninth Appellate District relied on the authority of *Moore* and the language of R.C. 2744.02(B)(4). Id. The *Hawsman* Court stated:

{¶46} "[T]he Supreme Court [since *Cater*] has implicitly abandoned a distinction between the places of business and places of recreation in interpreting the applicability of R.C. 2744.02(B)(4). *** The majority [in *Moore*] analyzed the phrase 'including, but not limited to' and observed that it 'denotes a nonexclusive list of buildings to which the exception may apply.' *** On appeal, the Supreme Court seized on the phrase 'buildings that are used in connection with the performance of a governmental function. *** For that reason, the court held that R.C. 2744.02(B)(4) created an exception to immunity in that case. *** Although the Court did not explicitly abandon the governmental-business-versus-recreation-use distinction, a housing authority apartment is not a place where the public generally appears and government business takes place." *Hopper*, supra, at ¶15.

{¶47} In the present case, the pleadings do not resolve whether there is a building anywhere on the grounds of Sunny Lake Park, and what the relation may be to the chain link fence at issue. If the facts in this regard favor an exception to immunity, Ganzhorn must be given an opportunity to resolve this issue in the discovery process. No heightened standard of pleading exists that would require Ganzhorn to anticipate an affirmative defense and plead an exception to it at this stage. As a result, the trial court erred by granting Aurora's motion for judgment on the pleadings.

{¶48} Ganzhorn's first assignment of error is well taken.

{¶49} Ganzhorn's second assignment of error states:

{¶50} "The trial court erred in granting Defendant-Appellee's motion for judgment on the pleadings and failing to allow time for additional discovery."

{¶51} In this assignment of error, Ganzhorn asserts the trial court should have allowed him to conduct discovery to determine if Aurora's conduct may have been "wanton or reckless" and also to determine if the required elements of the recreational user statute apply to this case.

{¶52} Ganzhorn asserts two contentions under this assignment. He first contends that the "court should consider whether any of the defenses afforded in R.C. 2744.03 apply that would provide the political subdivision with a defense against liability." He argues that without discovery, he is unable to counter any defense, "such as the one set forth in section R.C. 2744.03(A)(5) ***." Ganzhorn then states that he is not only required to prove liability but also that "[Aurora's] conduct was in a wanton or reckless manner."

{¶53} Ganzhorn's second contention alleges that he needs discovery to determine if the affirmative defense under the recreational user statute is applicable. Based on the disposition of Ganzhorn's first assignment of error, these issues are rendered moot since this matter is being remanded for further proceedings which will allow Ganzhorn to seek discovery of additional relevant facts with regard to both contentions.

{¶54} Ganzhorn's second assignment of error is moot.

{¶55} Aurora has asserted the following cross-assignment of error:

{¶56} "The trial court erred when it failed to apply the Recreational User Statute, R.C. 1533.181, to bar [Ganzhorn's] claims as a matter of law."

{¶57} The trial court granted Aurora's Civ.R. 12(C) motion solely on the fact that it is immune from suit for injury for the "construction, repair, and maintenance of a

playfield such as the one where Plaintiff was injured. See, R.C. 2744.01(C)(2)(u)." The referenced section defines what constitutes a governmental use, which is not at issue in this appeal. There is no discussion of the three-step analysis under R.C. 2744.02(A), 2744.02(B), and 2744.03 in the trial court's judgment entry. Further, the trial court does not address the second contention raised by Aurora in its motion, i.e., that Aurora was entitled to judgment on the pleadings as a result of the application of R.C. 1533.181, the recreational user statute.

{¶58} R.C. 2505.22, entitled "Assignments of error filed on behalf of appellee," provides:

{¶59} "In connection with an appeal of a final order, judgment, or decree of a court, *assignments of error may be filed by an appellee who does not appeal*, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part. The time within which assignments of error by an appellee may be filed shall be fixed by rule of court." (Emphasis added.)

{¶60} Since disposition of this assignment of error may result in preventing a reversal of the trial court ruling, this court will address the cross-assignment of error.

{¶61} R.C. 1533.181, commonly referred to as the recreational user statute, provides:

{¶62} "Immunity from liability to recreational users

{¶63} "(A) No owner, lessee, or occupant of premises:

{¶64} "(1) Owes any duty to a recreational user to keep the premises safe for entry or use;

{¶65} "(2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;

{¶66} "(3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

{¶67} "(B) Division (A) of this section applies to the owner, lessee, or occupant of privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals."

{¶68} The complaint in this case alleges that Ganzhorn was a "paid participant" in the softball league. It further alleges that because Ganzhorn "paid a fee" to Aurora to participate in the softball league, "he is not a recreational user." In addition, the complaint alleges that Aurora, a municipal corporation, "owned, operated, maintained, possessed and controlled" the softball field in question.

{¶69} "Premises" and "recreational user" are defined in R.C. 1533.18, as follows:

{¶70} "(A) 'Premises' means all privately owned lands, ways, and waters and any buildings and structures thereon, and all privately owned and state-owned lands, ways and waters *leased* to a private person, firm, or organization, including any buildings and structures thereon.

{¶71} "(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 of the state or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-

purpose vehicle, or four-wheel drive motor vehicles, or to engage in other recreational pursuits." (Emphasis added.)

{¶72} At a minimum, there are facts that are unresolved regarding the payment of the fee and whether the property in question meets the definition of "premises." As noted in the first assignment of error, the facts contained in the complaint must be construed as true, and accepting them as true, there must be no set of facts that would allow recovery for Ganzhorn. Because there are potential facts that, if resolved in favor of Ganzhorn, could result in rendering the recreational user statute inapplicable to this case, judgment on the pleadings is inappropriate, and the cross-assignment of error is without merit.

{¶73} We have concluded that the trial court erred in granting Aurora's motion for judgment on the pleadings in relation to its immunity argument. Aurora may, or may not, ultimately be entitled to immunity in this matter. We merely conclude, in light of factual inferences to which Ganzhorn, as the plaintiff, is entitled on a Civ.R. 12(C) exercise, that judgment on the pleadings is not appropriate in this matter.

{¶74} The judgment of the Portage County Court of Common Pleas is hereby reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶75} Defendant-appellee, the City of Aurora, is entitled to judgment on the pleadings pursuant to Ohio's Recreational User Statute, as argued in its cross-assignment of error. Accordingly, I dissent from the majority's decision to reverse the judgment of the lower court.

{¶76} The Recreational User Statute provides:

> (A) No owner, lessee, or occupant of premises:
>
> (1) Owes any duty to a recreational user to keep the premises safe for entry or use;
>
> (2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
>
> (3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

R.C. 1533.181. "A political subdivision has derivative immunity from tort liability to a recreational user of municipal property to the same extent that an owner of private land has, pursuant to R.C. 1533.181, immunity from tort liability to a recreational user of private property." *Johnson v. New London* (1988), 36 Ohio St.3d 60, at the syllabus.

{¶77} "Premises" are defined as "all privately owned lands, ways, and waters, and any buildings and structures thereon, and all privately owned and state-owned lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon." R.C. 1533.18(A). "A park which otherwise meets the definition of 'premises' under the Ohio recreational-user statutes does not lose its immunity because (1) the park includes a softball field with dugouts, ***fences***, base plates and similar man-made structures and (2) the plaintiff was engaged in a softball tournament played on those premises." *Miller v. Dayton* (1989), 42 Ohio St.3d 113, at

paragraph two of the syllabus (emphasis added). There is no question that Sunny Lake Park, wherein the City of Aurora provides "recreation programs for the general public" (paragraph one of the Complaint), constitutes premises for the purposes of the Recreational User Statute.

{¶78} A "recreational user" is defined as "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 of the state, or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel drive motor vehicle, or to engage in other recreational pursuits." R.C. 1533.18(B). Stated otherwise, "[a] person is not a 'recreational user,' as defined in R.C. 1533.18(B), if he pays a fee or consideration *to enter* upon 'premises' to engage in recreational pursuits." *Moss v. Dept. of Natural Resources* (1980), 62 Ohio St.2d 138, at paragraph two of the syllabus (emphasis sic).

{¶79} Ganzhorn was a "recreational user" of Sunny Lake Park for the purposes of the Recreational User Statute as a participant in the Aurora Parks and Recreation Summer Adult Softball League. Ganzhorn argues that he was not a recreational user, because he "paid a fee to the defendant *** to participate in the softball league" (paragraph seven of the Complaint).

{¶80} Ganzhorn's argument is unavailing. There is abundant case law that softball league participation fees do not constitute a "fee or consideration *to enter* upon 'premises'." *Boggs v. Bowling Green*, 6th Dist. No. WD-03-008, 2003-Ohio-4093, at ¶7 ("[t]he mere fact that a fee was paid to a sponsor does not mean that a fee was paid to

the municipality '*to enter* upon "premises" to engage in recreational pursuits'"); *Pippin v. M.A. Hauser Ents.* (1996), 111 Ohio App.3d 557, 563 ("[t]he fee in question *** was a sponsor's fee that permitted a C&C Painting team to join a league," and so "the fee was not required for any specific team member to make use of the park's recreational facilities"); *Opheim v. Lorain* (1994), 94 Ohio App.3d 344, 347 ("[a]ny member of the public could enter the park, free of charge, to enjoy the baseball game"); *Dinarda v. Louisville*, 5th Dist. No. CA-8415, 1991 Ohio App. LEXIS 3449, at *5 ("[a]n entrance fee paid by the team does not take the individual members of that team out of the definition of recreational user under R.C. 1533.18"); *Dowdell v. Eastlake*, 11th Dist. No. 89-L-14-121, 1990 Ohio App. LEXIS 3318, at *7-*8 ("fees *** charged to certain leagues for yearly light and field maintenance costs [did] not change the fact that individual 'persons' were never charged for admission to the park").

{¶81} The majority asserts that there are "facts that are unresolved regarding the payment of the fee and whether the property in question meets the definition of 'premises'." Supra at ¶72. I disagree. The allegations contained in Ganzhorn's Complaint, in light of the legal authorities, preclude all doubt as to the applicability of the Recreational User Statute in the present case. Accordingly, I respectfully dissent.