IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

MICHAEL H. LEWIS Plaintiff, vs. JP MORGAN CHASE BANK, dba CHASE BANK, et al Defendants.	CASE NO. 15 CV 2832 JUDGE MAUREEN SWEENEY **JUDGMENT ENTRY GRANTING DEFENDANT PAUL C. CONN'S MOTION TO DISMISS**

1. Findings of Fact:

The Mahoning County Court of Common Pleas appointed Attorney Conn to represent plaintiff Lewis in a criminal proceeding. Mr. Lewis subsequently sued Attorney Conn for legal malpractice based on that representation. Because Attorney Conn (a court appointed attorney) was an employee of Mahoning County (a political subdivision) he is presumptively immune from liability.

According to the complaint, "Paul C. Conn is an Attorney at Law who was appointed by the Mahoning County Common Pleas Court to represent Plaintiff [Michael H. Lewis] in a criminal case, under Case No. 14CR85...." (See Complaint at ¶ 6). During that representation, Attorney Conn "agreed to provide a Power of Attorney to Defendant John A. Runyon, a friend of Plaintiff [Michael H. Lewis], in order to grant access to Plaintiff's checking account, held with Defendant Chase Bank, for the specific and express purpose of accessing the account to withdraw the specific sum of three thousand one hundred dollars ($3,100.00) for the express and specific purpose of having counsel collect the

funds and forward the funds to the bail bondsman to affect Plaintiff's release on bond from the Mahoning County Jail during the pendency of the criminal case...." (Complaint at ¶ 10).

The complaint further alleges that "Defendant Conn did provide the Power of Attorney to Defendant, Runyon and then did fail to accompany Defendant Runyon to the bank, and did fail to collect the three thousand one hundred dollars ($3,100.00) and deliver the funds to the bail bondsmen and fail to effect Plaintiff's release from pretrial incarceration...." (Complaint at ¶ 12).

The second cause of action listed in the complaint attempts to state a claim against Attorney Conn for legal malpractice, alleging that the "acts and conduct of Defendant Paul C. Conn, aforesaid, were committed with reckless and/or negligent disregard for his duties arising from the attorney-client relationship undertaken by Defendant Conn; and/or with intent to defraud Plaintiff...." (Complaint at ¶¶ 24-25).

2. Conclusions of Law:

Civil Rule 12(B)(6)

A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion that tests the sufficiency of the complaint. *Bangor v. Amato*, 2014-Ohio-5503, 25 N.E.3d 386, ¶ 53 (7th Dist.). Dismissal is appropriate when a plaintiff can prove no set of facts that would entitle him or her to relief. *E.g.*, *Meikle v. Edward J. DeBartolo Corp.*, 7th Dist. No. 00-CA-58, 2001 WL 1468563, 2001-Ohio-3242, *3 (Nov. 7, 2001). While a court must accept the allegations in the complaint as true, it need

not presume the truth of any conclusions unsupported by factual allegations. *Id.* citing *Schulman v. City of Cleveland*, 30 Ohio St.2d 196, 198, 283 N.E.2d 175 (1975).

The United States Supreme Court, applying the analogous federal rules of civil procedure, has explicitly mandated that a complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal,*, 129 S. Ct. 1937, 1940 (2009). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

Legal malpractice

To state a cause of action for legal malpractice arising from criminal representation, a plaintiff must allege the following: (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately cause by the breach. *Thorp et al. v. Strigari*, 155 Ohio App.3d 245, 2003-Ohio-5954, 800 N.E.2d 392, ¶ 5 (5th Dist.).

Immunity under R.C. 2744.03(A)(6)

Ohio Revised Code 2744.03(A)(6) creates a presumption of immunity for employees of political subdivisions, providing that employees are immune from liability in performing their job unless:

(1) the acts or omissions are manifestly outside the scope of the employment;

(2) the acts or omissions are malicious, in bad faith, or wanton or reckless; or

(3) civil liability is expressly imposed upon the employee by another statute. *Thorp* at ¶ 31 quoting R.C. 2744.03(A)(6).

I. Attorney Conn is immune from liability under R.C. 2744.03(A)(6).

Under Ohio law, employees of political subdivisions are immune from liability unless one of the following applies:

- The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; or
- The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[1];

Attorney Conn is immune from liability based on his representation of Mr. Lewis for two reasons: (1) As a court appointed attorney, he was an employee of Mahoning County—a political subdivision—and therefore presumptively

[1] An additional exception to immunity exists if "[c]ivil liability is expressly imposed upon the employee by a section of the Revised Code." R.C. 2744.03(A)(6)(c). Because that exception is not applicable to this case, it is omitted.

immune from liability, and (2) The complaint does not contain factual allegations to rebut the presumption of immunity.

(1) Attorney Conn is presumptively immune from liability because he was a Mahoning County employee during his representation of Mr. Lewis.

Ohio Revised Code 2744.03(A)(6) provides a presumption of immunity for employees of political subdivisions. *Wooten v. Vogels*, 147 Ohio App.3d 216, 221, 769 N.E.2d 889, 2001-Ohio-7096 (1st Dist. 2001). An employee of a political subdivision is "overlaid with an additional layer of protection against civil liability—a shield—which must be peeled away before the [employee can] be held liable on the substantive claim." *Mayes v. Columbus*, 105 Ohio App.3d 728, 741, 664 N.E.2d 1340 (10th Dist. 1995).

Plaintiff does not dispute that by representing Mr. Lewis as an attorney appointed by the Mahoning County Court of Common Pleas, Attorney Conn was an employee of Mahoning County, a political subdivision of the state of Ohio. *See* R.C. 2744.01(F). One function assigned to political subdivisions like Mahoning County is providing public defender services pursuant to chapter 120 of the Revised Code. *See* R.C. 2744.01(C)(2)(v). Mahoning County fulfills this function through Rule Four of the Mahoning County Criminal Local Rules of Court, which provides that counsel shall be appointed for indigent defendants. (Rule Four of the Criminal Local Rules of Court). Under Mahoning County's system, appointed counsel is eventually paid by submitting the necessary documentation to the Ohio Public Defender Commission. Because Attorney Conn was appointed to represent Mr. Lewis under Rule Four of the Mahoning

County Criminal Local Rules of Court, he was an employee of Mahoning County, a political subdivision, during his representation of Mr. Lewis.

As an employee of Mahoning County, Attorney Conn is presumptively immune from liability for acts or omissions involving his representation of Mr. Lewis. Court appointed attorneys who are employees of political subdivisions are presumptively immune from liability. *See Wooden v. Kentner*, 153 Ohio App.3d 24, 28, 790 N.E.2d 813, 2003-Ohio-2695 (10th Dist. 2003). In *Wooden v. Kentner*, the plaintiff alleged that his criminal defense attorneys—who were public defenders—were negligent for, among other things, failing to research the law, failing to challenge the issues of fact and conclusions of law, failing to preserve appellate rights, failing to seek records and investigate, and failing to subpoena witnesses. *Id.* at 25. The trial court granted the defendant attorneys' motion to dismiss on the basis of immunity, and the plaintiff appealed. *Id.* Affirming the trial court, the 10th District explained that because the attorneys were "immune from liability for negligent conduct...the trial court properly concluded that plaintiff's complaint fails to state a claim for relief against" the defendant attorneys. *Id.* at 28 citing *Wooten*, supra.

Here, Attorney Conn's alleged legal malpractice consists of the following:

- failing to accompany Mr. Runyon to the bank;
- failing to collect the three thousand one hundred dollars and deliver the funds to the bail bondsmen in order to effect Mr. Lewis's release from pretrial incarceration.

Just like the defendant attorneys in *Wooden*, Attorney Conn was an employee of a political subdivision during his representation of Mr. Lewis. Just like the defendant attorneys in *Wooden*, Attorney Conn faces an allegation that he was negligent in representing a criminal defendant. And just like the defendant attorneys in *Wooden*, Attorney Conn is presumptively immune from liability under R.C. 2744.03(A)(6).

(2) The complaint does not contain any factual allegations to rebut the presumption of immunity.

Because Attorney Conn is presumptively immune from liability, the complaint must contain factual allegations that rebut the presumption of immunity. Under R.C. 2744.03(A)(6)(a)-(b), political subdivision employees like Attorney Conn are immune from liability unless one of the following exceptions apply: (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; or (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. Those exceptions are absent in this case.

(a) Attorney Conn's acts or omissions were not manifestly outside the scope of his employment.

All of Attorney Conn's alleged acts and omissions were performed within the scope of his representation of Mr. Lewis as appointed criminal defense counsel. To be "manifestly outside the scope of employment" for purposes of a political subdivision employee, the act or omission must be "so divergent that it severs the employer-employee relationship." *Jackson v. McDonald*, 144 Ohio App.3d 301, 307, 760 N.E.2d 24 (5th Dist. 2001) (explaining that "an

employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment") (citation omitted). An employee's conduct is within the scope of employment if it is initiated, in part, to further or promote the employer's business. *Id.* (citation omitted).

Mr. Lewis does not allege any factual allegations to support the position that Attorney Conn's acts or omissions were "manifestly outside the scope" of his role as criminal defense counsel. At plaintiff's request, Attorney Conn provided the Power of Attorney to Mr. Lewis's friend, Mr. Runyon, in an effort to effectuate Mr. Lewis's release on bond. (Complaint ¶ 11). The alleged omission of failing to accompany Mr. Runyon to the bank, which led to the failure to deliver the money needed to secure Mr. Lewis's release on bail, even if true, was not an omission "so divergent that it severs the employer-employee relationship." *Jackson*, 144 Ohio App.3d at 307. Because all of Attorney Conn's alleged acts or omissions were performed within the scope of his employment as appointed criminal defense counsel, the presumption of immunity remains.

(b) Attorney Conn's acts or omissions were not committed with a malicious purpose, in bad faith, or in a wanton or reckless manner.

The presumption of immunity for political subdivision employees can be rebutted if the plaintiff proves that the employee's acts or omissions were committed with a malicious purpose, in bad faith, or in a wanton or reckless manner. All of those terms have specific definitions, and none of them exist in this case.

(i) Attorney Conn's acts or omissions were not committed with a malicious purpose.

"Malice" is "the willful and intentional design to do injury." *Wooten v. Vogels*, 147 Ohio App.3d 216, 221, 769 N.E.2d 889, 2001-Ohio-7096 (1st Dist. 2001). The factual allegations in the complaint—that Attorney Conn provided Power of Attorney to Mr. Runyon then failed to accompany Mr. Runyon to the bank—are not sufficient to survive a motion to dismiss on the basis of immunity. Even if it was negligent for Attorney Conn to not accompany Mr. Runyon to the bank, Mr. Lewis has not pleaded factual allegations to support the position that Attorney Conn acted with malice. The presumption of immunity remains.

(ii) Attorney Conn's acts or omissions were not committed in bad faith.

"Bad faith" entails more than bad judgment or negligence: it connotes "dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." *Wooten*, 147 Ohio App.3d at 221 (explaining that bad faith requires an actual intent to mislead or deceive another). Again, none of the factual allegations in the complaint support the position that Attorney Conn's acts or omissions were performed in bad faith. The presumption of immunity remains.

(iii) Attorney Conn's acts or omissions were not committed in a wanton or reckless manner.

Wanton conduct is the failure to exercise any care whatsoever. *Wooten*, 147 Ohio App.3d at 222. As the Ohio Supreme Court has explained, "mere negligence is not converted into wanton misconduct unless the evidence

establishes a disposition to perversity on the part of the tortfeasor." *Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994). Such perversity requires the alleged tortfeasor to be conscious that his or her conduct will, in all likelihood, result in injury. *Id.*

Reckless also has a particular definition under the statute:

> [A]n individual acts recklessly when he or she, bound by a duty, does an act or intentionally fails to do an act, knowing, or having reason to know of, facts that would lead a reasonable person to realize not only that there is an unreasonable risk of harm to another, but also that such risk is substantially greater than that which is necessary for negligence.

Wooten, 147 Ohio App.3d at 222 citing *Thompson v. McNeill*, 53 Ohio St.2d 102, 104-105, 559 N.E.2d 706 (1990).

Mr. Lewis has not pleaded factual allegations to support the position that Attorney Conn acted with wanton disregard or recklessness. Providing a Power of Attorney to Mr. Lewis's friend in order to obtain bail money for Mr. Lewis and not accompanying that friend to the bank does not rise to the level of wanton or reckless conduct on the part of Attorney Conn.

Mr. Lewis conclusory statement that Attorney Conn acted with "reckless and/or negligent disregard for his duties" does not rebut the presumption of immunity. (Complaint ¶ 24). Simply claiming recklessness without any factual allegations to support that claim is not enough to convert negligence into recklessness. *Thorp et al. v. Strigari*, 155 Ohio App.3d 245, 2003-Ohio-5954, 800 N.E.2d 392, ¶ 33 (5th Dist.). The 5th District addressed this issue in *Thorp et al. v. Strigari*, a case in which the plaintiffs sued their attorney—a public

defender—based on his representation. *Id.* Explaining that the attorney was immune from liability because he was an employee of a political subdivision, the court addressed the allegation in the complaint that the attorney was reckless as well as negligent: "Even under the notice-pleading requirements of Civ.R. 8(A), a negligence claim is not converted to one of reckless conduct on a mere allegation in the complaint without evidence of a substantially greater risk than negligence." *Id.* at ¶ 33.

As the United States Supreme Court has explained, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,*, 129 S. Ct. 1937, 1940 (2009) (applying analogous Federal Rules of Civil Procedure 8(a)(2)). Rule of Civil Procedure 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 1950.

Here, Mr. Lewis's conclusory allegation of reckless conduct does not convert a negligence claim into one of reckless conduct. The factual allegations do not support the proposition that it was reckless for Attorney Conn to provide a Power of Attorney to Mr. Lewis's friend then not accompany the friend to the bank. Because Mr. Lewis' complaint is bereft of factual allegations that Attorney Conn acted wantonly or recklessly, the presumption of immunity remains, and Attorney Conn's motion to dismiss is granted.

A STATUS HEARING WITH THE REMAINING DEFENDANT'S SHALL BE SET IN 30(THIRTY) DAYS. STATUS SET FOR July 18, 2016 at 11:00 am.

IT IS SO ORDERED:

DTP _____
JUDGE MAUREEN SWEENEY