

[Cite as *Bueno v. Cleveland*, 2017-Ohio-8881.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105485

JOSE C. BUENO

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-830841

BEFORE: Kilbane, P.J., Boyle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: December 7, 2017

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, the city of Cleveland (“the City”) appeals the trial court’s judgment denying its motion for summary judgment. For the reasons set forth below, we affirm.

{¶2} In August 2013, plaintiff-appellee, Jose Bueno (“Bueno”), was injured in a car accident as a passenger in a vehicle owned by the City and driven by Stanley Anderson (“Officer Anderson”), a Corrections Officer employed with the City. The vehicle driven by Anderson collided into a vehicle driven by Shirley Williams (“Shirley”) and owned by her husband, James Williams (“James”). The accident occurred while Officer Anderson was transporting three prisoners, one of which was Bueno, from the City “workhouse” to the City jail.

{¶3} In August 2014, Bueno filed a complaint against the City, Officer Anderson, James, and Shirley, seeking damages for the injuries he sustained in the accident. Bueno’s complaint contained: (1) a negligence count against all of the defendants; (2) a negligent entrustment count against the City and James; (3) a negligence claim against the City as Officer Anderson’s employer; and (4) a negligent hiring and retention count against the City.

{¶4} The City moved for summary judgment, arguing that it was immune from liability under R.C. 2744.02(A)(1) and Officer Anderson was also immune from liability because he was “on an emergency call to duty” at the time of the accident. Bueno opposed, and the trial court agreed with Bueno. The trial court, in a thoughtful opinion,

found as a matter of law that

Officer Anderson was performing a governmental function for which an exception to immunity applies pursuant to R.C. 2744.02(B)(1), which provides that “political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority.”

The court further finds as a matter of law that Officer Anderson was operating a motor vehicle while responding to an emergency call pursuant to R.C. 2744.02(B)(1)(a). The court finds, however, genuine issues of material fact exist as to whether Officer Anderson operated the vehicle in a wanton, willful, or reckless manner, and as to whether he was competent to transport inmates within the scope of his employment. The affidavit of Officer Anderson conflicts with his deposition testimony that he does not remember the accident.

{¶5} It is from this order the City appeals, raising the following two assignments of error for review:

Assignment of Error One

The trial court erred when it denied the [City’s] motion for summary judgment because, under R.C. Chapter 2744, the City is immune from civil liability for the provision of police services.

Assignment of Error Two

The trial court erred by deciding that certain non-material disputed evidence in the record establishes that Officer Anderson was not entitled to statutory immunity pursuant to Ohio R.C. 2744.03(A)(6).

Motion for Summary Judgment — Political Subdivision Immunity

{¶6} Summary judgment is appropriate when (1) no genuine issue of material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C).

{¶7} The burden of demonstrating that there is no genuine issue of material fact is on the moving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. The movant must affirmatively establish that the nonmoving party's claims lack support by pointing to evidence in the form of pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc. *Dresher* at 293; Civ.R. 56(C). Summary judgment will be granted unless the nonmovant can set forth sufficient facts to establish a genuine issue of material fact for trial. *Id.*; Civ.R. 56(E).

{¶8} A trial court's grant of summary judgment is subject to de novo review by an appellate court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Consequently, we must independently review the record to determine if summary judgment was appropriate, and need not defer to the trial court's decision.

{¶9} Chapter 2744 of the Ohio Revised Code, entitled Political Subdivision Tort Liability, provides a three-tiered analysis to determine whether a political entity is entitled to immunity from liability. First, R.C. 2744.01(A)(1) generally immunizes political subdivisions from civil liability for death or injuries that result from the exercise of governmental or proprietary functions. Therefore, a court must determine whether the immunity-seeking entity is a political subdivision, and whether the alleged injuries followed from the exercise of a governmental or a proprietary function. Second, a court must determine whether the plaintiff has demonstrated that the political subdivision's immunity has been removed pursuant to one of five statutorily enumerated exceptions under R.C. 2744.02(B). Relevant to this case is the exception set forth in R.C. 2744.02(B)(1): "political subdivisions are liable for injury * * * to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." Finally, if an exception to immunity applies under R.C. 2744.02(B), a court must consider whether the political subdivision may claim a defense to liability under R.C. 2744.03.

{¶10} In the instant case, both parties agree that the City possesses immunity pursuant to R.C. 2744.01(A)(1) because it is a political subdivision exercising governmental and proprietary functions. However, the City and Bueno disagree over whether the City's immunity has been abrogated by an exception under R.C. 2744.02(B)(1). The City argues none of the exceptions under the second tier apply to remove its immunity, and as a result, its sovereign immunity also applies to Officer

Anderson. The City acknowledges that Officer Anderson's deposition collides factually with the sworn affidavit he signed, but maintains the trial court erred because his failure to remember the details of the accident are not sufficient to create a genuine issue of material fact. We disagree.

{¶11} Under R.C. 2744.02(B)(1), a political subdivision is liable for injury to persons caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The City is entitled to a full defense against liability for an employee's negligent operation of a motor vehicle if a "member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct." R.C. 2744.02(B)(1)(a).

{¶12} The trial court found, and we agree, that there is a genuine issue of material fact as to whether Officer Anderson operated the vehicle in a wanton, willful, or reckless manner and as to whether he was competent to transport inmates within the scope of his employment. According to his affidavit of October 2015, Officer Anderson states he was involved in a motor vehicle accident with Shirley while transporting four inmates. At his deposition in November 2015, Officer Anderson stated he does not remember being involved in the accident. He does remember transporting either three or four inmates, but could not recall their names. He did not remember making a written statement to the police. Officer Anderson stated: "I'm being honest with you, I don't

even remember that day that this accident really, really took place no more than the questions you're asking me and to the best of my knowledge.”

{¶13} Based on the foregoing, we find that genuine issues of material fact exist as to whether Officer Anderson operated the vehicle in a wanton, willful, or reckless manner and as to whether he was competent to transport inmates within the scope of his employment.

{¶14} Accordingly, the first and second assignments of error are overruled.

{¶15} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR