[Cite as *Blair v. Columbus Div. of Fire*, 2011-Ohio-3648.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William Blair [Individually, and as the Administrator of the Estate of Barbara Gail Blair, Deceased],	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-575 (C.P.C. No. 08CVC-08-12511)
Columbus Division of Fire et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 26, 2011

Steven M. Goldberg Co., L.P.A., *J. Michael Goldberg* and *Steven M. Goldberg*; *Leeseberg & Valentine*, and *Gerald S. Leeseberg*, for appellant.

Richard C. Pfeiffer, Jr., City Attorney, and *Bradley Hummel*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, William Blair, individually and as the administrator of the estate of Barbara Gail Blair, appeals from the summary judgment granted by the Franklin County Court of Common Pleas in favor of defendants-appellees, the city of Columbus, Larry Ruh, Tim Kynion, Jeremy Winegardner, and Eric Keener. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} This matter regards the tragic events that occurred on March 7, 2007. On that morning, Mrs. Blair was experiencing shortness of breath while driving her daughter, Misti Envoy, to work. Mrs. Blair pulled her vehicle over to the side of the road, and Ms. Envoy called 911 for assistance. The call was placed at 6:48 a.m. and was reported as an asthma attack.

{¶3} Mr. Winegardner arrived at the scene in Engine 14. While Mr. Winegardner was a firefighter/paramedic, the medic unit from Station 14 was unavailable because it had been dispatched elsewhere. As a result, the medic unit from Station 2 was dispatched.

{¶4} Upon Mr. Winegardner's arrival, Mrs. Blair was standing, breathing, speaking normally, and responding coherently to questions. Her primary complaint was that she was short of breath. Ms. Envoy explained to Mr. Winegardner that Mrs. Blair had a history of asthma and chronic obstructive pulmonary disease ("COPD"). She also explained that Mrs. Blair's symptoms had begun on the prior night and had not gotten any better. Mr. Winegardner perceived the situation as a moderate asthma attack. In effort to provide some quick relief, he initiated a breathing treatment with a nebulizer mask.

{¶5} Meanwhile, at 6:53 a.m., Medic 2 arrived at the scene. The crew of Medic 2 was comprised of Mr. Ruh and Mr. Kynion, who were both firefighter/paramedics. Mr. Keener was also a member of the crew but was a paramedic student who had completed approximately half of his training. Generally, paramedic students are permitted to participate in patient care to the extent of their training.

{¶6} The crew of Medic 2 retrieved a cot for Mrs. Blair, whose legs had begun to buckle. Mrs. Blair was assisted to the cot, and it soon became clear that the nebulizer

treatment was not providing sufficient relief, as was demonstrated by her level of consciousness. Therefore, she was given a nonrebreather mask on 100 percent oxygen. Nevertheless, her condition continued to decline.

{¶7} She was taken into Medic 2. The medics laid her flat and hooked her up to a monitor. An EKG demonstrated sinus bradycardia with a heart rate in the 30s. At this point, she also had an oxygen saturation of 48 percent oxygen on room air. A medic listened to her breathing and heard rales, which is indicative of pulmonary edema, or fluid buildup in the lungs. As a result, congestive heart failure was considered as one of the differential diagnoses. The medics considered using continuous positive airway pressure ("CPAP") to assist with breathing but decided against it because of Mrs. Blair's unconsciousness. She was given nitrous spray at 6:59 a.m., but her heart rate and respiratory rate both continued to drop. Her breaths continued to get shorter and shallower. The medics knew that they had to establish an airway and decided that Mrs. Blair was a candidate for endotracheal intubation.

{¶8} Endotracheal intubation provides a secure airway by placing an endotracheal tube ("ET tube") into the trachea. As the medics prepared the intubation materials, Mr. Ruh was ventilating Mrs. Blair with a bag-valve-mask. The goal of ventilating a patient with a bag-valve-mask is to physically force air into a patient's lungs. Bag-valve-masking does not provide a secure airway and instead presents a risk of blowing air into the stomach.

{¶9} Mr. Keener asked if he could perform the intubation, and Mr. Kynion obliged. Mr. Keener used a laryngoscope to attempt to view the trachea and, within 10 to 15 seconds, realized that the task of intubating Mrs. Blair was going to be beyond his

training. Therefore, Mr. Kynion attempted the intubation. After Mr. Kynion placed the ET tube, Mrs. Blair vomited, and the medics realized the ET tube was in the esophagus, rather than being properly in the trachea. The medics removed the ET tube and suctioned the airway. Mr. Ruh continued ventilation via a bag-valve-mask as a new ET tube was prepared.

{¶10} Mr. Kynion performed the second attempt at intubation. At this point, Mrs. Blair became asystolic, which was demonstrated by a straight-line cardiac rhythm with no electrical activity. As a result, Mr. Winegardner initiated cardiopulmonary resuscitation ("CPR"). After the second ET tube was placed, the medics proceeded through the criteria for determining whether it was properly in the trachea, which include: movement in the chest wall, the presence of breathing sounds, the absence of epigastric sounds, the presence of condensation on the tube, and verification of the tube's placement by using capnography.

{¶11} Capnography involves connecting a device to the ET tube to measure the level of carbon dioxide being expelled. When it is used, a monitor displays a numeric value demonstrating the quality of the gas exchange that is occurring. If no gas exchange is occurring, the display shows a flat, straight line. Standard operating procedures for Columbus firefighter/paramedics require the use of capnography to verify the proper placement of an ET tube.

{¶12} When the medics attempted to verify the ET tube's placement with capnography, the capnography display did not appear on the monitor. No numeric value was displayed. No flat line was shown. Instead, the monitor merely showed a dashed line. For approximately 10 or 15 seconds, the medics discussed whether anyone knew

how to enable the capnography function. Because none of them did, and because they had arrived at Grant Hospital's Emergency Department ("Grant"), they took Mrs. Blair into the hospital without having verified the ET tube's placement using capnography. However, the paramedics concluded that they had proper placement based upon breath sounds, condensation on the tube, chest wall movement, and the lack of epigastric sounds. CPR continued as the medics took Mrs. Blair into Grant.

{¶13} Dr. David Marcus was the emergency room ("ER") physician who saw Mrs. Blair upon her arrival at Grant.[1] Apparently, he viewed the medics' ET tube and observed "what appears to be stomach contents shooting out of the end of the ET tube with each bag ventilation." (February 17, 2010 Memorandum Contra, exhibit No. 2.) Dr. Marcus performed a laryngoscopy and believed that the medics' ET tube was in the esophagus. Dr. Marcus then attempted to intubate Mrs. Blair with another ET tube, while the medics' ET tube remained in place. After Dr. Marcus placed his ET tube, the nurse could not compress the bag, and therefore Mrs. Blair could not be ventilated. Dr. Marcus's ET tube was removed before he attempted another intubation. Again, however, ventilation could not occur through Dr. Marcus's newly placed ET tube. At this point, the medics' ET tube was removed, which allowed ventilation through Dr. Marcus's newly placed ET tube. In spite of continued resuscitation efforts, Mrs. Blair was pronounced dead at 7:28 a.m.

{¶14} Appellant filed suit against appellees and filed amended pleadings on three separate occasions. Of relevance to this appeal, appellant alleged that appellees engaged in willful or wanton misconduct when emergency medical services were

[1] Various portions of the record refer to Dr. Marcus as both "David" and "Richard."

administered to Mrs. Blair. On November 9, 2009, appellees filed a motion for summary judgment, which the trial court granted.

{¶15} This timely appeal followed and presents the following assignment of error:

ASSIGNMENT OF ERROR

> AS A MATTER OF LAW, APPELLEES WERE NOT ENTITLED TO SUMMARY JUDGMENT, WHERE:
>
> (I) APPELLEES FAILED TO MEET THEIR INITIAL BURDEN UNDER CIV. R. 56(C); AND
>
> (II) APPELLANT ESTABLISHED THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT THROUGH EXPERT TESTIMONY.

{¶16} We will address the components of appellant's sole assignment of error together. At issue, therefore, is whether the trial court erred when it granted summary judgment.

{¶17} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶18} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to

but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd*., 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶19} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶20} In the instant matter, the parties dispute the legal analysis applicable herein. Appellant argues that appellees' conduct must be adjudged on a willful or wanton standard in accordance with R.C. 4765.49. Appellees disagree and argue they are completely immune from liability under R.C. Chapter 2744. We agree with appellant's suggested analysis but nevertheless find that appellees are immune based upon the facts of this matter.

{¶21} When considering whether a political subdivision may be held liable, courts employ a three-tiered analysis. *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-57, 2000-Ohio-486. First, the general understanding is that political subdivisions are immune from liability associated with the performance of either a governmental or proprietary function. Id.; see also R.C. 2744.02(A)(1). That immunity, however, is not absolute and instead must be subject to the second tier of the analysis, which requires a consideration of the exceptions to immunity. *Hill v. Urbana*, 79 Ohio St.3d 130, 133, 1997-Ohio-400. If an exception applies, then the third tier requires a consideration of whether immunity is reinstated based upon the defenses and immunities set forth in R.C. 2744.03. *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421.

{¶22} With regard to the first tier of the analysis, the administration of "emergency medical, ambulance, and rescue services or protection" is considered a "governmental function." R.C. 2744.01(C)(2)(a). In the instant matter, appellant acknowledges that the city of Columbus is a political subdivision, and the individual appellees administered emergency medical services for Mrs. Blair. As such, this matter concerns the performance of a governmental function. Appellees are immune, unless an exception applies.

{¶23} As for the second tier of the analysis, R.C. 2744.02(B)(5) provides, "a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code[.]"

{¶24} Appellant argues that liability is expressly imposed in accordance with R.C. 4765.49(A), which provides, in pertinent part:

> A first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct. * * *

Similarly, R.C. 4765.49(B) provides that a political subdivision providing emergency medical services is not liable unless the individuals listed above administered such services "in a manner that constitutes willful or wanton misconduct."

{¶25} In response to appellant's argument that R.C. 4765.49 applies, appellees argue that R.C. 4765.49 is an immunity statute rather than one that expressly imposes liability. As such, appellees contend that the immunity granted under R.C. 2744.02(A)(1) was never lost by an exception to immunity. Alternatively, they argue that the administration of emergency medical services to Mrs. Blair did not amount to willful or wanton misconduct, such that they cannot be held liable in accordance with R.C. 4765.49(A) and (B). Either way, appellees argue that they are immune from liability for the conduct that occurred in this matter.

{¶26} In *Fuson v. Cincinnati* (1993), 91 Ohio App.3d 734, the First Appellate District addressed the interplay amongst these statutes.[2] That case outlined the immunity afforded to political subdivisions in relation to the performance of emergency medical services. In this regard, the court provided:

> R.C. 3303.21 provides that no emergency medical technician, paramedic or political subdivision is liable in civil damages for injury, death or loss to persons or property resulting from the administration of emergency medical care or treatment, unless that care is administered in a manner constituting

[2] The court in *Fuson* noted that R.C. 3303.21 was codified as R.C. 4765.49 and became effective on November 12, 1992.

> willful or wanton misconduct. R.C. 1.51 mandates that where a general provision conflicts with a special provision, they are to be construed, wherever it is possible, to give effect to both. If they are irreconcilable, the special provision prevails as an exception to the general provision.
>
> In *Swanson v. Columbus* (1993), 87 Ohio App.3d 748, 622 N.E.2d 1181, the court determined that R.C. 2744.02(A) confers blanket immunity upon political subdivisions with respect to all governmental functions unless R.C. 2744.02(B) specifically imposes liability. Because R.C. 3303.21 pertains specifically to emergency medical services and, further, limits the immunity of a political subdivision and its emergency employees to cases not involving willful and wanton misconduct, it is reconcilable with R.C. 2744.02(B), and we must, accordingly, address whether the evidence in this case reasonably supports a conclusion that the instant appellees engaged in willful [or] wanton misconduct.

Id. at 738.

{¶27} While *Fuson* analyzed a prior version of the emergency medical personnel statute, appellate courts have applied its analysis to the present-day statute. See *Johnson v. Cleveland*, 8th Dist. No. 95688, 2011-Ohio-2152, ¶22; *Donlin v. Rural Metro Ambulance, Inc*., 11th Dist. No. 2002-T-0148, 2004-Ohio-1704, ¶15 (generally holding that evidence of willful or wanton misconduct creates an exception to immunity via R.C. 4765.49(A)); *Denham v. New Carlisle* (2000), 138 Ohio App.3d 439, 443 (applying R.C. 4765.49(A) and (B) to claims against city and paramedics).

{¶28} We agree that R.C. 4765.49 applies herein. See *Fuson*, *Johnson*, *Donlin*, and *Denham*. Because that statute applies, the analysis requires a consideration of whether the immunity imposed by R.C. 2744.02(A)(1) is lost by the exception to immunity set forth in R.C. 4765.49. See *Donlin* at ¶15. The determinative issue, therefore, regards whether appellees engaged in willful or wanton misconduct.

{¶29} Wanton misconduct involves the complete " 'failure to exercise any care toward one to whom a duty of care is owed under circumstances in which there is a great probability that harm will result[.]' " *Smith v. McBride*, 10th Dist. No. 09AP-571, 2010-Ohio-1222, ¶23, quoting *Robertson v. Dept. of Pub. Safety*, 10th Dist. No. 06AP-1064, 2007-Ohio-5080, ¶18, citing *Hunter v. Columbus* (2000), 139 Ohio App.3d 962, 969. To constitute wanton misconduct, the defendant must recognize this great probability of harm. Id. Wanton misconduct demonstrates a " 'reckless disregard of the rights of others, which reflects a reckless indifference on the consequences to the life, limb, health, reputation, or property of others.' " Id., quoting *Byrd v. Kirby*, 10th Dist. No. 04AP-451, 2005-Ohio-1261, ¶23, citing *State v. Earlenbaugh* (1985), 18 Ohio St.3d 19, 21. " '[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury." Id., quoting *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97.

{¶30} Willful misconduct " 'involves a more positive mental state prompting the injurious act than does wanton misconduct.' " *Hunter* at 969, quoting *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 515. Willful misconduct is performed with "the intent, purpose, or design to injure." *Smith* at ¶23, quoting *Robertson* at ¶14, quoting *Byrd*. It presents "an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Robertson* at ¶14, quoting *Tighe v. Diamond* (1948), 149 Ohio St. 520.

{¶31} In the instant matter, appellees offered ample evidence regarding the sequence of events and the emergency services performed on March 7, 2007, as we have previously outlined. They also explained the reasons and rationale for the actions they took. Therefore, appellees' evidence was sufficient to meet their initial Civ.R. 56 burden. We reject appellant's contention to the contrary.

{¶32} Appellant also argues that he met his reciprocal burden in demonstrating that there are genuine issues of material fact, such that summary judgment was improperly granted. More specifically, appellant argues that there are genuine issues of material fact regarding whether appellees engaged in willful or wanton misconduct based upon the following: (1) they failed to recognize that Mrs. Blair's respiratory distress was imminent and failed to use CPAP; (2) they permitted a paramedic student to attempt the endotracheal intubation; (3) they failed to follow standard operating procedures, which require the use of capnography to verify an ET tube's proper placement; and (4) the capnography display had been disabled on the ambulance. We will address these contentions in turn.

{¶33} Initially, however, we note that appellant argues that genuine issues of material fact generally exist based upon the affidavit of appellant's expert, Dr. Bryan Bledsoe. Appellant suggests that summary judgment was improper because Dr. Bledsoe opined that appellees' actions constituted willful or wanton misconduct. However, "expert-witness testimony stating that the actions of [appellees] were 'deliberate' willful or wanton [mis]conduct does not create any issue of fact, but merely states appellant's position with respect to appellee[s'] culpability, which is a legal conclusion." *Donlin* at

¶26, citing *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768. We must therefore analyze the facts underlying Dr. Bledsoe's conclusion.

{¶34} First, appellant contends that appellees engaged in willful or wanton misconduct by failing to recognize that Mrs. Blair's respiratory distress was imminent. Appellant argues that genuine issues of material fact exist based upon Dr. Bledsoe's opinions. Specifically, he opined that upon observing an initial oxygen saturation of 48 percent on room air, the paramedics should have provided emergency care and moved Mrs. Blair to the ambulance for transport to the hospital. (Bledsoe affidavit, at 8a.) This statement misconstrues the timing and sequence of events. Indeed, when the oxygen saturation reading was obtained, Mrs. Blair was already on a cot inside Medic 2 and had been receiving medical care. Appellees' evidence demonstrates that the paramedics all appreciated the urgency of the situation and took appropriate measures, as outlined above.[3]

{¶35} With further regard to appellees' conduct, Dr. Bledsoe criticized their decision not to use CPAP because it "may have negated or delayed the need for mechanical ventilation and endotracheal intubation." (Bledsoe affidavit, at 8b.) This statement also fails to create genuine issues of material fact. First, Dr. Bledsoe does not state with any sort of certainty that using CPAP would have changed the course of treatment or its outcome. Indeed, with respect to the use of CPAP, Dr. Bledsoe's opinion is riddled with reservations. Secondly, and more importantly, the evidence demonstrates that the paramedics considered using CPAP, but because of Mrs. Blair's

[3] Because appellant never raised an objection before the trial court, he has failed to preserve any challenge to the affidavit of Dr. David Keseg and the supplemental affidavits of Mr. Kynion, Mr. Ruh, and Mr. Keener. See *Freshour v. TK Constructors, Inc*., 10th Dist. No. 10AP-28, 2011-Ohio-2163, fn.1.

unconsciousness, CPAP was contraindicated because it requires some degree of responsiveness on the part of the patient. Nowhere does appellant dispute this. As a result, no genuine issues of material fact exist with regard to appellees' recognition of the urgency of the situation and their decision not to use CPAP.

{¶36} Appellant next contends that the decision to allow a paramedic student to attempt the endotracheal intubation constituted willful or wanton misconduct. In support, Dr. Bledsoe asserts that appellees permitted Mr. Keener to attempt to place an ET tube despite the predictive indicators showing that the intubation would be difficult. However, Mr. Keener did not attempt to place the ET tube. He merely attempted to view the trachea with a laryngoscope. Furthermore, only 10 to 15 seconds passed before Mr. Keener realized the task of intubating Mrs. Blair was going to be too difficult for him. The evidence shows that Mr. Keener's attempt to view the trachea did not delay Mr. Kynion's actual attempt at performing the intubation. The evidence also shows that paramedic students are permitted to perform medical services consistent with their level of training. Indeed, they are actually encouraged to do so in order to develop the skills necessary to become paramedics. As of March 7, 2007, Mr. Keener's training permitted him to perform endotracheal intubations. Appellant has not refuted any of this evidence. As a result, there are no genuine issues of material fact with regard to Mr. Keener's involvement in Mrs. Blair's care.

{¶37} Next, appellant contends that appellees engaged in willful or wanton misconduct by failing to follow standard operating procedures, which require the use of capnography to verify an ET tube's placement. Dr. Bledsoe states that capnography was available, and the paramedics should have known how to enable it.

{¶38} With respect to these positions, we find that the sequence of events is of critical importance when determining whether appellees' actions constituted willful or wanton misconduct. The evidence shows that the paramedics believed the second intubation was successfully placed in the trachea. Again, this belief was based upon breath sounds, condensation on the tube, chest wall movement, and the absence of epigastric sounds. When they attempted to use capnography, the display did not appear. Therefore, by all accounts, the paramedics wanted to use capnography but could not when they tried. They did not simply choose to forego using capnography. When the capnography display did not appear, they discussed whether anyone knew how to enable it. None of them did. They then faced a dilemma. They could have attempted to troubleshoot the capnography for some period of time without knowing whether they would ultimately succeed in enabling capnography and verifying the ET tube's placement. Alternatively, because they were already in Grant's parking lot, they could have taken Mrs. Blair into Grant for further treatment. They chose the latter. When this decision was made, again, the paramedics all believed the second ET tube had been properly placed. Appellees' expert, Dr. David Keseg, opines that it is entirely appropriate to confirm an ET tube's placement via the manual methods when capnography is not working. This is precisely what appellees did.

{¶39} Given these circumstances, there was no deliberate intent to ignore the standard operating procedures requiring capnography. Nor was there a failure to exercise any care, which demonstrated a reckless indifference toward the consequences to Mrs. Blair. Instead, the paramedics were concerned for Mrs. Blair's health and administered care accordingly. Based upon the record before us, the paramedics' failure

to verify the ET tube's placement with capnography was not willful or wanton misconduct. The same can be said of their inability to enable capnography. There are no genuine issues of material fact in this regard.

{¶40} Appellant also argues that appellees engaged in willful or wanton misconduct because the capnography display had been disabled on the ambulance. There is a disconnect associated with this allegation that we must illustrate. The alleged act of disabling capnography was not a part of the emergency medical services administered by appellees to Mrs. Blair on March 7, 2007. Indeed, it is not clear as to when or whether someone actually and affirmatively disabled capnography. No testimony or explanation was offered with regard to the specific individual or individuals who allegedly disabled capnography. Instead, this theory was merely offered by some of the paramedics as one potential explanation as to why capnography was not displayed on the monitor on March 7, 2007. It was the mere supposition and conjecture during their deposition testimony. Inasmuch as appellant has neither identified an individual who disabled capnography nor has actually shown that capnography was in fact disabled, there are no genuine issues of material fact with regard to this purported misconduct. Indeed, it cannot be said that some unknown individual had a deliberate intent, purpose, or design to injure Mrs. Blair. Similarly, it cannot be said that this unknown individual failed to exercise care towards Mrs. Blair despite having the recognition that probable harm would result to her. No genuine issues of material fact exist with regard to this purported misconduct.

{¶41} Having found no genuine issues of material fact with regard to the issue of whether appellees engaged in willful or wanton misconduct, we find that the trial court did

not err in finding that appellees were immune from liability under R.C. 2744.02(A)(1). Furthermore, it did not err in granting summary judgment based upon this finding. Appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.