[Cite as *Cantwell v. Franklin Cty. Bd. of Commrs.* , 2012-Ohio-2273.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph Cantwell,	:	
Plaintiff-Appellant,	:	
		No. 11AP-849
v.	:	(C.P.C. No. 09CVH-13720)
Franklin County Board of Commissioners,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on May 22, 2012

Tyack, Blackmore, Liston & Nigh, Co., LPA, Jonathan T. Tyack; Weston Hurd LLP, and *Daniel T. Downey*, for appellant.

Ron O'Brien, Prosecuting Attorney, *Nick A. Soulas, Jr.*, and *Mary Jane Martin*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Joseph Cantwell, plaintiff-appellant, appeals from the judgment of the Franklin County Court of Common Pleas, in which the court denied his motion for summary judgment, and granted the motion for summary judgment filed by the Franklin County Board of Commissioners, defendant-appellee.

{¶ 2} Appellant was employed as a deputy sheriff and guard at the Franklin County Corrections Center ("the jail" or the "Franklin County jail"). Phillip Barnett also worked as a deputy sheriff and guard at the jail. On February 16, 2009, appellant and Barnett were working at the jail and delivering bologna sandwiches to inmates. Appellant and Barnett took one sandwich to inmate Todd Triplett and requested that he place his

penis on a bologna sandwich, which he did. They then photographed the act on appellant's cell phone. The sandwich was then given to inmate Joseph Copeland, who began to eat it. Appellant and Barnett then showed Copeland the photograph on appellant's cell phone and teased him about having eaten the sandwich. Several months later, the incident was investigated, resulting in the termination of appellant and Barnett from their positions.

{¶ 3} Copeland and Triplett filed separate actions in the Franklin County Court of Common Pleas against numerous defendants, including appellant, based upon the February 2009 incident. The inmates' cases were eventually removed to federal court and consolidated. Appellant requested that appellee provide him with legal counsel to represent him in the cases brought by Copeland and Triplett, but appellee refused to do so.

{¶ 4} On May 8, 2009, appellant filed the present declaratory judgment action in the Franklin County Court of Common Pleas, seeking a declaration that appellee had a duty to defend him in the actions brought by Copeland and Triplett pursuant to R.C. 2744.07. Appellant also sought payment for all costs associated with the defense of the inmates' action and those costs associated with the filing of the declaratory judgment action.

{¶ 5} On December 23, 2010, appellant and appellee filed motions for summary judgment. On September 9, 2011, the trial court denied appellant's motion for summary judgment and granted appellee's motion for summary judgment, concluding that appellant did not act in good faith and acted manifestly outside the scope of his employment. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> I. THE TRIAL COURT ERRED WHEN IT DENIED DEPUTY CANTWELL'S MOTION FOR SUMMARY JUDGMENT.
>
> II. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

{¶ 6} Appellant argues his assignments of error together; thus, we will likewise address them together. Appellant argues in his assignments of error that the trial court erred when it granted appellee's motion for summary judgment and denied his motion for

summary judgment. Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip*, 80 Ohio App.3d 487, 491 (9th Dist.1992). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id*. Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id*. The non-moving party may not rest upon the allegations or denials in the pleadings, but must affirmatively demonstrate the existence of a genuine issue of material fact to prevent the granting of a motion for summary judgment. Civ.R. 56(C); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 7} R.C. 2744.07 provides the terms under which a political subdivision must provide a legal defense for an employee:

> (A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities.
>
> * * *
>
> (C) * * * In determining whether a political subdivision has a duty to defend the employee in the action, the court shall

> determine whether the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. The pleadings shall not be determinative of whether the employee acted in good faith or was manifestly outside the scope of employment or official responsibilities.
>
> If the court determines that the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities, the court shall order the political subdivision to defend the employee in the action.

Accordingly, if the employee acted (1) in good faith, and (2) not manifestly outside the scope of his or her employment or official responsibilities, the political subdivision has a duty to provide a defense for the employee if a civil action or proceeding against the employee for damages is commenced. *See* R.C. 2744.07(A)(1); *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 576 (2001).

{¶ 8} In the present case, appellant's argument first addresses the scope-of-employment requirement under R.C. 2744.07. Whether an employee is acting within the scope of employment is generally a question of fact to be decided by the fact finder. *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271 (1976). Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law. *Osborne v. Lyles*, 63 Ohio St.3d 326, 330 (1992).

{¶ 9} Appellant here contends that Copeland's complaint in the underlying action alleges that appellant was acting under the color of state law and under the direct supervision of his superiors, while Triplett's complaint alleges that the county is liable for appellant's actions. Thus, appellant maintains, the complaints allege that appellant was acting within the scope of his employment at all relevant times. Although appellant acknowledges that R.C. 2744.07(C) specifically disclaims the determinativeness of the pleadings, he asserts the claims made by Triplett and Copeland in their underlying lawsuits constitute evidence that may be considered by a trier of fact in the factual determination of whether his conduct was manifestly outside the scope of employment.

{¶ 10} With regard to Copeland's allegation in his complaint that appellant was acting under color of state law, the fact that one may have acted under color of state law does not mean that one likewise acted within the scope of his employment. *Miller v. Leesburg*, 10th Dist. No. 97APE10-1379 (Dec. 1, 1998). In *Miller*, the court explained that

"[a]lthough the two concepts are related, they are separate and distinct, as the under color of state law concept is broader than the within the scope of employment concept." *Id*. Regardless, appellant cannot rely upon this allegation in Copeland's complaint to support his claim that his conduct was not manifestly outside the scope of employment, because, in the very next paragraph in the complaint, Copeland alleges that appellant was acting manifestly outside the scope of his employment, which is directly contrary to the point for which appellant relies upon Copeland's complaint.

{¶ 11} As for Triplett's complaint, he too alleges that appellant acted under color of state law, which we find of little sway based upon the same reasoning above. Otherwise, our review of Triplett's complaint reveals little else that aids our analysis. Triplett does not specifically raise any allegations as to whether appellant was acting manifestly outside the scope of his employment. In this respect, Triplett's complaint only alleges generally that appellant was a police officer and corrections officer and is liable in his official capacity for his actions. This allegation is insufficient to raise a genuine issue of material fact as to whether appellant was acting within the scope of his employment.

{¶ 12} Nevertheless, appellant's main contention on appeal is that the testimony from several depositions raises a genuine issue of material fact as to whether he was not acting manifestly outside the scope of his employment. In this respect, appellant contends it was commonplace for jokes and pranks to take place at the Franklin County jail between inmates, as well as hazing to take place between deputies, and such, if not condoned, were certainly not discouraged. Thus, appellant contends, because these jokes were encouraged, promoted, and tolerated, his "joke" to give Copeland a genital-tainted sandwich was not manifestly outside the scope of his employment. In support, appellant cites the deposition testimony of Mark Eagan, a Franklin County deputy sheriff; James Karnes, the Franklin County sheriff; and Geoffrey Stobart, the commander of the internal affairs bureau for the Franklin County sheriff's office.

{¶ 13} With regard to Eagan, appellant relies upon his testimony that he himself engaged in jokes with inmates in order to maintain camaraderie with them, he believed appellant was only joking with Copeland when the incident occurred, he joked with Copeland about the incident, Eagan thought it was funny at the time, and he never thought appellant's actions were meant to be malicious or harmful. With regard to Sheriff

Karnes, appellant relies upon his testimony that he investigated the improper training of Franklin County deputies at the Jackson Pike jail, which involved corrections officer trainees being required to sing "I'm a Little Tea Pot" and trainees being tasered on their third day on the job. With regard to Stobart, appellant relies upon his testimony that he investigated incidents prior to the incident in the present case involving deputies playing practical jokes on each other, corrections officer trainees at the Jackson Pike jail singing songs on duty, and deputies at the Jackson Pike jail being handcuffed together, and that there was no additional training between those incidents at Jackson Pike and the incident here. Based upon all of this testimony, appellant maintains that, though distasteful, appellant's conduct was in line with the conduct of other deputies at the Franklin County jail, as evidenced by the failure of supervisors to provide additional training to the deputies involved. The lack of additional training, appellant contends, shows that the behavior was not discouraged and could not fall outside the course and scope of appellant's employment. We disagree.

{¶ 14} Our review of the deposition testimony of these three witnesses reveals as follows. Initially, Stobart specifically testified that he believed appellant's actions were outside the scope of his employment. Stobart further acknowledged that he was aware of deputies playing practical jokes on each other at the Franklin County sheriff's office. However, he said a supervisor that was aware of the hazing between deputies at the Jackson Pike jail was demoted three ranks. He also stated that a criminal investigation commenced as soon as the sheriff's office became aware of the present incident, with an administrative investigation commencing thereafter. As for Eagan, he testified that workers at the Jackson Pike jail do not listen to their supervisors, and he believed appellant's actions violated Copeland's rights and went beyond mere joking. Like Stobart, Karnes testified he believed appellant's actions were outside the scope of his responsibilities. Karnes said he knew of no supervisors who knew about the incident in question but failed to report it. He also testified that those participating in hazing at the Jackson Pike jail were not doing their jobs and were doings things against the department's policies.

{¶ 15} After reviewing the above evidence from these three witnesses, we find appellant fails to raise any genuine issue of material fact with regard to whether he acted

manifestly outside the scope of his employment. The submitted evidence demonstrates that he did act manifestly outside the scope of employment. Stobart and Karnes both testified that they believed appellant acted outside the scope of his employment. Furthermore, despite appellant's claim that joking was commonplace in the Jackson Pike jail, Eagan testified that appellant's actions went beyond mere joking. Importantly, far from the "pranking" and "joking" being condoned, Stobart and Karnes testified that those involved in the activities at the Jackson Pike jail were demoted, suspended, and subject to subsequent criminal and administrative investigations. Karnes also made clear that he believed that those involved in the Jackson Pike incidents were not doing their jobs. Eagan said that the workers at Jackson Pike do follow their supervisors' directives. It is also important to point out that the vast majority of appellant's argument in his brief involves activities and behavior beyond mere verbal joking that occurred at the Jackson Pike jail, while there was little testimony about similar behavior occurring at the Franklin County jail, where the incident in question took place.

{¶ 16} Furthermore, the determination of whether conduct is within or outside the scope of employment necessarily turns on the fact finder's perception of whether the employee acted, or believed himself to have acted, at least in part, in his employer's interests. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, ¶ 17, citing *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 151 (3d Cir.1999), fn. 6. In light of this standard, we can find no reasonable minds could conclude that appellant could have believed himself to have been acting in appellee's best interest. Although appellant argues that he was on duty, in uniform, and serving meals to prisoners as part of his assigned duties, his acts here went far beyond his mere serving of meals to inmates. Appellant's act of taking a photograph of an inmate's penis on a sandwich and then serving the sandwich to another inmate did not further appellee's business in any manner and was plainly not in appellee's best interest. Also, although serving food to inmates is part of appellant's job duties, the acts in question did not occur during his actual serving of a meal. Instead, appellant engaged in activities that did not involve his duty to serve meals, i.e., the asking of an inmate to place his penis on a sandwich and the taking of a photograph of the inmate's genitals. Although appellant did eventually serve the sandwich to Copeland, the

meal served was one plainly unauthorized by appellee and obviously outside of appellant's authorized duties.

{¶ 17} In addition, we find distinguishable *Harrison*, upon which appellant relies. In *Harrison*, a female employee filed a federal action against a municipality and its male chief of police, based upon the employee's allegations that the chief had used the department's computer system to display and distribute offensive and pornographic photographs and e-mails, and that he also used hidden electronic devices owned by the department to audio record female employees while they were in the police department restroom. Appellant was an insurer that provided liability insurance coverage to the city and the chief of police. The insurer filed a declaratory judgment action in the common pleas court seeking a determination that it had no duty to provide coverage or a defense to the chief. The trial court granted summary judgment in the insurer's favor. The court of appeals reversed, finding the insurer had a duty to defend because the chief's actions were taken in the course of his duties. The Supreme Court of Ohio affirmed the court of appeals finding that the employee's claims were not clearly and indisputably outside of the contracted policy coverage; therefore, the insurer had a duty to defend the chief against all claims in the employee's federal lawsuit.

{¶ 18} In the present case, appellant contends that, if the chief of police was entitled to a defense for his actions in *Harrison*, then he is entitled to a defense here. However, the circumstances in *Harrison* are distinguishable from those in the current case. The most glaring difference between *Harrison* and the present case is that *Harrison* involved an insurance company's duty to defend pursuant to the terms of an insurance policy, while the present case involves a duty to defend pursuant to R.C. 2744.07. After first declining to hold that sexual harassment is conduct that is outside the scope of employment as a matter of law, the court in *Harrison* went on to address the insurer's duty to defend the police chief. In concluding there to be a genuine issue of fact regarding whether the chief had been acting within the scope of employment during the alleged conduct, the court looked to the language in the insurance contract between the parties.

{¶ 19} Initially, unlike the duty to defend under R.C. 2744.07, "[t]he scope of the allegations in the complaint against the insured determines whether an insurance company has a duty to defend the insured." *Id*. at ¶ 19, citing *Motorists Mut. Ins. Co. v.*

Trainor, 33 Ohio St.2d 41 (1973), paragraph two of the syllabus. Thus, the court found in *Harrison* that, because the employee alleged in her complaint misfeasance, malfeasance, and nonfeasance, as well as civil rights and discrimination claims, the insurer had a duty to defend because the policy specifically agreed to defend these types of claims.

{¶ 20} In addition, the court in *Harrison* found that the policy expressly indicated a duty to defend claims based on a "wrongful act"—including allegations that are groundless, false or fraudulent—which broadens an insurer's duty to defend. The court also noted that the policy expanded the definition of "wrongful act" to include any matter claimed against an insured solely by reason of the insured's having served or acted in an official capacity. In this respect, the allegations in the underlying federal complaint related directly to the chief's official capacity as chief of police, and the employee alleged that the chief committed wrongful acts while he was acting in his official capacity and under color of state law.

{¶ 21} The court also found that, although the policy limited coverage to elected or appointed officials and employees while acting in the interest of the city, it also provided coverage for employees while acting on behalf of the city. Thus, even if the police chief's acts were not in furtherance of the city's interest, coverage still existed if he was acting on behalf of the city. Accordingly, the court determined, while this language could be construed as limiting an insured to one acting within the scope of employment, it could also be construed to include an officer who acted in his official capacity or an officer who is simply on duty. The court found that, because the limiting phrase " 'while acting on behalf of or in the interest of' " is susceptible to more than one interpretation, it must be construed against the insurer. *Id*. at ¶ 26.

{¶ 22} Furthermore, in finding there to be a genuine issue of fact regarding whether the chief had been acting within the scope of employment during the alleged conduct, the court also found the chief's intent could not be determined until evidence was submitted in the employee's underlying action. Thus, the court in *Harrison* concluded that the employee's claims were not clearly and indisputably outside of the contracted policy coverage; therefore, the insurer had a duty to defend the police chief against all claims in the employee's federal lawsuit.

{¶ 23} Thus, the present case differs markedly from *Harrison* in at least three respects. First, in determining whether an insurance company has a duty to defend the insured, the allegations in the underlying complaint are determinative, unlike the duty to defend under R.C. 2744.07, which specifically provides that the pleadings are not determinative of the duty to defend. Second, nearly the entire analysis in *Harrison* is based upon the specific language of the insurance policy at issue. In the present case, there is no identical or similar language in R.C. 2744.07 to that in the insurance policy in *Harrison*. Third, with respect to the court's finding that there was a genuine issue of fact regarding whether the police chief had been acting within the scope of employment because it could not be determined whether he acted in his official capacity or with purely private motives until evidence was submitted in the employee's underlying action, in the present case, we have already found that, even construing the evidence most favorably for appellant, it appears from the deposition testimony that reasonable minds could only conclude that appellant acted manifestly outside the scope of his employment. For these reasons, we find *Harrison* distinguishable and unpersuasive.

{¶ 24} Based upon the foregoing, we find the trial court did not err when it granted appellee's motion for summary judgment and denied appellant's motion for summary judgment. The court properly concluded that there remained no genuine issues of material fact. Because reasonable minds could only conclude that appellant's actions in photographing an inmate placing his penis on a sandwich and then feeding the sandwich to another inmate were manifestly outside the scope of employment, appellee was entitled to judgment as a matter of law. Furthermore, having found that appellant acted manifestly outside the scope of his employment, we need not determine the issue of good faith, pursuant to R.C. 2744.07(A)(1), as both requirements had to have been met before appellee had a duty to defend. For these reasons, appellant's first and second assignments of error are overruled.

{¶ 25} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and DORRIAN, JJ., concur.
