[Cite as *Rilley v. Brimfield Twp.*, 2010-Ohio-5181.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

SCOTT RILLEY, EXECUTOR OF THE ESTATE OF SARAH POSITANO, DECEASED, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-P-0036**
- vs -	:	
TOWNSHIP OF BRIMFIELD, COUNTY OF PORTAGE, OHIO, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 0085.

Judgment: Affirmed.

Paul W. Flowers, Paul W. Flowers Co., L.P.A., Terminal Tower, 35th Floor, 50 Public Square, Cleveland, OH 44113-2216, and *Michael T. Callahan*, Callahan, Greven, Riley & Sinn, L.L.C., 137 South Main Street, #300, Akron, OH 44308 (For Plaintiffs-Appellants).

Mel L. Lute, Jr., Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, OH 44720 (For Defendants-Appellees).

MARY JANE TRAPP, P.J.

{¶1} Appellants, Scott Rilley, administrator of the estate of Sarah Positano, and her parents, Susan and James Positano, appeal the judgment of the Portage County Court of Common Pleas, which dismissed their wrongful death and survivorship claims and granted summary judgment in favor of appellees, Brimfield Township and Brimfield Chief of Police, David A. Blough.

{¶2} On the night of January 21, 2005, Ms. Sarah Positano was taken hostage and fatally shot by Mr. James Trimble. This hostage standoff came to a tragic and devastating ending that necessarily and understandably prompted questions and second guessing based upon hindsight; however, we find that appellants did not provide the trial court with any evidence creating an issue of material fact that would offer Ms. Positano's family relief from the sovereign immunity statute. Thus, we must affirm the trial court's judgment.

{¶3} **Substantive and Procedural Facts**

{¶4} On that fatal night, Chief Blough received a call from dispatch at about 9:45 p.m. reporting that Mr. Trimble had just killed his girlfriend and her nine-year old son at their home. Chief Blough then received another dispatch that two people walking their dog in the woods near that residence were threatened by a man dressed in camouflage and carrying an assault rifle. Chief Blough called officers to the scene and contacted the Metro SWAT team commander and Fairlawn Sergeant, Scott Robertson, to assemble the Metro SWAT team. Chief Blough then headed directly to Mr. Trimble's residence.

{¶5} While Metro SWAT was assembling, the officers who had already responded to the scene set up outer and inner perimeters around the location where Mr. Trimble was last sighted. They formed a skirmish line to narrow the perimeter and "squeeze" Mr. Trimble out of hiding. Unbeknownst to the officers, Mr. Trimble had already broken into a condominium and taken a hostage.

{¶6} At about 11:18 p.m., the hostage, Ms. Positano, called 911 reporting that a man had entered her apartment. She told the 911 operator that the man was holding a

gun to her head and was going to shoot her unless the police left the scene. To calm Mr. Trimble, who was later identified as the man holding Ms. Positano hostage, the 911 operator told Ms. Positano to relay the message that the police were retreating. Both Chief Blough and Sergeant Robertson testified in their deposition that there were no officers in position because while they were actually in the vicinity of Ms. Positano's condominium, her exact location at the time of the 911 call was still unknown.

{¶7} By 11:45 p.m., the Metro SWAT team had taken control of the scene and all other officers were retreating. All together there were over one hundred police officers on the scene at some point that night.

{¶8} Mr. Trimble allowed Ms. Positano to stay on the line with the operator, who transferred the call to Sergeant Rick Baron. During the call, Mr. Trimble asked to speak directly with the police and was connected to Sergeant Michael Korach, a Fairlawn police officer and hostage negotiator for Metro SWAT, via a three-way call to Sergeant Korach's cell phone.

{¶9} During the call, Mr. Trimble reiterated that he was armed and that he would not hurt Ms. Positano as long as the police retreated. The call was disconnected, but Sergeant Korach was able to reestablish a connection within ten to fifteen minutes. During the second call, Mr. Trimble agreed that he would release Ms. Positano in two hours if he was "left alone." Sergeant Korach asked to speak with Ms. Positano, but Mr. Trimble denied the request. The sergeant did not hear Ms. Positano and Mr. Trimble speaking in the background as he had during the first call.

{¶10} Meanwhile, Ms. Positano was still on the line with Sergeant Baron. He overheard her speaking with Mr. Trimble and relayed the agreement reached between

Sergeant Korach and Mr. Trimble, trying to reassure her that she would be released in several hours.

{¶11} At about 12:04 a.m., Sergeant Baron heard Ms. Positano scream and gasp for several seconds, and then the call was disconnected. The officers continuously called both Mr. Trimble and Ms. Positano for the remainder of the evening to no avail. No one on the line heard a gunshot or knew Ms. Positano had been fatally shot in the neck. The best they could assess at the time was that Ms. Positano suffered an asthma attack because she had been warning the operator and Sergeant Baron that one was imminent.

{¶12} Six minutes later, at 12:10 a.m., Mr. Trimble began shooting at two of the snipers outside. When Mr. Trimble began firing upon the officers, Sergeant Robertson requested, and Chief Blough issued, a "Delta Order," which gave the team permission to shoot Mr. Trimble, if possible, while protecting the hostage and themselves. Three return shots were fired by two of the officers at approximately 12:30 a.m. and 12:37 a.m. Mr. Trimble retreated back into the house and continued to fire shots sporadically until almost 3:00 a.m.

{¶13} Mr. Trimble was finally apprehended around 7:30 a.m. after Metro SWAT burst through the door. The officers found Ms. Positano dead on the landing and Mr. Trimble barricaded in the bedroom upstairs.

{¶14} Civil Suit for Claims of Wrongful Death and Survivorship

{¶15} Mr. Rilley and the Positanos filed suit alleging state and federal claims of civil rights violations, inadequate training and supervision, including negligent hiring and retention of the police officers involved, civil conspiracy, breach of fiduciary duty,

negligent infliction of emotional distress, wrongful death, statutory violations, as well as negligence. The suit was subsequently transferred to federal court for resolution of the federal claims, only to be later reinstated in state court.

{¶16} Mrs. Trimble, Mr. Trimble's mother and a named defendant, filed a motion for summary judgment, which was subsequently denied.

{¶17} Brimfield Township and Chief Blough also filed a motion for summary judgment, which was granted, triggering the instant appeal.

{¶18} Trial Court Excludes Certain Evidentiary Materials Offered in Opposition to Motion for Summary Judgment

{¶19} Attached to appellees' motion for summary judgment were: depositions of Chief Blough, Sergeant Korach, Sergeant Robertson, and Officer Richard Soika, a Kent police officer and member of Metro SWAT; affidavits from Sergeant Korach, Sergeant Baron, and Dr. Anthony Lazcano, who reviewed Ms. Positano's autopsy and drug screen results; as well as a transcript of Ms. Positano's call to 911.

{¶20} Mr. Rilley and the Positanos submitted affidavits from Mr. Roger F. Collins, an investigator working privately and for the state of Ohio, and Attorney Richard J. Vickers, a public defender who specializes in death penalty cases. Also attached was a portion of the Westshore Enforcement Bureau SWAT Team Leadership Reference Manual, a "Sanity Evaluation of Mr. Trimble" by Dr. Robert L. Smith, investigator notes of Detective Christopher, and notes from Officer Ken Ciesla.

{¶21} Appellees filed a motion to strike the Rilley/Positano evidentiary materials on the basis of a failure to comply with the requirements of Civ.R. 56(C) and (E).

{¶22} The trial court agreed, finding that Mr. Collins was not established as an expert in audio forensics, ballistics, or firearms; and that his affidavit contained largely

hearsay and presented conclusory opinions unsupported by admissible facts. Similarly, the trial court found Mr. Vickers' affidavit did not establish him as a firearms expert and was also based on unauthenticated documents. The procedure manual, the sanity evaluation, and the two police reports that were offered were not authenticated by affidavit or otherwise; thus, the trial court did not consider any of these materials.

{¶23} The court did, however, consider the depositions submitted by appellees as no objections were raised as to either their form or substance, despite the fact that some of the depositions were not certified or signed by the witness who was deposed.

{¶24} Trial Court Considers the Merits of the Motion

{¶25} Specifically, the court found Brimfield Township was immune as a political subdivision from appellants' claims. There was no evidence that the Brimfield Police and assisting law enforcement officers acted outside the scope of their official duties and, therefore, an exception to governmental immunity applied. As to Chief Blough personally, the trial court found that appellants had failed to establish that Chief Blough was acting outside of his scope of employment or that he acted in a malicious, wanton or reckless manner.

{¶26} As to appellants' substantive arguments, the court found that Chief Blough's "Delta Order" was issued at the urging of Metro SWAT Commander Robertson when the officers came under Mr. Trimble's direct fire. The order authorizing them to return fire only when necessary and appropriate was issued to protect the officers. Further, the trial court found appellants' theory, that a rogue sniper had fired an unauthorized shot, which prompted Mr. Trimble to shoot Ms. Positano, was

unsubstantiated. The trial court found no evidence in the record that any gun had been fired prior to Mr. Trimble shooting Ms. Positano.

{¶27} Thus, with no genuine issues of material fact remaining for determination, summary judgment was awarded to appellees, and it is from this judgment that appellants raise the following assignment of error:

{¶28} "The trial judge erred, as a matter of law, to plaintiff-appellants' substantial detriment by granting summary judgment upon all claims against defendant-appellees, Brimfield Township and Chief David Blough."

{¶29} **Summary Judgment Standard of Review**

{¶30} "Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party. Id., citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is de novo. Id., citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶31} "Accordingly, '[s]ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292.

'Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' Id., citing *Dresher* at 293." *Welsh v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶36-37.

{¶32} "Since summary judgment denies the party his or her 'day in court' it is not be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be

entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶33} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, *** is too broad and fails to account for the burden Civ.R. 56 places upon a moving party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*.

{¶34} "The Supreme Court in *Dresher* went on to hold that when neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276." *Ziccarelli* at ¶40-42.

{¶35} **Claims against Brimfield Township**

{¶36} We first address appellants' claims as to Brimfield Township. Specifically, Mr. Rilley and the Positanos argue that there was sufficient evidence that Chief Blough, acting in his official capacity, failed to properly oversee and control Metro SWAT. Thus, they contend that Brimfield Township is liable for Chief Blough's reckless and wanton conduct that occurred while he was acting in the scope of his employment. Appellants contend Officer Blough failed to properly oversee Metro SWAT in his issuance of a "Delta Order" and in his communications with Metro SWAT prior to Mr. Trimble shooting Ms. Positano.

{¶37} Brimfield Township is a political subdivision. R.C. 2744.01(F); *Hiles v. Franklin Cty. Bd. of Commrs.*, 10th Dist. No. 05AP-253, 2006-Ohio-16, ¶34; *Piispanen v. Carter*, 11th Dist. No. 2005-L-133, 2006-Ohio-2382. "R.C. Chapter 2744 sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability in a civil action." *Hiles* at ¶34, citing *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 150 Ohio App.3d 383, 2002-Ohio-6344, ¶26. Initially, pursuant to R.C. 2744.02(A)(1), Brimfield Township is immune from liability in a civil action for injury, death, or loss to persons allegedly caused by an act or omission of Brimfield Township or its employees in connection with a governmental or proprietary function. The operation of the police is a governmental function. R.C. 2744.01(C). Therefore, unless an exception applies, Brimfield Township is immune from appellants' claims.

{¶38} The general grant of immunity found in R.C. 2744.02(A)(1) is subject to the exceptions contained in R.C. 2744.02(B). Appellants, however, do not argue that any of these exceptions apply. Rather, appellants contend that R.C. 2744.03(A)(6) negates that immunity. R.C. 2744.03 provides defenses and immunities to liability in civil actions. These exceptions do not negate immunity or create a basis for liability; rather, they simply qualify immunity. *Hiles* at ¶35; *Piispanen* at ¶17. Moreover, "R.C. 2744.03(A)(6) applies only to individual employees and not to political subdivisions." *Hiles* at ¶35, citing *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356. Therefore, this provision has no relevance to Brimfield Township.

{¶39} Because none of the exceptions in R.C. 2744.02(B) apply in this case (nor do appellants argue that one of the exceptions do apply), Brimfield Township is immune

from appellants' claims. Id. at ¶36, citing *Wynn v. Butler Cty. Sheriff's Dept.* (Mar. 22, 1999), 12th Dist. No. CA98-08-175, 1999 Ohio App. LEXIS 1128 (finding political subdivision immune from suit where none of the exceptions apply).

{¶40} Thus, the trial court properly awarded summary judgment to Brimfield Township.

{¶41} **Claims against Chief Blough**

{¶42} The claims against Chief Blough, individually and personally, also fail. Chief Blough is an employee of Brimfield Township. R.C. 2744.01(F). Employees of a political subdivision are immune from suit unless one of the exceptions found in R.C. 2744.03(A)(6) or (7) apply. *Hiles* at ¶38, citing *Franklin v. Dayton Probation Servs. Dept.* (1996), 109 Ohio App.3d 613, 616; *Workman v. Franklin Cty.* (Aug. 28, 2001), 10th Dist. No. 00AP-1449, 2001 Ohio App. LEXIS 3818. Appellants contend that Chief Blough should be stripped of his immunity because he acted "with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b). Specifically, appellants argue that a material question of fact exists surrounding Chief Blough's issuance of the Delta Order and his lack of communication with Metro SWAT during the "cooling off" period Sergeant Korach negotiated with Mr. Trimble just prior to Mr. Trimble shooting Ms. Positano. We disagree.

{¶43} **The Test for Willful and Wanton Misconduct**

{¶44} "A two-part test has been applied for a determination of 'wanton' misconduct. '[F]irst, there is a failure to exercise any care whatsoever by those who owe a duty of care to appellant[s]. Secondly, this failure occurs under circumstances in which there is a great probability that harm will result from the lack of care. The first

prong of the test requires that we determine the duty appellees owed appellant[s], and also the extent of care exercised by appellees. Then, we must consider the nature of the hazard created by the circumstances.'" *Thompson v. Smith*, 178 Ohio App.3d 656, 2008-Ohio-5332, ¶40, citing *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210, 212; *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, syllabus; *Tighe v. Diamond* (1948), 149 Ohio St. 520, 526 (wanton misconduct "comprehends an entire absence of all care for the safety of others and indifference to consequences;" "it implies a failure to exercise any care toward those to whom a duty of care is owing when the probability that harm will result from such failure is great, and such probability is known to the actor. It is not necessary that an injury be intended or that there be any ill will on the part of the actor towards the person injured as a result of the conduct"); *Brockman v. Bell* (1992), 78 Ohio App.3d 508.

{¶45} "As to 'willful misconduct,' 'it implies 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.'" Id. at ¶41, quoting *Tighe* at 527.

{¶46} "When determining whether a political subdivision employee's conduct was willful or wanton so as to remove the immunity afforded under R.C. 2744.02, the courts have emphasized the importance of evaluating each case under its own circumstances." Id. at ¶42.

{¶47} "The term 'willful and wanton misconduct' connotes behavior demonstrating a deliberate or reckless disregard for the safety of others, but because the line between such misconduct and ordinary negligence is sometimes a fine one

depending on the particular facts of a case, it is generally recognized that such an issue is for the jury to decide. The issue should not be withheld from the jury where reasonable minds might differ as to the import of the evidence." Id. at ¶43, quoting *Reynolds v. Oakwood* (1987), 38 Ohio App.3d 125, 127. See, also, *Fabrey* at 356; *Brockman* at 515. Where, however, the record contains insufficient evidence to support such a finding, a trial court correctly grants summary judgment for the defendant. *Hiles* at ¶40, citing *Wooton v. Vogele* (2001), 147 Ohio App.3d 216; *Rose v. Haubner* (June 5, 1997), 10th Dist. No. 96APE11-1488, 1997 Ohio App. LEXIS 2430.

{¶48} Appellants failed to present any evidence or inferences from the evidence that created an issue of material fact as to whether Chief Blough acted in a wanton or reckless manner. As evidence that Chief Blough acted with such reckless disregard, appellants argue that Chief Blough did not communicate to Metro SWAT that a two-hour "cooling-off" period had been negotiated, and because of this, Metro SWAT continued to approach the area, prompting Mr. Trimble to shoot Ms. Positano. Appellants further contend that Chief Blough then hastily issued the Delta Order without discovering what happened to Ms. Positano.

{¶49} First, Metro SWAT Commander Sergeant Scott Robertson testified in his deposition that Sergeant Korach relayed the negotiated two-hour period and accordingly, the squad "stood" for 10-14 minutes. Sergeant Robertson was in direct contact with Sergeant Korach via the Metro SWAT radios. Due to the state of the technology at the time, Metro SWAT was capable of radio communication only with the SWAT team. Sergeant Robertson communicated with the 911 operator and the Brimfield Police by cell phone and the command center vehicle.

{¶50} Second, the evidence establishes that not one shot was fired by Metro SWAT or any of the officers until they were under direct fire by Mr. Trimble at 12:09 a.m., after Mr. Trimble fatally shot Ms. Positano at 12:04 a.m. Communication with both Mr. Trimble and Ms. Positano was lost by that time. Quite simply, there was no evidence submitted to support the theory that any action on the part of Metro SWAT prompted Mr. Trimble to shoot Ms. Positano.

{¶51} Third, Sergeant Robertson requested, and Chief Blough issued, the Delta Order at approximately 12:10 a.m., when the offices were under Mr. Trimble's direct fire. This was done, in the words of several officers, for the safety of both the officers and the hostage.

{¶52} This hostage standoff came to a tragic and devastating ending which necessarily and understandingly prompts questions and second guessing based upon hindsight; however, there is simply no evidence in this record that Chief Blough acted with a wanton and reckless disregard, or even negligently, in trying to save Ms. Positano's life.

{¶53} In the absence of any evidence that Chief Blough acted "with malicious purpose, in bad faith, or in a wanton or reckless manner," the trial court properly awarded summary judgment to Chief Blough.

{¶54} **Evidence Considered Upon Summary Judgment**

{¶55} Lastly, appellants argue that the trial court erred in granting appellees' motion to strike the affidavits of Mr. Collins and Attorney Vickers, which were attached to their brief in opposition to motion for summary judgment. The trial court found that these affidavits were based on hearsay and offered conclusory opinions unsupported by

admissible facts. Moreover, while Mr. Collins, a private investigator, and Attorney Vickers, a public defender who specializes in death penalty cases, are certainly experts in their respective fields, neither was an expert in the areas related to their proffered testimony.

{¶56} "A trial court's decision to grant or deny a motion to strike is within its sound discretion and will not be overturned on appeal unless the trial court abuses its discretion." *Douglass v. Salem Community Hosp.*, 153 Ohio App.3d 350, 2003-Ohio-4006, ¶20, citing *Early v. Toledo Blade* (1998), 130 Ohio App.3d 302, 318. "Similarly, the decision regarding the admission of testimony of an expert witness lies with the sound discretion of the trial court and will not be disturbed unless the trial court abuses that discretion." Id., citing *Scott v. Yates* (1994), 71 Ohio St.3d 219, 221. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. We note that in this case, the decision to admit evidence is purely a legal one as it involves solely a question of law, thus necessarily the standard of review is de novo. Under either standard, however, we believe the trial court did not abuse its discretion, and, in addition, used the proper legal analysis to strike the affidavits.

{¶57} "Pursuant to Civ.R. 56(C), a court may not consider any evidence when ruling on a motion for summary judgment unless it conforms with Civ.R. 56. According to Civ.R. 56(E), 'supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the

affidavit.' Thus, affidavits containing opinions *** must meet the requirements in the Rules of Evidence governing the admissibility of opinions." *Douglass* at ¶21, citing *Tomlinson v. Cincinnati* (1983), 4 Ohio St.3d 66, paragraph one of the syllabus.

{¶58} "[I]n order to comply with Civ.R. 56(E) and Evid.R. 702, an expert affidavit must set forth the expert's credentials and the facts supporting the expert's opinion which would be admissible into evidence." Id., citing *Hall v. Fairmont Homes, Inc.* (1995), 105 Ohio App.3d 424, 434.

{¶59} "When deciding whether an expert is qualified to render the opinions found in an affidavit in support of summary judgment, a court may look to other evidentiary matter, including depositions of the affiant not previously filed in the court." Id. at ¶31, citing *Cleveland Clinic Found. v. Commerce Group Benefits, Inc.* (Mar. 28, 2002), 8th Dist. No. 79907, 2002-Ohio-1414; *Williams v. 312 Walnut Ltd. Partnership* (Dec. 13, 1996), 1st Dist. No. 960368, 1996 Ohio App. LEXIS 5887. "Ohio's standards regarding the admissibility of expert opinions are relatively lenient as to a determination of who is an expert but relatively strict in governing the admissibility of the expert testimony." Id., citing *State v. Rangel* (2000), 140 Ohio App.3d 291, 295.

{¶60} "To qualify as an expert, the witness must have some 'specialized knowledge, skill, experience, training or education regarding the subject matter of the testimony.' Evid.R. 702(B). An expert's testimony must either relate to matters beyond the knowledge or experience possessed by lay persons or dispel a misconception common among lay persons. Evid.R. 702(A). 'Neither special education nor certification is necessary to confer expert status upon a witness. The individual offered as an expert need not have complete knowledge of the field in question, as long as the

knowledge he or she possesses will aid the trier of fact in performing its fact-finding function.' *State v. Hartman* (2001), 93 Ohio St.3d 274, 285, citing *State v. Baston* (1999), 85 Ohio St.3d 418, 423; *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 191. Finally, the witness is an expert only if his or her testimony 'is based on reliable scientific, technical, or other specialized information.' Evid.R. 702(C). When applying this prong of Evid.R. 702, the trial court acts as a 'gatekeeper' to ensure the proffered information is sufficiently reliable. See *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 590; *State v. Nemeth* (1998), 82 Ohio St.3d 202, 211." *Douglass* at ¶32.

{¶61} Furthermore, "Civ.R. 56(C) provides the exclusive list of documentary evidence to support a summary judgment motion: affidavits, depositions, answers to interrogatories, written admissions, transcripts of evidence in the pending case, and written stipulations. No other evidence may be considered. Civ.R. 56(C). Other documentary evidence may be admitted; however, the appropriate method to introduce this evidence is by way of an affidavit that complies with Civ.R. 56(E)." *Drawl v. Cornicelli* (1997), 124 Ohio App.3d 562, 569, citing *Martin v. Central Ohio Trans. Auth.* (1990), 70 Ohio App.3d 83, 89.

{¶62} In the case of Mr. Collins, no evidence was offered as to his qualifications in audio forensics, ballistics, or firearms, areas in which he sought to offer his expert opinion. Further, none of the documents upon which Mr. Collins based his formulation of the events of that night are attached to the affidavit or authenticated by affidavit or in the record.

{¶63} As noted, "[t]he proper procedure for introducing evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Civ.R. 56(E)." *State ex. rel. Anderson v. Village of Obetz*, 10th Dist. No. 06AP-1030, 2008-Ohio-4064, ¶30, quoting *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222.

{¶64} Similarly, Attorney Vickers was never qualified as an expert in ballistics and firearms. His credentials established that he has given many lectures on the topic as it relates to his experience as a defense counsel in death penalty cases, but did not establish that he has any direct educational or professional background in the areas in which he sought to offer his opinion. Further, as the trial court noted, Mr. Vickers listed various documents that he reviewed in preparing the findings and conclusions set out in his affidavit, including testimony from a previous criminal trial, an exhibit and laboratory report from a previous criminal case, an autopsy report, a firearm instructional manual, an affidavit of Mr. Trimble, and an unauthenticated transcript of an emergency 911 call from the night of January 21, 2005. Not one of the documents was attached to the answer brief in opposition to the motion for summary judgment or otherwise offered as supporting evidentiary materials, or certified to be authentic or true and accurate copies.

{¶65} Thus, Attorney Vickers' affidavit did not incorporate by reference the evidence he relied on in forming his expert opinion as required by Civ.R. 56(C). Rather, the actual affidavit submitted, as evidenced by the caption, was from Mr. Trimble's criminal case. Moreover, it failed to properly establish Attorney Vickers' credentials as an expert in ballistics and firearms.

{¶66} It bears repeating the well-settled rule that "documents submitted in opposition to a motion for summary judgment must be sworn, certified or authenticated by affidavit to be considered by the trial court in determining whether a genuine issue of material fact exists for trial." *Sintic v. Cvelbar* (July 5, 1996), 11th Dist. No. 95-L-133, 1996 Ohio App. LEXIS 3009, 5, citing *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94, 97; *Green v. B.F. Goodrich* (1993), 85 Ohio App. 223, 228.

{¶67} Thus, upon the appellees' motion to strike, the trial court properly excluded these affidavits on summary judgment as neither complied with the requirements of Civ.R. 56(E).

{¶68} For these reasons, the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.