

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
MERCER COUNTY**

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**BETHANY WENTWORTH, ET AL.,**

**PLAINTIFFS-APPELLEES,**

**CASE NO. 10-14-18**

**v.**

**VILLAGE OF COLDWATER, ET AL.,**

**OPINION**

**DEFENDANTS-APPELLANTS.**

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**Appeal from Mercer County Common Pleas Court  
Trial Court No. 13-CIV-123**

**Judgment Reversed and Cause Remanded**

**Date of Decision: April 13, 2015**

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**APPEARANCES:**

*Lynnette Dinkler and Jamey T. Pregon* for Appellants

*Jose M. Lopez and Jonathan S. Zweizig* for Appellees

**SHAW, J.**

{¶1} Defendants-appellants Village of Coldwater (“Coldwater”) and Officer David M. Powell (“Officer Powell”) appeal the November 24, 2014, judgment of the Mercer County Common Pleas Court denying their Civ.R. 12(C) motion for judgment on the pleadings on the basis of immunity that had been filed against plaintiffs-appellees Bethany Wentworth (“Wentworth”) and the co-administrators of the Estate of Craig A. Gengler, William Balyeat and Peter R. Van Arsdel (collectively referred to as “appellees”).

{¶2} The facts relevant to this appeal are as follows. On July 22, 2013, appellees filed a complaint against Coldwater and Officer Powell. (Doc. No. 3). That complaint was amended on July 29, 2013. (Doc. No. 9). The amended complaint alleged that on July 14, 2012, Officer Powell stopped a vehicle for operating at a high rate of speed and swerving outside marked lanes of travel. (*Id.*) The vehicle was being operated by Ryan Billenstein. (*Id.*) According to the complaint, during the traffic stop, Officer Powell detected an “odor of alcohol emanating from the vehicle but [he] did not properly conduct any field sobriety test of Billenstein.” (*Id.*) The complaint alleged that Officer Powell at all times was acting “within the course and scope of his employment.” (*Id.*)

{¶3} The complaint further alleged that

**despite (1) an odor of alcohol emanating from the vehicle, (2) an admission that the passengers of the vehicle had been drinking, (3) Billenstein's high rate of speed, (4) Billenstein's erratic driving, (5) the fact that it was 2:37 A.M. on a Saturday night, (6) Billenstein's numerous past driving convictions, including an alcohol related offense, and (7) Billenstein's admission that he was traveling from a local bar, [Officer Powell] merely released Billenstein with a "warning" for a lane violation.**

*(Id.)* The complaint indicated that “[l]ess than 60 seconds after releasing Billenstein with a ‘warning’ for a lane violation, [Officer Powell was] advised that a vehicle matching the description of Billenstein’s \* \* \* [was] seen leaving [Coldwater] \* \* \* at a high rate of speed.” *(Id.)* Then, “[a]t approximately 2:58 A.M., less than 15 minutes after being released by [Officer Powell] \* \* \* Billenstein [lost] control of his vehicle and crashe[d] while both (1) intoxicated and (2) traveling well in excess of the posted speed limit.” *(Id.)* As a result of the crash, two passengers were killed and Wentworth was “severely injured.” *(Id.)*

{¶4} Based on these alleged facts, the complaint asserted three claims against appellants. In the first claim, appellees assert that Officer Powell “on his own behalf and as an officer for [Coldwater] \* \* \* acted in an intentional, malicious, reckless and/or wanton manner” by failing to enforce Ohio’s traffic laws, by failing to carry out his duties as a police officer, by failing to properly investigate whether Billenstein was operating his vehicle with a blood alcohol content above the legal limit, and by failing to properly conduct a field sobriety test. *(Id.)* According to the complaint, as a result of Officer Powell’s “intentional,

malicious, reckless, and/or wanton behavior” Wentworth sustained injuries and damages. (*Id.*) The complaint also alleged wrongful death and survivorship claims related to Craig Gengler. (*Id.*)

{¶5} On August 22, 2013, Coldwater and Officer Powell filed their answer to the amended complaint. Coldwater and Officer Powell denied the allegations against them and asserted that Officer Powell acted lawfully and in good faith. (Doc. No. 15). As support for this assertion, they attached a portion of Officer Powell’s incident report from the incident in question to the answer. (*Id.*) Officer Powell’s report indicated that he performed the HGN test on Billenstein and detected no clues from the test and that despite smelling an alcoholic beverage emanating from the vehicle, Officer Powell did not smell it on Billenstein specifically while speaking with him. (*Id.*) According to Officer Powell’s report, Billenstein had indicated that he was not drinking but his passengers had been. (*Id.*)

{¶6} In addition to the denials of the allegations, Coldwater and Officer Powell asserted 23 defenses, which included immunity under Revised Code Chapter 2744. (*Id.*)

{¶7} On June 19, 2014, Coldwater and Officer Powell filed a motion for judgment on the pleadings pursuant to Civil Rule 12(C). (Doc. No. 37). In the

motion, Coldwater and Officer Powell asserted that appellees had not asserted any cause of action that would defeat Coldwater or Officer Powell's immunity. (*Id.*)

{¶8} On July 2, 2014, appellees filed their response to the motion, claiming that there was an exception to Coldwater and Officer Powell's immunity under R.C. 2744.03(A)(6)(b) for an instance where an "employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]" (Doc. No. 38).

{¶9} On July 7, 2014, appellants filed their reply brief in support of their motion for judgment on the pleadings. (Doc. No. 39). In the reply brief, appellants asserted that R.C. 2744.03(A)(6)(b) does not create a cause of action, and that appellees had not pled a cognizable exception to immunity under R.C. 2744.02. (*Id.*)

{¶10} On August 6, 2014, appellees filed a "Motion to strike the incident report attached to defendants' answer." (Doc. No. 44). In the motion, appellees claimed that the police report was hearsay and not admissible, that it would not have been admissible under Civ.R. 56, let alone Civ.R. 12. (*Id.*)

{¶11} On August 19, 2014, Coldwater and Officer Powell filed a memorandum in opposition to appellees' motion to strike, contending that courts are permitted to consider material attached to the pleadings. (Doc. No. 45). On

August 27, 2014, appellees filed their reply memorandum in support of their motion to strike. (Doc. No. 46).

{¶12} On November 4, 2014, the trial court filed its judgment entry on the motion for judgment on the pleadings and on the motion to strike. Ultimately the trial court determined that neither Coldwater nor Officer Powell would be granted immunity at that time, as it was not clear that appellees could prove no set of facts that would entitle them to relief. (Doc. No. 50). The trial court thus denied Coldwater and Officer Powell’s motion for judgment on the pleadings.<sup>1</sup> (*Id.*)

{¶13} It is from this judgment that Coldwater and Officer Powell appeal, asserting the following assignments of error for our review.

**ASSIGNMENT OF ERROR 1  
THE TRIAL COURT ERRED IN DENYING THE VILLAGE  
OF COLDWATER IMMUNITY FROM THE APPELLEES’  
CLAIMS.**

**ASSIGNMENT OF ERROR 2  
THE TRIAL COURT ERRED IN DENYING OFFICER  
POWELL IMMUNITY FROM THE APPELLEES’ CLAIMS.**

*First Assignment of Error*

{¶14} In Coldwater and Officer Powell’s first assignment of error, they argue that the trial court erred in denying Coldwater immunity pursuant to R.C.

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<sup>1</sup> As to resolving the motion to strike, the trial court indicated that it had “not considered the allegations contained in defendants’ Exhibit A to their answer as true since the court must consider those as mere allegations without the Exhibit and its contents being authenticated. Though they argue to the contrary, defendants true basis for their motion would require the court to convert their motion to one for summary judgment under Civ.R. 56 which the court has chosen not to do at this time.” (Doc. No. 50).

2744.02. Specifically, they contend that the trial court erred by determining that appellees had pled a cause of action that created an exception to Coldwater's assertion of immunity.

{¶15} An appellate court reviews a trial court's decision on a Civ.R. 12(C) motion for judgment on the pleadings *de novo* and considers all legal issues without deference to the trial court's decision. *Reznickcheck v. N. Cent. Correctional Institution*, 3d Dist. Marion No. 9-7-22, 2007-Ohio-6425, ¶ 11; *Rose v. CTL Aerospace, Inc.*, 12th Dist. Butler No. CA2011-09-171, 2012-Ohio-1596, ¶ 7.

{¶16} Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds *beyond doubt*, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Reznickcheck* at ¶ 12, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 1996-Ohio-459. Thus, the granting of a judgment on the pleadings is only appropriate where the plaintiff has failed to allege a set of facts which, if true, would establish the defendant's liability. *Id.* citing *Walters v. First National Bank of Newark*, 69 Ohio St.2d 677 (1982).

{¶17} In this case, appellees filed a complaint alleging three claims against Coldwater and Officer Powell. In those claims, appellees alleged that they were

injured by the “intentional, malicious, reckless, and/or wanton” conduct of Officer Powell, and that Coldwater should be held liable for those injuries.<sup>2</sup> Coldwater answered the complaint by asserting sovereign immunity pursuant to R.C. Chapter 2744.

{¶18} Chapter 2744 of the Ohio Revised Code, the Political Subdivision Tort Liability Act, contains a comprehensive statutory scheme for the tort liability of political subdivisions and its employees. The statutory framework begins with R.C. 2744.02(A)(1), a general grant of immunity to a political subdivision from civil liability. Revised Code 2744.02(A)(1) provides:

**(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.**

{¶19} The statute then enumerates five exceptions to the general grant of immunity. These five exceptions are provided in R.C. 2744.02(B):

**(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:**

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<sup>2</sup> Appellees’ allegations that Officer Powell individually should be held liable will be dealt with in the next assignment of error.

**(1) Except as otherwise provided in this division, 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.<sup>3</sup> \* \* \***

**\* \* \***

**(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.**

**(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.**

**(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.**

**(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, 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**

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<sup>3</sup> R.C. 2744.02(B)(1) contains additional defenses if there is an exception to immunity under this section.

**the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term “shall” in a provision pertaining to a political subdivision.**

{¶20} Finally, in the event that there is an exception to immunity established under R.C. 2744.02(B), R.C. 2744.03 provides several additional defenses for political subdivisions and their employees. Revised Code 2744.03 contains multiple provisions delineating further instances where a political subdivision is immune from liability. *See* R.C. 2744.03(A)(1)-(7).

{¶21} In *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, the Supreme Court of Ohio interpreted the immunity statutes as setting forth a three-tier analysis. The Court stated that “[t]he first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or a proprietary function.” *Colbert* at ¶ 7. If the political subdivision is immune, the second-tier “requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability.” *Colbert* at ¶ 8, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28 (1988).

{¶22} Under the three-tier analysis, the end of inquiry is reached when the acts or omissions of a political subdivision do not fit under any of the five exceptions enumerated in R.C. 2744.02(B). *Howard v. Girard*, 11th Dist. Trumbull No. 2010-T-0096, 2011-Ohio-2331, ¶ 45. In other words, courts do not engage in the third-tier analysis regarding available defenses provided in R.C. 2744.03 if no exception under R.C. 2744.02(B) can be found to remove the general grant of immunity. *Id.*

{¶23} However, if an exception to immunity is found under R.C. 2744.02(B), then courts proceed to a third-tier analysis, which is to determine whether the political subdivision or its employees have any additional defenses or immunities under R.C. 2744.03. For determining the immunity of a political subdivision, R.C. 2744.03 is not considered until an exception to immunity is determined under R.C. 2744.02(B). *Golden v. Milford Exempted Village School Bd. of Edn.*, 12th Dist. Clermont No. CA2008-10-097, 2009-Ohio-3418, ¶ 12, quoting *Ziegler v. Mahoning Cty. Sheriff's Dept.*, 137 Ohio App.3d 831, 836 (7th Dist.2000).

### **Coldwater's Immunity**

{¶24} In applying the three-tier immunity analysis to this case, appellees do not dispute that Coldwater is a political subdivision or that Officer Powell was employed by Coldwater and therefore Coldwater is generally immune from suit

for damages in a civil action for injury, death, or loss to person or property pursuant to R.C. 2744.02(A)(1). Thus under the first-tier of the analysis, Coldwater is immune.

{¶25} Under the second-tier analysis, we turn to whether any exceptions to Coldwater’s immunity exist. Appellees conceded both here and at the trial court level that there are no exceptions to immunity relevant to this case in R.C. 2744.02(B)(1), (3), (4), and (5). At the trial court level, appellees seemed to suggest that perhaps (B)(2) might be relevant, where a political subdivision may be liable for injuries “caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.”

{¶26} Despite appellees arguments, (B)(2) only allows for an exception to immunity for “proprietary functions” of political subdivisions. Pursuant to R.C. 2744.01(C)(2)(a), however, “the provision or nonprovision of police \* \* \* protection” and the “enforcement or nonperformance of any law” are specifically included in the definition of “governmental functions.” *See* R.C. 2744.01(C)(2)(a); (i). Thus the exception under (B)(2) for proprietary functions is not applicable in this case, and there are no exceptions to immunity for Coldwater.

{¶27} In its judgment entry, the trial court did not specifically find that an exception to immunity existed under R.C. 2744.02(B) for Coldwater; rather, it continued forward to discuss further defenses and exceptions to liability under

R.C. 2744.03(A)(6)(b), which is the third-tier of the immunity analysis. However, as noted above, the analysis at the trial court level should not have proceeded to the third-tier when there was no exception to immunity invoked under R.C. 2744.02.

{¶28} As there are no exceptions in R.C. 2744.02(B) to the immunity of a political subdivision for alleged intentional, wanton conduct by an employee engaged in a governmental function, we find that the trial court erred in failing to dismiss appellees' claims against Coldwater as appellees failed to allege any cause of action that would defeat Coldwater's immunity.<sup>4</sup> Therefore Coldwater's first assignment of error is sustained.

*Second Assignment of Error*

{¶29} In Coldwater and Officer Powell's second assignment of error, they argue that the trial court erred in its determination that Officer Powell was not entitled to a Civ.R. 12(C) judgment on the pleadings.

**Officer Powell's Immunity**

{¶30} Our analysis regarding Officer Powell's potential immunity differs slightly from our analysis regarding Coldwater's immunity. Under R.C. 2744.03(A)(6)(b) *employees* of political subdivisions can lose their immunity when their acts or omissions were "with malicious purpose, in bad faith, or in a

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<sup>4</sup> Appellees have indicated both in their brief to this court and at oral argument that Coldwater should be entitled to immunity, despite the trial court's ruling to the contrary and their arguments at the trial court level, unless this Court found a specific exception to immunity.

wanton or reckless manner.” *See also O’Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, ¶¶ 48, 72-73. Thus there is no three-tier analysis for individual employees of political subdivisions.

{¶31} Appellees argue, and the trial court found, that appellees pled sufficient facts that if proven to be true, would establish the specific exception to Officer Powell’s immunity under R.C. 2744.03(A)(6)(b), which reads,

**(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:**

\* \* \*

**(b) The employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;**

{¶32} All of the words in R.C. 2744.03(A)(6)(b) have been further defined by Ohio courts. “ ‘Malicious purpose’ has been defined as the ‘willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through \* \* \* unlawful or unjustified’ conduct.” *Schoenfield v. Navarre*, 164 Ohio App.3d 571, 577, 2005-Ohio-6407, ¶ 22 (6th Dist.) quoting *Cook v. Hubbard Exempted Village Bd. of Edn.*, 116 Ohio App.3d 564, 569 (11th Dist.1996).

{¶33} “ ‘Bad faith’ implies more than mere bad judgment or negligence. It connotes a ‘dishonest purpose, moral obliquity, conscious wrongdoing, breach of a

known duty through some ulterior motive or ill will partaking of the nature of fraud.’ ” *Schoenfield* quoting *Jackson v. McDonald*, 144 Ohio App.3d 301, 309 (5th Dist.2001) (Internal citations omitted).

{¶34} In *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, the Ohio Supreme Court defined “wanton misconduct” as “the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result.” *Anderson* at syllabus citing *Hawkins v. Ivy*, 50 Ohio St.2d 114 (1977).

{¶35} The Ohio Supreme Court defined “recklessness” in *O’Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, as, “a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in injury.” *O’Toole* at syllabus.

{¶36} In this case appellees asserted three claims in their complaint against Officer Powell alleging “intentional, malicious, reckless, and/or wanton” conduct. Under the notice pleading requirements of Civ.R. 8(A), the appellees needed only to plead sufficient, operative facts to support recovery under their claims. *Clemens v. Katz*, 6th Dist. Lucas No. L-08-1274, 2009-Ohio-1461, ¶ 7, citing *Doe v. Robinson*, 6th Dist. Lucas No. 1-07-1051, 2007-Ohio-5746, ¶ 17. Nevertheless, to constitute fair notice, the complaint must still allege sufficient underlying facts

that relate to and support the alleged claim, and may not simply state legal conclusions. *Katz* citing *DeVore v. Mut. of Omaha Ins. Co.*, 32 Ohio App.2d 36, 38 (7th Dist.1972).

{¶37} Clearly appellees alleged some of the key legal phrases set forth in R.C. 2744.03(A)(6)(b) as they used the words “malicious, reckless, and/or wanton.” To support their claim that Officer Powell acted “intentionally, maliciously, recklessly, and/or wantonly,” appellees alleged that,

**despite (1) an odor of alcohol emanating from the vehicle, (2) an admission that the passengers of the vehicle had been drinking, (3) Billenstein’s high rate of speed, (4) Billenstein’s erratic driving, (5) the fact that it was 2:37 A.M. on a Saturday night, (6) Billenstein’s numerous past driving convictions, including an alcohol related offense, and (7) Billenstein’s admission that he was traveling from a local bar, [Officer Powell] merely released Billenstein with a “warning” for a lane violation.**

{¶38} The trial court found that based on these accusations and the language contained in appellees’ pleading that it could not determine “beyond doubt that plaintiffs could prove no set of facts in support of their claims that would entitle them to the relief they seek.”

{¶39} While the trial court’s decision may have been appropriate if the standard for liability was one of mere negligence, the definitions for bad faith, malicious, wanton, and/or reckless conduct set forth above require specific allegations of misconduct and culpability far greater than mere negligence. *See Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 118 Ohio St.3d 392,

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398, 2008-Ohio-2567, ¶ 37 (“ ‘[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.’ ”) (Citations omitted).

{¶40} The factual claims that are made by appellees, taken as absolutely true, simply do not give rise to the legal conclusions that they wish to assert. Merely alleging facts that could give rise to a negligence claim (which would be barred by immunity in any event in this instance), then asserting the legal conclusion that those facts amount to “intentional, malicious, reckless, and/or wanton conduct” does not create a viable claim to defeat immunity under R.C. 2744.03(A)(6)(b).

{¶41} In sum, it is our conclusion that the factual allegations in this complaint are not sufficient as a matter of law to establish a claim of malicious, wanton or reckless conduct. Therefore we find that the trial court erred by not granting Officer Powell’s Civ.R. 12(C) motion for judgment on the pleadings. Accordingly, the second assignment of error is sustained.

{¶42} For the foregoing reasons appellants’ first and second assignments of error are sustained and the judgment of the Mercer County Common Pleas Court

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is reversed. This cause is remanded for further proceedings consistent with this opinion.

*Judgment Reversed and  
Cause Remanded*

**PRESTON and WILLAMOWSKI, J.J., concur.**

**/jlr**