[Cite as *Folmer v. Meigs Cty. Commrs.*, 2018-Ohio-31.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

MICHELLE D. FOLMER,	:	
	:	
Plaintiff-Appellee,	:	Case No. 16CA17
	:	
v.	:	
	:	DECISION AND
MEIGS COUNTY COMMISSIONERS, et al.,	:	JUDGMENT ENTRY
	:	
Defendants-Appellants.	:	Released: 01/02/18

APPEARANCES:

Mark Landes and Aaron M. Glasgow, Isaac Wiles Burkholder & Teetor, LLC, for defendants-appellants.

Travis Mohler, Colombo Law, Columbus, Ohio, for plaintiff-appellee.

Hoover, J.

{¶ 1} Defendants-appellants, Meigs County Commissioners, Meigs County Emergency Medical Services ("Meigs County EMS"), and Alfred Wayne Lyons ("Lyons") (collectively "Appellants") appeal the judgment of the Meigs County Court of Common Pleas. Plaintiff-appellee, Michelle D. Folmer ("Folmer"), had filed a personal injury action and a motion for summary judgment against the Appellants. In response, Appellants filed a motion contra to Folmer's motion. Appellants also filed its own motion for summary judgment. The trial court denied Folmer's motion. As for Appellant's motion for summary judgment, the trial court granted the motion in part and denied the motion in part.

{¶ 2} On appeal, Appellants claim that the trial court erred in finding that a genuine issue of material fact exists regarding whether Lyons acted (1) in a wanton and willful manner under

R.C. 2744.02(B)(1)(a)[1]; and (2) with malicious purpose, in bad faith, or in a wanton or reckless manner under R.C. 2744.03(A)(6)(b).

{¶ 3} Upon review of the record, we conclude that the trial court did not err in concluding that genuine issues of material fact existed regarding whether Lyons acted in a wanton and willful manner under R.C. 2744.02(B)(1)(c) and a wanton manner under R.C. 2744.03(A)(6)(b); but it did err in concluding that genuine issues of material fact existed regarding whether Lyons acted with malicious purpose, bad faith, or recklessness under R.C. 2744.03(A)(6)(b).

{¶ 4} Accordingly, we affirm in part and reverse in part the judgment of the trial court.

I. Facts and Procedural History

{¶ 5} On the evening of March 23, 2013, Meigs County EMS received a 911 call from an urgent care facility, the Holzer Clinic, in Pomeroy, Ohio. The urgent care facility had requested that an ambulance transport a patient to the Holzer Medical Center in Gallipolis, Ohio. Supposedly, the patient was experiencing a medical emergency. A Meigs County EMS ambulance, driven by Lyons, responded to the facility, with its lights and sirens activated. Teresa Johnson ("Johnson") accompanied Lyons.

{¶ 6} Upon arriving at the clinic, Lyons and Johnson spoke with the staff about the patient's condition; and within five minutes, the patient was loaded in the back of the ambulance with Johnson. Lyons and Johnson determined that the patient was not in critical condition; therefore, Lyons drove to the Holzer Medical Center without the ambulance's lights and sirens activated.

[1] Appellants mistakenly cite to R.C. 2744.02(B)(1)(a) which is not applicable to this case. We presume that Appellants meant to refer to R.C. 2744.02(B)(1)(c).

{¶ 7} While traveling southbound on State Route 7 in the Village of Cheshire, Lyons veered left of center and hit a sedan traveling in the opposite direction. The sedan spun around due to the force of the collision. The sedan then hit Folmer's vehicle which was traveling behind the sedan. Folmer sustained several injuries as a result of the collision, including a torn rotator cuff and multiple protruding and bulging discs in her spine.

{¶ 8} Folmer later filed a complaint alleging that (1) Lyons negligently and/or willfully and wantonly operated the ambulance; and (2) Meigs County EMS and Meigs County Commissioners were liable for Lyons's actions. Appellants denied the allegations and asserted immunities and defenses under R.C. 2744.02 and 2744.03.

{¶ 9} Following discovery, Folmer moved for summary judgment, arguing that Lyons's conduct was willful, wanton, and reckless. Several pieces of evidence were attached to her motion, including her deposition testimony, the deposition testimony of Lyons, and the deposition testimony of the driver of the sedan, Charles Kearns.

{¶ 10} At his deposition, Lyons testified that just before the collision, the two vehicles in front of him were playing a "brake check" game, erratically slowing down and speeding up. However, Lyons did not report any such "brake check" game to the highway patrol when asked how the collision occurred. Lyons could not recall the specific moments before the collision, saying he "just lost everything" and "blacked out." However, Meigs County EMS did not have a record of Lyons reporting a black-out episode. According to Lyons, when he "got [his] senses back", Kearns's vehicle "was there", and he was completely in the northbound lane of travel. He explicitly denied that he was attempting to pass at the time of the collision.

{¶ 11} Folmer and Kearns recalled a different version of events. At her deposition, Folmer testified that she had just proceeded through an intersection with a flashing yellow light

when she observed Lyons attempting to pass the car in front of him. In doing so, Lyons came into the northbound lane and collided with Kearns's sedan.

{¶ 12} At his deposition, Kearns testified that just before the collision, Lyons accelerated and drove completely into the northbound lane in an attempt to pass the vehicle in front of him. According to him, after passing the vehicle—but before crossing back over into the southbound lane—Lyons hit his sedan.

{¶ 13} Folmer also attached an accident-reconstruction expert's report to her motion for summary judgment. The expert opined that, at the time of the collision, Lyons was approaching an intersection and was traveling at a minimum speed of 55-58 m.p.h. The expert also remarked that Lyons's movement of the ambulance from the southbound lane to the northbound lane was not a gradual movement. Rather, Lyons made an abrupt lane change in an attempt to pass the vehicle in front of him; or Lyons swerved to the left to avoid a rear end collision with the vehicle in front of him.

{¶ 14} Appellants responded with a memorandum in opposition to Folmer's motion for summary judgment as well as their own motion for summary judgment. Appellants argued, inter alia, that they were immune from liability because Lyons was on an emergency call at the time of the collision; and Lyons's driving did not constitute willful or wanton misconduct. Appellants' filings included copies of Johnson's affidavit, which indicated that the ambulance did not accelerate or noticeably swerve into the northbound lane prior to the collision, as one would do in an attempt to pass.

{¶ 15} Importantly, the portion of State Route 7 where the collision occurred is a two-lane road with one lane of traffic going in each direction. The posted speed limit is 35 m.p.h.; and solid double yellow lines indicate that the roadway is a no-passing zone.

{¶ 16} On October 18, 2015, the trial court issued its judgment on the competing motions for summary judgment. The trial court ordered as follows:

> 1. That [Folmer's] motion for summary judgment is denied.
>
> 2. That part of [Appellants'] motion for summary judgment is granted because Defendant Lyons was on an emergency call at the time of the collision.
>
> 3. That part of [Appellants'] motion and Defendant Lyons' motion for summary judgment are denied because there is a genuine issue of material facts [sic] whether Lyons' driving constituted negligence or wanton or willful misconduct and in Lyons' case, also was done with malicious purpose, in bad faith or in a wanton or reckless manner.

{¶ 17} Appellants timely appealed.[2]

II. Assignments of Error

{¶ 18} Appellants' assignments of error are not separately identified and briefed as required by App. R. 16(A). Instead, the assignments of error are set forth as two, one-sentence paragraphs under the heading "Assignments of Error." We will designate the first paragraph as the First Assignment of Error; and the second paragraph as the Second Assignment of Error:

FIRST ASSIGNMENT OF ERROR

> The Trial Court erred in finding that a genuine issue of material fact exists regarding whether Appellant Lyons acted in a wanton or willful manner under R.C. § 2744.02(B)(1)(a)[3].

SECOND ASSIGNMENT OF ERROR

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[2] Ordinarily, a decision denying a party's motion for summary judgment is not a final, appealable order. However, under R.C. 2744.02(C), "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order."

[3] Again, appellants mistakenly cite to R.C. 2744.02(B)(1)(a) which is not applicable to this case. We presume that Appellants meant to refer to R.C. 2744.02(B)(1)(c).

The Trial Court erred in finding that a genuine issue of material fact exists regarding whether Appellant Lyons acted with malicious purpose, in bad faith, or in a wanton or reckless manner under R.C. § 2744.03(A)(6)(b).

III. Law and Analysis

A. Standard of Review

{¶ 19} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. Accordingly, we afford no deference to the trial court's decision and independently review the record and the inferences that can be drawn from it to determine whether summary judgment is appropriate. *Harter v. Chillicothe Long-Term Care, Inc.*, 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12; *Grimes v. Grimes*, 4th Dist. Washington No. 08CA35, 2009-Ohio-3126, ¶ 16.

{¶ 20} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the nonmoving party's favor. Civ.R. 56(C). The party moving for summary judgment bears the initial burden to demonstrate that no genuine issues of material fact exist and that they are entitled to judgment in their favor as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," that affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R.

56(C); *Dresher* at 293. Once that burden is met, the nonmoving party then has a reciprocal burden to set forth specific facts to show that there is a genuine issue for trial. *Dresher* at 293; Civ.R. 56(E).

B. Genuine Issues of Material Fact Exist Regarding Whether Lyons Acted in a Willful and Wanton Manner

{¶ 21} In their First Assignment of Error, Appellants argue that the trial court erred in concluding that genuine issues of material fact existed regarding whether Lyons acted in a wanton and willful manner under R.C. 2744.02(B)(1)(c). We disagree. We believe that genuine issues of material fact exist regarding whether Lyons acted in a willful and wanton manner.

{¶ 22} R.C. 2744.02(A)(1) sets forth the general rule that a political subdivision is immune from tort liability for acts or omissions connected with governmental or proprietary functions. *E.g.*, *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 14. However, R.C. 2744.02(B)(1) sets forth an exception to the general rule of immunity, providing that "political subdivisions are liable for injury, death, or loss to persons 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."

{¶ 23} Then, if liability attaches under R.C. 2744.02(B)(1), R.C. 2744.02(B)(1)(c) provides a political subdivision with a full defense if the liability arose in connection with the negligent operation of a motor vehicle by "[a] member of an emergency medical service owned or operated by a political subdivision * * * while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506 or a driver's license issued pursuant to Chapter 4507 of the Revised Code, *the operation of the vehicle did not constitute willful or wanton misconduct*,

and the operation complie[d] with the precautions of section 4511.03 of the Revised Code."[4] (Emphasis added.)

{¶ 24} Here, the parties do not dispute that, at the time of the collision, Lyons (1) was an employee of the Meigs County EMS/Meigs County Commissioners; (2) was a validly licensed driver; and (3) was operating the ambulance within the scope of his employment and in compliance with the precautions of section 4511.03 of the Revised Code.

{¶ 25} Next, although Folmer argues in her appellee's brief that the trial court erred in finding that Lyons was responding to or completing an emergency call at the time of the collision, Folmer failed to file a notice of appeal from the judgment of the trial court. The Supreme Court of Ohio has stated:

> We have held that "assignments of error of an appellee who has not appealed from a judgment may be considered by a reviewing court only to prevent 'a reversal of the judgment under review. * * * [A]n assignment of error by an appellee, where such appellee has not filed any notice of appeal from the judgment * * *, may be used by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sword to destroy or modify that judgment.' " *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 31-32, quoting *Parton v. Weilnau* (1959), 169 Ohio St. 145, 170-171, 8 O.O.2d 134, 158 N.E.2d 719.

O'Toole v. Denihan, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 94.

[4] R.C. 4511.03 imposes a duty upon "[t]he driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign [, to] slow down as necessary for safety to traffic [and to] * * * proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway."

{¶ 26} As we discuss infra, because we ultimately agree with the trial court's determination that a genuine issue of material fact exists regarding whether Lyons acted in a wanton or willful manner, Appellee's cross-assignment of error is rendered moot and need not be considered. App.R. 12(A)(1)(c). Therefore, regarding the liability of Meigs County EMS/Meigs County Commissioners, the only issues are if genuine issues of material fact exist regarding whether Lyons's operation of the ambulance constitutes willful or wanton misconduct.

{¶ 27} The terms willful and wanton misconduct describe different and distinct degrees of care and are not interchangeable. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph one of the syllabus. "Willful misconduct 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 purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Id.* at paragraph two of the syllabus. "Wanton misconduct is 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." *Id.* at paragraph three of the syllabus.

{¶ 28} Here, the evidence indicates that Lyons was exceeding the posted speed limit by at least twenty miles per hour at the time of the collision. He was also operating the ambulance without lights and sirens activated, thus providing no warning to fellow travelers. This fact is especially concerning because the collision occurred in the Village of Cheshire while Lyons was approaching an intersection. While Lyons denied that he was in the process of passing the vehicle in front of him at the time of the collision, both Kearns and Folmer claimed that he had passed or was in the process of passing the vehicle in front of him when the collision occurred.

Furthermore, Lyons's own deposition testimony provides little detail of how he ended up in the opposite lane of travel.

{¶ 29} Based on this evidence, reasonable minds could conclude that (1) Lyons's conduct amounted to "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 [a] purposefully * * * wrongful act[] with knowledge or appreciation of the likelihood of resulting injury", as the definition of willful misconduct requires; or (2) Lyons failed "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," as the definition of wanton misconduct requires.[5] *E.g.*, *Hunter v. Columbus*, 139 Ohio App.3d 962, 746 N.E.2d 246 (10th Dist.2000) (driver's conduct could be found to be willful or wanton misconduct under R.C. 2744.02(B)(1)(c) where driver of an emergency vehicle, driving sixty-one m.p.h. in a thirty-five m.p.h. speed zone and driving left of center, crashed into another vehicle).

{¶ 30} Thus, the trial court did not err in concluding that genuine issues of material fact existed regarding whether Lyons acted in a wanton or willful manner under R.C. 2744.02(B)(1)(c). We overrule Appellant's first assignment of error.

C. Genuine Issues of Material Fact Do Not Exist Regarding Whether Lyons Acted with a Malicious Purpose, in Bad Faith, or Recklessly; However, Genuine Issues of Material Fact Do Exist Regarding Whether Lyons Acted Wantonly

{¶ 31} In their second assignment of error, Appellants argue that the trial court erred in finding that a genuine issue of material fact exists regarding whether Lyons acted with malicious purpose, in bad faith, or in a wanton or reckless manner under R.C. 2744.03(A)(6)(b). We agree with the Appellants that no genuine issues of material fact exist regarding whether Lyons acted

[5] This is consistent with our recent decision in *Kearns v. Meigs Cty. Emergency Med. Servs.*, 2017-Ohio-1354, --- N.E.3d ---, ¶ 21 (4th Dist.).

with a malicious purpose, in bad faith, or recklessly. On the other hand, we believe that genuine issues of material fact exist regarding whether Lyons's actions were wanton.

{¶ 32} R.C. 2744.03(A)(6) provides that employees of political subdivisions are immune from liability for acts or omissions connected with governmental or proprietary functions. However, employees are not immune from liability if (1) the employee's acts or omissions were manifestly outside the scope of the employee's employment; (2) *the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner*; or (3) civil liability is expressly imposed upon the employee by a section of the Revised Code. (Emphasis added.) R.C. 2744.03(A)(6)(a)-(c).

{¶ 33} Again, the parties do not dispute that, at the time of the collision, Lyons was an employee of the Meigs County EMS/Meigs County Commissioners and was operating the ambulance within the scope of his employment. Also, neither party claims that civil liability is expressly imposed upon Lyons by a section of the revised code. Thus, we are left to consider whether Lyons's acts were with malicious purpose, in bad faith, or wanton or reckless.

{¶ 34} In *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007–Ohio–2070, 865 N.E.2d 845, the Supreme Court of Ohio concluded that the appellate court "strayed well beyond the pleadings and erred in reversing the judgment of the trial court" when the amended complaint failed to allege malice, bad faith, or wanton or reckless conduct. *Id.* at ¶ 31. After *Elston*, appellate courts have concluded that allegations of malice, bad faith, or wanton or reckless conduct must be included in a plaintiff's complaint against a political subdivision in order for the issues to be considered on summary judgment. *E.g., Iannuzzi v. Harris*, 7th Dist. Mahoning No. 10-MA-117, 2011-Ohio-3185, ¶¶ 42-47 ("because appellee failed to assert in her complaint or first amended complaint that [sheriff's deputy] acted with malice, bad faith, or

wanton or reckless conduct, she may not now rely on such allegations to defeat [his] personal immunity under R.C. 2744.03(A)(6)"); *Smith v. Martin*, 176 Ohio App.3d 567, 2008-Ohio-2978, 892 N.E.2d 971 (10th Dist.), ¶¶ 32-33 (arguments regarding wanton or reckless conduct were insufficient to justify denial of summary judgment motion by Central Ohio Transit Authority (COTA) where complaint alleged only that COTA had acted negligently); *Ohio Bell Tel. Co. v. Digioia-Suburban Excavating, L.L.C.*, 8th Dist. Cuyahoga No. 89708, 2008-Ohio-1409, ¶¶ 39-40 (reversing trial court's denial of summary judgment based on political subdivision immunity when plaintiffs alleged only negligence and not that the city had acted with malicious purpose, in bad faith or in a wanton or reckless manner).

{¶ 35} In the case sub judice, Folmer's complaint alleged that Lyons acted negligently, willfully, and wantonly. Folmer did not allege that Lyons acted with malicious purpose, bad faith, or recklessly. Despite the fact that Folmer made allegations in her motion for summary judgment regarding malicious purpose, bad faith, and recklessness, she did not make those allegations in her complaint. Thus, the trial court "strayed well beyond the pleadings" in denying the motion for summary judgment with respect to whether Lyons acted with malicious purpose, bad faith, or recklessly. *Elston* at ¶ 31.

{¶ 36} We have already found in our analysis of the first assignment of error that genuine issues of material fact exist regarding whether Lyons acted in a wanton manner.

{¶ 37} Accordingly, we agree with Appellants that the trial court erred in finding that a genuine issue of material fact existed regarding whether Lyons acted with malicious purpose, in bad faith, or recklessly. In contrast, we disagree with Appellants that the trial court erred in finding genuine issues of material fact existed regarding whether Lyons acted in a wanton manner under R.C. 2744.03(A)(6)(b).

{¶ 38} Thus, we sustain in part and overrule in part Appellants' second assignment of error. We sustain the portion of Appellants' second assignment of error regarding whether Lyons acted with malicious purpose, in bad faith, or recklessly. On the other hand, we overrule the portion of Appellant's second assignment of error regarding whether Lyons acted in a wanton manner.

IV. Conclusion

{¶ 39} Having determined that the trial court did not err in concluding that genuine issues of material fact existed regarding whether Lyons's acted in a wanton and willful manner under R.C. 2744.02(B)(1)(c) and in a wanton manner under R.C. 2744.03(A)(6)(b), we overrule Appellants' first assignment of error and a portion of Appellants' second assignment of error.

{¶ 40} However, we do find that the trial court did err in concluding that genuine issues of material fact existed regarding whether Lyons acted with malicious purpose, in bad faith, or recklessly under R.C. 2744.03(A)(6)(b); therefore, we sustain a portion of Appellants' second assignment of error.

{¶ 41} Consequently, we affirm in part and reverse in part the judgment of the trial court.

JUDGMENT AFFIRMED IN PART AND
JUDGMENT REVERSED IN PART.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND JUDGMENT IS REVERSED IN PART. Costs shall be equally divided between the parties.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

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

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.