[Cite as *Mix v. Romstadt,* 2015-Ohio-561.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Ellen Jean Mix, Individually and as Personal Representative of the Estate of Timothy Mix

Appellant

v.

Timothy M. Romstadt, Individually and in his Official Capacity, et al.

Appellees

Court of Appeals No. WD-13-090

Trial Court No. 2012CV0179

DECISION AND JUDGMENT

Decided: February 13, 2015

* * * * *

Paul T. Belazis, for appellant.

Amy M. Natyshak, Jill K. Bigler, and Meghan Anderson Roth, for appellees, City of Northwood, et al.

Mark L. Schumacher, Julia A. Turner, and Sandra R. McIntosh, for appellee, David A. Miramontes, M.D.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This wrongful death action commenced on March 2, 2012, with a complaint naming the city of Northwood ("the city"), several city officials, including the mayor and

city council members, chief of the fire department, EMS personnel and 911 dispatchers, and the city's medical director. The complaint alleged that the defendants acted "recklessly and/or wantonly" in their delayed response to appellant's 911 call, in their deficient emergency response capabilities, and in their knowing disregard for the risk of death or serious physical harm. Appellant, Ellen Jean Mix, claimed that these actions (or inactions) resulted in the death of her husband.

{¶ 2} The factual basis for appellant's claims is undisputed. The city operates a volunteer fire department in accordance with its powers of local governance. The department consists of one fire chief, one deputy chief, and two district fire chiefs. The volunteer fire fighters are awarded a modest sum for their response and although they are notified by pager when a call is received, they are not obligated to respond. The department maintains two fire stations, one on the east side of the city and one on the west side. The city also maintains a first response unit, known as the 800 unit, with advanced lifesaving services ("ALS") which was intended to be manned 24 hours a day. In the year leading up to Mr. Mix's death, it is undisputed that the vehicle was unmanned 52.5 hours.

{¶ 3} During the two years preceding the incident, the city experienced an economic downturn and had to reduce the 2010 budget by 30 percent. This resulted in a hiring freeze for fire department volunteers and a pay reduction. This also caused a reduction in the volunteer pool.

{¶ 4} When a 911 call for medical help was received, the dispatcher would "tone out" or page the EMTs assigned to the nearest fire station. If no response to the station occurred after seven minutes, the dispatcher would tone out both stations. Thereafter, if after seven additional minutes no response was received, the dispatcher would call for aid from a neighboring department pursuant to a mutual aid agreement. Once an EMT got to the respective station he or she would "clear the call" or let the dispatcher know that someone had responded. That individual would typically wait for someone else to arrive because the ambulance required two to transport.

{¶ 5} On March 3, 2011, at 6:49 a.m., appellant called Northwood 911 and reported that she could not wake her husband. At 6:50 a.m., station two and the 800 unit were toned out; it was discovered that the 800 unit was unmanned. At 6:57 a.m., both stations were toned out. At 6:58, appellant called to see if anyone had been dispatched. Volunteer and basic EMT Anthony Caligiuri responded to the tone out of both stations and proceeded to station one. He cleared the call at 7:01 a.m., and began waiting for a second responder. At 7:06 a.m., Caligiuri contacted dispatch to determine whether station two had cleared the call, it had not; Caligiuri proceeded to the scene solo. Appellant called again at 7:11 a.m. and stated that her husband had stopped breathing. At this point, Lake Township was contacted and at 7:13 a.m. a medic unit was in route to the home. Upon hearing that Lake Township was responding, Caligiuri requested that the stations again be toned out.

{¶ 6} Caligiuri arrived on the scene and began CPR and oxygen treatment. Shortly thereafter, the medic unit arrived and began ALS procedures. A pulse was regained but Mr. Mix died in the hospital two days later.

{¶ 7} On the date of the incident, the city's EMS medical director was appellee Dr. David Miramontes. Dr. Miramontes, an emergency physician, acted as a consultant and provided medical training to first responders.

{¶ 8} On June 10, 2013, the city filed a motion for summary judgment arguing that it and its employees were immune from liability under the Political Tort Liability Act, R.C. Chapter 2744. Specifically, the city argued that of the five exceptions to immunity under R.C. 2744(B), only subsection (B)(5), where liability may be imposed under another section of the Ohio Revised Code, has potential application. R.C. 4765.49(B), imposes liability in the context of emergency medical services where the political subdivision employee's misconduct in providing services was "willful or wanton." The city claimed that there was no issue of fact as to whether the medical services provided to Mr. Mix rose to the level of willful or wanton misconduct. Even assuming the evidence created an issue of fact the city argued, however, that several of the additional defenses under R.C. 2744.03 applied.

{¶ 9} On the same date, Dr. David Miramontes filed a separate motion for summary judgment in which he argued that as a consultant to the Northwood fire chief, he had no oversight of the fire department staffing, dispatch procedures, or response

times. Miramontes argued that he was immune from liability under R.C. 4765.49, which specifically provides immunity for medical directors unless their act or omission was willful or wanton.

{¶ 10} Appellant opposed both motions. As to Miramontes, appellant raised the issue of Miramontes' April 16, 2011 memorandum to Northwood Mayor Stoner, Chief Romstadt and various city officials in which he stated that the current EMS-Fire deployment plan did not meet the community standard of care. Further, appellant offered affidavits of two experts who also opined that the city's response time and procedures did not meet the relevant standard of care. Miramontes objected to the use of the memorandum as a subsequent remedial measure and the affidavits. The court ultimately agreed and did not consider the materials in its decision.

{¶ 11} On November 21, 2013, the trial court granted the city's and Miramontes' motions for summary judgment finding that the evidence failed to raise a genuine issue of fact was to whether the parties acted in a willful/wanton or reckless manner. This appeal followed.

{¶ 12} Appellant now raises four assignments of error for our review:

> 1. The lower court erred in granting summary judgment on behalf of appellees Mark Stoner, Timothy Romstadt, Dr. David Miramontes and City of Northwood.

2. The lower court erred in determining that there was no genuine issue of material fact related to the wanton and/or reckless conduct of appellees.

3. The lower court erred in determining that appellee Miramontes' April 16, 2011 memorandum should be excluded under Ohio Evidence Rule 407 as evidence of subsequent remedial measures.

4. The lower court erred in refusing to consider the expert affidavits of Thomas Weber and Dr. Peter Springer.

{¶ 13} For ease of discussion, we will first address the evidentiary issues raised in this appeal. In appellant's third assignment of error, she claims that the trial court erroneously determined that a memorandum authored by medical director David Miramontes, M.D., be excluded from consideration under Evid.R. 407, as a subsequent remedial measure. We first note that the exclusion of evidence of subsequent remedial measures is within the discretion of the trial court. *Holman v. Licking Cty.*, 107 Ohio App.3d 106,112, 667 N.E.2d 1239 (5th Dist.1995), citing *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343.

{¶ 14} Evid.R. 407 provides:

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not

> admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

{¶ 15} The memorandum at issue, dated April 16, 2011, was written by Dr. Miramontes following the March 24, 2011 safety committee meeting. In the memo, Dr. Miramontes makes several recommendations regarding "adequate staffing, supervision, and deployment of resources." Appellant contends that the memorandum was not a remedial measure as contemplated under the rule; rather, the content was regarding the applicable standard of care and recommendations for achieving compliance. Appellant further argues that the trial court's reliance on an Eleventh Appellate District case captioned *Bishop v. Nelson Ledges Quarry Park, Ltd.*, 11th Dist. Portage No. 2004-P-0008, 2005-Ohio-2656, was misplaced.

{¶ 16} *Bishop* involved the July 2000 accidental drowning of a juvenile at a private quarry. The *Bishop* court examined the admissibility of an expert witness report which referenced recommendations made by the health department in 2001, nearly a year following the accident. *Id.* at ¶ 29. The majority of the report focused on the defendant's response to the recommendations. *Id.* The court concluded that "none of the evidence of subsequent measures in [the expert's] report is admissible under Evid.R. 407 to prove

negligence or culpable conduct in connection with Eric's drowning." *Id.* at ¶ 30. In the present case, we agree that the facts of *Bishop* are not analogous to the present facts. However, it does not follow that the April 2011 memorandum was improperly excluded as a subsequent remedial measure. The purpose of Evid.R. 407 is to encourage remedial measures to prevent further injuries. *See Gollihue v. Consolidated Rail Corp.*, 120 Ohio App.3d 378, 408, 697 N.E.2d 1109 (3d Dist.1997). As to Miramontes, the memorandum was *his* response to the request of city officials; thus, in light of Miramontes' position and function as medical director and advisor, the memorandum was properly considered an inadmissible, subsequent remedial measure.

{¶ 17} Further, we do not agree that as to Dr. Miramontes, the memorandum was admissible, as argued by appellant, as impeachment. In his deposition, Miramontes admits to authoring the memorandum and making the recommendations contained therein; thus, the memorandum was not needed to impeach his testimony. Moreover, such evidence of credibility generally may not be considered on summary judgment. *See Bank of Am. v. Merlo*, 11th Dist. Trumbull No. 2012-T-0103, 2013-Ohio-5266, ¶ 17. Thus, appellant's third assignment of error is not well-taken.

{¶ 18} In appellant's fourth assignment of error, she argues that the trial court improperly excluded the affidavits of Dr. Peter Springer and Thomas Weber based on its conclusions that the information in the affidavits, i.e. opinions regarding the deviation from the standard of care, were within the knowledge of a potential juror and, thus,

inadmissible as expert opinions under Evid.R. 702. The court further excluded the materials as they were based, in part, on Miramontes' April 16, 2011 memorandum.

{¶ 19} We will first address the arguments relating to the admissibility of expert opinions. Evid.R. 702, provides in relevant part:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

{¶ 20} Thus, to the extent that the affidavits either rely on the April 16, 2011 memorandum or express legal conclusions, they will be disregarded. However, as this court has explained:

> To qualify as an expert the witness need not be the best witness on the subject, but must demonstrate some knowledge on the particular subject superior to that possessed by the trier of fact. *Id.* "The qualification of an expert depends upon the expert's possession of special knowledge that he or

she has acquired either by study of recognized authorities on the subject or by practical experience that he or she can impart to the trier of fact." *Vermett v. Fred Christen & Sons Co.*, 138 Ohio App.3d 586, 605-06, 741 N.E.2d 954 (6th Dist.2000), quoting *In re John B.*, 6th Dist. Lucas No. L-97-1165, 1998 WL 290230 (May 8, 1998).

{¶ 21} Thus, we find that the court erred in precluding their use in ruling on the motions for summary judgment. Dr. Springer, medical director for Volusia County, Florida, and Thomas Weber, a former fire chief, had relevant knowledge gained through their professional experience. Because our review is de novo, see below, we will consider them to the extent they are admissible. *See, generally, Mitchell v. Norwalk Area Health Services*, 6th Dist. Huron No. H-05-022, 2005-Ohio-5261. Based on the foregoing, we find appellant's fourth assignment of error is well-taken, in part.

{¶ 22} We now turn to the arguments raised in appellant's first and second assignments of error which relate to the trial court's award of summary judgment to appellees. At the outset we note that our standard of review is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most

strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 23} Appellant argues that the trial court erred when it granted summary judgment to the parties by finding that no issue of fact remained regarding willful/wanton or reckless conduct. Specifically, appellant contends that ample, material evidence was presented to demonstrate the city's deviation from the accepted standard of care including the purposely unmanned 800 unit and the delay in toning out the stations and seeking aid from neighboring jurisdictions.

{¶ 24} Ohio uses a "three-tiered analysis" to determine whether a political subdivision is immune from liability. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10; *see also Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, ¶ 9. Under the first tier,

we examine whether the general grant of immunity provided by R.C. 2744.02(A) applies. *Id.* If so, the second tier requires us to determine whether immunity has been abrogated by the exceptions set forth in R.C. 2744.02(B). *Id.* at ¶ 11. If an exception applies, the third tier involves a determination of whether the political subdivision is able to successfully assert one of the defenses listed in R.C. 2744.03, thereby reinstating its immunity. *Id.* at ¶ 12.

{¶ 25} The parties do not dispute that the city employees are entitled to general presumption of immunity under R.C. Chapter 2744, unless:

> (1) the employee's acts or omissions are "manifestly outside the scope of the employee's employment or official responsibilities;" (2) the employee's acts are done "with malicious purpose, in bad faith, or in a wanton or reckless manner;" or (3) "Civil liability is imposed upon the employee by a section of the Revised Code." R.C. 2744.03(A)(6)(a), (b), and (c). *Horen v. Bd. of Edn. of Toledo Pub. Sch.*, 6th Dist. Lucas No. L-09-1143, 2010-Ohio-3631, ¶ 45.

{¶ 26} The terms "willful," "wanton," and "reckless" have been defined as follows:

> 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. * * *. 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. * * *. Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (Citations omitted.) *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 32-34.

{¶ 27} Appellant contends that issues of fact remain as to whether the actions of various city employees were wanton or reckless. Appellant specifically names then Northwood Fire Chief Timothy Romstadt, Northwood Mayor Mark Stoner, and medical director David Miramontes. We will examine each in turn.

{¶ 28} Chief Romstadt was responsible for the overall operation of the fire/EMS division including payroll, hiring, training, policy enforcement and discipline, and assigning and scheduling personnel. Romstadt testified in his deposition that if no one signed up to man the 800 unit during a particular time slot on the monthly calendar, then no one was available and it was left empty. Chief Romstadt stated that if an individual had to leave early, either he or Deputy Chief Wojcinski, who left in February 2011, and was responsible for setting the 800 unit monthly schedule, would try to cover the slot or

try and find someone to cover. Chief Romstadt acknowledged that although he was not doing the scheduling on the date of the incident, he would not have tried to fill the two-hour gap.

{¶ 29} Similarly, Deputy Chief Wojcinski stated in his deposition that when scheduling the 800 unit, if there was a gap of any hour or two where no one had signed up he would not "go out of my way to fill one hour because of the redundancy of the system being a volunteer based system was that someone should be or hopefully would be available to respond." Wojcinski admitted that there was no written policy or procedure in place to notify a dispatcher when the 800 unit would be unmanned. When the unit was unmanned, Wojcinski stated that it was his belief that if a dispatcher was aware of it, they would notify the volunteers when the call was toned out. Wojcinski further admitted that the 800 unit was initially manned with two individuals from 8:00 a.m. until 5:00 p.m. (then the 806 unit) and that, due to budget constraints, the coverage reverted to one person and the unit was taken home.

{¶ 30} Reviewing the actions of Romstadt, we cannot agree that material evidence was presented to create an issue of fact as to whether his failure to ensure that the 800 unit was properly manned or that the emergency response time was within accepted limits was wanton or reckless. Chief Romstadt testified that he attempted to keep the unit manned at all times but that due to the voluntary nature of the department, if no one was

available he could not fill certain gaps. This issue was compounded by the economic downturn and resulting budget cuts.

{¶ 31} We now turn to the arguments relating to Mayor Mark Stoner. Appellant's claim that Mayor Stoner was not entitled to immunity revolves around the allocation of resources following the 30 percent budget reduction around 2010. Stoner testified that the city attempted to raise revenue on two occasions but that the voters rejected the levies. The budget within the fire department was cut by 10.3 percent for 2010. To make up the shortfall, daytime staffing of the EMS unit (8:00 a.m. to 4:00 p.m.) was reduced from two to one individual with a vehicle and a pager and a three percent pay reduction was implemented. A hiring freeze was also implemented. However, as an incentive to respond promptly, volunteers were paid only if their arrival at the station was within ten minutes.

{¶ 32} Appellant further contends that the Mayor Stoner falsely represented that the EMS unit would be manned 24/7. These alleged false representations were found on the Northwood website and made in his 2010 state of the city address.

{¶ 33} Reviewing the above arguments, we have found no evidence that Mayor Stoner acted in a wanton or reckless manner. Mayor Stoner was forced to reduce the budget by 30 percent, or ten percent as to the fire department. The goal and intent was to have the 800 EMS unit manned 24/7 but, due to the volunteer nature of the department, gaps occurred. The evidence demonstrated an average of a one hour gap per week the

year preceding the incident. This court has similarly found that a city's decision not to purchase a defibrillator for the EMS vehicle was immune from liability for an act "deciding how to acquire and allocate resources." *Opial v. Rossford*, 116 Ohio App.3d 588, 594, 688 N.E.2d 1073 (6th Dist.1996)

{¶ 34} Appellant next argues that the court erred when it granted summary judgment to Dr. Miramontes. As to Dr. Miramontes, R.C. 4765.49(A) provides, in part:

> A physician, physician assistant designated by a physician, or registered nurse designated by a physician, any of whom is advising or assisting in the emergency medical services by means of any communication device or telemetering system, is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's advisory communication or assistance, unless the advisory communication or assistance is provided in a manner that constitutes willful or wanton misconduct. *Medical directors* and members of cooperating physician advisory boards of emergency medical service organizations are not liable in damages in a civil action for injury, death, or loss to person or property resulting from their acts or omissions in the performance of their duties, unless the act or omission constitutes willful or wanton misconduct. (Emphasis added.)

{¶ 35} Appellant argues that Dr. Miramontes' continued assertion that he had no knowledge or oversight of the daily operations of the fire department was belied by his actions and the expert affidavits of Peter Springer, M.D. and former fire Chief Thomas G. Weber. As set forth above, references to the subsequent remedial measures set forth in Miramontes' April 11, 2011 memorandum, are not properly before us. However, even considering the affidavits as providing evidence of the relevant standard of care, Miramontes consistently maintained that he was not responsible for scheduling the 800 unit or the training or oversight of the dispatchers. Miramontes' primary role was the training of EMS personnel and the ordering of equipment. Any knowledge gained after the incident can be attributed to the request made by Chief Romstadt for recommendations for improved emergency response.

{¶ 36} While it is possible that Dr. Miramontes may have been negligent in his oversight of the operations of the EMS; specifically, his failure to recognize the issues presented in the expert affidavits, such negligence does not rise to the degree of willful or wanton conduct.

{¶ 37} Based on the foregoing, we find that the city and its employees and Dr. David Miramontes are immune from liability for the unfortunate death of appellant's husband, Mr. Mix. Appellant's first and second assignments of error are not well-taken.

{¶ 38} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE