[Cite as *Malone v. Torres*, 2010-Ohio-157.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92878

BESSIE MALONE

PLAINTIFF-APPELLEE

vs.

JOSE TORRES, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-644099

BEFORE: Jones, J., Cooney, P.J., and Kilbane, J.

RELEASED: January 21, 2010

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Appellant-defendant, the city of Cleveland ("the City"), appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE

{¶ 2} This case involves a traffic accident between a police cruiser and two older women driving home from church who were stopped at a red light. On December 12, 2007, plaintiff, Bessie Malone ("Malone"), sued the City of Cleveland Police Department, Police Officer Jose Torres ("Torres"), and GMAC Insurance for injuries she sustained when a city of Cleveland police car driven by Torres slammed into the side of her vehicle.

{¶ 3} During the course of the litigation, Malone dismissed the Cleveland Police Department and GMAC Insurance. In addition, Malone filed an amended complaint naming the City as an additional party. Subsequently, both the City and Torres filed a motion for summary judgment. Malone filed a brief in opposition, to which the City filed a reply brief. Finally, Malone requested and was granted leave to file a surreply brief.

{¶ 4} On January 29, 2009, the trial court granted summary judgment in favor of Torres, and granted in part and denied in part the City's motion for summary judgment. Specifically, the trial court focused on the conflicting evidence presented by Malone, Torres, and the City. The denial of immunity is a

final appealable order under R.C. 2744.02(C), and the City filed an appeal to this court on February 26, 2009.

STATEMENT OF THE FACTS

{¶ 5} On December 14, 2005, at approximately 9:20 p.m., Malone was riding home from church in her car. Although Malone owned the vehicle, her sister, Dorothy Small ("Small"), was driving on the day of the accident. Malone and Small were traveling north on Eddy Road in the village of Bratenahl, Ohio, but were stopped at a red light near the Interstate 90 eastbound ramp. Malone states that the radio was not on in the car, neither of them were talking on cell phones, and neither of them were involved in any other distracting activities that would have inhibited their abilities to see what was about to occur.

{¶ 6} After the light turned green, Small carefully proceeded straight ahead intending to turn left onto the highway entrance ramp. Suddenly, a Cleveland police car, driven by Torres and traveling at a high rate of speed, sped through the red light at the intersection. The police cruiser struck Malone's vehicle. Torres claimed he was chasing a suspect who allegedly exited Interstate 90 off the ramp where Malone was stopped at the red light.

{¶ 7} However, Torres failed to follow procedure and inform anyone of the chase or the suspect with his radio. At no point did Torres testify that he notified anyone of the alleged vehicle chase. In addition, the City failed to provide any corroborating witnesses, other than two fellow police officers from the village of Bratenahl, who later came to the scene. The two fellow police officers made their

reports after hearing the accounts only of Torres and Officer Claudio ("Claudio"), Torre's partner.

ASSIGNMENT OF ERROR

{¶ 8} The City assigns one assignment of error on appeal:

{¶ 9} "[1.] The trial court incorrectly ruled that conflicting evidence existed as to whether police officers Jose Torres and Victor Claudio were on emergency call at the time of their accident, and, as such, incorrectly denied the city's summary judgement based upon the defense of immunity under R.C. Chapter 2744."

LEGAL ANALYSIS

Motion for Summary Judgment

{¶ 10} Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come but to one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

{¶ 11} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265;

Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 604 N.E.2d 138.

{¶ 12} In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Medina, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher,* " * * * 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 or material element of the nonmoving party's claim." Id. at 296, 662 N.E.2d 264. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293, 662 N.E.2d 264. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 13} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party * * *."

{¶ 14} Generally, a political subdivision will not be liable for damages caused by a police officers's negligent operation of a motor vehicle *if the officer was*

responding to an emergency call at the time of the accident. (Emphasis added.) R.C. 2744.02(B)(1)(a).

{¶ 15} It is with the above standards in mind that we now address the City's argument. The City claims that the lower court *incorrectly* ruled that there was conflicting evidence concerning whether or not Torres and Claudio were on an emergency call at the time of the accident. After evaluating all of the evidence, we agree with the lower court and find conflicting evidence that the emergency call existed. Therefore, the lower court properly denied the motion for summary judgment.

Distinguished from *Colbert* and *Natale*

{¶ 16} Although at first glance this case seems to be similar to *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319 and *Natale v. Rocky River*, Cuyahoga App. No. 90819, 2008-Ohio-5868. However, further analysis reveals that the case at bar is readily distinguishable.

{¶ 17} In *Colbert,* a 4-3 decision by the Ohio Supreme Court, the police were patrolling in an area with the reputation as a high-drug, high-crime area, and the officers stated that they had just witnessed a drug deal. After observing the drug deal, the officers followed the vehicle, without activating their lights and siren, most likely to see where the suspected drug dealer was going before making themselves known to the suspect.

{¶ 18} Here, Torres and Claudio were allegedly in pursuit of a "reckless driver." Therefore, unlike *Colbert*, there would be no need to maintain a quiet or

stealth pursuit of the suspect in order to see where the suspected criminal was going. Moreover, in the case at bar, the police did not actually observe any crime beyond speeding and lane changing without signaling. When Torres was describing what he *actually* observed, he described the reckless driving as "going in and out of traffic, not using turn signals or anything."[1] He only surmised that the driver could have been involved in a more serious crime, a "possible DUI." This is distinguishable from *Colbert*, where the police officer actually observed the drug transaction take place in a high-crime area and needed to pursue the suspect in a stealth manner.

{¶ 19} Accordingly, the traffic violations, i.e., speeding and improper lane changing, in the case at bar are readily distinguishable from high-crime area drug deal observation and necessary stealth pursuit in *Colbert*. It is questionable that speeding or improper lane changing, without personal observation of more serious crimes, is worth putting citizens' lives at risk. Therefore, allowing immunity in a situation where officers failed to use their lights and sirens or even make a dispatch call to the police station before racing through an intersection against the light becomes a question of fact.

{¶ 20} In *Natale v. Rocky River*, Cuyahoga App. No. 90819, 2008-Ohio-5868, the police were responding to a call that the city's police department received at 10:30 p.m. "reporting a case of domestic violence in which

[1]Torres Depo. at 10:7-11:2.

a couple were 'beating each other and throwing each other around.' Consistent with department police relating to domestic violence complaints, two police cars were dispatched to the scene." In *Natale*, the police were responding to an actual call that was made to the department, not chasing an alleged speeder that the police failed to call dispatch about. Moreover, in *Natale*, unlike the case at bar, it was established police department policy to send two patrol cars to respond to this verified and in-progress domestic violence crime.

Conflicting Evidence

{¶ 21} In addition to the fact that this case is readily distinguishable from *Colbert* and *Natale*, there is significant conflicting evidence concerning several genuine issues of material fact in this case.

{¶ 22} For example, Malone and Small testified that no vehicle traveled through the intersection immediately before the collision; however, Torres and Claudio testified that they were chasing a suspect vehicle through the intersection. Moreover, there is also a major question of fact remaining as to whether or not Torres activated the lights and sirens on his police car before colliding with Malone's vehicle.

{¶ 23} The question as to whether a particular situation constitutes an emergency call is a question of fact. *Horton v. Dayton* (1988), 53 Ohio App.3d 68, 558 N.E. 2d 79. In this case, the evidence is conflicting with an absence of independent corroborating evidence of the events immediately preceding the

collision. As such, this issue centers on the credibility of the witnesses and is not properly considered on summary judgment.

{¶ 24} Both Malone and Small stated that they did not see any flashing lights or hear any sirens before the accident occurred. In addition, Malone testified that immediately after the accident Torres *admitted to her that his lights and sirens were not on.* Indeed, Torres stated that, before the accident, he was "fixing to put them on."[2] Accordingly, serious questions of fact regarding significant evidence still remain.

{¶ 25} Here, the trial court properly denied the city's motion for summary judgment because a determination of summary judgment would require a determination of the credibility of the witnesses. In *McGuire v. Lovell* (1998), 128 Ohio App.3d 473, there was found to be a genuine issue of material fact as to whether the police officer was actually responding to an emergency call at the time of the collision. In similar facts to the present case, the police officer in *McGuire* traveled through a red light and collided with the plaintiff's vehicle. In *McGuire*, as in the present matter, there were questions of fact as to whether or not the sirens and lights had been activated. However, unlike in the present case, there was radio contact in *McGuire* to back up the police officer's argument that he was responding to an emergency call.

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[2]Malone Depo., p. 27.

{¶ 26} The exclusive reliance by the City on the self-serving testimony of Torres and Claudio to establish the existence of an emergency is insufficient for granting summary judgment. In *Hudson v. City of East Cleveland* (March 10, 1994), Cuyahoga App. No. 65924, the court decided that there were genuine issues of material fact as to whether or not the police officers were actually responding to an emergency call. Similar to the present case, the only evidence provided by the appellant-city was self-serving evidence by the police officer that the lights and sirens had been activated, and that he was in fact responding to an emergency call.

{¶ 27} Despite the City's contentions, the sworn testimony of Torres and Claudio holds no greater weight than the sworn testimony of Malone and Small. To hold otherwise would be to weigh the evidence and question the credibility of the witnesses, neither of which are permitted in summary judgment proceedings. Id.

{¶ 28} A review of the evidence demonstrates that the City has provided no other evidence of the existence of the emergency call other than the self-serving testimony of the police officers involved, and the report by fellow police officers who were not present at the time and only met with Torres and Claudio. This evidence was directly refuted by Malone and Small.

{¶ 29} However, conflicting evidence does exist as to various material facts. For example, the record includes testimony by both Malone and Small that the police did *not* have their lights and sirens on. However, this testimony conflicts

with other testimony from the police that they did have their lights and sirens on prior to the accident. Given the conflicting evidence and significant genuine issues of material fact in dispute, we agree with the trial court's dismissal of the City's motion for summary judgment. The conflicting testimony of the parties, the dispute as to the use of emergency lights and sirens, and the lack of a dispatch call before giving chase, all combine to create genuine issues of material fact in dispute. Issues of credibility should not be denied on motion for summary judgment.

{¶ 30} Accordingly, genuine issues of material fact remain. We therefore find that the trial court properly denied the City's motion for summary judgment.

{¶ 31} Appellant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, J., CONCURS;

COLLEEN CONWAY COONEY, P.J., DISSENTS
WITH SEPARATE OPINION

COLLEEN CONWAY COONEY, P.J., DISSENTING:

{¶ 32} I respectfully dissent. I would reverse the trial court's denial of summary judgment and find the City immune under the circumstances of this emergency call.

{¶ 33} First, I disagree with the majority's statement that Malone and Small testified that no vehicle traveled through the intersection immediately before the collision. Their testimony merely established that they did not observe a vehicle and did not see the police car until it struck them. This testimony does not contradict the police testimony that they were chasing a vehicle. Therefore, I would find the evidence supporting the emergency call to be unrebutted.

{¶ 34} Furthermore, the issue of lights and siren on the police vehicle is not relevant to the determination in the instant case. In *Colbert*, the Ohio Supreme Court held that, as defined in R.C. 2744.01(A), "emergency call" involves a situation to which a response by police is required by the officer's professional obligation. *Colbert*, syllabus. The court's analysis contained none of the factors cited by the majority to justify driving without lights or

siren activated. Therefore, I would find *Colbert* controlling and reverse the trial court's denial of summary judgment.