

[Cite as *Dorsey v. Cleveland*, 2015-Ohio-1142.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101467

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**MARY DORSEY**

PLAINTIFF-APPELLEE

vs.

**CITY OF CLEVELAND, ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:**  
AFFIRMED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CV-13-805947 and CV-13-811057

**BEFORE:** McCormack, P.J., E.T. Gallagher, P.J., and Boyle, J.

**RELEASED AND JOURNALIZED:** March 26, 2015

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TIM McCORMACK, P.J.:

{¶1} The city of Cleveland appeals from a judgment of the Cuyahoga Court of Common Pleas Court that denied its motion for summary judgment in a personal injury action filed by Mary Dorsey. Dorsey's complaint stemmed from an incident where an ambulance struck Dorsey's vehicle in an intersection. The city moved for summary judgment claiming sovereign immunity. The trial court denied the motion on the ground that a genuine issue of material fact existed regarding whether the city was entitled to immunity under the circumstances of this case. After a careful review of the record and applicable law, we conclude the trial court properly denied the city's motion for summary judgment and therefore affirm.

#### **Substantive Facts and Procedural History**

{¶2} On the afternoon of September 23, 2012, while traveling on Cedar Avenue near East 33rd Street in Cleveland, Dorsey's vehicle was struck by an ambulance driven by James Lang, an employee of the city. Dorsey sustained injuries from the incident. In July 2013, she filed a personal injury suit against the city of Cleveland and Lang.<sup>1</sup> Lang had passed away several months prior to the lawsuit, in April 2013.

{¶3} The city filed an answer in August 2013. In February 2014, the city moved for summary judgment, asserting the defense of sovereign immunity. After a hearing, the trial court denied the city's motion for summary judgment.<sup>2</sup> The city now appeals, arguing the trial court erred in denying its motion for summary judgment.

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<sup>1</sup>Tashell Higgins, a minor, who was the patient transported by the ambulance when the accident occurred, filed a separate lawsuit (Cuyahoga C.P. No. CV-13-805947), by and through her mother Latasha Higgins. The two trial court cases were consolidated in August 2013. Subsequently, in March 2014, Tashell Higgins filed a notice of voluntary dismissal.

<sup>2</sup>The trial court granted the city's motion regarding James Lang, on the ground that Dorsey

{¶4} The city’s assignment of error states: “The Trial Court erred by denying the City of Cleveland’s Motion for Summary Judgment. Plaintiff failed to establish that the City’s general grant of immunity is defeated by James Lang’s alleged failure to comply with O.R.C. 4511.03.”

{¶5} As an initial matter, we note that although a denial of summary judgment generally is not a final appealable order, when a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order is a final appealable order pursuant to R.C. 2744.02(C). *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, syllabus.

#### **Summary Judgment Review**

{¶6} Summary judgment is appropriate when: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C). We review the trial court’s judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

#### **Political Subdivision Immunity: Exceptions and Defenses**

{¶7} Chapter 2744 of the Ohio Revised Code, the Political Subdivision Tort Liability Act, sets forth a comprehensive statutory scheme for the tort liability of political subdivisions and its employees. R.C. 2744.02(A)(1) grants immunity to a political subdivision from civil liability. It provides:

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failed to properly substitute Lang’s estate as a party.

(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.

{¶8} Section (B) of R.C. 2744.02 enumerates five exceptions to the general grant of immunity. Of the five exceptions, the exception regarding an employee's negligent operation of a vehicle enumerated in section (B)(1) is pertinent to this case.<sup>3</sup>

{¶9} Under R.C. 2744.02(B)(1), although a political subdivision generally enjoys immunity from civil tort liability, the political subdivision is nonetheless liable for its employees' negligent operation of a vehicle. The statute, however, provides three full defenses to this liability: (1) when the vehicle is operated by a police officer responding to an emergency call (R.C. 2744.02(B)(1)(a)); (2) when a firefighter proceeds to a fire in progress (R.C. 2744.02(B)(1)(b)); and (3) when emergency medical service personnel respond to a call for emergency medical care (R.C. 2744.02(B)(1)(c)).

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<sup>3</sup>R.C. 2744.02(B) states:

“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:

(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.  
\* \* \*.”

{¶10} All three defenses can be asserted only when an employee’s operation of the vehicle does not constitute “willful or wanton misconduct.” The defense regarding the emergency medical service (“EMS”) has an additional requirement: the operation of the EMS vehicle must also comply with R.C. 4511.03, a statute that governs the operation of emergency vehicles. *Schwarzbek v. Wauseon*, 125 Ohio App.3d 736, 740, 709 N.E.2d 570 (8th Dist.1998). R.C. 2744.02(B)(1)(c) states:

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle 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 complies with the precautions of section 4511.03* of the Revised Code.

(Emphasis added.)

{¶11} Under the plain language of the statute, for the city to claim political subdivision immunity, the city must show *both* that the operation of an ambulance did not constitute “willful or wanton misconduct,” and that the driver complied with R.C. 4511.03.

{¶12} In denying the city’s motion for summary judgment, the trial court focused on the question of whether the driver complied with the precautions of R.C. 4511.03. The trial court held that because reasonable minds can differ on the issue of whether the ambulance driver Lang proceeded cautiously past the stop sign with due regard for the safety of others using the street, there remained a genuine issue of material fact that precluded summary judgment for the city on its immunity claim.

{¶13} R.C. 4511.03 (“Emergency vehicles to proceed cautiously past red or stop signal”) states:

(A) The 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 *shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.*

(Emphasis added.)

### **Analysis**

{¶14} It is undisputed that the incident occurred while Lang’s ambulance was transporting Tashell Higgins to MetroHealth Hospital. The ambulance stopped at a stop sign before attempting to turn left onto Cedar Avenue. It collided with Dorsey’s vehicle in the intersection. According to the deposition of Jacklin Vannoy, Lang’s partner, the ambulance did not have its sirens or lights on because the patient was being transported in a manner commonly known as “routine.”

{¶15} Dorsey gave a similar account of the incident. She was traveling at between 20 and 35 miles per hour westbound in the curb lane on Cedar near E. 33rd Street. As she approached the intersection of Cedar and E. 33rd Street, she saw an ambulance in a stopped position with no flashing lights or sirens activated. A few seconds later, when she “had already begun to enter the intersection,” she looked to her left and saw the ambulance driver “intentionally accelerating across Cedar Avenue into the curb lane where [she] was driving.” Dorsey alleged that in order to avoid being crushed by the large ambulance, she tried to speed up to get out of the way. The ambulance smashed into the left side of her vehicle and pushed her vehicle onto the sidewalk. The ambulance driver, Lang, exited his vehicle and said to her “I didn’t see you.” Lang repeated the statement to the paramedic in the back of the ambulance and also to the patient’s mother, who was driving her own vehicle and following the ambulance to the hospital.

{¶16} Applying a de novo standard of review and construing the evidence in favor of the nonmoving party, we, as the trial court did, find the evidence in this case created a genuine issue of material fact regarding whether the ambulance driver proceeded cautiously past the stop sign with due regard for the safety of the other drivers on the road.

{¶17} Lang’s ambulance did not have its sirens or lights activated. We recognize that the lack of use of lights or sirens in an emergency vehicle is not dispositive in an immunity analysis. *Stevenson v. Prettyman*, 193 Ohio App.3d 234, 2011-Ohio-718, 951 N.E.2d 794 (8th Dist.), citing *Lipscomb v. Lewis*, 85 Ohio App.3d 97, 619 N.E.2d 102 (12th Dist.1993). Here, however, the ambulance came to a complete stop before a stop sign. That stop might well have signaled to others on the road that the ambulance was not on an emergency run. After coming to a complete stop, Lang then accelerated and pulled into the intersection, apparently failing to see Dorsey’s vehicle, which had the right of way. These circumstances, coupled with the fact that Lang did not sound the horn to alert other drivers of the presence of the ambulance, raised an issue of material fact whether Lane “proceeded cautiously” past the stop sign “with due regard for the safety of” others on the road in compliance with R.C. 4511.03. The city argues that the mere fact that Lang observed and stopped at the stop sign satisfied his duty under R.C. 4511.03. The statute requires more than that. After slowing down as necessary for a red or stop sign, the emergency vehicle driver must proceed cautiously with due regard for others using the street. Whether Lang complied with this part of the statute is the question raised by the evidence in the record.

{¶18} To be entitled to summary judgment based on the political subdivision immunity, the city must demonstrate an absence of any genuine issue of material fact that (1) the EMS driver’s operation of the vehicle did not “willful or wanton misconduct” did not, *and* (2) the



EMS driver complied with R.C. 4511.03. The existence of a triable issue of material fact regarding whether the driver complied with R.C. 4511.03 therefore precluded summary judgment for the city.

{¶19} A review of cases involving the collision of an EMS vehicle and another vehicle indicates that the courts have not hesitated to find that a triable issue of material fact regarding the EMS driver's compliance with R.C. 4511.03 precluded summary judgment on the issue of immunity.

{¶20} For example, in *Williams v. Stefka*, 8th Dist. Cuyahoga No. 96145, 2012-Ohio-353, the view near an intersection was obstructed and neither driver saw the other. No evidence showed the ambulance driver slowed down significantly or sounded the horn upon approaching the intersection. This court found a genuine issue of material fact regarding whether the ambulance driver slowed down as necessary for safety to traffic in compliance with R.C. 4511.03. In *Zivich v. Northfield*, 9th Dist. Summit No. 24836, 2010-Ohio-1039, the Ninth District upheld a trial court's denial of the village's summary judgment on immunity grounds. The case also involved a view obstruction and the court held that the trial court properly found the existence of a genuine issue of material fact regarding the ambulance driver's compliance with R.C. 4511.03). Compare *Perlberg v. Cleveland*, 8th Dist. Cuyahoga No. 91913, 2009-Ohio-1788 (where a wall near an intersection presented a view obstruction but the ambulance's siren and lights were activated and the driver also honked as he proceeded through the intersection, the driver complied with R.C. 4511.03); *Harris v. Kennedy*, 116 Ohio App.3d 687, 690-691, 689 N.E.2d 53 (8th Dist.1996) (where the ambulance's sirens and lights were activated and the ambulance driver applied the brakes to slow down to five to ten m.p.h. before

entering the intersection, the court found no issue of material fact that the ambulance driver complied with R.C. 4511.03).<sup>4</sup>

{¶21} In order to successfully assert the defense of sovereign immunity, the city must show that its EMS driver's operation of the vehicle did not constitute willful or wanton misconduct *and* that the operation complied with the precautions of R.C. 4511.03. Because the evidence before the trial court created a genuine issue of material fact as to whether the EMS driver proceeded cautiously past the stop sign with due regard for the safety of others using the street, we conclude the trial court properly denied the city's motion for summary judgment. The assignment of error is without merit.

{¶22} Judgment affirmed.

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

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<sup>4</sup>The city cites *Stevenson*, 193 Ohio App.3d 234, 2011-Ohio-718, to support its position. That case involved a police officer transporting a prisoner to a hospital. The issue was whether the city of Cleveland was immune from liability pursuant to R.C. 2744.02(B)(1)(a), which concerns a *police officer's* operation of a vehicle and does not require a showing of the driver's compliance of R.C. 4511.03 for immunity purposes. The issue in that case was therefore whether the officer's operation of his vehicle was "willful or wanton." In determining whether the officer acted wantonly or willfully, this court analyzed whether the officer proceeded through the intersection with the precautions required by R.C. 4511.03, which governs all emergency or public safety vehicles responding to an emergency call. Based on the police officer's averment that he exercised caution as he proceeded through the intersection, a fact that the plaintiff did not counter, this court held that there was no genuine issue of material fact regarding whether the officer acted wantonly or willfully and affirmed the summary judgment granted in the city's favor. *Id.* at ¶ 37-38. The plaintiff in *Stevenson* was a passenger in the vehicle struck by the police vehicle. In a separate case subsequently filed by the driver of the struck vehicle, *State v. Taylor*, 8th Dist. Cuyahoga No. 97597, 2012-Ohio-3369, the plaintiff driver submitted (1) her own affidavit asserting that the officer traveled at a high speed and (2) the affidavit of the prisoner being transported, who stated the officer did not slow down as he proceeded through the intersection. Based on a different record, this court concluded a genuine issue of material fact remained as to whether the officer acted wantonly or willfully in proceeding through the intersection. These two cases were decided on R.C. 2744.02(B)(1)(a), rather than R.C. 2744.02(B)(1)(c), and therefore are not directly on point in the present case.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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TIM McCORMACK, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and  
MARY J. BOYLE, J., CONCUR