

[Cite as *Dickerson v. Greater Cleveland Regional Transit Auth.*, 2015-Ohio-1299.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101597

MCKINLEY DICKERSON, JR.

PLAINTIFF-APPELLEE

vs.

**GREATER CLEVELAND REGIONAL
TRANSIT AUTHORITY, ET AL.**

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-795482

BEFORE: S. Gallagher, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 2, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Defendants-appellants Cleveland police officers Sgt. William Mokshefsky, Det. John L. Vinson, and Officer Antonio Colon appeal the rulings of the trial court that denied their motion for summary judgment and determined appellants are not entitled to immunity. For the reasons stated herein, we affirm the judgment of the trial court.

{¶2} On November 13, 2012, plaintiff-appellee McKinley Dickerson, Jr., filed a complaint alleging wrongful arrest and false imprisonment. Following initial pleadings and the dismissal of certain defendants, appellee filed an amended complaint on April 19, 2013, that named appellants as defendants in the action, along with the city of Cleveland and several officers from the Greater Cleveland Regional Transit Authority (“RTA”). The city of Cleveland was dismissed from the action. The RTA defendants obtained summary judgment because of the expiration of the applicable statute of limitations.

{¶3} In his amended complaint, appellee alleged that on November 14, 2011, while riding aboard a bus, he was detained by RTA officers on suspicion of robbing a bank. Appellee alleged he informed the officers he had been shopping all day and was in possession of certain security uniform items he had purchased. Appellee further alleged that after Cleveland police officers Mokshefsky and Colon arrived on scene, he was handcuffed and brought before the complaining bank teller at Huntington Bank. Appellee further alleged that the bank teller, Paula Spencer, stated appellee was not the robber, but Sgt. Mokshefsky and Officer Colon, with malicious purpose, in bad faith, in a wanton and reckless manner, and without warrant or other legal process, arrested him and

held him in jail for 19 days. It was also alleged that Det. Vinson acted with malicious purpose, in bad faith, and in a wanton and reckless manner by not releasing appellee when the bank teller identified the true perpetrator in a picture lineup three days after appellee's arrest. After the filing of a motion to terminate charges, appellee was finally released 19 days after his arrest and imprisonment. Appellee alleged that he was required to employ counsel at expense to himself, incurred lost wages, suffered mental and bodily distress, and was subjected to humiliation and embarrassment. The true perpetrator eventually was charged.

{¶4} Appellants, who are the Cleveland police officers named in the action, filed a motion for summary judgment claiming immunity. Appellee filed a brief in opposition that included a partial transcript of Paula Spencer's deposition. Appellee also attached his own affidavit.

{¶5} The trial court denied the motion for summary judgment on May 28, 2014, upon finding disputed evidence of "whether Colon and/or Mokshefsky were told by the bank teller or by another individual on the scene that [plaintiff] was not the person [who] robbed the bank teller" and "whether [plaintiff] was arrested notwithstanding this statement from the bank teller[.]" The court further found the plaintiff's evidence supported a conclusion that one or more of the defendants acted in bad faith, with malicious purpose, in a wanton and reckless manner, or without probable cause. Because the trial court ruled on the motion prior to the filing of the reply brief, the trial court issued a substitute ruling on June 3, 2014, finding as follows:

This substitute ruling is made having reviewed the [defendants'] reply brief and the transcript of the [bank teller's] deposition * * *. The court again concludes that [defendants' motion for summary judgment] must be and is hereby denied. Deponent Spencer's testimony that she told the Cleveland police officers on the scene of the bank robbery that the man they arrested and brought before her for her identification was not in fact the person who robbed the bank is now properly before the court for consideration and that testimony remains un rebutted. [Defendants] claim Spencer on a later date identified [plaintiff] as the robber when shown a photo lineup but that fact is not in evidence. In Spencer's [deposition] testimony she spoke of a photo lineup shown [to] her by the Cleveland police some days after the robbery but in her testimony she stated that [plaintiff's] photo was not in this photo lineup. Even if it were in evidence that several days after the robbery, Spencer identified [plaintiff] as the robber, the court would still be required to deny the [motion for summary judgment.] At the time the two [Cleveland police] officers arrested plaintiff and put him in county jail for the bank robbery, they were — according to Spencer's testimony — on notice from Spencer that he was not the robber. [Plaintiff's] complaint alleges movants acted maliciously and in bad faith etc. by continuing [plaintiff's] arrest and confining him in county jail on the bank robbery charge after Spencer stated he was not the robber. A later identification by Spencer of [plaintiff] as the robber would not affect the propriety of the movants' arrest and confinement of [plaintiff] on the day of Spencer's original opportunity to identify the robber.

{¶6} Appellants timely filed this appeal. They raise two assignments of error for our review. Under their first assignment of error, appellants claim the trial court erred when it considered the partial deposition transcript of Paula Spencer. Appellants argue that a complete transcript was not filed with the court and the deposition was taken without notice to appellants, upon whom service had not yet been obtained in the action.

{¶7} Appellants' reliance on Civ.R. 32(A) is misplaced. Although Civ.R. 32(A) provides that at trial a deposition may only be used against a party who was present or represented at the taking of the deposition or who had reasonable notice thereof, the same analysis is infirm with respect to a determination of whether summary judgment should be

granted. *Gerken v. Mir*, 3d Dist. Mercer No. 10-95-7, 1995 Ohio App. LEXIS 5532, *5 (Nov. 30, 1995). “[W]hen the issue is merely determining whether a genuine issue of material fact exists, the deposition should be allowed for that purpose only regardless of whether it would later be inadmissible against the party at trial.” *Id.* The deposition properly “may be considered as an affidavit in opposition to a motion for summary judgment as long as the deponent is presently available to testify at trial.” *Napier v. Brown*, 24 Ohio App.3d 12, 15, 492 N.E.2d 847 (2d Dist.1985).

{¶8} Further, although appellee failed to file a properly authenticated deposition transcript in support of his opposition brief and appellants objected to this, appellants filed a complete certified transcript and relied on the transcript in their reply brief. Because a properly authenticated deposition transcript was filed before the trial court issued its substituted ruling on the motion for summary judgment, the trial court did not abuse its discretion in considering the deposition in its ruling. *See King v. Rubber City Arches, L.L.C.*, 9th Dist. Summit, 2011-Ohio-2240, ¶ 20. Appellants’ first assignment of error is overruled.

{¶9} Under their second assignment of error, appellants claim the trial court erred when it failed to grant summary judgment on the basis of immunity. Our review of the trial court’s decision is de novo. *See Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 20.

{¶10} Appellants assert that they are entitled to immunity under R.C. 2744.03(A)(6)(b), which provides that an employee of a political subdivision is

immune from liability “for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, unless “[t]he employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]”

{¶11} Our review of the record reflects that appellee presented evidence demonstrating a genuine factual dispute as to whether appellees acted maliciously, in bad faith, or in a wanton or reckless manner. Appellee averred in his affidavit that after a day of shopping for uniforms, he was stopped on a bus by RTA officers, Cleveland police officers Sgt. Mokshefsky and Officer Colon handcuffed him and transported him to a Huntington Bank, he stood in a one-man lineup at the bank, and he was then arrested and imprisoned for 19 days. The complaining bank teller, Paula Spencer, testified in her deposition that when appellee was brought before her at the bank, she informed the two Cleveland police officers that “it was not him.” These facts, construed in appellee’s favor, demonstrate a genuine issue of material fact about whether appellants acted with malice, in bad faith, or in a wanton or reckless manner when they arrested appellee and held him in jail for 19 days, despite purportedly knowing appellee was not the person who robbed the bank. Although appellants submitted an affidavit of Officer Colon in which he averred he lacked knowledge of Spencer’s alleged statement at the crime scene, and also presented evidence to reflect Spencer identified appellee as the bank robber when presented with the photo lineup, the conflicting evidence nonetheless raised an issue

about whether the Cleveland police officers lacked probable cause to arrest appellee and hold him in jail for 19 days.

{¶12} Finally, we reject appellants' attempt to apply the public-duty rule because it does not apply with respect to the R.C. 2744.03(A)(6)(b) exception to immunity for wanton and reckless conduct. *See Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 201, ¶ 20-21.

{¶13} Upon our review, we find that appellants are not entitled to statutory immunity in this case and that their motion for summary judgment was properly denied. Appellants' second assignment of error is overruled.

{¶14} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed. 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.

SEAN C. GALLAGHER, JUDGE
MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR