[Cite as *Hunt v. Cleveland*, 2016-Ohio-3176.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103468

CHARLES D. HUNT, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-755540

BEFORE: Jones, A.J., Kilbane, J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 26, 2016

ATTORNEY FOR APPELLANTS

Willa M. Hemmons
City of East Cleveland
Director of Law
14340 Euclid Avenue
Cleveland, Ohio 44112

ATTORNEY FOR APPELLEES

Robert F. DiCello
The DiCello Law Firm
7556 Mentor Avenue
Mentor, Ohio 44060

LARRY A. JONES, SR., A.J.:

{¶1} Defendants-appellants, Todd Carroscia and the city of East Cleveland, appeal the trial court's decision to deny their motion for summary judgment. We affirm.

{¶2} In October 2008, plaintiffs-appellees, Charles Hunt and Merylin Conard, were injured when Hunt's car was involved in an accident with East Cleveland police officer Todd Carroscia.

{¶3} On the night of the incident, around 2:00 a.m., Officer Carroscia received a dispatch report that another East Cleveland police officer was following a stolen motorcycle. Officer Carroscia advised dispatch that he and Sergeant Scott Gardner, who was in a separate zone car, would respond to the call. Officer Carroscia estimated he was driving around 40 miles per hour en route to the location and had his overhead lights and sirens activated.

{¶4} Hunt and Conard were traveling in Cleveland on East 140th Street approaching the intersection with St. Clair Avenue. Hunt's car entered the intersection and Carroscia's zone car crashed into Hunt's car; Hunt's car slammed into a light pole. Hunt and Conard sustained serious injuries and were hospitalized for lengthy periods of time. Blood tests showed that Hunt's blood alcohol level was above the legal limit and he had marijuana and cocaine in his system; he denied consuming drugs the night of the incident, but admitted to drinking. Conard admitted to consuming cocaine the night of the accident.

{¶5} The incident occurred in the city of Cleveland and Cleveland Police Detective John Kiggins was assigned to investigate the accident. Although both Officer Carroscia and Sergeant Gardner's zone cars were equipped with video cameras, there was no video footage available from either car documenting the accident. Officer Carroscia and the city claimed that the video equipment malfunctioned and/or that the tapes had run out prior to the accident; therefore, no recording ever existed. Hunt and Conard alleged the video footage was intentionally destroyed by the police department.

{¶6} Detective Kiggins's investigation revealed that Officer Carroscia was driving under a suspended license, but further investigation revealed that the license suspension was not lifted prior to the date of the accident due to a court clerical error.

{¶7} East Cleveland fired Officer Carroscia ten days after the accident. The decision to terminate his employment was made by the city's mayor and law director. The mayor stated that he fired Officer Carroscia for being reckless on the night of the accident. The law director stated that her decision was based on the suspended license, the officer's failure to turn in video equipment from the zone car, and the circumstances of the accident. The city subsequently received documentation that Officer Carroscia's license should have been reinstated prior to the accident and rehired him.

{¶8} In 2009, Hunt and Conard filed suit in state court against the city of Cleveland, Detective Kiggins, the city of East Cleveland, East Cleveland Police Chief Ralph Spotts, East Cleveland Police Officers Todd Carroscia and Christopher Cargille, and John Does 1-20.

{¶9} Hunt and Conard dismissed their complaint but refiled it in 2011 and the case was removed to federal court. In June 2013, the federal district court granted summary judgment for the defendants on all federal claims but declined to exercise jurisdiction over the state claims and remanded the case to the state court. *See Hunt v. Cleveland*, N.D.Ohio No. 1:11-CV-01608 (June 28, 2013). The district court's decision was affirmed on appeal. *Hunt v. Cleveland*, 563 Fed.Appx. 404 (6th Cir.2014).

{¶10} In March 2015, the plaintiffs filed a notice in state court dismissing the city of Cleveland and Kiggins without prejudice. The court then granted partial summary judgment to the remaining defendants, dismissing all state claims except one against Officer Carroscia and the city of East Cleveland.

{¶11} Carroscia and the city of East Cleveland filed a timely notice of appeal, raising three assignments of error for our review, which will be discussed together:

> I. The trial court erred to appellants' prejudice in its implicit finding that Officer Carroscia was not on an emergency call at the time of the accident.
>
> II. The trial court erred to the prejudice of appellants by failing to consider application of the special immunity defense as set forth in R.C. 2744.02(B)(1)(a).
>
> III. The trial court erred to the prejudice of appellants as appellees failed to satisfy their reciprocal duty to present evidence that Officer Carroscia's operation of his police cruiser constituted willful, wanton, or reckless misconduct.

A. Summary Judgment

{¶12} An appellate court reviews summary judgment under a de novo standard. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588, 641 N.E.2d 265 (8th

Dist.1994). Summary judgment is appropriate only when the moving party demonstrates (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 677 N.E.2d 343 (1997).

{¶13} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). However, the moving party cannot discharge its initial burden under this rule with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must specifically point to evidence of the type listed in Civ.R. 56(C) affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997). Once the moving party discharges its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 11. If the nonmoving party does not so respond, summary judgment may be entered in favor of the party seeking affirmative relief if it is appropriate to do so. *Id.*; Civ.R. 56(E).

B. Governmental Immunity

{¶14} Determining whether a governmental entity or actor is immune from tort liability involves a three-step analysis. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10. First, R.C. 2744.02(A)(1) sets forth the general blanket immunity applicable to political subdivisions. It provides that a political subdivision is generally not liable in a civil action for injury, death, or loss to person or property incurred while performing governmental or proprietary functions. To overcome this immunity, a plaintiff must show that one of the five exceptions contained in R.C. 2744.02(B) applies.

{¶15} As it applies to the case at bar,

> [e]xcept 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.

R.C. 2744.02(B)(1). But a "full defense" to liability, is if the "member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call *and* the operation of the vehicle did not constitute willful or wanton misconduct." (Emphasis added). R.C. 2744.02(B)(1)(a).

{¶16} In addition, if a plaintiff demonstrates that one of the five enumerated exceptions to governmental immunity applies, a political subdivision may then assert one of the defenses set forth in R.C. 2744.03(A) to revive its immunity. *Hampton v. Cleveland*, 8th Dist. Cuyahoga No. 103244, 2016-Ohio-1226, ¶ 8.

C. No Error in Denying Summary Judgment

{¶17} In this case, the trial court determined that "summary judgment as to governmental immunity is denied pursuant to R.C. 2744.01(B)(1), as genuine issues of material fact exist as to the negligence claim against defendant city of East Cleveland and Officer Todd Carroscia * * * ."

{¶18} On summary judgment, Officer Carroscia and the city of East Cleveland were required to '"present evidence tending to prove the underlying facts upon which the [immunity] defense is based.'" *Szefcyk v. Kucirek*, 9th Dist. Lorain No. 15CA010742, 2016-Ohio-171, ¶ 12, quoting *Trubiani v. Graziani*, 9th Dist. Medina No. 2874-M, 1999 Ohio App. LEXIS 6281, 9 (Dec. 29, 1999). There is no dispute that the city of East Cleveland is a political subdivision and Officer Carroscia was an employee of a political subdivision at the time of the accident; the plaintiffs alleged as much in their complaint. The sole remaining count of the complaint, Count 5, alleged that Officer Carroscia's actions constituted an act of negligence for which immunity does not apply to the city of East Cleveland, that he drove while under a suspended license, drove at a high rate of speed, breached his duty to the motoring public, committed negligence per se, showed a reckless, willful and/or wanton disregard for the rights and safety of others, and caused the crash and injuries that "nearly killed" the plaintiffs. Count 5 also alleged that plaintiffs were damaged as "a proximate result of" Officer Carroscia's "wanton, willful, reckless and/or negligent disregard for the rights of the motoring public and the plaintiffs" and Officer Carroscia's conduct was "a direct and proximate result" of the plaintiffs' injuries.

{¶19} The city of East Cleveland and Officer Carroscia argue that R.C.

2744.02(B)(1)(a) operates as a full defense to liability because Officer Carroscia was responding to an emergency call and the operation of his zone car did not constitute "willful or wanton misconduct" at the time of the accident. They further argue that Officer Carroscia is immune from liability pursuant to R.C. 2744.03(A)(6), which provides that an employee of a political subdivision is immune from liability unless (a) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; or (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.

1. City of East Cleveland's Liability

{¶20} Thus, summary judgment on the issue of the city's immunity is proper if reasonable minds could only conclude that (1) Officer Carroscia was responding to an emergency call, and (2) Officer Carroscia's operation of his patrol car did not constitute willful or wanton misconduct.

{¶21} An "emergency call" has been defined as "a call to duty including * * * personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of the peace officer." R.C. 2744.01(A). The statutory definition does not limit "emergency calls" to occasions of inherent danger or danger to human life. *Moore v. Columbus*, 98 Ohio App.3d 701, 706, 649 N.E.2d 850 (10th Dist.1994).

{¶22} In *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, the Ohio Supreme Court defined "wanton misconduct" as 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 two of the

syllabus; *see also Hardesty v. Alcantara*, 8th Dist. Cuyahoga No. 102684, 2015-Ohio-4591, ¶ 31, *appeal allowed*, 145 Ohio St.3d 1421, 2016-Ohio-1173, 47 N.E.3d 166. "Willful misconduct" is "'[a]n 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 purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.'" (Citations omitted.) *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129, ¶ 26 (9th Dist.), quoting *Brockman v. Bell*, 78 Ohio App.3d 508, 515, 605 N.E.2d 445 (1st Dist.1992).

{¶23} Officer Carroscia claims that he was driving to an emergency call with his lights and sirens activated and had a green light when he entered the intersection of St. Clair Avenue and East 140th Street. He further claims that he was traveling about 40 miles per hour in a 35 mile per hour zone. Sergeant Gardner testified at deposition that he was following Officer Carroscia and Officer Carroscia had his lights and siren activated. Sergeant Gardner observed that there was no traffic on the road and the area was well lit. He testified that Officer Carroscia was speeding towards their destination but he did not know how fast he was traveling. According to Sergeant Gardner, as they approached the intersection, Officer Carroscia had a green light and proceeded through the intersection when another car, driven by Hunt, sped through the intersection without slowing down. According to Sergeant Gardner, Officer Carroscia tried to avoid hitting Hunt's car by slamming on his brakes and swerving into the other lane of traffic, but he was unsuccessful and hit Hunt's car.

{¶24} In their complaint, Hunt and Conard alleged that Officer Carroscia was traveling closer to 55-65 miles per hour. They also testified at deposition that it was Hunt who had the green light. Hunt and Conard further allege that Officer Carroscia's overhead lights and siren were not activated at the time of the accident, and that Officer Carroscia was not on an emergency call. They support their argument with the affidavit of Stromboli Douglas, a witness who stated that Officer Carroscia's car did not have lights and siren on, and the testimony of Sergeant James Ruth, who testified at deposition that Officer Carroscia told him he was going between 60-65 miles per hour before the crash.

2. Officer Carroscia's Individual Liability

{¶25} In Ohio, a "police officer * * * cannot be held personally liable for acts committed while carrying out his or her official duties unless one of the exceptions to immunity is established." *Cook v. Cincinnati*, 103 Ohio App.3d 80, 90, 658 N.E.2d 814 (1st Dist.1995); R.C. 2744.03. In this regard, R.C. 2744.03(A)(6) provides that

> [a]n employee of a political subdivision is immune from liability unless (1) the employee acted outside the scope of his or her employment or official responsibilities, (2) the employee acted with malicious purpose, in bad faith, wantonly, or recklessly, or (3) the Revised Code expressly imposes liability on the employee.

Moss v. Lorain Cty. Bd. of Mental Retardation, 185 Ohio App.3d 395, 2009-Ohio-6931, 924 N.E.2d 401, ¶ 21 (9th Dist.), citing R.C. 2744.03(A)(6)(a)-(c); *Szefcyk*, 9th Dist. Lorain No. 15CA010742, 2016-Ohio-171, at ¶ 11.

{¶26} Hunt and Conard have alleged that Officer Carroscia cannot escape liability under R.C. 2744.03(A)(6) because he acted in a reckless manner. "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." *Anderson,* 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at paragraphs two and three of the syllabus.

{¶27} Hunt and Conard allege that Officer Carroscia acted in a reckless manner by failing to heed departmental rules requiring him to travel at a safe speed, slow down when entering an intersection, and have his lights and siren active when responding to a call. We further note that Lieutenant R.S. Steadman of the East Cleveland Police Department recommended Officer Carroscia receive an oral reprimand for "neglecting to have his video system operational during his tour of duty."

{¶28} At this juncture, we agree with the trial court that genuine issues of material fact remain regarding whether the city of East Cleveland and Officer Carroscia were entitled to immunity. There is conflicting evidence with regard to the rate of speed at which Officer Carroscia was traveling, whether his zone car's lights and siren were activated, and which driver had a green light at the intersection of St. Clair Avenue and East 140th Street. Thus, there are genuine issues of material fact as to whether Officer Carroscia operated his zone car in a wanton, willful, or reckless manner so as to preclude a finding of liability. It is, of course, possible that the trier of fact will conclude that Officer Carroscia was not acting as alleged and therefore he and the city of East Cleveland may still be entitled to immunity.

{¶29} In light of the above, the trial court did not err in denying the city of East

Cleveland and Officer Carroscia's motion for summary judgment. The assignments of error are overruled.

{¶30} Judgment affirmed.

It is ordered that appellants recover of appellees 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 Cuyahoga 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.

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR