[Cite as *Brown v. Cuyahoga Falls*, 2010-Ohio-4330.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

TIMOTHY J. BROWN	C.A. No. 24914
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CITY OF CUYAHOGA FALLS, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. CV 07 11 8031

DECISION AND JOURNAL ENTRY

Dated: September 15, 2010

BELFANCE, Presiding Judge.

{¶1} Defendants-Appellants City of Cuyahoga Falls ("the City") and Officer Brandon Good appeal the judgment of Summit County Court of Common Pleas which denied their motion for summary judgment. For the reasons set forth below, we affirm.

BACKGROUND

{¶2} On December 30, 2006, around 5 a.m., the Cuyahoga Falls Police Department received a call concerning a fight involving five people at the Studio City apartment complex. Two cars were dispatched to the scene. Officer Good and Officer Quior were not dispatched, but each separately elected to respond to the scene as well. Officer Quior proceeded behind Officer Good while responding to the call. While en route to the scene, Officer Good struck Plaintiff-Appellee Timothy Brown with the cruiser as Brown was crossing the street. Brown was not in a cross-walk. Brown sustained serious injuries as a result of the collision.

{¶3} On November 16, 2007, Brown filed a tort action against Officer Good and the City. The case proceeded through discovery and the City and Officer Good filed a motion for summary judgment contending that both the City and Officer Good were immune from liability pursuant to Chapter 2744 of the Ohio Revised Code. Brown opposed the motion. The City and Good also filed to a motion to strike the affidavit of Brown's accident reconstruction expert. The trial court denied both the motion for summary judgment and the motion to strike. The trial court concluded that issues of material fact existed with respect to whether Officer Good was responding to an emergency call and with respect to whether Officer Good's conduct was wanton or reckless. The City and Officer Good have appealed, raising two assignments of error for our review.

STANDARD OF REVIEW

{¶4} We begin by noting that "[w]hen a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at syllabus. We review a ruling on a motion for summary judgment de novo. See *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. "Pursuant to Civ.R. 56(C), summary judgment is appropriately rendered when '(1) [n]o genuine issue as to any material fact remains 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 to but 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.'" *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶5} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Dresher*, 75 Ohio St.3d at 293.

SOVEREIGN IMMUNITY

The City

{¶6} The City and Officer Good assert in their first assignment of error that the trial court erred in denying the City the benefit of immunity because it is immune pursuant to R.C. 2744.02(A) and none of the exceptions outlined in R.C. 2744.02(B) apply.

{¶7} In order to determine whether a political subdivision is immune from liability, we must engage in a three-tiered analysis. *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 28. The first tier sets forth the premise that:

> "[e]xcept 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 an act or omission of the political subdivision or an employee of the political subdivision in connection with a government or proprietary function." R.C. 2744.02(A)(1).

Pursuant to the second tier, we determine whether one of the five exceptions to immunity outlined in R.C. 2744.02(B) applies to hold the political subdivision liable for damages. *Cater*, 83 Ohio St.3d at 28. Lastly, immunity may be restored, and the political subdivision will not be liable, if one of the defenses enumerated in R.C. 2744.03(A) applies. Id.

{¶8} There is no dispute that the City is a political subdivision. Further, "[t]he provision or nonprovision of police * * * services or protection" is a governmental function, R.C. 2744.01(C)(2)(a), and therefore pursuant to R.C. 2744.02(A)(1), the City is entitled to immunity

for the provision of such services, absent an exception. See, also, *Weible v. City of Akron* (May 8, 1991), 9th Dist. No. 14878, at *1.

{¶9} We next examine whether one of the exceptions to immunity applies. The exception that Brown alleges applies is contained in R.C. 2744.02(B)(1)(a) which provides that:

> "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. The following are full defenses to that liability:
>
> "(a) A 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[.]"

There is no dispute that Officer Good was an employee of the City at the time of the accident, and that he was engaged within the scope of his employment and authority as a police officer. Thus, assuming that Officer Good's operation of the cruiser was negligent, the City is immune from liability only if (1) Officer Good was responding to an emergency call at the time of the collision; and (2) Officer Good's operation of the vehicle did not constitute willful or wanton misconduct. Id.

{¶10} The City asserts that it was entitled to summary judgment as Officer Good was on an emergency call and his operation of the vehicle did not amount to willful or wanton misconduct. Brown disagrees.

{¶11} R.C. 2744.01(A) defines an "[e]mergency call" as "a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer."

{¶12} In 2003, in *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, the Supreme Court of Ohio elaborated on the contours of what is meant by a "call to duty." In that case, police officers were in a high crime area when they observed two men exchange money. Id. at ¶3. Believing that they had witnessed a drug transaction, the officers began to follow the suspects and were struck by Colbert as they entered an intersection. Id. at ¶¶3-4. On appeal, Colbert argued that the officers were not on an emergency call because an emergency call must involve an inherently dangerous situation. Id. at ¶11.

{¶13} The Court concluded that "a 'call to duty' involves a situation to which a response by a peace officer is *required* by the officer's professional obligation." (Emphasis added.) Id. at ¶13. The Court went on to note that the phrase in R.C. 2744.01(A), "'including, but not limited to,' indicates that what follows is a *nonexhaustive* list of *examples.* Examples are typically intended to provide illustrations of a term defined in the statute, but do not act as limitations on that term." (Internal quotations and citations omitted. Emphasis in original.) Id. at ¶14. Thus, the high court concluded that "the phrase 'inherently dangerous situations' places no limitation on the term 'call to duty.'" Id. Applying the law to the facts of the case, the *Colbert* Court held that the "officers' investigation of the men suspected of dealing drugs was an 'emergency call' as that term is defined in R.C. 2744.01(A)." Id. at ¶16.

{¶14} In the instant matter, the trial court found that "there is a genuine issue of material fact as to whether the radio transmission Good responded to involved an inherently dangerous situation that demanded an immediate response." Under *Colbert*, however, whether an inherently dangerous situation is present is not determinative of whether a call is an emergency call. See *Colbert* at ¶14 ("[T]he phrase 'inherently dangerous situations' places no limitation on the term 'call to duty.'"). Nonetheless, we still conclude that the trial court was correct in

denying the City summary judgment as reasonable minds could reach different conclusions with respect to whether Officer Good was responding to an emergency call as defined by statute and case law, and specifically, with respect to whether Officer Good's response was "*required* by [his] professional obligation." (Emphasis added.) *Colbert* at ¶13.

{¶15} Officer Good was on duty at the time of the accident. He did not observe any potentially illegal conduct but instead heard a radio dispatch concerning a fight involving five people at the Studio City apartment complex. The police department frequently received calls from Studio City. Officer Good was not specifically dispatched to the scene and did not respond to the radio transmission. Instead, he unilaterally decided to respond to the dispatch by going to the scene. Officer Quior left the station at the same time as Officer Good and proceeded to the scene behind Officer Good in his own cruiser. Neither officer had his lights or sirens on except briefly to pass a vehicle in the road along the way. Officer Quior acknowledged that this was not a situation that "we would consider an emergency call." Officer Quior noted during his deposition that "[w]e were running normal speed, not lights and sirens. There were already *at least* two cars ahead of us going to the fight." (Emphasis added.) It is unclear from the record how many police officers actually responded to the scene; however, Captain Pozza's deposition testimony indicates that officers from eight police cruisers responded to the radio dispatch, including the two that were actually dispatched. Captain Pozza commented that it "[m]ust have been a slow night, everybody was going." The City and Officer Good conceded for purposes of summary judgment and appeal that Officer Good was traveling between 55 to 65 m.p.h. at the time of the collision.

{¶16} In light of the foregoing, we conclude reasonable minds could differ with respect to whether Officer Good was required by his professional obligation to respond to the call.

Viewing the facts in a light favorable to Brown, reasonable minds could conclude, even without the advantage of hindsight, that Officer Good's participation in the call was not required, or even necessary, given the number of cruisers that responded via radio to the dispatch and the fact that two cars were specifically dispatched ahead of Officers Good and Quior to the scene. Moreover, Officer Good did not even choose to inform dispatch that he was responding to the call, further calling into question whether he was required by a professional obligation to respond. See, e.g. *Hubbard v. Shaffer*, 8th Dist. No. 89870, 2008-Ohio-1940, at ¶¶26-30.

{¶17} Further, because we conclude reasonable minds could differ on whether Officer Good was responding to an emergency call, we need not address whether Officer Good's conduct was willful or wanton. See R.C. 2744.02(B)(1)(a) (requiring that in order to be immune, the officer must have been responding to an emergency call and his conduct must not have been willful or wanton). Thus, we cannot say the trial court erred in concluding summary judgment was not appropriate with respect to the City. We overrule the City's and Officer Good's first assignment of error.

Officer Good

{¶18} In the City's and Officer Good's second assignment of error, they contend that the trial court erred in denying Officer Good the benefit of immunity; they assert that Officer Good was immune from liability pursuant to R.C. 2744.03(A)(6) and that his actions were not "with malicious purpose, in bad faith, or in a wanton and reckless manner[.]" R.C. 2744.03(A)(6)(b).

{¶19} The three-tiered analysis of liability applicable to a political subdivision does not apply when determining whether an employee of the political subdivision will be liable for harm caused to an individual. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, at ¶17. Pursuant to R.C. 2744.03(A)(6), an employee of a political subdivision is immune from

liability unless an exception applies. In the instant matter, the relevant exception would strip Officer Good's immunity only if his "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]" R.C. 2744.03(A)(6)(b). Brown contends on appeal only that issues of fact exist concerning whether Officer Good's conduct was "wanton or reckless[,]" not whether he acted with malice or in bad faith. In the instant matter, the trial court concluded that Officer Good's speed was at issue along with "the extent of its excessiveness." The trial court went on to state that "depending on the speed of the vehicle, reasonable minds may conclude that Good should have employed the use of his overhead lights and sirens, and that his speed was excessive to a point of recklessness."

{¶20} This Court has stated that "reckless conduct refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that this risk is greater than that necessary to make the conduct negligent." (Internal quotations and citations omitted.) *Elsass v. Crockett*, 9th Dist. No. 22282, 2005-Ohio-2142, at ¶21. Whether conduct is reckless is generally a question to be resolved by a jury. Id. at ¶32.

{¶21} Viewing the facts of the case in a light most favorable to Brown, the non-moving party, we conclude that reasonable minds could come to more than one conclusion concerning whether Officer Good's actions were reckless. The collision occurred around 5 a.m. on a Saturday on Munroe Falls Avenue. The road was dry and there was no precipitation. The two-lane roadway was dark except for surrounding ambient lighting. The area where the collision occurred was primarily residential with some businesses located nearby. The speed limit on the road was 35 m.p.h. Prior to the collision, Officer Good heard a radio transmission about a fight involving approximately five people at the Studio City apartment complex. Police frequently

receive calls from Studio City. Officer Good was not dispatched to the scene and did not respond to the dispatch, however, he decided to proceed to the scene. Officer Quior followed behind Officer Good in a separate vehicle. Neither of the officers had his lights and sirens on, although they did turn on their headlights. Officer Good, Officer Quior and Captain Pozza all agreed in their respective deposition testimony that the situation at the apartment complex did not warrant that the officers "run hot." Captain Pozza defined the term "run hot" to mean "going in an expedited fashion to a location utilizing [] lights and siren." He agreed that it included going at a speed or in a manner not in compliance with traffic laws. Captain Pozza made conflicting statements in his deposition testimony; he first stated that when "running hot[,]" officers should utilize both lights and sirens, but then later stated that "one must still use prudent exercise, prudent judgment in utilizing the lights and siren and running hot. It is not dictated to the officer as to when it is permitted to use lights and siren, that's up to the discretion of the officer." However, then still later in the deposition, Captain Pozza testified "we instruct our officers in training that if you're running hot, quote, unquote, to a call, don't use just lights and no siren, use lights and siren because for you to be – for a police car to be considered an emergency vehicle by definition they better be utilizing both lights and siren." Officer Good testified that the use of lights and sirens was at the officer's discretion. Officer Quior further testified that the situation was "not what we would consider an emergency call."

{¶22} Officers Good and Quior both testified that they had to pass one vehicle en route to Studio City. Officer Good testified to turning on his overhead lights and passing the vehicle and Officer Quior testified to briefly turning on both his lights and siren to pass the vehicle. After passing the vehicle, Officer Quior testified that Officer Good turned off his lights and proceeded through a green light on Bailey Road. Officer Quior then saw a flash of a person, who

was later identified as Brown, coming from the left, running into the road in front of Officer Good's cruiser from a dark bushy area. Brown was not crossing in a cross-walk or at an intersection. Officer Quior saw Officer Good brake and swerve. Officer Good cannot say for certain whether he first saw Brown slightly before impact, or at impact. Officer Good also testified that Brown came from the left and in front of the driver's side of Officer Good's cruiser. Officer Good applied the brakes, but was unable to avoid hitting Brown. Officer Good believed he was traveling between 40 and 45 m.p.h. prior to striking Brown. Captain Pozza testified that Officer Anderson, who was called to the scene of the collision to investigate, estimated Officer Good's speed at 42 m.p.h. Charles Veppert, Brown's accident reconstruction expert, however, submitted an affidavit averring that based on his examination of the evidence, Officer Good was traveling between 55 to 68 m.p.h. at the time of the collision. He further opined that had Officer Good been traveling at 35 m.p.h., he would have been able to stop in time and avoid a collision with Brown.[1] Brown has no recollection of the accident or why he was crossing the street that morning. For purposes of summary judgment, the City and Officer Good concede that Officer Good was traveling between 55 m.p.h. and 65 m.p.h.

{¶23} Brown asserts that Officer Good's conduct violated R.C. 4511.24 because he failed to utilize his lights and sirens when exceeding the speed limit. R.C. 4511.24 provides that:

> "The prima-facie speed limitations set forth in section 4511.21 of the Revised Code do not apply to emergency vehicles or public safety vehicles when they are responding to emergency calls and are equipped with and displaying at least one

[1] Veppert also contended that, based on Brown's injuries and other evidence, Brown was crossing the street in the opposite direction of that testified to by Officers Quior and Good. The City and Officer Good filed a motion in the trial court to strike Veppert's affidavit asserting that it contradicted his prior deposition testimony in which he claimed he could not determine Brown's path of travel. The trial court denied the motion. The City and Officer Good again contend on appeal that Veppert's affidavit could not create a dispute of fact. Assuming, without deciding that Veppert's affidavit was contradictory, we have not considered the allegedly contradictory portions in determining that summary judgment was not appropriate.

> flashing, rotating, or oscillating light visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle and when the drivers thereof sound audible signals by bell, siren, or exhaust whistle. This section does not relieve the driver of an emergency vehicle or public safety vehicle from the duty to drive with due regard for the safety of all persons using the street or highway."

While other courts have concluded that "a breach of a statutory duty of care does not, without more, amount to reckless or wanton misconduct[,]" *Ybarra v. Vidra*, 6th Dist. No. WD-04-061, 2005-Ohio-2497, at ¶14, we determine that the facts of this case could lead reasonable minds to differ as to whether Officer Good's conduct was *more* than a breach of a statutory duty.

{¶24} Regardless of whether Officer Good was on an emergency call as defined by R.C. 2744.01(A), it is clear that Officer Good, Officer Quior, and Captain Pozza did not believe that the fight at Studio City warranted the officers to "run hot" and travel to the scene in an expedited fashion while disregarding traffic laws. Yet, the City and Officer Good concede that Officer Good was traveling somewhere between 55 to 65 m.p.h. through a residential and business area, on a two-lane road with a speed limit of 35 m.p.h. without using lights and sirens. Officer Quior testified that they were "running normal speed * * *. There were already at least two cars ahead of us going to the fight." He further stated that the call was "not what we would consider an emergency call." Reasonable minds could differ as to whether Officer Good's actions were reckless. A reasonable person could find that Officer Good's actions of traveling well in excess of the speed limit without utilizing lights and sirens when it was clear to Officer Good that it was not necessary to "run hot" amounted to a known and "unnecessary risk of physical harm and that this risk [was] greater than that necessary to make the conduct negligent." *Elsass* at ¶21. See, e.g. *Thompson v. Smith*, 11th Dist. No. 2008-T-0007, 2008-Ohio-5532, at ¶¶5, 46, 67 (affirming the denial of summary judgment in officer-pedestrian accident in which pedestrian failed to cross at cross-walk and concluding that material issues of fact remained concerning whether officer's

conduct was willful and wanton or reckless when speed of officer was disputed and officer was not utilizing lights and sirens). Accordingly, we overrule the City's and Officer Good's second assignment of error.

CONCLUSION

{¶25} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

JOHN T. MCLANDRICH and FRANK H. SCIALDONE, Attorneys at Law, for Appellant.

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