

[Cite as *Burkhart v. Dayton Bd. of Edn.*, 2010-Ohio-2496.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STEPHANIE BURKHART, et al.	:	
Plaintiffs-Appellees	:	C.A. CASE NO. 23739
v.	:	T.C. NO. 2007 CV 07556
DAYTON BOARD OF EDUCATION, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellants	:	
	:	

OPINION

Rendered on the 4th day of June, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Mikesha Vineyard, filed November 13, 2009. Vineyard and the Dayton Board of Education filed a joint motion for summary judgment against Plaintiffs Stephanie Burkhardt and her daughter, Andrea Snyder, and the trial court granted the motion as to the Plaintiffs' claims against the

Board, and it denied the motion as to the claims against Vineyard.

{¶ 2} The events giving rise to this matter began on Friday, September 9, 2005, when Vineyard, a bus driver for the City of Dayton public school system, informed Snyder, who was then a 12 year old student on Vineyard's bus route, that on the upcoming Monday she would begin picking Snyder up for school at an earlier time. On Monday, September 12th, Snyder missed her bus. After Vineyard completed her route, dropping her students off at Stivers Middle School, she returned to Snyder's stop and picked her up, and she also picked up another student who missed the bus. Vineyard then contacted another bus driver via radio, and she agreed to meet him at a K-Mart parking lot in Riverside, so that he could take Snyder and the other student to Stivers. This would allow Vineyard to begin her second route of the day for another school. As she exited Vineyard's bus, Snyder was injured, and Burkhart and Snyder asserted multiple tort claims against Vineyard.

{¶ 3} In ruling against Vineyard on her motion for summary judgment, the trial court determined as follows: "Here, there remain genuine issues of material fact as to what if anything occurred on the bus. Plaintiff Snyder alleges a verbal altercation occurred, she was pulled from her seat, and injured her wrist while exiting the bus. Conversely, Defendant Vineyard asserts that a verbal altercation never took place and she was already off the bus when Plaintiff Snyder exited. Thusly, [sic] there remains an issue of credibility, which is for the jury to decide. Further, the Court has no information to determine whether the alleged act of Defendant Vineyard's pulling Snyder out of the seat was within the scope of her employment."

{¶ 4} Vineyard asserts one assignment of error with subparts as follows:

{¶ 5} “THE TRIAL COURT ERRED WHEN IT DENIED MIKESHA VINEYARD, A DAYTON PUBLIC SCHOOL BUS DRIVER, THE BENEFIT OF POLITICAL SUBDIVISION IMMUNITY UNDER R.C. CHAPTER 2744.

{¶ 6} “A. Ms. Vineyard acted in the scope of her employment and official responsibilities ‘at all times,’ such that no genuine issue of material fact remains regarding the exception to political subdivision immunity in R.C. §2744.03(A)(6)(a).

{¶ 7} “B. The testimony and evidence in the record does not demonstrate Ms. Vineyard acted with a ‘malicious purpose, in bad faith, or in a wanton or reckless manner,’ so as to trigger the exception to political subdivision immunity in R.C. § 2744.03(A)(6)(b).”

{¶ 8} “Civ. R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. (Internal citations omitted). Our review of the trial court’s decision to grant summary judgment is de novo.” *Cohen v. G/C Contracting Corp.*, Greene App. No. 2006 CA 102, 2007-Ohio-4888.

{¶ 9} R.C. 2744.03 provides:

{¶ 10} “(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶ 11} * *

{¶ 12} “(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 331 4.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

{¶ 13} “(a) The employee’s acts or omissions were manifestly outside the scope of the employee’s employment or official responsibilities;

{¶ 14} “(b) The employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; ***”

{¶ 15} An employee “acts within the scope of his duties if his actions are ‘initiated, in part, to further promote the master’s business.’ *Jackson v. McDonald* (2001), 144 Ohio App. 3d 301 * * * . Even if an employee’s actions are in retrospect wrongful and unnecessary, improper, unjustified, or excessive, this ‘does not automatically take the act manifestly outside the scope of employment.’ *Id.* Indeed, ‘[i]t is only where the acts of employees are motivated by actual malice or other [situations] giving rise to punitive damages that their conduct may be outside the scope of * * * employment * * * The act must be so divergent that it severs the employer-employee relationship.’” *Moffitt v. Litteral*, Montgomery App. No. 19154, 2002-Ohio-4973, ¶ 94.

{¶ 16} “For purposes of R.C. 2744.03, we have interpreted malice, bad faith, and wanton or reckless as follows:

{¶ 17} “‘Malice’ is the intention or design to harm another by inflicting serious injury, without excuse or justification, by an act which in and of itself may not be unlawful.

* * *

{¶ 18} “Bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.’

{¶ 19} “Wanton misconduct charged against a defendant implies a disposition to perversity and a failure to exercise any care toward those to whom a duty of care was owing when the probability that harm would result from such failure was great and such probability was actually known, or in the circumstances ought to have been known, to the defendant.’

{¶ 20} “The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of * * * harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” (Citations omitted.) *Garrison v. Bobbitt* (1999), 134 Ohio App.3d 373, 384.

{¶ 21} According to Snyder’s deposition testimony, she and the other students “were getting to school later than what we should be getting to school, * * * . And so, [Vineyard] decided that she was going to change the bus time without notifying anyone.

{¶ 22} “So I went home and told my mom that our bus time had changed and it was already a good time ahead of what the original bus stop time was supposed to be. And my mom was angry. She called transportation, they said they had no record of any changed time at all.” Snyder stated, after she missed the bus, “we called transportation and they said

that they would send the same bus around to pick me up after she dropped the other kids off.” When Vineyard arrived, “she started yelling at me, asking me questions like she shouldn’t have to do this and why did she have to come pick me up again, why wasn’t I just at the bus stop?

{¶ 23} “And I tried to explain to her that I was on my way to the bus stop and she was even earlier than the time that she had told me that Friday. She tried to say that she wasn’t * * *.”

{¶ 24} After Vineyard pulled away, Snyder testified, “[w]e got on the highway and after a little while I noticed that we weren’t going the normal way that we would go to school. * * * And she was having another conversation with another bus driver over the intercom, the radio. * * * And they were trying to arrange a spot where they could meet.

{¶ 25} “And we pulled into a K-Mart parking lot and that bus was already waiting there for us. And she told us that we were going to get on another bus and that bus was going to take us to Stivers.

{¶ 26} “And I asked her * * *if my mom knew that I was getting on another bus. And she told me that my mom didn’t need to know. * * * [S]he said it rudely. And I told her that there was no need to be rude with me. And she said that rude would be leaving me on the bus until 9:00.

{¶ 27} “And I told her that I wasn’t going to get off the bus. And by this time the boy was already walking off. And she grabbed my arm and pulled me from the seat. She got behind me and pushed me with her body towards the door.” According to Snyder, Vineyard’s stomach “was touching my back,” and Vineyard “had her hands on the seats as

she went by (indicating).”

{¶ 28} Snyder testified, “when I got to the stairs, she tried to force me down the stairs. And as I was walking, I felt like I was going to fall. So, I tried to grab for the handlebars to steady myself. And I ended up smacking my wrist on the bars when I missed. And I didn’t fall. I made sure that I didn’t fall as I got off the bus. And she put me on the other bus * * * .” Snyder stated that she did not tell Vineyard that she thought she was going to lose her balance when she reached the top of the stairs. According to Snyder, Vineyard “was going to get off the bus too, so she was still behind me. I hesitated, just because I felt like I was going to fall down the steps. They were bigger steps. And I tried to stop myself, but she was right behind me, so she ran into me from behind.”

{¶ 29} According to Vineyard’s deposition testimony, the change in pick up time was made at the direction of “Mr. Redd” because Vineyard’s students were arriving too late on her second route of the day, and the principal from that school had complained. She stated that she orally advised Snyder that her pick up time would change from 6:42 a.m. to 6:28 a.m. After Snyder missed the bus on Monday, and after Vineyard dropped the other students at Stivers, her dispatcher “was calling over the radio for someone to go and pick [Snyder] up. Nobody responded, so I in turn told dispatch since that was my student and my stop, I would return to the stop.” Vineyard denied being angry about having to pick up Snyder, and she denied that she yelled at Snyder when she got on the bus.

{¶ 30} Vineyard testified that she clarified with her dispatcher that it was permissible to transfer the students to a second bus, and when Vineyard’s bus arrived at the K-Mart parking lot, she stated that Snyder asked her if Burkhart knew of the transfer. Vineyard

stated that she “told her that her mom didn’t have to be aware of the situation. That she would just get on the other bus and the other bus would take her to school.” According to Vineyard, she “exited the bus first and was talking to the bus driver, Jack Jones. I told him that they were coming off the bus. They got off my bus and got on his bus and that was it. I proceeded on back to my bus to do my route.” Vineyard denied that Snyder refused to get off the bus, and she denied grabbing, pushing or otherwise forcing Snyder off of the bus. According to Vineyard, she “never touched her at all.” Vineyard did not see Snyder stumble or try to catch herself.

{¶ 31} Attached to Vineyard’s brief and authenticated by the affidavit of John P. Concannon, Law Director for the Dayton Public Schools Board of Education, is the Dayton Public Schools Policy Manual that was in force and effect at the time of the incident herein. The manual provides in part that students “will: * * * 5. Obey the driver promptly and respectfully and realize that he/she has an important responsibility and that it is everyone’s duty to help.” The manual further provides: “When discipline problems with individual students arise the following procedure should be applied: 1. If possible, the driver should handle the problem.”

{¶ 32} Having reviewed the competent summary judgment evidence before us, we conclude that Vineyard’s actions, if construed most strongly in favor of Snyder and Burkhart, were not manifestly outside the scope of her employment. Vineyard is responsible for getting her students on and off their bus and to school on time. She had returned to Snyder’s stop to pick her up, and her conduct upon arrival in the K-Mart parking lot was initiated to get Snyder to school in a timely manner, after Snyder refused to transfer to the

waiting bus. There is no evidence to suggest that Vineyard acted to intentionally inflict serious injury to Snyder. Snyder's testimony establishes that Vineyard explained that the second bus would take Snyder to school, and when she refused to exit the bus as instructed by Vineyard, Vineyard pulled her to her feet, and pushed her down the aisle with her body, with her hands on the seats and not on Snyder. Snyder did not tell Vineyard that she feared falling when they reached the steps, and when Snyder stopped moving forward, or "hesitated," Vineyard "ran into" Snyder from behind. Even if Vineyard's conduct "in retrospect [was] wrongful and unnecessary, improper, unjustified, or excessive," there is no evidence that she intended to seriously injure Snyder. Construing the facts in Snyder's and Burkhart's favor, we conclude that Vineyard's acts were not manifestly outside the scope of her employment or official responsibilities, and that no genuine issue of material fact exists for the jury to determine on that issue.

{¶ 33} While close, we find a genuine issue of material fact does exist as to whether Vineyard's conduct in removing Snyder from the bus rose to the level of recklessness. According to Snyder, Vineyard was angry at the time, "grabbed" her arm, pushed her down the aisle, and "ran into" her at the top of the stairs, forcing her off the bus and causing an injury. It is for a jury to decide whether Vineyard's conduct created an unreasonable risk of harm to Snyder, and whether the risk was substantially greater than that which is necessary to constitute negligent conduct, such that Vineyard is not entitled to governmental immunity pursuant to R.C. 2744.03(A)(6).

{¶ 34} Accordingly, the judgment of the trial court denying Vineyard's motion for summary judgment is affirmed to the extent that a genuine issue of material fact exists under

the exception provided for in R.C. 2744.03(A)(6).

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BROGAN, J. and GRADY, J., concur.

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