

IN THE SUPREME COURT OF OHIO

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| DR. TOBIAS R. REID, PH. D., |) CASE NO.: 2016-1122 |
| |) |
| Plaintiff-Appellee, |) On Appeal from the Cuyahoga County |
| |) Court of Appeals, Eighth Appellate District |
| v. |) |
| CITY OF CLEVELAND POLICE |) Court of Appeals Case Number CA-15- |
| DEPARTMENT, <i>et al.</i>, |) 103781 |
| |) |
| Defendants- Appellants. |) |

**REPLY BRIEF OF APPELLANTS CITY OF CLEVELAND POLICE DEPARTMENT,
SERGEANT KEITH LARSON AND SERGEANT DALE MORAN**

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Appellants City of Cleveland Police Department, Sergeant Keith Larson and Sergeant Dale Moran now offer this reply in support of their merit brief.

I. APPELLEE'S RECITATION OF THE ELEMENTS OF A MOTION FOR SUMMARY JUDGMENT FAILS TO OVERCOME HIS BURDEN TO OFFER THE NECESSARY FACTUAL BASIS TO SUPPORT A CLAIM.

Appellee devotes his entire brief reviewing the legal standards for summary judgment and referencing a three- tiered analysis for determining whether a political subdivision is immune for actions connected with a government function. Appellee, however, fails to offer the necessary factual basis to support a claim against Appellants. Civ. R. 56(e). Specifically, Appellee's Merit Brief confirms that Appellee failed to assert claims against proper entities. The City of Cleveland Police Department is not an entity that is capable of being sued. *Richardson v. Grady*, 8th Dist. Nos. 77381, 77403, 2000 WL1847588 (December 18, 2000). In addition, Appellee does not identify any factual basis to support a finding that Sgt. Larson or Sgt. Moran were involved with impounding or disposing of Appellee's vehicle.

Moreover, even if Appellee had sued the proper person or entity, the three-tiered analysis clearly determines that Appellee's claims are barred by sovereign immunity. In addition, the Eighth District Court of Appeals' reference to Appellee's criminal conviction is not determinative of the issues in this case because: (1) the return of the SUV was not considered during the plea hearing in the criminal court, and (2) the criminal court failed to make any determination as to whether the vehicle was unclaimed or forfeited.

After a review of the evidence, Appellee does not and cannot dispute that the disposition of his vehicle, pursuant to O.R.C. 4513.61, was proper as a matter of law. *State v. Reid*, 2015-Ohio-4185, ¶ 11 and O.R.C. § 4513.61(A)(1). Consequently, the decision of the appellate court should be reversed and the decision of the trial court should be reinstated.

II. APPELLEE FAILS TO OFFER NECESSARY FACTS TO SUPPORT HIS CLAIM FOR CONVERSION.

To prove conversion, Appellee must show a wrongful or unauthorized act of control or dominion over his property. *Suru v. City of Cleveland*, 8th Dist. No. 73639, 1999 WL126141, at 4 (Feb. 25, 1999) (citing *Taylor v. First National Bank of Cincinnati*, 31 Ohio App.3d 49 (1st Dist. 1986); *Ohio Tel. Equip. Sales, Inc. v. Hadler Realty Co.*, 24 Ohio App.3d 91 (10th Dist. 1985)). Here, Appellee concedes that his vehicle was properly seized and impounded as the result of his arrest for breaking and entering. Appellee's Merit Brief, p. 1. See also, *State v. Taylor*, 114 Ohio App. 3d 416, 422 (2nd Dist. 1996).

In addition, Appellee does not offer any evidence to support a finding that the vehicle was wrongfully disposed of. Pursuant to O.R.C. § 4513.61, the chief of police may declare a motor vehicle that has come into his possession to be a nuisance and may dispose of the vehicle if: (1) he provides notice that the vehicle is being declared a nuisance, and (2) if the vehicle is not claimed within ten days from the date of mailing notice. O.R.C. § 4513.61(C) (1) and (D). Appellee does not dispute that O.R.C. 4513.61 provides the statutory authority to dispose of vehicles or that the City followed the statutory requirements. Appellants' Merit Brief, p. 9. Because the statutory requirements of O.R.C. § 4513.61 were met, disposing of the vehicle was proper.

III. THE SERGEANTS ARE IMMUNE FROM LIABILITY.

Appellee's conversion claim also fails as matter of law because Sgt. Larson and Sgt. Morgan are entitled to statutory immunity under O.R.C. § 2744.1. Pursuant to O.R.C. 2744.03(A)(6), an employee of political subdivision is immune from liability *unless* one of the following applies:

- (a) The employee acts or omissions were manifestly outside the scope of the employee employment or official responsibilities;
- (b) The employee acts or omissions were with malicious purpose, in bad faith, or in wanton or reckless manner; and when
- (c) Civil liability is expressly imposed upon the employee by section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes responsibility or mandatory duty upon an employee, because that section provides for criminal penalty, because of general authorization in that section that an employee may sue and be sued, or because the section uses the term shall in provision pertaining to an employee.

O.R.C. § 2744.03(A) (6) (a)-(c). See also, *Meredith v. Cleveland Hts. Police Dept.*, 8th Dist. No. 93436, 2010 WL2206405, 2010-Ohio-2472, at 28.

In this case, there isn't any evidence in the record to establish that Sgt. Larson or Sgt. Moran had any involvement in the impounding and subsequent dispositive of the vehicle. Appellants' Merit Brief, pp. 10-11. In addition, there is nothing in the record to support a finding that any of the actions taken by Sgt. Larson and Sgt. Moran in the underlying case rose to the level of willful, wanton, or reckless conduct, or demonstrated bad faith and malicious conduct.

IV. THE CLEVELAND POLICE DEPARTMENT DOES NOT HAVE THE LEGAL CAPACITY TO BE SUED.

Similarly, the Cleveland Police Department is not a proper party because a department of the City of Cleveland does not have the legal capacity to sue or be sued in court of law. *Richardson v. Grady*, 8th Dist. Nos. 77381, 77403, 2000 WL1847588 (December 18, 2000). Nevertheless, even if Appellee had named a proper party, Appellee's claim would still fail.

O.R.C. Chapter 2744 establishes a three-tiered analysis for determining whether a political subdivision may be immune from liability. As a general rule, political subdivisions are immune from civil liability incurred in performing a governmental or proprietary function. Specifically, O.R.C. 2744.02 (A)(1) provides that 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.ö

Here, the City would unquestionably be a political subdivision entitled to immunity under O.R.C. 2744.02(A). See O.R.C. 2744.01(F) (defining political subdivision to include, e.g., municipal corporations). öGovernmental functionsö include, among other things, ö[t]he provision or nonprovision of police * * * services or protection.ö O.R.C. 2744.01 (C)(2)(a). Furthermore, police power to impound a vehicle constitutes a governmental function. *Pavlik v. Cleveland*, Cuyahoga App. No. 92176, 2009-Ohio-3073, ¶ 18; *Globe Am. Cas. Co. v. Cleveland* (1994), 99 Ohio App.3d 674, 678, 651 N.E.2d 1015. *Swanson v. Cleveland*, Cuyahoga App. No. 89490, 2008-Ohio-1254(The police actions of seizing, impounding, and destroying the vehicle were strictly governmental functions. *Swanson*, at ¶ 15). Here, as in *Swanson*, Appellee concedes that the vehicle was impounded by the police in conjunction with the arrest of the driver, and therefore this seizure occurred during the course of a governmental function. Appellee's Merit Brief, p. 1. Therefore, the City was immune from liability under O.R.C. 2744.02 (A)(1).¹

¹ O.R.C. 2744.02(B) further provides five exceptions to the general grant of immunity under subsection (A)(1), the first four of these exceptions plainly have no application to the facts of this case. Although not argued by Appellee, the fifth exception allows political subdivisions to be held liable where civil liability is expressly imposed by a section of the Revised Code. While O.R.C. 4513.61 imposes duties on the police to notify the owners of vehicles seized by the police and to give them the opportunity to reclaim the vehicles, this statutory duty is not the equivalent of statutory civil liability. See O.R.C. 2744.02(B)(5) (ö[c]ivil liability shall not be construed to exist under another section of the Revised Code merely because that section

V. APPELLEE'S CRIMINAL CASE DID NOT DETERMINE THE CENTRAL ISSUE IN THIS CASE.

Finally, Appellee's Merit Brief rests on his mistaken belief that the Eighth District Court determined that he had a right to be compensated for his vehicle. *Reid v. Cleveland Police Department*, 2016-Ohio-3466. However, a cursory review of the criminal docket entry reveals this is simply not the case. First, there is nothing in the record to support a finding that Appellee's vehicle was mentioned during the criminal case. See, *State v. Reid*, 2015-Ohio-4185, p.11. Consequently, the *law of the case* doctrine⁵ cannot apply. *State ex rel. Baker v. State Personnel Bd. of Review*, 85 Ohio St.3d 640 (1999). Second, the criminal court docket entry clearly left the question whether Appellee's SUV was forfeited or unclaimed unanswered. Here, Appellants conclusively established that Appellee's SUV was unclaimed and properly disposed of pursuant to O.R.C. §4513.61(A)(1). Appellee does not offer any evidence to oppose these facts. Consequently, Appellants cannot be liable for Appellee's claim as a matter of law.

imposes a responsibility or mandatory duty upon a political subdivision⁵). Consequently, none of the exceptions to immunity under O.R.C. 2744.02(B) apply to this case.

VI. CONCLUSION

For all the above reasons, the Cleveland Police Department, Sergeant Keith Larson and Sergeant Dale Moran respectfully requests that the judgment of the court of appeals be reversed and the judgment of the court of common pleas be reinstated.

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Appellants Cleveland Police Department, Sergeant Keith Larson and Sergeant Dale Moran was sent by regular U.S. mail, postage prepaid to Tobias R. Reid, 681 Clarkson Avenue #6, New York, New York 11203, this 24th day of April, 2017.

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