[Cite as *Mencini v. Greater Cleveland Regional Transit Auth.*, 2023-Ohio-2299.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ANTHONY MENCINI, ET AL.,	:	
Plaintiffs-Appellees,	:	No. 112032
v.	:	
GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: July 6, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-951009

Appearances:

Kalish Law Firm, Alexander B. Reich, and D. Scott Kalish, *for appellees*.

Janet E. Burney, General Counsel — Deputy General Manager for Legal Affairs, and Brian R. Gutkowski, Associate Counsel II, *for appellants*.

MICHELLE J. SHEEHAN, P.J.:

{¶ 1} Defendants-appellants Greater Cleveland Regional Transit Authority

("RTA") and its employee John Tyson (collectively "appellants") appeal from a judgment of the Cuyahoga County Court of Common Pleas that denied appellants' motion for summary judgment based on political subdivision immunity. Plaintiffs-appellees Anthony Mencini and his wife Samantha Mencini (collectively "appellees" or "Mencinis") filed a complaint against appellants, claiming they were injured in a collision between their vehicle and an RTA bus operated by Tyson on Community College Avenue. This stretch of Community College Avenue has a lane for vehicular travel on the left side of the road and a bike lane on the right side. Both vehicles had been traveling eastbound in the left-side lane. When Anthony attempted to turn right into a driveway on the right side of the road, he collided with the RTA bus, which had been traveling behind the Mencinis' vehicle but moved to the bike lane before the collision.

{¶ 2} As we explain in the following, RTA is entitled to immunity unless Tyson acted negligently in operating the bus and Tyson is entitled to immunity unless he acted in a wanton or reckless manner. Appellants claim that Anthony was solely at fault for causing the collision because he failed to activate his right-turn signal when he attempted to turn right, and also violated various other traffic statutes and ordinances. Appellees argue that triable issues of fact exist regarding whether Tyson was negligent in failing to yield and improperly passing their vehicle on the right. Having reviewed the record and applicable law, we affirm the trial court's decision denying summary judgment regarding RTA but reverse its decision regarding Tyson.

Appellants' Motion for Summary Judgment and Appellees' Opposition

{¶ 3} While Anthony was not cited for any traffic violations, appellants claim in their motion for summary judgment that Anthony violated (1) R.C. 4511.139, which requires a driver to activate a turn signal at least one hundred feet before commencing a turn; and (2) sections 431.08(b) and 431.11(a) of Cleveland Codified Ordinances (C.C.O.), which appellants argue require a motorist to turn into a private driveway such as Tri-C Metro's parking lot from the bike lane rather than from the left-hand lane. Appellants also assert that a bus driver is permitted to travel in a bike lane to drop off passengers and Tyson was in the bike lane to drop off a passenger. Appellants in addition argue that Anthony violated R.C. 4511.21(A), the assured-clear-distance statute, and that Tyson was permitted to pass on the right of the Mencinis' vehicle pursuant to R.C. 4511.28, which governs the overtaking and passing upon the right of another vehicle. Appellants additionally argue that because a passenger had requested to be dropped off, Tyson's bus had the right of way and a vehicle with the right of way has a "preferential status" with a right to proceed uninterruptedly.

{¶ 4} Appellants attached to its motion an expert report and an affidavit from Hank Lipian of Introtech. Under the heading of "CRASH REPORT," the expert referenced an incident report prepared by the "Greater Cleveland Regional Transit Authority Police Agency" and noted that in the report, the incident was listed as a two-vehicle crash with the bus being the vehicle in error. The expert also noted that the police investigator coded the contributing circumstances for the incident as the

bus's "Improper Passing." The expert, however, concluded that Anthony alone caused the collusion by (1) failing to signal the right turn, (2) failing to turn from the bike lane into the Tri-C parking lot driveway, and (3) turning his vehicle into the bus without paying attention to his surroundings.

{¶ 5} Appellees opposed appellants' motion for summary judgment, asserting that appellants are not entitled to summary judgment because there is a question of fact regarding whether Tyson was negligent in his operation of the bus. They assert that that RTA's own expert acknowledged that RTA's own investigator found the "contributing circumstances" for the collision to be the bus driver's improper passing.

{¶ 6} Appellees also argue that the videos capturing the incident from several cameras in the bus (attached as an exhibit to appellants' motion for summary judgment) show Tyson was negligent. Appellees allege the video footage depict the following: moments before the incident, the Mencinis' vehicle was traveling in the only lane for vehicular traffic and Tyson was driving directly behind him in that lane; when Anthony began to slow down to turn right into the driveway, Tyson, without braking, immediately began merging into the bike lane and then collided with the Mencinis' vehicle when it turned right.

{¶ 7} Appellees attached to their brief opposing the summary judgment motion Tyson's deposition testimony and several exhibits introduced during his deposition. During his deposition, Tyson was asked to read his hand-written statement in the "Traffic Crash Witness Statement" provided by RTA to the Ohio

Department of Public Safety regarding the incident (exhibit 2). The statement reads, "I was heading east on Community College attempting to make way around vehicle and was hit on the front left side by another vehicle." The report indicated the posted speed limit was 35 mph and it contained Tyson's statement that he was traveling 30 mph.

{¶ 8} During Tyson's testimony, appellees also introduced a "Greater Cleveland Reginal Transit Police Incident Report # 19-31407" (exhibit 4). The incident report was provided by appellants in discovery and prepared by RTA Police Officer Anderson Campbell. (It is unclear from the record whether this incident report is the report referenced in RTA's expert report.) Tyson was asked about the following statement in the incident report: "I [Campbell] spoke with the operator of the coach (unit #1), John Tyson, who advised that he thought that unit #[2] was slowing to turn left and he [Tyson] passed the unit on the right side." Tyson acknowledged that "that's how it reads" but denied he ever stated that he thought the Mencinis' vehicle was slowing to turn left.

{¶ 9} Tyson testified that the other driver Anthony Mencini was at fault for the incident because he failed to signal for a right turn and impeded the flow of traffic, and that he was not expecting Anthony to turn right. Tyson acknowledged that section 406.5 of RTA Bus Operator Handbook (exhibit 3), which concerns designated bike lanes, states "[d]o not operate within the designated bike lane except: when making right turns at designated locations or when making a passenger stop at a designated passenger stop location." Tyson testified that he was

not making a passenger stop at the time, but he was "setting up to make the passenger stop." Tyson also acknowledged in his deposition that he was issued a "First Written Reminder" and placed on probation after the incident.

{¶ 10} The trial court denied appellants' motion for summary judgment. On appeal, RTA raises the following three assignments of error for our review:

> I. The trial court erred by expressly considering "all of the evidence" including unauthenticated hearsay materials specifically objected to by appellants.
>
> II. The trial court erred in denying operator Tyson's motion for summary judgment because he is immune under R.C. 2744.03(A)(6).
>
> III. The trial court erred in denying GCRTA's motion for summary judgment because it is a political subdivision and immune under R.C. 2744.02.

{¶ 11} For ease of discussion, we will address the assignments of order out of order.

Final Appealable Order

{¶ 12} As an initial matter, we note that while an order denying a motion for summary judgment is generally not a final appealable order, an order denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability is a final order. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 27, citing R.C. 2744.02(C). While we lack appellate jurisdiction to consider the merits of this dispute, we have the jurisdiction to consider the question of whether RTA and its employee are entitled to immunity. *Alpha Plaza Invests., Ltd. v. Cleveland*, 2018-Ohio-486, 105 N.E.3d 680, ¶ 19 (8th

Dist.) ("An appeal from the denial of a motion seeking judgment against a plaintiff's claim based on sovereign immunity is limited to review of only the trial court's decision denying the political subdivision the benefit of immunity.").

Summary Judgment Standard

{¶ 13} Civ.R. 56(C) states that summary judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

{¶ 14} Summary judgment is appropriate where (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his or her favor. *Harless v. Willis Day Warehousing Co., Inc.,* 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). We review a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

Political Subdivision Liability

{¶ 15} RTA is a political subdivision created pursuant to R.C. 306.31 et seq. *Parsons v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 93523, 2010-Ohio-266, ¶ 7. The functions of political subdivisions are either governmental or proprietary. R.C. 2744.02(A)(1). Pursuant to R.C. 2744.01(G)(2),

a proprietary function includes the "establishment, maintenance, and operation of * * * a railroad, a busline or other transit company * * *." R.C. 2744.02(G)(2)(c). In connection with either governmental or proprietary function, a political subdivision is generally not liable for any injury, death, or loss of property caused by an act or omission of the political subdivision or an employee of the political subdivision. R.C. 2744.02(A)(1).

{¶ 16} That immunity is not absolute, however. A political subdivision is liable if any of the five exceptions enumerated in R.C. 2744.02(B) applies. Of the five exceptions, the exception set forth in division (B)(2) is applicable in this case: a political subdivision is liable for "the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." As this case involves a political subdivision engaged in a proprietary function, RTA would be immune from liability unless Tyson negligently operated the bus. In denying RTA's motion for summary judgment, the trial court found the existence of genuine issues of material fact precluding summary judgment.

Whether RTA Was Immune

{¶ 17} The question of whether RTA is immune turns on whether Tyson operated the bus in a negligent manner. If there is an issue of material fact regarding whether Tyson acted negligently, then RTA's motion for summary judgment grounded on immunity should be denied. Under the third assignment or error, appellants argue the trial court erred in denying RTA's motion for summary

judgment because Anthony was solely at fault for the collision and Tyson did not act negligently in his operation of the bus.

{¶ 18} Our review of the video footage capturing the incident shows that in the pertinent stretch of Community College Avenue, the curb lane is designated as a "bike lane." At the time mark of 8:15:12, the RTA bus is seen proceeding through the intersection of East 22nd Street and Community College Avenue. At 8:15:28, the bus pulled to the curb lane to drop off a passenger. At 8:15:45, the Mencinis' vehicle is seen driving in the left-side lane, just ahead of the bus. At 8:15:50, a bus passenger signaled to request a stop. At 8:15:58, the bus was travelling directly behind the Mencinis' vehicle in the left-side lane. At 8:16:00, plaintiffs' brake lights were illuminated, and the vehicle slowed down; the bus merged into the bike lane and moments later, the front passenger side of the vehicle collided with the front driver's side of the bus as the vehicle attempted to turn right. Anthony testified in his deposition that he turned on the right-turn signal before attempting to make the right turn into the driveway. While the video reflects his vehicle's brake lights were illuminated, it is unclear if a right-turn signal was on.

{¶ 19} It appears from our review of the video footage that Tyson's bus was traveling behind the Mencinis' vehicle in the left-hand lane of the road but, when the Mencinis' vehicle slowed down, Tyson merged into the bike lane, seemingly attempting to pass the Mencinis' vehicle on the right. Tyson testified in his deposition that he merged to the bike lane at that moment because he was "setting up" to drop off a passenger. While the video footage shows a passenger had

requested a drop-off, Tyson testified that he was unsure of the distance from the entrance to Tri-C Metro's driveway to the bus stop. Furthermore, in a statement made after the crash, Tyson stated that he "was attempting to make way around [the Mencinis'] vehicle."

{¶ 20} Even if Anthony operated his vehicle unlawfully in failing to activate his right-turn signal before making a right turn, that fact does not mean that Tyson could not be found to have operated his bus negligently. *Johnson v. Greater Cleveland Regional Transit Auth.*, 2021-Ohio-938, 171 N.E.3d 422, ¶ 95 (8th Dist.) (this court affirmed the trial court's denial of RTA's motion for summary judgment based on immunity, explaining that even if plaintiff motorcycle driver violated the traffic law, that fact did not mean RTA's driver owed no duty of care or that the driver could not be found negligent).

{¶ 21} Appellants contend additionally that Anthony violated various other traffic statutes and ordinances and therefore he was solely at fault for the incident. This court has observed that in cases involving an alleged traffic law violation, "[w]here conflicting evidence is presented as to any of the elements necessary to establish a violation of the statute, a jury question is created." *Yarmoshik v. Parrino*, 8th Dist. Cuyahoga No. 87837, 2007-Ohio-79, ¶ 31. One of the traffic statutes appellants claim Anthony to have violated as proof of his negligence is the assured-clear-distance statute, but as this court in *Yarmoshik* further commented, "'[e]specially in cases involving the assured clear distance statute, which, by definition, require evaluation of the conduct of the driver in light of the facts

surrounding the collision, the judgment of a jury is more likely to achieve a fair result than is a judge made rule of law.'" (Citations omitted.) *Id.*, quoting *Ziegler v. Wendel Poultry Svcs., Inc.*, 67 Ohio St.3d 10, 12-13, 615 N.E.2d 1022 (1993). This assignment of error concerns only the question of whether RTA is entitled to immunity and that issue turns on whether its employee Tyson acted negligently. Regardless of whether Anthony violated the traffic law, a genuine issue of material fact would still exist as to whether Tyson acted negligently under the circumstances. *Johnson* at ¶ 88.

{¶ 22} Appellants also claim that an expert report is required to establish causation when the injuries were "soft-tissue" injuries and argue that, because there was no expert report in the record, there is no issue of fact regarding whether the collision proximately caused the injuries.[1]

{¶ 23} We recognize that, before R.C. 2744.02(B)(2) removes a political subdivision's immunity, the plaintiff must establish the elements required to sustain a negligence action: duty, breach, proximate cause, and damages. *Pierce v. City of Gallipolis*, 2015-Ohio-2995, 39 N.E.3d 858, ¶ 20 (4th Dist.), citing *Gabel v. Miami E. School Bd.*, 169 Ohio App.3d 609, 2006-Ohio-5963, 864 N.E.2d 102, ¶¶ 39-40 (2nd Dist.). However, the cases cited by appellants for the claim that an expert

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[1] The record reflects that Anthony testified he suffered constant pulsing lower back pain from the collision and Samantha testified she suffered pain in her neck and back. They submitted their medical records as well as an expert opinion from Dr. DeMicco, who opined that their injuries were a result of the incident. The trial court, however, struck the expert report for being untimely.

opinion is necessary to prove soft-tissue injuries were not decided in the context of summary judgment and are therefore not pertinent here.[2]

{¶ 24} In a notice of supplemental authority, appellants cite *Pietrangelo v. Hudson*, 8th Dist. Cuyahoga No. 111805, 2023-Ohio-820, where this court affirmed the trial court's denial of the *plaintiff's* motion for summary judgment. This court stated that soft-tissue injuries are not "so apparent as to be a matter of common knowledge" and therefore expert medical testimony would be required to establish causation. Without a medical expert's opinion, the plaintiff failed to demonstrate that *no* genuine issue of material fact existed for trial regarding causation. *Id.* at ¶ 25-26. This reasoning was made in the context of the plaintiff's acknowledgment that he had a pre-existing condition of neck and back injuries. This court explained that because the plaintiff failed to provide expert testimony and treatment records "to clarify the history of the prior injuries," he failed to meet the burden of demonstrating that no genuine issue of material fact exists regarding causation. *Id.* at ¶ 24 and 26. A review of Anthony's deposition reflects his testimony that he did not have a prior history regarding the constant back pain he experienced after the incident. Moreover, while this court determined in *Pietrangelo* that an expert

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[2] Appellants cite the following four cases: *Davie v. Nationwide Mut. Ins.* Co., 8th Dist. Cuyahoga No. 101285, 2015-Ohio-104 (trial); *Dolly v. Daugherty*, 8th Dist. Cuyahoga No. 40021, 1979 Ohio App. LEXIS 11205 (Nov. 15, 1979) (workers' compensation); *Boewe v. Ford Motor Co.*, 94 Ohio App.3d 270, 640 N.E.2d 850 (8th Dist.1992) (workers' compensation); and *Davis v. D&T Limousine Serv.*, 8th Dist. Cuyahoga Nos. 65683, 66027, 1994 Ohio App. LEXIS 2615 (June 16, 1994) (workers' compensation).

opinion was required for the plaintiff to demonstrate no issue of fact existed for trial, that holding would be inapplicable to this case, where the defendants claim that they have demonstrated no issue of fact exists because the plaintiffs do not have an expert report. *Pietrangelo* does not apply here.

{¶ 25} Having reviewed the record, we are unable to conclude that there are no genuine issues of material fact and reasonable minds cannot but conclude Anthony was solely at fault for the incident and Tyson did not act negligently in his operation of the bus. Tyson's fault, lack of fault, or relative fault in the collision is a highly fact-specific inquiry given the circumstances of this case. Accordingly, the trial court appropriately denied RTA's motion for summary judgment. We overrule the third assignment of error with the caveat that our resolution of the immunity question is not to be construed to reflect on the ultimate merits of the case, which will ultimately be determined by the jury.

Employee Liability

{¶ 26} Under the second assignment of error, appellants claim the trial court erred in denying Tyson's motion for summary judgment. Appellants claim that Tyson, as a political subdivision employee, is immune under R.C. 2744.03(A)(6).

{¶ 27} R.C. 2744.03(A)(6) is applicable to the issue of whether an employee of a political subdivision is immune from liability. *A.J.R. v. Lute*, 163 Ohio St.3d 172, 2020-Ohio-5168, 168 N.E.3d 1157, ¶ 12. Pursuant to R.C. 2744.02(A)(6)(b), an employee of a political subdivision such as Tyson is entitled to immunity under

R.C. Chapter 2744 unless his "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 28} There was no allegation that Tyson acted with malicious purpose or in bad faith. Furthermore, wanton misconduct is "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." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, syllabus three of the syllabus. Reckless conduct is conduct 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." *Id.* at paragraph four of the syllabus.

{¶ 29} A review of appellees' complaint reflects that appellees did not allege Tyson failed to exercise any care (wanton conduct) or consciously disregarded a known risk (reckless conduct). Rather, they alleged that Tyson's operation of the bus was negligent and "careless." Regarding whether "careless" conduct is akin to reckless conduct, the court has noted that "recklessness" implies something more than simple carelessness. *Byrd v. Kirby*, 10th Dist. Franklin No. 04AP-451, 2005-Ohio-1261, ¶ 27, citing *Poe v. Hamilton*, 56 Ohio App.3d 137, 138. 565 N.E.2d 887 (12th Dist.1990) ("In R.C. 2744.03(A)(6)(b), the word 'reckless' is associated with the words 'malicious purpose,' 'bad faith,' and 'wanton,' all of which suggest conduct more egregious than simple carelessness."). *See also Farinacci v. Garfield Hts.*, N.D.Ohio No. 08-CV-1355, 2010 U.S. Dist. LEXIS 30406, 43 (Mar. 30, 2010)

{¶ 30} The facts as alleged in the complaint reflects a claim of negligent conduct by Tyson, but not willful, wanton, or reckless conduct. Accordingly, the trial court erred in denying Tyson's motion for summary judgment. The second assignment of error is sustained.

Evidentiary Issues

{¶ 31} Under the first assignment of error, appellants contend that the trial court erred by "expressly considering 'all of the evidence' including unauthenticated, hearsay materials specifically objected to by appellants."

{¶ 32} In appellants' response to appellees' opposition to appellants' motion for summary judgment, appellants objected to exhibit 4 (Greater Cleveland Regional Transit Police Incident Report #19-31407), exhibit 2 (Ohio Department of Public Safety Traffic Crash Witness Statement), and exhibit 3 (RTA Bus Operator Handbook), which were introduced during Tyson's deposition. On appeal, appellants noted their objection at the trial court to these exhibits, but only set forth arguments regarding the inadmissibility of the incident report (exhibit 4). Appellants argue that the incident report was not properly authenticated, and that Tyson's statement related by officer Campbell that he passed the Mencinis' vehicle on the right was inadmissible hearsay.

{¶ 33} "'Only facts which would be admissible in evidence can be * * * relied upon by the trial court when ruling upon a motion for summary judgment.'" *Guernsey Bank v. Milano Sports Ents., LLC*, 177 Ohio App.3d 314, 2008-Ohio-2420, 894 N.E.2d 715, ¶ 59 (10th Dist.), quoting *Tokles & Son, Inc. v.*

Midwestern Indemn. Co. 65 Ohio St.3d 621, 631, 605 N.E.2d 936 (1992), fn. 4. However, the trial court has discretion when considering which evidence is appropriate under Civ.R. 56 when ruling on a motion for summary judgment. *Hastings Mut. Ins. v. Halatek*, 174 Ohio App.3d 252, 2007-Ohio-6923, 881 N.E.2d 897, ¶ 15 (7th Dist.).

{¶ 34} Regarding the authentication requirement set forth in Evid.R. 901, the rule provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). However, the court has observed that "the authentication requirement of Evid.R. 901(A) is a low threshold that does not require conclusive proof of authenticity, but only sufficient foundation evidence * * * that the evidence is what its proponent claims it to be." *State v. Toudle*, 8th Dist. Cuyahoga No. 98609, 2013-Ohio-1548, ¶ 21, citing *Yasinow v. Yasinow*, 8th Dist. Cuyahoga No. 86467, 2006-Ohio-1355, ¶ 81.

{¶ 35} Here, notably, the incident report appellants objected to was provided by appellants in discovery. Items produced in discovery are implicitly authenticated in satisfaction of Evid.R. 901 by the act of production by the opposing party. *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 159 Ohio St.3d 283, 2020-Ohio-353, 150 N.E.3d 877, ¶ 22, citing *Stumpff v. Harris*, 2015-Ohio-1329, 31 N.E.3d 164, ¶ 35-36 (2d Dist.). Consequently, the incident report produced by appellants should be deemed authenticated in conformity with Evid.R. 901.

{¶ 36} Next, appellants argue the statement in the report by Officer Campbell that he was advised by Tyson that he was passing the Mencinis' vehicle on the right was hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement." Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the exceptions to the rule against hearsay. The hearsay rule applies in the summary judgment context as well. *Guernsey Bank v. Milano Sports Ents., LLC*, 177 Ohio App.3d 314, 2008-Ohio-2420, 894 N.E.2d 715, ¶ 59 (10th Dist.).

{¶ 37} Here, Officer Campbell's statement in the incident report is hearsay within hearsay. Pursuant to Evid.R. 805, "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Tyson's statement that he was passing on the right was not hearsay pursuant to Evid.R. 801(D)(2), which states that a statement is not hearsay if it is offered against a party and is the party's own statement.

{¶ 38} As to Officer Campbell's statement in the incident report he prepared, while the report was not properly certified or accompanied by the testimony of a custodian in conformity with Evid.R. 803(6) (the "business records" exception), it is unusual that RTA challenges the trustworthiness of a report prepared by its own employee and produced by RTA itself in discovery. In any event, Officer Campbell's statement in the report also qualifies under Evid.R. 801(D)(2) as

a non-hearsay statement because Campbell's statement (1) was offered by appellees against RTA and (2) is a statement by RTA's employee concerning a matter within the scope of the employment.

{¶ 39} Finally, the admission and consideration of Tyson's statement reported by Officer Campbell is harmless, even if the statement were hearsay. This court has noted that "'where a declarant is examined on the same matters as contained in an impermissible hearsay statement and where the testimony is essentially cumulative, the admission of any such hearsay statement is harmless.'" *State v. Marshall*, 8th Dist. Cuyahoga No. 109633, 2022-Ohio-2666, ¶ 32, quoting *State v. Gutierrez*, 3d Dist. Hancock No. 5-10-14, 2011-Ohio-3126, ¶ 50. *See also State v. Shropshire*, 2017-Ohio-8308, 99 N.E.3d 980, ¶ 26 (8th Dist.). Here, Tyson was examined regarding the incident report and his statement therein, and furthermore, Officer Campbell's report was essentially cumulative: Tyson acknowledged that his own handwritten statement stated that "I was heading east on Community College attempting to make my way around [a] vehicle and was hit on the front left side * * *." In addition, appellants' own expert's report also acknowledged that, Tyson, while responding to the investigator's questions immediately after the crash, stated that he thought the Mencinis' vehicle was "slowing to turn left, and he passed the unit on the right side." Therefore, the trial court's consideration of Tyson's statement as reported in the incident report, even if in error, is harmless. The first assignment of error is without merit.

{¶ 40} For all the foregoing reasons, we affirm the trial court's judgment denying RTA's motion for summary judgment predicated on political subdivision immunity but reverse its judgment denying summary judgment regarding Tyson.

{¶ 41} Affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

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MICHELLE J. SHEEHAN, PRESIDING JUDGE

EMANUELLA D. GROVES, J., and
SEAN C. GALLAGHER, J., CONCUR