[Cite as *Hines v. Cleveland*, 2023-Ohio-2488.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

TERAI C. HINES, ET AL., :

Plaintiffs-Appellees, :

No. 112218

v. :

CITY OF CLEVELAND, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED
RELEASED AND JOURNALIZED: July 20, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-948707

Appearances:

Nager, Romaine & Schneiberg Co., LPA, and Vincent D. Scebbi, *for appellees*.

Mark D. Griffin, City of Cleveland Director of Law, and Affan Ali and James R. Russell, Jr., Assistant Directors of Law, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} The city of Cleveland appeals the denial of the benefit of immunity from liability under R.C. Chapter 2744 in an action filed by Terai Hines, the driver of a vehicle involved in a collision with a city-operated garbage truck, and Levy Hicks

III,[1] a passenger in Hines's vehicle (collectively "plaintiffs"). Joseph Zellous[2] drove the garbage truck at the time of the collision. For the following reasons, the trial court's decision is reversed, and judgment is hereby entered in favor of the city based on the inapplicability of the exception to immunity under R.C. 2744.02(B)(1), which provides an exception to immunity for liability if the plaintiff can demonstrate the negligent operation of a motor vehicle.

{¶ 2} The allegations in the complaint are sparse. According to the complaint, Zellous "failed to control his vehicle and struck" the vehicle plaintiffs occupied, a four-door sedan. According to the parties' description of events, Zellous was stopped at a "T" intersection preparing to turn right onto a cross street. Both streets were narrow, two-lane streets (one lane of travel in each direction). Zellous maneuvered the truck with the driver's side tires over the centerline of the street as he prepared his turn, which required more space given the size of the truck. This left a gap between the truck and the curb. Zellous waited for the cross traffic to clear before initiating his right turn. It is undisputed that the truck was adorned with the

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[1] Hicks was not identified as an occupant of the vehicle in the police report, which was generated by the officer assisting at the accident scene.

[2] Zellous was a named defendant, but the claims against him personally were dismissed based on the plaintiffs' concession that he was immune under R.C. 2744.03(A)(6). The claims against the city based on negligent training, supervision, and negligent entrustment were dismissed as well. *See McConnell v. Dudley*, 158 Ohio St.3d 388, 2019-Ohio-4740, 144 N.E.3d 369, ¶ 32 (R.C. Chapter 2744 does not impose liability on a political subdivision for allegedly violating a duty in hiring, training, or supervising an employee). The only claim pending was based on the employee's alleged negligence in causing the motor vehicle collision and a derivative claim against the Ohio Department of Medicaid's right to subrogation for the medical coverage it provided the plaintiffs.

conspicuous warning that following drivers should use caution at intersections due to the propensity for the truck to make wide turns in either direction.

{¶ 3} While Zellous was stopped, and unbeknownst to him, Hines proceeded to pass the truck on the right, filling the gap between the curb and the garbage truck. There is no evidence that Hines was aware of which direction the truck would be turning. Further, neither Hines nor Hicks saw or could verify whether the garbage truck's turn signals were activated, demonstrating that Hines did not rely on the truck's turn signal as an indication of Zellous's desired path, which could only be turning left or right.

{¶ 4} Predictably, as Zellous commenced his right turn, the two vehicles collided because Hines's vehicle was in the gap Zellous needed to turn onto the cross street. The mechanical arm that picks up garbage bins struck the driver side, front quarter panel of Hines's vehicle.

{¶ 5} According to the plaintiffs, Zellous was negligent in the way he conducted the wide right turn, which everyone agrees was necessary to successful navigation of the tight intersection with the large truck. During Zellous's deposition, he conceded that a commercial driver's license manual ("CDL manual") may have advised a different method to conduct a wide right turn, in which the truck keeps the rear of the vehicle as close to the curb as possible angling left across, but entirely within, the lane of travel before commencing a wide-swing right turn that begins by going left (which logically would cause the truck to veer into the oncoming lane on the cross street to complete the turn). Zellous could not verify the contents of the

manual, and the plaintiffs did not introduce the CDL manual through any witness or expert testimony to establish a standard of care separate from statutory or common law.

{¶ 6} Nonetheless, according to the plaintiffs, Zellous breached his duty by leaving a gap between his truck and the curb by straddling the centerline of the terminating two-lane street, and as a result of that conclusion, there are genuine issues of fact necessitating a trial under Civ.R. 56. The trial court agreed with their assessment.

{¶ 7} There is no dispute that the city is generally immune from liability based on the allegations advanced. That liability is removed if the plaintiffs can demonstrate the applicability of R.C. 2744.02(B)(1): "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." Under that exception to the general grant of immunity, as is pertinent to the issues advanced in this appeal, a plaintiff must allege that the damages caused by the employee were a result of a negligent act of an employee. *Garmback v. Cleveland*, 8th Dist. Cuyahoga No. 110295, 2022-Ohio-1490, ¶ 26, citing *Riveredge Dentistry Partnership v. Cleveland*, 8th Dist. Cuyahoga No. 110275, 2021-Ohio-3817, ¶ 32; *William v. Glouster*, 2012-Ohio-1283, 864 N.E.2d 102, ¶ 17 (4th Dist.); and *Gabel v. Miami E. School Bd.*, 169 Ohio App.3d 609, 2006-Ohio-5963, 864 N.E.2d 102, ¶ 39-40 (2d Dist.).

{¶ 8} "Actionable negligence requires a showing of a duty, a breach of that duty and an injury proximately resulting" therefrom. *Johnson v. Greater Cleveland Regional Transit Auth.*, 2021-Ohio-938, 171 N.E.3d 422, ¶ 65 (8th Dist.), citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). The element of duty "may be established by common law, by legislative enactment or by the circumstances of a given case." *Id.*, citing *Schmitz v. NCAA*, 2016-Ohio-8041, 67 N.E.3d 852, ¶ 48 (8th Dist.), and *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998). Typically, the duty is established through Ohio's vehicular traffic laws. It is "[o]nly after it has been found that the vehicle is not proceeding in a lawful manner, by violating a law or ordinance, [that] consideration of the driver's common-law duty to use ordinary care [comes] into play." *Lydic v. Earnest*, 7th Dist. Mahoning No. 02 CA 125, 2004-Ohio-3194, ¶ 2.

{¶ 9} At the summary-judgment stages, a plaintiff seeking to demonstrate the existence of an exception to immunity need not prove negligence. Typically, a plaintiff need only demonstrate a genuine issue of material fact as to whether the political subdivision employee, acting in the course and scope of their employment, was negligent in operating any motor vehicle. *See Johnson*; *Figueroa v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 110069, 2021-Ohio-2268, ¶ 20-21. The existence of a duty, however, is a legal question, to be resolved under the de novo standard of review. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

{¶ 10} The plaintiffs claim that Zellous violated his duty as established under R.C. 4511.36(A)(1), as demonstrated through the cross-examination pertaining to the CDL manual. Ohio law requires vehicles to stay "as close as practicable to the right-hand curb or edge of the roadway" when approaching and making a right-hand turn. *Id.* The plaintiffs maintain that there is a question of credibility based on Zellous's lack of knowledge of the CDL manual because Zellous's method of not closing the gap between the curb and his truck permitted Hines to proceed as she did.

{¶ 11} That argument is misplaced for two reasons. Credibility of a witness's testimony is not an issue to be considered or addressed under Civ.R. 56. *Oko v. Cleveland Div. of Police*, 8th Dist. Cuyahoga No. 110025, 2021-Ohio-2931, ¶ 21. Further, there is no evidence in this record demonstrating that the CDL manual creates an actionable standard of care under Ohio law. The plaintiffs identified R.C. 4511.36(A)(1) as the controlling statute for this claim; however, that subdivision does not rigidly mandate any particular method of making right turns. The standard of care, for conducting a right turn as close to the curb or edge of the roadway, is one of practicability.

{¶ 12} Ohio law establishes a "preferential status" for the vehicle with the right-of-way, and that status determines the standard of care owed. *Johnson,* 2021-Ohio-938, 171 N.E.3d 422, at ¶ 71, citing *Anderson v. Schmidt*, 8th Dist. Cuyahoga No. 99084, 2013-Ohio-3524, ¶ 22, and *Deming v. Osinski*, 21 Ohio App.2d 89, 255 N.E.2d 279 (11th Dist.1969), *affirmed*, 24 Ohio St.2d 179, 265 N.E.2d 554 (1970);

see also Pierce v. Vanbibber, 4th Dist. Scioto No. 99 CA 2639, 2000 Ohio App. LEXIS 3210, 7 (June 30, 2000). "Right-of-way" is broadly defined as the "right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly *in a lawful manner* in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path." (Emphasis added.) R.C. 4511.01(UU)(1).[3] The driver with the right-of-way "*bears no duty"* to yield, avoid, or even look for other drivers who violate that right-of-way. (Emphasis added.) *Ramos v. Kalfas*, 8th Dist. Cuyahoga No. 64806, 1994 Ohio App. LEXIS 2171, 17-18 (May 19, 1994), *see also Johnson* at ¶ 71. Any driver of a vehicle who is lawfully proceeding in their right-of-way "has the right to assume other drivers will obey any laws requiring them to yield the right of way and *has no duty to watch for approaching vehicles* that may threaten to violate the right of way." (Emphasis added.) *Johnson*, citing *Anderson* at ¶ 24, *McCullough v. Youngstown City School Dist.*, 2019-Ohio-3965, 145 N.E.3d 996, ¶ 46 (7th Dist.), *Lydic v. Earnest*, 7th Dist. Mahoning No. 02 CA 125, 2004-Ohio-3194, ¶ 25-34, and *Morris v. Bloomgren*, 127

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[3] In *Somogyi v. Natl. Eng. & Contracting Co.*, 8th Dist. Cuyahoga No. 68694, 1996 Ohio App. LEXIS 64, 1996 WL 11318, *2 (Jan. 11, 1996), the panel rejected a narrow interpretation of R.C. 4511.01(UU) that would require vehicles to be traveling on intersecting courses. *Somogyi* concluded that the right-of-way definition includes vehicles proceeding in the same lane but in different directions, which in that case was a truck and a bicycle traveling in the same direction when the truck sideswiped the bicycle. Because the two vehicles in this case collided, it is undisputed that they were traveling in different directions for the purposes of R.C. 4511.01(UU)(1); otherwise, no collision could have occurred. Importantly, neither party has claimed otherwise nor asked us to revisit *Somogyi,* forfeiting any argument against further reliance on that authority. *See Halloran v. Barnard*, 4th Dist. Lawrence No. 16CA9, 2017-Ohio-1069, ¶ 31.

Ohio St. 147, 187 N.E. 2 (1933), paragraphs one and five of the syllabus. If there is evidence that the driver with the right-of-way was aware of the encroachment, then a separate standard of care under common law may arise. *See Johnson* at ¶ 71, fn. 8.

{¶ 13} Thus, if Zellous was lawfully conducting the right turn and was unaware of Hines's encroachment, the plaintiffs are unable to establish that Zellous owed a duty to prevent the collision as a matter of law.

{¶ 14} On this point, the city cites *Cuyahoga Falls v. Green*, 112 Ohio App.3d 362, 365, 678 N.E.2d 973 (9th Dist.1996). After consideration of R.C. 4511.36(A)(1), the Ninth District concluded that a truck driver was lawfully proceeding despite leaving a gap between his truck and the curb in navigating a right-hand turn. *Id.*, citing *Keller-Hall, Inc. v. C.M. Bldg., Inc.*, 9th Dist. Summit No. 12421, 1986 Ohio App. LEXIS 7549, 5-6 (July 9, 1986). In *Green*, the truck driver was in the right lane of a four-lane, undivided road (two lanes in each direction). *Id.* at 363. In anticipation of a tight turn into a commercial parking lot, the driver activated the right-turn signal while traveling in the curb lane. *Id.* He then moved left with the vehicle straddling both lanes before he commenced the right turn into the parking lot. *Id.* In preparing for the turn in that manner, a gap opened between the truck and the curb. *Id.* A pickup truck following behind the semitruck continued through the gap created by the truck's maneuver, causing a collision between the two vehicles as the semitruck turned into the driveway. *Id.*

{¶ 15} According to *Green*, swinging wide into the left-hand lane, even if a gap is created at the rear of the larger vehicle that requires a greater turning radius,

is considered a lawful way of negotiating a right-hand turn under R.C. 4511.36(A)(1). Under those conditions, a driver is "as close as practicable" to the curb under Ohio law and is proceeding lawfully. *Id.*; *see also* R.C. 4511.33(A)(1) (providing the same practicability standard with respect to driving within a single lane: a vehicle "shall be driven, as nearly as is practicable" within a single lane of travel).

{¶ 16} The analysis provided in *Green* impacts the lawfulness of Zellous's conduct, which directly relates to the duty element of the negligence claim that is the crux of the exception under R.C. 2744.02(B)(1). *See, e.g., Birch v. Heropulos*, 5th Dist. Stark No. 2007 CA 00016, 2007-Ohio-4252, ¶ 22 (summary judgment in favor of defendant was affirmed because plaintiff, who was riding a motorcycle past stopped traffic, was not proceeding lawfully such that the oncoming traffic turning left in front of the motorcycle owed a duty to yield). We have been provided no reason to distinguish or disregard *Green* despite the city's reliance on the authority.

{¶ 17} R.C. 4511.36(A) does not mandate a rigid requirement of keeping the back of the vehicle next to the curb to prevent other drivers from encroaching into another vehicle's right-of-way. The statute, as a result, does not create any duty to keep a portion of the vehicle in a position to block others from attempting to overtake it. In practical terms, there are good reasons for a driver to defensively position their vehicle in such a manner as a way to fend off inattentive drivers. That defensive positioning, however, does not define the legal standard owed to other drivers, at least not according to the record and analysis presented for our review.

{¶ 18} Zellous was lawfully conducting a right turn as close as practical to the right curb given the turning radius of the truck. As a result, he maintained the right-of-way at the intersection as it relates to all traffic approaching him from a different direction, such as a vehicle entering the space he created to navigate the tight intersection. Because Zellous was in front of Hines's vehicle conducting a right turn onto the cross street, he had no duty to look for or yield to her attempt to overtake on the right because, as a matter of law, he could assume that Hines would be driving in a lawful manner. The undisputed evidence established that Zellous was not aware of Hines's presence in the gap as he commenced his turn.

{¶ 19} On the other hand, as the city aptly demonstrates, Hines's action of attempting to pass Zellous on the right was prohibited conduct; she was not lawfully proceeding. Under R.C. 4511.28(A), a driver of a motor vehicle may overtake and pass on the right side of another vehicle only if the vehicle "overtaken is making or about to make a left turn" or if there are two lanes of travel in the direction being traveled. It is undisputed that there is only one lane of travel in the direction the parties were traveling at this intersection. Thus, Hines could only overtake Zellous's truck if he was turning or intending to turn left. There is no evidence that Zellous intended to turn left. Accordingly, Hines was not lawfully proceeding; she was required to yield to Zellous's right-of-way. *See, e.g., Humphries v. Haver*, 8th Dist. Cuyahoga No. 88994, 2008-Ohio-221, ¶ 20 (driver turning right from left lane of an undivided four-lane street was acting in accordance with R.C. 4511.36(A)(1); the plaintiff, as the oncoming vehicle turning left, owed a duty to yield his right-of-way

to the right-turning vehicle, and therefore, the verdict was against the weight of the evidence).

{¶ 20} According to the undisputed evidence, Zellous was intending to, and in fact did, turn right. Neither Hines nor Hicks was aware of whether Zellous had activated any turn signal to indicate his intended direction of travel, which arguably could have created confusion as to the lawfulness of Hines's attempt to pass or presented a question of liability based on the failure to properly indicate the turn. Hines, however, did not testify to knowing which direction the truck was turning at the "T" intersection. In her deposition, Hines simply stated that she passed the truck on the right and then was stopping because of the stop sign. At that point, both the truck and Hines's vehicle were attempting to occupy the same space. In light of the fact that there was only a single lane of travel in their direction, Hines's maneuver can only be described as an attempt to pass Zellous's truck, which undisputedly arrived at the intersection first and was lawfully commencing a right turn. *See Green*, 112 Ohio App.3d at 365, 678 N.E.2d 973. Because Hines was not lawfully proceeding, the plaintiffs have not demonstrated that Zellous owed a common law duty to prevent the collision; that only arises when neither party is lawfully proceeding.

{¶ 21} Zellous's conduct was lawful, and therefore, he owed no duty to look for or yield to Hines's vehicle as he commenced his right-hand turn. With no duty being established as a matter of law, there can be no genuine issue of material fact as to whether Zellous is negligent. This is not a question of comparative negligence,

but solely turns on whether Zellous owed a duty to Hines after she attempted an unlawful pass to the right of Zellous's truck. *See Crosby v. McWilliam*, 2d Dist. Montgomery No. 19856, 2003-Ohio-6063, ¶ 28. Hines and Hicks are unable to establish an issue of material fact as to whether the city employee was negligent in the operation of his vehicle for the purposes of R.C. 2744.02(B)(1), and as a result, they have not demonstrated an exception to the general grant of immunity. The trial court erred in concluding otherwise.

{¶ 22} The decision of the trial court is reversed.[4] The city is immune from liability arising from the motor vehicle accident as between Zellous and Hines and Hicks. Judgment should have been, and hereby is, rendered in the city's favor upon the sole claim advanced against it.

It is ordered that appellant recover from appellees 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.

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[4] Hines and Hicks included a claim advanced against the Ohio Department of Medicaid based on the subrogation rights the department would have over any damages recovered from the city. In light of the derivative nature of that claim, there is no need to remand to finalize this matter. Having found in favor of the city, no subrogation claim can survive.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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SEAN C. GALLAGHER, JUDGE

ANITA LASTER MAYS, A.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR