

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MELANIE GREGORY, et al.	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiffs-Appellees	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 00058
BRENDA PHILLIPS, et al.	:	
	:	
	:	
Defendants-Appellants	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Fairfield County Court of
Common Pleas Case No. 06-CV-1281

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 8, 2009

APPEARANCES:

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Delaney, J.

{¶1} Defendants-Appellants, Police Officer Lyle Campbell and Police Chief Scott Schermerhorn, appeal the August 1, 2008 decision of the Fairfield County Court of Common Pleas to deny their motion for summary judgment as to the application of individual statutory immunity pursuant to R.C. Chapter 2744. For the reasons that follow, we affirm the decision of the trial court.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On July 1, 2006, the Village of Sugar Grove held its annual fireworks display in celebration of the Fourth of July at Berne Union High School. When the fireworks were over, considerable traffic developed from those exiting the high school parking lot onto Sugar Grove Road. The backup was the result of traffic congestion of those trying to leave the Village at the intersection of U.S. Route 33 and Sugar Grove Road.

{¶3} Route 33 is a two-lane, divided highway with lanes traveling north and south. The speed limit on Route 33 is 60 mph. Sugar Grove Road intersects with Route 33 and travels east to west.¹ Traffic is maintained at the intersection by a red, yellow, and green traffic control signal. On southbound Route 33, there is a flashing signal to notify drivers prior to the intersection to prepare to stop at a red light. Traffic traveling southbound on Route 33 has a turn lane to turn left onto Sugar Grove Road into the Village of Sugar Grove. From Sugar Grove Road, traffic can turn north on to Route 33 or south on to Route 33, but there are no dedicated turn lanes. The

¹ The road to the east of Route 33 is named Sugar Grove Road and the road to the west of Route 33 is named Sharp Road.

intersection of Route 33 and Sugar Grove Road is outside the corporate limits of the Village of Sugar Grove.

{¶4} Chief Schermerhorn, Chief of Police for the Village of Sugar Grove, was at the high school that night when he observed the traffic backing up within the Village. Officer Campbell, a part-time police officer with the Village of Sugar Grove, was directing traffic out of the high school parking lot. At approximately 11:15 p.m., Chief Schermerhorn ordered Officer Campbell to go with him in the Chief's police cruiser to direct traffic at the intersection of Route 33 and Sugar Grove Road to alleviate the congestion.

{¶5} Chief Schermerhorn had directed traffic at this intersection after the fireworks display since 2003. He knew traffic became congested and so earlier in the day, he had tried to contact the Fairfield County Sheriff's Department for assistance in directing traffic. At the time of the congestion, no assistance from the Sheriff's Department had arrived. Chief Schermerhorn determined that he would block northbound traffic on Route 33 just south of the intersection. He would have an officer direct the traffic traveling west on Sugar Grove Road to turn right onto northbound Route 33 without waiting for the traffic light. Chief Schermerhorn did not deactivate the traffic control signal. Chief Schermerhorn did not have any officers directing traffic traveling southbound on Route 33.

{¶6} When the officers arrived at the intersection, Chief Schermerhorn parked the police cruiser in the northbound lanes of Route 33, just south of the intersection of Route 33 and Sugar Grove Road, and perpendicular to Sugar Grove Road. He activated the lights on the cruiser and placed numerous flares around the intersection.

{¶7} Chief Schermerhorn instructed Officer Campbell to direct traffic at the intersection. Officer Campbell has been a police officer since March 2006 and had directed traffic approximately ten times before July 1, 2006, but never the Fourth of July traffic. Officer Campbell positioned himself in the center of the northbound lanes of Route 33 and faced the Village of Sugar Grove. He was wearing a reflective vest and had a flare at his feet. Chief Schermerhorn instructed Officer Campbell to keep the traffic moving as fast as possible onto northbound Route 33, but to use the light for those turning left onto southbound Route 33. For the officer's safety, Chief Schermerhorn placed numerous flares on the intersection, some in the berm of southbound Route 33.

{¶8} After Officer Campbell's direction, traffic alleviated some and the officers allowed the traffic signal to control the traffic flow. When traffic became congested again, the police cruiser was moved to block the northbound lanes of Route 33 and Officer Campbell directed traffic again from his previous position. Chief Schermerhorn stayed at the police cruiser while Officer Campbell directed traffic.

{¶9} As Officer Campbell was directing traffic, Appellee, Brenda Phillips approached the intersection of Route 33 and Sugar Grove Road. Phillips did not want to turn right onto Route 33 northbound, but instead wanted to go straight across the intersection, continuing westbound onto Sharp Road. As Phillips approached the intersection, she noticed there were cars on southbound Route 33 waiting to turn left into the Village. Phillips drove her car through the intersection to stop at Officer Campbell's position and she asked Officer Campbell if she could go straight across the intersection. Officer Campbell advised Phillips that once the traffic from southbound

Route 33 turned into the Village, she could proceed. The officer directed that traffic to turn into the Village and then Phillips proceeded to go straight. She did not look to see what color the traffic light was as she proceeded, nor did she look to see if any cars were coming southbound on Route 33.

{¶10} At approximately the same time, Appellee Melanie Gregory was driving southbound on Route 33. As Gregory approached the intersection of Route 33 and Sugar Grove Road, she slowed down because she had a red light. When she got closer to the intersection, the light turned green so she accelerated. She noticed flashing police lights on the northbound side of Route 33, but she thought someone had been pulled over. As Gregory went through the intersection, she saw Phillips's car in front of hers, but it was too late for Gregory to stop. Gregory's car collided with the car driven by Phillips.

{¶11} Immediately before the accident, Ohio State Highway Patrol Trooper Brian Spackey was en route to the intersection of Route 33 and Sugar Grove Road to assist with traffic direction. While in transit to the location, the Ohio State Highway Patrol dispatch notified Trooper Spackey there was an accident with injuries at the intersection. Trooper Spackey arrived at the scene and conducted an accident investigation culminating in an accident report. Trooper Spackey concluded in his accident report that based upon his investigation, he determined there was no officer assisting with southbound traffic on Route 33, but an officer was allowing traffic coming out of Sugar Grove traveling west to cross Route 33 on to Sharp Road. Trooper Spackey stated in his report that this is what caused the crash. He also opined in his deposition that he considered it reckless to direct traffic across an intersection on a

divided highway without regard to traffic signal indication and with no officer and cruiser on the other side of the intersection.

{¶12} On December 11, 2006, Gregory filed a complaint against Phillips and the Village of Sugar Grove with the Fairfield County Court of Common Pleas. In response, Phillips filed a counterclaim against Gregory and a cross-claim against the Village. In a later entry, the parties stipulated that Chief Schermerhorn and Officer Campbell were to be added as party defendants to Gregory's complaint and Phillips' cross-claim.

{¶13} On October 12, 2007, Phillips moved for partial summary judgment against the Village, Chief Schermerhorn and Officer Campbell on their defense of statutory immunity. The Village, Chief Schermerhorn and Officer Campbell also moved for summary judgment on their defense of statutory immunity.

{¶14} The trial court overruled Phillips's motion for partial summary judgment on June 10, 2008. On August 1, 2008, the trial court sustained in part and overruled in part the motion for summary judgment filed by the Village of Sugar Bush parties. The trial court determined that the Village was statutorily immune from liability, but there remained a genuine issue of material fact as to whether Chief Schermerhorn and Officer Campbell were individually entitled to statutory immunity.

{¶15} It is from this judgment that Appellants Chief Schermerhorn and Officer Campbell (hereinafter "Appellants") now appeal.

{¶16} Appellants raise one Assignment of Error:

{¶17} "THE TRIAL COURT ERRED IN DENYING INDIVIDUAL IMMUNITY TO APPELLANTS, POLICE OFFICER LYLE R. CAMPBELL AND POLICE CHIEF SCOTT

SCHERMERHORN, UNDER OHIO REVISED CODE SECTION 2744.03(A)(6) FOR A TRAFFIC CONTROL RELATED ACCIDENT.”

{¶18} We review Appellants’ Assignment of Error pursuant to the standard set forth in Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶19} “Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no 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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.”

{¶20} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶21} The issue raised in Appellants’ motion for summary judgment before the trial court and the issue raised before this Court is whether the police officers are entitled to statutory immunity pursuant to R.C. 2744.03(A)(6) for their actions in directing traffic on July 1, 2006.

{¶22} The Ohio Supreme Court reiterated the three-tiered analysis to determine a political subdivision's immunity under R.C. Chapter 2744 in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505. The Court stated that, "subject to a few exceptions, R.C. 2744.02(A)(1) provides that political subdivisions are '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.'" Immunity is extended, with three exceptions, to employees of political subdivisions under R.C. 2744.03(A)(6). The second prong of the three-tiered analysis, whether any of the exceptions to immunity apply, is the focus of our inquiry in this case. Under R.C. 2744.03(A)(6)(b), employees can lose their immunity for acting "with malicious purpose, in bad faith, or in a wanton or reckless manner." *Id.* at ¶ 47-48.

{¶23} In its August 1, 2008 judgment entry, the trial court determined there were genuine issues of material fact that precluded summary judgment in the officers' favor. The trial court stated in its judgment entry:

{¶24} "The parties disagree upon what color the light was when Campbell directed Phillips to proceed through the intersection. Also, the court cannot say, viewing the evidence in a light most favorable to the nonmoving parties, that the officers were not wanton or reckless in their regulation of traffic, as a whole. And proximate cause is a disputed material fact."

{¶25} This is a limited, statutorily authorized interlocutory appeal of a denial of summary judgment on sovereign immunity grounds. We must determine upon our de novo review whether the statutory exception to immunity under R.C. 2744.03(A)(6)(b)

applies to the case at hand. In *Riggs v. Richard*, Stark App. No. 2007CA00328, 2008-Ohio-4697, ¶ 36-38, this Court addressed the issues of malice, bad faith, and wanton or reckless conduct in the sovereign immunity context:

{¶26} “‘Malicious purpose’ has been defined as the ‘willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through ... unlawful or unjustified’ conduct. *Cook v. Hubbard Exempted Village Bd. of Edn.* (1996), 116 Ohio App.3d 564, 569, 688 N.E.2d 1058. ‘Bad faith’ imports more than mere bad judgment or negligence. *Id.* It connotes 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.’ *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 309, 760 N.E.2d 24.

{¶27} “‘Wanton’ conduct is the complete failure to exercise any care whatsoever. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. However, mere negligence will not be construed as wanton misconduct in the absence of evidence establishing ‘a disposition of perversity on the part of the tortfeasor’, the actor must be aware that his conduct will probably result in injury. *Id.* (quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 97, 269 N.E.2d 420). One acts recklessly ‘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 physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.’ *Jackson v. Butler Cty. Bd. of Cty. Commrs.*

(1991), 76 Ohio App.3d 448 454, 602 N.E.2d 363, (quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705).

{¶28} “Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. *Fabrey*, * * *. However, summary judgment is appropriate in instances where the alleged tortfeasor's actions show ‘that he did not intend to cause any harm ..., did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose....’ *Fox v. Daly* (Sept. 26, 1997), Trumbull App. No. 96-T-5453 [1997 WL 663670], (quoting *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772, 663 N.E.2d 384). *Henney* at paragraphs 48-50.” *Doe v. Jackson Local School Dist.*, Stark App. No.2006CA00212, 2007-Ohio-3258 at ¶ 38.”

{¶29} Upon review of the record in the present case, we find the definition of recklessness to be the focal point for our determination of whether to extend statutory immunity to Appellants. In addition to the above definition of recklessness, the Ohio Supreme Court further defined recklessness as follows:

{¶30} “Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk.” *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31; see also *McGuire v. Lovell* (1999), 85 Ohio St.3d 1216, 1219, 709 N.E.2d 841 (Moyer, C.J., dissenting); *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 454, 602 N.E.2d 363 (“we recently held that the term ‘reckless’ as used in R.C. 2744.03(A)(6)(b) means a perverse disregard of a known risk”).

{¶31} “Recklessness, therefore, necessarily requires something more than mere negligence. *Fabrey*, 70 Ohio St.3d at 356, 639 N.E.2d 31. In fact, ‘the actor must be conscious that his conduct will in all probability result in injury.’ *Id.*” *O’Toole*, supra, ¶ 73-74.

{¶32} We consider the Civ.R. 56 evidence most strongly in favor of the non-moving party to determine whether there is a genuine issue of material fact that Appellants acted in a reckless manner when they directed traffic at the intersection of Route 33 and Sugar Grove Road. The parties presented deposition testimony from Chief Schermerhorn, Officer Campbell, Trooper Spackey, Mrs. Phillips and Mrs. Gregory. Trooper Spackey’s accident report, testified to by Trooper Spackey in his deposition, stated:

{¶33} “Northbound traffic on U.S. 33 was blocked why (sic) Sugar Grove Police Department was releasing traffic from Sugar Grove Rd. onto U.S. 33 Northbound. There was no officer assisting with Southbound traffic on U.S. 33. However, the officer working traffic allowed traffic traveling West to cross U.S. 33 to Sharp Rd. That is what caused this crash.”

{¶34} Chief Schermerhorn testified in his deposition that Appellants were responsible for controlling the entire intersection. However, Chief Schermerhorn intended the traffic to follow either Officer Campbell’s directions or the traffic light, depending on the direction the car was traveling. (Depo. p. 28). The only instruction Chief Schermerhorn gave to Officer Campbell was to keep people moving northbound as much as possible and to use the light if people had to go southbound. *Id.* Chief

Schermerhorn stayed with the cruiser and observed Officer Campbell directing traffic. (Depo. p. 24).

{¶35} Officer Campbell, who had never directed the Fourth of July traffic before, testified that he was ushering the vehicles in the direction that they wanted to go, northbound, southbound or west to Sharp Road. (Depo. p. 17). The officer testified that upon the first round of their traffic direction, he saw that Chief Schermerhorn was stopping traffic on southbound Route 33. (Depo. p. 58). During the second round, Officer Campbell assumed Chief Schermerhorn was again directing traffic on southbound Route 33. Id.

{¶36} Trooper Spackey testified that more officers were needed to direct the traffic at the intersection since they were to be in control of the entire intersection. (Depo. p. 28). If the officer was going to direct someone to cross into southbound traffic, the southbound traffic should have been made aware that the traffic light may be voided. Id. Trooper Spackey graduated from the Ohio State Highway Patrol Academy in 2004 and received technical crash investigation and traffic control training. He testified in his deposition that he has investigated over three hundred accidents. (Depo. p. 55).²

² Appellants filed a motion in limine with the trial court regarding the use of the Trooper's opinions as to causation and recklessness, but the trial court did not rule upon said motion prior to denying summary judgment. Appellants did not raise as an Assignment of Error the trial court's failure to rule on the admissibility of the evidence before denying Appellants' motion for summary judgment. Appellants first raise the issue of the Trooper's testimony in their Reply Brief. Additionally, the admission or exclusion of evidence rests generally within the trial court's discretion, and a reviewing court may reverse the decision only upon the showing of an abuse of discretion. Until the trial court exercises its discretion and rules on the evidentiary issue, there is nothing for this Court to consider. See, *Hollins v. Shaffer*, Cuyahoga App. No. 91639, 2009-Ohio-2136, ¶23.

{¶37} In addition, the evidentiary material before us demonstrates there is a material issue of fact as to the color of the light at the intersection at the time of the accident and whether the flares placed in the roadway by Chief Schermerhorn had extinguished by the time of the accident. Ohio case law supports the notion that questions of fact regarding immunity are enough to overcome summary judgment. See, *Knox v. Hetrick*, Cuyahoga App. No. 91102, 2009-Ohio-1359, ¶37.

{¶38} Upon a review of the Civ.R. 56 evidence, we find that reasonable minds can come to differing conclusions as to whether Appellants acted recklessly in their direction of traffic at the intersection. Although the standard for showing such misconduct is high, and a jury may ultimately conclude their actions were merely negligent, we cannot conclude as a matter of law that Appellants' conduct could not be viewed as reckless misconduct for which they are not entitled to immunity.

{¶39} Accordingly, Appellants' sole Assignment of Error is overruled and the judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

Wise, J., concurring.

{¶40} I concur that Trooper Spackey's affirmative response to the question posed to him asking him if the actions of the officers in directing traffic in this matter were "reckless" was sufficient to survive summary judgment. However, I write separately to express my concern that no definition of "reckless" or "recklessness" as it applies to statutory immunity cases pursuant to R.C. §2744.03 was provided to the trooper prior to asking him to make such a legal determination. Without such a framework, I do not believe such is sufficient to survive a directed verdict at trial.

JUDGE JOHN W. WISE

[Cite as *Gregory v. Phillips*, 2009-Ohio-4854.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MELANIE GREGORY, et al.	:	
	:	
	:	
Plaintiffs-Appellees	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRENDA PHILLIPS, et al.	:	
	:	
	:	
Defendants-Appellants	:	Case No. 08 CA 00058

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to Appellants.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS