[Cite as *Meredith v. Cleveland Hts. Police Dept.*, 2010-Ohio-2472.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93436

KAREN MEREDITH

PLAINTIFF-APPELLEE

vs.

CLEVELAND HEIGHTS POLICE DEPARTMENT, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-617310

BEFORE: Sweeney, J., Kilbane, P.J., and Cooney, J.

RELEASED: June 3, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellants, City of Cleveland Heights ("the City") and Cleveland Heights Police Officer Bradford Sudyk ("Officer Sudyk"), appeal the court's denial of their motion for summary judgment based on statutory immunity in this personal injury case brought by plaintiff-appellee, Karen Meredith ("Meredith"). After reviewing the facts of the case and pertinent law, we reverse and remand.

{¶ 2} On June 4, 2005, Meredith hosted a high school graduation party for her son Ernest ("Ernest") at their house on Euclid Heights Blvd., in Cleveland Heights. A group of approximately 30 students left the party at the same time and walked across the street toward where their cars were parked. Officer Sudyk was patrolling the area in his police cruiser, and he approached the group. All of the students dispersed except Stephen Lott ("Lott"), who remained in the street. Officer Sudyk parked his patrol car with the intent of issuing Lott a citation for walking outside of a crosswalk.

{¶ 3} Lott allegedly did not cooperate with Officer Sudyk, and the crowd began to protest the situation. Ernest yelled at Officer Sudyk to leave Lott alone. The crowd continued to get louder, and Meredith, who was in her house at the time, learned that the police were outside. Meredith approached the crowd and saw that Officer Sudyk was interacting with Ernest and Lott.

{¶ 4} According to Meredith, she went up to Officer Sudyk to find out what was going on. Officer Sudyk was attempting to put Lott into the back of the police cruiser, and Meredith began pleading with the officer to calm down and

give Lott a chance to get in the car. Additionally, she yelled at the crowd to try to get them to calm down.

{¶ 5} Meredith next saw Officer Sudyk somehow touch Ernest. She ran towards them, screaming "Stop. No. Don't let anybody get hurt." Meredith is unsure what happened next, but she thinks she was bumped by someone in the crowd, because she, Ernest, and Officer Sudyk fell to the ground. By this time, back-up police officers had arrived and one of them pulled Meredith off Officer Sudyk and handcuffed her.

{¶ 6} Meredith was arrested and the City charged her with assault on a police officer, obstructing official business, and aggravated riot. The charges were dismissed at the municipal court, and Meredith was indicted in Cuyahoga County for assault on a police officer, aggravated riot, and resisting arrest. The case went to jury trial, and on March 3, 2006, Meredith was acquitted on all charges.

{¶ 7} On March 1, 2007, Meredith filed suit against the City and Officer Sudyk for false imprisonment/arrest, malicious prosecution, slander per se, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. On May 12, 2009, the court granted summary judgment on the slander, negligence, and negligent infliction of emotional distress claims in favor of both defendants. The court denied summary judgment on the false imprisonment/arrest, malicious prosecution, and intentional infliction of emotional distress claims, finding that a material issue of fact existed as to each count.

Furthermore, the court denied summary judgment based on immunity pursuant to R.C. 2744.03(A)(6), finding that a material issue of fact existed as to whether Officer Sudyk acted with malice, in bad faith, or in a wanton or reckless manner.

{¶ 8} The City and Officer Sudyk now appeal, raising two assignments of error for our review. We first address the second assignment of error, which states:

{¶ 9} "II. The trial court erred in denying appellant, the City of Cleveland Heights, summary judgment by failing to find that the City is immune from liability as a matter of law, pursuant to R.C. 2744.02, because there is no applicable exception to the blanket grant of immunity for the City."

{¶ 10} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

{¶ 11} "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of 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 nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to

judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

{¶ 12} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

{¶ 13} As a general rule, "a political subdivision is immune from liability incurred in performing either a governmental function or a proprietary function" under R.C. Chapter 2744. There are five exceptions to this rule listed in R.C. 2744.02(B). *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781. If any of these exceptions apply to a political subdivision, the burden shifts, and "the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability." *Colbert*, at ¶9.

{¶ 14} An employee of a political subdivision may also be shielded by immunity from civil liability; however, the analysis is governed by R.C. 2744.03(A)(6), and it differs from the analysis used for the political subdivision.

{¶ 15} In the instant case, the court denied immunity for all of the *defendants* (emphasis on plural) at the summary judgment stage under R.C.

2744.03(A)(6). This statute clearly applies to Officer Sudyk. However, it becomes relevant to political subdivisions only if one of the five exceptions to immunity listed in R.C. 2744.02(B) applies. See *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, 733 N.E.2d 1141.

{¶ 16} It is undisputed that the City is a political subdivision that was performing a governmental function, namely providing police services, concerning Meredith's arrest and the charges against her. Therefore, the City is immune from liability unless one of the exceptions in R.C. 2744.02(B) applies. In denying summary judgment for the City, the court did not point to any R.C. 2744.02 exception to immunity. Additionally, Meredith does not raise an appropriate exception in either her summary judgment motion or on appeal.

{¶ 17} Briefly, the R.C. 2744.02(B) exceptions to immunity include: operating a motor vehicle, proprietary functions, failure to repair roads, building defects, and statutorily imposed liability. Our review of the record shows that none of these exceptions to political subdivision immunity apply to the City in the instant case.

{¶ 18} The court erred by denying summary judgment to the City on all of Meredith's claims and the second assignment of error is sustained.

{¶ 19} "I. The trial court erred in denying appellant, Commander Bradford Sudyk, summary judgment by failing to find that Commander Sudyk is immune from liability as a matter of law pursuant to R.C. 2744.03, because there is no

evidence in the record to support a finding that Commander Sudyk acted with malice, in bad faith, or in a wanton or reckless manner."

{¶ 20} Generally, individual employees of a political subdivision, such as Officer Sudyk, are immune from civil actions 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." R.C. 2744.03(A). This immunity exists unless "(a) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; [or] (c) civil liability is expressly imposed upon the employee by a section of the Revised Code." R.C. 2744.03(A)(6); see, also, *Lee v. Cleveland*, 151 Ohio App.3d 581, 2003-Ohio-742, 784 N.E.2d 1218.

{¶ 21} In the instant case, our analysis focuses on R.C. 2744.03(A)(6)(b), as it is undisputed that the other exceptions to individual immunity are inapplicable.

{¶ 22} "Malicious purpose encompasses exercising 'malice,' which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified." *Caruso v. State* (2000), 136 Ohio App.3d 616, 620-21, 737 N.E.2d 563, citing *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453-54, 602 N.E.2d 363. See, also, *Strickland v. Tower City Mgt. Corp.* (Dec. 24, 1997), Cuyahoga App. No. 71839.

{¶ 23} "'Bad Faith' connotes a dishonest purpose, conscious wrongdoing, intent to mislead or deceive, or the breach of a known duty through some ulterior motive or ill will." *Strickland*, supra.

{¶ 24} "[R]eckless conduct refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that such risk is greater than that necessary to make the conduct negligent." *Caruso*, supra. See, also, *Ferrante v. Peters*, Cuyahoga App. No. 90427, 2008-Ohio-3799.

{¶ 25} "Wantonness" is described as a "degree greater than negligence." *Ferrante*, supra. Wanton misconduct is the failure to exercise any care whatsoever. *Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639 N.E.2d 31. "Mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor." Id., citing *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 269 N.E.2d 420.

{¶ 26} Courts often use "reckless" interchangeably with "wanton," and this Court has found that the terms are functional equivalents of each other. *Ferrante*, supra, citing *Sparks v. Cleveland,* Cuyahoga App. No. 81715, 2003-Ohio-1172.

{¶ 27} See, also, *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705.

{¶ 28} By enacting R.C. 2744.03(A)(6), the Ohio legislature has determined that a police officer, for example, cannot be held personally liable for acts committed while carrying out official duties unless one of the exceptions to immunity is established. *Cook v. Cincinnati* (1995), 103 Ohio App.3d 80, 90, 658 N.E.2d 814. Therefore, we begin with a presumption of immunity.

{¶ 29} Meredith argues that this presumption of immunity is overcome because Officer Sudyk acted with malice, in bad faith, or in a wanton or reckless manner, in the events leading up to her arrest and her prosecution.

{¶ 30} Regarding her arrest, Meredith alleges that the following conduct by Officer Sudyk amounts to an exception to statutory immunity. Officer Sudyk harassed Lott and used excessive force against him when trying to put him in the police vehicle; that this harassment "(1) caused the crowd to be in an uproar; (2) led to her being falsely arrested and prosecuted; and (3) caused her to sustain severe injury." Additionally, Officer Sudyk lacked probable cause to arrest her.

{¶ 31} While Officer Sudyk's conduct toward Lott may have contributed to the crowd's uproar, it was not directed toward causing injury or loss to Meredith. In other words, it was not foreseeable that harassing Lott would result in Meredith's false arrest, and we will not extend this exception to sovereign immunity beyond the victim of the allegedly malicious or reckless conduct. See, generally, *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. Therefore, for the purpose of immunity under R.C. 2744.03, Officer Sudyk's conduct toward Lott is irrelevant to Meredith's claims.

{¶ 32} Turning to the allegation that there was no probable cause to arrest Meredith, we must determine whether the facts known to Officer Sudyk at the time of the arrest would warrant a person of reasonable caution to believe that an offense had been committed. *Beck v. Ohio* (1964), 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed.2d 142; *State v. Timson* (1974), 38 Ohio St.2d 122, 311 N.E.2d 16. In *Brinegar v. United States* (1949), 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879, the United States Supreme Court described the concept of probable cause as follows: "In dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

{¶ 33} Furthermore, "[p]robable cause exists where 'the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar*, supra, at 175-76, quoting *Carroll v. United States* (1923), 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543.

{¶ 34} In dealing with a false arrest allegation, "knowledge of the precise crime committed is not necessary to a finding of probable cause provided that probable cause exists showing that a crime was committed by the defendants." *United States v. Anderson* (1991), 923 F.2d 450, 457. Meredith argues extensively that there is no evidence in the record to support the elements of

aggravated riot and assault on a police officer, which were two of the three charges against her. While she may be correct — the jury acquitted her of these charges — her argument concerning insufficient evidence of each particular offense is misplaced. Rather, we review whether it was reasonable for Officer Sudyk to believe that Meredith committed *any* criminal offense.

{¶ 35} At her criminal trial, Meredith testified that when she learned a police officer was outside, she immediately approached him, asked him to calm down and wait a minute, and tried to get an understanding of what was going on because she felt she was responsible for her son's graduation party. Meredith said she was talking to Officer Sudyk in a loud voice and waving her hands, but not "hollering or screaming." Meredith also stated that she was yelling at the crowd, but they did not listen to her because "they were out of control." Meredith continued to tell the officer to calm down, and she began praying that no one would get hurt. Although at the time Meredith believed she was silently praying, according to witnesses, Meredith was praying out loud.

{¶ 36} Meredith testified that when she saw Officer Sudyk touch her son Ernest's arm, she ran toward them, saying "Stop. No. Don't let anybody get hurt." At this point, Meredith does not remember what happened, but she, Officer Sudyk, and her son ended up on the ground.

{¶ 37} Officer Sudyk testified as to the following version of the same events: He was asking Ernest not to interfere with issuing Lott a citation, when Meredith ran up to them, yelling and screaming, and got in between the officer and Ernest.

According to Officer Sudyk, he told Meredith that she was not helping the situation, and he was looking for cooperation.

{¶ 38} Officer Sudyk testified that when he tried to arrest Lott, Meredith and Ernest grabbed and pulled at him from the back. As the crowd closed in on him, Officer Sudyk went into "survival mode," radioed for back-up, and got his baton out of the trunk of his car. At this point, Meredith screamed at the officer, "You don't have to do this." Officer Sudyk replied to her, "You now need to back off from me," because he was not sure what she would do next.

{¶ 39} When other officers arrived, Officer Sudyk instructed them to arrest Lott "because he was the main instigator." Officer Sudyk testified that Ernest and Meredith grabbed him from behind again and tried to interfere with the handcuffs being put on Lott. When Lott was secure in the police vehicle, Officer Sudyk turned his attention to Ernest. At this point, he was "bum rushed" and he and Ernest went down to the ground with Meredith on top of him.

{¶ 40} Cleveland Heights Police Officer Christopher Barton ("Officer Barton") testified that when he arrived on the scene, Officer Sudyk was surrounded on all sides by a crowd, and a few people, including Meredith, were "in his face screaming at him." He testified that Meredith, along with others, pushed him and Officer Sudyk as the two tried to place Lott in the police vehicle. Officer Barton eventually put Lott into the cruiser, and the next thing he saw was Meredith tackling Officer Sudyk, who had hold of her son Ernest. Officer Barton pulled Meredith off Officer Sudyk, and placed Meredith in handcuffs.

{¶ 41} After review, we find it reasonable that the officers believed Meredith had committed an offense, resulting in probable cause to arrest her. Officer Sudyk testified that Meredith tried to prevent him from dealing with Lott and Ernest, and her screaming was "not helping" calm the crowd. Additionally, Officer Barton testified that he saw Meredith tackle Officer Sudyk from behind.

{¶ 42} Looking at the facts in a light most favorable to Meredith, as we must, we find that there are certainly inconsistencies between the City's evidence and Meredith's evidence. This is supported by the fact that Meredith was found not guilty of the offenses she was charged with. However, there is no evidence that Officer Sudyk acted with malice, in bad faith, or in a wanton or reckless manner toward Meredith.

{¶ 43} Although Meredith testified that her purpose in getting involved was to make sure nobody got hurt, she also stated that she was yelling and waving her arms in the middle of an out of control crowd, she told the officer that there was no need to issue a citation to, or arrest, Lott and Ernest, and somehow, she came into contact with Officer Sudyk and they ended up falling to the ground. Cf. *Knox v. Hetrick*, Cuyahoga App. No. 91102, 2009-Ohio-1359 (affirming the denial of summary judgment based on immunity when there were questions of fact as to whether the officer used derogatory language and swear words toward the plaintiff and eyewitness testimony characterizing the officer's incident report as a "false statement").

{¶ 44} Meredith can prove no set of facts that would lead to an exception to Officer Sudyk's immunity, and this assignment of error is well-taken. Accordingly, the court's denial of the City and Officer Sudyk's summary judgment motion is reversed and this matter is remanded for proceedings consistent with this opinion.

It is ordered that appellants recover from appellee their 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 Court of Common Pleas 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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JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS
IN JUDGMENT ONLY