[Cite as *Chavalia v. Cleveland*, 2017-Ohio-1048.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104608 and 104621

GLORIA A. CHAVALIA, ADMINISTRATOR OF THE ESTATE OF DYLAN F. BALVIN, DECEASED

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART;
REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-837765

BEFORE: E.A. Gallagher, J., Keough, A.J., and McCormack, J.

RELEASED AND JOURNALIZED: March 23, 2017

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EILEEN A. GALLAGHER, J.:

{¶1} In this consolidated appeal, defendants-appellants Lisa Carbone f.k.a. Lisa Zak ("Carbone") and Carol Valencic-Newcomb ("Valencic-Newcomb") (collectively, the "dispatchers") in Appeal No. 104621 and the city of Cleveland (the "city") in Appeal No. 104608 (collectively, "appellants") appeal the trial court's denial of their motions for summary judgment. Appellants argue that they have statutory immunity under R.C. 2744.02 and 2744.03(A)(6) from the wrongful death claims brought by plaintiff-appellee Gloria Chavalia, administrator of the estate of Dylan Balvin ("appellee") arising out of appellants' alleged failure to promptly dispatch a zone car to investigate a 911 call involving Balvin. For the reasons that follow, we affirm the trial court's denial of summary judgment as to the dispatchers. However, we find that the trial court erred in denying the city's motion for summary judgment on the basis of statutory immunity and, therefore, reverse the trial court's ruling as to the city.

Factual and Procedural Background[1]

The 911 Call

{¶2} On November 1, 2010, at approximately 7:31 p.m., Beth Greene placed a 911 call (the "911 call") on her cell phone. Greene testified that she had intended to go to "open swim" at the Estabrook Recreation Center but when she arrived at the recreation center, she discovered the pool was closed and decided to take a walk in the surrounding neighborhood instead. At approximately 7:00 p.m., as she was walking on the sidewalk

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[1]The factual summary that follows is based on the materials submitted by the parties in

along Ridgeview Road in Cleveland, Greene heard a "thud" and observed two women (later identified as Stephanie Baga and Giovanna Oravec) pulling a man who was "missing a lot of clothes" (later identified as Dylan Balvin) out of a car, dragging him across the front lawn and "dump[ing]" him into a leaf pile on the street near the curb "like they were throwing out trash." She testified that the two women looked "very unhappy and angry and hostile" and were yelling at the man, "Are you going to wake up now?"[2]

{¶3} As Oravec and Baga were dragging Balvin, Greene continued walking towards Memphis Avenue, then turned around and saw Balvin a second time. She testified that it was cold that night, that his "backside was hanging out of the leaves" and that he was "snoring loudly" like "a sleeping bear." By that time, the two women were gone. Greene testified that she walked back to her car and called her daughter to see if she knew the non-emergency police number. Greene's daughter encouraged her to call 911 instead. As she was driving to her daughter's house, Greene made the call.

{¶4} Police operators working in the Cleveland Police Department's Bureau of Communications, Communications Control Section ("Communications Control Section")

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support of their briefs on summary judgment.

[2]According to statements Baga and Oravec made to homicide detectives after the incident, Balvin had injected himself with heroin while he was in a car with them, then immediately passed out and began to make a snoring noise. After Oravec and Baga drove back to their house, they pulled Balvin out of the car and placed him in a pile of leaves on the tree lawn, thinking that "the cold might wake him up and/or the drugs might work their way out of his system." Oravec and Baga then went to get something to eat, leaving Balvin on the tree lawn. When they returned home an hour to an hour-and-a-half later, the women checked on Balvin. Finding no pulse, Oravec called 911. Responding officers arrived a few minutes later.

are classified as "call takers" or "dispatchers." When a "call taker" receives a 911 call, he or she first determines whether the caller is in need of emergency medical services ("EMS"), fire services or police services. If the caller is in need of EMS or fire services, the call is transferred to EMS/fire dispatchers. If the call is not transferred, the call taker is responsible for obtaining all relevant information from the caller, including the caller's information and location and the reason police assistance is needed, prioritizing the seriousness of the call and assigning the call to the appropriate police district. The call taker enters the relevant information into the computer that generates an assignment. The assignment then appears on the computer screen of the dispatcher or dispatchers assigned to that district in their pending assignments queue. All of the information obtained and actions taken by the call taker and dispatchers relating to an incident are to be recorded in a time-stamped, audit trail of the incident (the "event chronology").

{¶5} Cuyahoga County's 911 system directed Greene's 911 call to the city. Because of the location of her cell phone when she made the call, Greene's call was originally directed to the Third District. Greene's phone disconnected during the call and a Third District operator called her back. Greene testified that she told the operator what she had seen. Based on the location of the incident, it was assigned to the Second District.

{¶6} Carbone and Valencic-Newcomb explained that when an assignment appears in their pending assignments queue, each dispatcher generally clicks on the assignment and reviews the "basic information screen" to ensure that all the relevant information has

been provided. This screen contains information such as the location of the assignment, the type of assignment, the caller's callback information, the priority level of the assignment and the reason for the call. If information is missing or if the dispatcher does not understand the information provided, the dispatcher may call the caller back to obtain additional information. If all of the relevant information has been provided, the dispatcher will generally look at his or her available car screen to see if a zone car is available to respond to the call. If no zone cars are available, the dispatcher will look at the priority of the assignments to which the zone cars are currently assigned. If a zone car is assigned to a lower priority assignment, the car will be reassigned to the higher priority assignment. If no zone cars are available for an assignment, the dispatcher will wait to assign the call until a zone car becomes available unless the priority of the assignment requires that the dispatcher take other steps to assign the call.

{¶7} In this case, the incident was coded by the call taker as a priority 2 assignment,"trouble– unknown cause." A priority two assignment is one that has the potential for serious physical harm or serious property damage or involves a crime that has just occurred.[3] The comments entered by the call taker in the event chronology[4]

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[3]A priority 0 assignment is the highest priority assignment (used when an officer is down or in danger of bodily harm), followed by a priority 1 assignment (involving serious physical harm, serious property damage or a serious crime in progress) and a priority 2 assignment (involving the potential for serious physical harm or serious property damage or a crime that has just occurred). A priority 5 assignment is the lowest priority assignment (involving incidents that are "administrative in nature").

[4]Carbone testified that the event chronology could be accessed by dispatchers when reviewing the assignment and that dispatchers could add to the chronology by typing information into a written

indicated that Greene had seen two females drag a male across the street and put him into the trash — a leaf pile — on the west side of the street and that Greene could hear the man snoring as she walked by. Although the assignment was forwarded to the Second District to dispatch a zone car to investigate the incident Greene had reported, no zone cars were dispatched to the scene until 9:29 p.m., nearly two hours after Greene's call. Officers arrived at the scene a few minutes later. EMS assistance was immediately requested, but Balvin was "dead on arrival."

The City's Dispatching Assignments Policy

{¶8} At the time of the incident, the city's Communications Control Section had a written policy and procedures for dispatching assignments (the "dispatching assignments policy" or the "policy"), which had been in place for at least six years. The purpose of the policy was "to establish a priority classification for all calls for service that are received and to provide guidelines for the proper dispatching of incidents," including setting "target dispatch times" for each priority classification and guidelines for handling difficulties in dispatching high priority assignments. Specifically, with respect to priority 2 assignments, the policy stated:

> **<u>Priority 2:</u>** Requires a minimum delay response to incidents that have the potential for serious physical harm, serious property damage or a crime that has just occurred.
>
> 1. Target dispatch time for priority 2 assignments shall be fifteen (15) minutes or less.

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narrative box. Valencic-Newcomb acknowledged that the event chronology in this case "contained all the relevant information regarding communications within the 911 system and dispatchers regarding this incident."

2. Dispatchers may assign concurrent multiple priority 2 assignments to the same unit.
3. "Life" incidents shall take precedence over "property" incidents.

{¶9} The policy required that either one two-man zone car or two one-man zone cars be dispatched to a priority 2 incident. If no open units were available to assign to an assignment, the dispatcher was to broadcast the incident location and other relevant details over the district channel assignment. If a dispatcher was having difficulty dispatching a priority 2 assignment, the dispatcher was to request assistance from a sector supervisor[5] or contact a CCS supervisor. When "experiencing a large backlog of assignments," the dispatcher was required to advise a sector supervisor, a CCS supervisor and the complainant of potential delays.

The Dispatchers' Handling of the Assignment

{¶10} Carbone and Valencic-Newcomb were the two dispatchers assigned to the Second District at the time the assignment relating to Greene's call came in, shortly after 7:30 p.m. They were working the 2:30 p.m. to 10:30 p.m. shift. Carbone had been a city dispatcher for approximately 15 years and Valencic-Newcomb had been a city dispatcher for approximately 12 years.

{¶11} The Second District dispatchers worked as a team. One dispatcher was the "primary dispatcher," who worked in the "A position" and dispatched units to investigate assignments, and the other dispatcher worked in the "B position," handling "all other

[5] A sector supervisor is a police sergeant assigned to a district who has supervisory responsibility for all on-duty zone cars.

functions," such as warrant checks and call backs. The two dispatchers sat approximately two feet from each other.

{¶12} According to Carbone, during their shift on November 1, 2010, she and Valencic-Newcomb "shared" the dispatching duties and would "take turns" performing various functions. At the time they received the assignment at issue, Valencic-Newcomb was serving as the primary dispatcher in the "A position" and Carbone was performing all non-dispatching functions in the "B position."

{¶13} Carbone and Valencic-Newcomb each testified that they saw the assignment in their pending assignments queue at some point that evening and reviewed the assignment at that time. Carbone testified that she saw the assignment "[w]hatever time it came in." She acknowledged that the assignment was coded a priority 2 and indicated that, to the best of her recollection, it related to a call that two women were dragging a mannequin to the tree lawn on Ridgeview Road.[6] Carbone did not immediately dispatch any units to the scene or inquire if any units were available to go to the scene to respond to the assignment. She could not recall whether she discussed the assignment with Valencic-Newcomb when it came in.

{¶14} "At some point" later that evening, Carbone saw the assignment on her monitor a second time. She testified that she indicated to Valencic-Newcomb that a car

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[6]Carbone testified that her understanding of the facts of the incident came from the event chronology for the assignment. However, there is nothing in the event chronology that references a mannequin.

could be pulled from another assignment to respond to this call but that she did not know what Valencic-Newcomb did in response to her suggestion.

{¶15} Valencic-Newcomb acknowledged receiving a priority 2 assignment sometime that evening regarding two females dragging a snoring male onto a tree lawn. During her deposition in July 2013, Valencic-Newcomb testified that when she received the assignment, she looked at it, then "[l]ooked to see if there was a car to send." She stated that she did not have a specific recollection of whether any cars were available to respond to the assignment at that time but indicated that "apparently" no zone cars were available[7] because none were sent.

{¶16} She testified that she returned to the assignment at least once that evening but could not recall when that was or what, if anything, she did in response to the assignment at that time. She claimed that she was aware of the pending assignment the entire two hours but that she didn't dispatch a car because "[i]f I don't have a car to dispatch, you can't dispatch." She indicated that Carbone "could have" reminded her to dispatch a car to the assignment but denied that she "ignore[d]" any such reminder. She testified that she did not recall whether a car was ever dispatched to that assignment and, if one was dispatched, whether it was she or Carbone who dispatched a car to that assignment.

[7]The dispatchers testified that because the assignment at issue did not relate to a specialized area such as vice, narcotics or homicide, only zone cars could be dispatched to the assignment.

{¶17} In a November 2013 affidavit, Valencic-Newcomb tweaked her testimony slightly, stating:

> 17. I do not know why neither Lisa nor I dispatched a vehicle at that time. It was busy and I did not realize that it was still unassigned. I do not know if a two-man car or two one-man cars were available at an earlier time. Nor do I recall if there were any cars that could have been pulled from a lower priority call.
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> 18. When I was interviewed about the incident months later, I thought that there were no cars available to assign. However, this statement was made in March of 2011 from memory. I have never reviewed the complete audiotapes of that night or the logs. I do not recall if there were any cars available.

{¶18} Carbone similarly testified in her November 2013 affidavit:

> 18. I do not know why neither Carol nor I dispatched a vehicle. It was busy and I did not realize that it was still unassigned. I do not know if a two-man car or two one-man cars were available at an earlier time. Nor do I recall if there were any cars that could have been pulled from a lower priority call.

{¶19} From the time the Second District received the assignment at approximately 7:35 p.m. until 9:29 p.m., nothing was documented by Carbone or Valencic-Newcomb in the event chronology. Although neither Carbone nor Valencic-Newcomb could recall who ultimately dispatched a zone car to investigate

Greene's call or when the zone car was dispatched, the event chronology shows that Carbone dispatched a zone car to the scene at approximately 9:29 p.m.

{¶20} Valencic-Newcomb and Carbone agreed that it was their joint responsibility to dispatch a zone car to investigate the assignment at issue. Both dispatcher were familiar with the city's dispatching assignment policy and acknowledged that their actions (or rather, inaction) violated that policy. Both dispatchers further acknowledged that although city policy required them to immediately notify a sector supervisor or a CCS supervisor if they were having difficulty dispatching a priority 2 assignment, they did not do so.

Appellee's Lawsuit

{¶21} On December 19, 2014, appellee refiled a complaint[8] against the city, Cleveland Police Chief Michael McGrath (who was the Chief of Police of the Cleveland Police Department at the time of the incident; the city and McGrath are collectively referred to as the "city defendants"), the dispatchers, Baga and Oravec (collectively, "defendants") seeking to recover compensatory and punitive damages for Balvin's pain and suffering (survivorship claim) and death (wrongful death claim). Appellee alleged that the dispatchers and city defendants ignored Greene's 911 call for two hours, "conscious[ly] disregard[ing] * * * the rights and safety of others" and that their delay in sending a police officer to investigate the call caused Balvin to develop hypothermia and his death or "at the very least, the * * * loss of chance of a cure for his condition."

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[8]The original complaint was filed in November 2012 and was voluntarily dismissed without

Appellee further alleged that the actions of the dispatchers and city defendants "either individually and/or by and through their agents and/or employees" in ignoring the 911 call and failing to promptly dispatch an officer to investigate the call for nearly two hours constituted "negligent," "malicious" or "wanton or reckless" misconduct and "bad faith" in violation of R.C. Chapter 2744, former R.C. Chapter 4931 and "other sections of the Ohio Revised Code." The dispatchers and city defendants filed answers, denying any wrongdoing and asserting various affirmative defenses, including that appellee's claims against them were barred by statutory immunity.

Motions for Summary Judgment

{¶22} Following the completion of discovery, the city and the dispatchers filed separate motions for summary judgment.[9] The dispatchers argued that they were entitled to summary judgment because they were immune from liability under R.C. 2744.03(A)(6) and because former R.C. 4931.49 did not apply to them. In support of their motion, the dispatchers attached (1) affidavits from Valencic-Newcomb and Carbone in which they discussed their backgrounds, their duties and responsibilities as city dispatchers and their recollection of the incident and (2) an affidavit from Cleveland Police Detective Timothy

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prejudice pursuant to Civ.R. 41(A)(1)(a) in December 2013.

[9]Police Chief McGrath and the city filed a joint motion for summary judgment. Oravec also filed a motion for summary judgment. The trial court entered summary judgment in favor of Police Chief McGrath on all of appellee's claims. The trial court ruled in favor of Oravec on appellee's punitive damages and survivorship claims but denied her motion for summary judgment as to appellee's wrongful death claims. The trial court's summary judgment rulings on the claims against Oravec and Police Chief McGrath are not part of this appeal and, therefore, are not further discussed here. Baga died in June 2015 and the trial court thereafter dismissed the claims

Entenok, one of the homicide detectives assigned to investigate Balvin's death, attaching portions of a "supplementary report" summarizing interviews he and his partner conducted of Baga and Oravec relating to the incident (the "Entenok affidavit").

{¶23} The city argued that it was entitled to summary judgment because (1) it was immune from liability under R.C. 2744.02, (2) R.C. 4931.49 did not apply and could not "evade the City's statutory immunity" and (3) the "public duty doctrine" barred appellee's wrongful death claim. In support of their motion, the city defendants submitted (1) excerpts from Greene's deposition, (2) an affidavit from McGrath regarding his lack of personal involvement in the matter and (3) an affidavit from Mark Cebron, Chief Dispatcher for CCS, addressing the training provided to, and duties and responsibilities of, the city's call takers and dispatchers. Copies of the event chronology for the incident and the city's dispatching assignments policy were authenticated by and attached to Cebron's affidavit.

{¶24} Appellee filed a combined opposition to the defendants' summary judgment motions. She argued that a genuine issue of material fact existed as to whether the dispatchers acted recklessly or wantonly, depriving them of immunity under R.C. 2744.03(A)(6)(b), 2744.03(A)(6)(c) and former R.C. 4931.49. Appellee further argued that the dispatchers' "wanton misconduct * * * impose[d] liability" on the city pursuant to R.C. 2744.02(B)(5) and former R.C. 4931.49 and that the public duty rule was not applicable to her claims. In support of her opposition, appellee submitted: (1) excerpts

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against her pursuant to Civ.R. 25.

from the depositions of Baga, Oravec, Greene, Carbone and Valencic-Newcomb; (2) the Entenok affidavit; (3) the event chronology; (4) a CD containing Greene's 911 call and other dispatch and radio transmissions; (5) an affidavit from Dennis McClure, M.D., attaching expert reports in which he opined that if EMS had promptly responded after Greene's call, Balvin's hypothermia "could have been corrected," his overdose symptoms could have been "reversed" and he would have survived; (6) the coroner's report from Balvin's autopsy; (7) the city defendants' responses to appellee's requests for production of documents and (8) various versions of the dispatching assignment policy.[10]

{¶25} The trial court granted summary judgment in favor of all of the defendants on appellee's survivorship and punitive damages claims. The trial court reasoned that because appellee had alleged in her complaint that Balvin was "unconscious" during the incident, she could not establish that Balvin suffered any "conscious pain and suffering" prior to his death as required to prove a survivorship claim. Because appellee could not sustain her survivorship claim, the trial court held that her punitive damages claim failed as well.

{¶26} As to appellee's wrongful death claim, the trial court denied the dispatchers' and the city's motions for summary judgment, concluding that the evidence presented

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[10]The dispatchers argue that we should not consider the event chronology, coroner's report, 2012 update to the dispatching assignments policy and the documents attached to the city defendants' responses to requests for production because they are not proper summary judgment evidence under Civ.R. 56(C). The event chronology was attached to and authenticated by Cebron's affidavit. As to the other items, we need not resolve the issue of whether they are properly considered on summary judgment because we find that genuine issues of material facts exist precluding the entry summary judgment for the dispatchers on immunity grounds even if these items are not considered.

regarding the dispatchers' failure to dispatch any units to the scene or to take any other steps with respect to the assignment at issue for nearly two hours (1) was "sufficient to establish a jury question regarding whether Carbone and [Valencic-Newcomb] were reckless within the meaning of R.C. 2744.03(A)(6)," and (2) created a genuine issue of material fact as to whether an exception to the city's statutory immunity applied under R.C. 2744.02(B)(2) based on the dispatchers' "negligent performance of their acts as employees." The trial court did not address the parties' arguments relating to former R.C. Chapter 4931, declaring them "moot" in light of the trial court's analysis of R.C. Chapter 2744.

{¶27} The dispatchers and the city appealed the denial of their motions for summary judgment on immunity grounds. The dispatchers have raised the following single assignment of error for review:

> First Assignment of Error: The Motion for Summary Judgment was improperly denied as it relates to the immunity of Appellants Carbone and Valencic-Newcomb, both employees of the City of Cleveland.

The city has raised the following two assignments of error for review:

> First Assignment of Error: The trial court erred when it denied the City of Cleveland's Motion for Summary Judgment because, under O.R.C. Chapter 2744, the City is immune from liability for the provision of police services.
>
> Second Assignment of Error: The trial [c]ourt erred when it determined that the provision of police dispatch services was a proprietary rather than a governmental function depriving the City of Cleveland immunity pursuant to O.R.C. Chapter 2744.

Law and Analysis

Standard of Review

{¶28} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.

{¶29} Under Civ.R. 56, summary judgment is appropriate when (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party.

{¶30} On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

Statutory Immunity of Political Subdivisions and Their Employees

{¶31} Ohio's Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744, absolves political subdivisions and their employees of tort liability, subject to

certain exceptions. We address the dispatchers' arguments for immunity under R.C. Chapter 2744 first.

Immunity of Employees of a Political Subdivision Under R.C. 2744.03(A)(6)

{¶32} Whether an employee of a political subdivision is immune from liability is determined by applying R.C. 2744.03(A)(6). *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 17. Pursuant to R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless: (1) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (2) the employee's acts or omissions were with malicious purpose, in bad faith, or wanton or reckless or (3) civil liability is expressly imposed upon the employee by another section of the Revised Code.

Exception to Immunity for Wanton or Reckless Conduct Under R.C. 2744.03(A)(6)(b)

{¶33} The trial court denied the dispatchers' motion for summary judgment based on the exception to immunity set forth in R.C. 2744.03(A)(6)(b), concluding that there was a genuine issue of material fact as to whether the dispatchers' conduct was "reckless." As a general matter, whether a political subdivision or an employee of a political subdivision is entitled to immunity under R.C. Chapter 2744 is a question of law for determination by the court. *See, e.g., Srokowski v. Shay*, 8th Dist. Cuyahoga No. 100739, 2014-Ohio-3145, ¶ 11, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 291, 595 N.E.2d 862 (1992), and *Feitshans v. Darke Cty.*, 116 Ohio App.3d 14, 19, 686 N.E.2d 536 (2d Dist.1996). However, whether the employee acted in a wanton or reckless

manner under R.C. 2744.03(A)(6)(b) is typically a question of fact for the jury.[11] *See, e.g., Miller v. Hace*, 8th Dist. Cuyahoga No. 102500, 2015-Ohio-3591, ¶ 17; *Stevenson v. Prettyman*, 193 Ohio App.3d 234, 244, 2011-Ohio-718, 951 N.E.2d 794, ¶ 43 (8th Dist.). Thus, a trial court may not grant summary judgment on the basis of R.C. 2744.03(A)(6) immunity unless, based on the evidence, reasonable minds could conclude only that the employee did not act in a wanton or reckless manner. If reasonable minds could disagree on this issue, then a trial court cannot properly grant an employee summary judgment based upon statutory immunity under R.C. 2744.03(A)(6).

{¶34} In *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, the Ohio Supreme Court defined "wanton" and "reckless" as used in R.C. 2744.03(A)(6)(b) as follows, clarifying that they are "different and distinct degrees of care" and are "not interchangeable":

> 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. *Hawkins [v. Ivy*, 50 Ohio St.2d 114, 117-118, 363 N.E.2d 367 (1977)]; *see also Black's Law Dictionary* 1613-1614 (8th Ed.2004) (explaining that one acting in a wanton manner is aware of the risk of the conduct but is not trying to avoid it and is indifferent to whether harm results).
>
> Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is

[11] Appellee has not argued that the dispatchers acted (or failed to act) with malicious purpose or in bad faith and there is no evidence in the record to suggest that they did so. Accordingly, we consider only whether a reasonable jury could find that the dispatchers acted wantonly or recklessly given the facts as they have been developed by the parties.

> unreasonable under the circumstances and is substantially greater than negligent conduct. *Thompson [v. McNeill*, 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705 (1990)], adopting 2 Restatement of the Law 2d, Torts, Section 500, at 587 (1965); *see also Black's Law Dictionary* 1298-1299 (8th Ed.2004) (explaining that reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the risk, but the actor does not desire harm).

(Emphasis omitted.) *Id.* at ¶ 31, 33-34.

{¶35} The standard for establishing wanton or reckless conduct is "high" and requires consideration of the "totality of the circumstances." *See, e.g., Miller* at ¶ 17; *Adams v. Ward*, 7th Dist. Mahoning No. 09 MA 25, 2010-Ohio-4851, ¶ 27; *Stevenson* at ¶ 43. As such, the determination of whether an employee acted in a wanton or reckless manner is highly dependent on the facts of each case.

{¶36} The dispatchers argue that they were entitled to summary judgment because "[t]here is no evidence of any reckless or wanton conduct" in the record and that they were "at most negligent in failing to follow up on the call." The dispatchers further contend, relying on the affidavits they submitted in support of their motion for summary judgment, that no reasonable jury could find their conduct "wanton" or "reckless" because they (1) were working an "active" shift and handling "multiple responsibilities" in one of the city's "busiest police districts," (2) do not know what happened to the assignment and "do not recall" why they failed to dispatch a unit to the assignment and

(3) had "no nefarious purpose," "harbored no ill will towards Mr. Balvin" and did not "intentionally disregard his situation." In her affidavit submitted in support of her motion for summary judgment, Valencic-Newcomb testified:

> I did not have any intent to injure Dylan Balvin. Nor did I wish him harm. While I do not recall why a car was not dispatched, I was working on other tasks. There was no intent to ignore the call or to prioritize other assignments ahead of it.

Carbone offered identical testimony in her affidavit.

{¶37} We disagree. There is no requirement that an employee specifically intend to cause harm in order to be exempt from immunity under R.C. 2744.03(A)(6)(a).

{¶38} On the record before us, viewing the evidence in the light most favorable to appellee and considering the totality of the circumstances, we conclude that a reasonable factfinder could find that the dispatchers acted wantonly, i.e., that they failed to exercise any care toward those to whom a duty of care is owed under circumstances in which there is great probability that harm will result, or recklessly, i.e., with conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances. *Anderson,* 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266 at ¶ 33-34.

{¶39} During their depositions, Carbone and Valencic-Newcomb admitted that they violated the dispatching assignments policy by: (1) failing to dispatch a unit to the priority 2 assignment for nearly two hours; (2) making no attempt to reassign a unit from a lower priority assignment to the assignment for nearly two hours; (3) failing to broadcast the incident location and other details over the district channel if there was no

available unit to dispatch to the assignment; (4) failing to contact a sector supervisor or CCS supervisor for guidance if they were having difficulty dispatching the priority 2 assignment, and (5) failing to document any actions taken with respect to the assignment.

{¶40} With regard to an employee's failure to follow safety policies and procedures, the *Anderson* court stated: "it is well established that the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct." *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at ¶ 37. The court further explained:

> In order that the breach of [a] statute constitute reckless disregard for the safety of those for whose protection it is enacted, the statute must not only be intentionally violated, but the precautions required must be such that their omission will be recognized as involving a high degree of probability that serious harm will result.
>
> 2 Restatement of the Law 2d, Torts (1965) 587, Section 500, cmt. e.
>
> Thus, as we concluded in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, "[w]ithout evidence of an accompanying knowledge that the violations 'will in all probability result in injury,' [*Fabrey v. McDonald Village Police Dept.,* 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994)], evidence that policies have been violated demonstrates negligence at best." *Id.* at ¶ 92.

Anderson at ¶ 38.

{¶41} This is not a case in which the policy violations occurred "'[w]ithout evidence of any accompanying knowledge that the violations "will in all probability result in injury."'" *Anderson* at ¶ 38, quoting *O'Toole* at *¶* 92*,* quoting *Fabrey* at 356. Here, evidence exists from which reasonable minds could conclude that the dispatchers acted

(or rather, failed to act) both with knowledge that they were violating the city's dispatch assigning policy and that the violations would in all probability result in injury.

{¶42} Carbone and Newcomb testified that they saw and reviewed the assignment when it came in and knew the assignment was a priority 2 assignment — i.e., an assignment that has the potential for serious physical harm or serious property damage or involves a crime that has just occurred — for which the target dispatch time is 15 minutes or less. Carbone and Valencic-Newcomb further acknowledged that they knew, based on the description of the incident in the assignment — i.e., a snoring male who had been placed in a leaf pile in or near the road on a November evening — that this particular assignment involved the potential for serious physical injury rather than property damage.

{¶43} Nevertheless, from the time the dispatchers received the assignment at approximately 7:35 p.m. until 9:29 p.m., *nothing* was done by Carbone or Valencic-Newcomb to dispatch a unit to the assignment and *nothing* was documented by Carbone or Valencic-Newcomb in the event chronology for the assignment. Other than to state that they were "busy"[12] and "cannot recall" what happened to the assignment, the dispatchers could not explain why no units were dispatched to the assignment for nearly

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[12]Although the dispatchers claim that they were "busy," they point to no evidence in the record regarding what other assignments were pending or being handled by zone cars from 7:30 p.m. to 9:30 p.m. that evening or the priority of those assignments. Although it appears that such information may have been contained within the documents the city defendants produced in response to appellee's requests for production (which appellee submitted with her combined opposition to the defendants' motions for summary judgment), the dispatchers have argued that those documents are not proper summary judgment evidence and

two hours and could not explain why, if no units were available for dispatch or they were otherwise having dispatching difficulties, they did not broadcast the incident location and other relevant details over the district channel assignment or notify a sector supervisor or CCS supervisor of these difficulties as required under the dispatching assignment policy so that a decision could be made whether a zone car should be pulled off another assignment or other steps taken to obtain a prompt response to the call.

{¶44} Because genuine issues of fact exist as to whether the dispatchers acted wantonly or recklessly, the dispatchers were not entitled to immunity under R.C. 2744.03(A)(6), and the trial court did not err in denying the dispatchers' motion for summary judgment on immunity grounds. *See, e.g., Lyons v. Teamhealth Midwest Cleveland*, 8th Dist. Cuyahoga No. 96336, 2011-Ohio-5501, ¶ 64 (question of fact existed, precluding summary judgment, as to whether dispatcher was reckless when he failed to get an address for an emergency that included the city and instead "guess[ed] at" the information, leading to the dispatch of an ambulance that could not locate the address); *Wollacott v. Andreas*, 8th Dist. Cuyahoga No. 100168, 2014-Ohio-1079, ¶ 19-25 (evidence was sufficient to establish a jury question regarding 911 dispatcher supervisor's recklessness under R.C. 2744.03(A)(6)(b) where it took dispatcher supervisor four minutes to check her email regarding protocol changes and she failed to follow long-standing protocols regarding immediate dispatch of a first responder, provided a dispatcher trainee with the wrong telephone number for mutual aid, stopped

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should not be considered by this court in deciding their appeal. *See supra* at fn. 10.

the trainee as he attempted to look up the number to request an ambulance, failed to verify that the appropriate responder was called and knew that serious injury or death could result from failure to follow procedures and protocols). The dispatchers' assignment of error is overruled.

Immunity of a Political Subdivision Under R.C. 2744.02(B)(2)

{¶45} The city's two assignments of error are interrelated and will be addressed together. To determine whether a political subdivision is entitled to immunity from civil liability under R.C. Chapter 2744, a reviewing court must conduct a three-tiered analysis. *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶ 9, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998). The first tier is the general rule that a "political subdivision" is not liable "in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(A)(1); *Hortman* at ¶ 10-11. If the political subdivision is entitled to immunity under R.C. 2744.02(A)(1), then the court must determine, under the second tier of the analysis, whether any of the five exceptions to immunity set forth in R.C. 2744.02(B) applies. *Hortman* at ¶ 10-11. The five exceptions to immunity recognized under R.C. 2744.02(B) involve: (1) injury, death or loss to person or property caused by the negligent operation of a motor vehicle by an employee acting within the scope of employment and authority; (2) injury, death, or loss to person or property caused by an employee's negligent performance of acts with

respect to proprietary functions of the political subdivision; (3) injury, death, or loss to person or property caused by the negligent failure to keep public roads open and to remove obstructions; (4) injury, death, or loss to person or property caused by an employee's negligence within or on the grounds of, and due to physical defects within or on the grounds of, a building used for governmental purposes and (5) where civil liability for injury, death, or loss to person or property is expressly imposed upon the political subdivision by another section of the Revised Code.

{¶46} If an exception to immunity applies, then a third tier of analysis is performed to determine whether the political subdivision can establish one of the statutory defenses to liability set forth in R.C. 2744.03 to reinstate immunity. *Hortman* at ¶ 12.[13]

Applicability of Exception to Immunity Under R.C. 2744.02(B)(2)

{¶47} The trial court determined that genuine issues of material fact exist as to whether appellee's wrongful death claim falls within the exception to immunity set forth at R.C. 2744.02(B)(2) based on the dispatchers' "negligent performance of their acts as employees." R.C. 2744.02(B)(2) provides:

> Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their

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[13]The parties do not dispute that the city is a "political subdivision" entitled to the general grant of immunity under R.C. 2744.02(A)(1). *See* R.C. 2744.01(F) (definition of political subdivision). There is likewise no dispute that appellee seeks to recover damages for losses allegedly caused by an act or omission of the political subdivision or its employees "in connection with a governmental or proprietary function."

employees with respect to proprietary functions of the political subdivisions.

{¶48} The city argues that R.C. 2744.02(B)(2) is inapplicable here because it applies, by its terms, only to employees who are performing *proprietary functions* of the city. The city further contends that police dispatching — the subject of appellee's wrongful death claim — is a governmental function, not a proprietary function. The trial court did not address this issue in its decision below.

{¶49} R.C. 2744.01(C)(1) defines "governmental function" as

> a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:
>
> (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
>
> (b) A function that is for the common good of all citizens of the state;
>
> (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

{¶50} Under R.C. 2744.01(C)(2), "[t]he provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection" is specifically identified as a "governmental function." R.C. 2744.01(C)(2)(a).

{¶51} R.C. 2744.01(G)(1) defines "proprietary function" as follows:

> "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:
>
> (a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;
>
> (b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

{¶52} Pursuant to R.C. 2744.01(G)(2), "proprietary function" specifically includes:

> (a) The operation of a hospital by one or more political subdivisions;
>
> (b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;
>
> (c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
>
> (d) The maintenance, destruction, operation, and upkeep of a sewer system;
>
> (e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

{¶53} In *Lyons*, 2011-Ohio-5501, this court held that the county sheriff's department's dispatch service, which aided in responding to emergency medical calls, was "an integral part of the provision or nonprovision of police, fire, emergency medical, ambulances and rescue services or protection that is a clearly delineated governmental

function" pursuant to R.C. 2744.01(C)(2)(a) and R.C. 2744.01(C)(1)(a)-(c). *Id.* at ¶ 47. Because the dispatchers were performing a governmental function, the court concluded that exception to immunity set forth in R.C. 2744.02(B) did not apply and the trial court erred in denying the county's motion for summary judgment on immunity grounds. *Id.* at ¶ 49.

{¶54} We find no basis to distinguish the function performed by the city dispatchers in this case from that performed by the county dispatchers in *Lyons*. Because the dispatchers were engaged in a governmental function, R.C. 2744.02(B)(2) does not apply and does not create an exception to the city's statutory immunity in this case. Thus, the trial court erred in denying the city's motion for summary judgment based on the applicability of R.C. 2744.02(B)(2).

Applicability of R.C. 2744.02(B)(5) and Former R.C. 4931.49(B)

{¶55} Appellee does not dispute that she cannot meet the requirements for imposing liability on the city under R.C. 2744.02(B)(2). Rather, she contends that whether the dispatchers were engaged in a governmental or proprietary function is irrelevant because former R.C. 4931.49(B) creates an exception to immunity recognized under R.C. 2744.02(B)(5) that applies to both governmental and proprietary functions.

{¶56} R.C. 2744.02(B)(5) establishes an exception to immunity when civil liability is "expressly imposed" upon a political subdivision by another section of the Revised Code. Former R.C. 4931.49(B), as it existed on November 1, 2010, provides:

> Except as otherwise provided in section 4765.49 of the Revised Code, *an individual who gives emergency instructions through a 911 system*

> established under sections 4931.40 to 4931.70 of the Revised Code, *and the principals for whom the person acts*, *including* both *employers* and independent contractors, *public and private*, and an individual who follows emergency instructions and the principals for whom that person acts, including both employers and independent contractors, public and private, *are not liable in damages in a civil action for injuries, death, or loss to persons or property arising from the issuance* or following *of emergency instructions, except where the issuance* or following *of the instructions constitutes willful or wanton misconduct*.

(Emphasis added.)[14]

{¶57} Citing *Riffle v. Physicians & Surgeons Ambulance Serv.*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, appellee contends that this provision is applicable to the dispatchers as "individuals who give emergency instructions through a 911 system" and the city, as their employer, and imposes liability on both the dispatchers and the city for the dispatchers' "wanton misconduct" in the issuance of emergency instructions. We disagree.

{¶58} In *Riffle*, the Ohio Supreme Court interpreted similar statutory language in R.C. 4765.49(B)[15] as imposing civil liability on a political subdivision when emergency

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[14]This section was subsequently renumbered as R.C. 5507.32 by 2012 H.B. 360, § 1, effective December 20, 2012, and as R.C. 128.32 by 2013 H.B. 59, § 101.01, effective September 29, 2013.

[15]R.C. 4765.49(B), as applied by the court in *Riffle*, states:

> A political subdivision * * *, and any officer or employee of a public agency * * *, that provides emergency medical services * * * is not liable in damages in a civil action for injury, death, or loss to person or property arising out of any actions taken by a first responder, EMT-basic, EMT-I, or paramedic working under the officer's or employee's jurisdiction, or for injury, death, or loss to person or property arising out of any actions of licensed medical personnel advising or assisting the first responder, EMT-basic, EMT-I, or paramedic, unless the services are provided in a manner that

medical services were provided by an employee in a manner that constitutes willful or wanton misconduct. *Id.* at ¶ 22-23. The court explained that:

> [b]ecause R.C. 4765.49(B) expressly imposes liability on a political subdivision when emergency medical services are provided in a manner that constitutes willful or wanton misconduct, the exception to immunity contained in R.C. 2744.02(B)(5) applies, and therefore a political subdivision is not immune from liability under the circumstances alleged in the complaint.

Id. at ¶ 11.

{¶59} Even assuming former R.C. 4931.49(B) subjected the city to potential liability as an exception to immunity under R.C. 2744.02(B)(5), *see Riffle* at ¶ 11, 22-23, it did not apply in this case to remove the city's immunity under R.C. 2744.02(A)(1). Former R.C. 4931.49(B), by its terms, applies where (1) an individual "gives emergency instructions through a 911 system" or "follows emergency instructions" and (2) injuries, death, or loss to persons or property "aris[es] from the issuance or following of [the] emergency instructions." *See, e.g., Toles v. Regional Emergency Dispatch Ctr.,* 10th Dist. Franklin No. 2002CA00332, 2003-Ohio-1190, ¶ 8-9, 63 (where dispatcher received a 911 call and told caller she would inform police but failed to do so, R.C. 4931.49(B) was inapplicable because "no emergency instructions were given" by the dispatcher); *Messer v. Butler Cty. Bd. of Commrs.*, 12th Dist. Butler Nos. CA2008-12-290 and CA2009-01-004, 2009-Ohio-4462, ¶ 19 (R.C. 4931.49(B) did not apply where 911

> constitutes willful or wanton misconduct.

(Emphasis omitted.) *Riffle* at ¶ 17.

communications at issue involved reports of a power outage at an intersection and the dispatcher's request for signage from the state).

{¶60} Appellee's wrongful death claim arises out of the dispatchers' failure to timely dispatch a zone car; it does not "aris[e] from the issuance * * * of emergency instructions" "through a 911 system."[16] There is no evidence in the record that the dispatchers "gave" or "issued" "emergency instructions through a 911 system." Although Valencic-Newcomb acknowledged that, as a dispatcher, she "gives instructions to officers responding to emergencies" based on the information she receives from 911 call takers, she also testified that to the extent she provides instructions to responding officers, she does so through radio transmissions in the city's dispatch system, not "through a 911 system." Accordingly, R.C. 4931.49(B) is inapplicable here. Because no exception to immunity applies, the trial court erred in denying the city's motion for summary judgment on immunity grounds. The city's assignments of error are sustained. The trial court's denial of the city's motion for summary judgment is reversed.

{¶61} Judgment affirmed in part and reversed in part; case remanded for further proceedings consistent with this opinion.

It is ordered that appellee recover from appellants Carbone and Valencic-Newcomb the costs herein taxed.

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[16]Appellee does not contend that her wrongful death claim arises out of the "following of emergency instructions." Accordingly, we do not address that aspect of former R.C. 4931.49(B) here.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County 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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EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
TIM McCORMACK, J., CONCUR