[Cite as *Price v. Telb*, 2009-Ohio-3496.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Brian Price	Court of Appeals No. L-08-1099
Appellee	Trial Court No. CI05-3011
v.	
James Telb, Lucas County Sheriff, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: July 17, 2009

* * * * *

Alan Konop, for appellee.

Julia R. Bates, Lucas County Prosecuting Attorney, John A. Borell and Karlene D. Henderson, Assistant Prosecuting Attorneys, for appellants.

* * * * *

HANDWORK, J.,

{¶ 1} This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas. Appellants, James Telb, the Sheriff of Lucas, County, Ohio, and four of his unnamed deputies assert as error in the proceedings below:

{¶ 2} "The trial court erred in failing to grant summary judgment to the Appellant [sic] pursuant to Ohio Rev. Code 2744.03 as the Appellee did not present any evidence which would strip Appellant [sic] of sovereign immunity."

{¶ 3} The facts relevant to our disposition of this cause are as follows. On the morning of May 9, 2004, appellee, Brian Price, was arrested for driving his motor vehicle while under the influence of alcohol. He was taken to the Lucas County Corrections Center and placed in a holding cell with a number of other arrestees. According to appellee's complaint, the cell was in the booking area. Price fell asleep on a cot. Later that morning, Charles McDuffey, who is also a named defendant in this case, was arrested and placed in the same holding cell. McDuffey awakened appellee and told him to get off the cot. When Price refused, McDuffey assaulted appellee, causing him to suffer severe injuries. The beating was stopped by the other men who were in the holding cell, and McDuffey was confined in a separate cell by himself.

{¶ 4} On May 6, 2005, appellee filed a complaint naming Telb; Defendants Nos. 1, 2, 3, and 4 (the four deputies who were supposedly in a position to view the assault); and Charles McDuffey as defendants. Telb filed a motion for a judgment on the pleadings based upon R.C. Chapter 2744, the Public Subdivision Tort Liability Act, which grants immunity to employees of a political subdivision engaged in a governmental or proprietary function. R.C. 2744.03(A). The trial court denied appellant's motion. Telb appealed this denial. See *Price v. Telb* (Aug. 24, 2006), 6th Dist. No. L-06-1246. ("*Telb I*"). This court dismissed *Telb I* for lack of a final appealable

order. Id. The Ohio Supreme Court declined to accept *Telb I* for review. See *Price v. Telb*, 112 Ohio St.3d 1444, 2007-Ohio-152.

{¶ 5} On remand, Telb[1] filed a motion for summary judgment, asserting that he and his deputies were immune from liability under R.C. 2744.03 and that the sheriff himself was not liable as a matter of law pursuant to R.C. 311.05. Appellee filed a memorandum in opposition. On April 1, 2008, the trial court denied appellants' motion for summary judgment. The court found that appellants "failed to present any evidence that the Defendant himself, or any of his deputies, were unaware of any history related to Defendant McDuffey's behavior, or to show that the alleged conduct of acting *or failing to act* was not willful, or reckless, as alleged." (Emphasis in the original.) This appeal followed.

{¶ 6} Generally, the denial of a motion for summary judgment is not a final, appealable order. *Tomazic v. Sandusky*, 6th Dist. No. E-08-037, 2008-Ohio-6167, ¶ 6. Nevertheless, in *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, syllabus, the Ohio Supreme Court held: "When a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C)." Thus, this court has the jurisdiction to consider this appeal.

[1]The motion for summary judgment was filed in Sheriff Telb's name only, but also asserted that appellee failed to offer any evidence of the fact that either his conduct, or his deputies' conduct, by failing to act, was willful, wanton, or reckless.

{¶ 7} Because an appellate court reviews the grant of a summary judgment de novo, the standard applicable to appellants' assignment of error is found in Civ.R. 56(C). See, also, *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. The grant of a motion for summary judgment is proper when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 8} Appellants contend that they are immune from appellee's claims pursuant to R.C. 2744.03(A)(6) which provides, in material part, that an employee of a political subdivision, when acting in connection with a governmental or proprietary function, is immune from liability *unless* his or her acts or omissions were, inter alia, made "in a wanton or reckless manner." (Emphasis added.) Governmental functions include "[t]he provision * * * of police * * * services or protection." R.C. 2744.01(C)(2)(a). See, also, *Ziegler v. Mahoning Cty. Sheriff's Dept.* (2000), 137 Ohio App.3d 831, 835, citing *Whitler v. McFaul* (1997), 123 Ohio App.3d 199, 203.

{¶ 9} The exceptions to immunity set forth in R.C. 2744.03 must be narrowly construed. *Sturgis v. E. Union Twp.*, 9th Dist. No. 05CA0077, 2006-Ohio-4309, ¶ 18. "Wanton" conduct is generally categorized as "the failure to exercise any care whatsoever." *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356 (Citation omitted.). This court previously defined "wanton and reckless conduct" as a perverse disregard "of a known risk ." *Fowler v. Williams Cty. Commrs.* (1996), 113

Ohio App.3d 760, 775, citing *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105. We further held that such conduct can also be an intentional act or failure to act in "contravention of a duty" when the actor knows, or has reason to know, facts that "would lead a reasonable person to realize such conduct creates an unreasonable risk of harm substantially greater than the risk necessary to make the conduct negligent." Id. See, also, *Svette v. Caplinger*, 4th Dist. No. 06CA2910, 2007-Ohio-664, ¶ 28 (Citations omitted.). Where the record of a cause does not contain any evidence showing that the employee(s) acted in such a manner, a trial court correctly grants summary judgment. *Fabrey v. McDonald Village Police Dept.*, supra, 357.

{¶ 10} In the present case, appellants filed the affidavit of Jim O'Neal, the Administrator of the Lucas County Corrections Center, in support of the motion for summary judgment. O'Neal averred that the corrections center has no records indicating that McDuffey had a history of acting violent while he was in the corrections center or that he had "assaulted any inmates during prior incarcerations" at the corrections center. In addition, O'Neal swore that the "Medical Screening Form" attached to his affidavit was a record kept in the course of regularly conducted business activity at the corrections center. This document is captioned "Booking Officer's Visual Opinion." Question No. 9 asks: "Does the inmate's behavior suggest the risk of assault to staff or to other inmates?" The intake officer marked the answer "No." The document is signed by McDuffey.

{¶ 11} In his memorandum in opposition to appellants' motion for summary judgment, appellee argued that the assault took place in "clear view of the Defendant

Deputies," who were, therefore, "in a position to observe the incident." Thus, appellee urged he had "legitimate claims" because "a reasonable factfinder could find that the defendants' conduct was sufficiently 'wanton or reckless' to make Section 2744 immunity inapplicable." Appellee further maintained that it was premature to find that Sheriff Telb is immune under R.C. Chapter 2744 because it would defeat the purpose of R.C. 311.05, which he asserts expressly imposes liability on a sheriff. Consequently, according to appellee, a jury might find that Telb and his deputies were liable as codefendants or, in the alternative, that Telb was "fully liable for the tortious conduct of his subordinates."

{¶ 12} In reply, appellants claimed that appellee failed to offer any evidence to support his claim that the deputies were in a position to view the incident in the holding cell. We agree. If a party moving for summary judgment meets its initial burden, the nonmoving party cannot "rest upon mere allegations or denials of the party's pleadings." Civ.R. 56(E). Rather, the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial. *Dresher v. Burt* (1996), 70 Ohio St.3d 280, 294. If the nonmoving party does not so respond, summary judgment, if appropriate, must be entered against the nonmoving party. Id.

{¶ 13} Here, appellants offered specific evidence of the fact that McDuffey was not prone to assaulting other inmates and that, on May 24, 2004, the booking officer observed no risk of assault either to the inmates or the corrections center staff. Appellee, on the other hand, failed to offer any affidavits or other evidentiary materials as set forth in Civ.R. 56(C) to support the allegation that appellants engaged in wanton and willful

conduct by perversely disregarding a known risk, that is, that McDuffey would assault appellee, or that the four deputies were in a position to observe the assault and did not intercede. Consequently, appellants were entitled to summary judgment pursuant to R.C. 2744.03(A)(6). Appellants' sole assignment of error is found well-taken.

{¶ 14} On consideration whereof, this court finds that substantial justice was not done the parties complaining, and the judgment of the Lucas County Court of Common Pleas is reversed. Appellee, Brian Price, is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James R. Sherck, J. _____
CONCUR.
JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.