[Cite as *Yonkings v. Piwinski* , 2011-Ohio-6232.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dolores Yonkings, Administrator of the Estate of Charles A. Yonkings, deceased,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-07 (C.C. No. 2009-07156)
Donald A. Piwinski,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
Grafton Township et al.,	:	
Defendants/Third-Party Plaintiffs,	:	
v.	:	
Ohio Department of Transportation,	:	
Third-Party Defendant.	:	
	:	
Dolores Yonkings, Administrator of the Estate of Charles A. Yonkings, deceased,	:	
Plaintiff-Appellee,	:	No. 11AP-09
v.	:	(C.C. No. 2009-07156 PR)
Donald A. Piwinski,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	
Grafton Township et al.,	:	
Defendants/Third-Party Plaintiffs-Appellants,	:	
v.	:	
Ohio Department of Transportation,	:	

Third-Party Defendant.

:

D E C I S I O N

Rendered on December 6, 2011

Jefferies, Kube, Forrest & Monteleone Co., L.P.A., David A. Forrest and *Jarrett J. Northup; Riley, Resar & Associates, and Patrick Riley*, for Dolores Yonkings.

Mazanec, Raskin & Ryder Co., L.P.A., John T. McLandrich, Todd M. Raskin, and *Frank H. Scialdone*, for Donald A. Piwinski.

Baker, Dublikar, Beck, Wiley & Mathews, Anthony E. Brown, and *Andrea K. Ziarko*, for Grafton Township and Frank Raksi.

APPEALS from the Court of Claims of Ohio.

BROWN, J.

{¶1} Defendants-appellants, Donald A. Piwinski, Grafton Township ("Grafton"), and Frank J. Raksi, appeal from a judgment of the Ohio Court of Claims denying their motions for summary judgment on the wrongful death and survivorship claims asserted by plaintiff-appellee, Dolores Yonkings, administrator of the estate of Charles A. Yonkings.

{¶2} This action arises out of a fatal motor vehicle accident on July 2, 2007. The accident occurred in Grafton Township, Lorain County, at the intersection of State Route 57 ("S.R. 57"), a through highway that runs North and South, and Law Road ("Law"), a township road that runs East and West. At 12:10 p.m., a dispatcher at the Lorain County Sheriff's Office received a 911 call that the stop sign regulating eastbound traffic on Law approaching the intersection with S.R. 57 was down. There is no dispute that the stop

sign was owned, installed, inspected, and maintained by the Ohio Department of Transportation ("ODOT").

{¶3} At 12:21 p.m., the sheriff's dispatcher called the Lorain County Maintenance Garage. Piwinski, the Lorain County Assistant Highway Superintendent, answered the call and was informed of the problem. Piwinski told the dispatcher that ODOT was responsible for the stop sign, and volunteered to report the problem to the ODOT garage in Lorain County. Piwinski testified that he immediately called ODOT, reported the downed stop sign to an unidentified man who answered the call and told him the situation "needs to be taken care of." (Piwinski Depo. at 30.) Piwinski averred that the man with whom he spoke assured him that he "would take care of it." (Piwinski Depo. at 34.) Several ODOT employees employed at the Lorain County ODOT garage testified that Piwinski never reported the downed stop sign. No ODOT employee repaired or replaced the downed stop sign.

{¶4} Around the same time, Frank Raksi and Bob Richards, co-superintendents and the only two employees of Grafton's Road Department, were replacing a ditch pipe near the intersection of Law and Chamberlain Road, and had driven a dump truck and a backhoe to the work site. At approximately 12:50 p.m., a Grafton township trustee, Michael Podulka, received a report of a downed stop sign at the intersection of Law and Chamberlain Road. Podulka immediately called Raksi and asked him to investigate the situation. Raksi observed that both stop signs were intact, reported his findings to Podulka, and told him the report of the downed stop sign must have been a joke. Raksi and Richards thereafter resumed working on the ditch pipe.

{¶5} Later that afternoon, at approximately 2:29 p.m., another Grafton township trustee, Thomas Giese, received a report of a downed stop sign at the intersection of Law

and S.R. 57. Giese testified that he immediately notified Raksi and told him he needed to "check it out right away and put it back up - - or put one up, if it was missing completely - - right away." (Giese Depo. at 11.) Raksi testified that he told Giese about the prior report regarding the stop sign at Law and Chamberlain, but that Giese clarified that the call he had received concerned a downed stop sign at Law and S.R. 57. Raksi averred that he told Giese he could not immediately leave the Law/Chamberlain worksite because there was a "huge hole" at the side of the roadway, which, if left unattended, presented a significant danger to motorists. (Raksi Depo. at 36.) According to Raksi, he told Giese he would "get to the stop sign as soon as" he could, and Giese replied "okay." (Raksi Depo. at 36.) Raksi and Richards thereafter resumed working on the ditch pipe.

{¶6} At approximately 3:45 p.m., Charles Yonkings was traveling eastbound on Law at the intersection of S.R. 57. Because the stop sign on eastbound Law was down, Yonkings entered the intersection without stopping. Yonkings' vehicle was struck by a tractor-trailer traveling northbound on S.R. 57. Yonkings sustained fatal injuries in the collision.

{¶7} On June 17, 2009, plaintiff filed a complaint against defendants in the Lorain County Court of Common Pleas. Plaintiff asserted wrongful death and survivorship claims against Grafton premised upon its alleged negligent, reckless and/or wanton failure to timely repair or replace the downed stop sign or to otherwise warn motorists of the hazardous intersection. Plaintiff asserted wrongful death and survivorship claims against Raksi arising from his alleged wanton and/or reckless failure to repair or replace the downed stop sign in contravention of Giese's instructions to do so. Against Piwinski, plaintiff asserted wrongful death and survivorship claims stemming from his alleged wanton and/or reckless failure to notify ODOT of the downed stop sign.

{¶8} On August 7, 2009, Grafton and Raksi answered plaintiff's complaint and filed a third-party complaint against ODOT, alleging that ODOT was solely responsible for repairing or replacing the downed stop sign and negligently failed to do so. The filing of the third-party complaint coupled with the mandatory filing of a petition for removal resulted in the removal of the case to the Court of Claims pursuant to R.C. 2743.03.[1]

{¶9} On October 12, 2010, Piwinksi filed a motion for summary judgment. Piwinski argued that Lorain County owed no duty with respect to the downed stop sign as it was situated at the intersection of a state highway and a township road – not a county road – and, as such, he was insulated from liability even in the face of allegations of wanton and reckless conduct, as his actions were taken solely in his official capacity as an employee of Lorain County. Alternatively, Piwinski argued that he was immune from liability pursuant to R.C. Chapter 2744.

{¶10} Grafton and Raksi filed a joint motion for summary judgment on October 12, 2010, arguing that neither owed any legal duty to repair or replace the downed stop sign as it was owned, installed, maintained, and repaired by ODOT. Grafton and Raksi argued, alternatively, that both were immune from liability under R.C. Chapter 2744.

{¶11} Following an oral hearing on November 12, 2010, the Court of Claims, by decision and entry filed December 3, 2010, denied both motions for summary judgment. The court determined that Grafton "owed a duty of care to the traveling public with respect to the downed sign [and] that an issue of fact exists whether Grafton violated the standard of care by failing to replace the downed sign within a reasonable time after

[1] On June 25, 2009, plaintiff filed a complaint against ODOT in the Court of Claims asserting wrongful death and survivorship claims premised upon ODOT's alleged negligent failure to timely repair or replace the downed stop sign despite having been notified by Piwinski of the hazardous condition. The Court of Claims subsequently consolidated plaintiff's action against ODOT with her action against Grafton, Raksi, and Piwinski.

having received notice of the obvious hazard." With regard to the immunity issue, the court determined that genuine issues of material fact existed with regard to the defenses to liability asserted by Grafton under R.C. 2744.03(A)(5) and by Raksi under R.C. 2744.03(A)(6). As to Piwinski, the court, applying Restatement (Second) of Torts, Section 324A, determined that once Piwinski "volunteered to notify ODOT of the downed stop sign under circumstances where he knew that immediate notification was necessary to prevent serious harm to the traveling public, [he] assumed a duty of care to plaintiff's decedent" and "[w]hether Piwinski met the standard of care is a disputed issue of fact." The court further determined that genuine issues of material fact remained as to Piwinski's alleged immunity.

{¶12} Grafton and Raksi assign the following three errors:

> I. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION FOR SUMMARY JUDGMENT WHEN APPELLANT TOWNSHIP DID NOT OWE APPELLEE'S DECEDENT A DUTY TO REPLACE THE STOP SIGN AT THE TIME OF THE ACCIDENT[.]
>
> II. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION FOR SUMMARY JUDGMENT[.] APPELLANTS ARE ENTITLED TO IMMUNITY AS APPELLANT RAKSI WAS INVOLVED IN AN EXERCISE OF DISCRETION AT THE TIME OF HIS ACCIDENT[.]
>
> III. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT RAKSI IMMUNITY FROM APPELLEE'S CLAIMS AS RAKSI'S ACTIONS WERE NOT WITH MALICIOUS PURPOSE, IN BAD FAITH, OR IN A WANTON OR RECKLESS MANNER[.]

{¶13} Piwinski advances the following three errors:

> [I.] THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLANT DONALD A. PIWINSKI, PURSUANT TO O.R.C. §2744.02(A)(1), AFTER HAVING PROPERLY CONCLUDED THAT PLAINTIFF-APPELLEE SOLELY SUED HIM IN HIS OFFICIAL CAPACITY.

> [II.] THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLANT DONALD A. PIWINSKI WHEN IT WAS UNDI[SP]UTED THAT HE DID NOT OWE A DUTY TO PLAINTIFF-APPELLEE'S DECEDENT AND DID NOT VOLUNTARILY ASSUME A DUTY TO PLAINTIFF-APPELLEE'S DECEDENT.
>
> [III.] THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO GRANT DEFENDANT-APPELLANT DONALD A. PIWINSKI IMMUNITY AS THERE WAS NO EVIDENCE ESTABLISHING THAT ON JULY 2, 2007, HE ACTED IN A RECKLESS OR WANTON MANNER.

{¶14} While a trial court's denial of a motion for summary judgment is generally not a final, appealable order, "[w]hen 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)." *Hubbell v. Xenia,* 115 Ohio St.3d 77, 2007-Ohio-4839, syllabus. "A court of appeals must exercise jurisdiction over an appeal of a trial court's decision overruling a Civ.R. 56(C) motion for summary judgment in which a political subdivision or its employee seeks immunity." Id. at ¶21. Grafton, Raksi, and Piwinski all sought immunity under R.C. Chapter 2744; accordingly, the trial court's denial of summary judgment constitutes a final appealable order, and this court has jurisdiction to consider the appeals.

{¶15} An appellate court reviews a summary judgment disposition de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Accordingly, we conduct an independent review of the record and stand in the shoes of the trial court. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107.

{¶16} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, summary judgment is appropriate only if: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶17} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which affirmatively demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once the moving party meets its initial burden, the non-moving party must set forth specific facts demonstrating a genuine issue for trial. Id.

{¶18} In its first and second assignments of error, Grafton contends that the Court of Claims erroneously denied its motion for summary judgment as to its entitlement to political subdivision immunity. Whether a political subdivision is immune from civil liability is purely a question of law, properly determined prior to trial and preferably on a motion for summary judgment. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133, citing *Roe v. Hamilton Cty. Dept. of Human Servs.* (1988), 53 Ohio App.3d 120, 126. A court must engage in a three-tiered analysis to determine whether a political subdivision is entitled to immunity pursuant to R.C. Chapter 2744. *Hubbard v. Canton Cty. School*

Bd. of Educ., 97 Ohio St.3d 451, 2002-Ohio-6718, ¶10, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421. The first tier requires the court to determine whether the entity claiming immunity is a political subdivision and whether the alleged harm occurred in connection with either a governmental or proprietary function. R.C. 2744.02(A)(1); *Hubbard* at ¶10. Once it is determined that an entity is entitled to immunity under the first tier, the court then proceeds to the second tier of the analysis, which requires the court to determine whether any of the five exceptions to immunity enumerated in R.C. 2744.02(B) apply to expose the political subdivision to liability. Id. If the court finds applicable any of the R.C. 2744.02(B) exceptions, the political subdivision can reinstate immunity under the third tier by successfully arguing that one of the defenses to liability set forth in R.C. 2744.03 applies. *Elston v. Howland Local Schools,* 113 Ohio St.3d 314, 2007-Ohio-2070, ¶12.

{¶19} The parties do not dispute that Grafton is a political subdivision as defined by R.C. 2744.01(F)(1)[2] and that Yonkings' death occurred in connection with a governmental function as provided for in R.C. 2744.01(C)(2)(e).[3] Accordingly, the first tier of the immunity test is satisfied, and Grafton is presumed to be immune from liability unless one of the exceptions set forth in R.C. 2744.02(B) applies.

{¶20} Plaintiff asserts that the exception to immunity set forth in R.C. 2744.02(B)(3) applies to establish Grafton's liability. R.C. 2744.02(B)(3) provides that, subject to certain inapplicable exceptions, "political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads

[2] R.C. 2744.01(F)(1) defines a "political subdivision" as a "municipal corporation, *township*, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state." (Emphasis added.)

[3] Under R.C. 2744.01(C)(2)(e), a "governmental function" includes "[t]he regulation of the use of, and *'the maintenance and repair of*, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds.' " (Emphasis added.)

in repair." Plaintiff alleges that R.C. 2744.02(B)(3) applies because Yonkings' death was caused by Grafton's alleged negligent failure to replace or repair the downed stop sign on Law.

{¶21} In contrast, Grafton maintains that the R.C. 2744.02(B)(3) exception to immunity does not apply and cites *Walters v. Columbus,* 10th Dist. No. 07AP-917, 2008-Ohio-4258 in support. In *Walters,* this court considered a city's claim that it was immune from liability for alleged negligent conduct regarding a stop sign. There, the plaintiff failed to stop at a posted stop sign at the intersection of two city streets and struck another vehicle. The plaintiff filed a complaint against the city, asserting the city was negligent in failing to remove an obstruction from the stop sign (overhanging tree branches) and in failing to maintain and repair a public road. The city moved for summary judgment, arguing that it was immune from liability pursuant to R.C. Chapter 2744. The trial court denied the city's motion.

{¶22} On appeal, this court analyzed the same exception to immunity, R.C. 2744.02(B)(3), plaintiff urges here. This court initially noted that the term "public roads," as utilized in R.C. 2744.02(B)(3), is defined in R.C. 2744.01(H) and "does not include * * * traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices." This court further noted that stop signs are included in the definition of traffic control devices under R.C. 4511.01. Accordingly, we determined that the "critical inquiry before this court is whether or not the stop sign at issue was mandated by the Ohio Manual of Uniform Traffic Control Devices ("OMUTCD")." *Walters* at ¶12.

{¶23} In conducting this inquiry, we examined pertinent provisions of the OMUTCD. We noted initially that the introduction to the OMUTCD states that the material

within it was organized to differentiate between "Standards that must be satisfied * * * Guidances, that should be followed * * * and Options that may be applicable for the particular circumstances of a situation." Id. at ¶13. We further noted that Section 2B.05 of the OMUTCD, entitled "STOP Sign Application" provided:

> Guidance:
>
> STOP signs should be used if engineering judgment indicates that one or more of the following conditions exist:
>
> A. Intersection of a less important road with a main road where application of the normal right-of-way rule would not be expected to provide reasonable compliance with the law;
>
> B. Street entering a through highway or street (O.R.C. Section 4511.65 provides information on through highways (see Appendix B2));
>
> C. Unsignalized intersections in a signalized area; and/or
>
> D. High speeds, restricted view, or crash records indicate a need for control by the STOP sign.

Id.

{¶24} Pursuant to the language in Section 2B.05 of the OMUTCD stating that stop signs "should" be used if engineering judgment indicates that one or more of the listed conditions exists, this court determined that placement of the stop sign at issue was discretionary and not mandatory. Id. at ¶20, 22. We noted that "the General Assembly explicitly excluded traffic control devices from the definition of a 'public road' unless the traffic control device was mandated by the OMUTCD. By its clear language, it is evident that the General Assembly did not intend all erected traffic control devices to be considered part of a public road. * * * [R.C. 2744.01(H)] clearly distinguishes between traffic control devices that are, and traffic control devices that are not, mandated by the OMUTCD." Id. at ¶20. Accordingly, we concluded that "the stop sign at issue here is not

a traffic control device mandated by the OMUTCD, and, therefore, is not included in the definition of 'public road' as the term is used in R.C. 2744.02(B)(3). As such, the immunity exception contained in R.C. 2744.02(B)(3) is not applicable, and appellant is entitled to immunity pursuant to R.C. 2744.02(A)." Id. at ¶23.

{¶25} Plaintiff contends that *Walters* does not control the instant case because the intersection at issue there involved two city streets, not a state through highway and a township road. Plaintiff argues that Section 2B.05(B) of the OMUTCD incorporates R.C. 4511.65(A) to mandate a stop sign at the intersection of a street and a state through highway.

{¶26} Assuming arguendo that the immunity exception in R.C. 2744.02(B)(3) does apply, we next consider whether Grafton's immunity can be reinstated through any of the R.C. 2744.03 defenses to liability. Under R.C. 2744.03, immunity abrogated by a R.C. 2744.02(B) exception can be reinstated if the political subdivision successfully argues that one of the defenses to liability set forth in R.C. 2744.03 applies. *Elston* at ¶12.

{¶27} Grafton argues that the defenses in both R.C. 2744.03(A)(3) and (5) apply to reinstate its immunity from liability for plaintiff's claims. Because we find it determinative, we first consider application of R.C. 2744.03(A)(5), which provides as follows:

> The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶28} Under R.C. 2744.03(A)(5), "a political subdivision is immune from liability if the injury complained of resulted from an individual employee's exercise of judgment or

discretion in determining how to use equipment or facilities unless that judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." *Elston* at ¶3. Grafton claims that it is entitled to immunity under R.C. 2744.03(A)(5) because the alleged conduct underlying plaintiff's claims concerns Raksi's exercise of judgment or discretion in determining how to use Grafton's equipment and personnel, i.e, whether he and Richards should remain at the Law/Chamberlain worksite rather than proceed immediately to investigate, and replace, if necessary, the stop sign at the Law/S.R. 57 intersection. Plaintiff contends that the decision as to allocation of Grafton's available resources was left to Giese's discretion as township trustee, and that Giese exercised that discretion by instructing Raksi to abandon the Law/Chamberlain worksite and replace the stop sign at the Law/S.R. 57 intersection.

{¶29} R.C. 5571.02(C) specifically authorizes a township to appoint "some competent person, not a member of the board of township trustees, to have charge of maintenance and repair of roads within the township." In his affidavit attached to his motion for summary judgment, Raksi averred that "[a]s a Co-Road Superintendent, I have administrative and operative control of the Road Department of Grafton Township, Ohio, along with my fellow Co-Road Superintendent, Bob Richards." (Exhibit B, Affidavit at ¶5.) Raksi further averred that "[a]s part of the duties of my position of Co-Road Superintendent, I am required to use my judgment and discretion in determining the use of Grafton Township resources for addressing any reports of dangerous conditions on the roads located within the Township, and which reports can be addressed first, given the resources and personnel available to the Road Department of Grafton Township." (Affidavit at ¶9.) He further testified that "[o]n July 2, 2007, before the accident in this case, I used my judgment and discretion as the Co-Road Superintendent to determine

which dangerous situation, a report of a down stop sign or a large open ditch one foot away from another road, the Grafton Road Department had the ability and resources to respond to first." (Affidavit at ¶10.) Plaintiff does not point to any Civ.R. 56(C) evidence disputing Raksi's assertion that his position as co-superintendent of the Grafton Road Department afforded him discretion to address and prioritize the use of township equipment and personnel in situations pertaining to potentially dangerous roadway conditions. Accordingly, we find that, under the facts of this case, Raksi, not Giese, was charged with the discretionary decision regarding allocation of Grafton's equipment and personnel.

{¶30} In order to demonstrate an exercise of discretion for which R.C. 2744.03(A)(5) confers immunity, there must be " '[s]ome positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved.' " *Bush v. Beggrow,* 10th Dist. No. 03AP-1238, 2005-Ohio-2426, ¶57, quoting *Addis v. Howell* (2000), 137 Ohio App.3d 54, 60. We find that Raksi's decision to eliminate the potentially dangerous road hazard at the Law/Chamberlain worksite before investigating the stop sign at the Law/S.R. 57 intersection was the result of his exercise of judgment and discretion regarding use of Grafton's equipment and personnel. In his deposition, Raksi explained the "catch-22" with which he was presented. He described the open ditch at the Law/Chamberlain worksite as being four feet deep, six feet in diameter, and right at the edge of the roadway. Raksi provided a detailed explanation of the dilemma presented by the two dangerous situations – the open ditch at the Law/Chamberlain worksite, and the downed stop sign at the Law/S.R. 57 intersection:

> Sometimes there's projects you can leave go, sometimes there's projects you can't. And in this situation we could not

> leave a huge hole open at the side of the road where a car could fall in it, because now I'm damned if I do, and I'm damned if I don't. If I leave and go fix the stop sign and somebody goes into that hole and gets hurt, "Why did you leave that hole there?"
>
> Again as we stated, we didn't have any barricades, we didn't have any ribbon to put around there, nothing. And you can't leave a backhoe sit there [at the Law/Chamberlain worksite], because if somebody hits the backhoe, it's our fault. So there was – I mean, I was in a catch 22, and I felt I had to get this hole filled first.

(Raksi Depo. at 52-53.)

{¶31} Raksi also testified that both he and Richards would have had to abandon the Law/Chamberlain worksite because replacing a downed stop sign is a two-person enterprise due to the hard, gravel berms. He further averred that two persons were required to be at the Law/Chamberlain worksite, since it was necessary to have one person perform the work on the open ditch and the other to direct traffic. Raksi also considered the fact that the backhoe was present at the Law/Chamberlain worksite, presenting a danger to passing motorists. Raksi's testimony evidences a " 'positive exercise of judgment that portrays a considered adoption of the particular course of conduct in relation to an object to be achieved.' " *Bush* at ¶57, quoting *Addis* at 60.

{¶32} Although we conclude that Raksi's decision to eliminate the danger at the Law/Chamberlain worksite before investigating the stop sign at the Law/S.R. 57 intersection resulted from Raksi's exercise of judgment and discretion in determining how to use Grafton's equipment and personnel, R.C. 2744.03(A)(5) does not restore Grafton's immunity if Raksi exercised such discretion with malicious purpose, in bad faith, or in a wanton or reckless manner. Plaintiff does not argue that Raksi acted with malicious purpose or in bad faith. Accordingly, we must construe the evidence in a light most favorable to plaintiff and determine whether a genuine issue of material fact exists as to

whether Raksi's decision to eliminate the danger at the Law/Chamberlain worksite before investigating the stop sign at the Law/S.R. 57 intersection was wanton or reckless.

{¶33} In the context of political subdivision immunity, wanton misconduct is "the failure to exercise any care whatsoever." *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, citing *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, syllabus. " '[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' " Id. at 356, quoting *Roszman v. Sammet* (1971), 26 Ohio St.2d 94, 96-97. "Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury." Id., citing *Roszman* at 97. Reckless conduct occurs when an individual acts or intentionally fails to do an act that is his duty to the other to do, knowing or having reason to know of facts that would lead a reasonable person to realize, not only that his or her conduct creates an unreasonable risk of physical harm to another, but also that such a risk is substantially greater than what is necessary to make the conduct negligent. *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-05, citing 2 Restatement (Second) of Torts (1965), Section 500.

{¶34} Plaintiff has presented no evidence to counter Raksi's description of the two potentially dangerous road conditions present on July 2, 2007. Further, plaintiff has presented no evidence suggesting that Raksi exercised no care whatsoever or that he was conscious that his failure to replace the stop sign at the Law/S.R. 57 intersection would in all probability result in injury, or that he intentionally failed to act, knowing or having reason to know, that such failure to act created an unreasonable risk of physical harm to another. Raksi testified that the open ditch at the Law/Chamberlain intersection and the downed stop sign at the Law/S.R. 57 intersection posed equally dangerous

conditions to motorists. Raksi's decision to ensure that one potentially hazardous situation was safe before dealing with another potentially dangerous situation does not rise to the level of wanton or reckless conduct. We thus conclude that the exception to liability set forth in R.C. 2744.03(A)(5) applies to reinstate Grafton's immunity. Because Grafton is entitled to immunity under R.C. 2744.03(A)(5), we find Grafton's argument regarding its entitlement to immunity under R.C. 2744.03(A)(3) to be moot.

{¶35} Finally, we briefly address plaintiff's reliance on the Twelfth District Court of Appeals' decision in *Richardson v. Mason* (1994), 93 Ohio App.3d 175. There, the plaintiff was involved in a collision at the intersection of State Route 48 ("S.R. 48"), a state highway and Center Spring Road ("Center Spring"), a township road. The plaintiff was traveling on S.R. 48 when another motorist entered the plaintiff's lane of travel from Center Spring. The stop sign governing Center Spring was missing on the date of the accident. The trial court granted the township's motion for summary judgment, finding that the township owed no duty to maintain or erect the stop sign at issue.

{¶36} The court of appeals reversed, explaining at 177:

> The legislature has divided responsibilities for erecting and maintaining traffic control devices between state and local authorities. Under R.C. 4511.65, a local authority must erect a stop sign on a highway under its jurisdiction that intersects with a through highway. Under R.C. 4511.65, State Route 48 is a through highway and Center Spring Road is a highway. Center Spring Road is, according to an affidavit of the Warren County Engineer and a certified map of Clearcreek Township, under the jurisdiction of Clearcreek Township, which is a local authority.
>
> Thus, Clearcreek has a duty to erect a stop sign * * * on Center Spring Road where it intersects with State Route 48. Under R.C. 5535.01(C), Clearcreek has a duty to maintain Center Spring Road and, under R.C. 4511.11(A), to place and maintain the traffic control devices required under R.C. 4511.65.

{¶37} Upon this rationale, the court determined that the trial court's decision finding the state exclusively responsible for maintaining stop signs at intersections of a state route and a township road to be erroneous.

{¶38} *Richardson* is distinguishable from the instant case on two bases. First, the defense of political subdivision immunity was not at issue in *Richardson.* Second, it is undisputed here that the state, not Grafton, was responsible for placing and maintaining the stop sign at the Law/S.R. 57 intersection. Accordingly, we find plaintiff's reliance on *Richardson* without merit.

{¶39} Having held that Grafton is entitled to immunity from liability for plaintiff's claims pursuant to R.C. Chapter 2744, we hold that the Court of Claims erred in denying Grafton's motion for summary judgment. Accordingly, we sustain Grafton's first and second assignments of error.

{¶40} In his third assignment of error, Raksi contends that the Court of Claims erred in denying his motion for summary judgment regarding his individual immunity from liability for plaintiff's claims. As relevant here, R.C. 2744.03(A)(6)(b) provides that an employee of a political subdivision is immune from individual liability for acts or omissions connected with a governmental or proprietary function unless "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." We defer to our earlier analysis regarding the definition of wanton and reckless conduct. As stated earlier, there is no evidence that Raksi acted in a wanton or reckless manner in deciding to alleviate the hazard at the Law/Chamberlain intersection before proceeding to the Law/S.R. 57 intersection. As such, Raksi is entitled to immunity pursuant to R.C. 2744.03(A)(6)(b). Having so determined, we hold that the Court of Claims erred in

denying Raksi's motion for summary judgment. The third assignment of error is therefore sustained.

{¶41} We turn next to a consideration of Piwinski's assignments of error, which contend that the Court of Claims erred in denying his motion for summary judgment. Piwinski's first assignment of error argues that, because plaintiff sued him solely in his official capacity as an employee of Lorain County, the suit against him constituted a suit against Lorain County, and the Court of Claims erred in failing to employ the requisite political subdivision analysis set forth in R.C. 2744.02. Upon review of the record, we conclude that plaintiff did not sue Piwinski in his official capacity. Plaintiff originally filed suit against the offices of the Lorain County Engineer and the Lorain County Commissioners. Piwinski was not named as a party in the original action. Following discovery, plaintiff dismissed the original action and filed the instant case against Piwinski. The complaint does not name Piwinski by his official job title nor does it list his work address. The complaint asserts that Piwinski engaged in wanton and/or reckless misconduct while performing his duties as an employee of Lorain County. Accordingly, because plaintiff did not sue Piwinski in his official capacity, the three-tiered analysis employed in determining political subdivision immunity does not apply to plaintiff's claims against Piwinski, and the Court of Claims did not err in failing to apply it. Accordingly, we overrule Piwinski's first assignment of error.

{¶42} Piwinski's second and third assignments of error are interrelated and thus will be considered together. Piwinski's second assignment of error contends the Court of Claims erred in determining that he voluntarily assumed a duty of care to plaintiff's decedent when he offered to call ODOT and report the downed stop sign. Piwinski's third

assignment of erred contends the Court of Claims erred in failing to find he was entitled to individual immunity under R.C. 2744.03(A)(6)(b).

{¶43} R.C. 2744.03(A)(6) creates a presumption of immunity for employees of a political subdivision. As we noted in our discussion of Raksi's individual immunity, R.C. 2744.03(A)(6)(b) provides that an employee of a political subdivision is immune from individual liability for acts or omissions connected with a governmental or proprietary function unless "[t]he employee's acts or omissions were * * * in a wanton or reckless manner." A negligence claim is not converted to one of wanton or reckless conduct on a mere allegation in the complaint without evidence of a substantially greater risk than negligence. As noted in *Fabrey* at 356, "mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor." To prevail on her claim, plaintiff must point to evidence establishing that, in failing to notify ODOT of the downed stop sign, Piwinski acted with perversity of will, conscious that his conduct would, in all likelihood, have resulted in an injury or created an unreasonable risk of injury.

{¶44} Here, construing the evidence in a light most favorable to plaintiff, the record establishes that Piwinski acted negligently in failing to notify ODOT of the downed stop sign after having volunteered to do so. Plaintiff points to no Civ.R. 56(C) evidence demonstrating that Piwinski acted with the requisite perverse disregard necessary to sustain a claim of wanton or reckless behavior. As such, Piwinski is entitled to immunity pursuant to R.C. 2744.03(A)(6)(b). Having so determined, we hold that the Court of Claims erred in denying Piwinski's motion for summary judgment. The third assignment is therefore sustained, rendering Piwinski's second assignment of error moot.

{¶45} Based on the foregoing, we reverse the judgment of the Court of Claims of Ohio and enter judgment in favor of Grafton, Raksi, and Piwinski on plaintiff's claims.

Judgment reversed.

BRYANT, P.J., and FRENCH, J., concur.

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