UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

VIRGINIA LeFEVER,

Plaintiff,

v.

JAMES FERGUSON, et al.,

Defendants.

Case No. 2:11-cv-935
JUDGE GREGORY L. FROST
Magistrate Judge E.A. Preston Deavers

ALEX LeFEVER,

Plaintiff,

v.

JAMES FERGUSON, et al.,

Defendants.

Case No. 2:12-cv-664
JUDGE GREGORY L. FROST
Magistrate Judge E.A. Preston Deavers

OPINION AND ORDER

This matter is before the Court on the motion for summary judgment of Defendants Licking County, Ohio and Dr. Robert Raker (the "Licking County Defendants") on Plaintiff's Alex LeFever's claims. (Case No. 2:12-cv-664, ECF No. 61.)[1] Also before the Court are Plaintiff's combined memorandum contra all Defendants' motions for summary judgment (ECF No. 75), and the Licking County Defendants' reply in support of their motion (ECF No. 94). For the reasons explained below, the Court **GRANTS** Defendants' motion.

[1] Unless otherwise indicated, all docket references in this Opinion and Order are to the docket in Case No. 2:12-cv-664.

I. Background

These consolidated cases arise out of Virginia LeFever's 1990 conviction for the aggravated murder of her husband, William LeFever in September 1988. Twenty-two years after being sent to prison for the murder, the trial court judge vacated Virginia's conviction and released her from prison. The basis for the trial court's ruling was the realization that Defendant James Ferguson, the forensic toxicologist in the Franklin County Coroner's Office who examined William LeFever's body in 1988, had lied at Virginia's trial about his credentials. Following the trial court's ruling ordering Virginia's release from prison, the Licking County (Ohio) Prosecutor dismissed the indictment against Virginia. In the cases before the Court, Plaintiffs Virginia (Case No. 2:11-cv-935) and her son Alex LeFever (Case No. 2:12-cv-664) sue Ferguson, Newark police officers Ken Ballantine and Bill Hatfield, then-Licking County Coroner Robert Raker, the City of Newark, Ohio, Licking County, and Franklin County.

Defendants Raker and Licking County moved for dismissal of Alex's Amended Complaint under Rule 12(b)(6) for failure to state a claim upon which the Court could grant relief. (ECF No. 39.) The Court granted the Licking County Defendants' motion with regard to the federal claims but denied the motion as to the state law claims alleging intentional infliction of emotional distress ("IIED") and loss of consortium. (ECF No. 80.) As to the state law claims, the Licking County Defendants moved for dismissal solely on statute-of-limitations grounds. The Court found that it could not state beyond doubt that the state law claims alleged in Alex's Amended Complaint were time-barred. (ECF No. 80 at PAGEID# 1579.) Thus, the state-law claims survived the Licking County Defendants' motion to dismiss.

During the pendency of their motion to dismiss, the Licking County Defendants filed their motion for summary judgment on all claims asserted in Alex's Amended Complaint. (ECF No. 96.) With the Court having dismissed the federal claims, the Licking County Defendants' motion for summary judgment is ripe for this Court's adjudication on the remaining state claims.

II. Discussion

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may therefore grant a motion for summary judgment if the nonmoving party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case. *See Muncie Power Prods. v. United Techs. Auto., Inc.*, 328 F.3d 870, 873 (6th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

In viewing the evidence, the Court must draw all reasonable inferences in favor of the nonmoving party, which must set forth specific facts showing that there is a genuine issue of material fact for trial. *Id*. (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)); *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 234 (6th Cir. 2003). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Muncie*, 328 F.3d at 873 (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Consequently, the central issue is " 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Hamad*, 328 F.3d at 234-35 (quoting *Anderson*, 477 U.S. at 251-52).

As noted above, this Court already disposed of Alex's federal claims when it granted in part the Licking County Defendants' motion to dismiss Alex's Amended Complaint. (ECF No. 80.) Thus, only Alex's state-law claims for IIED (against Dr. Raker, but not Licking County) and loss of consortium (against Dr. Raker and Licking County) remain against the Licking County Defendants.

A. Intentional Infliction of Emotional Distress ("IIED")

In the Third Claim of the Amended Complaint, Alex alleges a claim for IIED against Dr. Raker and individual defendants Ferguson, Ballentine, and Hatfield. Under Ohio law, the elements of a claim of IIED are:

> [(1)] the defendant intended to cause emotional distress or knew or should have known that its conduct would result in serious emotional distress to the plaintiff; (2) defendant's conduct was outrageous and extreme and beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; (3) defendant's conduct was the proximate cause of plaintiff's psychic injury; and (4) plaintiff's emotional distress was serious and of such a nature that no reasonable person could be expected to endure it.

Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1110 (6th Cir. 2008) (quoting *Ekunsumi v. Cincinnati Restoration, Inc.,* 698 N.E.2d 503, 506 (Ohio Ct. App. 1997)).

In the motion for summary judgment, Defendants argue that Alex LeFever's claim for IIED must fail because Dr. Raker's actions were "reasonable." (ECF No. 61 at PAGEID# 1040.) As such, Dr. Raker claims that he is immune from liability under Ohio Rev. Code Chapter 2744. (ECF No. 61 at PAGEID# 1040.) In citing to the state law immunity statute applicable to political subdivisions and their employees, Dr. Raker is apparently seeking the protection of Ohio Rev. Code § 2744.03(A)(6), which provides in relevant part:

> [t]he [political subdivision's] employee is immune from liability unless one of the following applies:

> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.
>
> (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

Id.

Courts in Ohio have held that the recklessness of the conduct necessary to establish the tort of IIED is characterized as behavior, "so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Hale v. Vance*, 267 F. Supp. 2d 725, 736 (S.D. Ohio 2003) (quoting *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 453 N.E.2d 666, 671 (Ohio 1983)); *Irving v. Austin*, 138 Ohio App. 3d 552, 557, 741 N.E.2d 931 (Ohio Ct. App. 2000). Defined as such, it would seem superfluous to analyze the applicability of political subdivision immunity to determine whether a plaintiff's IIED claim can survive summary judgment. *See Chesher v. Neyer*, 477 F.3d 784, 799 (6th Cir. 2007) (observing that the § 2744.03(A)(6)(b) exception requires the court to consider evidence of "wanton or reckless acts," which is a similar standard to the sufficiency of a plaintiff's evidence on the merits of an IIED claim; an IIED claim requires the court to consider whether each defendant acted in an "extreme and outrageous manner"). Nonetheless, Ohio state and federal courts have applied Ohio Rev. Code § 2744.03(A)(6) immunity to IIED claims. *See, e.g., Satterfield v.*

Karnes, 736 F. Supp. 2d 1138, 1155-56 (S.D. Ohio 2010); *Irving*, 138 Ohio App. 3d at 556. Because Defendant Raker's motion frames the IIED issue in terms of Chapter 2744 immunity, the Court will analyze it that way.

Whether conduct was reckless or wanton is normally a question for a jury. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St. 3d 351, 356, 639 N.E.2d 31 (Ohio 1994). But summary judgment on this point is appropriate where the record fails to set forth sufficient evidence by which reasonable minds could differ. *See Irving*, 138 Ohio App. 3d at 556 (to grant summary judgment, the record must be "devoid of evidence tending to show that the political subdivision employee acted wantonly or recklessly"). In order to survive a motion for summary judgment, Alex must come forth with some evidence that that the actions of Dr. Raker were malicious, in bad faith, wanton, or reckless. Absent this evidence, summary judgment is appropriate.

In his memorandum contra Defendants' motion for summary judgment, Alex tries to escape summary judgment on his IIED claim by arguing that this claim is not barred by the statute of limitations. But while the statute of limitations was at issue in connection with the Licking County Defendants' motion to dismiss Alex's Amended Complaint, the motion for summary judgment does *not* raise the statute of limitations. Instead, Dr. Raker's principal argument for summary judgment on the IIED claim is that he is entitled to statutory immunity under Ohio Rev. Code Chapter 2744 because he acted reasonably, meaning that his actions did not fall under one of the exceptions to immunity listed under Ohio Rev. Code § 2744.03(A)(6).

Dr. Raker supports his motion for summary judgment on Alex's IIED claim with evidence that he did not act with malicious purpose, in bad faith, or in a wanton or reckless manner so as to remove the protection of the immunity provided by Ohio Rev. Code §

2744.03(A)(6). (ECF No. 61 at PAGEID# 1040.) Alex's opposition does not come forward with evidence to rebut summary judgment on this basis. With Alex having failed to meet his summary judgment burden, Dr. Raker is entitled to judgment as a matter of law on the IIED claim.

B. Loss of Consortium

Alex's Fourth Claim of the Amended Complaint pleads loss of consortium under Ohio law. Ohio law recognizes an action by an adult child for loss of consortium against a third party who injures the child's parent. *See Rolf v. Tri State Motor Transit Co*., 91 Ohio St. 3d 380, 381, 745 N.E.2d 424 (Ohio 2001). Loss of consortium claims are derivative claims, and thus a defense to the underlying action generally constitutes a defense to the loss of consortium claims. *See Bowen v. Kil-Kare, Inc*., 63 Ohio St. 3d 84, 93, 585 N.E. 2d 384 (Ohio 1992).

The Licking County Defendants are entitled to summary judgment on Alex's loss of consortium claim. In his combined opposition to all of the Defendants' motions for summary judgment, Alex conceded that his loss of consortium claim is derivative of his mother's state law claims. (ECF No. 75 at PAGEID# 1216.) Thus, Alex further conceded that his loss of consortium claim "cannot proceed independently of Virginia's state law claims." (*Id.*)

Alex's concession in this regard proves fatal to his loss of consortium claim. As to Defendant Licking County, Virginia expressly abandoned her state law claims. (ECF No. 114 in Case No. 2:11-cv-935 at PAGEID# 3923.) And as to Dr. Raker as an individual Defendant, the Court has determined that he is entitled to summary judgment on Virginia's state-law claims. (ECF No. 137 in Case No. 2:11-cv-935.) The Licking County Defendants are therefore entitled to summary judgment on Alex's Fourth Claim.

III. Conclusion

For the foregoing reasons, the Court **GRANTS** the motion for summary judgment of Defendants Licking County and Dr. Raker (ECF No. 61). Licking County and Dr. Raker are no longer parties to this action.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE