

[Cite as *Young v. Univ. of Akron*, 2003-Ohio-7125.]

IN THE COURT OF CLAIMS OF OHIO

TAMMY YOUNG, Admx.	:	
Plaintiff	:	CASE NO. 2003-05984
	:	Magistrate Lee Hogan
v.	:	
	:	<u>MAGISTRATE DECISION</u>
THE UNIVERSITY OF AKRON	:	
Defendant	:	
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{¶1} The court held an evidentiary hearing in this case to determine whether Guy Marrelli, an in-house electrical engineer for defendant, University of Akron (UA), is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶2} At the outset of the proceedings, the court overruled a December 11, 2003, motion to quash filed by attorney Mel L. Lute, Jr., on behalf of Thomas Bowers. Thereafter, Mr. Bowers appeared and testified at the hearing. The court reserved ruling on plaintiff's motion to leave the record open to allow him to present the deposition testimony of one additional witness. On December 16, 2003, the court conducted a conference with the parties for the purpose of ruling on that issue. After reviewing all of the evidence, the court held that additional testimony would be cumulative, and that to allow the record to remain open for such reason would be of no real benefit. Thus, plaintiff's motion was DENIED and the court will now proceed with determination of the issue of immunity.

{¶3} R.C. 2743.02(F) provides, in part:

{¶4} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶5} R.C. 9.86 provides, in part:

{¶6} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ***" (Emphasis added.)

{¶7} In the present case, the parties have stipulated that Mr. Marrelli was at all times pertinent hereto acting within the scope of his employment with UA. The issue, then, is whether he acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Plaintiff stated at the hearing that the only contention being made was that Mr. Marrelli's conduct was "reckless." While the court will focus on plaintiff's allegation of recklessness in reviewing the evidence, the court will also consider whether Marrelli's conduct meets any of the other exceptions contemplated by the statute.

{¶8} Briefly stated, the facts pertinent to this decision are as follows.

{¶9} Plaintiff's decedent and husband, Douglas Young, sustained fatal injuries on May 21, 2001, while performing electrical repair services on UA premises. At the time, Mr. Young was employed by Thompson Electric, Inc. (Thompson Electric). The area where he was working had previously been the site of Project No. UAK-97-005 (the project), which was undertaken by UA to replace potentially dangerous existing oil switches with an alternative gas-style switch.

{¶10} Mr. Marrelli prepared the general conditions, drawings, and specifications for the project. Decedent's employer, Thompson Electric, performed the work on the project, which was completed in 1999. Pursuant to Mr. Marrelli's drawings and specifications, elbow-type terminators were to be used to connect voltage cables with the new gas switches. The elbow terminators provided a protective "sleeve" against possible electrocution for workers coming into contact with the medium-voltage connections. However, at some point, Thompson Electric made a decision to use 3M electrical tape to terminate the connections. Mr. Marrelli became aware of this change and "accepted" it on his final walk-through inspection of the project. There were no injuries associated with the taped terminations until the time of Mr. Young's death in 2001.

Plaintiff's complaint alleges, among other things, that:

{¶11} "*** MARRELLI, had both a Bachelor of Science Degree in engineering, as well as a Master's Degree in engineering and routinely prepared electrical engineering specifications for [UA] ***.

{¶12} "*** MARRELLI, acted in a willful, wanton manner, and with a reckless disregard for the safety of others by disregarding certain specifications for the project that were critical for safety, including but not limited to the installation of elbow-type connectors at the switch gear.

{¶13} "*** MARRELLI acted in a willful, wanton manner, and with a reckless disregard for the safety of others by disregarding IEEE, NEC, American National Standards Institute ('ANSI') standards and other nationally recognized safety standards by approving Thompson's taped terminations at the switch gear in the boiler plant vault.

{¶14} "*** MARRELLI acted in a willful, wanton manner, and with a reckless disregard for the safety of others by failing to give Thompson and Decedent Douglas Young any engineering specifications for making the terminations with electrical tape."

{¶15} Based upon the totality of the testimony and evidence presented, the court finds for the following reasons that plaintiff has failed to prove that Mr. Marrelli is subject to personal, civil liability for any of his conduct that is at issue in this case.

{¶16} The issue of whether Mr. Marrelli is entitled to immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. However, the question of whether Mr. Marrelli acted outside the scope of his employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is a question of fact. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9.

{¶17} In the context of immunity, an employee's wrongful conduct, even if it is unnecessary, unjustified, excessive or

improper, does not automatically subject the employee to personal liability unless the conduct is so divergent that it severs the employer-employee relationship. *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775, citing *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App. 3d 86, 89.

{¶18} The standard for showing such conduct, particularly reckless or wanton misconduct, is high. Mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor. *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97. That degree of perversity exists where an actor is conscious that his conduct will, in all probability, result in injury. *Id.* "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." *Thompson v. McNeill* (1990), 53 Ohio St. 3d 102, 105, quoting 2 Restatement of the Law 2d, Torts (1965) 590, Section 500, Comment f.

{¶19} Here, the evidence is wholly insufficient to establish that any conduct on the part of Mr. Marrelli rises to the requisite level. Rather, the evidence is consistent, with the possible exception of plaintiff's expert, that taped connections were not uncommon in the industry, and certainly were not recognized as a known safety hazard. Indeed, the evidence suggests that decedent himself may have made the decision to use the taped connections, and even if it were not his own decision, he did participate in the decision-making process and assisted with the installation. Under these circumstances, the court is hard-pressed to find that any act on the part of Mr. Marrelli was shown to be malicious, made in bad faith, was wanton or reckless, or was such that it could be found to have severed his employee relationship with UA.

{¶20} Defendant's December 11, 2003, bench brief correctly sets forth the well-settled definitions of the aforementioned statutory terms and, in the interest of brevity, the court will not reiterate them herein. The court finds Mr. Marrelli is a competent, credible witness and based upon his testimony the court further finds that Mr. Marrelli harbored no willful or intentional design to do injury; no self-interest or sinister motive; and no perverse disregard of a known risk, as those terms are defined in case law. See, e.g., *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453-454; *Lowry v. Ohio State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835; *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 771; *Thompson v. McNeill*, supra. Moreover, none of the testimony of the other witnesses demonstrated that Mr. Marrelli engaged in any conduct of this nature.

{¶21} Accordingly, having fully considered the evidence, the court finds that Guy Marrelli did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, it is recommended that the court find Guy Marrelli to be entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F) and that the courts of common pleas do not have jurisdiction over civil actions against him based upon the allegations in this case.

{¶22} A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).

{¶23} On another matter, a conference is scheduled for *January 28, 2004, at 9:30 a.m.*, to discuss the status of the connected action. At the time of the conference, the court will contact all counsel by telephone.

LEE HOGAN
Magistrate

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LH/cmd
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