[Cite as *Baker v. Cleveland*, 2010-Ohio-5588.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93952

DEBORAH BAKER, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART AND REVERSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-619966

BEFORE: Sweeney, J., Stewart, P.J., and Sweeney, J.*

RELEASED AND JOURNALIZED: November 18, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, the city of Cleveland (the "City"), appeals from the verdict and judgment in favor of plaintiff-appellee, Deborah L. Baker ("Baker"), that awarded her damages as well as prejudgment interest and costs related to injuries she sustained in an automobile collision with Cleveland Police Officer Woods ("Woods") on May 31, 2003. The City also appeals the trial court's decision that denied its motion to off-set the economic

damage award by collateral source payments relating to Baker's medical bills and lost wages. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} Baker initially commenced an action against the City in 2005. After a voluntary dismissal, she re-filed the instant matter on March 28, 2007. The City asserted defenses to Baker's claims, including immunity pursuant to R.C. 2744.02(B)(1)(a) (emergency call immunity) and the sudden emergency doctrine. The trial court denied the City's motions for directed verdict and the jury found the City liable to Baker for $33,000.00 in damages.[1] The City moved for collateral source off-set from the economic damages portion of the judgment pursuant to R.C. 2744.05, which the trial court denied. The trial court granted Baker's motion for pre-judgment interest and to tax costs, awarding her additional money. The City appeals the verdict, the denial of its motion for off-set, and the pre-judgment interest award.

{¶ 3} The pertinent facts will be set forth in connection with the assignments of error to which they are relevant.

{¶ 4} "Assignment of Error A: The trial court erred by denying the City of Cleveland's Motions for Directed Verdict because evidence could only lead to

[1] Comprised of $13,000.00 in economic damages and $20,000.00 in non-economic damages.

the conclusion that police officer Woods was on an emergency call at the time of this incident."

{¶ 5} "Assignment of Error B: The trial court erred by denying the City's request to provide a complete and accurate jury instruction on 'Emergency Call' that was consistent with *Colbert v. City of Cleveland*."

{¶ 6} Both of these errors require us to examine the application of political subdivision immunity and, more specifically, the application of emergency call immunity.

{¶ 7} There is no dispute that Officer Woods was engaged in a governmental function at the time of the incident. See R.C. 2744.01(C)(2)(a) and R.C. 2744.02(A)(1). Baker alleged that Woods's negligent operation of his police car proximately caused her injuries. R.C. 2744.02(B)(1). At issue is whether R.C. 2744.02(B)(1)(a) absolves the City of liability for the injuries and property losses Baker sustained.

{¶ 8} A political subdivision is not liable when: "[a] member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct." Id.

{¶ 9} "An 'emergency call' means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand

an immediate response on the part of a peace officer." R.C. 2744.01(A). The Ohio Supreme Court has held that R.C. 2744.01(A) contains a non-exhaustive set of examples of emergency calls which are not limited to "those calls to duty that concern inherently dangerous situations." *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶11. "A 'call to duty' involves a situation to which a response by a peace officer is required by the officer's professional obligation." Id. at ¶13. The question that was being resolved by the Court in *Colbert* was whether the phrase "inherently dangerous situations" placed a limitation on the term "call to duty" for purposes of emergency call immunity, which the court found it did not. Accordingly, the Court found that the officer's negligent operation of his vehicle qualified for emergency call immunity where it was undisputed that he was pursuing and investigating suspected drug activity at the time of the accident.

{¶ 10} Unlike the facts in *Colbert*, the evidence as to what Officer Woods was doing, i.e., where he was going immediately prior to his accident with Baker, is disputed.

{¶ 11} Baker testified that she drove westbound on Union Ave. to the store. While doing so she observed a car accident in the curb lane, which she drove around. The parties to that accident were identified as Trivers and Crawford. Baker observed Trivers and Crawford looking for damage to their

vehicles. As Baker was returning eastbound on Union, Trivers' and Crawford's vehicles were still in the curb lane of the westbound side of the street and they were on the sidewalk. Baker was approaching a red light in the center lane of the eastbound side of Union. She observed three vehicles stopped at the light, turned her indicator on, and merged into the curb lane. At this time, the light changed to green so she accelerated to approximately 20 mph. She then observed a police car, which was stopped second in line at the traffic light, swerve towards her car. The contact from the police car caused Baker's vehicle to go off of the road, and she was just able to avoid hitting a pole. Baker testified about various injuries she sustained that are not in dispute here.

{¶ 12} Woods stated he was traveling eastbound on Union on his way to a parade assignment. According to his testimony, he may have been 45 minutes late. He said that he observed the Trivers and Crawford accident from a distance of about 75 feet and made an immediate decision to stop. He denied being stopped at the traffic light. Instead, Woods said he drove past the Trivers and Crawford accident at approximately 21 mph, with the intention of gaining some clearance in order to turn around and investigate the accident. Despite this intention, Woods admits that he did not activate his lights or sirens and did not contact dispatch. According to Woods, the Trivers and Crawford accident was in the center lane with individuals

standing and hovering around the double yellow line. Woods said someone walked into the path of his vehicle, which caused him to swerve into Baker's car.

{¶ 13} Woods testified that when he observes a motor vehicle accident it is his duty to stop and assist and to investigate. The City believes its Manual of Rules and Regulations corroborates this with the following provisions:

{¶ 14} "Section 4.18: An Officer shall investigate all reports of suspected criminal activity and non criminal activity incidents requiring police action that come to their attention, whether by observation, assignment or by other information;

{¶ 15} "Section 4.11: Personnel shall act immediately in every instance that comes to their attention where police assistance is required."

{¶ 16} Trivers and Crawford testified at the trial. Trivers insisted that the vehicles involved in his accident were always in the curb lane of westbound traffic on Union. No one was standing in the street. He had rear-ended another vehicle but no one was hurt, and there was very minimal damage to the vehicle. According to him, an officer said they could leave. He exchanged drivers' license and insurance information with the female he hit, but he did not make a police report. He did not observe the Woods and Baker car accident.

{¶ 17} Crawford also testified that her accident was in the curb lane of Union. She did not make a police report until the next day. The police report depicted the vehicles being positioned closer to the center lane. At the request of a City prosecutor, Crawford signed an affidavit two years after the accident verifying the accuracy of the police report, including the position of the vehicles. Crawford said she was not in the street. She said she heard the Woods and Baker accident but did not witness it. She did not recall talking to any police officers at the scene of her accident.

{¶ 18} The trial court denied the City's motion for directed verdict, which the City contends was error.

{¶ 19} Pursuant to Civ.R. 50(A)(4), a directed verdict may be granted when "the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *." We review a trial court's ruling on a motion for directed verdict under a de novo standard. *Steppe v. Kmart Stores* (1999), 136 Ohio App.3d 454, 737 N.E.2d 58; *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896.

{¶ 20} Under this standard, the court must not only construe all direct and positive evidence in a light most favorable to the non-moving party, but also must give the non-moving party the benefit of all "reasonable inferences"

that may be drawn from the evidence. *Rinehart v. Toledo Blade Co.* (1985), 21 Ohio App.3d 274, 487 N.E.2d 920. See, also, *Broz v. Winland* (1994), 68 Ohio St.3d 521, 526, 629 N.E.2d 395.

{¶ 21} Where there is competent evidence favoring the nonmoving party so that reasonable minds might reach different conclusions, the motion for a directed verdict must be denied. *Ramage v. Cent. Ohio Emergency Serv., Inc.* (1992), 64 Ohio St. 3d 97, 109, 592 N.E.2d 828. Even where there is voluminous evidence in the record to support a verdict for the moving party, a motion for directed verdict is improper where there is also adequate evidence to enable reasonable minds to find for the non-moving party. *Gliner v. Saint-Gobain Norton Indus. Ceramics Corp.* (2000), 89 Ohio St. 3d 414, 415, 732 N.E.2d 389, citing, *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 58 Ohio Op. 2d 424, 280 N.E.2d 896, paragraph four of the syllabus; see *Pangle v. Joyce* (1996), 76 Ohio St.3d 389, 391, 667 N.E.2d 1202.

{¶ 22} The City insists that Officer Woods's duty to stop at the Trivers and Crawford accident, coupled with his stated intent to do so, is irrefutable. This position disregards the province of the jury to weigh the evidence and assess the credibility of witnesses. Unlike the operative facts in *Colbert*, there is a genuine factual discrepancy as to what Officer Woods was doing at the time of his accident with Baker regardless of his duty to respond to the Trivers and Woods accident. Stated differently, just because Woods

recognized a duty to respond to the Trivers and Woods accident does not necessarily mean that he was doing so when his accident occurred.[2]

{¶ 23} Woods acknowledged that he was on his way to a parade assignment, which he stated was not a response to an emergency call, and the City has not asserted immunity based on Woods traveling to his parade assignment. When he saw the Trivers and Crawford accident from a distance of 75 feet away, he said that he immediately decided to stop.

{¶ 24} The City asserts it was entitled to a directed verdict based on Officer Woods's testimony concerning his intention to respond to the Trivers and Crawford accident. The record does, however, contain evidence that contradicts Woods's testimony on several critical points. For example, Woods said he was not stopped at a traffic light. But, according to Baker, the accident emanated from Woods's vehicle pulling around the vehicle that was in front of him at the light when it turned green. Trivers and Crawford both contradicted Woods's recollection that he swerved around a pedestrian who was in the middle of the street.

{¶ 25} There is also evidence that Woods was late to his parade assignment. He was not directed or ordered to respond to the Trivers and Crawford accident but stated that he made a unilateral decision to stop. It is

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[2] He was on the opposite side of the street and had driven past the point of the Trivers and Woods accident.

undisputed that he never activated his lights or sirens, nor did Woods report the Trivers and Crawford accident to dispatch.[3] For all these reasons, reasonable minds could reach different conclusions as to whether the officer was responding to a call to duty when he collided with Baker's vehicle. See, e.g., *Malone v. Torres*, Cuyahoga App. No. 92878, 2010-Ohio-157, ¶19 ("allowing immunity in a situation where officers failed to use their lights and sirens or even make a dispatch call to the police station before racing through an intersection against the light becomes a question of fact"); see, also, *Brown v. City of Cuyahoga Falls*, Summit App. No. 24914, 2010-Ohio-4330, ¶14 (holding reasonable minds could differ with respect to whether officer was responding to an emergency call and whether such response was required by a professional obligation).

{¶ 26} The trial court did not err by denying the City's motion for directed verdict pursuant to emergency call immunity.

{¶ 27} The City also contends the jury instructions given by the trial court concerning the emergency call immunity were neither complete nor accurate.

{¶ 28} A party is entitled only to have the law stated correctly by the trial court, not to have his proposed jury instruction presented to the jury. *Prejean*

[3] While we recognize the activation of lights and sirens is not determinative of emergency call immunity, it does support the possibility that he was not responding to the Trivers and Crawford accident at the time of the Baker accident.

v. Euclid Bd. of Edn. (Apr. 3, 1997), Cuyahoga App. Nos. 70905, 70906, 70907, 70908. It is within the trial court's discretion to determine the content of a jury instruction. *Burke v. Shaffner* (1996), 114 Ohio App.3d 655, 683 N.E.2d 861. Reversal is only warranted upon an abuse of that discretion. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Tracy v. Merrell-Dow Pharmaceuticals* (1991), 58 Ohio St.3d 147, 152, 569 N.E.2d 875. If the jury instruction incorrectly stated the law, then a de novo review must be performed to determine whether the incorrect jury instruction probably misled the jury in a matter materially affecting the complaining party's substantial rights. *Kokitka v. Ford Motor Co.* (1995), 73 Ohio St.3d 89, 652 N.E.2d 671.

{¶ 29} The City proposed a jury instruction on emergency call immunity that would include the following:

{¶ 30} "'Emergency Call' means a call to duty, which involves a situation to which a response by a peace officer is required by the officer's professional obligation * * * I instruct you that if an officer was in the process of responding to a motor vehicle accident, that this is responding to an emergency call."

{¶ 31} The court did not include these provisions but instructed the jury on the definition of emergency call set forth in the Ohio Revised Code and the Ohio Jury Instructions:

{¶ 32} "An 'Emergency call' means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer." Accord, R.C. 2744.01(A).

{¶ 33} The court further instructed, "An officer responds to an emergency call if he reasonably believes there is an urgent call to duty, regardless of the presence or absence of any actual danger or any actual need for the officer's presence there."

{¶ 34} The City's paramount objection is that the trial court's instruction did not include the wording "responses required by a police officer's professional obligation." The City maintains that the *Colbert* decision requires use of this wording in the jury instructions. As set forth previously, the Court, in *Colbert*, was examining whether a call to duty required the presence of an "inherently dangerous situation" and was not addressing the propriety or scope of jury instructions on emergency calls. While *Colbert* established that emergency call immunity exists in factual scenarios that are not specifically detailed in the statutory definition of "emergency call," *Colbert*

does not require trial courts to instruct the jury that emergency call immunity applies whenever a police officer is engaged in the scope of his/her employment or professional obligation.

{¶ 35} The court's instruction in this case was a proper statement of the law and did not mislead the jury. As determined by the *Colbert* decision, the trial court expressly instructed the jurors that an emergency call does not require the presence of inherent danger and is present when an officer reasonably believes there is an urgent call to duty. Officer Woods testified to that effect and, had the jury accepted this part of his testimony, they would have found emergency call immunity applied under the instructions they had received from the court. In a unanimous response to a specific interrogatory, the jury found that Officer Woods was not on an emergency call at the time of the accident. Nor did the jury believe that he encountered a sudden emergency that caused his collision with Baker. From these responses, it can readily be determined that the jury rejected at least some of the officer's testimony. The trial court's instructions concerning the emergency call immunity were both complete and accurate and did not constitute error.

{¶ 36} The first and second assignments of error are overruled.

{¶ 37} "Assignment of Error C: The Trial Court erred by denying the City's Motion to Off-Set the jury award by collateral sources paid to Baker

where the only economic damages awarded to Baker were collateral source damages."

{¶ 38} Baker testified concerning various components of her economic damages. She said her medical bills totaled $16,570.39. Under cross-examination, the City asked her, "and your medical bills, they have been paid in full, is that correct?" To which Baker responded, "I am not certain." She said she did not know how much of the bills had been paid. The City also inquired, "isn't it true that $5,000 was paid?" However, the court sustained an objection and no response was given.

{¶ 39} Baker also testified about her lost wages. Prior to her accident, she reported working about 50 hours a week over a five day period. After the accident, she utilized all of her sick and vacation time while she was off work between May and July. She was then off work another three days due to her injuries. In August, she missed another three weeks of work for which she was not paid. The defense questioned her about this time period utilizing a document indicating her claim was denied due to "no disabilities reported by medical documentation beyond July 30th, 2003." Baker sought compensation for 21 days of lost wages, amounting to $3,311.28.

{¶ 40} Baker presented her salary verifications, which her employer authenticated and are contained in the record as Plaintiff's Exhibit 3.

{¶ 41} The court instructed the jury that "economic loss means any of the following types of financial harm:

{¶ 42} "A, all wages, salaries or other compensation lost as a result of the plaintiff's injury or loss.

{¶ 43} "B, all expenditures for medical care or treatment, rehab services, or other care, treatment, services and products or accommodation incurred as a result of the plaintiff's injury or loss.

{¶ 44} "C, all expenditures incurred by the plaintiff or of another person on behalf of the plaintiff to repair or replace the plaintiff's property that was injured or destroyed.

{¶ 45} "And finally D, any other expenditure incurred as a result of the plaintiff's injury and loss."

{¶ 46} The general damages award of $33,000.00 is broken down into two categories: economic and non-economic damages. Although Baker sought $19,881.69 in economic damages, the jury awarded her only $13,000.00. There is no further apportionment of the economic damages award.

{¶ 47} Post-judgment the City moved for off-set of monies paid by insurance providers for short-term disability and medical bills. The City also requested a deduction for a settlement Baker received in an unrelated automobile accident. Baker opposed the off-set, maintaining that the City

failed to prove that the collateral source benefits were included in the jury's award.

{¶ 48} R.C. 2744.05(B)(1) provides:

{¶ 49} "If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to those benefits.

{¶ 50} "The amount of the benefits shall be deducted from an award against a political subdivision under division (B)(1) of this section regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery, in whole or in part, for the claim. A claimant whose benefits have been deducted from an award under division (B)(1) of this section is not considered fully compensated and shall not be required to reimburse a subrogated claim for benefits deducted from an award pursuant to division (B)(1) of this section."

{¶ 51} The Ohio Supreme Court held that "under R.C. 2744.05(B), a collateral benefit is deductible only to the extent that the loss for which it compensates is actually included in the jury's award." *Buchman v. Bd. of*

Edn. Of Wayne Trace Local School Dist. (1995), 73 Ohio St.3d 260, 269, 652 N.E.2d 952.

{¶ 52} The burden of disclosure of collateral benefits is on the plaintiff, but "it is the defendant's burden to prove the extent to which it is entitled to an offset under R.C. 2744.05(B)." Id. at 270. Defendants are not required to submit jury interrogatories that quantify the category of damages but this is "the most efficient and effective method, *if not the only method*, by which to determine whether the collateral benefits to be deducted are within the damages actually found by the jury." Id. (emphasis added). If the court is left to speculate as to the amount of benefits to be deducted from the jury's verdict, the defendant has failed in its burden of proof. Id.

{¶ 53} We have no way of matching the collateral benefits received to the jury's economic damages award. The jury did not award Baker the full amount of the economic damages she sought and had supported with evidence. The court instructed the jury on components of economic damages that included, but were not limited to, lost wages and medical bills. Finally, there was evidence presented that Baker suffered some economic damages that were not paid by any source. The law precludes an off-set without proof of a double recovery (i.e., that the jury award includes the amounts paid by collateral sources). Without any apportionment, it can only be speculated as to what part of the jury's economic damages award, if any, included amounts paid by a

collateral source. Based on the record, the trial court did not err when it denied the City's motion for off-set. The third assignment of error is overruled.

{¶ 54} "Assignment of Error D: Because the City had a good faith and reasonable belief that it was entitled to two complete defenses to liability, the trial court erred in awarding prejudgment interest on the former version of §1343.03 back to the filing date of Case No. 56325 [sic]."

{¶ 55} The focus of our review is the application of R.C. 1343.03(C). It is not the purpose of this statute to penalize those who go to trial. *Avondet v. Blankstein* (1997), 118 Ohio App.3d 357, 370, 692 N.E.2d 1063, citing *Hardiman v. ZEP Mfg.* (1984), 14 Ohio App. 3d 222, 227-228, 470 N.E.2d 941. Rather, the statute "'only affects those who choose to go to trial and then abuse the trial process, those who fail to conduct a lawsuit in good faith.'" Id. This court continues to find that "'it would be unconstitutional to penalize a party for exercising his right to a trial.'" Id.

{¶ 56} The Ohio Supreme Court has established the criteria for determining whether a party has "failed to make a good faith effort to settle" as contemplated by R.C. 1343.03(C) and directs that:

{¶ 57} "A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to

unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 495 N.E.2d 572, paragraph one of the syllabus.

{¶ 58} It is generally within the sound discretion of the trial court to determine whether a party's settlement efforts indicated good faith. Id. at 159, citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 482 N.E.2d 1248. However, where the record reflects that a party cooperated fully in discovery, did not unnecessarily delay any of the proceedings, and had a reasonable, good faith belief that it had no liability, the trial court abuses its discretion when it awards prejudgment interest against that party. Id. at 159-160.

{¶ 59} There is no allegation that the City attempted to unnecessarily delay any of the proceedings or that the City failed to fully cooperate in discovery proceedings. Baker maintains that the City failed to rationally evaluate its risks and potential liability and failed to make a good faith settlement offer. Even more specifically, Baker asserts that the City made no settlement offer. The record indicates that the City did communicate a settlement offer to the trial court on the eve of trial, however, the City's

counsel appeared to acknowledge that the offer may not have been relayed to Baker. In any case, a defendant has no duty to make any settlement offer if the defendant has an objective good faith belief that it has no liability.

{¶ 60} After a complete review of both the prejudgment interest transcript and the jury trial transcript, we can find no competent, credible evidence to refute the submitted evidence reflecting an objective, good faith belief that the City had no liability. Similarly, the evidence does not establish that the City failed to rationally evaluate its risks and potential liability. The law provides immunity to the City when a police officer is responding to an emergency call. The case law has defined an emergency call to include an officer's response to a call of duty required by his/her "professional obligation," regardless of inherent danger. In this case, Officer Woods testified that he felt an urgent duty to respond to the Trivers and Crawford accident and believed his response was required by his job. He said he was in the process of responding to this perceived urgent call of duty when he hit Baker.

{¶ 61} Furthermore, Baker's evidence was not without dispute. For example, Crawford's testimony was contradicted by her own affidavit concerning the location of the vehicles involved in her accident. Neither Trivers nor Crawford witnessed Baker's accident. In reaching its verdict, the jury was essentially left to weigh the testimony of Baker against the testimony

of Officer Woods. There was a genuine issue of material fact concerning the City's liability in this case.

{¶ 62} We cannot conclude that the City irrationally evaluated the evidence simply because the jury, and Baker, evaluated it differently. The City had a good faith belief that it had no liability. For these reasons, the fourth assignment of error is sustained and the prejudgment interest award is vacated.

Judgment affirmed in part, reversed in part.

It is ordered that appellee and appellant split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing 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.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
JAMES D. SWEENEY, J.,* CONCUR

*(Sitting by Assignment: Judge James D. Sweeney, Retired, of the Eighth District Court of Appeals)