

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

PAUL PEER,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2011-T-0014
CHARLES W. SAYERS, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2009 CV 2655.

Judgment: Affirmed.

Thomas E. Schubert, 138 East Market Street, Warren, OH 44481 (For Plaintiff-Appellant).

Gregory A. Beck and Mel L. Lute, Jr., Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, OH 44720 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Paul Peer, appeals the January 7, 2011 Judgment Entry of the Trumbull County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, Police Chief Charles W. Sayers and the Bazetta Township Police Department, and dismissing the Complaint, in which Peer raised claims of malicious criminal prosecution and false imprisonment. The determinative issue before this court is whether Chief Sayers' alleged conduct is afforded immunity under Ohio's Political Subdivision Tort Liability Act, R.C. Chapter 2744, i.e., whether he

performed his duties in a wanton or reckless manner. For the following reasons, Chief Sayers is entitled to immunity and we accordingly affirm the decision of the court below.

{¶2} On October 6, 2009, Peer filed a Complaint in the Trumbull County Court of Common Pleas against Police Chief Sayers and the Bazetta Township Police Department, alleging the violation of his civil rights (Section 1983), false imprisonment, and malicious prosecution. Peer's claims arose from his arrest for Attempted Theft, following an incident in which an unidentified individual attempted to steal merchandise from the Walmart Supercenter in Cortland, Ohio. The defendants answered the Complaint on October 23, 2009.

{¶3} On October 29, 2009, Peer voluntarily dismissed the federal claim pursuant to Civ.R. 41(A).

{¶4} On August 10, 2010, the defendants filed their Motion for Summary Judgment. In support of defendants' Motion was attached the Affidavit of Charles W. Sayers, which states:

{¶5} 1. On October of 2008 [sic] I was the police chief of the Bazetta Township Police Department.

{¶6} 2. I, along with Officer Chris Herlinger of the Bazetta Township Police Department was involved in an investigation arising out of an attempted theft which occurred at the Wal-Mart store.

{¶7} 3. I took the original call from Wal-Mart and assigned the investigation to Chris Herlinger. I assisted in determining probable cause.

{¶8} 4. On October 14, 2008, Bob Gillespie of the Wal-Mart *** advised that a subject was seen pushing a large screen television out of the store past the door greeters. The subject was stopped by a store associate and requested to provide proof of purchase and subsequently fled the store leaving the television behind.

{¶9} 5. Mr. Gillespie advised that the attempted theft was captured on DVD through the Wal-Mart surveillance system.

{¶10} 6. According to the information provided by Mr. Gillespie the suspect entered a red vehicle with Ohio Registration No. EIS5691 and left heading toward Elm Road.

{¶11} 7. Officer Christopher Herlinger ran the plate number and checked the registration against the Ohio Registry. Officer Herlinger obtained a photo of the registered owner and proceeded to the listed address at 215 Maryland Street NE in the City of Warren. Officer Herlinger knocked on the door but no one answered. Officer Herlinger ran the registration of other vehicles in the driveway as well.

{¶12} 8. On October 18, 2008, Officer Herlinger viewed the Walmart security tapes at the police station and was able to match the subject on the video to that of the father of the subject to whom the fleeing vehicle was registered. The fleeing vehicle was registered to Kyle Peer, and the individual identified by the officer in the Wal-Mart video tape was the subject's father, Paul E. Peer.

{¶13} 9. The officer used the Ohio registrar system to obtain a driver's license photo of the subject. The officer paused the video and compared the images and determined that the physical description matched the suspect in the video.

{¶14} 10. The officer then proceeded back to 215 Maryland Street NE in Warren and again was met with no contact although the officer observed the individuals moving in the house. Subsequently, statements were taken from the door greeter Eva Mae Brown, *** as well as Lisa Chalker, Asset Protection Associate with Wal-Mart. Following the investigation a warrant was issued for the arrest of Paul Peer for violation of O.R.C. § 2923.02 attempted theft.

{¶15} 11. Mr. Peer was arrested when Trumbull County Sheriff's deputy served the warrant on his residence on December 17, 2008.

{¶16} 12. In April of 2009, following a joint review of the Wal-Mart surveillance video by Paul Peer, his public defender, the prosecutor, and Sergeant Joseph Sofcheck of the Bazetta Township Police Department, Mr. Peer provided positive identification of the individual in the photograph, as being someone other than himself.

{¶17} On December 6, 2010, Peer filed his Response to Motion for Summary Judgment. Attached thereto were the Investigation Notes of Officer Herlinger. Neither Officer Herlinger nor Police Chief Sayers were deposed in the course of discovery. The Investigation Notes provide the following information: On October 17, 2008, Officer

Herlinger went to the residence at 215 Maryland Street NE and checked the registration of the vehicles found in the driveway. On the following day, Officer Herlinger obtained a driver's license photo of Peer and compared it with the suspect depicted in the Walmart security video. The Notes state that "[t]he physical description matched and a positive ID was made." Officer Herlinger returned to the Maryland Street address but was unable to make contact with anyone, although he "observed someone moving in the house from the kitchen to the upstairs but they wouldn't answer the door."

{¶18} Next, the Investigation Notes provide: "Officer was advised by Chief on 10/22/08 the report would be completed and entered. Officer advised him of the case and officer needs to obtain a statement from door greeter who stopped the subject and then case will be forwarded to prosecutor for consultation about filing attempted theft charges in this matter."

{¶19} Finally, on December 4, 2008, the following was entered: "Officer was able to view the security tape and obtain a positive id on the subject. Officer filed two counts of attempted felony theft at Central Court today. Officer obtained warrant for subject. Warrant was given to [the sheriff's department] for service."

{¶20} Also attached to the Response to Motion for Summary Judgment was the Affidavit of Paul Peer, which stated, in relevant part:

{¶21} 3. I *** identified the person who attempted the theft as Patrick D. Johnson, who at the time was the boyfriend of my ex-wife, Sandra K. Barnett-Peer. Mr. Johnson is approximately 42 years old, is about 5'11 and weighs 190 lbs. Mr. Johnson looks nothing like me except that he is approximately my age, and his driver's license photo and mine both show us wearing facial hair.

{¶22} 4. I was never contacted by the Bazetta Police Department by telephone, personal contact, or postal mail about the situation, and I was at all times able to explain my actions, and to identify Mr. Johnson from the video tapes. I disagree with any claim that the Bazetta Police came to my home,

knocked on the door, and were ignored when people were in the house, it certainly did not occur when I was present in the home.

{¶23} In contrast to Peer's physical description of Patrick Johnson, Peer is described by his Bureau of Motor Vehicle records as being 5' 5" tall and weighing 220 pounds.

{¶24} On January 7, 2011, a DVD of the Walmart security video was filed with the trial court.

{¶25} Also on January 7, 2011, the trial court issued its Judgment Entry, granting the defendants' Motion for Summary Judgment.¹

{¶26} On February 3, 2011, Peer filed his Notice of Appeal. On appeal, Peer raises the following assignment of error: "The trial court erred to the prejudice of plaintiff/appellant when it found that reasonable minds could reach only a conclusion adverse to plaintiff/appellant on the facts before the court when it considered defendant/appellee's Civil Rule 56 Motion for Summary Judgment."

{¶27} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an

1. In their Motion for Summary Judgment, the defendants asserted that the Bazetta Township Police Department was not sui juris, i.e., was not an entity capable of being sued. See *Ciganik v. Kaley*, 11th Dist. No. 2004-P-0001, 2004-Ohio-6029, at ¶40 (citations omitted). In his Reply, Peer stipulated to the "dismissal" of the Police Department. The trial court acknowledged that Peer abandoned his claims against this defendant. Accordingly, we will treat the appeal as against Sayers only.

appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.* (1993), 87 Ohio App. 3d 704, 711 (citation omitted).

{¶28} Before considering Peer's assignment of error, we will address certain ancillary issues. Police Chief Sayers maintains that the dismissal of the criminal charges against Peer contained a stipulation of probable cause and, for this reason, Peer may not assert claims for malicious prosecution or false imprisonment. The trial court found that, "although the Assistant Prosecutor *** stated that he dismissed the case upon that stipulation, said stipulation was never entered by the Central District Court, and the Plaintiff never agreed on the record." Accordingly, the court proceeded "as if Mr. Peer did not stipulate probable cause."

{¶29} Police Chief Sayers does not challenge the trial court's decision to proceed as if there was no stipulation of probable cause by filing a cross-assignment of error. The Ohio Revised Code provides for the filing of assignments of error on behalf of an appellee as follows: "In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part." R.C. 2505.22; *Gingrich v. D'Ambrozio*, 11th Dist. No. 2008-T-0103, 2009-Ohio-2956, at ¶22 ("[s]ince [appellee] sought to preserve the relief granted by the trial court, but for different reasons than those advanced by the trial court, a cross-assignment of error was the proper means to

challenge the trial court's ruling") (citation omitted). As Chief Sayers has not formally challenged this part of the trial court's judgment, we will not consider the argument that Peer has stipulated to probable cause.

{¶30} Police Chief Sayers also maintains the evidence in opposition to summary judgment submitted was "improper" in that it was not certified. In the court below, Chief Sayers noted the evidence was improper but did not move to strike its admission. In its decision, the trial court stated that it considered Peer's Reply "and all of the applicable evidence, including the Wal Mart videotape provided by the Plaintiff." Again, Chief Sayers does not challenge the lower court's consideration of the evidence through a cross-assignment of error and, therefore, its propriety will not be considered here. Cf. *State ex rel. Boyers v. Stuard*, 11th Dist. No. 2010-T-0111, 2010-Ohio-6444, at ¶5 ("the courts of this state have further concluded that when the opposing party *** fails to assert any objection to the lack of certified copies or a properly-framed affidavit, the documents can still be considered in disposing of the motion because any challenge to their authenticity has been waived").

{¶31} We now turn to the substance of Peer's assignment of error. "In a civil action brought against *** an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, *** the employee is immune from liability unless *** [t]he employee's acts or omissions were *** in a wanton or reckless manner." R.C. 2744.03(A)(6)(b).

{¶32} While the question of what constitutes wanton or reckless conduct is normally a jury question, the standard for demonstrating such conduct is a "high" one.

Fabrey v. McDonald Village Police Dept., 70 Ohio St.3d 351, 356, 1994-Ohio-368 (citations omitted); *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, at ¶37. Wanton conduct has been described as the “failure to exercise any care whatsoever,” and as a perversity such that “the actor must be conscious that his conduct will in all probability result in injury.” *Fabrey*, 70 Ohio St.3d at 356 (citation omitted). Reckless conduct has been described as knowledge that one’s conduct “creates an unreasonable risk of *** harm to another, [and] that such risk is substantially greater than that which is necessary to make his conduct negligent.” *Rankin*, 2008-Ohio-2567, at ¶37 (citation omitted).

{¶33} Peer maintains that his arrest for Attempted Theft constituted wanton and reckless conduct in that it was ordered without regard for the existence of probable cause. Specifically, Peer notes Officer Herlinger’s identification of him as the suspect in the surveillance video was based on the “infamously inaccurate and skewed” photographs from the Bureau of Motor Vehicles. He also faults Officer Herlinger for not having Walmart employees identify him as the suspect prior to the arrest. Peer suggests that Officer Herlinger was “irritated by what he perceived to be efforts to evade him by residents at 215 Maryland Avenue [sic].” Peer believes it is reasonably inferable that Police Chief Sayers pressured Officer Herlinger to make an arrest despite the fact that the investigation was not yet complete, based on the statement in the Investigation Notes that “the report would be completed and entered.” Finally, Peer argues that the adequacy of the investigation must be considered in light of the fact that over four weeks elapsed between the incident and his arrest, which was sufficient time for a more careful investigation.

{¶34} Construing the evidence most strongly in his favor, Peer has failed to raise a genuine issue of material fact as to whether Police Chief Sayers acted wantonly or recklessly in the decision to file criminal charges. Virtually all of the purported instances of wanton and reckless conduct were actions taken by Officer Herlinger, not Chief Sayers. Officer Herlinger conducted the investigation, took the statements from Walmart employees, made the identification based on surveillance video and Peer's drivers license photo, and attempted to make contact with the residents of 215 Maryland Street. There is no evidence that Chief Sayers performed any meaningful supervisory role in Officer Herlinger's investigation. There is a statement in Chief Sayers' affidavit that he "assisted in determining probable cause." However, no specifics as to what this assistance consisted of are given. In other words, Peer cannot point to one thing that Chief Sayers actually did or failed to do in the course of Officer Herlinger's determining that probable cause existed to arrest him. Without any specific instances of conduct, it is impossible to determine whether Chief Sayers' actions rose to the level of wanton or reckless conduct. *Thompson v. Faddis*, 11th Dist. No. 2006-P-0036, 2007-Ohio-891, at ¶17 ("[t]o the extent these allegations [of arrest without probable cause] do not relate to any act or omission ascribed to Deputy Faddis, there is no genuine issue of material fact to be litigated").

{¶35} Peer maintains that it is reasonable to infer that Police Chief Sayers pressured Officer Herlinger to file charges without regard for probable cause from the statement in the Investigation Notes that "Officer was advised by Chief on 10/22/08 the report would be completed and entered." We disagree. While the precise import of this statement is open to varied interpretations, it does not support the inference that Chief

Sayers contemplated Peer's arrest without probable cause. The Investigation Notes state that Officer Herlinger advised Chief Sayers that he needed to obtain a statement from the door greeter at Walmart and to consult with the prosecutor about filing charges. Thirteen days elapsed between Chief Sayers' advisement that "the report would be completed" and Peer's arrest. There is evidence that during this time Officer Herlinger did return to Walmart and obtain statements. The Investigation Notes state that it was Officer Herlinger who filed the charges, and there is no indication of further involvement from Chief Sayers. Thus, the statement that "the report would be completed" does not meet the high standard for wanton or reckless conduct. *Canfora v. Coiro*, 11th Dist. No. 2006-L-105, 2007-Ohio-2314, at ¶77 ("mere inferences that the *** officers' conduct 'rose to the crest of reckless, willful, or malicious conduct or that they acted in bad faith *** are insufficient to defeat summary judgment' based upon statutory immunity") (citation omitted).

{¶36} Furthermore, there is no evidence that Officer Herlinger filed the charges without regard for probable cause. Officer Herlinger believed he had positively identified Peer as the person in the surveillance video, took statements from Walmart employees, and attempted to contact Peer at his residence. These actions do not evidence the complete absence of care or consciousness of an unreasonable risk of injury to Peer necessary to create a genuine issue of material fact as to whether Police Chief Sayers acted wantonly or recklessly. Cf. *Brown v. King*, 5th Dist. No. 2008-CA-00165, 2009-Ohio-4957, at ¶40 ("[t]hat [the detective's] efforts could have been more thorough, or even that his actions may have been mistaken, does not mean that they were *unreasonable*") (emphasis sic).

{¶37} The sole assignment of error is without merit.

{¶38} For the foregoing reasons, the Judgment of the Trumbull County Court of Common Pleas, granting summary judgment in favor of Police Chief Sayers and the Bazetta Township Police Department with respect to all claims raised in Peer's Complaint, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.