**[Cite as *Christie v. Violet Twp. Fire Dept.*, 2010-Ohio-2547.]**

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| AARON M. CHRISTIE, ET AL. | : | JUDGES: |
| | : | Hon. W. Scott Gwin, P.J. |
| Plaintiffs-Appellees | : | Hon. Sheila G. Farmer, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | |
| VIOLET TOWNSHIP FIRE | : | Case No. 09CA57 |
| DEPARTMENT, ET AL. | : | |
| | : | |
| Defendants-Appellants | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Court of Common Pleas, Case No. 08CV0015 |
| JUDGMENT: | Reversed |
| DATE OF JUDGMENT ENTRY: | June 4, 2010 |

APPEARANCES:

| For Plaintiffs-Appellees | For Defendants-Appellants |
|---|---|
| BRADEN A. BLUMENSTIEL<br>261 West Johnstown Road<br>Columbus, OH 43230 | KENNETH E. HARRIS<br>941 Chatham Lane<br>Suite 201<br>Columbus, OH 43221 |

*Farmer, J.*

**{¶1}** On January 7, 2008, appellee, Aaron Christie, filed a complaint against appellants, the Violet Township Fire Department and John Does 1 through 3, claiming he sustained injuries from the willful and wanton actions of the EMS workers while being transported to the hospital following a seizure. An amended complaint was filed on May 9, 2008 to add Violet Township Fire Department Lieutenant Gregg Goodwin as a party defendant.

**{¶2}** On January 9, 2009, appellants filed a motion for summary judgment, claiming sovereign immunity. By entry filed September 24, 2009, the trial court denied the motion, finding there was a question of fact as to whether appellants' conduct was willful or wanton.

**{¶3}** Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

**{¶4}** "THE TRIAL COURT ERRED IN FAILING TO FIND, AS A MATTER OF LAW, THAT THE ALLEGED CONDUCT OF LT. GREGG GOODWIN AND THE OTHER MEMBERS OF THE VIOLET TOWNSHIP FIRE DEPARTMENT, WHILE INVOLVED IN THE RESCUE EFFORTS FOR PLAINTIFF, AARON CHRISTIE, WERE NOT IMMUNE PURSUANT TO OHIO STATUTE AND CASE LAW."

I

**{¶5}** Appellants claim the trial court erred in denying their motion for summary judgment as they were immune from liability. We agree.

**{¶6}** Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

**{¶7}** "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains 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 viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

**{¶8}** As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

**{¶9}** R.C. 2744.02 governs immunity for political subdivisions. Subsection (A)(1) states the following:

**{¶10}** "For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act

or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

**{¶11}** R.C. 2744.03(A)(1) provides for immunity from a civil action for "injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function" by a political subdivision or an employee of a political subdivision unless the acts or omissions "were with malicious purpose, in bad faith, or in a wanton or reckless manner."

**{¶12}** " 'Malice' is the willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified." *Cook v. Cincinnati* (1995), 103 Ohio App.3d 80, 90. " 'Bad faith' involves a dishonest purpose, conscious wrongdoing, the breach of a known duty through some ulterior motive or ill will, as in the nature of fraud, or an actual intent to mislead or deceive another." Id. "Wanton misconduct" is the failure to "exercise any care whatsoever." *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, syllabus. "Reckless" conduct has been defined as:

**{¶13}** " 'The actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.' " *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105, quoting 2 Restatement of the Law 2d, Torts (1965), at 587, Section 500.

**{¶14}** "Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. *Fabrey* [v. *McDonald Police Department* (1994)], 70 Ohio St.3d at 356, 639 N.E.2d 31. However, the standard for showing such conduct is high. Thus summary judgment is appropriate in instances where one's actions 'show[ ] that he did not intend to cause any harm***, did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose[ .]' *Fox v. Daly* (Sept. 26, 1997), 11th Dist. No. 96-T-5453, quoting *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772, 663 N.E.2d 384." *Shadoan v. Summit County Children Services Board,* Summit App. No. 21486, 2003-Ohio-5775, ¶14.

**{¶15}** First, it is important to point out a procedural error in the use of certain depositions for the summary judgment motion. The docket reveals only the depositions of Jason Smith, Donald Searls, Dave Zagoric, Gregory Goodwin, Rick Hoagland and Colin Kaide were filed. Attached to appellee's response to appellants' motion for summary judgment were excerpts from the depositions of appellee and Eric Rutkowski which had not been filed. Civ.R. 32(A) states, "[e]very deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing." Therefore, for a de novo review, the excerpts will not be considered.

**{¶16}** In his May 9, 2008 amended complaint, appellee averred that appellant Goodwin was wanton and willful in restraining him:

**{¶17}** "19. Defendant Goodwin negligently, recklessly, knowingly, intentionally, purposely, willfully and/or wantonly engaged in misconduct by continuing to bend

Aaron's wrist at a severe angle for several minutes after being repeatedly warned such a maneuver was inflicting considerable pain upon Aaron."

**{¶18}** From the depositions and affidavits filed, we find the following undisputed facts:

**{¶19}** 1) Each emergency responder termed appellee's actions as combative and cognitive while he was being restrained in the EMS squad. Hoagland depo. at 30-31, 51-52; Goodwin depo. at 11-12; Zagoric depo. at 30-33; Searls depo. at 29; Smith depo. at 41.

**{¶20}** 2) Appellee's actions were described as flailing, kicking, fighting, spitting, and cursing. Goodwin depo. at 11, 41; Zagoric, depo. at 29, 71; Searls depo. at 23-24; Smith depo. at 32, 45. Appellee was described as being "all over the place."

**{¶21}** 3) At the point that appellant Goodwin applied the joint manipulation on appellee's wrist, there were four firefighters and appellee in the back of the EMS unit. Zagoric was holding appellee's head and oxygen mask, Searls had his legs, Smith had his left arm, and appellant Goodwin had his right arm. Zagoric depo. at 39-40.

**{¶22}** 4) Appellee was held in by the cot straps around his waist and knees prior to his seizure as a safety precaution for transport, "the same principle as wearing a seat belt." Zagoric depo. at 39.

**{¶23}** 5) After appellee had his seizure, he did not relapse into the normal lethargic state that was common for him and common for seizure patients. See, Affidavits of Thomas, Darrow, Bendoff, and K. Rutkowski, attached to Appellee's January 30, 2009 Memorandum Contra to Motion for Summary Judgment.

**{¶24}** 6) Despite the use of handcuffs, appellee was still moving around. His arms were free to move up and down the rails of the cot. Hoagland depo. at 35-36.

**{¶25}** 7) Even in handcuffs, appellee could twist his body off the cot and kick out with his legs. Goodwin depo. at 50; Zagoric, depo. at 41.

**{¶26}** 8) Appellee called out that "it hurts, stop it" after appellant Goodwin applied the joint manipulation to his wrist. Hoagland depo. at 41; Goodwin depo. at 52; Searls depo. at 27; Smith depo. at 40.

**{¶27}** 9) Appellant Goodwin testified he released the pressure on the wrist when appellee yelled "it hurts," but still kept control of the wrist. Goodwin depo. at 48; Zagoric depo. at 45.

**{¶28}** 10) Once the pressure was released, appellee again resumed his fighting and flailing. Zagoric depo. at 45; Smith depo. at 41; Searls depo. at 29. This occurred several times during the transport to the hospital. Searls depo. at 29; Zagoric depo. at 45.

**{¶29}** 11) Appellee did not calm down until he was at the hospital. Zagoric depo. at 75.

**{¶30}** 12) Dr. Colin Kaide testified appellee's response to pain and the resumption of fighting after the pressure was released from the joint manipulation to his wrist were evidence that appellee was not seizing during the joint manipulation and was cognitive. Kaide depo. at 31.

**{¶31}** Dr. Kaide testified to the following at 32:

**{¶32}** "A. And as soon as he released the pressure the patient was calm for a few seconds, few minutes, and then began the behavior again. That demonstrates

cognitive responsiveness to a circumstance. He may not remember in the interim period that he was supposed to hold still, but during that period of time he clearly responded, and for a period of time he stopped kicking and fighting and biting and doing whatever was described in the testimony."

**{¶33}** Hoagland testified the joint manipulation procedure is not a procedure used by EMTs, but is commonly used by police in subduing a combative individual. Hoagland depo. at 14-17. It is not standard procedure for a person having a seizure. Goodwin depo. at 12.

**{¶34}** An affidavit filed by E. Rutkowski, attached to appellee's memorandum contra, also affirms that appellee's wrist was in a joint manipulation and he was yelling "it hurts and to stop" at least three to four times.

**{¶35}** From these facts, it is obvious the amount of chaos that existed in the small cramped space of the EMS unit was great. Included in the back of the space, described by appellant Goodwin and Zagoric as cramped and smaller than a conference table, were four adult firefighters, one cot attached to the floor, and appellee. All the firefighters/EMTs admitted their goal was to calm appellee down so the squad could proceed to the hospital.

**{¶36}** Admittedly, the joint manipulation of appellee's wrist was used to settle appellee and it was successful. Appellee became calm only when the procedure was used.

**{¶37}** We find although the use of the procedure may have been negligent, there is no evidence that it was malicious, wanton or reckless in its application. All five responders stated it was the only way appellee became calm. Given these undisputed

facts, and even if some termed appellee "an asshole" after the incident, we find the actions complained of do not rise to the level of wanton and willful misconduct.

**{¶38}** Upon review, we find the trial court erred in denying appellants' motion for summary judgment on the issue of sovereign immunity.

**{¶39}** The sole assignment of error is granted.

**{¶40}** The judgment of the Court of Common Pleas of Fairfield County, Ohio is reversed.

By Farmer, J.

Gwin, P.J. concur

Delaney, J. dissents.

s/ Sheila G. Farmer

s/ W. Scott Gwin

JUDGES

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*Delaney, J., dissenting*

**{¶41}** I respectfully dissent from the majority opinion.

**{¶42}** In the amended complaint, appellee alleged appellant Lt. Goodwin "negligently, recklessly, knowingly, intentionally, purposely, willfully and/or wantonly engaged in misconduct" by employing a police maneuver known as a "wrist lock" upon appellee during an emergency medical transport.

**{¶43}** A wrist lock is a restraint technique in which the wrist is held in a hyper flexed position, causing pain, to achieve control over a person. According to Lt. Goodwin, he used the technique upon appellee to calm him during transport. Although Lt. Goodwin had used the wrist lock technique to handcuff suspects in his part-job as security officer, this was the first time he had used the technique as an EMT. Appellee alleges the maneuver caused injury to his wrist. The evidence is undisputed that employing a wrist lock to restrain a patient is not part of EMT training or protocol.

**{¶44}** In the memorandum in support of the motion, appellants argue that summary judgment was appropriate for two reasons.

**{¶45}** First, appellants argued "[p]laintiff's attorney has conceded that there will be no expert testimony presented by Plaintiff on this point. 'This point' is the question whether using a joint manipulation technique to control a combative patient is a failure to meet the standard of care expected of a paramedic facing the same circumstances." Motion for Summary Judgment, p. 4.

**{¶46}** Appellants cite to the decisions of the Sixth Appellate District in *Mitchell v. Norwalk Area Health Services*, 6th Dist. No. H-05-002, 2005-Ohio-5261 and the Twelfth Appellate District in *Wright v. City of Hamilton*, 141 Ohio App. 3d 296, 750 N.E.2d 1190,

2001-Ohio-4194, for the proposition that a plaintiff must establish the relevant standard of care for paramedics at trial through expert testimony.

**{¶47}** While I agree with the reasoning of our colleagues in the Sixth and Twelfth Districts on this issue, appellants did not properly support the summary judgment motion under the standard enunciated by the Ohio Supreme Court in *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264, 1996-Ohio-107. " * * * [A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of basis for the motion and identifying those portions of record that demonstrate the absence of genuine issue of material fact on essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." Id. at 293.

**{¶48}** Appellants' bald contention "there will be no expert testimony presented by Plaintiff" simply does not discharge their obligation under Civ.R 56 to point to specific evidence affirmatively demonstrating that Appellee has no evidence to support the claims. Therefore, denial of summary judgment was appropriate.

**{¶49}** Secondly, appellants argue entitlement to statutory immunity under R.C. 2744 and R.C. 4765, although appellants cite no specific provision of either statute. Unlike the majority, I find R.C. 4765, rather than R.C. 2744, specifically sets forth the

appropriate immunity provisions applicable to this case. See, *Norwalk* and *Wright*, supra.

**{¶50}** R.C. 4765.49(A) provides that "[a] first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct." Similarly, R.C. 4765.49(B) provides that a "political subdivision * * * that provides emergency medical services * * * is not liable in damages in a civil action for injury * * * arising out of any actions taken by a * * * paramedic * * * unless the services are provided in a manner that constitutes willful or wanton misconduct."

**{¶51}** Appellee contends that Lt. Goodwin's use of the wrist lock constituted willful and wanton misconduct. As the standard of care expected of a paramedic in making a decision to restrain a patient, who is post-seizure and handcuffed, would not be sufficiently obvious to the average juror, expert testimony is necessary to establish the appropriate standard of care in which to evaluate whether Lt. Goodwin's conduct was willful or wanton.

**{¶52}** Although appellee would have the burden of proof should this case go to trial, appellants bear the initial burden in moving for summary judgment to support their motion with Civ.R. 56 evidence which affirmatively demonstrates their entitlement to immunity. While appellants belatedly attempted to rectify this deficiency in their reply memorandum with the affidavit of Dr. Kaide, such attempt was contrary to the

requirements of Civ. R. 56, which mandates the motion for summary judgment be supported by such evidence.

**{¶53}** Finally, the majority's finding that Lt. Goodwin's use of the procedure may have been negligent but not "wanton", is wholly speculative in light of the absence of any evidence as to the standard of care owed by Lt. Goodwin.

**{¶54}** Accordingly, summary judgment was not appropriate under the circumstances of this case and I would affirm the trial court's decision.

s/ Patricia A. Delaney
JUDGE PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| AARON M. CHRISTIE, ET AL. | : | |
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| -vs- | : | JUDGMENT ENTRY |
| VIOLET TOWNSHIP FIRE DEPARTMENT, ET AL. | : | |
| Defendants-Appellants | : | CASE NO. 09CA57 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio is reversed. Costs to appellee Aaron Christie.

s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

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JUDGES