[Cite as *Whitley v. Progressive Preferred Ins. Co.*, 2010-Ohio-356.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JEFFREY S. WHITLEY,	:	APPEAL NO. C-090240 TRIAL NO. A-0705619
Plaintiff-Appellant,	:	*D E C I S I O N.*
vs.	:	
PROGRESSIVE PREFERRED INSURANCE COMPANY,	:	
Defendant,	:	
and	:	
HAMILTON COUNTY, OHIO,	:	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO,	:	
LARRY HENDERSON,	:	
and	:	
SHERIFF OF HAMILTON COUNTY, OHIO,	:	
Defendants-Appellees,	:	
and	:	
BOARD OF TOWNSHIP TRUSTEES OF SYMMES TOWNSHIP, OHIO, et. al.,	:	
Defendants.	:	

LORA N. WHITLEY	:	APPEAL NO. C-090284 TRIAL NO. A-0705621
Plaintiff-Appellant,	:	*D E C I S I O N.*

vs.	:
PROGRESSIVE PREFERRED INSURANCE COMPANY,	:
Defendant,	:
and	:
BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO,	:
LARRY HENDERSON,	:
and	:
SHERIFF OF HAMILTON COUNTY,	:
Defendants-Appellees,	:
and	:
JEFFREY S. WHITLEY, et. al.,	:
Defendants	:

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February 5, 2010

Manley Burke, Emily T. Supinger, and *Daniel J. McCarthy*, for Plaintiff-Appellant Jeffrey S. Whitley,

Thomas J. Ruwe, for Plaintiff-Appellant Lora N. Whitley,

Joseph T. Deters, Hamilton County Prosecuting Attorney, *Thomas E. Deye* and *Mark C. Vollman*, Assistant Prosecuting Attorneys, for Defendants-Appellees Hamilton County, Ohio, Board of Commissioners of Hamilton County, Ohio, Larry Henderson, and Sheriff of Hamilton County.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Plaintiffs-appellants, Jeffrey S. Whitley and Lora N. Whitley, appeal a decision of the Hamilton County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Hamilton County, Ohio, Board of Commissioners of Hamilton County, Ohio, Deputy Larry Henderson, and Simon L. Leis, Jr., Hamilton County Sheriff (collectively "Hamilton County'). We find no merit in their assignments of error, and we affirm the trial court's judgment.

I. Facts and Procedure

{¶2} The Whitleys were seriously injured when the motorcycle that they were riding collided with Henderson's police cruiser at the intersection of Mason-Montgomery and Fields-Ertel Roads. Immediately before the crash, Jeffrey had been operating the motorcycle, with his wife, Lora, seated behind him as a passenger. After stopping at a traffic light, they proceeded east on Fields-Ertel Road. As they approached the intersection with Mason-Montgomery Road, the light turned green.

{¶3} Henderson, a Hamilton County deputy sheriff, was heading north on Mason-Montgomery Road while responding to an emergency dispatch. He intended to turn left onto Fields-Ertel Road. As he approached the intersection, the turn lanes were full.

{¶4} Henderson then entered the intersection against the red light, but he could not see all the lanes of oncoming traffic. He estimated that he was travelling from 20 to 30 m.p.h. Witnesses testified that he did not have his siren on when he entered the intersection. While he was in the intersection, the Whitleys' motorcycle collided with his cruiser's left front fender, sending the Whitleys flying.

{¶5} Jeffrey and Lora filed suit separately against Hamilton County and numerous other defendants. The trial court later consolidated the two cases. Hamilton County filed a motion for summary judgment in which it claimed that it was immune from liability under the doctrine of sovereign immunity. The trial court agreed, holding that Henderson's acts had not risen to the level of willful or wanton misconduct, and it granted Hamilton County's motion for summary judgment.

{¶6} The Whitleys each present a single assignment of error for review. They contend that the trial court erred in granting summary judgment in favor of Hamilton County. They argue that they presented sufficient evidence to show that genuine issues of fact existed for trial as to whether Henderson's conduct rose to the level of willful and wanton misconduct. This assignment of error is not well taken.

II. Standard of Review for Summary Judgment

{¶7} We review a trial court's decision to grant summary judgment de novo.[1] Summary judgment is appropriate if (1) no genuine issue of material fact exists for trial, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his or her favor.[2]

{¶8} The trial court has an absolute duty to consider all pleadings and appropriate evidentiary materials when ruling on a motion for summary judgment.

[1] *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Wilkerson v. Hartings*, 1st Dist. No. C-081160, 2009-Ohio-4987, ¶6.
[2] *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, ¶23.

It should not grant summary judgment unless the entire record shows that summary judgment is appropriate.[3]

{¶9} Although a trial court may not weigh the evidence in the context of a motion for summary judgment, it must evaluate that evidence to determine whether it is sufficient to support the nonmovant's position that a jury could reasonably find in the nonmovant's favor. Assessing the sufficiency of the evidence involves a qualitative, as well as a quantitative, analysis. Therefore, in addition to considering the amount of evidence presented on an issue, the court must consider whether the evidence makes a party's claim plausible.[4]

III. Sovereign Immunity

{¶10} "[P]olitical subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any vehicle by their employees when the employees are engaged within the scope of their employment and authority."[5] But a complete defense to a political subdivision's liability exists if "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."[6]

{¶11} Similarly, employees of a political subdivision enjoy a presumption of immunity in connection with their performance of governmental or proprietary functions.[7] An employee is immune from liability unless "the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless

[3] *Greene*, supra, at ¶23; *Westfield Ins. Co. v. Towne Investment II, Inc.*, 11th Dist. No. 2006-L-026, 2006-Ohio-5830, ¶19-20.
[4] *Markey v. Barrett* (Mar. 8, 1996), 2nd Dist. No. 15243; *Paul v. Uniroyal Plastics Co.* (1988), 62 Ohio App.3d 277, 282, 575 N.E.2d 484.
[5] R.C. 2744.02(B)(1).
[6] R.C. 2744.02(B)(1)(a).
[7] R.C. 2744.03(A); *Alagha v. Cameron*, 1st Dist. No. C-081208, 2009-Ohio-4886, ¶19.

manner[.]"[8] Such conduct is the "functional equivalent" of the willful and wanton misconduct that would subject a political subdivision to liability.[9]

{¶12} Willful and wanton misconduct is something more than negligence.[10] Wanton misconduct is the failure to exercise any care whatsoever towards those to whom a duty is owed if the failure to exercise care occurs when a great probability of harm exists.[11] Willful misconduct involves "an intent, purpose or design not to perform the duty of care that is owed."[12]

{¶13} Generally, the determination whether an employee of a political subdivision acted willfully and wantonly is a question of fact for the jury. But where the record does not contain evidence of willful or wanton misconduct, a trial court may grant summary judgment in favor of the employee and the political subdivision.[13]

IV. Alleged Statutory Violations

{¶14} The Whitleys argue that Henderson's conduct violated R.C. 4511.03, which requires the driver of a "public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign" to "slow down as necessary for safety to traffic." But the driver "may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway."

{¶15} They also argue that Henderson violated R.C. 4511.041. It provides that a number of traffic laws do not apply to the driver of a public safety vehicle

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[8] R.C. 2744.03(A)(6)(b).
[9] *Herweh v. Bailey* (Oct. 23, 1996), 1st Dist. No. 960177; *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 516, 605 N.E.2d 445.
[10] *Behm v. Cincinnati* (Nov. 18, 1992), 1st Dist. No. C-910865; *Brockman*, supra, at 515.
[11] *Alagha*, supra, at ¶21; *Herweh*, supra.
[12] Id.
[13] *Alagha*, supra, at ¶22; *Brockman*, supra, at 517.

responding to an emergency call if the vehicle "is equipped with and displaying at least one flashing, rotating, or oscillating light visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle and if the driver of the vehicle is giving an audible signal by siren, exhaust whistle, or bell." It goes on to state that "[t]his section does not relieve the driver" of the public safety vehicle "from the duty to drive with due regard for the safety of all persons and property upon the highway."

{¶16} The facts in this case are very similar to those in *Herweh v. Bailey*. In that case, we held that the failure of a driver of a public safety vehicle responding to an emergency call to comply with the requirements of R.C. 4511.041 was not per se willful and wanton misconduct. "A driver of an emergency vehicle does not automatically lose immunity under R.C. Chapter 2744 by failing to activate the vehicle's lights or siren on an emergency run."[14] Instead, the officer's failure to use a signal or lights was one factor for the court to consider in determining whether the officer's conduct was wanton or willful.[15]

V. Application of the Law to the Facts of this Case

{¶17} In *Herweh*, we went on to state, "[W]ith the evidence construed most strongly in favor of Herweh, Bailey responded to an emergency call without activating his siren, proceeded through a red traffic light and struck Herweh's vehicle. Bailey, did, however, have his lights activated and in Herweh's estimation was only traveling at 'a speed greater than 25 m.p.h.' Bailey's failure to use his siren would be considered with all the other evidence in determining whether he acted in a wanton or willful manner. * * *

[14] *Herweh*, supra, citing *Neuman v. Columbus* (Aug. 31, 1995), 10th Dist. No. 95APE02-161, and *Lipscomb v. Lewis* (1993), 85 Ohio App.3d 97, 619 N.E.2d 102.
[15] Id., citing *Neuman*, supra.

{¶18} "Considering the totality of the circumstances, we find that a genuine issue of fact does not exist, and that Bailey did not act wantonly or willfully as a matter of law. Although Bailey crossed the double yellow lines when executing a left turn and allegedly had not activated his siren, reasonable minds could not find that Bailey was guilty of willful and wanton misconduct."[16]

{¶19} We reach the same result in this case. We agree with the trial court that even with the facts construed in the Whitleys' favor, Henderson's conduct, which may have been negligent, did not rise to the level of willful and wanton misconduct as a matter of law. The record does not demonstrate that he failed to exercise any care whatsoever to those to whom he owed a duty of care or that he had an intent, design, or purpose not to perform the duty of care owed.

{¶20} The parties do not dispute that Henderson was responding to an emergency call as defined in R.C. 2744.01(A), and that the call was directed specifically to him. He was not just answering a general call for assistance.[17] He did not activate his siren, and the record is unclear as to whether he activated his lights. Henderson and Linda Warren, an eyewitness, testified that his lights were on when he entered the intersection. Neither of the Whitleys remembered seeing any lights, and Virgil Terry, another eyewitness, testified both that Henderson's lights were not on until after the crash and that he could not remember. Nevertheless, we do not find Henderson's failure to activate his lights to be dispositive.

{¶21} The parties do not allege that Henderson was speeding. The evidence showed that he was going from 20 to 30 m.p.h., which was less than the Whitleys' estimation of the speed at which they were travelling. Even Warner, the witness

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[16] Id.
[17] See *Quappe v. Ohio Dept. of Public Safety* (Ct.Cl.1997), 83 Ohio Misc.2d 74, 77-78, 679 N.E.2d 755.

whose testimony was the most supportive of the Whitleys' position, stated that while she did not feel that Henderson entered the intersection "with caution," he did not "fly out, like come flying through there." She stated that when he was in the intersection, he seemed to realize a collision was going to occur and tried to avoid it. She described his conduct as "human error."

{¶22} "Human error" might mean negligence, but it does not constitute willful or wanton misconduct. Since the evidence did not show that Henderson's conduct was willful and wanton, both Hamilton County and Henderson individually were immune from liability. The trial court did not err in granting Hamilton County's motion for summary judgment. We overrule the Whitleys' assignments of error, and we affirm the trial court's judgment.

Judgment affirmed.

HENDON, P.J., and **SUNDERMANN, J.,** concur.

Please Note:

The court has recorded its own entry this date.