**[Cite as *Callender v. Schroder*, 2010-Ohio-4473.]**

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

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| REGINALD J. CALLENDER, SR., | : | APPEAL NO. C-090803<br>TRIAL NO. A-0804156 |
| Plaintiff-Appellee, | : | |
| | | *D E C I S I O N.* |
| vs. | : | |
| CHRISTOPHER SCHRODER | : | |
| and | : | |
| CITY OF CINCINNATI, | : | |
| Defendants-Appellants. | : | |

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: September 24, 2010

*Mark A. Humbert*, for Plaintiff-Appellee,

*John P. Curp*, City Solicitor, and *Thomas O. Beridon*, Assistant City Solicitor, for Defendants-Appellants.

**SYLVIA SIEVE HENDON, Judge.**

**{¶1}** Defendants-appellants, the city of Cincinnati and Cincinnati Police Officer Christopher Schroder, appeal the decision of the Hamilton County Court of Common Pleas denying summary judgment on their claims of immunity from liability in a personal-injury action filed by plaintiff-appellee, Reginald J. Callender, Sr. For the following reasons, we reverse the judgment of the trial court.

**{¶2}** On November 7, 2006, at approximately 4:40 a.m., the Cincinnati Police Department issued a radio dispatch to its officers to respond to a train yard on Gest Street because a mentally impaired, violent man was threatening to jump in front of a train. Officer Schroder was on duty at the time and was driving a police cruiser as he responded to the dispatch. As he pulled out of a driveway within the train yard, he collided with Callender's vehicle.

**{¶3}** In a single assignment of error, the city and Officer Schroder argue that the trial court erred by denying their motion for summary judgment. They contend that the uncontroverted evidence demonstrated that they were entitled to immunity under R.C. Chapter 2744.

**{¶4}** We review a denial of summary judgment de novo.[1] Summary judgment is appropriate when (1) there is no genuine issue of material fact, (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, with that party being entitled to have the evidence construed most strongly in his favor.[2] The party moving for summary judgment bears the initial burden of

[1] See *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243.
[2] See *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.[3] If the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the pleadings. That party's response, by affidavit or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial.[4]

**{¶5}** Generally, a political subdivision is not liable for damages caused by a police officer's operation of a motor vehicle, if the officer was responding to an emergency call at the time of the accident, and the operation of the vehicle did not constitute willful or wanton misconduct.[5] In addition, the officer is immune from liability unless (a) his acts or omissions were manifestly outside the scope of his employment, or (b) his acts were with malicious purpose, in bad faith, or in a wanton or reckless manner.[6] For purposes of the immunity afforded under R.C. Chapter 2744, "wanton or reckless" misconduct under R.C. 2744.03(A)(6) is the functional equivalent of "willful or wanton misconduct" under R.C. 2744.02(B)(1)(a).[7]

**{¶6}** Wanton or reckless misconduct is more than negligence. Wanton misconduct is the failure to exercise any care whatsoever. " '[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability

[3] *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.
[4] Civ.R. 56(E); *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798.
[5] R.C. 2744.02(B)(1)(a); see, also, *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶1.
[6] R.C. 2744.03(A)(6).
[7] *Herweh v. Bailey* (Oct. 23, 1996), 1st Dist. No. C-960177; *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 516, 605 N.E.2d 445.

result in injury."[8] Recklessness involves the actor "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."[9]

**{¶7}** An "emergency call" is defined as "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."[10]

**{¶8}** In this case, in support of their motion for summary judgment, the city and Officer Schroder submitted an affidavit by Officer Schroder in which he asserted that, at the time of the collision, he had been on duty, in his uniform, and in a marked police cruiser. He stated that he had been responding to an emergency call "to assist in detaining a possibly mentally impaired violent individual." He further asserted that he had been "traveling at a reasonable speed for a[n] emergency response," and that he had not been operating his police cruiser "in a reckless, wanton, or negligent manner." According to the officer, he had been driving out of a train yard, between a trestle and an overpass, and had attempted to check for westbound traffic when Callender's vehicle collided with his cruiser.

**{¶9}** Officer Schroder's affidavit demonstrated that, at the time of the accident, he had been responding to an emergency call, and that he had not been reckless, wanton, or negligent in the operation of his police cruiser. Because the city and Schroder satisfied their burden to show that there were no material facts at

[8] *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639 N.E.2d 31, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 269 N.E.2d 420.
[9] *Cater v. Cleveland*, 83 Ohio St.3d 24, 33, 1998-Ohio-421, 697 N.E.2d 610, quoting *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 96, 559 N.E.2d 699, fn. 2.
[10] R.C. 2744.01(A).

issue, the burden then switched to Callender to show that material facts were in dispute. But he did not do so.

**{¶10}** We hold that reasonable minds could have concluded only that Officer Schroder was responding to an emergency call and that his conduct did not rise to the level of willful, wanton, or reckless misconduct. Consequently, the trial court improperly denied summary judgment to Officer Schroder and the city on Callender's claim for damages. We sustain the assignment of error, reverse the trial court's judgment, and remand this cause for the entry of summary judgment for Officer Schroder and the city on immunity grounds.

Judgment reversed and cause remanded.

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

Please Note:

The court has recorded its own entry on the date of the release of this decision.