[Cite as *Sakelos v. Cincinnati*, 2015-Ohio-1508.]

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

JOHN SAKELOS,	:	APPEAL NO. C-140327 TRIAL NO. A-1201351
and	:	
JENNIFER PARKS,	:	*O P I N I O N.*
Plaintiffs-Appellees,	:	
vs.	:	
CITY OF CINCINNATI,	:	
and	:	
SCOTT A. BRIANS,	:	
Defendants-Appellants,	:	
and	:	
ALLSTATE INSURANCE COMPANY,	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: April 22, 2015

Schiff & Associates Co., L.P.A., and *Terry V. Hummel*, for Plaintiffs-Appellees,

Paula Boggs Muething, City Solicitor, and *Shuva J. Paul*, Assistant City Solicitor, for Defendants-Appellants.

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

MOCK, Judge.

{¶1} In one assignment of error, defendants-appellants the city of Cincinnati and Scott A. Brians claim that the trial court improperly concluded that there was a genuine issue of material fact in this automobile-accident case. On this record, the trial court should have found that Brians and the city were entitled to summary judgment in their favor. We reverse the decision of the trial court, and remand the cause to the trial court with instructions to enter judgment for Brians and the city.

Very Limited Record Fails to Demonstrate Issue of Fact

{¶2} The only facts in the record are contained in the affidavits submitted by the parties, which are not extensive. On February 21, 2010, Brians was employed by the city as a police officer. On that date, he was in his patrol car traveling north on Reading Road at Rockdale Avenue. At that point, northbound Reading Road has two lanes, and Brians was traveling in the left lane. Plaintiff-appellee John Sakelos was driving a car in the right lane behind Brians. Brians heard a call on the radio, requesting assistance with a high-risk traffic stop. Brians determined that the stop was on Rockdale Avenue to his right, and he began to turn in that direction. Brians averred that he checked his rear-view mirror and looked over his shoulder. While Brians claimed that he activated his turn signal before attempting to execute the turn, Sakelos and plaintiff-appellee Jennifer Parks, a passenger in the Sakelos vehicle, claimed that he did not. Sakelos struck Brians's vehicle when Brians attempted to make the right turn from the left lane on Reading Road.

{¶3} Both Sakelos and Parks claimed that they were injured as a result of the accident, and filed suit against Brians, the city, and defendant Allstate Insurance

Company. Brians and the city filed a motion for summary judgment, claiming that they were entitled to sovereign immunity. The trial court concluded that a genuine issue of material fact remained as to whether Brians had acted wantonly or recklessly, which would defeat their claims for immunity. Arguing that the trial court erred in this determination, the city and Brians now appeal.

{¶4} R.C. 2744.02(B)(1)(a) provides a political subdivision with a full defense to liability 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." On the other hand, R.C. 2744.03(A)(6)(b) provides immunity for employees of a political subdivision who act within the scope of their duties, unless "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." In this case, there is no dispute that Brians was acting within the scope of his employment and was operating his vehicle in response to an emergency call. So, the only remaining issue is whether he acted in a willful, wanton, or reckless manner.

{¶5} The Ohio Supreme Court recently clarified that "[t]he terms 'willful,' 'wanton,' and 'reckless' as used in these statutes are not interchangeable." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 20. The court set forth the following definitions:

> Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. * * * Wanton misconduct is the failure to exercise any

> care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. * * * Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct.

(Citations omitted.) *Id.* at ¶ 32-34.

{¶6} There is no evidence in the record that Brians was speeding, that road conditions were adverse, that it was dark or rainy, what the traffic conditions were, or even whether it was day or night. Based upon the evidence in the record, Brians's misconduct consisted of turning right from the left lane and failing to use his turn signal. Since willful misconduct encompasses an intention or purpose to do wrong, the record fails to demonstrate that Brians's conduct reached that level. *See id.* at ¶ 26, quoting *Tighe v. Diamond*, 149 Ohio St. 520, 80 N.E.2d 122 (1948) (willful misconduct implies an intention to do wrong, and not a mere error of judgment). So the question is whether Brians's actions constitute wanton misconduct such that the city loses its immunity, or wanton or reckless misconduct such that Brians loses his.

{¶7} First, the record does not support the conclusion that Brians acted wantonly. This court addressed the level of misconduct required to constitute wantonness, stating

> [w]anton 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 result in injury.

Callender v. Schroder, 1st Dist. Hamilton No. C-090803, 2010-Ohio-4473, ¶ 6, quoting *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994). Such conduct 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." *Id.*, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 33, 697 N.E.2d 610 (1998). The record in this case does not support such a finding.

{¶8} A similar conclusion can be reached regarding recklessness. Recklessness requires the conscious disregard of or indifference to a known or obvious risk. *Munday v. Village of Lincoln Hts.*, 1st Dist. Hamilton No. C-120431, 2013-Ohio-3095, ¶ 27, quoting *Anderson* at ¶ 32. While Brians made a right turn from the left lane, causing the accident, he averred that he checked behind him before he turned. Therefore, the record fails to show either a conscious disregard for or an indifference to a known or obvious risk.

{¶9} The problem with Sakelos's and Parks's position is that they failed to produce evidence to contradict or impeach Brians's assertion that he checked behind him before beginning to make his turn. None of the parties were deposed in conjunction with the resolution of this summary-judgment proceeding, and no other evidence was presented to indicate that Brians's statement was inaccurate. So, the only evidence in the record demonstrates that he exercised some care prior to the accident. Therefore, this record fails to demonstrate an issue of fact as to whether Brians acted wantonly.

{¶10} Sakelos and Parks have established that Brians violated the traffic law by executing a right turn from the left lane. While this may have constituted negligence, it did not rise to the level of willful, wanton, or reckless conduct. For these reasons, we sustain the sole assignment of error. We reverse the judgment of the trial court, and remand this cause to the trial court with instructions to enter judgment in favor of Brians and the city on the issue of immunity.

Judgment reversed and cause remanded.

FISCHER, P.J., and **DEWINE, J.**, concur.

Please note:

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