[Cite as *MacCabee v. Mollica*, 2010-Ohio-4310.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

DANIEL MACCABEE, et al.,	:	
	:	
Plaintiffs-Appellees,	:	Case No. 09CA32
	:	
vs.	:	**Released: September 2, 2010**
	:	
ANTHONY C. MOLLICA, et al.,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Richard W. Ross and Nicole M. Donovsky, Columbus, Ohio, for Appellants.[1]

Samuel N. Lillard, Columbus, Ohio, for Appellees.

McFarland, P.J.:

{¶1} Appellant, Anthony C. Mollica, appeals the trial court's decision that denied his summary judgment motion on the basis of statutory immunity under R.C. 2744.03(A)(6)(b). He asserts that the trial court wrongly determined that it was precluded from determining appellant's immunity as a matter of law. Because immunity under R.C. 2744.03(A)(6)(b) may involve disputed questions of fact as to whether the political subdivision employee acted with malicious purpose, in bad faith, or

[1] Only Anthony C. Mollica appealed the trial court's decision.

in a wanton or reckless manner, the trial court did not improperly conclude that genuine issues of material fact remain. Appellant further contends that the trial court erred by failing to conclude that he did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. He argues that as a matter of law, his conduct was not malicious, in bad faith, or wanton or reckless. Reasonable minds could disagree as to whether appellant's conduct in dragging a student by the shirt collar into a hallway, yelling in the student's face, and slamming the student into the wall resulting in a back injury constitutes maliciousness, bad faith, or wantonness or recklessness. Consequently, the trial court did not err by failing to conclude that the facts precluded a finding of maliciousness, bad faith, wantonness or recklessness. Accordingly, we overrule appellant's two assignments of error and affirm the trial court's judgment.

I

FACTS

{¶2} On January 25, 2008, Daniel and Melissa Maccabee and their minor child, Abram Maccabee (appellees), filed a complaint against appellant and the Nelsonville-York City School Board[2] based upon an incident that occurred on January 25, 2007. They alleged that on January

[2] The trial court granted the school board's summary judgment motion. That decision is not presently before us.

25, 2007, after Abram denied hitting a classmate, appellant yelled at Abram, "You're a little fibber. I won't tolerate fibbers in my class." They further alleged that appellant grabbed Abram by the arm and dragged him toward the door and continued yelling at him. Appellees claimed that as appellant dragged Abram, appellant pushed him so violently in the back that Abram fell into a wall. They asserted that appellant continued to yell at Abram in the hallway and stated, "I hope these boys catch you on the playground and beat you up. If they do, I'm not going to stop them." Appellees alleged that Abram suffered and continues to suffer severe emotional distress as a result of the incident.

{¶3} Appellant subsequently filed a summary judgment motion that asserted he is statutorily immune from liability under R.C. 2744.03(A)(6)(b). Appellant argued that the evidence failed to show that he acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. To support his assertion, appellant submitted an affidavit in which he alleged: (1) during the 2007-2008 school year, Abram had hit or threatened other students on a number of occasions; (2) before the date of the incident alleged in the complaint (January 25, 2007), he recalls at least five occasions when he had to address Abram's behavior; (3) on January 25, 2007, as class was ending, two students approached appellant and informed him that Abram

had punched another student; (4) Abram denied the allegation but a number of students stated that he had punched another student; (5) appellant told the child "that nobody could fib to me in my class"; (6) Abram then admitted that he hit the other student; (7) appellant explained to the child "that he cannot keep doing this. I indicated that I was not going to be on the playground because I did not have playground duty. If these students get him on the playground, I am not going to be able to stop them"; (8) appellant admitted that he raised his voice but stated that he "was trying to make sure that he was listening to me and that I was communicating above the general noise in the gymnasium as the * * * class was wrapping up."

{¶4} Appellant also filed Abram's deposition. Abram explained the January 25, 2007 incident as follows:

> "* * * [Appellant] grabbed me, was talking mean to me and threw me out into the hallway, and said that the—and said that there—because somebody went and told that I punched somebody in the stomach and I didn't, and he thought I was lying. He grabbed me and he said in a really mean voice, I won't tolerate fibbing. He threw me into the hallway. He told me, I hope those boys on the playground find you and beat you up and if I see it, I won't do anything about it."

Abram stated that appellant pushed him against the wall, which caused him to hurt his back. Abram denied hitting another student and stated that he had never hit another student at school.

{¶5} On August 14, 2009, the trial court overruled appellant's summary judgment motion. The court first observed that appellees did not file their response in accordance with the court's timelines, so the court did not consider their untimely-filed response. The court found that Abram's deposition testimony demonstrated the existence of a genuine issue of material fact as to whether appellant's conduct was malicious, in bad faith, or wanton or reckless. The court stated:

> "Abram's deposition testimony, construed most strongly in his favor, shows that Mollica, an adult male teacher, without any apparent need for an actual and immediate show of physical force or intervention, grabbed a third-grade boy's shirt at or near his neck, pulled him by the shirt into a hallway, pushed him into the wall with a hand to the stomach causing his back to hit the wall 'really hard,' and yelled at the boy that he hoped other students would beat him up on the playground and that, if they did, he, Mollica, would do nothing about [it]. Even one incident of conduct involving a teacher's (or public employee's) intentionally grabbing a small student in an 'unnecessarily forceful' way may be construed as malicious, in bad faith, or wanton or reckless within the meaning of R.C. 2744.03(A)(6). See *Woods v. Miamisburg City Schools* (S.D.Ohio, 2003), 254 F.Supp.2d 868."

II

ASSIGNMENTS OF ERROR

{¶6} Appellant appeals the trial court's judgment and raises two assignments of error:

First Assignment of Error:

> "The Trial Court Erred by concluding that the existence of a genuine issue of material fact precluded the Trial Court from granting Appellant Anthony C. Mollica's Motion for Summary Judgment."
>
> Second Assignment of Error:
>
> "The Trial Court erred by failing to determine that Anthony C. Mollica's conduct did not rise to the level of malice, bad faith and wanton or reckless conduct required to overcome statutory immunity pursuant to R.C. 2744.03(A)(6)(b)."

III

LEGAL ANALYSIS

{¶7} Because appellant's two assignments of error challenge the trial court's summary judgment decision and, thus, involve the same standard of review, we consider them together.

{¶8} In his first assignment of error, appellant argues that the trial court wrongly determined that genuine issues of material fact remained. He contends that whether he is entitled to statutory immunity is a question of law for the court to decide and that it was therefore inappropriate for the court to conclude that genuine issues of material fact remained.

{¶9} In his second assignment of error, appellant contends that the trial court erred by failing to conclude, as a matter of law, that he did not act maliciously, in bad faith, wantonly, or recklessly.

{¶10} Initially, we note that when reviewing a trial court's summary judgment decision, an appellate court conducts a de novo review. See, e.g., *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment was appropriate and need not defer to the trial court's decision. See *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786. In determining whether a trial court properly granted a summary judgment motion, an appellate court must review the standard for granting a summary judgment motion as set forth in Civ.R. 56, as well as the applicable law.

{¶11} Civ. R. 56(C) provides, in relevant part, as follows:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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 or stipulation construed most strongly in the party's favor.

{¶12} Thus, a trial court may not grant a summary judgment motion unless the moving party demonstrates that (1) no genuine issues of material fact exist, (2) it is entitled to judgment as a matter of law, and (3) reasonable minds can come to only one conclusion and that conclusion is adverse to the opposing party. See, e.g., *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

{¶13} In determining whether summary judgment is appropriate, the "trial court must conscientiously examine all the evidence before it." *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 359, 604 N.E.2d 138. "Civ.R. 56(C) imposes an absolute duty upon a trial court to read and consider all pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact when ruling on a motion for summary judgment." Id., citing *Smith v. Hudson* (C.A.6, 1979), 600 F.2d 60, 63-64.

{¶14} Because summary judgment is a procedural device that terminates litigation, courts should award it cautiously and must resolve all doubts in favor of the non-moving party. Id. at 359. Furthermore, a trial court may not grant a summary judgment motion on the sole basis that the nonmoving party failed to respond to the motion. See *Morris v. Ohio Cas.*

Ins. Co. (1988), 35 Ohio St.3d 45, 47, 517 N.E.2d 904. Instead, the court has a mandatory duty to examine all of the evidence and determine whether any genuine issues of material fact remain for trial. *Murphy*, 65 Ohio St.3d at 360.

{¶15} In the case at bar, appellant asserts that the trial court should have entered summary judgment in his favor because the evidence before the court shows that pursuant to R.C. 2744.03(A)(6)(b), he is entitled to statutory immunity as a matter of law.

{¶16} R.C. 2744.03(A)(6) governs a political subdivision employee's immunity.[3] See *Dolan* at ¶25; see, also, *Wooton v. Vogele* (2001), 147 Ohio App.3d 216, 769 N.E.2d 889, at ¶15; *Cook v. Cincinnati* at fn. 6, citing *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. Under R.C. 2744.03(A)(6), a political subdivision employee is immune from liability for acts or omissions in connection with a governmental or proprietary function unless one of three exceptions applies: (1) his acts or omissions are manifestly outside the scope of his employment; (2) his acts or omissions are malicious, in bad faith, or wanton or reckless; or (3) liability is expressly imposed upon the employee by another section of

[3] The three-tier analysis applicable to political subdivisions does not apply to determine a political subdivision employee's immunity. See *Dolan v. Glouster*, 173 Ohio App.3d. 617, 2007-Ohio-6275, at ¶25

the Revised Code.[4] See *Svette v. Caplinger*, Ross App. No. 06CA2910, 2007-Ohio-664, at ¶26. Thus, an employee of a political subdivision is presumed immune unless one of these exceptions to immunity is established. See *Cook* at 90.

{¶17} As a general matter, whether an employee is entitled to R.C. 2744.03(A)(6) immunity ordinarily is a question of law. See, e.g., *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292, 595 N.E.2d 862; *Mathews v. Waverly*, Pike App. No. 08CA787, 2010-Ohio-347, at ¶14. However, "whether an individual acted manifestly outside the scope of employment" and whether the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner generally are questions of fact. See *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, at ¶14; *Fabrey* at 356; see, also, *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 517, 605 N.E.2d 445 (stating that "because the line between willful and wanton misconduct and ordinary negligence can be a fine one, the issue of whether conduct was willful or wanton should be submitted to the jury for consideration in light of the surrounding circumstances when reasonable

[4] R.C. 2744.03(A)(6) states:

In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

minds might differ as to the import of the evidence"). Thus, a trial court may not grant summary judgment on the basis of R.C. 2744.03(A)(6)(a) or (b) immunity unless reasonable minds can conclude only that (1) the employee did not act outside the scope of his employment, or (2) the employee did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. If reasonable minds could disagree on these issues, then a court may not grant the employee summary judgment based upon statutory immunity. Thus, for example, "[w]hen an issue turns upon the credibility of a witness because his testimony must be believed to resolve the issue and the surrounding circumstances place the credibility of the witness in question, the matter should be resolved by the trier of fact." *Lowry v. Ohio State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835. However, if the record is "devoid of evidence tending to show that the political subdivision employee acted wantonly or recklessly," then summary judgment is appropriate. *Irving v. Austin* (2000), 138 Ohio App.3d 552, 556, 741 N.E.2d 931.

{¶18} As the above case law makes clear, whether a political subdivision employee is entitled to immunity under R.C. 2744.03(A)(6)(b) ordinarily is a question of fact. Summary judgment is appropriate only when

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(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

the facts are clear and fail to rise to the level of conduct that could be construed as malicious, in bad faith, or wanton and reckless. In the case at bar, appellant's version of events differs from Abram's recollection. Thus, the facts are not clear and undisputed. Furthermore, as we explain below, reasonable minds could disagree as to whether those facts demonstrate that appellant acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Therefore, we find appellant's first assignment of error—that the trial court was required to determine his immunity as a matter of law—to be unavailing.

{¶19} Moreover, to the extent appellant argues that the trial court was required to grant him summary judgment due to appellees' failure to timely respond, we observe that the case law does not support his position. Instead, Civ.R. 56 prohibits a trial court from granting a summary judgment motion unless, upon its review of all timely submitted evidence, the court finds that no genuine issues of material fact remain. *Murphy*, supra. The nonmoving party's failure to respond, standing alone, is not a sufficient ground to grant a summary judgment motion. *Morris*, supra.

{¶20} Appellant further asserts that the trial court should have determined that the facts in the case at bar fail to demonstrate, as a matter of

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(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code * * * *

law, that appellant acted with malicious purpose, in bad faith, or in wanton or reckless manner.

{¶21} The term "malice" means the willful and intentional desire to harm another, usually seriously, through conduct which is unlawful or unjustified. *Hicks v. Leffler* (1997), 119 Ohio App.3d 424, 428-429, 695 N.E.2d 777. "Bad faith" implies sinister motive that has "no reasonable justification." Id. at 429. "Bad faith" embraces more than bad judgment or negligence. *Parker v. Dayton Metro. Hous. Auth.* (May 31, 1996), Montgomery App. No. 15556, 1996 WL 339935 . It imports a "dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." Id., citing Ohio Jurisprudence 3d, Words and Phrases, 1995 Supplement, see, also, *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 454, 602 N.E.2d 363.

{¶22} Wanton misconduct has been defined as the failure to exercise any care whatsoever. See *Fabrey*, at 356, citing *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 4 O.O.3d 243, 363 N.E.2d 367, syllabus. The Ohio Supreme Court has held that "'mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the

part of the tortfeasor.'" See id., quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 55 O.O.2d 165, 269 N.E.2d 420. Such perversity requires that the actor be conscious that his conduct will, in all likelihood, result in an injury. See id. Moreover, the standard of proof to show wanton misconduct is high. Id.

{¶23} "Reckless" refers to conduct that causes an unreasonable risk of harm and is "'substantially greater than that which is necessary to make [an actor's] conduct negligent.'" *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705, quoting 2 Restatement of the Law 2d, Torts (1965) 587, Section 500. Likewise, an individual acts recklessly when he or she, bound by a duty, does an act or intentionally fails to do an act, knowing, or having reason to know of, facts that would lead a reasonable person to realize not only that there is an unreasonable risk of harm to another, but also that such risk is substantially greater than that which is necessary for negligence. See id.; see, also, *Fabrey*, at 356.

{¶24} In *Burkhart v. Dayton Bd. of Edn.*, Montgomery App. No. 23739, 2010-Ohio-2496, the court determined that reasonable minds could disagree as to whether a bus driver's conduct toward a twelve-year old student constituted reckless or wanton conduct. In that case, the student testified that the bus driver "was angry," "'grabbed' her arm, pushed her

down the aisle, and 'ran into' her at the top of the stairs, forcing her off the bus and causing an injury." Id. at ¶33. The court concluded: "It is for a jury to decide whether [the bus driver's] conduct created an unreasonable risk of harm to [the student], and whether the risk was substantially greater than that which is necessary to constitute negligent conduct, such that Vineyard is not entitled to governmental immunity pursuant to R.C. 2744.03(A)(6)." Id.

{¶25} We find the facts in *Burkhart* substantially similar to those in the case at bar. In the case at bar, Abram, a third-grade student, stated that his teacher grabbed him by the shirt collar, dragged him into the hallway, yelled at him, and pushed him into the wall, which caused injury to his back. In both *Burkhart* and the instant case, the plaintiffs' versions of the facts show that a person in a position of authority over a minor child verbally assaulted the child and used some degree of force with the child that resulted in a physical injury. We agree with the *Burkhart* court that it is for a jury to decide whether this conduct constitutes reckless or wanton behavior. In the present case, if Abram's testimony is believed, the evidence shows that appellant dragged the child by his shirt into the hallway, yelled in his face, and slammed his back into the wall. We cannot agree with appellant that as a matter of law, this conduct fails to demonstrate, at the least, a perverse

disregard of a known risk, i.e., that slamming a child into a wall would likely result in injury or that yelling at the child would likely cause some emotional harm. Rather, we agree with the trial court that a jury should determine whether appellant perversely disregarded a known risk. See *Woods v. Miamisburg City Schools*, supra. (concluding that officer's conduct could be construed as malicious, in bad faith, or wanton or reckless when office grabbed petite student and slammed her against a wall).

{¶26} Accordingly, based upon the foregoing reasons, we overrule appellant's two assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., dissenting:

{¶27} I dissent because I find *Conley v. Shearer*, 64 Ohio St.3d 284, 1992-Ohio-133, at 292, controlling. There, the Supreme Court of Ohio stated:

* * *

> The question of whether Shearer is entitled to immunity as a governmental employee is a question of law for which there is no right to trial. A jury trial is necessary only when the case requires resolution of *factual* issues which are triable to a jury in comparable civil actions. See *Erie Ins. Group v. Fisher* (1984), 15 Ohio St.3d 380, 381-382, 15 OBR 497, 498-499, 474 N.E.2d 320, 322. See, also, R.C. 2311.04 and Civ.R. 56(C). "Whether immunity may be invoked is a purely legal

> issue, properly determined by the court prior to trial, *Donta v. Hooper* (C.A.6, 1985), 774 F.2d 716, 719, certiorari denied (1987), 483 U.S. 1019 [107 S.Ct. 3261, 97 L.Ed.2d 760], and preferably on a motion for summary judgment." *Roe v. Hamilton Cty. Dept. of Human Serv.* (1988), 53 Ohio App.3d 120, 126, 560 N.E.2d 238, 243.

{¶28} Thus, whether immunity may be invoked by a defendant is purely a legal issue. The necessity of a factual analysis to determine whether Mollica acted outside the scope of his employment (or with maliciousness, bad faith or wantonly) does not transform the question of law into a matter that cannot be addressed in summary judgment. Id. However, "[S]imply because resolution of a question of law involves a consideration of the evidence does not mean that the question of law is converted into a question of fact or that a factual issue is raised." *Ruta v. Breckenbridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68, 430 N.E.2d 935 (considering the standard of review for the denial of a motion for a directed verdict). The Supreme Court has noted that "a review of the evidence is more often that not vital to the resolution of a question of law. But the fact that a question of law involves a consideration of the facts or the evidence does not turn it into a question of fact." *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 219, 280 N.E.2d 896 (in the context of a motion for a directed verdict).

{¶29} Regardless of any suggestion in *Theobald v. University of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, at ¶14, to the contrary, until the Supreme Court expressly overrules *Conley*, I would apply it. I reach this conclusion in party in light of Theobald's direct citation to *Conley* without repudiating any part of it. See *Theobald* at ¶15.

{¶30} Moreover, In *Theobold v. Univ. of Cincinnati*, the Supreme Court cites *Hopper v. Univ. of Cincinnati* (Aug. 3, 2000), Franklin App. No. 99AP-787, 2000 WL 1059672, when stating that "whether an individual acted manifestly ****544*** outside the scope of employment is a question of fact." The court in *Hopper* cites two cases, without explanation, to support this statement. The first case, *Lowry v. Ohio State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835, makes the following comment:

> While the issue of immunity is a question of law, *Conley*, the trial court is required to consider specific facts of the case in order to resolve the issue. When an issue turns upon the credibility of a witness because his testimony must be believed to resolve the issue and the surrounding circumstances place the credibility of the witness in question, the matter should be resolved by the trier of fact.

There is no explanation of how the trier of fact's responsibilities on factual issues interacts with the trial court's obligation to answer the legal question of whether statutory immunity is available, or of how a factual dispute

removes a purely legal question (immunity) from the trial court's discretion. There is also no citation to additional authority.

{¶31} The second case in *Hopper* is *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9, 550 N.E.2d 544. There, the court states that "a determination of whether an employee is acting within the scope of his employment is a question of fact for the jury." Id. at 13. To support this statement, the court cites to *Goldberg v. Jordan* (1935), 130 Ohio St. 1, 3 O.O. 64, 196 N.E. 775. *Goldberg*, however, does not involve statutory immunity. Instead, *Goldberg* involves the liability of a business owner for the actions of an employee.

{¶32} Thus, I dissent.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellees recover of Appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, J.: Concurs in Judgment and Opinion.
Harsha, J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.