[Cite as *Smith v. Redecker*, 2010-Ohio-505.]

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

GLENN ALLEN[1] SMITH, :

Plaintiff-Appellant, : Case No. 08CA33

vs. :

DAVID REDECKER, et al., : DECISION AND JUDGMENT ENTRY

Defendants-Appellees. :

APPEARANCES:

COUNSEL FOR APPELLANT: David J. Winkelmann, 105 ½ South Market Street, McArthur, Ohio 45651

COUNSEL FOR APPELLEES: Steven G. LaForge and Nathan D. Painter, 250 East Broad Street, 9th Floor, Columbus, Ohio 43215-3742

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 2-4-10

PER CURIAM.

{¶ 1} This is an appeal from Athens County Common Pleas Court judgments in favor of Athens County Sheriff David Redecker and Deputies Bryan Cooper, Jimmy Childs and Matthew May, defendants below and appellees herein. The trial court entered summary judgment in favor of Redecker, May, and Childs. After the jury returned a verdict finding that Cooper was immune from liability under R.C.

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[1] At various places in the record, appellant's middle name is spelled "Allan." We use the spelling that appears on the trial court's final judgment entry.

2744.03(A)(6), the trial court entered judgment in Cooper's favor. Glenn Allen Smith, plaintiff below and appellant herein, raises the following assignments of error for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT DISMISSING ALL DEFENDANTS EXCEPT DEPUTY COOPER."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE RELEVANT TO ESTABLISHING THAT THE APPELLANT WAS INJURED BY THE DEFENDANT'S ACTIONS AND THE DAMAGES THE APPELLANT SUFFERED AS A CONSEQUENCE OF THE DEFENDANT'S CONDUCT."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT BY DEFINITION THE DEFENDANT'S CONDUCT DID NOT CONSTITUTE 'EXCESSIVE FORCE,' A FEDERAL CONSTITUTIONAL STANDARD INAPPLICABLE TO OHIO TORT LAW."
>
> FOURTH ASSIGNMENT OF ERROR:
>
> "THE ACTIONS OF DEPUTIES COOPER, CHILDS AND MAY WERE MALICIOUS, IN BAD FAITH AND UNDERTAKEN IN A WANTON AND WILLFUL MANNER."
>
> FIFTH ASSIGNMENT OF ERROR:
>
> "THE JURY'S CONCLUSION THAT DEPUTY COOPER DID NOT FALSELY ARREST AND IMPRISON GLENN ALLEN SMITH, AND DID NOT FALSELY IMPRISON HIM, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
>
> SIXTH ASSIGNMENT OF ERROR:
>
> "THE JURY'S DECISION FINDING THAT FIND [SIC] DEPUTY COOPER DID NOT ASSAULT GLENN ALLEN SMITH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

SEVENTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE ISSUE OF INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS."

EIGHTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN ITS DETERMINATION NOT TO GIVE AN INSTRUCTION ON PUNITIVE DAMAGES."

{¶ 2} Appellees raise the following cross-assignments of error:

FIRST CROSS-ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CLAIMS AGAINST DEPUTIES COOPER, CHILDS, MAY AND SHERIFF REDECKER ON THE BASIS OF RES JUDICATA."

SECOND CROSS-ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING THE MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO DEPUTY COOPER."

{¶ 3} This case arises out of a January 24, 1998 traffic stop. On that date at approximately 6:30 p.m., Athens County Sheriff's Deputies Childs and May observed appellant's vehicle traveling on State Route 33. Because they were unable to read appellant's license plate they decided to stop the vehicle. The officers initially intended to give appellant a warning for the license plate violation, but after they discovered that appellant failed to wear his seat belt they decided to issue a citation for the seat belt violation. During the time the officers completed the citation, appellant exited his vehicle and questioned the officers about the length of time they were taking to

complete the citation. Childs and May instructed appellant to return to his vehicle. When appellant did so, the officers thought appellant pushed an item underneath his seat. Due to appellant's suspicious behavior, the officers reported to dispatch that they had an uncooperative male suspect. The record is not clear as to whether the officers requested back-up, or whether they simply reported an uncooperative male.

{¶ 4} Cooper, coincidentally a K-9 officer, heard the dispatch and responded. Upon hearing the description of appellant’s conduct, Cooper decided to walk a drug detection dog around appellant’s vehicle. Before he did so, the officers requested appellant to exit his vehicle. According to the officers, appellant then became confrontational and claimed that he had been "set up." Appellant also ranted about the use of drug detection dogs during traffic stops and related his belief that the officers intended to plant evidence in his vehicle. Cooper explained that appellant’s persistent disruptive behavior agitated the drug detection dog and interfered with the officer’s ability to walk the dog around appellant’s vehicle. Cooper eventually arrested appellant for persistent disorderly conduct. A subsequent inventory search of appellant's vehicle revealed a knife and prescribed medications.

{¶ 5} Appellant maintained that Cooper slammed him into the hood of the vehicle as Cooper pulled appellant’s arms behind his back to arrest him and aggravated his pre-existing injuries. Upon appellant’s arrival at the sheriff's office, he demanded the officers transport him to the hospital. Hospital doctors discovered that appellant had elevated blood pressure, an elevated pulse and red marks around his wrists, but nevertheless released him to the officers.

{¶ 6} Subsequently, Cooper filed a criminal complaint that charged appellant

with disorderly conduct, resisting arrest, carrying a concealed weapon, and the failure to wear a seat belt. Appellant entered a no contest plea to the failure to wear a seat belt offense and the court dismissed the remaining charges.

{¶ 7} In January 1999, appellant filed a complaint in the United States District Court for the Southern District of Ohio against Athens County, the Athens County Sheriff's Department, Athens County Sheriff David Redecker, and four Athens County Sheriff's deputies (Bryan Cooper, Pat Kelly, Jimmy Childs, and Matthew May) that alleged violations of 42 U.S.C. Sections 1983, 1985, and 1988. Appellant asserted that the defendants lacked probable cause to arrest him and that they used excessive force during his arrest. His complaint additionally asserted the following state law claims: (1) intentional infliction of emotional distress; (2) malicious prosecution; (3) assault; (4) false arrest; and (5) false imprisonment.

{¶ 8} The district court ultimately granted summary judgment to the defendants regarding the alleged violations of 42 U.S.C. Sections 1983, 1985, and 1988. With respect to Childs and May, the court found that the traffic stop was justified and that the officers did not unlawfully prolong the stop's duration. The court observed that six minutes elapsed between the time of the initial stop and Cooper's arrival and that appellant's suspicious behavior of apparently pushing an item under the seat justified the officers in calling for backup. The court thus concluded that Childs and May were entitled to qualified immunity.

{¶ 9} The court further determined that Cooper was entitled to qualified immunity. The court noted that at the time Cooper ran the drug detection dog around appellant's vehicle, Childs and May had not completed the seat belt violation citation.

Thus, Cooper's dog sniff did not unlawfully prolong the traffic stop. The court further found that even if Childs and May had completed the citation, the officers obtained additional reasonable suspicion to detain appellant and walk the dog around his vehicle due to appellant's suspicious behavior when he appeared to be pushing an item underneath his seat.

{¶ 10} The court also concluded that Cooper possessed probable cause to arrest appellant for persistent disorderly conduct and that the evidence failed to show that the officers arrested appellant with excessive force. The court stated that appellant's evidence failed to show that he sustained any physical injury as a result of the arrest. The court declined to exercise supplemental jurisdiction over appellant's state law claims and dismissed them without prejudice.

{¶ 11} Appellant filed a pro se appeal to the United States Court of Appeals for the Sixth Circuit and asserted that the district court wrongly granted summary judgment to the defendants. Smith v. Athens County (C.A.6, Oct. 29, 2003), No. 03-3685, 79 Fed.Appx. 841. The Sixth Circuit, however, agreed with the district court's determination that no genuine issues of material fact remained regarding appellant's civil rights claims. The court also agreed with the district court that appellant failed to present a genuine issue of material fact regarding whether Cooper used excessive force to effectuate the arrest. The court concluded that Cooper's conduct in pushing appellant on the hood and applying handcuffs did not constitute the use of unreasonable force. The court stated that appellant's evidence that he had redness around his wrist and elevated pulse and blood pressure did not sufficiently demonstrate excessive force. The appellate court further agreed with the district court that "Childs

and May were entitled to qualified immunity because objectively reasonable officers under these circumstances would not have recognized that their conduct was violating any clearly established constitutional right." Id. at 843. The court additionally stated that "Cooper was entitled to qualified immunity for arresting [appellant] for disorderly conduct when his behavior interfered with the attempt to have the dog sniff his car for drugs." Id.

{¶ 12} On March 19, 2004, appellant filed a complaint in the Athens County Common Pleas court against Redecker, Cooper, Childs and May. His complaint contained the following causes of action: (1) assault and battery; (2) malicious prosecution; (3) false arrest and imprisonment; and (4) intentional infliction of emotional distress. Appellant also requested punitive damages. Eventually, appellant dismissed this complaint without prejudice.

{¶ 13} On September 27, 2007, appellant re-filed his complaint. On June 2, 2008, appellees filed a motion for summary judgment. On October 17, 2008, the trial court granted the motion as it related to Childs, May, and Redecker, but denied it as it related to Cooper. The court determined that under R.C. 311.05, Redecker could not be liable. With respect to Childs and May, the court noted that the federal district court determined that Cooper did not use excessive force. The court determined that this finding precluded appellant from arguing that he was subjected to excessive force. The court then stated that in light of this finding, appellant had no valid argument that Childs and May stood idly by while Cooper allegedly mistreated appellant. The court additionally determined that Childs and May are immune under R.C. 2744.03(A)(6).

{¶ 14} On October 28-29, 2008, the trial court held a jury trial. Appellant

testified that Childs approached his vehicle and requested his license and registration while May remained by the police cruiser. Childs advised appellant that he planned to issue appellant a warning for the license plate violation and Childs returned to the cruiser. In appellant's eyes, the two officers were standing around, "just sort of hanging out." Appellant sat in his vehicle for what he estimated to be five minutes and then exited his car to ask the officers if he was free to leave. The officers advised him that he was not free to leave because they intended to issue a citation for the failure to wear a seatbelt. The officers then requested appellant to return to his vehicle. Appellant stated, however, that it did not appear to him that the officers were writing the citation, but he believed they were sitting in the car or "hanging out." Appellant testified that Childs returned to appellant's vehicle and requested that he exit the car so the officers could show appellant the faded license plate, which was the reason the officers stopped appellant. Appellant, believed that the officers were unnecessarily detaining him and he again asked if he could leave. They informed him that he could not. Cooper then arrived and Childs explained to appellant that Cooper was going to walk the dog around appellant's vehicle. According to appellant, when Cooper arrived "the whole demeanor changed." Appellant also denied that he interrupted the dog from performing the walk-around and indicated that Cooper became angry with appellant for no valid reason. Appellant stated that Cooper told him that he acted like a drug dealer.

{¶ 15} Appellant testified that when Cooper arrested him, Cooper did not advise appellant of what arrestable offense he had committed. He claimed that Cooper spun him around, pulled his arms behind his back, and pulled his left shoulder back, at which

point appellant felt pain. Appellant stated that Cooper put the handcuffs on "super tight"–that it felt "like a vise grip was smashing [his] wrist." Appellant stated that he was "screaming in pain." Appellant testified that Cooper then "slam[med him] down on the hood of the car like uh, hitting primarily [his] chest because [he's] arched back and [Cooper] like, he slammed [him] several times down on the car like that." He stated that he requested the officers to loosen the handcuffs, but they refused. Appellant stated that he was angry and told the officers that he felt that they were treating him poorly, but "they threw [him] in the back of the car." He testified that once he was in the backseat of the police cruiser, one of the officers turned the heater on "full blast," "for a little extra torment."

{¶ 16} Appellant stated that when he arrived at the police station, he "was in such bad condition [he collapsed] on the floor." He stated that Childs and May drove him to the hospital and he claimed that he "was severely traumatized." Appellant stated that in the days that followed his arrest, he suffered from high blood pressure and spent two days in the hospital. He believed that Cooper exhibited an utter disregard for his pre-existing health problems during the arrest.

{¶ 17} Cooper testified that on January 24, 1998, he responded to the traffic stop after hearing a dispatch that the officers had an uncooperative male. He decided to use the dog because his training taught him that when individuals exit their vehicles during a traffic stop, it is often because they are trying to avoid letting officers near their vehicles to smell or see narcotics. Cooper stated that as he and the dog approached appellant's vehicle, appellant started his car as if to flee the scene. The officers then commanded appellant to turn off his vehicle. Appellant initially refused and "revved"

his engine, but eventually complied with their demands to turn off the vehicle. Cooper stated that appellant was extremely agitated and expressed a concern that the officers would plant something in his car. When Cooper started to walk the dog around the vehicle, appellant became disruptive, cursing at the officers and accusing them of planting evidence. Cooper stated that appellant's behavior caused the dog to enter "apprehension mode" and delayed the dog from performing the drug sniff. Cooper warned appellant to stop disrupting the dog. After appellant interrupted a second time, Cooper advised appellant that he was under arrest for disorderly conduct. In explaining how he effected the arrest, Cooper testified:

> "* * * I told [appellant] to turn around and place his hands on the car which he did. When I advised him he was under arrest for disorderly conduct again, as I pulled his hand, one of his hands back, he kind of turned and pulled his hand in to where I couldn't get it. Still upset. Wanting to know why he was under arrest. I advised him that he was warned uh, at that point and time I believe it was Matt May, but I can't remember the other officer came and assisted me cause he saw the struggle that I was having and eventually we talked him into getting his arms behind him. At that point and time he did tell that he had a shoulder injury uh, which we routinely do. We have two sets of cuffs on us all the time. At that time I made a decision to go ahead and double cuff him. He is a larger man and double cuff them to keep his arms more to the side instead of behind him."

{¶ 18} Cooper stated that he was "110%" certain that he used the double cuffs so as not to injure appellant. After appellant's arrest, officers conducted an inventory search of his vehicle and discovered a double-bladed knife under the console.

{¶ 19} Childs testified that he and May stopped appellant's vehicle because they could not read his license plate. He stated that May approached the vehicle and requested appellant's license and registration. He explained that during the traffic stop, the officers had to wait on "radio traffic." Childs testified that appellant became

irritated and that after appellant exited his vehicle for a second time, which was no more than one to two minutes from the first time appellant exited his vehicle, Childs called for back-up. Cooper testified that a 6:32 p.m. dispatch log states: "Citation seat belt. Suspect a little uncooperative." The log further shows that Cooper arrived on the scene at 6:33 p.m.

{¶ 20} Childs stated that he did not specifically request a canine unit, but Cooper happened to be nearby. Childs testified that when Cooper arrived, Childs explained to appellant that the dog would sniff the outside of the vehicle. He then asked appellant to exit the vehicle. Instead of exiting the vehicle, however, appellant started the vehicle. Appellant eventually turned off the vehicle and exited the car. Childs testified that appellant was "very upset" and Cooper told appellant to calm down and advised him that he would arrest him for disorderly conduct if he continued to disrupt the dog sniff.

{¶ 21} At the conclusion of the trial, the jury returned a verdict in Cooper's favor and expressly found that he was entitled to immunity from appellant's claims. This appeal followed.

I

{¶ 22} In his first assignment of error, appellant argues that the trial court erred by granting summary judgment in favor of Childs, May, and Redecker.

{¶ 23} In response, appellees first assert that appellant failed to comply with App.R. 3(D) in that he failed to designate the trial court's summary judgment as the judgment being appealed. Thus, appellees reason, we should decline to consider

appellant's first assignment of error. Appellees alternatively argue that no genuine issues of material fact remain regarding appellant's claims against Childs, May, and Redecker. With respect to Childs and May, appellees contend that no genuine issue of material fact remains as to whether either one arrested appellant. Appellees assert that because they did not arrest appellant, they cannot be liable for false arrest or imprisonment, assault or battery, malicious prosecution, or intentional infliction of emotional distress. They further assert that even if Childs and May were involved in the arrest, the officers possessed probable cause to arrest appellant for a misdemeanor, i.e., persistent disorderly conduct or obstructing official business. Appellees then argue that because the officers had probable cause to arrest appellant, the arrest was privileged and no assault or battery occurred. Appellees further contend that no genuine issues of material fact remain regarding Redecker's liability for appellant's claims. Appellees additionally assert that the trial court properly entered summary judgment in Childs', May's, and Redecker's favor because no genuine issue of material fact exists as to whether they are entitled to immunity under R.C. 2744.03(A)(6). Appellees contend that no genuine issues of material fact remain as to whether the officers acted, or failed to act, maliciously, in bad faith, or in a wanton or reckless manner.

A

APP.R. 3(D)

{¶ 24} Before we consider the merits of appellant's first assignment of error, we first address appellees' assertion that appellant failed to comply with App.R. 3(D).

{¶ 25} App.R. 3(D) provides that "a notice of appeal * * * shall designate the

judgment, order or part thereof appealed from * * *." The failure to comply with this provision is not jurisdictional. See Transamerica Ins. Co. v. Nolan (1995), 72 Ohio St.3d 320, 322, 649 N.E.2d 1229. Rather, "the only jurisdictional requirement for the filing of a valid appeal is the timely filing of a notice of appeal." Id. As App.R. 3(A) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal." The Transamerica court explicitly recognized that a court of appeals has "discretion to determine whether sanctions, including dismissal, are warranted," and further stated that the Ohio Supreme Court will not overturn an appellate court's decision on this matter absent an abuse of discretion. Id. "Additionally, we note that statutes relating to appeals are remedial and should be liberally construed, and that when possible we should decide cases on their merits rather than procedural technicalities." Roop v. Ross Cty. Floodplain Regulations Variance Bd., Ross App. No. 03CA2707, 2003-Ohio-5522, at ¶19.

{¶ 26} We have previously held that a party may appeal a trial court's interlocutory summary judgment decision upon the entry of a final order even though the party does not specify the interlocutory summary judgment decision as the judgment being appealed under App.R. 3(D). See Mtge. Electronic Registrations Sys. v. Mullins, 161 Ohio App.3d 12, 2005-Ohio-2303, 829 N.E.2d 326, at ¶21. In accordance with this holding, and in accordance with the proposition that cases should be decided on their merits rather than procedural technicalities, we disagree with appellees that we cannot or should not consider appellant's assignment of error relating

to the trial court's summary judgment decision. Instead, we will consider the assignment of error.

B

SUMMARY JUDGMENT STANDARD

{¶ 27} Appellate courts conduct a de novo review of trial court summary judgment decisions. See, e.g., Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. In other words, appellate courts independently review the record to determine if summary judgment is appropriate and need not defer to the trial court decisions. 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. Thus, to determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

{¶ 28} Civ. R. 56(C) provides in relevant part:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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.

Thus, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates 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) reasonable minds can come to but one conclusion, and after 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. See, e.g., Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

{¶ 29} In the case sub judice, appellant generally asserts that issues of material fact remain regarding his claims against Redecker, May, and Childs. Although he claims that disputed facts exist, he does not specifically point out how those alleged disputed facts create genuine issues of material fact regarding each of his claims for relief. Nonetheless, we believe that we may dispose of this assignment of error because even if some disputed facts remain regarding the elements of his claims, no genuine issues of material fact remain as to whether the officers are entitled to immunity under R.C. Chapter 2744. The officers' immunity under R.C. Chapter 2744 is a complete bar to appellants' claims against them.

C

R.C. CHAPTER 2744

{¶ 30} R.C. 2744.03(A)(6) governs a political subdivision employee's immunity.[2] 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 (1995), 103 Ohio App.3d 80, 658 N.E.2d 814, fn. 6, citing Fabrey v. McDonald Police Dept. (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d

[2] The three-tier analysis applicable to political subdivisions does not apply to determine a political subdivision employee's immunity. See Dolan v. Glouster, Athens App. No. 06CA16, 2007-Ohio-6275, at ¶25

31. Under R.C. 2744.03(A)(6),[3] 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 the Revised Code. 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 v. Cincinnati (1995), 103 Ohio App.3d 80, 90, 658 N.E.2d 814.

{¶ 31} Appellant did not argue that the officers' acts were manifestly outside the scope of their employment or official responsibilities at the time of appellant's traffic stop and arrest. Additionally, appellant did not allege that liability is expressly imposed by a statute. Our review thus focuses on R.C. 2744.03(A)(6)(b), i.e., whether the officers' acts "were with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 32} The term "malice" means the willful and intentional desire to harm another, usually seriously, through conduct which is unlawful or unjustified. Hicks v.

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[3] 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;
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

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. Id., citing Parker v. Dayton Metro. Hous. Auth. (May 31, 1996), Montgomery App. No. 15556. 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.; Jackson v. Butler Cty. Bd. of Cty. Commrs. (1991), 76 Ohio App.3d 448, 454, 602 N.E.2d 363.

{¶ 33} Wanton misconduct has been defined as the failure to exercise any care whatsoever. See Fabrey, 70 Ohio St.3d 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.

{¶ 34} "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 Thompson v. McNeill (1990), 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705; see, also, Fabrey, 70 Ohio St.3d at 356.

{¶ 35} Summary judgment in favor of a political subdivision employee is proper when the employee's actions "showed that he did not intend to cause harm, * * * did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose." Hackathorn v. Preisse (1995) 104 Ohio App.3d 768, 772, 663 N.E.2d 384. Furthermore, when the record does not contain evidence that the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner, a trial court correctly grants summary judgment. Fabrey, 70 Ohio St.3d at 357.

{¶ 36} In Alley v. Bettencourt (1999), 134 Ohio App.3d 303, 315, 730 N.E.2d 1067, we found a jury question remained as to whether the officers acted maliciously, in bad faith, or in a wanton or reckless manner. In that case, the plaintiff presented evidence that: (1) the officers beat him about the head, without provocation, to waken and arrest him; and (2) the officers tripped him when they took him from the cruiser to the hospital, breaking three of his ribs. We determined that these facts created an issue of fact as to whether the officers used more force than necessary to effectuate the arrest, which in turn created a genuine issue of material fact as to whether the officers acted maliciously or recklessly.

{¶ 37} In the case sub judice, appellant failed to present evidence to show that Childs, Mays, or Redecker acted wantonly, maliciously, recklessly, or in bad faith. Unlike Alley, none of these officers were physically involved in appellant's arrest.

Moreover, appellant did not present any evidence that Childs, May, or Redecker beat him unnecessarily or used more force than necessary to effectuate the arrest. In fact, the federal court also determined that none of the officers used excessive force when arresting appellant. Childs and Mays were on the scene, but did not participate in the arrest. Nothing shows that their conduct was in utter disregard of appellant's rights. If appellant's version of events is believed, Cooper slammed appellant into the hood of the vehicle. However, neither Childs, Mays nor Redecker, participated in this conduct. Moreover, Childs' and May's mere presence on the scene does not demonstrate that their failure to intervene constituted wanton, malicious, reckless or bad faith conduct.

{¶ 38} Furthermore, appellant failed to present any evidence to show that Redecker participated in any conduct that could be construed as malicious, reckless, willful or wanton. Redecker was not present at the scene of the arrest and had absolutely no direct involvement in the arrest. Appellant did not establish that Redecker, directly or indirectly, acted maliciously, recklessly, willfully or wantonly.

{¶ 39} Even if Redecker is not immune under R.C. Chapter 2744, the evidence does not create a genuine issue of material fact regarding his liability. R.C. 311.05 controls situations when a party desires to hold a sheriff liable for the acts of his or her deputies: "The sheriff shall only be responsible for the neglect of duty or misconduct in office of any of his deputies if he orders, has prior knowledge of, participates in, acts in reckless disregard of, or ratifies the neglect of duty or misconduct in office of the deputy." Thus, evidence of tortious wrongdoing on the part of the deputies must be established before liability can be imputed to the sheriff.

{¶ 40} In the case at bar, even if the evidence showed that Cooper's conduct

was tortious, there is no evidence to show that Sheriff Redecker ordered, had prior knowledge of, participated in, acted in reckless disregard, or ratified Cooper's allegedly wrongful conduct.

{¶ 41} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 42} In his second assignment of error, appellant asserts that the trial court abused its discretion by excluding testimony that he claims was relevant to establish the injuries he allegedly suffered as a result of his arrest. Specifically, he argues that the trial court abused its discretion by precluding the testimony of Drs. Brown, Platt, and O'Leary.

{¶ 43} Appellees contend that the doctrine of collateral estoppel precluded appellant from introducing testimony regarding injuries resulting from the arrest. Appellees observe that the federal courts determined that appellant had not suffered any injuries as a result of the arrest and assert that those findings were entitled to preclusive effect in the state court proceeding.

{¶ 44} Although the admissibility of evidence is generally a matter reserved to a trial court's sound discretion, see Valentine v. Conrad, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, at ¶9, whether the doctrine of collateral estoppel applies to a particular issue, and thus precludes evidence regarding that issue, is a question of law. See State v. Bundy, Montgomery App. Nos. 23063 and 23064, 2009-Ohio-5395, at ¶79, citing State v. Hill, 177 Ohio App.3d 171, 2008-Ohio-3509, 894

N.E.2d 108, at ¶37; see, also, J.R. Mason, Inc. v. South Bloomfield (Apr. 4, 1995), Pickaway App. No. 94CA13. Appellate courts review questions of law independently and without deference to the trial court. See, generally, Salyer v. Eplion, Lawrence App. No. 08CA18, 2009-Ohio-1623, at ¶20.

{¶ 45} The doctrine of collateral estoppel, or issue preclusion, "'precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action.'" State ex rel. Davis v. Pub. Emps. Retirement Bd. 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, at ¶27, quoting Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd. (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140; see, also, State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd., 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, at ¶28. "'[I]ssue preclusion, [or] collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.'" Davis at ¶27, quoting Ft. Frye, 81 Ohio St.3d at 395. Thus, the doctrine of collateral estoppel precludes the relitigation of an issue or fact "'when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.'" Davis at ¶28, quoting Thompson v. Wing (1994), 70 Ohio St.3d 176, 183, 637 N.E.2d 917; see, also, Goodson v. McDonough Power Equip., Inc. (1983), 2 Ohio St.3d 193, 201, 2 OBR 732,

443 N.E.2d 978 (stating that "an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action").

{¶ 46} In the case sub judice, the doctrine of collateral estoppel precluded appellant from relitigating the issue of the alleged injuries he suffered as a result of the January 1998 traffic stop. At trial, appellant sought to introduce evidence regarding his alleged injuries. He litigated this identical issue during the federal court proceedings. Thus, this issue "was actually and directly litigated in the prior action." Second, both the federal district court and the Sixth Circuit Court of Appeals determined that appellant failed to show that he suffered any injury as a result of the incident. This issue, therefore, "was passed upon and determined by a court of competent jurisdiction." Third, appellant previously litigated this issue in the federal court proceedings. Thus, "the party against whom collateral estoppel is asserted," i.e., appellant, "was a party in * * * the prior action." Consequently, the doctrine of collateral estoppel precluded appellant from relitigating this same issue during the state trial court proceedings and the trial court did not, therefore, improperly prohibit appellant from introducing the doctors' testimony regarding his alleged injuries suffered as a result of the traffic stop.

{¶ 47} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III

{¶ 48} Appellant's third, seventh, and eighth assignments of error challenge the trial court's jury instructions or the failure to give a jury instruction. We consider these related issues together.

{¶ 49} In his third assignment of error, appellant contends that the trial court erred by instructing the jury that Cooper's conduct did not constitute "excessive force." Specifically, he asserts that the following instruction was improper:

> "Plaintiff also claim[s] that Defendant engaged in conduct causing injuries and damages to him which constituted battery. Battery is intentional unconsented, contact with another.
>
> Even if you find that Defendant unlawfully arrested Plaintiff for a minor misdemeanor and thus perpetrated an unprivileged contact with the Plaintiff's person, you are instructed that the amount of force used by the Defendant in accomplishing the unlawful arrest was reasonable and not excessive."

{¶ 50} Appellees assert that because appellant failed to object at trial to the above instruction, he cannot raise it as error on appeal. Appellees additionally argue that the trial court's instruction complied with Ohio law. In his seventh assignment of error, appellant contends that the trial court erred by failing to instruct the jury regarding his intentional infliction of emotional distress claim. In his eighth assignment of error, appellant asserts that the trial court erred by failing to give the jury a punitive damages instruction.

A

STANDARD OF REVIEW[4]

{¶ 51} Generally, a trial court has broad discretion in deciding how to fashion jury

[4] We note that the Ohio appellate courts do not agree on the standard of review that applies to a trial court's jury instruction. Some courts apply an abuse of discretion standard. See State v. Sanders, Summit App. No. 24654, 2009-Ohio-5537; Geesaman v. St. Rita's Med. Ctr., Allen App. No. 1-08-65, 2009-Ohio-3931; State v. Reese, Montgomery App. No. 22907, 2009-Ohio-5046; State v. Mitchell, Stark App. No. 2008CA290, 2009-Ohio-5006; State v. Watson, Ross App. No. 08CA3072, 2009-Ohio-4852. Others seem to apply a mixed standard. See State v. Brown, Athens App. No. 09CA3, 2009-Ohio-5390; State v. Hendrickson, Athens App. No. 08CA12, 2009-Ohio-4416; State v. Sudderth, Lawrence App. No. 07CA38, 2008-Ohio-5115. Moreover, our own court does not appear to agree on the proper standard. See Watson; Hendrickson; State v. Abrams, Scioto App. No. 05CA3026; State v. Miniard, Gallia App. No. 04CA1, 2004-Ohio-5325.

instructions. A trial court must not, however, fail to "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." State v. Comen (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus. Additionally, a trial court may not omit a requested instruction, if such instruction is "'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.'" State v. Lessin (1993), 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (quoting State v. Nelson (1973), 36 Ohio St.2d 79, 303 N.E.2d 865, paragraph one of the syllabus).

{¶ 52} In determining whether to give a requested jury instruction, a trial court may inquire into the sufficiency of the evidence to support the requested instruction. See id. at 494. A trial court is therefore vested with discretion to determine whether sufficient evidence was presented at trial requires a particular jury instruction. State v. Mitts (1998), 81 Ohio St.3d 223, 228, 690 N.E.2d 522. If, however, the evidence does not warrant an instruction a trial court is not obligated to give the requested instruction. See Lessin, 67 Ohio St.3d at 494. Thus, in our review we must determine whether the trial court abused its discretion by finding that the evidence was insufficient to support the requested charge. See Mitts; State v. Wolons (1989), 44 Ohio St.3d 64, 541 N.E.2d 443, paragraph two of the syllabus; see, also, State v. Elijah (July 14, 2000), Montgomery App. No. 18034. Generally, an abuse of discretion may be found if a trial court's attitude is unreasonable, arbitrary or unconscionable. See, e.g., State v. Montgomery (1991), 61 Ohio St.3d 410, 413, 575 N.E.2d 167.

B

EXCESSIVE FORCE INSTRUCTION

{¶ 53} Initially, we agree with appellees that because appellant failed to object at trial to the court's excessive force jury instruction, he cannot raise that issue on appeal. It is well-established that a party may not assign as error on appeal "the giving or the

failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Civ.R. 51(A); see, also, Galmish v. Cicchini (2000), 90 Ohio St.3d 22, 32, 734 N.E.2d 782. Moreover, it is well-settled that failure to object at the trial court level to a complained of error results in a waiver of that error on appeal. See, e.g., Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099; Gallagher v. Cleveland Browns Football Co. (1996), 74 Ohio St.3d 427, 436-37, 659 N.E.2d 1232.

{¶ 54} Consequently, an appellate court may recognize an error that an appellant waived only if it constitutes plain error. See In re Etter (1998), 134 Ohio App.3d 484, 492, 731 N.E.2d 694. Courts should generally exercise extreme caution when invoking the plain error doctrine, especially in civil cases. Thus, courts should limit applying the doctrine to cases "involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process * * *." Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 122-123, 679 N.E.2d 1099; see, also, In re Alyssa C. 153 Ohio App.3d 10, 17, 2003-Ohio-2673, 790 N.E.2d 803; In re Curry, Washington App. No. 03CA51, 2004-Ohio-750. We believe that the case sub judice is not one of those exceptional cases in which the alleged error seriously affects the fairness of the proceedings.

{¶ 55} We again note that in the case at bar, the doctrine of collateral estoppel precluded appellant from re-litigating, and the jury from considering, the excessive force issue. In its October 27, 2008 ruling on appellees' motion in limine, the court noted that it was bound by the federal courts' conclusion that Cooper did not use excessive force and that it would so instruct the jury. The court further noted, however, that appellant could still show an assault and battery. "However, just because there was no excessive force, it does not follow that there was no assault and battery. Any unprivileged touching constitutes a battery. An unlawful arrest, even if not

accompanied by excessive force, still constitutes a battery." The trial court's jury instruction thus was not contrary to the law applicable to appellant's case. Groob v. KeyBank, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, at ¶32 (stating that "[a] trial court must give jury instructions that correctly and completely state the law"). Consequently, no error, let alone plain error, occurred.

C
LACK OF INTENTIONAL INFLICTION
OF EMOTIONAL DISTRESS INSTRUCTION

{¶ 56} We believe that appellant waived or invited any error in the trial court's failure to give the jury an instruction regarding intentional infliction of emotional distress. "Under the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." State ex rel. The V. Cos. v. Marshall (1998), 81 Ohio St.3d 467, 471, 692 N.E.2d 198. In the case at bar, appellant's counsel conceded that the trial court should not submit the issue to the jury: "And I think on the issue of infliction of serious emotional distress we don't have enough information you know, it would just be confusing to the jury." Thus, appellant invited any error in the court's failure to instruct the jury regarding his intentional infliction of emotional distress claim.

{¶ 57} Furthermore, appellant did not renew any objection to the absence of an intentional infliction of emotional distress instruction before the jury retired. Thus, under Civ.R. 51(A), appellant failed to preserve for appellate review any error resulting from the lack of the jury instruction. See Galmish, 90 Ohio St.3d at 32 ("At no time prior to jury deliberations did Cicchini object to the content of the trial court's charge on punitive damages, let alone specify the grounds of the objection that he now raises on appeal. Under these circumstances, this portion of Cicchini's fourth assignment of

error may not be considered on appeal.").

{¶ 58} Additionally, from our review of the trial court record, it appears that the trial court granted appellees' motion for a directed verdict regarding appellant's intentional infliction of emotional distress claim. After the parties discussed the evidence regarding the intentional infliction of emotional distress claim, the court stated: "So we'll grant the infliction, your motion on infliction." Neither of the parties, however, has asserted that the court directed a verdict on this claim. In any event, we find that appellant invited or waived any error associated with the trial court's failure to instruct the jury regarding intentional infliction of emotional distress.

{¶ 59} Furthermore, even if appellant had properly preserved the trial court's failure to give the jury an intentional infliction of emotional distress instruction, we would find no error. The evidence appellant presented at trial is insufficient to demonstrate the elements necessary for an intentional infliction of emotional distress instruction.

{¶ 60} To warrant an intentional infliction of emotional distress jury instruction, the plaintiff must present evidence on each of the following elements: (1) that the defendant either intended to cause emotional distress or knew or should have known that the actions taken would result in serious emotional distress; (2) that the defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it would be considered utterly intolerable in a civilized community; (3) that the defendant's actions were the proximate cause of plaintiff's psychic injury; and (4) that the mental distress suffered by plaintiff is serious and of such a nature that no reasonable person could be expected to endure it. See Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. (1983), 6 Ohio St.3d 369, 453 N.E.2d 666, syllabus ("One who by extreme and

outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."); Phung v. Waste Mgt., Inc. (1994), 71 Ohio St.3d 408, 410, 644 N.E.2d 286; Pyle v. Pyle (1983), 11 Ohio App.3d 31, 34, 463 N.E.2d 98. "[I]n order to state a claim alleging the intentional infliction of emotional distress, the emotional distress alleged must be serious." Yeager, 6 Ohio St.3d at 374. "[S]erious emotional distress" is "emotional injury which is both severe and debilitating." Paugh v. Hanks (1983), 6 Ohio St.3d 72, 78, 451 N.E.2d 759. "[S]erious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." Id.

{¶ 61} In the case at bar, the record contains no evidence that appellant suffered "serious emotional distress." Furthermore, the evidence is not sufficient to support any finding that Cooper's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it would be considered utterly intolerable in a civilized community. Cooper lawfully arrested appellant for persistent disorderly conduct. Insufficient evidence exists to show that the arrest or the circumstances surrounding it exceeded all possible bounds of decency. Consequently, the trial court did not err by refusing to give the jury an intentional infliction of emotional distress instruction.

C

LACK OF PUNITIVE DAMAGES INSTRUCTION

{¶ 62} R.C. 2315.21(C)[5] governs punitive damages in a tort action:

> Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:
>
> (1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.
>
> (2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

The Ohio Supreme Court likewise has consistently limited punitive damages in tort actions to cases involving "actual malice." See, e.g., Moskovitz v. Mt. Sinai Med. Ctr. (1994), 69 Ohio St.3d 638, 652, 635 N.E.2d 331. "Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." Preston v. Murty (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus; see, also, Moskovitz, 69 Ohio St.3d at 652.

{¶ 63} The Preston court explained the rationale for imposing an actual malice standard:

> "The policy for awarding punitive damages in Ohio '* * * has been recognized * * * as that of punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct.' Detling v. Chockley, supra, at 136, 24 O.O.3d at 240, 436 N.E.2d at 209, and citations therein. Since punitive damages are assessed for punishment and not compensation, a positive element of conscious wrongdoing is always required. This element has been termed conscious, deliberate or intentional. It requires the party to possess

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[5] Appellant's citation to R.C. 4112.99, which applies in an employment discrimination case, is puzzling.

> knowledge of the harm that might be caused by his behavior.
> A second principle inherent in the award of punitive damages is that something more than mere negligence is always required. Leichtamer v. American Motors Corp. (1981), 67 Ohio St.2d 456, 472, 21 O.O.3d 285, 295, 424 N.E.2d 568, 580; Detling v. Chockley, supra, 70 Ohio St.2d at 138, 24 O.O.3d at 242, 436 N.E.2d at 211. This concept is reflected in the use of such terms as 'outrageous,' 'flagrant,' and 'criminal.' The concept requires a finding that the probability of harm occurring is great and that the harm will be substantial. A possibility or even probability is not enough as that requirement would place the act in the realm of negligence. A requirement of substantial harm would also better reflect the element of outrage required to find actual malice."

Id. at 335-336.

{¶ 64} In the case at bar, the trial court did not err by failing to give the jury a punitive damages instruction. The evidence presented at trial falls far short of demonstrating that Cooper acted with actual malice during the traffic stop and subsequent arrest. None of the circumstances surrounding Cooper's conduct shows that he possessed any hatred, ill will or spirit of revenge, or that he consciously disregarded appellant's rights or safety resulting in a great probability of causing substantial harm.

{¶ 65} Furthermore, even if we were to determine that the trial court should have given the jury a punitive damages instruction, the jury's finding of immunity precluded appellant's claims against Cooper and thus, precluded any punitive damage award. Therefore, we cannot state that the court's failure to give the punitive damages instruction prejudiced appellant.

{¶ 66} Accordingly, based upon the foregoing reasons, we overrule appellant's third, seventh, and eighth assignments of error.

IV

{¶ 67} Appellant's fourth, fifth, and sixth assignments of error assert that the verdict is against the manifest weight of the evidence. Because the same standard of review governs these three assignments of error, we consider them together.

{¶ 68} In his fourth assignment of error, appellant appears to argue that: (1) the jury's verdict that Cooper is entitled to immunity under R.C. 2744.03(A)(6) is against the manifest weight of the evidence; and (2) the trial court erred by determining that no genuine issues of material fact remain as to whether Redecker, May, and Childs are entitled to immunity under R.C. 2744.06(A)(6).[6]

{¶ 69} In his fifth assignment of error, appellant contends that the jury's decision that Deputy Cooper did not falsely arrest and imprison or maliciously prosecute him is against the manifest weight of the evidence. In his sixth assignment of error, appellant asserts that the jury's finding that Deputy Cooper did not assault appellant is against the manifest weight of the evidence.

A

STANDARD OF REVIEW

[6] Appellant did not properly frame his fourth assignment of error as an "assignment of error." An "assignment of error" should designate a specific ruling that the appellant challenges on appeal. See Painter and Dennis, Ohio Appellate Practice (2007 Ed.), Section 1.45 (stating that "the assignments of error* * * set forth the rulings of the trial court * * * contended to be erroneous"). In this case, appellant's fourth assignment of error is stated as a general proposition and does not specifically challenge any aspect of the trial court's judgment. Nonetheless, we have interposed our own interpretation of what the assignment of error should be and will therefore consider it.

{¶ 70} Generally, we will not reverse a judgment as against the manifest weight of the evidence as long as some competent and credible evidence supports it. See, e.g., Shemo v. Mayfield Hts. (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018; C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. This standard of review is highly deferential and even "some" evidence is sufficient to support a court's judgment and to prevent a reversal. See Barkley v. Barkley (1997), 119 Ohio App.3d 155, 159, 694 N.E.2d 989; Willman v. Cole, Adams App. No. 01 CA725, 2002-Ohio-3596, at ¶24.

{¶ 71} Moreover, "an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusion of law." Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Issues relating to the credibility of witnesses and the weight to be given the evidence are primarily for the trier of fact. As the court explained in Seasons Coal Co.:

> "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."

Id. Thus, the fact-finder may believe all, part, or none of the testimony of any witness who appears before it. Rogers v. Hill (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; Stewart v. B.F. Goodrich Co. (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591.

B

IMMUNITY

{¶ 72} In our discussion of appellant's first assignment of error, we addressed

appellant's immunity argument as it relates to Redecker, Childs, and May. We need not repeat it here. Within appellant's fourth assignment of error, we therefore consider only whether the jury's verdict that Cooper is entitled to immunity under R.C. 2744.06(A)(6) is against the manifest weight of the evidence.

{¶ 73} In the case sub judice, appellant offered his version of the incident. He claimed that Cooper slammed him into the hood of the car, placed the handcuffs on too tight, and generally treated him with utter disregard and a complete lack of good faith. Appellant further testified that he believed that Cooper and the other officers unlawfully detained him for the improper purpose of performing a search for drugs. He basically argues that Cooper and the other officers acted with a vendetta.

{¶ 74} Cooper, on the other hand, testified that he used only the force reasonably necessary to effectuate the arrest. The traffic stop was valid (a point appellant does not dispute) and the officers did not unlawfully prolong the nature of the stop (an issue previously determined during the federal court proceeding). Moreover, Cooper stated that he believed he had probable cause to arrest appellant for persistent disorderly conduct or obstructing official business. He explained that appellant's conduct during the traffic stop interrupted the drug detection dog from performing the drug sniff. The jury obviously disbelieved appellant's testimony that his arrest was unlawful and instead chose to believe Cooper's testimony. We find nothing in the record that leads us to conclude the jury committed an obvious miscarriage of justice.

C

REMAINING CLAIMS

{¶ 75} In the case at bar, the jury determined that Cooper is entitled to immunity

under R.C. 274403(A)(6). Thus, per the trial court's jury instructions, its analysis of the facts and issues ended there. With a finding that the officer was entitled to immunity, the jury had no need to weigh the facts in order to determine whether appellant had proven his claims by a preponderance of the evidence. Because the jury never reached a finding on these issues, we have no manner of determining how it would have decided these issues and we have no verdict to weigh as against the manifest weight of the evidence. Arguably, it is possible that the jury determined that appellant proved his claims by a preponderance of the evidence, but then determined that Cooper is entitled to immunity. We note, however, that the trial court explicitly instructed the jury to consider first whether Cooper was entitled to immunity and, if it so found, its analysis ended there. In any event, even if the jury wrongly determined that appellant failed to prove his claims, its finding that Cooper is entitled to immunity is not against the manifest weight of the evidence. This immunity finding is a complete bar to appellant's causes of action.

{¶ 76} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth, fifth, and sixth assignments of error.

V

CROSS-APPEAL

{¶ 77} In their first cross-assignment of error, appellees argue that the trial court erred by failing to dismiss the claims against all of them on the basis of res judicata. In their second cross-assignment of error, appellees contend that the trial court erred by denying summary judgment with respect to Cooper.

{¶ 78} Because our resolution of appellant's assignments of error has rendered

appellees' cross-assignments of error moot, we decline to address them. See App.R. 12(A)(1)(c); see, also, Pang v. Minch (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313, paragraph eight of the syllabus ("Where the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in the brief thereof, App.R. 12(B) requires the appellate court to refrain from consideration of errors assigned and argued in the brief of appellee on cross-appeal which, given the disposition of the case by the appellate court, are not prejudicial to the appellee. The judgment or final order of the trial court should, under such circumstances, be affirmed as a matter of law by the court of appeals.").

{¶ 79} Accordingly, based upon the foregoing reasons, we overrule appellees' cross-assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellant the 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.

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

McFarland, P.J., Abele, J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY:___________________________
Matthew W. McFarland
Presiding Judge

BY:___________________________
Peter B. Abele, Judge

BY:___________________________
Roger L. Kline, 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.