[Cite as *Spears v. Akron Police Dept.*, 2010-Ohio-632.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

GERALD SPEARS, et al.	C. A. No. 24847
Appellees	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
AKRON POLICE DEPARTMENT, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. CV 2008-03-2421

DECISION AND JOURNAL ENTRY

Dated: February 24, 2010

MOORE, Judge.

{¶1} Appellants, City of Akron ("City") and Kevin Kabellar ("Officer Kabellar"), appeal the ruling of Summit County Court of Common Pleas which denied in part their summary judgment motion based upon sovereign immunity. For reasons set forth below, we affirm in part and reverse in part.

I.

{¶2} Appellee, Gerald Spears, and his wife, Appellee, Dottie Spears, were involved in a multi-vehicle automobile accident on Friday March 24, 2007. Mr. Spears was the driver. He had a couple of drinks at his Aunt's house prior the accident. Paramedics and police were dispatched to the scene. The paramedic who responded to the Spears' vehicle noted that Mr. Spears was uncooperative and "observed that [Mr. Spears] had been drinking[.]" Officer Kabellar "observed a strong odor of alcohol about [Mr. Spears'] person [and] also observed Mr. Spears staggering and his eyes were bloodshot."

{¶3} Officer Kabellar administered field sobriety tests to Mr. Spears. Mr. Spears did not complete all of the tests and the officer placed him under arrest. The parties hold different views of what took place during the process of arresting and transporting Mr. Spears to the police station. Mr. Spears alleged that Officer Kabellar's actions resulted in an injury to his left wrist. The police took Mrs. Spears home and Mrs. Spears had her daughter take her to the hospital. At the police station, Mr. Spears participated in the mobility tests, but refused to take a Breathalyzer test. Mr. Spears was then taken to the detoxification center and was later picked up there by his son and taken to the hospital to meet his wife. Mr. Spears contacted his physician concerning the injury to his left wrist that Monday. The physician referred Mr. Spears to a hand specialist who initiated conservative treatment; however, ultimately Mr. Spears was required to undergo surgery.

{¶4} Mr. and Mrs. Spears filed a five-count complaint against the Akron Police Department, the City, Officer Kabellar and a John Doe Officer for (1) assault – excessive force; (2) battery – excessive force; (3) intentional infliction of emotional distress; (4) reckless infliction of emotional distress; and (5) loss of consortium. The City, Akron Police Department, and Officer Kabellar moved for summary judgment on all claims based primarily upon sovereign immunity. The trial court granted the motion as to the Akron Police Department, finding that as an entity it was not capable of being sued. The trial court also granted summary judgment as to the Spears' claim for intentional infliction of emotional distress.[1] The trial court denied the motion with respect to the claims against the City and Officer Kabellar for assault and battery and with respect to Mrs. Spears' claim for loss of consortium. The City and Officer Kabellar have timely appealed, raising three assignments of error for our review.

II.

ASSIGNMENT OR ERROR I

> "THE TRIAL COURT ERRED IN NOT GRANTING IMMUNITY TO THE CITY OF AKRON PURSUANT TO R.C. []2744.02(A) FOR THE INTENTIONAL TORT CLAIMS OF ASSAULT AND BATTERY[.]"

{¶5} The City argues that the trial court erred by denying the City's motion for summary judgment on the claims of assault and battery, as the City is immune pursuant to R.C. 2744.02(A). We agree.

{¶6} Initially we note that "when a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and thus is a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at ¶27.

{¶7} This Court reviews an order ruling on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(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) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

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[1] The trial court did not specifically rule on the claim for reckless infliction of emotional distress.

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶10} In order to determine whether a political subdivision is immune from liability, we engage in a three-tiered analysis. *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 28. The first tier sets forth the premise that:

> "[e]xcept as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(A)(1).

Pursuant to the second tier, we determine whether one of the five exceptions to immunity outlined in R.C. 2744.02(B) applies to hold the political subdivision liable for damages. *Cater*, 83 Ohio St.3d at 28. Lastly, immunity may be restored, and the political subdivision will not be liable, if one of the defenses enumerated in R.C. 2744.03(A) applies. Id.

{¶11} Here the City argued in its motion for summary judgment that the City was immune pursuant to R.C. 2744.02(A), as the provision of police services was a governmental function, and that none of the exceptions found in R.C. 2744.02(B) was applicable. Mr. and Mrs. Spears made no argument in response with respect to the immunity of the City. The trial

court denied the City immunity, concluding that while "[Mr. Spears] has not identified any of the above exceptions [to immunity] as being applicable in this case[,] [] [Mr. Spears] claims that Officer Kabellar, an employee of the City of Akron is liable. If [] Officer Kabellar is liable, then the City may be as well." We disagree.

> "Chapter 2744 of the Ohio Revised Code grants immunity to political subdivisions for injuries caused by any act or omission unless an exception applies. R.C. 2744.02(A)(1). The City of Akron is a political subdivision under Chapter 2744. R.C. 2744.01(F). The exceptions to political subdivision immunity include, in general terms: (1) the negligent operation of a motor vehicle; (2) the negligent performance of proprietary functions; (3) the negligent failure to maintain public roads; (4) negligence on the grounds of a public building; and (5) liability that is expressly imposed by statute. R.C. 2744.02(B)(1)-(5)." *Watson v. Akron*, 9th Dist. No. 24077, 2008-Ohio-4995, at ¶12.

"The provision or nonprovision of police *** services or protection" is a governmental function, R.C. 2744.01(C)(2)(a), and therefore pursuant to R.C. 2744.02(A)(1), the City is entitled to immunity for the provision of such services, absent an exception. See, also, *Weibel v. Akron* (May 8, 1991), 9th Dist. No. 14878, at *1. As pointed out by the City, "[i]n Ohio, a political subdivision may not be held liable for intentional torts unless 'liability is expressly imposed upon the political subdivision by a section of the Revised Code.'" *Watson* at ¶14, quoting R.C. 2774.02(B)(5). Mr. Spears did not argue in the trial court, and does not argue here, that any of the above-listed exceptions applies to his case. In fact, Mr. Spears provided no argument refuting the City's contention that it was entitled to immunity. Therefore, the trial court erred in denying the City's motion for summary judgment pertaining to Mr. Spears' claims for assault and battery.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN NOT GRANTING IMMUNITY TO OFFICER KEVIN KABELLAR PURSUANT TO R.C. []2744.03(A)(6) FOR THE INTENTIONAL TORT CLAIMS OF ASSAULT AND BATTERY."

{¶12} The City and Officer Kabellar argue that Officer Kabellar was entitled to the benefits of immunity, and that the trial court erred in denying their motion for summary judgment. Specifically, the City and Officer Kabellar argue that Mr. Spears has not provided evidence that Officer Kabellar acted "with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b). Mr. and Mrs. Spears contend the opposite is true. Issues regarding malice, bad faith, recklessness and wanton conduct are generally questions left to the jury to resolve. *Shadoan v. Summit Cty. Children Servs. Bd.*, 9th Dist. No. 21486, 2003-Ohio-5775, at ¶14.

{¶13} The three-tiered analysis of liability applicable to a political subdivision does not apply when determining whether an employee of the political subdivision will be liable for harm caused to an individual. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, at ¶17. Pursuant to R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless:

> "(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;
>
> "(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term 'shall' in a provision pertaining to an employee."

{¶14} The issue before us is whether there remains a genuine issue of material fact concerning Officer Kabellar's actions with respect to Mr. Spears. The City and Officer Kabellar maintain that there is no evidence that Officer Kabellar acted with a "malicious purpose, in bad faith, or in a wanton or reckless manner[.]" R.C. 2744.03(A)(6)(b).

{¶15} One acts with a malicious purpose if one willfully and intentionally acts with a purpose to cause harm. *Piro v. Franklin Twp.* (1995), 102 Ohio App.3d 130, 139. Malice includes "the willful and intentional design to do injury, or the intention or desire to harm another through conduct which is unlawful or unjustified." (Internal quotations omitted.) *Shadoan* at ¶12. Bad faith is defined as a "dishonest purpose, moral obliquity, conscious wrongdoing, or breach of a known duty through some ulterior motive or ill will." (Internal quotations and citations omitted.) *Lindsey v. Summit Cty. Children Services Bd.*, 9th Dist. No. 24352, 2009-Ohio-2457, at ¶16. A person acts wantonly if that person acts with a complete "failure to exercise any care whatsoever." *Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356. One acts recklessly if one is aware that one's conduct "creates an unreasonable risk of physical harm to another[.]" (Internal quotations and citation omitted.) *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104. Recklessness is more than mere negligence in that the person "must be conscious that his [or her] conduct will in all probability result in injury." *Fabrey*, 70 Ohio St.3d at 356.

{¶16} We conclude there remains a genuine issue of material fact concerning Officer Kabellar's conduct, and thus the trial court did not err in denying Officer Kabellar the benefit of immunity. Officer Kabellar's and Mr. and Mrs. Spears' version of the events differ to a significant extent on several important facts. The City and Officer Kabellar presented the following evidence in support of their motion: portions of the deposition testimony of Mr. and Mrs. Spears, the affidavit of the paramedic, along with his report, the affidavit of Officer Kabellar, along with his report, and the affidavit of the officer who conducted the mobility tests at the police station, along with the video recording of that testing.

{¶17} The paramedic who treated both Mr. and Mrs. Spears stated in his affidavit that Mr. Spears was uncooperative, did not comply with the commands of Office Kabellar, and had been drinking. Officer Kabellar stated in his affidavit that Mr. Spears initially was compliant in completing the field sobriety testing. However, shortly into the testing, Mr. Spears refused to continue with the testing. When Officer Kabellar placed Mr. Spears under arrest "he became verbally combative and started walking away." Officer Kabellar, "[b]ased on [his] training and experience, [] grasped Mr. Spears' arm and placed him on the hood of a vehicle in order to control his person to effectuate handcuffing." Officer Kabellar's affidavit further provided that:

> "[w]hile waiting on the wagon, myself and another officer escorted Mr. Spears to the devil strip so that he could sit down on the grass. Mr. Spears then proceeded to lay down on his side. At this time, Mr. Spears complained that the handcuffs were too tight. I immediately responded and adjusted the handcuffs as Mr. Spears caused the handcuffs to tighten when he laid down.
>
> "[] Once the wagon arrived, Officer Dyer and myself escorted Mr. Spears to the rear and attempted to help him in the compartment of the wagon. Since Mr. Spears was having difficulty standing, I assisted him into the wagon by holding onto his upper arms. Mr. Spears refused to sit on the bench so we laid him on the floor. We determined to place[] him on his side so that he could breath[e] properly and the handcuffs would not tighten."

According to Officer Kabellar, at no time did Mr. Spears complain of an injury. Mr. Spears was able to fully participate in the mobility testing and was able to move both arms and wrists freely, which is confirmed by the officer who conducted the mobility tests and by the video of that testing. The paramedic further provided that Mr. Spears indicated he had right wrist pain due to the handcuffs. The paramedic examined Mr. Spears' right wrist and found no signs of trauma.

{¶18} The video of the mobility testing confirms the officers' affidavits that Mr. Spears did not complain of pain or injury during the mobility testing and that he did not appear to have any trouble moving his hands and wrists.

{¶19} Mr. and Mrs. Spears' deposition testimony, also submitted by the City and Officer Kabellar, portrays the events in a different light. Mr. Spears testified that he told Officer Kabellar that he could not continue with the field sobriety testing due to a previous neck injury. Mr. Spears believed Officer Kabellar then thought Mr. Spears "was playing with him[]" as Officer Kabellar then "grabbed [Mr. Spears] by the nape of [his] neck, left hand, slammed [his] face against the police cruiser[.]" According to Mr. Spears after the officers put the handcuffs on, the officers "dragg[ed]" Mr. Spears and "laid [him] in the grass[.]" Mr. Spears stated that his wife asked why the officers were treating him like that and Mr. Spears said that Officer Kabellar told his wife to "[s]hut up" or he would take her to jail. Mr. Spears alleged that he repeatedly complained about the handcuffs being too tight but it was never resolved. Mr. Spears stated that when the officers "helped [him] get up in the paddy wagon [he] heard [his wrist] snap." The Officers "picked [him] up" because "[he] couldn't get up in [the paddy wagon]" and laid Mr. Spears on the floor of the "paddy wagon." Mr. Spears indicated that his face became swollen and his left wrist was painful.

{¶20} Mrs. Spears testified in her deposition that the officers "took [Mr. Spears] and threw him on top of the cruiser and then they put handcuffs on him and threw him over on the sidewalk in the grass." Mrs. Spears demanded to know why they were treating Mr. Spears in that manner. Mrs. Spears confirmed that her husband was complaining that the handcuffs were too tight and confirmed Mr. Spears' version of events indicating that the officers did not remedy the situation. Mrs. Spears, however, did not observe the officers' interaction with Mr. Spears when he was being put in the "paddy wagon."

{¶21} In response to the City's and Officer Kabellar's motion, Mr. and Mrs. Spears submitted their own affidavits, the affidavit of Mr. Spears' son who picked Mr. Spears up from

the detoxification center, and an affidavit and accompanying letter of Mr. Spears' treating physician.

{¶22} In his affidavit Mr. Spears stated that he

> "performed the standard roadside tests for Officer Kabellar and then [Officer Kabellar] became irritated with [him] and grabbed [his] left hand and wrist and put it behind [his] back while taking [the Officer's] other hand and putting it on the back of [Mr. Spears'] neck and slam[ing] [Mr. Spears'] face on to the hood of [the Officer's] cruiser. [Officer Kabellar] along with another officer then took [Mr. Spears'] other hand and put it behind [his] back and handcuffed [him] and threw [him] on the grass[.]"

With respect to the officers' conduct in putting Mr. Spears in the "paddy wagon," Mr. Spears' affidavit provides that he "was dragged by [his] arms handcuffed behind [him]" and that he "was screaming in pain all the while the police dragged [him] to the wagon, and then [he] heard a snap come from [his] left wrist as they threw [him] in to the wagon."

{¶23} The City and Officer Kabellar argued in the trial court and on appeal that Mr. Spears' affidavit contradicts his previous deposition and that Mr. Spears does not remedy that inconsistency within his affidavit. We agree.

{¶24} "'[A]n affidavit of a party opposing [summary] judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment.' *Byrd v. Smith*, 110 Ohio St.3d 24, [] 2006-Ohio-3455, at ¶28. Further '[a] nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created.' Id. at ¶29." *FirstMerit Bank v. Angelori*, 9th Dist. No. 08CA0033-M, 2008-Ohio-6740, at ¶15.

{¶25} To the extent that Mr. Spears in his affidavit describes that the officers "threw" him on the grass, it contradicts his prior deposition testimony during which he indicated that the officers "laid" him in the grass. Further, Mr. Spears' deposition testimony concerning the

officers' actions in escorting Mr. Spears to the "paddy wagon" is devoid of any indication that the Officers' actions were violent or forceful, and Mr. Spears makes no mention in his deposition of "screaming in pain[.]" As Mr. Spears offers no explanation for the apparent contradiction between his deposition testimony and that provided in the affidavit, we conclude that it does not establish a genuine issue of material fact. Id. Further, to the extent that the trial court in its decision relied on portions of the affidavit contradicted by prior deposition testimony, it was error to do so. Nonetheless, we determine that the trial court still came to the correct result. "[W]e have consistently held that '[a]n appellate court shall affirm a trial court's judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial.'" *Lindsey* at ¶12, quoting, *In re Estate of Baker*, 9th Dist. No. 07CA009113, 2007-Ohio-6549, at ¶15.

{¶26} Mrs. Spears' affidavit confirms much of her deposition testimony, as well as her husband's deposition testimony. She stated that she "witnessed [her] husband perform roadside tests *** when the police officer became irritated and slammed [her] husband's face on to the top of the cruiser. The police then put his hands behind him, handcuffed him, and threw him on to the grassy strip next to the street[.]"

{¶27} The City and Officer Kabellar also argue that to the extent that Mr. and Mrs. Spears state in their affidavits that Officer Kabellar was "irritated" with Mr. Spears that such contradicts their deposition testimony and/or constitutes improper Civ.R. 56 evidence as it is outside their personal knowledge. We disagree.

{¶28} Given the circumstances *as described by Mr. and Mrs. Spears* in their depositions it is a reasonable inference to conclude that Officer Kabellar was, or appeared to be, irritated. Mr. Spears indicated in his deposition that when he told Officer Kabellar that he could not

continue with the field sobriety testing, he believed Officer Kabellar thought Mr. Spears "was playing with him." Mr. Spears did not state that he was in fact "playing" with Officer Kabellar. Following that, Mr. Spears claimed that Officer Kabellar grabbed Mr. Spears and slammed his face into the cruiser. Mrs. Spears stated in her deposition that Officer Kabellar "threw" her husband onto the cruiser. She indicated that she did not know why Officer Kabellar was treating her husband in that manner. Thus, despite the fact that Mr. and Mrs. Spears could not have personal knowledge as to Officer Kabellar's mental state, as they both witnessed the events, they could perceive the circumstances and make inferences based upon them. The Spears' conclusion in their affidavits that Officer Kabellar was irritated essentially supplements their deposition testimony, and does not contradict it. Further, we cannot conclude that it was improper testimony. As has been repeatedly acknowledged in the criminal context, mental state "*must* be inferred from the surrounding circumstances." (Emphasis added.) *State v. Logan* (1979), 60 Ohio St.2d 126, 131. Moreover, Officer Kabellar's testimony that he "placed [Mr. Spears] on the hood of a vehicle in order to control his person to effectuate handcuffing" does not preclude the conclusion that Officer Kabellar was in fact also responding out of irritation or a desire to injure Mr. Spears.

{¶29} Mr. Spears' son's affidavit averred that Mr. Spears' face was swollen and that Mr. Spears was complaining of a wrist injury when Mr. Spears' son picked him up from the detoxification center. Mr. Spears' doctor stated in his letter accompanying his affidavit that "Mr. Spears[']s wrist injury that being the radial sensory neuritis and aggravation of his preexisting osteoarthritis is a direct injury that occurred during his handcuffing and placement into a police vehicle." The doctor further stated that Mr. Spears' condition is permanent and he will never have normal function in that wrist.

{¶30} There is sufficient evidence in the record to conclude that there is a genuine issue of material fact concerning whether Officer Kabellar's actions were done with a "malicious purpose, in bad faith, or in a wanton or reckless manner[.]" R.C. 2744.03(A)(6)(b). While Mr. Spears does not deny being uncooperative, he explained in his deposition that he told Officer Kabellar that he could not continue with the field sobriety testing due to a prior neck injury. Officer Kabellar indicated that when Mr. Spears refused to further participate in the testing he placed Mr. Spears under arrest. This is allegedly when Mr. Spears "became verbally combative and started walking away." Mr. Spears does not deny this. Nonetheless, there is no testimony in the record indicating that Mr. Spears ever became physically abusive towards Officer Kabellar.

{¶31} What happens next is in dispute. Officer Kabellar stated that he "placed" Mr. Spears on a vehicle in order to handcuff him. Mr. Spears alleged that Officer Kabellar grabbed his neck and left hand and "slammed" Mr. Spears' face on the cruiser. Mrs. Spears confirmed the above and stated that she did not know why Mr. Spears was being treated in that way.

{¶32} Officer Kabellar averred that he fixed Mr. Spears handcuffs as soon as he became aware that they were too tight. He also indicated that Mr. Spears caused the handcuffs to become too tight by lying on them. Mr. Spears however claimed that he repeatedly complained about the handcuffs being too tight and that problem was not remedied. Mrs. Spears heard her husband complain about the handcuffs and confirmed that they were not loosened.

{¶33} Disregarding the contradictory testimony of Mr. Spears' affidavit, it is clear that Officer Kabellar's actions in placing Mr. Spears into the paddy wagon were for the purpose of assisting Mr. Spears and not hurting him. It is also clear that Mr. Spears did not complain about any injury during the mobility testing and appeared to be able to freely move both of his hands and wrists. However, both Mrs. Spears and Mr. Spears' son stated that when they saw Mr.

Spears after the incident his face was swollen and he complained of wrist pain. Mr. Spears' physician concluded that Mr. Spears' injuries occurred during the incident.

{¶34} Given the above evidence presented to the trial court there is a genuine issue of material fact concerning whether Officer Kabellar's actions were done with a "malicious purpose, in bad faith, or in a wanton or reckless manner[.]" R.C. 2744.03(A)(6)(b). If the facts as presented by Mr. and Mrs. Spears are true, if nothing else, it could reasonably be determined that Officer Kabellar's actions in arresting Mr. Spears were reckless in that he was aware that his conduct "create[d] an unreasonable risk of physical harm to [Mr. Spears][,]" *Thompson*, 53 Ohio St.3d at 104, or were done with a malicious purpose in that Officer Kabellar could be perceived as willfully and intentionally acting with a purpose to cause harm. *Piro*, 102 Ohio App.3d at 139. While a jury could find the Officer's actions reasonable under the circumstances, a jury could also find that slamming a suspect's face into a police car, forcibly grabbing him by the neck and arm and then applying handcuffs too tightly or allowing them to remain too tight when the officer was not confronted by a physically combative suspect could constitute reckless or malicious behavior on the part of the officer. As reasonable minds could differ on whether Officer Kabellar's conduct was reckless or done with malicious purpose, summary judgment was inappropriate. See, e.g., *Ruth v. Jennings* (1999), 136 Ohio App.3d 370, 375-376 (even assuming appellant was resisting arrest, the facts required "further inquiry to determine whether the actions of the arresting officers were reasonable under the circumstances, or whether the officers acted in a malicious, willful or wanton manner[]"); *MacNamara v. Gustin* (June 4, 1999), 2d Dist. No. 17575, at *6 ("Assuming the truth of Judy MacNamara's assertions that one of the officers had tightened the handcuffs after she had explained that they were too tight, that her shoulder had 'popped,' and that she had injured her shoulder while being shoved into the

police cruiser, reasonable minds could conclude that Officers Gustin and Colvin had acted with a malicious purpose, in bad faith, or in a reckless manner.").

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN NOT DISMISSING DOTTIE SPEARS' DERIVATIVE LOSS OF CONSORTIUM CLAIM[.]"

{¶35} In the City's and Officer Kabellar's third assignment of error they allege that the trial court erred in not granting them summary judgment on Mrs. Spears' consortium claim because it is a derivative claim and all of Mr. Spears' claims fail. We disagree.

{¶36} "A claim for loss of consortium is derivative and, but for the primary cause of action by the plaintiff, would not exist." *Bradley v. Sprenger Enterprises, Inc.*, 9th Dist. No. 07CA009238, 2008-Ohio-1988, at ¶14. However, as we agreed with the trial court's determination that Mr. Spears' claims for assault and battery against Officer Kabellar survive summary judgment, the loss of consortium claim survives as well. See *Moss v. Lorain Cty. Bd. of Mental Retardation*, 9th Dist. No. 09CA009550, 2009-Ohio-6931, at ¶32.

III.

{¶37} The City's and Officer Kabellar's first assignment of error is sustained and the remaining assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part and reversed in part.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to all parties equally.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

CHERI CUNNINGHAM, Director of Law, PATRICIA AMBROSE RUBRIGHT, and MICHAEL J. DEFIBAUGH, Assistant Directors of Law, for Appellants.

KERRY O'BRIEN, Attorney at Law, for Appellee.