SLIP OPINION NO. 2023-OHIO-3009

HARRIS, APPELLANT, *v.* HILDERBRAND, APPELLEE.

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R.C. 2744.03(A)(6)—Immunity for employees of political subdivisions—Reasonable minds could disagree regarding whether K-9 officer was manifestly acting outside scope of his employment during events leading up to his houseguest's dog-bite injury.

(No. 2022-0784—Submitted April 19, 2023—Decided August 30, 2023.)

APPEAL from the Court of Appeals for Jefferson County,
No. 21 JE 0013, 2022-Ohio-1555.

KENNEDY, C.J.

{¶ 1} In this appeal from the Seventh District Court of Appeals, we determine whether a K-9 officer who is required to keep his canine partner with him in his home enjoys political-subdivision immunity from liability under R.C. 2744.03(A)(6) if the dog bites a social guest at the officer's home. Essential to that

determination is whether the officer's acts or omissions leading up to the incident were manifestly outside the scope of his employment or official responsibilities. We hold that the court of appeals erred in reversing the trial court's partial denial of the officer's motion for summary judgment and in holding that as a matter of law, the officer in this case was not manifestly acting outside the scope of his employment or official responsibilities during the events leading up to the dog bite. Based on the facts in this case, reasonable minds could disagree regarding whether the officer was acting outside the scope of his employment. Therefore, we reverse the judgment of the court of appeals and remand the matter to the trial court.

I. Factual and Procedural Background

A. The dog-bite incident

{¶ 2} Appellee, Dustin Hilderbrand, a Belmont County deputy sheriff and K-9 handler, hosted a cookout for friends at the home he shared with his fiancée, Kelcie Leonard, in August 2019. Appellant, Allison Harris, attended the cookout, where she was bitten by Hilderbrand's canine partner, Xyrem.

{¶ 3} At the time of the incident, Hilderbrand had been in the K-9 unit for about 11 months. As a member of the K-9 unit, he was required to keep Xyrem at his home. James Zusak, the chief deputy sheriff of the Belmont County Sheriff's Office, testified by affidavit as follows regarding the responsibilities of deputies in the K-9 unit:

> As a requirement of their position, K-9 deputies must keep and care for their dogs at their homes when they are off duty, and * * * supervise the conduct of the dog at all times. The purpose of the arrangement is to solidify the bond between the deputy and the dog, so that they work well together while on duty. The arrangement also allows the deputy and the dog to be on call and available as needed as a unit, and to ensure that the dog is continually supervised.

> Keeping their dog[] in their home and caring [for] and supervising the dog is one of their duties as a K-9 deputy. K-9 deputies are not permitted to work in that position if they are not willing or unable to keep and care for their dogs in their home.

{¶ 4} Also in attendance at the cookout were Harris's boyfriend, Thomas Riedel, who was also a Belmont County deputy sheriff, and a third couple, Carrie and Andrew Chesonis. All of the attendees testified by deposition in this case.

{¶ 5} Hilderbrand and his guests were drinking alcoholic beverages at the cookout. At some point before dinner, Carrie Chesonis asked for a demonstration of Xyrem's abilities, so Hilderbrand demonstrated to the guests three things that Xyrem had been trained to do. First, he had the dog sniff a small item, and then he threw it into the yard for the dog to find. Harris testified that Hilderbrand yelled at Xyrem and had possibly used the dog's shock collar to shock him when he seemed to lose interest in finding the item. Hilderbrand testified that he administered a vibration through the collar, not a shock, and that he did that only to stop Xyrem from sniffing another dog. Riedel testified that Hilderbrand was randomly firing off commands to Xyrem.

{¶ 6} Second, Hilderbrand retrieved contraband from his police vehicle—illegal drugs used for training—and hid it in his yard. Xyrem found the contraband upon Hilderbrand's command. Leonard testified that she had never seen Hilderbrand hide drugs in their yard before this incident.

{¶ 7} Third, Hilderbrand demonstrated that Xyrem has been trained to bark when Hilderbrand says a phrase including the words "Belmont County Sheriff's Office." He later testified that this command is often said as part of a longer warning that he has been trained to give a suspect before he gives a separate command to Xyrem to bite the suspect. Hilderbrand described the full warning as, "Belmont County Sheriff's Office. Show me your hands, come out now, or I'm

going to send my dog in and you'll get bit." On the evening of the incident, Hilderbrand gave only the command, "Belmont County Sheriff's Office." Leonard testified that Xyrem's behavior always changes when he hears that command, and Carrie Chesonis testified that the command changed Xyrem's behavior that evening. According to Leonard's testimony, upon hearing the command that day, Xyrem lunged at a door to the house and started barking. She also testified that prior to the day of the cookout, Hilderbrand had never given the command with guests present and she had only seen him give the command a few times before.

{¶ 8} Hilderbrand also had three other dogs, and the guests played with them, too. Riedel testified that Hilderbrand at one point poured some beer on a cement area for Xyrem to lap up. Hilderbrand denied that assertion, explaining in his testimony that it was one of his other dogs he had given beer to.

{¶ 9} Hilderbrand estimated that after about an hour, he removed Xyrem's shock collar and took him inside the house to eat his dinner in his kennel. After about 45 minutes to an hour, Xyrem was let back outside without his shock collar.

{¶ 10} Andrew Chesonis then asked Hilderbrand whether he could put the collar on himself to experience a shock. Andrew put the collar on his arm, and Hilderbrand administered a shock at the lowest setting. Andrew asked to be shocked again. Andrew later testified that Hilderbrand was administering the second shock when Xyrem approached Harris, who was in the yard setting up a game, and bit her chest. Riedel testified that Hilderbrand later told him that his first response had been to activate the shock collar but then he had realized that the collar was not on Xyrem. Hilderbrand testified that after Xyrem bit Harris, he commanded Xyrem to lie down, he lay down beside Xyrem, holding the dog by the scruff of his neck, and Xyrem made no further attempts to bite Harris.

{¶ 11} Harris received medical care for her wound that evening and later had surgery to repair the damage. At the time of her deposition, she was scheduled to have further surgery.

B. The trial court

{¶ 12} Harris sued Hilderbrand, asserting a claim for common-law negligence and a claim under Ohio's dog-bite statute, R.C. 955.28, which imposes strict liability for injuries caused by a dog in certain situations. Both Hilderbrand and Harris moved for summary judgment on both claims. The trial court granted Hilderbrand's motion in part.

{¶ 13} The trial court acknowledged that Hilderbrand was required to keep Xyrem at his home but concluded that the dog is meant to be used for police work and that Hilderbrand is not immune from liability for injuries caused by the dog when it is used for entertainment or amusement. The court analogized the situation to a police officer's passing around the officer's loaded service firearm at a party. The court stated that it was not finding that no immunity exists but was "simply overruling the Motion for Summary Judgment on that issue [and] leaving it for the Jury to decide."

{¶ 14} The trial court granted Hilderbrand's motion for summary judgment as to the strict-liability claim. The court determined that under R.C. 955.28(B), strict liability is triggered by keeping or harboring a dog that bites someone. The court held that Hilderbrand was immune from liability related to the strict-liability statute because under that statute, the behavior of the keeper of the dog is not an element of the claim. Rather, the court noted, liability attaches to the person merely for harboring the dog, and since Hilderbrand's employment required him to harbor the dog, the immunity statute operated to grant him immunity from liability for harboring the dog.

C. The court of appeals

{¶ 15} Pursuant to R.C. 2744.02(C), Hilderbrand appealed the trial court's judgment denying him summary judgment on Harris's negligence claim. That statute provides that "[a]n order that denies a political subdivision or an employee

of a political subdivision the benefit of an alleged immunity from liability * * * is a final order."

{¶ 16} Harris did not file a notice of cross-appeal, but she did assert in her brief in response to Hilderbrand's brief that the trial court had erred in granting Hilderbrand summary judgment on her strict-liability claim.

{¶ 17} The court of appeals reversed the trial court's judgment denying Hilderbrand summary judgment on the negligence claim. It determined that the bite occurred approximately an hour after Hilderbrand had Xyrem do the demonstrations for his guests, and it noted that there was nothing in the way the dog was behaving before the bite that would have indicated he might bite someone.

{¶ 18} The court considered the implications if it were to hold that summary judgment was not appropriate in this case, writing:

> It is undisputed [that] a part of a K-9 officer's duty is to house and take care of the canine. Being at the cookout, gave the dog a chance to acclimate to people in different situations and bond in the family unit. Requiring Xyrem to live with [Hilderbrand] and to be a part of [Hilderbrand's] household facilitates and promotes the business of the Belmont County Sheriff's Department. It ensures [that] Xyrem can be around people and learn how to properly behave in diverse human settings while at the same time be trained for his job of narcotic detection and apprehension. To hold otherwise would essentially mean [Hilderbrand] is not permitted to have house guests or must lock up the canine every time he has a guest. To prohibit an officer to have house guests if they are a K-9 unit would result in fewer officers accepting the official responsibilities of and becoming a K-9 unit. K-9 units are a valuable tool to police departments and our communities. Also, to require the dog to be

> locked up any time a K-9 officer may have guests could have serious implications on how the dog reacts to people in real life situations when on the job. Foreclosing immunity in a situation such as this will keep otherwise capable officers from becoming a K-9 officer and could have training implications on the dog being around others in the field. Furthermore, the claim here is mere common law negligence. Being "manifestly outside" the scope of his official responsibilities is a high standard. The facts of this case indicate, as a matter of law, [Harris] cannot meet that burden.

2022-Ohio-1555, 191 N.E.3d 1143, ¶ 35.

{¶ 19} The court concluded that there were no issues of material fact in the case, and it held: "Although this was an unfortunate situation, reasonable minds can find only one conclusion, i.e., [Hilderbrand] is entitled to immunity as a matter of law because there is nothing tending to show that he was acting manifestly outside the scope of his official responsibilities at the time of the incident." *Id.* at ¶ 36.

{¶ 20} As for the strict-liability claim, the appellate court found that Harris had not timely filed a notice of cross-appeal, and further, that the ruling regarding strict liability was not a final, appealable order. The court pointed out that R.C. 2744.02(C) deems as a final order an order that *denies* a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability and that a *grant* of immunity is not a final, appealable order when other issues remain. *Id.* at ¶ 40-41. The court held that Harris's attempt to cross-appeal did not invoke its jurisdiction. *Id*. at ¶ 39. In dicta, the court went on to discuss the claim "in the interest of justice and thoroughness," and it purported to affirm the trial court's judgment as to that claim. *Id*. at ¶ 42, 50.

{¶ 21} Harris appealed, and this court agreed to consider the following two propositions of law:

> Proposition of Law No.1: An off-duty deputy sheriff who is a K-9 handler should not be entitled to immunity from a claim of common law negligence for an attack by his K-9 of a third-party guest at his personal residence simply because he is required to harbor and keep the K-9 at his home. Rather, whether immunity exists should be a question for the jury when there are disputed issues of fact as to whether the officer is acting manifestly outside the scope of his employment.
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> Proposition of Law No. 2: An off-duty deputy sheriff who is a K-9 handler should not be entitled to immunity from a claim for strict liability under O.R.C. 955.28(B) for an attack by his K-9 of a third-party guest at his personal residence simply because he is required to harbor and keep the K-9 at his home.

{¶ 22} Because the second proposition of law is not properly before this court for lack of a final, appealable order and the lack of a timely filed notice of cross-appeal in the court of appeals, we do not address its merit. We now turn to the remaining proposition of law.

II. Law and Analysis

A. Standard of review

{¶ 23} This court's review of cases involving a grant of summary judgment is de novo. *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 8. " 'Summary judgment may be granted when "(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." ' " *McConnell v. Dudley*, 158 Ohio St.3d 388, 2019-Ohio-4740, 144 N.E.3d 369, ¶ 18, quoting *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12, quoting *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 24} The determination "whether an employee [was] acting within the scope of employment is a question of fact to be decided by the jury." *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 16. "Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law." *Osborne v. Lyles*, 63 Ohio St.3d 326, 330, 587 N.E.2d 825 (1992) (plurality opinion).

B. R.C. 2744.03(A)(6)(a)—Immunity for political-subdivision employees

{¶ 25} With exceptions not relevant here, under Ohio's political-subdivision-immunity statutory scheme, an employee of a political subdivision is immune from liability for injury or loss caused by his or her acts or omissions unless "[t]he employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities," R.C. 2744.03(A)(6)(a).

C. The statutory language

1. "Manifestly"

{¶ 26} We must determine whether the court of appeals correctly determined that as a matter of law, Hilderbrand did not manifestly act outside the scope of his employment. The term "manifestly" is not defined in R.C. Chapter 2744. Statutory terms that are not defined by the legislature are accorded their common, everyday meaning. R.C. 1.42; *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 21. In *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 578, 752 N.E.2d 267 (2001), this court looked to a dictionary definition of the term "manifestly" in determining the meaning of the phrase "manifestly outside the scope of [the employee's] employment" in a duty-to-defend case involving an employee of a political subdivision: "Webster's Third

New International Dictionary (1986) 1375, defines the word 'manifestly' as 'plainly, obviously.' "

{¶ 27} Therefore, the inquiry in this case is whether Hilderbrand was plainly and obviously acting outside the scope of his employment prior to Xyrem's biting Harris.

2. "Scope of employment"

{¶ 28} R.C. Chapter 2744 also does not define "scope of employment." In *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573, ¶ 15, a case involving a statute that provides immunity for state employees unless the employee's actions were manifestly outside the scope of employment, this court wrote: "For purposes of personal immunity * * *, a state employee acts within the scope of employment if the employee's actions are 'in furtherance of the interests of the state.' *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 287, 595 N.E.2d 862. Thus, a state employee's duties should define the scope of employment." This court added in *Theobald* that an employee's actions are manifestly outside the scope of employment if the actions are "self-serving or have no relationship to the employer's business." *Id.* at ¶ 28.

D. Reasonable minds could disagree

{¶ 29} As noted above, we must view the evidence most strongly in favor of the party against whom the motion for summary judgment was made. Viewing the evidence most strongly in favor of Harris, reasonable minds could differ as to whether Hilderbrand's acts or omissions were obviously outside the scope of his employment during the events leading up to Xyrem's biting Harris.

{¶ 30} It is undisputed that Hilderbrand's position as a K-9 deputy sheriff for the Belmont County Sheriff's Office required him to keep Xyrem in his home. The issue here is whether Hilderbrand's acts and omissions in handling Xyrem prior to his canine partner's biting a social guest were manifestly outside the scope of his employment.

{¶ 31} According to at least one deposed witness, Hilderbrand was responding to the request of a guest when he decided to demonstrate what Xyrem had been trained to do. Hilderbrand introduced Xyrem into a situation in which multiple people were consuming alcohol, including himself, the K-9 handler. There is a factual dispute as to whether Hilderbrand let Xyrem or another dog drink beer that had been poured on the sidewalk.

{¶ 32} While Xyrem was wearing his shock collar, Hilderbrand worked Xyrem by giving him commands to find contraband and to bark and lunge at a door to the house. After the demonstration was complete, Xyrem was taken inside the house and fed dinner. Approximately an hour later, Xyrem, without his shock collar, was let back outside, where he had previously been responding to work commands. Riedel testified that Hilderbrand said that his first reaction when Xyrem bit Harris was to activate his shock collar.

{¶ 33} Considering the evidence in a light most favorable to Harris, we hold that reasonable minds could disagree as to whether Hilderbrand was obviously acting in a manner that did not further the interests of the Belmont County Sheriff's Office prior to Xyrem's biting Harris.

III. Conclusion

{¶ 34} Harris's second proposition of law is not properly before us. As to the first proposition of law, whether an employee was manifestly acting outside the scope of his or her employment is ordinarily a question for a jury. "Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law." *Osborne*, 63 Ohio St.3d at 330, 587 N.E.2d 825 (plurality opinion). Reasonable minds could differ regarding whether Hilderbrand was manifestly acting outside the scope of his employment during the events leading up to Harris's injury. Therefore, we reverse the Seventh District Court of Appeals' judgment on the negligence claim, and we remand the matter to the trial court for further proceedings.

Judgment reversed
and cause remanded to the trial court.

FISCHER, DEWINE, DONNELLY, STEWART, BRUNNER, and DETERS, JJ., concur.

Bordas & Bordas, P.L.L.C., and James G. Bordas III, for appellant.

Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., Matthew P. Mullen, John P. Maxwell, and Kyle W. Rea; and Isaac, Wiles, Burkholder & Teetor, L.L.C., for appellee.

Friedman, Gilbert & Gerhardstein, Alphonse A. Gerhardstein, and M. Caroline Hyatt, urging reversal for amicus curiae Ohio Association for Justice.

Ennis Britton Co., L.P.A., Hollie F. Reedy, and Pamela A. Leist, urging affirmance for amicus curiae Ohio School Boards Association.

Gwen E. Callender, urging affirmance for amici curiae Fraternal Order of Police of Ohio, Inc., Buckeye State Sheriff's Association, Inc., and Ohio Association of Chiefs of Police, Inc.

Green & Green, Lawyers, and Jared A. Wagner, urging affirmance for amicus curiae Ohio Association of Civil Trial Attorneys.
