

IN THE SUPREME COURT OF OHIO

07-0062

Laura Gatten Vasquez,

Appellant,

v.

Village of Windham, et al.,

Appellees.

On Appeal from the Portage
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. 2005-P-0068

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LAURA VASQUEZ

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST

This cause presents a single critical issue for the future of political subdivision immunity in Ohio: whether an inadvertent negligent act can constitute a discretionary act of an employee of a political subdivision under R.C. 2744.03(A)(3), thereby providing a defense to political subdivision liability imposed by R.C. 2744.02(B).

In this case, the court of appeals held that a police officer's inadvertent negligent failure to completely read a LEADS¹ report before issuing a summons was an exercise of discretion with respect to his enforcement powers, thereby immunizing the Windham Police Department and the Village of Windham from civil liability.

The decision of the court of appeals threatens the entire structure of political subdivision immunity created by the General Assembly in R.C. Chapter 2744. By its ruling, the court of appeals undermines legislative intent, ignores the plain meaning of the political subdivision immunity statutes, and creates its own unsupported definition of discretion in relation to political subdivision immunity. Moreover, the court of appeals' decision establishes a rule that inadvertent acts of negligence by a political subdivision employee is an exercise of discretion of that employee, thereby eliminating liability arising from negligence as established in R.C. 2744.02(B).² Finally, the court of appeals' decision is in conflict with the definition of discretion in analogous precedent of other district courts in Ohio and the Supreme Court of Ohio.

The implications of the decision of the court of appeals affect every governmental entity in Ohio by holding that political subdivisions will no longer be held liable for their

¹ LEADS stands for Law Enforcement Automated Data System, an information database used by Ohio law enforcement agencies.

² R.C. 2744.02(B) imposes liability for certain acts of negligence which are exceptions to the blanket immunity for political subdivisions created in R.C. 2744.02(A).

negligence if the negligence is the least bit related to their discretionary powers. Such a holding removes the impetus for a political subdivision to act with reasonable care in performing its function as a government agency. Similarly, the public interest is affected if the plain meaning of a statute duly adopted by the General Assembly can be judicially altered to subvert the legislature's intent to provide redress to Ohio citizens and deter negligent acts by political subdivisions by imposing liability upon political subdivisions in specific instances.

Apart from these governmental considerations, which make this case one of great public interest, the decision of the court of appeals has broad general significance in Ohio tort law. The great majority of governmental actions in Ohio are performed by political subdivisions of Ohio, and Ohio citizens are affected on a daily basis by the acts of political subdivisions. By enacting R.C. 2744.02(B), the General Assembly has granted Ohio citizens a right to compensation under traditional tort principles for injuries caused by certain forms of negligent conduct of political subdivisions. Under this codification, the General Assembly has demonstrated its intent to subject political subdivisions to limited tort liability and the deterrent effect such liability has on negligent conduct.

The decision of the court of appeals sets a precedent that allows political subdivisions to escape liability imposed by the General Assembly by asserting that inadvertent negligent acts of the subdivision or its employees are within the subdivision's exercise of discretion. The conclusion of the court of appeals is contrary to the statutory scheme of R.C. Chapter 2744 and conflicts with existing precedent. Ohio courts that have addressed the issue have held that discretion, as referred to in

R.C. 2744.03, involves policy-making and the exercise of independent judgment, and that a political subdivision cannot simply assert that all of its decisions or actions are discretionary in order to obtain protection under R.C. 2744.03.

In sum, this case presents the issue of whether an inadvertent act of negligence constitutes an exercise of discretion for purposes of political subdivision immunity, thereby affecting every political subdivision and citizen in Ohio. To promote the purpose and preserve the intent of the statutory scheme for political subdivision immunity, to assure uniform application of political subdivision immunity, and to preserve the rights of Ohio citizens to receive just compensation for injuries arising from the negligent acts of political subdivisions, this court must grant jurisdiction to hear this case and review the erroneous and dangerous decision of the court of appeals.

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STATEMENT OF THE CASE AND FACTS

The case arises from the erroneous arrest and imprisonment of appellant Laura Vasquez, formerly known as Laura Greathouse ("Appellant").³ In December of 2002, Patrolman Thomas Denvir, defendant below, received a complaint from Amanda Walker, who alleged she was assaulted by a woman named Laura Greathouse. Ms. Walker provided a general physical description of her assailant. Patrolman Denvir submitted a request for a LEADS report on Laura Greathouse. The report contained information on Appellant as well as a second woman named Laura Greathouse. Both women fit Ms. Walker's physical description of her assailant and lived in the vicinity of Windham, Ohio. However, Patrolman Denvir negligently failed to read the portion of the report containing the information of the second Laura Greathouse, who was the one that assaulted Ms. Walker. Unaware of the second Laura Greathouse, Patrolman Denvir issued a complaint and summons upon Appellant, charging her with assault. Appellant appeared in Court at the scheduled time, believing she would be able to explain the mix-up in Court, but was never given the opportunity to inform the court of her doppelgänger. Appellant, unfamiliar with the legal process, entered a plea of not guilty and was taken into custody from January 23, 2003, until January 24, 2003, because she could not post bail. Appellant was released after Ms. Walker confirmed that Appellant was not her attacker. In December of 2003, Appellant filed a complaint alleging false arrest, false imprisonment, and negligence against the Village of Windham, the Windham Police Department, and Patrolman Denvir.

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³ Appellant has since changed her name to Laura Vasquez after obtaining a divorce from Brian Greathouse.

The Village of Windham and the Windham Police Department (hereinafter "Windham") moved for judgment on the pleadings, claiming political subdivision immunity under R.C. Chapter 2744. The trial court granted the Motion, holding that the Movants were immune to liability. After discovery, Patrolman Denvir filed a Motion for Summary Judgment, also claiming immunity under R.C. Chapter 2744. The trial court granted Patrolman Denvir's Motion for Summary Judgment. Appellant appealed both decisions of the trial court.

The Eleventh District Court of Appeals affirmed both decisions of the trial court. The court of appeals affirmed Patrolman Denvir's Motion for Summary Judgment, finding there was no genuine issue of material fact regarding whether Patrolman Denvir's actions rose to the level of wanton or reckless misconduct. The court of appeals also affirmed the trial court's Decision to grant Windham's Motion for Judgment on the Pleadings, but for reasons different from those of the trial court. Specifically, the court of appeals found that Windham was liable under former 2744.03(B)(4),⁴ but that Patrolman Denvir's negligence fell within his discretion by virtue of his duties as a police officer, and therefore Windham had a valid defense to liability under R.C. 2744.03(A)(3).

The court of appeals erred in finding that Patrolman Denvir's inadvertent negligent actions were an exercise of his discretion as a police officer. In support of her position on these issues, the appellant presents the following argument.

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⁴ The Sub. S.B. 108 version of R.C. Chapter 2744 (effective 7/1/2001) was in effect when Appellant's cause of action accrued and was applied by the trial court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: An inadvertent negligent act cannot constitute an act within the discretion of an employee of a political subdivision within the meaning of R.C. 2744.03(A)(3).

Ohio's political subdivision immunity laws do not call for a broad interpretation of discretion within R.C. 2744.03. A broad interpretation of discretion would abrogate liability expressly imposed upon political subdivisions by R.C. 2744.02(B). The statutory scheme of R.C. Chapter 2744 makes this clear.

The application of sovereign immunity as embodied by R.C. Chapter 2744⁵ contains three tiers. First, R.C. Chapter 2744.02(A) sets forth the general and broad principle that political subdivisions are immune from damages in a civil action for injury caused by any act or omission of the political subdivision or employee of the political subdivision in connection with a government or proprietary function.⁶ *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610. Second, R.C. 2744.02(B) creates five exceptions to the blanket immunity set forth in R.C. 2744.02(A) which impose liability upon political subdivisions for certain negligent acts of political subdivision or its employees. *Id.* Third, R.C. 2744.03 provides several "defenses or

⁵ As mentioned above, the Sub. S.B. 108 version of R.C. Chapter 2744 was applied below. R.C. 2744.02(A) and (B) have since been amended, but their general functions in the statutory scheme of R.C. Chapter 2744 remain the same. The current language of R.C. 2744.03(A)(3), the only provision at issue on appeal, is identical to the language in Sub. S.B. 108. Therefore, the court of appeals' ruling is precedent for future claims involving the application of R.C. 2744.03(A)(3).

⁶ "Political subdivision," "governmental function," and "proprietary function" are defined in R.C. 2744.01. Appellant is not contesting the findings of the court of appeals that both the Village of Windham and the Windham Police Department are political subdivisions, or that Patrolman Denvir's conduct was a governmental function under R.C. 2744.01(C)(2)(i).

immunities” which an employee or political subdivision can assert to “re-attach” immunity to acts or omissions exempted from immunity by R.C. 2744.02(B). *Id.*

Appellant does not contest the appellate court’s rulings regarding the application of R.C. 2744.02(A) or 2744.02(B). The only issue on appeal is the appellate court’s application of R.C. 2744.03(A)(3) in Windham’s Motion for Judgment on the Pleadings.

R.C. 2744.03(A)(3) allows immunity to reattach to liability imposed by the exceptions found in R.C. 2744.02(B) when the employee’s negligent conduct was “within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.” R.C. 2744.03(A)(3). However, it was not the intention of the General Assembly to abrogate all liability for negligence under the rubric that inadvertent negligence was in the discretion of the political subdivision employee. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, citing *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810, 811-812; see also *Sturgis v. East Union Township* (2006), Ninth Dist. No. 05CA0077 at ¶18, 2006-Ohio-4309, 2006 WL 2389589 (“A ‘discretionary’ act necessarily involves ‘[s]ome positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved[.]’”); *Hacker v. Cincinnati* (1998), 130 Ohio App.3d 764, 770, 721 N.E.2d 416 (“Discretion, as referred to in R.C. 2744.03(A)(3) and (A)(5), involves policy-making and the exercise of independent judgment.”). Thus, a plain reading of 2744.03(A)(3) would grant immunity to a political subdivision only if the negligent acts or omissions of the subdivision’s employee involved a positive

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exercise of judgment by the employee. *Sturgis v. East Union Township*, supra (holding that passive negligence leading to property damage does not fall within the discretionary defenses of R.C. 2744.03(A)(3) or (A)(5)); cf. *Perkins v. Norwood City Schools* (1999), 85 Ohio St.3d 191, 707 N.E.2d 868; *Malone v. City of Chillicothe* (2006), Fourth Dist. No. 05CA2869, 2006-Ohio-3268; *Hallet v. Stow Bd. of Edn.* (1993), 89 Ohio App.3d 309, 624 N.E.2d 272. Patrolman Denvir's failure to read the entire LEADS report was inadvertent, and not a discretionary act. Therefore, the statutory defense of R.C. 2744.03(A)(3) is inapplicable to this case.

Further, in order for the statutory structure chosen by the legislature to make sense, the exceptions to liability found in R.C. 2744.03 must be read more narrowly than the exceptions to non-liability found in R.C. 2744.02(B). *Hallet*, 89 Ohio App.3d at 313; *Malone*, supra, at ¶16. A political subdivision cannot simply assert that all of its decisions are discretionary in order to obtain protection under R.C. 2744.03(A)(3) and (A)(5). *Hacker*, 130 Ohio App.3d at 770. Because R.C. 2744.02(B)(1)-(4) impose liability upon a political subdivision for acts of negligence, an act "within the discretion of the employee" under R.C. 2744.03(A)(3) cannot be construed so broadly as to encompass all negligent acts, but instead must be construed to include only acts which involved a conscious decision by the employee, rather than careless, inadvertent acts or omissions. See e.g. *Hallet*, supra; cf. *Bolding v. Dublin Local Sch. Dist.* (1995) Tenth Dist. No. 94APE09-1307, 1995 WL 360227. A broad construction of "discretion" would clearly contradict the General Assembly's intent to hold political subdivisions liable for certain instances of negligence, as outlined in R.C. 2744.02(B). See *Hallet*, supra.

The court of appeals recognized that Appellant's complaint alleged that Patrolman Denvir and Windham "acted negligently in performing their tasks when they knew or should have known that Appellant was not the person who committed the offenses alleged." (Opinion of the Court of Appeals, Apx.10). The negligence alleged does not distinguish between inadvertent negligence or a negligence resulting from Patrolman Denvir's positive exercise of judgment. Therefore, Appellant's assertion of negligence, when construed in favor of Appellant, is sufficient to defeat a motion for judgment on the pleadings because Plaintiff would only have to prove that Windham's acts were inadvertent negligence in order to be entitled to relief from Windham under R.C. 2744.03(B)(4).⁷ The court of appeals' decision allowed Windham to obtain protection under R.C. 2744.03(A)(3) by simply asserting that its negligent conduct was discretionary, without having to provide any evidence whatsoever that its negligence involved a positive exercise of judgment, and was not an inadvertent act of negligence. Such a precedent is dangerous because it allows political subdivisions to escape 2744.02(B) liability without even addressing the facts underlying the allegations of negligence.

Finally, the decision of the court of appeals conflicts with analogous precedent of courts throughout Ohio. Ohio Courts have repeatedly refused to treat ordinary negligence in maintaining premises as discretionary decisions that would re-attach immunity under 2744.03(A)(5). See *Perkins*, supra (rejecting R.C. 2744.03(A)(5) defense for passive negligence not involving a high degree of judgment or discretion);

⁷ In order to succeed on a motion for judgment on the pleadings, the defendant must show that plaintiff can prove no set of facts in support of the claims that would entitle plaintiff to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996) 75 Ohio St.3d 565, 570. By implication, the appellate court ruled that plaintiff would not be able to prove that Patrolman Denvir's act did not involve a positive exercise of judgment, which is clearly not the case.

Malone, supra (same); Sturgis, supra (same); Hacker, supra (same); Hallet, supra (same); Bolding, supra (same).

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellant requests that this court accept jurisdiction in this case so that the important issue presented will be reviewed on the merits.

Respectfully submitted,

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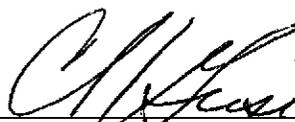
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was sent by First Class U.S. Mail this 11 day of January, 2007 to:

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APPENDIX

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

FILED
COURT OF APPEALS

DEC 04 2006

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY OHIO

LAURA GATTEN VASQUEZ, : OPINION

Plaintiff-Appellant, :

- vs - :

VILLAGE OF WINDHAM, et al., :

Defendants-Appellees. :

CASE NO. 2005-P-0068

DEC 07 2006

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 01349.

Judgment: Affirmed.

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Nick C. Tomino, 803 East Washington Street, #200, Medina, OH 44256 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Laura Vasquez, appeals the judgment entries of the Portage County Court of Common Pleas awarding appellees, Village of Windham and Windham Police Department judgment on the pleadings and appellee Thomas Denvir, summary judgment. For the reasons herein, we affirm.

{¶2} On December 15, 2002, Amanda Walker arrived at the Windham Police Department alleging she had been assaulted by a woman named Laura Greathouse. Patrolman Thomas Denvir took her statement during which Ms. Walker described her

assailant as a white female, approximately 30 years old, blonde, and weighing between 100 to 125 pounds. Ms. Walker also stated her assailant lived in the "Projects." Patrolman Denvir retrieved a "Master Index" card identifying a Laura Greathouse. The Master Index is a general system of names kept by the Windham Police Department of all parties who visit the department, whether reportees or suspects. Coincidentally, appellant had previously contacted the department to report incidents of harassment by her now ex-husband, Brian Greathouse.¹ As a result, appellant had a card in the Master Index under her former, married name, Laura Greathouse.

{¶3} Patrolman Denvir then submitted a request from the Law Enforcement Automated Data System (LEADS) for data on appellant. The LEADS report provided appellant's physical description, which was similar to the description offered by Ms. Walker. Further, the LEADS data indicated appellant had two known names: Laura Greathouse and Laura R. Gatten. LEADS also contained information on another woman, also matching the description, named Laura Greathouse. Patrolman Denvir failed to notice the additional Laura Greathouse.

{¶4} Based upon Ms. Walker's statement and description as well as the information contained in the Master Index and the LEADS report, Patrolman Denvir prepared a complaint charging Laura Greathouse with assault. Appellant received a summons by certified mail on January 7, 2003 but did not notify authorities that she was not involved in the alleged assault. While appellant was not personally acquainted with the other Laura Greathouse she testified she was aware that another Laura Greathouse lived in the Windham area. Because she knew another individual had a name which

1. Sometime subsequent to her divorce from Brian Greathouse, appellant changed her name to Laura Vasquez.

matched her former name, appellant believed she could address the issue by appearing in court and explaining the likely mix up.

{¶5} On January 23, 2003, appellant appeared in court to explain the mistaken identification. However, she was unable to make a statement to the judge and, being unfamiliar with the criminal process, simply pleaded not guilty. Bail was posted at \$3,500 (or 10% thereof). However, appellant was unable to post bail and was consequently taken into custody. Appellant was detained in the Portage County Jail from January 23, 2003 until January 24, 2003 when she posted bail. Eventually, Ms. Walker confirmed that appellant was not the Laura Greathouse that allegedly assaulted her and the charges were dismissed.

{¶6} On December 22, 2003, appellant filed a complaint alleging false arrest, false imprisonment, and negligence against the Village of Windham, the Windham Police Department, and Patrolman Denvir. The Village of Windham and the Windham Police Department moved for judgment on the pleadings on February 20, 2004. On July 19, 2004, the trial court granted the motion determining the movants were immune from liability pursuant to R.C. Chapter 2744., et seq. On April 15, 2005, the remaining defendant, Patrolman Denvir, moved the court for summary judgment. On April 22, 2005, appellant filed a "Motion For Leave to File Amended Complaint." On May 2, 2005, appellant filed her motion in opposition to Patrolman Denvir's motion for summary judgment. On June 22, 2005, the trial court granted appellant's motion to file an amended complaint. Appellant's amended complaint, which included allegations of "recklessness" against Patrolman Denvir, was subsequently filed on the same date. The record indicates that during a status conference, counsel for both parties agreed no

further briefing was necessary in connection with the motion for summary judgment. On July 12, 2005, the trial court awarded summary judgment to the officer without extensive analysis. Appellant now appeals and asserts two assignments of error for our consideration. Her first assignment of error contends:

{¶7} “The trial court erred in finding defendants Village of Windham and Windham Police Department’s [sic] immune from civil liability based on the pleadings.

{¶8} Because Civ.R. 12(C) motions test the legal basis for the claims asserted in a complaint, our standard of review is de novo. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570. In ruling on a Civ.R. 12(C) motion, a court is permitted to consider both the complaint and the answer. *Id.* at 569. In so doing, the court must construe the material allegations in the complaint, with all reasonable inferences drawn therefrom, as true and in favor of the non-moving party. *Whaley v. Franklin Cty. Bd. of Commrs.* (2001), 92 Ohio St.3d 574, 581. A court granting the motion must find that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief. *Pontious*, supra, at 570.

{¶9} In the instant matter, the trial court granted the foregoing motion on the basis of political subdivision immunity under R.C. Chapter 2744. A three tiered analysis is required for determining a political subdivision’s immunity from tort liability under the statute. *Greene Cty. Agricultural Soc. v. Liming*, (2000), 89 Ohio St.3d 551, 556. First, “a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any 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). However, this general immunity is limited by

R.C. 2744.02(B), which sets forth five instances in which a political subdivision is not immune. Finally, if a political subdivision is exposed to liability through the application of R.C. 2744.02(B), a court must consider whether the political subdivision could legitimately raise any of the defenses under R.C. 2744.03 thereby re-asserting immunity. See, e.g., *Greene Cty. Agricultural Soc.*, supra, at 557.

{¶10} In the instant case, it is undisputed that appellees, as a “political subdivision” and police department, meet the first step of the analysis and qualify for general immunity. Moreover, both parties appear to agree that appellant’s arrest falls under the rubric of a governmental function. See, e.g., R.C. 2744.01(C)(2)(i).² Accordingly, we must next determine whether any of the exceptions to immunity listed in former R.C. 2744.02(B) are applicable.³

{¶11} In her response motion to appellees motion for judgment on the pleadings, appellant argued that former R.C. 2744.02(B)(4) applied to except the acts or omissions of the Village of Windham and Windham Police Department from the general allowance of immunity afforded them under R.C. 2744.02(A)(1). Former R.C. 2744.02(B)(4) provided:

{¶12} “*** political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a

2. R.C. 2744.01(C)(2)(i) provides: “A governmental function includes *** [t]he enforcement or nonperformance of any law.” Patrolman Tom Denvir filed the initial “Uniform Incident Report” in his capacity as a Windham Police Officer. Such an action falls directly within the function of law enforcement.

3. The actions leading to the instant suit occurred on December 15, 2002. R.C. 2744.02 was amended by 2002 S 106; however, this amendment was not effective until April 9, 2003. Because we are bound to apply the law in effect at the time of the alleged negligent acts occurred, the language of former R.C. 2744.02(B)(4) is operative in the current matter. *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 454, 2002-Ohio-6718.

governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, ***.”

{¶13} Specifically, appellant asserted she was injured by the negligence of a Windham employee, Officer Denvir, which occurred within the Windham Police Department and the Portage County Courthouse, i.e., buildings used in connection with a governmental function.

{¶14} The trial court rejected appellant’s argument. Specifically, the court stated in its judgment entry that appellant’s position:

{¶15} “*** stretches the exception to immunity set forth in R.C. 2744.02(B)(4) beyond its logical limits. Taken to the logical extreme, this argument would mean that anytime police did anything in a courthouse, immunity would not apply. Police officers do a lot of work in courthouses, including filing complaints and testifying in court. Disallowing immunity here would nearly negate the statutory immunity given to political subdivisions for governmental functions. This cannot result here.”

{¶16} We disagree with the trial court’s assessment. First, the trial court’s analysis is premised upon an inaccurate interpretation of former R.C. 2744.02(B)(4), viz., that accepting appellant’s allegations would universally abrogate statutory immunity for police officers whenever they are “working” in a courthouse. When read in its proper context, former R.C. 2744.02(B)(4) creates an exception to immunity where a party is *injured by the negligence* of a political subdivision’s employee that occurs within or on the grounds of a building used in connection with the performance of a governmental function. The trial court’s analysis presumes any and all actions of a police officer within

the confines of a courthouse would expose him or her to liability. As the former statute clearly states, an officer would be exposed to liability if and only if his or her actions *negligently cause injury* within or on the grounds of buildings used in connection with the performance of a governmental function. To the extent appellant properly pleaded an injury occasioned by the negligence of a political subdivision's employee which occurred within or on the grounds of a building used in connection with the performance of a governmental function, her allegations are sufficient to overcome the Civ.R. 12(C) exercise with respect to this step of the analysis.

{¶17} Next, the trial court stated:

{¶18} "Moreover, Plaintiff is claiming an exception to immunity based on an act in a government building that is not owned or controlled by Windham. Justice Lundberg Stratton noted in her concurring and dissenting opinion in the above cited case [*Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718] that the majority held that 'a political subdivision may be liable for any negligent act of an employee that occurs within or on the grounds of its buildings.' Clearly, the Portage County Courthouse is not a Windham building, and thus the case is distinguishable from Hubbard." (Emphasis sic.)

{¶19} We believe the trial court's assessment is again based upon an inaccurate interpretation of the former statute as well as an improper analysis of the decision in *Hubbard*. The Supreme Court in *Hubbard* held:

{¶20} "The exception to political-subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a

political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function. ***." *Id.* at syllabus.

{¶21} The trial court seized upon an inconsequential pronoun within the concurring and dissenting opinion of *Hubbard* to support its position that a building "used in connection with the performance of a governmental function" must be owned by the political subdivision in order for former R.C. 2744.02(B)(4) to apply. Neither the statute nor the majority's analysis in *Hubbard* supports the trial court's assessment.

{¶22} That said, appellant's complaint alleged Officer Denvir negligently failed to identify the proper wrongdoer before issuing a Summons and Complaint in connection with the allegations of a private citizen which led to her wrongful arrest and false imprisonment in wanton or reckless disregard of her rights. Accepting the material accusations as true, we believe appellant set forth facts which would fit within the exception set forth in former R.C. 2744.02(B)(4) and delineated by the Supreme Court in *Hubbard*. Thus, we hold, the trial court erred in awarding appellees' judgment on the pleadings in relation to R.C. 2744.02(B)(4).

{¶23} An additional matter pertaining to R.C. 2744.02(B)(4) deserves attention: Appellees argue that appellant's allegations pertaining to former R.C. 2744.02(B)(4) are deficient because she fails to allege the injury suffered and the alleged negligent act occurred on the same premises. The plain language of the statute does not support this narrow reading. The statute simply requires that an injury resultant from the negligence of a political subdivision's employee and that injury occur within or on the grounds of buildings used in connection with the performance of a governmental function. Thus,

we decline to hold former R.C. 2744.02(B)(4) mandates the negligence and the injury to occur in the same building.

{¶24} We must next examine whether appellees could legitimately reassert immunity under R.C. 2744.03. The trial court believed appellees could properly do so, reasoning:

{¶25} “*** while R.C. 2744.02 provides exceptions to immunity, R.C. 2744.03 provides ‘exceptions to exceptions.’ Subsection (A)(1) provides immunity to the political subdivision if the employee involved was engaged in the performance of a prosecutorial function. Subsection (A)(2) provides immunity if the conduct of the employee was authorized by law and/or was necessary or essential to the exercise of powers of the political subdivision. Certainly the filing of a criminal complaint is a prosecutorial function – initiating the prosecution process – and is also authorized by law.”

{¶26} We again disagree with the trial court’s analysis. R.C. 2744.03(A)(1) allows a political subdivision to reassert immunity “if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.” R.C. 2744.03(A)(2) provides immunity “if the conduct of the employee involved; other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.”

{¶27} Here, Patrolman Denvir is not a judge, a prosecutor, a member of the general assembly nor a quasi-functionary of any similar offices. Patrolman Denvir is a police officer and, as such, was engaged in law enforcement activities in filing his report

and Summons on Complaint.⁴ Accordingly, R.C. 2744.03(A)(1) does not apply to shield appellees from liability.

{¶28} Furthermore, R.C. 2744.03(A)(2) explicitly states that conduct “required” or “authorized by law” are shielded to the extent that the conduct giving rise to the claim was “other than negligent conduct.” The trial court ignored this predicate and, in so doing, allowed immunity to reattach simply because Patrolman Denvir’s conduct was authorized by law. This analysis is incomplete. Specifically, we believe R.C. 2744.03(A)(2), when read in its entirety, protects a political subdivision from the intentional acts of its employees. *Engleman v. Cincinnati Bd. of Edn.* (June 22, 2001), 1st Dist. No. C-000597, 2001 Ohio App. LEXIS 2728, at 11 (noting immunity reattaches under this provision for employee’s intentional torts via application of the canon of construction *expressio unius est exclusio alterius*, i.e., the inclusion of one thing implies the exclusion of another). That is, where a subdivision’s employee acts under the authority of law, but in doing so commits an intentional tort, the provision shields the subdivision from liability for the resulting injuries to others. *Id.*

{¶29} Here, even though false arrest and false imprisonment are intentional torts, appellant alleged appellees “acted negligently in performing their tasks when they knew or should have known that [appellant] was not the person who committed the offenses alleged ***.” To be sure, appellant was falsely arrested and falsely imprisoned as a result of Patrolman Denvir’s acts or omissions; however, we do not believe appellant’s allegations set forth adequate facts such that one could reasonably conclude

4. Although filing the complaint is a necessary link in the process of a criminal prosecution, our research reveals no case law indicating Officer Denvir’s actions could be framed as “prosecutorial” for purposes of R.C. 2744.03(A)(1).

that Patrolman Denvir's conduct was intentional. Accordingly, R.C. 2744.03(A)(2) does not apply to the instant matter.

{¶30} However, as we review the Civ.R. 12(C) exercise de novo, we believe R.C. 2744.03(A)(3) does apply to shield the Village and its police department from liability. That provision provides:

{¶31} "The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee."

{¶32} Here, Patrolman Denvir's actions were within his discretion with respect to enforcement powers by virtue of his duties as a police officer. By operation of the statute, immunity reattaches under the facts before this court. Thus, although we disagree with its substantive justifications, we believe the trial court did not err in awarding the Village and the police department judgment on the pleadings. Appellant's first assignment of error lacks merit.

{¶33} Appellant's second assignment of error asserts:

{¶34} "The trial court erred in finding no genuine issue of material fact remained regarding the reckless action of defendant Windham Patrolman Thomas Denvir."

{¶35} Summary judgment is proper where:

{¶36} "**** (1) no genuine issue of 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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389.

{¶37} The moving party to a Civ.R. 56 motion bears the initial burden of providing the court with a basis for the motion and identifying evidence within the record which demonstrate the absence of an issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 1996-Ohio-107. If the moving party satisfies its burden, the nonmoving party has the reciprocal burden of providing evidence to demonstrate an issue of material fact. If the nonmoving party fails to satisfy his or her burden, then summary judgment is appropriate. Civ.R. 56(E). Appellate court's review a trial court's award of summary judgment de novo. *Schnarrs v. Girard Bd. of Education*, 11th Dist. No. 2005-T-0046, 2006-Ohio-3881, at ¶13.

{¶38} Under her second assignment of error, appellant contends the trial court erred in awarding appellee, Patrolman Thomas Denvir, summary judgment because an issue of material fact remains regarding whether his acts or omissions in investigating the instant matter rise to the level of reckless misconduct.

{¶39} As noted above, appellant moved the trial court for leave to amend her complaint to include allegations that appellee Denvir acted "recklessly" and in "wanton disregard" of her rights. This motion was filed subsequent to appellee Village of Windham and appellee Windham Police Department being awarded judgment on the pleadings. In his motion for summary judgment, Patrolman Denvir argued he was immune from liability pursuant to R.C. 2744.03(A)(6), the statutory provision affording employees of political subdivisions immunity absent a specified demonstration (1) that

the employee's conduct was outside the scope of his or her employment, (2) that the employee's conduct occurred with malicious purpose, in bad faith, or in a wanton or reckless manner, or (3) that liability is expressly imposed by a separate section of the Revised Code. In response, appellant contended Patrolman Denvir was personally liable pursuant to R.C. 2744.03(A)(6)(b) because his conduct was wanton or reckless.

{¶40} "Wanton misconduct is the failure to exercise any care whatsoever." *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368. "Mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' *** Such perversity must be under such conditions that the actor must be conscious that his conduct will, in all likelihood, result in an injury." *Id.* at 356, citing *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97. Reckless misconduct may be understood as synonymous with "willful misconduct." *Hancock v. Ashenhurst*, 10th Dist. No. 03AP-1163, 2004-Ohio-3319, at ¶11, citing, *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 516. "Willful misconduct is also something more than negligence and it involves a more positive mental state prompting the injurious act than does wanton misconduct. *** [T]he intention relates to the misconduct, not to the result, and, therefore, an intent to injure need not be shown." *Id.* at 515. As such, willful or reckless misconduct involve "an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Tighe v. Diamond* (1948), 149 Ohio St. 520, 527. In short, recklessness involves a "perverse disregard of a known risk." *Hancock supra*, citing, *Poe v. Hamilton* (1990), 56 Ohio App.3d 137, 138.

{¶41} Under the guidelines of Civ.R. 56, there must be some evidence to demonstrate that Patrolman Denvir acted wantonly or recklessly. Given the state of the evidence, we cannot conclude that Patrolman Denvir exhibited the kind of "perversion of will" contemplated by the definitions of reckless or wanton misconduct. By implication, we further conclude the officer's conduct did not occur in perverse disregard for a known risk, i.e., with the appreciation of the probability of the injury which resulted.

{¶42} Accordingly, we hold, there is no genuine issue of material fact regarding whether Patrolman Denvir acted wantonly or recklessly in filing the report and summons on complaint against appellant.

{¶43} For the reasons set forth above, appellant's two assignments of error are overruled and of the Portage County Court of Common Pleas is affirmed.

DONALD R. FORD, P.J., concurs,

WILLIAM M. O'NEILL, J., dissents.

STATE OF OHIO
COUNTY OF PORTAGE

)
) **SS. FILED**
) COURT OF APPEALS SEVENTH DISTRICT

IN THE COURT OF APPEALS

DEC 04 2006

LAURA GATTEN VASQUEZ, LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY OHIO

Plaintiff-Appellant,

DEC 07 2006

JUDGMENT ENTRY

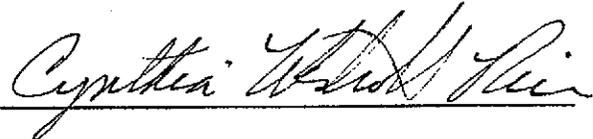
- vs -

CASE NO. 2005-P-0068

VILLAGE OF WINDHAM, et al.,

Defendants-Appellees.

For the reasons stated in the Opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.



JUDGE CYNTHIA WESTCOTT RICE

DONALD R. FORD, P.J., concurs,

WILLIAM M. O'NEILL, J., dissents.