[Cite as *Bush v. Community Care Ambulance Network*, 2012-Ohio-4458.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

RITA C. BUSH,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-A-0072**
- vs -	:	
COMMUNITY CARE AMBULANCE NETWORK, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2010 CV 1202.

Judgment: Affirmed.

Ryan M. Harrell and *Kevin L. Lenson*, Elk & Elk Co., Ltd., 6105 Parkland Boulevard, Mayfield Heights, OH 44124 (For Plaintiff-Appellant).

D. John Travis and *Holly Olarczuk-Smith*, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Rita C. Bush, appeals the decision of the Ashtabula County Court of Common Pleas granting Appellee Community Care Ambulance Network's motion for summary judgment. At issue is whether, in response to a motion for summary judgment, Bush provided sufficient evidentiary material to establish a question of fact as to whether conduct by paramedics of Community Care Ambulance Network

("CCAN"), in transporting Bush to the hospital, rose to the level of willful or wanton misconduct. For the following reasons, the judgment is affirmed.

{¶2} On November 30, 2008, Ashley Wickert and Carrie Hartley, paramedics from CCAN, were dispatched to Bush's home. Bush, weighing approximately 350 pounds, had passed out onto the floor from a syncopal episode. Upon arrival, the first squad phoned in for assistance with lifting Bush. After the lift-assist call was placed, Bush regained consciousness and complained of pain. Emergency medical services were administered to Bush. Soon thereafter, the second squad from CCAN, Mike Goodwell and Jake Schwenk, arrived on the scene. CCAN has a written protocol recommending that certain bariatric equipment be used to transport patients over 300 pounds. However, no such bariatric equipment was used in transporting Bush. Instead, the four paramedics placed Bush onto a standard backboard and lifted her onto a wheeled cot. Bush was strapped to the cot, though testimony differs with regard to the number of straps that were securely buckled. Bush testified during her deposition that two of the straps came undone.

{¶3} Bush was then carried out of her house on the cot by paramedics, though testimony differs as to the number of paramedics. Bush maintains only two paramedics carried her out; one male paramedic from the second squad was at the foot of the cot, and one female paramedic from the first squad was situated at the top. In evaluating CCAN's summary judgment motion, the trial court accepted that only two paramedics carried Bush. The entryway to the house contained an elevated porch, with five to seven steps to the ground level. While transporting Bush out of the house toward the steps, bystander Jeffrey Wheeler, who was at the Bush residence with two other

witnesses, testified during his deposition that he warned the duo about not being able to carry the cot down the steps. Wheeler stated he offered his assistance, but it was denied. As the two descended the steps, the cot veered to the right. At this point, testimony regarding the incident again varies. One version of the events is that the paramedics, aware of the ensuing difficulty in transit, slowly and gently lowered the cot to the ground, at which point Bush evidentially sustained injuries. Another version of the events is that the cot tipped, and as a result, Bush crashed to the ground. Again, in evaluating CCAN's summary judgment motion, the trial court accepted the latter version of events—that the cot tipped to the left and was dropped with Bush falling to the ground.

{¶4} Bush filed a complaint for monetary damages alleging only negligence and recklessness against CCAN and its Jane and John Doe agents for injuries sustained as a result of the fall. CCAN filed a motion for summary judgment on the grounds that emergency-services immunity was conferred via R.C. 4765.49. In its motion, CCAN first argued that Bush did not allege willful and wanton misconduct, and therefore, the complaint failed to state a cause of action whereby relief could be granted. CCAN additionally argued that, even if the complaint stated a valid claim, the paramedic's actions did not rise to the level of willful and wanton misconduct. Bush agreed that R.C. 4765.49 was applicable but, ignoring CCAN's first argument, contended the paramedics' actions constituted willful and wanton misconduct such that immunity would not apply. The trial court did not address CCAN's first argument. However, it found CCAN was entitled to summary judgment based on the immunity provision of R.C. 4765.49 because there was insufficient evidentiary material to establish a genuine issue

of material fact as to whether the paramedics' conduct rose to the level of willful or wanton misconduct.

{¶5} Bush now appeals the grant of summary judgment in favor of CCAN in her sole assignment of error, which states:

{¶6} "The court erred when it granted summary judgment in favor of defendant-appellee, holding that no material issue of fact existed regarding immunity of defendant-appellee."

{¶7} Bush argues that summary judgment was inappropriate because there are genuine issues of material fact as to whether the conduct constituted willful or wanton misconduct. Bush additionally argues that the trial court improperly decided factual questions.

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

{¶9} (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*., 50 Ohio St.2d 317, 327 (1977).

{¶10} To prevail on a motion for summary judgment, the moving party has the initial burden to affirmatively demonstrate that there is no genuine issue of material fact to be resolved in the case, relying on evidence in the record pursuant to Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If this initial burden is met, the

nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E). *Id*.

{¶11} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105 (1996). Thus, the court of appeals applies "the same standard as the trial court, viewing the facts in the case in a light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Viock v. Stowe-Woodward Co*., 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶12} R.C. 4765.49(A) confers qualified civil immunity to emergency medical personnel and agencies, stating, in relevant part:

> **{¶13}** A first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, *unless the services are administered in a manner that constitutes willful or wanton misconduct*. (Emphasis added.)

{¶14} Thus, R.C. 4765.49(A) limits prospective causes of action against emergency medical personnel and agencies strictly to "willful and wanton misconduct." It is clear that causes of action for mere negligence are completely barred by the statute.

{¶15} As a preliminary matter, it must be noted that Bush alleged in her complaint that the actions of the paramedics constituted "negligence and/or recklessness." She neither alleged the actions of the medical personnel constituted

willful and wanton misconduct, nor did she amend her complaint to subsequently include this allegation. In fact, Bush alleged willful and wanton misconduct for the first time in her brief in opposition to the motion for summary judgment. However, the trial court did not address this issue in its ruling on the motion for summary judgment. In addition, CCAN has not raised a cross-assignment of error before this court, pursuant to R.C. 2505.22, which provides:

{¶16} "In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part."

{¶17} Thus, even though it was referred to by CCAN in its brief and at oral argument, it is not proper to address this defense on review because of CCAN's failure to raise a cross-assignment of error. However, even if such a cross-assignment was raised, this issue would only be addressed, as provided in the statute, to prevent a reversal of the judgment in whole or in part. *See Parton v. Weilnau*, 169 Ohio St. 145, 170-171 (1959). ("There is nothing in the statute to indicate that such assignments of error shall necessarily be passed upon where, as here, the judgment of the Court of Appeals is being affirmed.")

{¶18} Thus, the principle determination on review is whether the evidentiary material submitted, viewed most strongly in Bush's favor, presents a question of fact regarding whether the actions of the CCAN employees amounted to "willful and wanton" misconduct. The statute only allows for liability if the conduct amounted to "willful and wanton."

{¶19} Willful misconduct implies an intentional deviation or disregard from a clear duty or a definite rule of conduct, a deliberate purpose not to discharge such duty, or the performance of a wrongful act with appreciation or knowledge of the likelihood of resulting injury. *Thompson v. Smith*, 178 Ohio App.3d 656, 2008-Ohio-5532, ¶41 (11th Dist.), quoting *Tighe v. Diamond*, 149 Ohio St. 520, 526 (1948). *See also Kovacic v. City of Eastlake*, 11th Dist. No. 2005-L-205, 2006-Ohio-7016, ¶74, quoting *Donlin v. Rural Metro Ambulance, Inc*., 11th Dist. No 2002-T-0148, 2004-Ohio-1704, ¶18. The word "willful" implies an intention relating "'to the misconduct and not merely to the fact that some specific act, such as operating an automobile, was intentionally done. * * * The intention relates to the commission of wrongful conduct, independent of the intent to use certain means with which to carry out such conduct.'" *Peoples v. Willoughby*, 70 Ohio App.3d 848, 851 (11th Dist.1990), quoting *Tighe v. Diamond*, *supra*, 526-527.

{¶20} OJI CV 401.41(1) reflects this case law:

{¶21} Willful misconduct means intentionally doing that which is wrong or intentionally failing to do that which should be done. The circumstances must also disclose that the defendant knew or should have known that such conduct would probably cause injury to the plaintiff. It is a general rule that every person may be presumed to intend the natural and probable consequences of his acts. Willful misconduct implies an intentional disregard of a clear duty or of a definite rule of conduct, a purpose not to discharge such duty, or the performance of wrongful acts with knowledge of the likelihood of resulting injury. Knowledge of surrounding

> circumstances and existing conditions is essential; actual ill will or an intent to injure need not be present.

{¶22} Wanton misconduct suggests a failure to exercise any care whatsoever toward the plaintiff to whom a duty of care is owed and a complete indifference to the consequences. *Peoples v. Willoughby*, 70 Ohio App.3d at 851. The probability that harm or injury would result from such failure is great, and the actor is conscious of such probability. *Fabrey v. McDonald Village Police Dept*., 70 Ohio St.3d 351, 356 (1994).

{¶23} OJI CV 401.41(2) similarly reflects this case law:

{¶24} Wanton misconduct differs from ordinary negligence in that it implies a failure to use any care for the plaintiff and an indifference to the consequences, when the probability that harm would result from such failure is great, and such probability is known, or ought to have been known, to the defendant(s).

{¶25} Willful and wanton misconduct, therefore, present a much greater standard than mere negligence. This court has previously distinguished these standards in *Donlin v. Rural Metro Ambulance, Inc.*, 2004-Ohio-1704, at ¶19:

{¶26} We must also distinguish negligent actions from willful or wanton misconduct, as negligence is afforded immunity under R.C. 4765.49(A). First, with respect to wanton misconduct, it is axiomatic that '"mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor."' *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639

> N.E.2d 31. * * * Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury. * * * As for willful misconduct, we note that 'the difference between negligence and willfulness is a difference in kind and not merely a difference in degree, and, accordingly, negligence cannot be of such degree as to become willfulness.' *Roszman* [*v. Sammett* (1971), 26 Ohio St.2d 94, 96].

{¶27} In this case, construing the evidence in a light most favorably to Bush, the conduct of the paramedics simply does not rise to the level of willful and wanton misconduct. There is no evidence that the paramedics acted perversely and without any regard for Bush's safety. Instead, the record indicates the paramedics exercised at least some level of care when attempting to transport Bush.

{¶28} In its motion for summary judgment, CCAN submitted sufficient evidentiary material to shift the burden to establish a genuine issue of material fact to Bush. CCAN established that it qualified for statutory immunity. It submitted an affidavit and report from Hartley averring that care was exercised, and the crew simply could not stabilize the cot as it began to tip. It also submitted a portion of Bush's deposition transcript where Bush affirmed that she did not have any reason to believe the paramedics thought she was going to be injured as they were taking her out of her home.

{¶29} In her response, Bush did not present sufficient evidentiary material to establish that immunity did not apply. Bush argues the paramedic's conduct constituted willful or wanton misconduct because they did not follow the written and established

protocol for transporting bariatric patients. This protocol was attached to Bush's summary judgment opposition brief. The protocol states, in pertinent part:

> **{¶30}** In managing a patient with weight over 300 lbs., consider moving the patient with at least 4 individuals to assist. At the scene, as many EMS personnel as can be mobilized may be supplemented by police or other safety personnel as appropriate. If 4 individuals are not available, mutual aid may be required.
>
> **{¶31}** * * *
>
> **{¶32}** The patient is to be placed on at least 2 (double) backboards or other adequate transfer device for support.
>
> **{¶33}** A 'Slip' device [special material padding with gel inside] should be used when moving all bariatric patients for the safety of the crew and patient.
>
> **{¶34}** The patient is to be loaded on a cot that is load rated for the weight of the patient.

{¶35} However, this protocol does not establish a genuine issue of material fact as to the issue of willful or wanton misconduct. Under Bush's facts, Bush was injured because the cot was dropped by an insufficient number of individuals assisting in the transportation of the cot.

{¶36} Thus, in relation to the attached protocol, the injury was not caused by a failure to use a double backboard. There is some dispute about whether a backboard of any kind was used. However, there is no suggestion that the cot would not have tipped

if a double backboard had been used, as opposed to a regular backboard or no backboard at all.

{¶37} The injury was not caused by a failure to use a slip device. In fact, Wickert testified that the use of a "slip" device, while recommended in some situations pursuant to protocol, was not appropriate in this situation because a backboard and C-collar on the neck were used.

{¶38} The injury was not caused by a failure to use a load-rated cot. Wickert testified that CCAN's regular cots are rated for up to 600 pounds; thus, Bush was loaded on a cot that was load rated for the patient's weight. Wickert also testified that, when going in and out of residences, a bariatric cot is not always preferable because it is wider than a standard cot, making maneuverability difficult through doorways and passages.

{¶39} Thus, construing the evidence most strongly in Bush's favor, only a departure from the first of the cited protocols—moving a bariatric patient with four people—had any bearing on the cause of the injury because it is the only one attributable to the cause of the accident. However, the relevant section of the protocol relied on by Bush is discretionary, directing EMS personnel to the action they should "consider" taking. By its express language, the use of four persons to move the patient is recommended, though not required.

{¶40} Certainly it can be argued, as Bush does, that the paramedics were aware of the protocol for transporting bariatric patients, and they deliberately employed other methods. However, as explained above, the intention must be related to the misconduct. The record indicates that the paramedics evaluated the situation and

performed emergency services that they felt would most likely result in safe transport of the patient. Essentially, the record is devoid of any evidence that the paramedics intentionally disregarded a clear duty, deliberately failed to discharge any duty, or performed a wrongful act with knowledge of the likelihood of resulting injury. The paramedic's inaction in this case, if any, cannot be considered "willful."

{¶41} Additionally, there is no issue as to whether the paramedic's conduct constituted wanton misconduct: there is simply no evidence to support the proposition that there was a failure to exercise any care with a complete indifference to any consequences. Again, the converse is true: the paramedics took care to supply Bush with oxygen, check for signs of visible trauma, and stabilize her neck by way of a C-collar. When loaded onto the cot, the paramedics executed a "standing take down" whereby they assisted Bush in an up-right position, then slowly pulled her up to standing position before lifting her to the cot.

{¶42} Most importantly, it is undisputed the paramedics exercised *some* care in that they recognized the difficulty the two females might have in transporting Bush. Bystander Jeffrey Wheeler specifically described the two females as having smaller builds. Therefore, the initial responders called for additional help from a second unit. When the additional help arrived, it is undisputed that one of the male backup paramedics took the majority of the load at the foot of the cot. Thus, the record indicates the paramedics exercised some care when transporting Bush. The initial responders called for help, and indeed, the requested help was used when a male from the second unit inserted himself into transportation efforts.

{¶43} Bush cites two cases where willful and wanton misconduct was found to be a question for the jury and emergency-service personnel immunity did not apply. However, a flagrant disregard to exercise any care and an utter indifference to the consequences were plainly evident in both cases.

{¶44} In *Toles v. Regional Emergency Dispatch Ctr.*, 5th Dist. No. 2002CA00332, 2003-Ohio-1190, a 9-1-1 operator took a report of an assault in progress, though no weapon was reported. *Id.* at ¶7. Evidence in the record indicated that, instead of informing the police, the operator disregarded the call and simply did nothing. *Id.* at ¶8 & ¶9. Sometime after the call was placed, the assault escalated and the victim and her unborn child were ultimately stabbed to death. *Id.* at ¶6. The Fifth Appellate District concluded the matter of willful and wanton misconduct was a question for a jury and reversed summary judgment.

{¶45} In *Weber v. City Council*, 2d Dist. No. 18329, 2001 Ohio App. LEXIS 465 (2001), two emergency medical technicians ("EMT") were dispatched to a scene where a man had fallen to the ground, reportedly in the midst of a stroke. *Id.* at *3. Testimony indicated that when the EMTs arrived, they told the victim that if he wanted to go to the hospital, he would have to walk to the stretcher himself. *Id.* Further testimony indicated that the victim tried to walk to the stretcher, but he was unable to walk that distance. *Id.* Additionally, the victim told the EMTs he thought he was having a stroke and was seeing double vision. *Id.* at *4. The EMTs dismissed the call as a mere "panic attack" and left the scene. *Id.* at *3. The EMTs conversely testified that the man refused to be transported to the hospital. *Id.* at *5. When the victim awoke the next day, he could not hear anything. *Id.* at *4. He was taken to the hospital where it was determined he had

suffered a stroke. *Id.* The Second Appellate District concluded that if the jury believed that the EMTs thought the victim was having a stroke and failed to transport him, such conduct could constitute willful and wanton misconduct. *Id.* at *11.

{¶46} The case sub judice, while unfortunate, does not rise to the high standard of willful and wanton misconduct that could be found by a jury in *Toles* and *Weber*. If anything, these cases demonstrate that the willful and wanton misconduct standard is extremely high. These cases reflect a potential jury question in that one version of events involves a total lack of care and utter indifference to the consequences. Here however, even after construing all evidence in a light most favorable to Bush, reasonable minds can come to but one conclusion in this case: that the paramedics did not engage in willful or wanton misconduct.

{¶47} Bush's sole assignment of error is without merit.

{¶48} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.