[Cite as *Webber v. Lazar*, 2015-Ohio-1942.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

MARK WEBBER, et al.	:	
	:	Appellate Case Nos. 26188
Plaintiff-Appellees	:	26463
	:	
v.	:	Trial Court Case No. 2013-CV-2495
	:	
GEORGE LAZAR, et al.	:	(Civil Appeal from
	:	Commons Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 15th day of May, 2015.

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HALL, J.

{¶ 1} George Lazar appeals from the trial court's denial of his motion for summary

judgment on the basis of statutory immunity under R.C. Chapter 2744.

{¶ 2} Lazar advances two assignments of error. First, he contends the trial court erred in failing to find immunity under R.C. 2744.03(A)(6). Second, he asserts that the trial court erred in failing to find immunity under R.C. 2744.05(A)-(C).

{¶ 3} The present appeal stems from a collision between a Chevy Tahoe that Lazar was driving and a motorcycle driven by plaintiff-appellee Mark Webber. At the time of the collision, Lazar was traveling with two companions from Warren, Ohio to St. Louis, Missouri to attend a high school science competition. Lazar, a retired teacher, was towing a trailer containing robotic equipment for the competition. Students attending the competition traveled separately by bus.

{¶ 4} Shortly after dark, Lazar exited Interstate Route 70 onto Brandt Pike in Huber Heights. That portion of Brandt Pike had two lanes in each direction and a center turn lane. Lazar proceeded south in the left-hand lane closest to the center turn lane. Webber and a friend, Tom Bett, were behind Lazar on motorcycles. While looking for somewhere to get gas and food, Lazar drove slowly on Brandt Pike. Upon seeing a gas station to his right, Lazar commenced a right-hand turn from the left lane. In his deposition, Lazar stated that he checked his mirror before making the turn and did not see anyone. He also testified that he used his turn signal. Bett testified in his deposition, however, that Lazar did not signal. In any event, Webber attempted to pass Lazar's truck and trailer on the right as Lazar made the right-hand turn. Webber was unable to stop his motorcycle and collided with the right side of the Chevy Tahoe. Webber sustained injuries as a result of the accident and was hospitalized. Lazar was cited for a marked-lanes violation and was found guilty.

{¶ 5} Webber and his wife filed a tort suit against Lazar and the Warren City School District in April 2013.[1] Lazar later sought summary judgment on the basis of "volunteer" immunity under R.C. 2305.38. Alternatively, he sought partial summary judgment limited to his status as an "employee" of the Warren City School District. The trial court found Lazar not entitled to summary judgment on the grounds that he was acting as a statutory volunteer who enjoyed complete immunity under R.C. 2305.38. The trial court found Lazar entitled to judgment as a matter of law, however, with regard to his alternative request for a declaration that he was acting as an employee of the Warren City School District at the time of the accident. The trial court noted that unresolved issues remained regarding whether Lazar met the requirements for immunity as an employee of a political subdivision under R.C. Chapter 2744.

{¶ 6} Lazar promptly filed a second summary judgment motion, arguing that he was entitled to immunity under R.C. 2744.03(A)(6) and R.C. 2744.05(A)-(C). While this motion was pending below, Lazar appealed from the trial court's ruling on his first motion. On June 27, 2014, this court remanded the case to the trial court for the limited purpose of ruling on Lazar's second summary judgment motion. On October 17, 2014, the trial court filed a decision, order, and entry denying the second summary judgment motion. With regard to immunity under R.C. 2744.03(A)(6), the trial court found conflicting testimony and, therefore, genuine issues of material fact "as to whether and when Defendant Lazar signaled his intent to turn right into the gas station, and whether Defendant Lazar merged

[1] Webber's wife was a plaintiff for purposes of a loss-of-consortium claim.

from the left to the right lane before continuing to turn right into that gas station or rather turned abruptly from the left lane and across the right lane of traffic and into the gas station entrance." (Oct. 17, 2014, Decision, Order, and Entry at 12). The trial court reasoned "that those disputed factual issues may be material to the question of whether Defendant Lazar's conduct leading to the subject accident was 'reckless' and not merely negligent, such that his actions are excepted from immunity under R.C. §2744.03(A)(6)(b)." (*Id*.). The trial court declined to hold that Lazar did not act recklessly as a matter of law. (*Id*. at 13). Finally, with regard to immunity from certain damages under R.C. 2744.05(A)-(C), the trial court denied summary judgment without prejudice. It expressed its preference to consider damages issues only after judgment. (*Id*.). This appeal followed.

{¶ 7} In his first assignment of error, Lazar contends the trial court erred in denying him summary judgment on the basis of immunity under R.C. 2744.03(A)(6). Specifically, he claims the trial court applied an incomplete definition of "recklessness" and incorrectly found issues of fact as to whether he was reckless at the time of the accident.

{¶ 8} "Immunity from a civil suit presents a purely legal issue that may properly be determined by summary judgment." *Thorp v. Strigari*, 155 Ohio App.3d 245, 2003-Ohio-5954, 800 N.E .2d 392, ¶ 10 (1st Dist.), citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992). Summary judgment should be entered if the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" and "that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or

stipulation construed most strongly in the party's favor." Civ.R. 56(C). We review the trial court's summary judgment decision de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶ 9} The issue before us is whether the trial court correctly found genuine issues of material fact concerning Lazar's immunity under R.C. 2744.03(A)(6)(b), which "provides immunity to employees of a political subdivision for acts that are not committed in a wanton or reckless manner." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 39. As noted above, the trial court found factual disputes about whether Lazar signaled before moving from the left-hand lane and whether he merged into the right-hand lane before commencing his right turn as opposed to abruptly turning right from the left-hand lane. The trial court opined that whether Lazar acted negligently or recklessly may turn on resolution of these factual disputes. It then reasoned:

> Given Second District jurisprudence counseling that the distinction between recklessness and negligence is a decision best left to the jury, "based on the totality of the circumstances," see *Whitfield [v. City of Dayton]*, [2d Dist. Montgomery No. 21072,] 2006-Ohio-2917, ¶39, the Court declines to hold as a matter of law that Defendant Lazar's actions did not evince "a 'conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." [Citations omitted]. To the contrary, this Court finds that a reasonable trier of fact could conclude that Defendant Lazar's admittedly "risky" maneuver from the left lane and across

> the right traffic lane while towing a trailer exhibited indifference to the obvious risk that a vehicle traveling in the right lane might be unable to avoid colliding with the truck and/or the trailer he was operating. Defendant Lazar's motion for judgment in his favor as a matter of law under Civ.R. 56 on the basis of R.C. §2744.03(A) immunity therefore is not well taken.

(Oct. 17, 2014, Decision, Order, and Entry at 13).

{¶ 10} On appeal, Lazar contends he did not act recklessly, as a matter of law, even if we accept arguendo that he did not signal and that he turned directly from the left-hand lane without first merging into the right-hand lane.[2] In making this argument, Lazar also asserts that the trial court overlooked a definition of recklessness that requires "a perverse disregard for a known risk." Conversely, Webber maintains that the trial court properly used a definition of recklessness articulated by the Ohio Supreme Court in 2012 in *Anderson*, supra. Applying that definition, Webber claims that trial court correctly found genuine issues of material fact for trial.

{¶ 11} In *Anderson*, the Ohio Supreme Court clarified that "willful," "wanton," and "reckless" misconduct are not functionally equivalent as used in R.C. Chapter 2744. The majority explained that "these degrees of care have been confused, but they have different meanings, involve different degrees of culpability, and are not interchangeable." *Anderson* at ¶ 3. Therefore, *Anderson* disavowed prior case law suggesting that they are "equivalent standards." *Id*. at ¶ 31. The majority then proceeded to provide the following

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[2] If Lazar is correct, then the disputed issues of fact the trial court found would not preclude summary judgment. As set forth above, the trial court found conflicting testimony about whether Lazar signaled before turning and whether he merged into the right-hand lane before commencing his turn. For present purposes, we will resolve these factual disputes against Lazar and assume that he made a right turn directly from the left-hand lane without signaling.

definitions:

> Willful misconduct implies 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 purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. * * *
>
> Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result. * * *
>
> Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. * * *.

Id. at ¶ 32-34.

{¶ 12} After setting forth the foregoing definitions, the *Anderson* court proceeded to flesh out the meaning of recklessness. With regard to violations of statutes or ordinances (which would include the traffic violations at issue here), the majority stated: "Further, it is well established that the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se * * * reckless conduct, but may be relevant to determining the culpability of a course of conduct." (Citations omitted). *Id*. at ¶ 37. The majority added: "'In order that the breach of [a] statute constitute reckless disregard for the safety of those for whose protection it is enacted, the statute must not only be intentionally violated, but the precautions required must be such that their omission will be recognized as involving a high degree of probability that serious harm will

result.'" *Id*. at ¶ 38, quoting Restatement of the Law 2d, Torts, Section 500, Comment e (1965). Absent evidence that a tortfeasor knew his violations "'in all probability'" would result in injury, "'evidence that policies have been violated demonstrates negligence at best.'" *Id.,* quoting *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 92, quoting *Fabrey v. McDonald Village Police Dept*., 70 Ohio St.3d 351, 639 N.E.2d 31 (1994).

{¶ 13} In a case that involved R.C. 2744.03(A)(6) and applied *Anderson*, this court stated: "'Recklessness is a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in injury.'" *Granato v. Davis*, 2d Dist. Montgomery No. 26171, 2014-Ohio-5572, ¶ 22, quoting *O'Toole* at paragraph three of the syllabus. In another case, *Seege v. Smith*, 2d Dist. Montgomery No. 26210, 2014-Ohio-5450, which also involved R.C. 2744.03(A)(6) and applied *Anderson*, this court recognized that the determination of recklessness typically is within the province of the jury, but that summary judgment remains appropriate where a defendant's conduct fails to demonstrate a disposition to perversity. (Citations omitted). *Id*. at ¶ 35; *see also Ellis v. Greater Cleveland R.T.A*., 2014-Ohio-5549, 25 N.E.3d 503 (8th Dist.), ¶ 29 ("We recognize that the determination of recklessness is typically within the province of the jury. However, the standard for showing recklessness is high and, given the facts of this case, we are unable to conclude that [the tortfeasor's] conduct demonstrated a disposition to perversity. Accordingly, we find that the evidence does not support a claim of recklessness[.]").

{¶ 14} On appeal, the parties dispute whether the trial court erred in failing to apply

a "perverse regard" standard to determine whether Lazar's conduct could constitute recklessness. Although this court applied that standard post-*Anderson* in *Granato*, Webber insists that recklessness does not always involve a perverse disregard of a known risk. We need not resolve that issue, however, because it is beyond dispute that *Anderson's* definition of recklessness requires an actor to be aware that his conduct involves a high probability of resulting injury. *Anderson* at ¶ 38; *Granato* at ¶ 22.

{¶ 15} Construing the evidence and all reasonable inferences in Webber's favor, as we must in the context of Lazar's summary judgment motion, we see no genuine issue of material fact as to whether Lazar consciously disregarded or was indifferent to a known risk that his conduct involved a high probability of injuring someone. Viewed in Webber's favor, the evidence establishes that Lazar was driving slowly in the left-hand lane shortly after dark. (Bett depo. at 27-28). Without signaling, he made a right turn directly from the left-hand lane. (*Id*. at 28-33). Just before Lazar did so, Webber pulled out from behind Lazar's truck and trailer, attempting to pass on the right. (*Id*.). Webber had "no place to go" when Lazar turned and Webber hit the passenger side of Lazar's truck. (*Id*. at 33). Lazar provided uncontroverted testimony that there was little traffic on the road, that he had checked his side-view mirror before commencing the turn, and that he had not seen anyone in the right-hand lane. (Lazar depo. at 15, 18, 22). Bett confirmed that there were no other vehicles in the right-hand lane before Webber attempted to pass. (Bett depo. at 29). It appears, then, that Lazar checked his side-view mirror just before Webber pulled his motorcycle out from behind the truck and trailer.

{¶ 16} Although Lazar admitted that turning right from the left-hand lane was "risky" (Lazar depo. at 20), we do not believe a rational trier of fact could find, on the facts

before us, that his conduct involved a *high probability* of hurting someone. Lazar was traveling slowly with little traffic present, and he checked his side-view mirror before commencing the turn. He undoubtedly acted negligently and created some risk by turning from the wrong lane without signaling. But we see no basis to conclude that "in all probability" an injury would result. To the contrary, it was not probable that a motorcycle (or any vehicle) would pull out from behind Lazar and attempt to pass just after Lazar checked his mirror and just before Lazar commenced his turn. This unfortunate sequence of events did come to pass, of course, but "[w]e must apply the law without consideration of emotional ramifications and without the benefit of 20—20 hindsight." *O'Toole* at ¶ 76. Even viewing the evidence in Webber's favor, Lazar's conduct does not meet the high standard for recklessness as a matter of law. Consequently, the trial court erred in denying his motion for summary judgment on the issue of statutory immunity. The first assignment of error is sustained.

{¶ 17} Having found that Lazar is entitled to immunity from suit, we overrule as moot his second assignment of error, which raises an issue concerning immunity from certain types of damages.

{¶ 18} The trial court's judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

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WELBAUM, J., concurs.

DONOVAN, J., dissenting:

{¶ 19} I disagree. I would affirm the well-reasoned denial of summary judgment rendered by the trial court. There are facts in this record which arguably would establish

more than simple carelessness, i.e., negligence. The "risky maneuver" admitted to by Lazar need not create a risk to a specific person, but an unjustifiable risk of harm to others on the roadway. "Reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the risk, but the actor does not desire harm." See Black's Law Dictionary 1298-1299 (8th Ed. 2004).

{¶ 20} An actor can be found to be reckless either based on his actual knowledge of a risk of harm or under an objective standard (that the risk is obvious). See generally Restatement of the Law 2d, Torts, Section 500 (1965). Comment *f* to Section 500 contrasts recklessness and intentional misconduct: "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." Comment *a* to Section 500 adds that " * * * the risk must itself be an unreasonable one under the circumstances." As noted by the trial court, Lazar admitted turning right from a center-thru lane. Further, Lazar acknowledged this is a risky maneuver.

{¶ 21} As we recognized in *Seege v. Smith*, the determination of recklessness is typically within the province of the jury. In *Carder v. Kettering*, Montgomery App. No. 20219, 2004-Ohio-4260, ¶ 22, quoting *Hunter v. Columbus* (2000), 139 Ohio App.3d 962, 969, 746 N.E.2d 246, we emphasized "the line between recklessness and negligence is often fine."

{¶ 22} Accepting arguendo that Lazar did not signal and that he turned directly from the left-hand lane without first merging into the right-hand lane, such facts, if established, create genuine issues of material fact which warrant jury consideration.

{¶ 23} Construing the evidence most strongly in Webber's favor, reasonable minds can come to different conclusions on the issue of recklessness. I would affirm the

denial of summary judgment.

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