[Cite as *Bates Recycling, Inc. v. Cygnet Fire Dept.*, 2012-Ohio-4185.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Bates Recycling, Inc.	Court of Appeals No. WD-11-060
Appellant	Trial Court No. 2010CV1073
v.	
Village of Cygnet Fire Department, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: September 14, 2012

* * * * *

John C. Filkins, for appellant.

Teresa L. Grigsby and Anastasia K. Hanson, for appellees.

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HANDWORK, J.

{¶ 1} This appeal is from the September 1, 2011 judgment of the Wood County Court of Common Pleas, which granted summary judgment to appellees, Village of Cygnet Fire Department and Andy Socie, a firefighter, and dismissed the claims of

appellant, Bates Recycling, Inc. for monetary and injunctive relief. Upon consideration of the assignment of error, we affirm the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

> THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION FOR SUMMARY JUDGMENT FOR THERE EXIST GENUINE ISSUES OF MATERIAL FACT WHICH PRECLUDE SUMMARY JUDGMENT.

{¶ 2} Appellant is a metal recycling business and owner of a CAT 235 Series B excavator, which is used daily in appellant's business operation. Appellant brought suit against appellees asserting an unspecified tort claim to recover $25,000 for the damage appellees caused to appellant's excavator while using the excavator, without appellant's permission, to assist in a firefighting operation. Appellant also sought an injunction to prevent appellees from entering upon appellant's premises again and using its property or equipment for firefighting purposes.

{¶ 3} Appellees moved for summary judgment arguing they are statutorily immune from liability under R.C. Chapter 2744 and also that appellant is not entitled to injunctive relief. Appellant opposed the motion arguing that there are material questions of fact that must be determined at trial, i.e., whether Socie and the fire department gained access to and used the excavator for a malicious purpose, in bad faith, or in a wanton or reckless manner, which would bar the claim of statutory immunity, and whether an injunction should be issued. Appellant also filed a memorandum in response to the reply memorandum of appellees arguing that the use of the excavator constituted a

governmental taking of private property. The trial court found that the surreply was filed without leave of court and the taking issue was immaterial to the claims raised in appellant's complaint and the motion for summary judgment. Therefore, the surreply was stricken from the record.

{¶ 4} The following depositional testimony was presented. Luke Swartz, the Fire Chief for the village of Cygnet, testified the fire department was called to a fire in the very early morning hours on October 3, 2010, at appellant's property, which was being used as a scrap yard. The fire department had previously been called to put out fires on the property and the chief recalled that some of those fires were intentionally started. He believed this was also an arson fire.

{¶ 5} Swartz's main concern upon arrival on the scene was a 10-foot x 12-foot x 10-foot pile of what appeared to be acetylene canisters within ten feet of the fire and a fire which was 25 feet high. He instructed all the firefighters to keep an eye on the canisters and to keep them cool because they were pressurized and could explode. He was also concerned there were high tension wires above the fire that could break apart and fall on the canisters. Other concerns were a hole on the south side of the pile of canisters and sharp objects under their feet that could penetrate their boots.

{¶ 6} Although the flames had been extinguished within ten minutes, Swartz was concerned there was no way to ensure that it would not rekindle without expending a great deal of water over a long period of time. He recalled talking to Andy Socie on several occasions that morning about using an excavator found on the property to rake out the debris and extinguish the fire. Swartz did not want to use the excavator because it

was an expensive piece of equipment and belonged to appellant. Eventually, he did direct Socie to use the excavator because there was no way to extinguish the fire safely and quickly.

{¶ 7} Swartz knew that Socie was an equipment operator and Swartz observed Socie start up the machine without hesitating to find where the controls were located. While no water was sprayed directly on the excavator's rake, it did get wet from the water being sprayed on the fire. Socie used the excavator for 10 to15 minutes to rake the pile two or three times. Other firefighters used a thermal imaging camera to ensure the temperature of the pile was low enough to quit raking it. Had they not used the rake, the fire department would have expended approximately another 36 hours to verify the fire would not rekindle. Swartz did not want to make the volunteer firefighters have to be away from their other jobs for that length of time. He also worried about the canisters exploding if the fire rekindled.

{¶ 8} Socie testified he has worked as a millwright and pile driver, using heavy equipment, for the last 11 years. For the prior four years, he had been using excavators like the one involved in this case. His training consisted of basic hands-on working with the machine after a basic overview of how it operated. He had worked a 245 CAT excavator and the one he used to fight the fire was the smaller 235 model. But, he had never operated an excavator like appellant owned with a rake.

{¶ 9} While other firefighters checked to make sure all the flames were out, Socie walked back to the fire station and retrieved his universal CAT keys from his truck to unlock the door of the excavator. When he started the excavator, Socie did not notice any

damage to the excavator and he did not observe anything unusual in the use of the excavator or any blackening or bending of the rake during its use. He had no idea of the temperature rating for the rake or the hydraulic connections regarding temperature exposure, but believed the equipment would have been rated for several thousand degrees. He had suggested using the rake because he knew it would be a faster and safer way to fully extinguish the fire.

{¶ 10} Socie operated the excavator following the directions of other firefighters who were checking the temperature of the area and spraying water on the debris. He recalled being told that the area was less than 100 degrees. His main concern was not to expose the rake to any open flames. Socie believed he raked the pile three times over a period of ten minutes. As he worked, he moved the rake over the pile about five feet above the pile, and then brought the rake down and pulled the top of the pile toward the excavator. Only the very end of the rake (about one foot) was in contact with the moving debris. After Socie was done, he returned the excavator to the same spot where he had found it. He did not observe any leaking of fluid when he saw the excavator later that morning.

{¶ 11} When Swartz and Socie returned to the site approximately 12 hours later, Christopher Bates, the owner of Bates Recycling, complained the front and side windshields were cracked and there was a vibration in a pump. Socie could not remember if the cracks in the glass were there the night before or not. The owner started up the excavator to demonstrate the vibration, but it did not occur. Socie did not believe he damaged the excavator.

{¶ 12} Bates testified that there had been prior fires on the premises as a result of employees using a cutting torch and igniting leaves and when trucks were on fire as they entered the premises. He also described his extensive knowledge of heavy equipment operation and maintenance. He valued the excavator at approximately $70,000 to $80,000. Bates had operated the excavator on Wednesday afternoon, two days prior to the fire, and it worked fine.

{¶ 13} Bates first noticed the damage when he drove by the morning of the fire. He observed the glass was broken, the end of the stick was scorched, and it was parked differently than how he had left it. He noticed that something was vibrating when he started the excavator, but did not believe it was a major issue. He did not try to run the excavator that day. When Bates saw evidence of a fire in the yard, he contacted the fire department and Socie told Bates that he had used the excavator to knock down the flames. Socie also admitted he had only had experience operating a mini-excavator.

{¶ 14} Ultimately, Bates determined the damage to the excavator included: broken glass, overheated cylinder, stick, bucket linkage, quick coupler and rake, which led to leaking in the cylinder and quick coupler and weakened metal. He also discovered the dogbones were bent as a result of an inexperienced operator. Even after Bates repaired the excavator, he found that it does not operate correctly.

{¶ 15} The trial court determined that summary judgment should be awarded to the village of Cygnet Fire Department based upon the defense of governmental immunity. The court determined that the fire department, a governmental entity, was engaged in a governmental function. Therefore, the general grant of immunity under

R.C. 2744.02(A)(1) applied and precluded liability against appellee. The court further found that appellant was unable to demonstrate that any of the exceptions under R.C. 2744.02(B) applied. The court held that the exception for wanton operation of a motor vehicle, discussed in *Burlingame v. Estate of Burlingame,* 5th Dist. Nos. 2010-CA-00124 and 2010-CA-00130, 2011-Ohio-1325, is not applicable because an excavator is not a motor vehicle under R.C. 2744.01(E).

{¶ 16} As to Socie's individual liability, the court held that he also had immunity under R.C. 2744.03(A)(6). Furthermore, the court found none of the exceptions to immunity applied because the evidence was undisputed that Socie acted with prudence and in good faith. At most, the evidence demonstrated that Socie may have acted negligently rather than maliciously, wantonly, recklessly, or in bad faith.

{¶ 17} Finally, the court denied appellant's request for an injunction on the ground that appellant had failed to prevail on the merits of the case, failed to demonstrate that he could suffer irreparable harm without the injunction, and an injunction would not serve the public interest.

{¶ 18} On appeal, appellant argues in his sole assignment of error that the trial court erred when it failed to find that there were genuine issues of material fact and improperly granted summary judgment to appellee. Appellant argues that there are conflicting facts regarding whether Socie acted maliciously, in bad faith, or in a wanton or reckless manner.

{¶ 19} Appellant also argued in one sentence that there were genuine issues of material fact related to whether appellees should be enjoined from making use of

appellant's property in the future but failed to expound upon this argument. Whether or not Socie's conduct fit within the exception to statutory immunity was not relevant to the issue of whether an injunction could be issued against appellees to prevent future use of appellant's equipment. We do not reach the second issue because appellant did not properly set forth arguments related to this claimed error in its appellate brief.

{¶ 20} The appellate court reviews a trial court's decision to grant summary judgment de novo. *Doe v. Shaffer,* 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Pursuant to Civ.R. 56(C), a party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show 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." Therefore, summary judgment is appropriate only where (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) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Because summary judgment is a procedural device to terminate litigation, it should only be imposed after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 604 N.E.2d 138 (1992). Self-serving testimony which baldly contradicts the evidence offered by the moving party is insufficient to create a genuine issue of fact.

Citibank v. Eckmeyer, 11th Dist. No. 2008-P-0069, 2009-Ohio-2435, ¶ 60, and *State ex rel. Todd v. Felger*, 7th Dist. No. 06 CO 38, 2007-Ohio-2065, ¶ 22, *rev'd on other grounds*, 116 Ohio St.3d 207, 2007-Ohio-6053, 877 N.E.2d 673.

{¶ 21} Generally, R.C. 2744.02(A), provides: "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." Appellant does not dispute that appellee is a political subdivision. A government function includes firefighting. R.C. 2744.02(C)(2)(a).

{¶ 22} Exceptions to the general grant of immunity to political subdivisions are set forth in R.C. 2744.02(B). There are five exceptions and appellant contends one is relevant to this case. R.C. 2744.02(B) provides a political subdivision is liable for damages caused by negligent operation of a motor vehicle with two exceptions for police and firefighters responding to emergency calls where their operation of the motor vehicle did not rise to the level of willful or wanton misconduct.

{¶ 23} The trial court held that appellant had failed to demonstrate that this exception is applicable in this case. We agree, as a matter of law, that this exception is not applicable to this case because Socie was not operating a motor vehicle defined by R.C. 2744.01(E) and R.C. 4511.01 as

> every vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires, except motorized bicycles, road rollers, traction engines, power shovels, power cranes, and

> other equipment used in construction work and not designed for or employed in general highway transportation, hole-digging machinery, well-drilling machinery, ditch-digging machinery, farm machinery, and trailers designed and used exclusively to transport a boat * * *.

Therefore, we find that the trial court did not err in granting summary judgment to the village of Cygnet Fire Department.

{¶ 24} As to Socie, appellant contends statutory immunity is not available because Socie acted "with malicious purpose, in bad faith, or in a wanton or reckless manner." Appellant contends that it presented evidence Socie was untrained and lacked the qualifications to use this type of excavator, which caused damage to the excavator. Furthermore, there was evidence that there was no emergency and the decision to use appellant's excavator was based upon a desire to quickly prevent the fire from reigniting.

{¶ 25} An individual firefighter as the employee of a political subdivision is also protected with immunity unless the employee acts outside the scope of his employment, acts "with malicious purpose, in bad faith, or in a wanton or reckless manner," or a statute expressly imposes civil liability upon the employee. R.C. 2744.03(A)(6) and *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 47. When summary judgment is sought on the issue of whether the second exception is applicable, the remedy is usually inappropriate because the determination of the motivation for the employee's actions and whether the actions constitute negligence rather than wanton or reckless conduct requires a jury's evaluation of the factual evidence even when it is undisputed. *Burlingame, supra* at ¶ 49-61. Nonetheless, summary judgment is

appropriate when there is no question that the employee "did not intend to cause harm, * * *, did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose." *Schoenfield v. Navarre*, 164 Ohio App.3d 571, 2005-Ohio-6407, 843 N.E.2d 234, ¶ 24 (6th Dist.) quoting *Fox v. Daly*, 11th Dist. No. 96-T-5453, 1997 WL 663670 (Sept. 26, 1997), and *Hackathorn v. Preisse*, 104 Ohio App.3d 768, 772, 663 N.E.2d 384 (1995).

{¶ 26} In this case, the trial court held that the undisputed evidence showed Socie acted with prudence and good faith because he was an experienced operator, asked permission, obtained authority from the fire chief, and worked with other firefighters to ensure the temperature of the fire was safe. At most, the evidence would show negligence, but not malicious, wanton, or reckless conduct nor bad faith.

{¶ 27} We agree with the trial court's reasoning. Appellant presented no evidence Socie acted with malice or in bad faith or had any ulterior motive beyond his stated purpose of resolving the fire as quickly and safely as possible. While appellant did present evidence that the excavator was damaged in the fire, it produced no evidence that Socie intentionally damaged the excavator or knew that introducing the excavator to the hot debris would cause damage to the excavator. Although he had no formal training, Socie testified he had operated excavators in the past. He took steps to ensure that there were no open flames and was informed the temperature of the debris was less than 100 degrees. His miscalculation of the damage that could result from using the excavator might constitute negligence, but never wanton nor reckless conduct.

{¶ 28} Therefore, we find appellant's sole assignment of error not well-taken.

{¶ 29} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE