[Cite as *Valentino v. Wickliffe City School Dist. Bd. of Edn.*, 2010-Ohio-5515.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

WAYNE VALENTINO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2009-L-083 and 2009-L-089**
THE BOARD OF EDUCATION OF THE WICKLIFFE CITY SCHOOL DISTRICT, et al.,	:	
Defendants,	:	
RODNEY OLENCHIK, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 07 CV 002566.

Judgment: Affirmed.

Kami D. Rowles, The Law Firm of Kami D. Rowles, L.L.C., 700 West St. Clair Avenue, Suite 316, Cleveland, OH 44113 (For Plaintiff-Appellee).

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David K. Smith, and *Sherrie C. Massey*, Britton, Smith, Peters & Kalail Co., L.P.A., 3 Summit Park Drive, Suite 400, Cleveland, OH 44131-2582 (For Defendants-Appellants Susan M. Haffey and Leonard Forinash).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Rodney Olenchick,[1] Leonard Forinash, and Susan M. Haffey, appeal the June 15, 2009 judgment entry of the Lake County Court of Common Pleas denying their motion for summary judgment against appellee's claims for intentional infliction of emotional distress. We affirm.

{¶2} Appellee, Wayne Valentino, had been a bus mechanic with the Wickliffe City School District ("school district") for 30 years. As a mechanic, Valentino was required to establish a preventative maintenance program for the school buses as well as to care for the buses and keep them in good repair. Valentino reported directly to the school transportation supervisor, Olenchick.

{¶3} Olenchick was employed by the Lake County Educational Service Center. Through an employment contract, Olenchick became the director of transportation for the school district in 2004. As the director of transportation, Olenchick was responsible for, inter alia, scheduling the work-shifts of the employees, routing and scheduling bus transportation, assigning job tasks to the bus garage employees, and scheduling and managing all activities in preparation for the annual Ohio State Highway Patrol bus inspection.

{¶4} Forinash was hired by the board as manager of operations and support services for the school district in August 2002. Forinash is generally responsible for managing the operations and support services of the school district. Forinash supervises the supervisor of transportation, as well as the individuals employed in the maintenance, building and grounds, custodial, and food services departments.

1. Although the complaint incorrectly spells appellant's name as "Olenchik," for purposes of this appeal we will use the correct spelling of "Olenchick."

{¶5} Haffey was hired by the board as treasurer in 1984. Haffey serves as the board's chief financial officer and is responsible for the receipt, safekeeping, and disbursement of the funds of the school district. Haffey prepares employment contracts and works with the superintendant in the preparation and issuance of written notices of intention not to re-employ and notices of termination to both teaching and non-teaching positions.

{¶6} Olenchick was Valentino's immediate supervisor. As the 2004-2005 school year progressed, the relationship between Olenchick and Valentino deteriorated. Valentino claimed that Olenchick failed to communicate with him as to the condition of the buses and, further, Olenchick did not review his preventative maintenance program. Olenchick issued Valentino a written reprimand for insubordination in November 2004.

{¶7} In December 2004, Valentino approached Forinash to discuss his concern over the safety of the school buses. Due to the relationship between Valentino and Olenchick, Forinash created a system whereby Olenchick and Valentino would communicate by writing notes to one another on a dry erase board.

{¶8} In February 2005, Valentino's doctor, Dr. Greenwald, requested that he be released from work for one month due to a "stressful environment at work." Valentino continued to take intermittent leave during the rest of 2005 and 2006, as he was diagnosed with "situational depression." For example, in May 2005, Dr. Greenwald signed a Family Medical Leave Act ("FMLA") form indicating that he was being treated for depression but that he was able to work. In April 2006, Valentino's symptoms resurfaced, and Dr. Greenwald again wrote a letter to Forinash indicating that Valentino was experiencing a variety of medical complaints similar to those previously experienced. Dr. Greenwald reported that most of his symptoms were due to the

stressful environment at work. In May 2006, Valentino took time off work under FMLA, reporting situational depression brought on by his work environment. Dr. Greenwald reported that Valentino would be ready to return to his full duties on June 6, 2006.

{¶9} On July 5, 2006, Valentino returned to work. On July 18, 2006, Valentino again called in sick to work claiming stress and depression caused by his work environment. Forinash notified Valentino that he was placed on paid administrative leave until further notice. Per the request of the school board, Valentino was to be examined by Dr. Joel Steinberg, a psychiatrist.

{¶10} While Valentino was on administrative leave, in August 2006, the school buses were inspected by the Ohio State Highway Patrol. Despite the fact that all buses were checked and considered ready for the inspection the evening prior, all eight buses failed the inspection due to numerous wiring and electrical problems. Suspecting criminal mischief, school officials referred the matter to the Wickliffe Police Department for investigation. Valentino and the other individuals having access to the buses were interviewed by the police. The police investigation was inconclusive.

{¶11} In August 2006, the school district received the report of Dr. Steinberg indicating that he had performed a comprehensive psychiatric evaluation of Valentino. The report indicated that Valentino was able to return to work, and he was capable of performing his duties as a mechanic with some accommodations to allow him to complete his 30 years of required work for retirement eligibility.

{¶12} In a letter dated September 20, 2006, Haffey set out "the expectations" of Valentino upon returning to his duties as bus mechanic. The letter indicated that it would follow the recommendations of Dr. Steinberg through the end of October, at

which time Valentino would be eligible for retirement. The letter stated that Valentino was to return to work on September 29, 2006.

{¶13} Valentino returned to work and received a written reprimand and warning on October 11, 2006, for an incident occurring on October 6th, whereby Valentino worked on the hood of a bus after he accused other mechanics of incorrectly retrofitting school bus hoods. Valentino's actions on October 6th were contrary to those outlined in the September 29, 2006 letter.

{¶14} Valentino again received a written reprimand on October 26, 2006, for failing to follow the procedure to call in sick to work on October 25th.

{¶15} On November 27, 2006, Valentino executed an application for use of intermittent family medical leave indicating that on November 29, 2006, he would be absent due to "immediate family member care: relationship 'son.'" Due to previous occurrences of absenteeism, the districted retained a private investigator to follow Valentino on the morning of November 29th and document his whereabouts. The private investigator indicated that after Valentino's son boarded the school bus, he drove his van to a location where he was observed operating a grinder and performing work on a vehicle.

{¶16} Upon returning to work the following day, on November 30, 2006, Valentino executed a paid personal leave form for November 29, 2006, indicating the reason for leave as "necessary family matters" and "emergency."

{¶17} The board of education terminated Valentino's employment with the school district, effective January 17, 2007.

{¶18} Valentino filed a complaint against the Board of Education of the Wickliffe City School District, Olenchick, Forinash, and Haffey, alleging: wrongful discharge in

violation of public policy (count 1); violation of R.C. 4113.52, Ohio's Whistleblower Statute (count 2); disability termination in violation of R.C. 4112.02 (count 3); failure to accommodate Valentino's disability in violation of R.C. 4112.02 (count 4); defamation per se and with malice on the part of Olenchick (count 5); intentional infliction of emotional distress on the part of Olenchick (count 6); negligent infliction of emotional distress on the part of Olenchick (count 7); intentional infliction of emotional distress on the part of Haffey (count 8); and intentional infliction of emotional distress on the part of Forinash (count 9).

{¶19} Appellants filed a motion for summary judgment, and Valentino filed a brief in opposition. The trial court issued a June 15, 2009 judgment entry granting Olenchick's motion for summary judgment on counts 1 through 5 and count 7. The trial court denied summary judgment on count 6 - intentional infliction of emotional distress. In a June 16, 2009 judgment entry, the trial court granted Haffey and Forinash's motion for summary judgment on counts 1 through 4 and denied summary judgment on counts 8 and 9 - intentional infliction of emotional distress.

{¶20} It is from these judgments that appellants filed timely notices of appeal.

{¶21} Olenchick assigns one assignment of error for our review, stating:

{¶22} "The trial court erred to the prejudice of defendant/appellant Rodney Olenchick when it denied him the benefit of individual immunity under R.C. 2744.03(a)(6)(b)."

{¶23} As their first assignment of error, Forinash and Haffey assert:

{¶24} "The trial court erred in denying the benefit of an immunity under R.C. 2744.03(A)(6)(b) to appellants on counts eight and nine of appellee's complaint by

concluding appellee presented a genuine issue of material fact as to whether appellants acted with malice."

{¶25} As their second assignment of error, Forinash and Haffey assert:

{¶26} "The trial court erred in denying summary judgment to appellants on counts eight and nine of appellee's complaint."

{¶27} We address the assignments of error in a consolidated analysis.

{¶28} Appellants assert the trial court improperly denied their motions for summary judgment on Valentino's cause of action for intentional infliction of emotional distress. Olenchick, Forinash, and Haffey contend they are entitled to immunity under R.C. 2744.03.

{¶29} In *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at ¶21, the Supreme Court of Ohio analyzed whether an order overruling a motion for summary judgment based on a claim of sovereign immunity is a final, appealable order. The *Hubbell* Court held, "when a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and thus is a final, appealable order pursuant to R.C. 2744.02(C)." Id. at ¶12.

{¶30} Viewing policy considerations, the *Hubbell* Court reasoned that a plain reading of R.C. 2744.02(C) better serves judicial economy, as "'the determination of immunity could be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses ***.'" Id. at ¶26. (Citation omitted.)

{¶31} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

{¶32} "*** (1) [N]o 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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶33} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242, 248.

{¶34} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E) provides:

{¶35} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶36} Summary judgment is appropriate pursuant to Civ.R. 56(E) if the nonmoving party does not meet this burden.

{¶37} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs*. (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn*. (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116, 119-120.

{¶38} R.C. 2744.03(A)(6) sets forth the circumstances under which an employee of a political subdivision is immune from civil liability for damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function. As employees of a political subdivision, Olenchick, Forinash, and Haffey would be immune from liability for a tortious act unless Valentino could prove under R.C. 2744.03(A)(6) that one of the following statutory exemptions to immunity applies:

{¶39} "(a) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

{¶40} "(b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶41} "(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code."

{¶42} There is no allegation that liability has been expressly imposed upon appellants by any section of the Revised Code. Further, Valentino has alleged that appellants caused him harm as a result of their actions within the course of their employment. Therefore, we conclude that appellants are entitled to governmental immunity unless Valentino could prove an exemption under R.C. 2744.03(A)(6)(b). We

must, therefore, determine whether Valentino proffered evidence which raised a material issue of fact as to appellants' entitlement to the defense of statutory immunity.

{¶43} In discussing the applicability of R.C. 2744.03(A)(6)(b), this court, in *Fleming v. Ashtabula Area City School Bd. of Edn.*, 11th Dist. No. 2006-A-0030, 2008-Ohio-1892, at ¶55-59, stated:

{¶44} "The First Appellate District has defined 'malice,' in the context of R.C. 2744.03(A)(6), as '"the willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified."' *Norwell v. Cincinnati* (1999), 133 Ohio App.3d 790, 813. (Citations omitted.)

{¶45} "The First District described 'bad faith' as 'conduct that involves "a dishonest purpose, conscious wrongdoing, the breach of a known duty through some ulterior motive or ill-will partaking of the nature of fraud, or an actual intent to mislead or deceive another."' *Norwell v. Cincinnati*, 133 Ohio App.3d at 813. (Citations omitted.)

{¶46} "In another case addressing R.C. 2744.03(A)(6)(b), this court has held that the same legal standard applies when determining whether the alleged tortfeasor 'acted in a "wanton and willful" manner and whether he acted in a "wanton or reckless manner."' *Ferrell v. Windham Twp. Police Dept.* (Mar. 27, 1998), 11th Dist. No. 97-P-0035, 1998 Ohio App. LEXIS 1269, at *13. This conclusion was based on the Supreme Court of Ohio's equation of the 'standard for reckless conduct with that of wanton and willful misconduct.' Id. citing *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104, fn. 1.

{¶47} "'"'Wanton misconduct' comprehends an entire absence of all care for the safety of others and an indifference to consequences. *** It implies a failure to exercise any care toward those whom a duty of care is owing when the probability that harm will result from such failure is great, and such probability is known to the actor. It is not

necessary that an injury be intended or that there by any ill will on the part of the actor toward the person injured as a result of such conduct. *** Wanton misconduct is positive in nature while mere negligence is naturally negative in character.'" *Peoples v. Willoughby* (1990), 70 Ohio App.3d 848, 851, quoting *Tighe v. Diamond* (1948), 149 Ohio St. 520, 526-527."

{¶48} "A claim for intentional infliction of emotional distress lies where '(o)ne who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another.' *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, ***, at syllabus. 'In a case for intentional infliction of emotional distress, a plaintiff must prove (1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress.' *Phung v. Waste Mgt., Inc.* [(1994)], 71 Ohio St.3d 408, 410, *** (citation omitted). Additionally, the mental anguish suffered by the plaintiff must be so severe and debilitating that 'a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.' *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 78, ***. 'A non-exhaustive litany of some examples of serious emotional distress should include traumatically induced neurosis, psychosis, chronic depression, or phobia.' Id. (citation omitted); *Kovacic v. Eastlake*, 11th Dist. No. 2005-L-215, 2006 Ohio 7016, at ¶94 (citations omitted)." *Weir v. Krystie's Dance Academy*, 11th Dist. No. 2007-T-0050, 2007-Ohio-5910, at ¶26. (Parallel citations omitted.)

{¶49} In denying summary judgment to Forinash and Haffey, the trial court stated as follows:

{¶50} "*** Valentino claims that the defendants: (1) tried to blame him for the dismal August 2006 school bus safety inspection; (2) accused him of tampering with the school buses; (3) made him take a lie detector test (in connection with the police investigation of the failed school bus inspection); (4) made him see a psychiatrist; (5) refused to continue to provide accommodations to him when he did not voluntarily retire on November 1, 2006; (6) wrote him up for raising safety issues; and (7) illegitimately terminated him for taking a day off to attend to his special needs son. Valentino claims both defendants knew of his anxiety, depression and fragile emotional state when they took these actions.

{¶51} "With respect to item three, it is unclear whether it was the police who wanted to have those persons who had access to the school buses take a lie detector test. *** With respect to item four, the evidence shows that Forinash and Haffey became concerned over Valentino's numerous absences, particularly after Valentino's doctor reported that Valentino was experiencing situational depression. They were well aware that Valentino intensely disliked Olenchick and would not work under him. Both sought to find a way to permit Valentino to continue to work until he was able to retire at thirty years. With respect to item five, the evidence clearly shows that both intended to resume normal transportation department operations by again having Olenchick resume direct supervision of Valentino if Valentino wanted to continue working. While Valentino claims he was given oral and written warnings for raising safety issues, there is substantial evidence for defendants' position that Valentino was being warned for insubordination and misconduct. Both also provided substantial evidence justifying Valentino's termination for abuse of paid time off. Nevertheless, construing the

evidence in a light most favorable to Valentino, the court cannot conclude that Valentino can prove no facts in support of his claim [for intentional infliction of emotional distress].

{¶52} "The arguments by Forinash and Haffey that they are entitled to statutory immunity pursuant to R.C. 2744.03(A) are not well taken. Because Valentino has provided some evidence that both may have acted with malice, the court at this point cannot conclude that both are entitled as a matter of law to immunity under R.C. 2744.03(A). There is an issue whether the exception to immunity found in R.C. 2744.03(A)(6)(b) is applicable. ***"

{¶53} From the foregoing, it is evident the trial court found there was evidence in the record which might be construed to support items one and two in Valentino's list of complaints against Forinash and Haffey: i.e., that they tried to blame him for the failed school bus safety inspection, and that they accused him of tampering with the buses relative to that inspection. Apparently, the trial court also found some (though little) evidence to support Valentino's claims under items six and seven: i.e., that they wrote him up for raising safety issues, and sought his termination for taking time off to attend to his son.

{¶54} Ultimately, in these summary judgment proceedings, in which all evidence must be construed in favor of the nonmovant, we agree with the trial court that Valentino made a sufficient showing of malice to put at issue whether Forinash and Haffey are entitled to the immunity found at R.C. 2744.03(A)(6)(b). A finding that they falsely accused Valentino of tampering with the school buses so the buses would not pass the August 2006 safety inspection, at a time when Valentino was suffering sufficient mental distress to be on leave, could be found to constitute a willful and intentional design to do injury. Cf. *Fleming*, supra, at ¶55. Further, construing the evidence in Valentino's favor,

such conduct could be sufficient to support a claim for intentional infliction of emotional distress: i.e., "'(1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress.' *Phung v. Waste Mgt., Inc.* [(1994)], 71 Ohio St.3d 408, 410, *** (citation omitted)." *Weir*, supra, at ¶26. (Parallel citations omitted.)

{¶55} Regarding Olenchick, the trial court stated:

{¶56} "*** Valentino claims Olenchick, along with the other defendants: (1) tried to blame him for the dismal August 2006 school bus safety inspection; (2) accused him of tampering with the school buses; (3) made him take a lie detector test (in connection with the police investigation of the failed school bus inspection); (4) made him see a psychiatrist; (5) refused to continue to provide accommodations to him when he did not voluntarily retire on November 1, 2006; (6) wrote him up for raising safety issues; and (7) illegitimately terminated him for taking a day off to attend to his special needs son. With respect to item seven, Valentino claims Olenchick told Haffey that Valentino was working a second job when he took time off under the FMLA. Valentino claims Olenchick knew of Valentino's anxiety, depression and fragile emotional state when he took these actions.

{¶57} "With respect to item three, it is unclear whether it was the police who wanted to have those persons who had access to the school buses take a lie detector test. It is clear that Valentino was not the only one who was requested to take a lie detector test. With respect to item four, the evidence is clear that Olenchick played no role in the Wickliffe School Board's decision to require Valentino to see Dr. Steinberg. Likewise with respect to item five, the evidence clearly shows that Olenchick had no role

in the decision to resume normal transportation department operations. There is absolutely no evidence that Olenchick wrote up Valentino for raising safety issues (item six) and as discussed earlier, Olenchick played no role in the decision to terminate Valentino for abusing FMLA leave. However it is unclear how personnel at the Wickliffe School Board came to suspect that Valentino was using FMLA leave for outside employment. The court also notes that although self serving testimony alone is insufficient to substantiate a claim for emotional distress, Valentino has presented additional evidence of his emotional distress, as observed by third parties, Drs. Greenberg and Steinberg.

{¶58} "The argument by Olenchick that he is entitled to statutory immunity pursuant to R.C. 2744.03(A) is not well taken. Because Valentino has provided some evidence that Olenchick may have acted with malice, the court at this point cannot conclude that he are (sic) entitled as a matter of law to immunity under R.C. 2744.03(A). There is an issue whether the exception to immunity found in R.C. 2744.03(A)(6)(b) is applicable.

{¶59} "Construing the evidence in a light most favorable to the non-movant, the court cannot conclude that Valentino can prove no facts in support of his claim [for intentional infliction of emotional distress]."

{¶60} Again, in these summary judgment proceedings, we must agree that the evidence, if construed most strongly in Valentino's favor, that Olenchick blamed him for the failure of the August school bus safety inspection due to tampering with the buses, is sufficient to support a finding of malice for purposes of statutory immunity, as well as the elements for intentional infliction of emotional distress.

{¶61} The assignments of error lacking merit, the judgment of the Lake County Court of Common Pleas is affirmed.

{¶62} It is the further order of this court that appellants are assessed costs herein taxed.

{¶63} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J., concurs in judgment only, with a Concurring Opinion,

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in judgment only, with a Concurring Opinion.

{¶64} I concur in the judgment to affirm the decision of the lower court. I do so, however, for reasons other than those given in the written opinion of this court. The underlying judgments denied the appellants the benefit of immunity under R.C. Chapter 2744 and denied their motions for summary judgment with respect to Valentino's claims of intentional infliction of emotional distress. The denial of a motion for summary judgment on an emotional distress claim is not a final order and, therefore, beyond the jurisdiction of this court. *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23; *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. While this court lacks jurisdiction to consider the merits of Valentino's intentional infliction of emotional distress claims, it must review the trial court's determination that genuine issues of material fact exist as to whether the appellants are entitled to immunity as employees of

a political subdivision. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at ¶21. A review of the record before this court demonstrates there is some evidence that the appellants acted with malicious purpose and/or bad faith toward Valentino, which is sufficient to overcome summary judgment. On this basis, I concur in the judgment ultimately reached in the written opinion.

{¶65} With respect to appellant Olenchick, there was evidence that he caused the criminal investigation into the alleged tampering with the school buses in order to conceal his own responsibility for the failure of those buses to pass inspection. Forinash reported that Olenchick had told him, prior to the August 2006 inspection, that he had inspected the buses and that they would pass the inspection. When the buses failed, Olenchick claimed it was because someone had tampered with them. There is no evidence that a criminal investigation would have occurred had Olenchick not raised allegations of tampering.

{¶66} There is further evidence, however, that Olenchick did not inspect the buses and that they were not properly prepared for inspection, irrespective of the alleged tampering. Olenchick told the investigating officer that mechanics Lawson and Williamson had inspected the buses, but this statement was contrary to the statements given by Lawson and Williamson. In one particular instance, Valentino noted Bus 6 had a malfunctioning emergency door switch in July 2006. Olenchick reported the door operational a few days prior to the August 2006 inspection. The inspector found the door malfunctioning as indicated in July by Valentino. Olenchick suggested that the door had been fixed, but then re-broken by someone else prior to inspection.

{¶67} Thus, there is evidence that Olenchick caused the criminal investigation, in which he identified Valentino specifically as a suspect, to cover his own responsibility

for the buses' failure to pass inspection. For the purpose of denying summary judgment, this is evidence of malicious purpose and/or bad faith sufficient to deny Olenchick immunity, i.e., willful injury through unjustified conduct and/or the intent to mislead or deceive.

{¶68} For the purpose of summary judgment with respect to appellants Forinash and Haffey, there is evidence that they terminated Valentino's employment in January 2007 for improper motives. It was claimed that Valentino had abused personal leave. An arbitrator with the American Arbitration Association concluded, however, that Valentino had not been terminated for just cause inasmuch as he had not violated the employment contract. Notably, the arbitrator stated that the discharge would not have been justified "[e]ven assuming *** the Employer's application of its leave policies against [Valentino] were contractually well founded." Valentino claims his termination was actually in retaliation for raising complaints about the School Board's maintenance of its school buses and/or his mental health issues. A jury could reasonably infer these conclusions based on Valentino's improper termination in January 2008 and other actions taken by the School Board, such as reprimanding him for raising safety concerns and only adopting temporary accommodations to alleviate the tensions between him and Olenchick.

{¶69} For the reasons stated herein, I concur in the affirmance of the trial court's judgment.

TIMOTHY P. CANNON, dissenting.

{¶70} I respectfully dissent from the opinion of the majority.

{¶71} The tort of intentional infliction of emotional distress was not recognized in Ohio until 1983. As stated by the Supreme Court of Ohio, the reasoning behind this refusal was that "'"[t]he damages sought to be recovered are too remote and speculative. The injury is more sentimental than substantial. Being easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately, compensated."'" *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 373, quoting *Bartow v. Smith* (1948), 149 Ohio St. 301, 311.

{¶72} In recognizing this tort, the Supreme Court of Ohio emphasized that the cause of action is viable only where the distress results from "extreme and outrageous" conduct. In an effort to delineate the nature of the standard, the Court, quoting the Restatement of Torts, explained:

{¶73} "'*** [It is not] enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"'" *Yeager*, supra, at 374-375, quoting Restatement of the Law 2d, Torts (1965) 73, Section 46, Comment d.

{¶74} The sole remaining claims in this case are for intentional infliction of emotional distress. It is therefore necessary to carefully examine what Valentino, as the

plaintiff, was required to establish in order to meet his reciprocal burden and overcome summary judgment. To wit, he was required to demonstrate material issues of fact as to whether: (1) appellants intended to cause him serious emotional stress; (2) appellants' conduct was extreme and outrageous; and (3) appellants' conduct was the proximate cause of his serious emotional distress. *Phung v. Waste Mgt., Inc.* (1994), 71 Ohio St.3d 408, 410. (Citation omitted.)

{¶75} In analyzing whether summary judgment is proper under this particular case, it is important to recognize that the standard of proof for this cause of action is greater than that necessary to overcome immunity set forth in R.C. 2744.03(A)(6)(b). While evidence of wanton and/or reckless misconduct on the part of appellants would suffice to overcome an assertion of immunity on summary judgment, it is insufficient to establish liability for intentional infliction of emotional distress. That said, the analysis germane to this appeal is limited to whether (1) appellants presented sufficient evidentiary material to establish their actions were not "extreme and outrageous" under the *Phung*, supra, test; and, if they did, (2) was sufficient evidence produced by Valentino, with the burden shifted to him, to create an issue of fact with regard to that element.

{¶76} In his brief in opposition to appellants' motion for summary judgment, Valentino did not argue that appellants' conduct fell under R.C. 2744.03(A)(6)(b). In fact, Valentino made no mention of the immunity statute. Instead, Valentino asserted that appellants' conduct satisfied the elements for intentional infliction of emotional distress. Without citing to *any supporting evidentiary material* in the record, Valentino made the following assertions with respect to appellants' conduct, stating they: "(1) [T]ried to blame him for the dismal August 2006 school bus safety inspection; (2)

accused him of tampering with the school buses; (3) made him take a lie detector test (in connection with the police investigation of the failed school bus inspection); (4) made him see a psychiatrist; (5) refused to continue to provide accommodations to him when he did not voluntarily retire on November 1, 2006; (6) wrote him up for raising safety issues; and (7) illegitimately terminated him for taking a day off to attend to his special needs son."

{¶77} Valentino further claimed that "Olenchick's statement to Defendant Haffey that [he] was working a second job is what led directly to [his] illegitimate termination." He asserted that both Haffey and Forinash knew of his anxiety, depression, and fragile emotional state when they took the above-mentioned actions.

{¶78} **Olenchick**

{¶79} The June 16, 2009 judgment entry of the trial court reveals that after enumerating Valentino's claims, the trial court found the third, fourth, fifth, sixth, and seventh arguments without merit. The trial court reasoned that (1) "Valentino was not the only one who was requested to take a lie detector test"; (2) "Olenchick played no role in the Wickliffe School Board's decision to require Valentino to see Dr. Steinberg"; (3) "Olenchick had no role in the decision to resume normal transportation department operations"; and (4) "[t]here is absolutely no evidence that Olenchick wrote up Valentino for raising safety issues ***[.] Olenchick played no role in the decision to terminate Valentino for abusing FMLA leave."

{¶80} After an independent examination of the evidence, I agree with the trial court with respect to Valentino's third, fourth, fifth, sixth, and seventh arguments. I also agree that Valentino's first and second arguments are without merit. In his motion for summary judgment, Olenchick provided sufficient evidentiary material to establish that

his conduct did not rise to the level of "extreme and outrageous" to satisfy the element of the remaining cause of action, to wit: intentional infliction of emotional distress. Therefore, under the standard in *Dresher*, supra, the burden to establish a genuine issue of material fact as to this element shifted to Valentino.

{¶81} In his complaint, appellate brief, and memorandum in opposition to Olenchick's motion for summary judgment, Valentino goes to great lengths to substantiate his claims of Olenchick's incompetence; however, the burden on Valentino is not to demonstrate that Olenchick was unable to perform his job duties as director of transportation. Rather, he was required to establish a material fact as to how Olenchick's conduct was "extreme and outrageous" pursuant to the test set forth in *Phung*, supra. As stated by the *Yeager* Court, it is not enough to show that Olenchick's conduct may have been "wanton," "reckless," or even malicious. Id. At 374-375. Simply because conduct may be sufficient to overcome immunity does not mean that it also meets the test to establish liability for intentional infliction of emotional distress.

{¶82} To support his claim that Olenchick tried to blame him for the dismal August 2006 school bus safety inspection and that Olenchick accused him of tampering with the school buses, Valentino provided a copy of the Wickliffe Police Department report, dated August 15, 2006. This report reflected that, when questioned by the police as to the August 2006 school bus safety inspection, Olenchick stated, "the buses could have been tampered with anytime over the previous months, but that they are secured in a gated area over the midnight hours." The report notes that, when asked, Olenchick identified Valentino as an employee that *may have been* responsible for the tampering; however, when interviewed by the police, the report states that "[Olenchick] did not name anyone who he suspects of tampering with the buses." Forinash and Haffey also

averred that at no time did they hear Olenchick state that Valentino sabotaged the buses.

{¶83} Numerous other bus drivers also averred that they never heard Olenchick accuse Valentino of tampering with the buses. The majority contends there is evidence in opposition to summary judgment that Olenchick "*falsely accused*" Valentino of tampering with the buses. The fact is there is *no* such evidence. At worst, Olenchick simply named Valentino as one of those who had access to the buses and could possibly be responsible. No one has suggested these statements are anything but accurate. Without some indication that Olenchick was targeting Valentino to the exclusion of other employees, I fail to see how his statements, which were supported by other independent evidence, were either extreme and outrageous or uttered with intent to cause Valentino emotional distress.

{¶84} I recognize that Olenchick, in his affidavit, averred that he provided Valentino's name during the police investigation, "because[Valentino] had access to the bus garage, he had knowledge of the inspections, and he was considered a disgruntled employee." Once again, Valentino did not rebut Olenchick's averments in any way. And, because the information was offered in the course of an investigation, I fail to see how it could be viewed as extreme conduct without some additional evidence to support this conclusion.

{¶85} In any event, interviews were requested of *all* persons with access to the bus garage, including Valentino. When interviewed by the police, Valentino identified Olenchick as a liar and cheat, as having poor character, and that Olenchick intentionally did not follow state laws regarding school buses. Valentino further stated that he suspected Olenchick damaged the school buses. Over the objections of the police,

Valentino also spoke of the alleged circumstances that led to the termination of Olenchick's prior employment.

{¶86} The record further demonstrates that the board of education, not Olenchick, contacted the Wickliffe Police Department regarding the tampering of the school buses, as the nature of the defects included disconnected wires and pulled fuses. Upon arrival, the officer spoke with Olenchick as to the condition of the school buses. Initially, Olenchick commented that Valentino may have been responsible, but his response was prompted by questioning from an officer. Olenchick's comment was made during the course of a police investigation. None of this is disputed. Therefore, this does not constitute "extreme and outrageous" conduct sufficient to establish intentional infliction of emotional distress, let alone deprive Olenchick of statutory immunity. There is no evidence that Olenchick acted with any intent to harm Valentino. When viewed in the light most favorable to Valentino, there is no evidence that Olenchick engaged in any conduct that was unlawful or unjustified.

{¶87} Valentino cannot create a question of fact by simply summarizing the statements and actions of Olenchick. Valentino did not produce any evidentiary material that would support the contention that the statements Olenchick made were *false*, that *he knew they were false*, and that *they were designed specifically* to harm Valentino.

{¶88} In denying Olenchick's motion for summary judgment, however, the trial court noted: "[I]t is unclear how personnel at the Wickliffe School Board came to suspect that Valentino was using FMLA leave for outside employment. The court also notes that although self serving testimony alone is insufficient to substantiate a claim for emotional distress, Valentino has presented additional evidence of his emotional distress, as

observed by third parties, Drs. Greenberg and Steinberg." There is *nothing*, however, in these reports or the record to substantiate that the emotional distress is a direct and/or proximate result of the actionable conduct of *any* of the appellants herein.

{¶89} Valentino also failed to address the issue of the justifiability of his termination in his memorandum in opposition to Olenchick's motion for summary judgment. Once the burden shifted, however, he was required to do so. The uncontroverted evidence demonstrates that in the fall of 2002, Valentino was issued multiple oral and written warnings for failing to adhere to the school district's policy prohibiting use of its facilities for personal work. In April 2003, Valentino was issued a three-day suspension for continuing to use the school district's facilities to work on personal vehicle parts. On April 23, 2003, Valentino was issued a written warning for failing to comply with the directive to remove personally-owned vehicle body and engine parts from the transportation garage.

{¶90} According to Haffey's affidavit, during Olenchick's first year, he advised her that he had received information that Valentino was performing duties as a mechanic at a private business. The affidavit also states that around the same time, in 2004, Valentino began to use his accumulated sick leave on a more frequent basis. Haffey averred that Valentino used 16.25 sick days during the 2003-2004 school year and 41.75 sick days during the 2004-2005 school year. Prior to his termination, Valentino used 64.75 sick days during the 2006-2007 school year.

{¶91} David Albertone, a bus driver for the school district for approximately 26 years, averred that during working hours, Valentino worked on personal vehicles in the bus garage. Albertone further averred that Valentino was working on vehicles at an off-site location and that he had taken his personal vehicles to said location for repair work.

Albertone provided three separate invoices detailing the vehicle repair services rendered by Valentino.

{¶92} Forinash averred that as a result of Valentino potentially abusing sick leave based on his multiple previous occurrences of absenteeism and working somewhere else during the paid time he required to be absent from duty, the *board of education's legal counsel advised* that a state-licensed private investigator conduct surveillance of Valentino. As a result of the investigation, Valentino was terminated for abusing paid leave. Therefore, it would be inappropriate to use anything related to this incident as a fact supporting the contention that Valentino was "illegitimately terminated." He was not.

{¶93} There is a lack of evidence in the record demonstrating that Olenchick acted with any type of malice when informing the district that Valentino was performing work as a private mechanic. Olenchick informed the school district of Valentino's possible outside employment in 2004. Valentino, however, did not request leave from work until February 2005, when he submitted a letter from his physician noting that he was "seen for a variety of medical complaints" and that "[a]fter much discussion, it appears that the stressful environment at work is the primary cause of his symptoms."

{¶94} Furthermore, it was within the purview of Olenchick's job duties to inform the school district that an employee may be abusing paid sick leave. As testified to by Forinash in his deposition, Olenchick was obligated to enforce school policies and procedures for employees. The fact that Olenchick informed the board of Valentino's outside employment fails to demonstrate any wrongdoing.

{¶95} Based on the Civ.R. 56(C) evidence in the record, I conclude that the facts offered by Valentino, when taken as true, are insufficient to create a material issue of

fact on the issue of whether Olenchick engaged in extreme and/or outrageous conduct. Valentino failed to meet his reciprocal burden, and, therefore, I would hold Olenchick was entitled to summary judgment as a matter of law.

{¶96} **Forinash and Haffey**

{¶97} In the June 16, 2009 judgment entry, the trial court stated: "With respect to item three, it is unclear whether it was the police who wanted to have those persons who had access to the school buses take a lie detector test. It is clear that Valentino was not the only one who was requested to take a lie detector test. With respect to item four, the evidence shows that Forinash and Haffey became concerned over Valentino's numerous absences, particularly after Valentino's doctor reported that Valentino was experiencing situational depression. They were well aware that Valentino intensely disliked Olenchick and would not work under him. Both sought to find a way to permit Valentino to continue to work until he was able to retire at thirty years. With respect to item five, the evidence clearly shows that both intended to resume normal transportation departments operations by again having Olenchick resume direct supervision of Valentino if Valentino wanted to continue working. While Valentino claims he was given oral and written warnings for raising safety issues, there is substantial evidence for defendants' position that Valentino was being warned for insubordination and misconduct. Both also provided *substantial* evidence justifying Valentino's termination for abuse of paid time off. Nevertheless, construing the evidence in a light most favorable to Valentino, the court *cannot conclude that Valentino can prove no facts in support of his claim* in counts eight and nine." (Emphasis added.)

{¶98} I disagree with the trial court. It does not matter if the court could not "conclude that Valentino can prove no facts in support of his claim." The question is

whether he did, in fact, present such facts after the *Dresher* burden shifted to him. While it is possible he might present other facts at trial, he did not have the luxury of failing to present them in opposition to the request for summary judgment on this claim.

{¶99} The trial court concluded that because Valentino provided some evidence that both Forinash and Haffey "may have acted with malice," the court cannot conclude that both are entitled to immunity. The trial court stated this because of an issue of whether the exception found under R.C. 2744.03(A)(6)(b) applied; however, as described above, in addition to applying this exception, the more limited test to be addressed is whether Valentino has met the *Yeager* standard to establish "extreme and outrageous" conduct.

{¶100} The Wickliffe Police Department investigated the alleged tampering with the buses in connection with their inspection. Including the employees who had access to the buses, Forinash was also interviewed by the police. Furthermore, the police report indicates that all of the interviewees advised the police they would submit to truth verification; Haffey further stated that she would check with the board's legal counsel before having the school employees submit to truth verification. On a later date, the police report indicates that Haffey indicated the school board would have to authorize the hiring of an examiner.

{¶101} The evidence also reveals that due to Valentino's behavior, he was placed on leave and required to submit to an examination to determine his fitness for duty. Forinash and Haffey implemented the plan set forth in Dr. Steinberg's report to allow Valentino to continue working so that Valentino could attain 30 years of service with the school district. Valentino was aware of the expectations, as outlined in Haffey's letter dated September 20, 2006. The letter to Valentino clearly indicated that they would

follow the recommendations of Dr. Steinberg through the end of October, at which time Valentino would be eligible for retirement.

{¶102} As noted by the trial court, the evidence also establishes that Valentino was reprimanded because of his insubordination and misconduct—not because he was raising safety issues. Finally, as previously mentioned, the evidence reveals that Valentino was terminated due to his abuse of paid leave. In fact, the trial court noted that both Haffey and Forinash "provided substantial evidence justifying Valentino's termination for abuse of paid time off."

{¶103} The evidence demonstrates that Forinash and Haffey were acting within the scope of their employment, and Valentino has not put forth any evidence to substantiate his claim that the conduct engaged in by Forinash and Haffey was "extreme and outrageous." Based on the Civ.R. 56(C) evidence in the record, I would conclude that the facts offered by Valentino, when taken as true, are insufficient to create a material dispute of fact with regard to the elements of the sole remaining cause of action. Moreover, Valentino has failed to identify any genuine issue of material fact sufficient to overcome Haffey's and Forinash's statutory immunity. Thus, I believe the trial court erred in denying summary judgment in favor of Forinash and Haffey with respect to the claims of intentional infliction of emotional distress, as Valentino failed to meet his *Dresher* burden.

{¶104} As for their second assignment of error, Forinash and Haffey allege: "The trial court erred in denying summary judgment to appellants on counts eight and nine of appellee's complaint."

{¶105} Based on my analysis of the first assignment of error, I would also conclude that Forinash and Haffey's second assignment of error has merit. It is not

necessary to reach the issue of whether appellee's pleadings set forth a cause of action for negligent infliction of emotional distress or intentional infliction of emotional distress. This is because appellee has not provided any evidentiary material to establish a genuine issue of material fact that the conduct of Forinash and Haffey was "extreme and outrageous" as that test is set forth in *Yeager*. Appellants provided sufficient evidence of a proper and reasonable purpose for their conduct. There is no evidence that Forinash and Haffey made statements they knew were false or acted without a legitimate business purpose.

{¶106} I would enter summary judgment in favor of appellants on Valentino's claim of intentional infliction of emotional distress.