[Cite as *Zivich v. Northfield*, 2010-Ohio-1039.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

PAUL ZIVICH	C. A. No. 24836
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
VILLAGE OF NORTHFIELD	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CV 2008-06-4638

DECISION AND JOURNAL ENTRY

Dated: March 17, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Village of Northfield ("Northfield"), appeals from the decision of the Summit County Court of Common Pleas denying its motion for summary judgment. This Court affirms.

I

{¶2} On July 1, 2007, paramedic Brian Wasson and his partner Eric Moss responded to an emergency call at the home of an elderly woman. Upon evaluating the patient, they decided to transfer her to a nearby hospital. Wasson drove the ambulance while Moss tended to the patient. Wasson activated his lights and siren as he proceeded westbound on Aurora Road. As he approached the intersection of Aurora Road and Boyden Road, the traffic light was red for cars traveling on Aurora Road. Wasson slowed as he approached the light. Traffic heading westbound on Aurora Road had yielded to permit the ambulance to pass. When Wasson checked the traffic to his right, several vehicles heading southbound on Boyden Road had also stopped.

When he checked the traffic to his left, he noticed that a white car which was heading northbound on Boyden Road was also slowing and appeared to be stopping for the ambulance as it proceeded through the intersection. Wasson accelerated as he went through the intersection, at which point a white car, driven by Paul Zivich's mother, ran into the driver's side of the ambulance. Zivich's mother, who was 81 years old at the time, sustained significant injuries from the collision and died approximately two weeks later.

{¶3} Zivich, as the executor of his mother's estate, filed a wrongful death suit against Northfield. Northfield answered and filed a motion for summary judgment, arguing it was immune from liability pursuant to R.C. 2744.02(B)(1)(c) because Wasson was in the process of responding to a call for emergency medical care at the time of the collision. The trial court disagreed and denied Northfield's motion for summary judgment. Northfield timely appealed and asserts one assignment of error for our review.

II

Assignment of Error

"THE TRIAL COURT ERRED BY DENYING THE VILLAGE OF NORTHFIELD'S MOTION FOR SUMMARY JUDGMENT."

{¶4} In its sole assignment of error, Northfield asserts that the trial court erred by denying its motion for summary judgment pursuant to the governmental immunity provisions set forth in R.C. 2744.02(B)(1)(c). We disagree.

{¶5} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. It applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co*. (1983), 13 Ohio App.3d 7, 12. Summary judgment is proper under Civ.R. 56(C) if:

> "(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 the 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.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support its motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293; Civ.R. 56(E).

{¶6} Northfield is a political subdivision as defined by R.C. 2744.01(F). Generally, political subdivisions are immune from liability for damages incurred as a result of their employee's actions if the employee was performing a governmental function at the time. R.C. 2744.02(A)(1). Governmental functions include the provision of "emergency medical, ambulance, and rescue services[.]" R.C. 2744.01(C)(2)(a). The cloak of immunity can be removed, however, in certain instances where an employee has acted negligently. R.C. 2744.02(B)(1) - (4). Specifically, "a political subdivision is liable in damages in a civil action for injury, death, or loss to person *** [where the damages are] caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment[.]" R.C. 2744.02(B)(1). The statute provides a full defense to a political subdivision in such an instance, however, if:

> "A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506[] or a driver's license issued pursuant to Chapter 4507[] of the Revised Code, the operation of

> the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code." R.C. 2744.02(B)(1)(c).

The precautions set forth in 4511.03(A) require that when approaching a red traffic signal while in the process of responding to an emergency call, "[t]he driver of any emergency vehicle *** shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway."

{¶7} In its summary judgment motion, Northfield argued that Wasson's conduct permits application of foregoing statutory defense because: (1) the collision occurred while Wasson was responding to a call for emergency medical care with the ambulance lights and siren activated; (2) Wasson had a valid Ohio driver's license; (3) Wasson's conduct was not wanton or willful because he was travelling within the posted speed limit, with the ambulance lights and siren activated, and slowed as he approached the intersection after checking for traffic both ways; and (4) Wasson acted within the dictates of R.C. 4511.03 as he proceeded through the intersection because he believed the traffic light had turned green, and even if it had not, he slowed down and checked for traffic before proceeding.

{¶8} Northfield supported its argument with an affidavit from Wasson, in which he attests that he never exceeded the posted speed limit of 40 miles per hour on Aurora Road. He further stated that as he approached the red light at the intersection, he slowed to approximately 5 – 10 miles per hour and passed several cars on Aurora Road that had already stopped or yielded to the ambulance. When he checked the traffic to his right, he saw "[t]here were several vehicles that were southbound on Boyden Road that had stopped at the intersection despite the fact that the [] traffic signal was green [in their direction] at that time." Wasson attested that when he checked the traffic to his left:

> "[He] saw a white car. The white car was not travelling at high rate of speed and appeared to be slowing to yield to our clearly visible and audible [ambulance]. There were absolutely no obstructions that would prevent the driver of the white car from seeing the [ambulance] as it approached the intersection at approximately 5 to 10 mph. It appeared to [him] that the white car was stopping. [He] then looked back to the right to verify that the southbound traffic on Boyden Road had remained stopped. As [he] entered the intersection, the light was red for traffic on Aurora Road but had begun to turn green. Out of the corner of [his] eye to the left, it appeared that the white car was stopping because it was not traveling at a high rate of speed. [He] started to accelerate through the intersection and looked back to the left. At that time, [he] realized for the first time that the white car was not stopping. [He] was almost through the intersection when the front end of the white car collided with the driver's side of the [ambulance]."

Wasson further averred that he "was not able to see the color of the light at the time [of] the collision" because he was in the middle of the intersection, but stated that "it [was his] belief *** that the traffic signal had turned green for Aurora Road traffic at that time."

{¶9} Northfield also argued that Wasson fulfilled his duty to exercise due regard for the safety of other drivers by activating his lights and siren during the time he was driving the ambulance. Northfield alleges that, because Zivich's mother suffered from significant hearing loss, she was unable to hear the ambulance as it approached. Northfield relied on copies of medical records to argue that within the preceding month, the hearing aid in Zivich's mother's left ear was found to be inoperable. Northfield argued that the record indicated she also needed to obtain a hearing aid for her right ear based on recent testing which demonstrated diminished hearing in that ear, too. Based on the information contained in the foregoing evidence, Northfield satisfied its initial *Dresher* burden.

{¶10} In response, Zivich argued that reasonable minds could disagree as to whether Wasson complied with the mandates of R.C. 4511.03. Zivich relied on an accident reconstruction report prepared by Choya Hawn which concluded that the collision was a result of Wasson's failure to exercise due regard for the safety of others, thus constituting willful and

wanton misconduct. The report was based upon the review of several materials, including: the Sagamore Hills police report and photographs of the scene; witness statements made at the scene; photographs and inspection of the vehicles after the collision; and photographs of and visits to the scene after the collision.

{¶11} Northfield argues that the trial court erred by relying on unsworn statements of witnesses as set forth in Hawn's report when it denied Northfield's motion for summary judgment. On appeal, Northfield argues that such statements are hearsay and cannot properly be considered under Civ.R. 56(C). This Court has previously indicated that:

> "Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment. Those materials are affidavits, depositions, transcripts of hearings in the proceedings, written admissions, answers to interrogatories, written stipulations, and the pleadings. The proper procedure for introducing evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *** [I]f the opposing party fails to object to improperly introduced evidentiary materials, the trial court may, in its sound discretion, consider those materials in ruling on the summary judgment motion." (Internal quotations and citations omitted). *Wolford v. Sanchez*, 9th Dist. No. 05CA008674, 2005-Ohio-6992, at ¶20.

The record reveals that Hawn's report was appended to his affidavit. Additionally, Hawn's report expressly identifies the materials upon which he relied in forming his conclusions, which included statements from witnesses to the accident. Even if it was improper for the trial court to consider the conclusions contained in Hawn's report, Northfield failed to object to the trial court on that basis. Failure to object to materials presented to the trial court at the summary judgment stage, when the issue is apparent at that time, constitutes a forfeiture of that issue. *Szakal v. Akron Rubber Dev.*, 9th Dist. No. 21496, 2003-Ohio-6820, at ¶6. Consequently, Northfield cannot raise this issue for the first time on appeal. Id. Because the trial court considered the

contents of Hawn's report when denying Northfield's summary judgment motion, we must consider the same evidence in our de novo review. *Wolford* at ¶21.

{¶12} In his report, Hawn indicates that the investigating officer estimated that the ambulance was traveling at approximately 20 – 33 miles per hour at the moment of impact and that Zivich's mother's car was traveling at 19 – 28 miles per hour. Hawn notes, however, that this estimation is based on a flawed calculation which fails to consider the transfer of momentum from the ambulance to the car based on the relative size of the vehicles. After accounting for this difference, Hawn's revised calculations estimate that the ambulance was traveling at approximately 30 – 35 miles per hour, while the car was traveling at 12 – 15 miles per hour.

{¶13} Hawn's report also revealed that there are 17 wide, tall, pine trees in the southeast corner of the intersection which hang low to the ground. Hawn concluded that the numerous trees "provided a significant view obstruction for both westbound drivers on Aurora Road and northbound drivers on Boyden Road" and that the trees "would also likely obstruct the sound of the [ambulance's] siren[.]" Hawn recounted the statements from five different witnesses who consistently reported that the traffic light was green for the Boyden Road traffic at the time of the collision, in direct contradiction to Wasson's "belief" that it was red in that direction at the time. Additionally, one of the witnesses travelling toward the ambulance on Aurora Road recalled being able to see the ambulance lights before she was able to hear its siren.

{¶14} Based on conflicting evidence between the parties as to the speed at which both vehicles were travelling, whether the trees obstructed the view of either driver, and whether the light had changed from red to green for traffic on Aurora Road, we conclude that there remains a genuine issue of material fact regarding Northfield's ability to avail itself of the immunity

protections of R.C. 2744.02(B)(1)(c). Accordingly, Zivich sustained his *Dresher* burden of offering facts to show a genuine issue for trial.

{¶15} Northfield argues that, irrespective of whether the light on Aurora Road had changed from green to red, Wasson's conduct was not wanton or willful. It points to several cases, all of which are distinguishable from this case. See, e.g, *Byrd v. Kirby*, 10th Dist. No. 04AP-451, 2005-Ohio-1261, at ¶19-26 (assessing municipality liability based on the conduct of a police officer under R.C. 2744.02 (B)(1)(a)); *Harris v. Kennedy* (1996), 116 Ohio App.3d 687, 690-91 (providing immunity under R.C. 2744.02(B)(1)(c) where both parties agreed that the ambulance driver slid into the intersection on a patch of ice); and *Semple v. Hope* (1984), 15 Ohio St.3d. 372, 374-75 (affirming a jury finding that a police officer acted with due regard for the safety of others pursuant to R.C. 4511.45). Northfield inappropriately relies on these cases as well to assert that, even if the light was red, Wasson's conduct complied with the requirements of R.C. 4511.03. Accordingly, the trial court did not err in denying Northfield's motion for summary judgment as a genuine issue remains as to its ability to exercise statutory immunity under R.C. 2744.02(B)(1)(c). Northfield's arguments to the contrary lack merit and its sole assignment of error is overruled.

III

{¶16} Northfield's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

RONALD A. MINGUS, and BRIAN D. SULLIVAN, Attorneys at Law, for Appellant.

MICHAEL D. SHROGE, Attorney at Law, for Appellee.

PAUL W. FLOWERS, Attorney at Law, for Appellee.