2015 IL App (1st) 140086-U

SIXTH DIVISION
ORDER FILED: February 20, 2015

No. 1-14-0086

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PAMELA BOEHM and MICHAEL BOEHM, On Behalf of Jeffrey Boehm, a Minor,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	
v.	)	No. 10 L 11304
WILLIAM J. KOWALSKI and THE VILLAGE OF LANSING,	)	Honorable Frank B. Castiglione and Patrick J. Sherlock,
Defendants-Appellants,	)	Judges, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court was reversed where the defendants were entitled to judgment notwithstanding the verdict on the plaintiffs' willful and wanton claims.

¶ 2 The plaintiffs, Pamela Boehm and Michael Boehm, on behalf of Jeffrey Boehm, a minor (hereinafter "Jeffrey"), filed an action alleging negligence and willful and wanton conduct

against the defendants, William J. Kowalski (Officer Kowalski) and the Village of Lansing (the Village), for injuries which Jeffrey sustained after his car collided with the police car that Officer Kowalski was driving while responding to an emergency domestic dispute call. After a jury trial, Jeffrey was awarded $45,000 for his injuries on his willful and wanton conduct claims. The defendants now appeal from that judgment, arguing that: (1) Jeffrey failed to prove that Officer Kowalski's conduct was willful and wanton; and, (2) in the alternative, the trial court's evidentiary errors entitle them to a new trial. For the following reasons, we reverse the judgment of the circuit court.

¶ 3 Jeffrey filed a four-count complaint against the defendants following his collision with Officer Kowalski on November 27, 2009, near the intersection of Burnham Avenue and 178th Street in Lansing. Counts I and II alleged negligence and willful and wanton conduct against Officer Kowalski, individually, and counts III and IV alleged the same against the Village based on a *respondeat superior* theory. Under section 2-202 of the Illinois Local Government and Government Employees Tort Immunity Act (Act) (745 ILCS 10/1-101 *et seq.* (West 2008)), a public employee and his employer are immune from liability based on negligence while engaged in the execution of the law, unless the conduct is proven to be willful and wanton. On August 9, 2013, the trial court dismissed counts I and III, with prejudice, based on section 2-202 of the Act, and counts II and IV proceeded to a jury trial on August 20, 2013.

¶ 4 In a motion *in limine*, the defendants requested, in relevant part, that the court bar Jeffrey from offering any testimony or evidence that Lansing Police Commander Peter Grutzius found Officer Kowalski "at fault" for the accident or that he had violated an internal police department policy. The trial court denied the defense motion in part, stating that Commander Grutzius would not be allowed to offer his opinion as to who was "at fault," but that he would be

permitted to testify as to whether he believed that Officer Kowalski's actions violated police department policies. The trial court explained that, while a violation of an internal policy is not *per se* proof of willful and wanton conduct, it is probative of the question.

¶ 5 We first note that it is undisputed that the weather on November 27, 2009, was dry and sunny and that the pavement was dry. Jeffrey testified at trial that, on that date, he was driving southbound on Burnham Avenue, heading to pick up a friend at the Family Dollar store located near the intersection of Burnham Avenue and 178th Street. He heard sirens as he was coming to a stop in the left lane to turn into the Family Dollar parking lot. Jeffrey testified that he looked in his rearview mirror when he heard the sirens, but he did not see any emergency vehicles. According to Jeffrey, he waited for a northbound car to pass by his path before attempting to turn left. He testified that "as soon as [he] let [his] foot off the brake" to turn left, he "blacked out." When he regained consciousness, Jeffrey was in the back seat area of his car, because his seat had broken.

¶ 6 On cross-examination, however, Jeffrey admitted that he had seen a police car in his left side mirror just as he began to turn left. He stated that about 10 to 20 seconds had passed from the time he heard the sirens until the time of impact and that seeing the police car in his mirror was his last memory before regaining consciousness after the collision. He admitted that he was listening to music at the time of the collision, but he denied that the music was playing loudly or prevented him from hearing the sirens. Jeffrey further admitted that the right lane was clear and that he could have pulled over to the right when he heard the sirens.

¶ 7 Commander Grutzius testified that the police department's policy and procedure manual is known as the "General Orders." He identified General Order 41.2, which provides that the orders "establish guidelines that will direct patrol officers in the performance of their daily patrol

activities and vehicle usage in a safe, efficient, and professional manner." The order further provides that "all employees operating a department vehicle will exercise due regard for the safety of all persons." Commander Grutzius confirmed that General Order 41.2 states that "no police response is of such importance that the principles of safety become secondary." He acknowledged that patrol officers are allowed to travel in excess of the posted speed limit and drive in any lane or non-lane of traffic, as safety permits. He explained that the phrase "as safety permits" as used in the General Orders means in a manner which avoids a collision. Commander Grutzius testified that he reviewed the circumstances surrounding the November 27, 2009, collision, the report issued by the department's Accident Review Board, and the videotape from Officer Kowalski's dashboard camera.

¶ 8 The video, identified as Plaintiff's Ex. No. 1, was admitted into evidence and published to the jury. The video depicts Officer Kowalski's car cruising on patrol before receiving a domestic dispute call at which time he activated his lights and sirens and accelerated his speed. The sirens can be heard on the video as Officer Kowalski proceeds down a street, slowing as he approached an intersection. The cars in and around the intersection stop and wait as the police car navigates around them through the intersection. A few cars are seen past the intersection, but those cars have either pulled to the right or stopped in their places to allow Officer Kowalski to pass by them. Jeffrey's car is seen stopped in the left lane as Officer Kowalski approaches from behind with his lights and sirens activated. Just as the police car begins to pass Jeffrey on his left, Jeffrey's car turns left, directly in front of Officer Kowalski's vehicle. The entire video is 140 seconds in length and recorded the police car's speed.

¶ 9 During the time preceding the collision, Commander Grutzius stated that Officer Kowalski's speed ranged from 70 to 81 miles per hour. Just before the collision, however, the

police car's speed had reduced to about 65 miles per hour. The speed limit on Burnham Avenue at the time of the crash was 35 miles per hour. According to Commander Grutzius, he determined that Officer Kowalski was traveling at a speed greater than safety permitted and that he failed to reduce his speed at the intersection of Burnham Avenue and 178th Street in order to avoid a collision. Based on his review of the facts, Commander Grutzius believed that Officer Kowalski violated General Order 41.2.

¶ 10 On cross-examination, defense counsel asked Commander Grutzius whether Jeffrey's conduct contributed to the collision in addition to Officer Kowalski's violation of General Order 41.2. Jeffrey objected on the basis that the court had previously barred Commander Grutzius from testifying as to who was at fault for the collision. The trial court sustained the objection, and defense counsel made an offer of proof to preserve the issue for appeal. During the offer of proof, counsel read from Commander Grutzius's deposition testimony in which he stated that he found Officer Kowalski "at fault for his contributing part in this accident." He further testified in his deposition that he "believe[d]" Officer Kowalski's violation of policy "was a contributing fact in the crash."

¶ 11 Called as an adverse witness for Jeffrey, Officer Kowalski testified that, on November 26, 2009, he began work at Wal-Mart at approximately 11 p.m. and worked continuously until 3 or 4 a.m. on November 27. After completing his shift at Wal-Mart, he then started his shift at the police department at 7 a.m. on November 27, 2009. Officer Kowalski testified that he had napped in between those shifts. Later, when called by the defense, Officer Kowalski stated that he had been employed by the Lansing Police Department since 1999, had trained with the Illinois State Police Academy, and had worked as a patrol officer, paramedic, crime scene investigator, and in other capacities with the department. The parties stipulated that Officer Kowalski had "no

memory of the facts related to the occurrence alleged in Plaintiff's Complaint and that no inference or conclusion should be made in favor of or against any party to the lawsuit."

¶ 12 The evidence deposition of Dr. P.K. Alexander was read to the jury. Dr. Alexander testified regarding the plaintiff's injuries, which are not at issue in this appeal.

¶ 13 At the close of Jeffrey's case-in-chief, the defendants moved for a directed verdict, which the trial court denied.

¶ 14 Jeffrey then moved *in limine* for the court to bar the defendants from presenting any testimony of their expert witness, Dennis Harper, related to Jeffrey's compliance with the Vehicle Code and his alleged contributory negligence. Defense counsel objected, arguing that it would be unfairly prejudicial to have allowed Commander Grutzius to testify that Officer Kowalski violated an internal police department policy, but to bar Harper from testifying that Jeffrey violated a provision of the Vehicle Code.

¶ 15 The trial court stated that, if Harper had the training, experience and expertise to discuss the proper manner in which to drive an emergency vehicle, he would be allowed to "opine on whether or not the officer's driving comported with the Lansing policy," providing his opinions had been properly disclosed before the trial. However, the court stated that it would not let Harper discuss whether Officer Kowalski or Jeffrey violated any provision of the Vehicle Code or whether such a violation contributed to the negligence of either party. According to the trial court, "[t]hat would invade the province of the trier of fact. They will decide whether anybody broke the law. And if they did, whether it contributes to the accident or not." Thus, the trial court seemingly granted in part and denied in part Jeffrey's motion *in limine* regarding Harper's testimony. The defendants, however, chose not to call Harper as a witness.

¶ 16 Lansing Police Officer Daniel Powers testified for the defense. On November 27, 2009, Officer Powers was responding to an emergency, driving southbound on Burnham Avenue. He approached the accident scene and stopped his vehicle. Officer Powers checked on Jeffrey, noting that the music was playing so loudly that he had to ask Jeffrey to turn the volume down. He administered first aid to Jeffrey's wounds and saw that Officer Kowalski's vehicle was wrapped around a nearby tree.

¶ 17 After resting their case, the defendants moved for a directed verdict on the affirmative defense of contributory negligence. The trial court denied that motion and denied Jeffrey's subsequent motion for a directed verdict in his favor.

¶ 18 During the parties' jury instruction conference, the matter of Harper not being called to testify arose, upon which the defendants maintained that they did not call Harper to testify because the court had barred him from opining about Jeffrey's contributory negligence. Jeffrey, however, argued that he would have questioned Harper about his opinions related to the General Orders. The parties agreed to re-open the proofs in order to allow Jeffrey to call Harper as a rebuttal witness. Harper then testified that he was retained by defense counsel to review the November 27, 2009, collision. As part of his review, he read General Order 41.2 and determined that such a rule is a general safety rule enacted in most municipalities.

¶ 19 The jury was then instructed on the relevant principles of law, including that the defendants had alleged that Jeffrey was guilty of contributory negligence for making a left turn into the path of an emergency vehicle and for failing to properly yield the right-of-way to an approaching emergency vehicle which had its lights and sirens activated. The jury was also instructed that there was a statute in force at the time of the collision requiring drivers to "yield the right of way" and "immediately drive to a position parallel to, and as close as possible to, the

right hand edge of the curb of the highway" upon the "immediate approach of a police vehicle properly" using an "audible or visual signal." The instruction further provided that the statute "shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway," and if the jury determined that Jeffrey had "violated the statute," it may consider that fact with all other facts and circumstances when determining whether and to what extent, if any, he was negligent. Three verdict forms were provided to the jury: a general form finding in favor of Jeffrey; a general form finding in favor of the defendants, and a special verdict form finding in favor of Jeffrey but reducing his award by a percentage accounting for his contributory negligence.

¶ 20 The jury returned a general verdict in favor of Jeffrey, awarding him $45,000. The court entered judgment on the verdict on August 21, 2013. Thereafter, the defendants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. Jeffrey filed a petition for costs. On December 10, 2013, the trial court denied the defendants' posttrial motion and awarded Jeffrey $889 in costs. This appeal followed.

¶ 21 We first address the defendants' argument that the trial court erred when it denied their motion for judgment notwithstanding the verdict. A judgment notwithstanding the verdict, or *n.o.v.*, should be entered where all the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 387 (2008) (citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 504 (1967)). In ruling on such a motion, the trial court may not weigh the evidence or determine the credibility of the witnesses as it may only consider the evidence in the light most favorable to the non-moving party. *Bulger v. Chicago Transit Authority,* 345 Ill. App. 3d 103, 122 (2003). The trial court may not grant judgment

n.o.v. where a decisive outcome depends upon resolution of a substantial factual dispute or conflicting evidence or where the assessment of witness credibility is necessary. *Id.* We review *de novo* rulings on motions for judgment notwithstanding the verdict. *Id.*

¶ 22 Section 2-202 of the Act provides that "[a] public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 ILCS 10/2-202 (West 2008). The Act also provides that a municipality is not liable for an injury resulting from its employee's act or omission if the employee is not liable. 745 ILCS 10/2-109 (West 2008). Here, it is undisputed that Officer Kowalski was responding to an emergency call in order to enforce or execute the law. See *Morris v. City of Chicago*, 130 Ill. App. 3d 740, 744 (1985) (the Act applies to conduct of an officer engaged in enforcing or executing the law). Thus, Jeffrey could not prevail unless he could prove that Officer Kowalski's conduct was willful and wanton. *Wade v. City of Chicago*, 364 Ill. App. 3d 773, 780 (2006).

¶ 23 The Act defines "willful and wanton conduct" as meaning "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2008)). Here, the parties do not dispute that there is no evidence that Officer Kowalski intentionally caused harm to Jeffrey. See *Murray v. Chicago Youth C*, 224 Ill. 2d 213, 237 (2007) (stating that conduct performed with an utter indifference to or a conscious disregard for the safety of others has been upheld as willful and wanton despite a lack of intention, noting the court has called such "willful and wanton conduct 'quasi-intentional.' "). The defendants assert, however, that there was also no evidence that Officer Kowalski showed an utter

indifference to or conscious disregard for the safety of others when he activated his sirens and lights and proceeded at a high rate of speed to respond to an emergency call.

¶ 24 The question of whether an officer's actions amount to willful and wanton misconduct is normally reserved for the trier of fact; in this case, the jury. *Shuttlesworth v. City of Chicago*, 377 Ill. App. 3d 360, 366 (2007). However, the question may be resolved by the trial court by directing the verdict when all the evidence viewed in the light most favorable to the nonmovant so overwhelmingly favors the movant that no contrary determination based on that evidence could ever stand. *Id.*; see also *Harris v. Thompson*, 2012 IL 112525, ¶ 42.

¶ 25 We find the facts of this case remarkably similar to the facts in *Harris*. *Id.*, ¶ 46. In *Harris*, the defendant ambulance driver drove eastbound on Ninth Street toward Butler Road in response to an emergency call at a nursing home. *Id.*, ¶ 3. The plaintiff was driving southbound on Butler Road when his car collided with the ambulance. *Id.*, ¶ 4. The plaintiff testified that he never saw the ambulance prior to the impact because he was looking to his left upon entering the intersection, which was away from the direction the eastbound ambulance was traveling. *Id.* At the conclusion of the plaintiff's case on both his negligence and willful and wanton negligence counts, the defendants moved for a directed verdict on the latter count, which the trial court granted. *Id.*, ¶ 8. The trial proceeded on the negligence count, and the jury returned a verdict in favor of the plaintiffs. *Id.* The defendants appealed, and the plaintiff cross-appealed; the appellate court affirmed the judgment of the circuit court. *Id.*, ¶ 11. The supreme court reversed the appellate court's judgment as to the negligence count, but affirmed its judgment as to the willful and wanton count. *Id.*, ¶ ¶ 32, 46.

¶ 26 In affirming the directed verdict on the willful and wanton claim, the supreme court noted that the evidence demonstrated that the ambulance driver had: activated his lights and sirens just

before approaching the intersection at Butler Road; slowed down at each intersection he crossed; and, eased into the intersection with his foot on the brake in case he needed to stop. *Id.*, ¶ 38. While the ambulance driver estimated his speed at 10 miles per hour, the plaintiff's passenger testified that the ambulance appeared to be traveling at 40-plus miles per hour. *Id.*, ¶ 39. The plaintiff conceded that the defendant ambulance driver did not intend to harm him, but rather he exhibited a conscious disregard for the safety of others. *Id.*, ¶ 43.

¶ 27 The supreme court determined that these facts, even viewed in the light most favorable to the plaintiff, fell "far short of establishing that [the defendant ambulance driver] consciously disregarded, or was utterly indifferent to, the safety of others." *Id.*, ¶ 44. The supreme court further rejected the plaintiff's argument that there was a dispute on the speed at which the ambulance was traveling. The court stated that "driving at an excessive rate of speed alone is not decisive as to the issue of willful and wanton conduct. Rather, speed is only a single circumstance in the totality of the evidence presented to establish willful and wanton conduct." *Id.*, ¶ 45. The court noted that Illinois courts have held that, "although emergency vehicle drivers entered intersections at excessive speeds, the totality of the circumstances nonetheless failed to show that the drivers consciously disregarded or were utterly indifferent to the safety of others." *Id.* (citing *Hampton v. Cashmore*, 265 Ill. App. 3d 23, 31 (1994) (ambulance); *Bosen v. City of Collinsville*, 166 Ill. App. 3d 848, 850 (1987) (police); *Lipscomb v. Lewis*, 619 N.E. 2d 102, 105-06 (Oh. App. Ct. 1993) (ambulance)). The supreme court, therefore, upheld the circuit court's directed verdict in favor of the defendants on the plaintiff's willful and wanton claim. *Id.*, ¶ 46.

¶ 28 In this case, Officer Kowalski had his lights and sirens activated at all times following his dispatch, his speed had slowed to 65 miles per hour as he approached Jeffrey's vehicle, and the video establishes that there was nothing obstructing either driver's view of each other. Jeffrey

himself admitted that he heard the sirens and that he noticed the police car in his left mirror just before he turned left. While Jeffrey argues that Officer Kowalski's speed suggests a conscious disregard for the safety of others, our supreme court clearly explained that "driving at an excessive rate of speed alone is not decisive as to the issue of willful and wanton conduct." *Harris,* 2012 IL 112525, ¶ 45. Here, there is simply no evidence other than Officer Kowalski's speed to support Jeffrey's claim, and we simply cannot find that his speed alone may sustain a claim of willful and wanton conduct. Even considering the testimony of Commander Grutzius in the light most favorable to Jeffrey, the law clearly provides that the "[v]iolation of self-imposed rules or internal guidelines," such as General Order 41.2, will not normally impose a legal duty, " 'let alone constitute evidence of negligence, or beyond that, willful and wanton conduct.' " *Wade v. City of* Chicago, 364 Ill. App. 3d 773, 781 (2006) (quoting *Morton v. City of Chicago,* 286 Ill. App. 3d 444, 454 (2006)). Accordingly, we agree with the defendants that the circuit court erred when it denied their motion for judgment notwithstanding the verdict on the willful and wanton claims.

¶ 29 Based on the foregoing reasons, we reverse the judgment of the circuit court of Cook County.

¶ 30 Reversed.