ATTORNEY FOR APPELLANT

Daniel M. Witte
Travelers Staff Counsel Indiana
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Edward R. Reichert
Golitko & Daly, P.C.
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Howard County Sheriff's Department and Howard County 911 Communications,

Appellant-Defendant,

v.

Derrick Duke and Dustin Duke, as Co-Personal Representatives of the Estate of Tammy Lynn Ford, Deceased,

Appellee-Plaintiffs.

June 24, 2021

Court of Appeals Case No. 20A-CT-1936

Appeal from the Howard Circuit Court

The Honorable Lynn Murray, Judge

Trial Court Cause No. 34C01-1604-CT-278

Pyle, Judge.

Statement of the Case

[1] In this interlocutory appeal, the Howard County Sheriff's Department ("the Sheriff") and the Howard County 911 Communications ("the County 911

Dispatch") (collectively, "the County") appeal the trial court's order denying the County's motion for summary judgment on the complaint filed against the County by Derrick Duke and Dustin Duke (collectively, "the Dukes") as co-personal representatives of the estate of Tammy Lynn Ford ("Ford") (collectively, "the Ford Estate").

[2] This appeal involves a statutory exception to the statutory immunity provided to a governmental entity from a loss that results from the use of a 911 system, also known as an enhanced emergency communication system. Specifically, the statutes at issue in this appeal include governmental immunity under INDIANA CODE § 34-13-3-3(a)(19) for loss resulting from the use of a 911 system and the willful or wanton misconduct exception under INDIANA CODE § 36-8-16.7-43 that precludes the application of that 911 system immunity.

[3] Here, the County filed a summary judgment motion, arguing that it had governmental immunity under INDIANA CODE § 34-13-3-3(a)(19). In response, the Ford Estate argued that the County's immunity defense was precluded by the willful or wanton exception of INDIANA CODE § 36-8-16.7-43 and that there was a genuine issue of material fact as to whether the County's conduct amounted to willful or wanton misconduct. The trial court agreed that there was a genuine issue of fact and denied the County's summary judgment motion. Concluding that the trial court did not err by denying the County's summary judgment motion, we affirm the trial court's interlocutory order.

[4] We affirm.

Issue

Whether the trial court erred by denying the County's summary judgment motion.

Facts

[5] On July 1, 2015, the following four employees were on duty at the County 911 Dispatch: Zachary Rudolph ("Dispatcher Rudolph"), Hillary Farmer ("Dispatcher Farmer"), Jennifer Garber ("Dispatcher Garber"), and Matthew Wohlford ("Dispatcher Wohlford"). The County 911 Dispatch had a standard operating procedures ("SOP") manual that set forth how employees were to process 911 calls. In relevant part, the SOP manual required employees to ask for the caller's location, verify the location and phone number, and then manually enter the location into the computer, especially when the caller placed the call from a cell phone.

[6] On July 1, 2015, at 1:41 a.m., Ford called the County 911 Dispatch from her cell phone at her residence. Dispatcher Rudolph and Dispatcher Farmer answered the 911 call, and Dispatcher Rudolph asked Ford "where is your emergency?" (Appellee's App. at 2; Ex. AA). Ford responded that she was located at Terrace Towers in apartment 416, which had an address of 605 South Bell Street. Ford also reported that she could not breathe. Dispatcher Rudolph did not enter Ford's address into the computer and hung up when Dispatcher Farmer took over the call. Dispatcher Farmer got Ford's name and phone number, but she did not verify Ford's address.

[7] At 1:45 a.m., Dispatcher Farmer dispatched medics and the Kokomo Fire Department ("KFD") to apartment 416 at Civic Towers at 210 East Taylor Street. Civic Towers was approximately ten blocks from Ford's Terrace Towers residence. When KFD arrived at Civic Towers at 1:50 a.m., they could not locate apartment 416. KFD firefighter Kurt Reed ("Firefighter Reed") then radioed back to the County 911 Dispatch to verify the apartment number. Dispatcher Garber took Firefighter Reed's call and determined that Dispatcher Farmer had dispatched KFD and the medics to the wrong address. Dispatcher Rudolph confirmed to Dispatcher Garber that Ford had reported that her location was at Terrace Towers. Upon getting the correct address from Dispatcher Garber, KFD arrived at Ford's apartment at Terrace Towers at 1:58 a.m. When KFD arrived at Ford's apartment, she was slumped over and did not have a pulse. She was, however, still warm to the touch. Ford was then transported to the hospital, where she was pronounced dead.

[8] In April 2016, the Ford Estate filed a complaint against the County and sought damages recoverable under the wrongful death statute.[1] The Ford Estate alleged, in part, that the County had negligently and carelessly sent the medics to the incorrect address and that the delay had resulted in Ford's death. The Ford Estate also alleged that the County's actions amounted to willful or wanton misconduct.

---

[1] The Ford Estate later filed an amended complaint in February 2017. The amendment did not affect the issue on appeal.

[9] A few years later, in February 2020, the County filed a summary judgment motion, arguing that it was immune from liability under the Indiana Tort Claims Act based on INDIANA CODE § 34-13-3-3(a)(19) for a loss arising from the use of an enhanced emergency communication system or 911 system. The County acknowledged the willful or wanton exception under INDIANA CODE § 36-8-16.7-43 that could preclude the invocation of immunity for the use of a 911 system, but it argued that the Ford Estate could not show that the County's actions amounted to willful or wanton misconduct. The County designated the CAD report for Ford's 911 call as well as depositions from six people, including the three dispatchers who were involved with Ford's 911 incident, Firefighter Reed, the KFD fire chief, and the County's 911 director.

[10] In the Ford Estate's summary judgment response, it argued that summary judgment should be denied because there was a genuine issue of material fact regarding whether the County's actions constituted willful or wanton misconduct under INDIANA CODE § 36-8-16.7-43. The Ford Estate designated depositions from nine people, including the three dispatchers who were involved with Ford's 911 incident, Firefighter Reed, the KFD fire chief, the Kokomo Police Department ("KPD") Chief, and the County Sheriff. The Ford Estate also designated Ford's 911 call and the SOP manual for the County's 911 dispatchers. The designated evidence showed that the County 911 dispatchers had failed to follow some of the SOPs. The Ford Estate also designated a KFD incident report from the 911 run to Ford's apartment. The incident report noted the delay that had been caused by the County's 911 dispatchers, and the

report contained an opinion from Firefighter Reed that "the difference in time being sent to the wrong address played a big part in the pt. not making it." (App. Vol. 5 at 28, 29). The Ford Estate's designated evidence also showed that the KFD and KPD had reported issues with the County's 911 dispatch prior to the 2015 incident with Ford.

[11] In the County's summary judgment reply, it argued there was no genuine issue of material fact because there was "no evidence to support a finding of willful or wanton misconduct" by the County. (App. Vol. 5 at 44-45). The County argued that the dispatcher's response to Ford's 911 call was "simply an honest mistake" and that the County was immune. (App. Vol. 5 at 45). The County also argued that the issue of willful or wanton misconduct was not a question of fact for the jury.

[12] The trial court held a hearing and then issued an order denying the County's summary judgment motion. The trial court made the following relevant findings:

> 14. As per the SOP, the location of the call for 911 emergency service is request from the caller first, and is to be entered into the computer system after verification. When the caller is using a cell phone, like Ms. Ford was, the dispatcher must manually enter the address into the computer system.
>
> 15. Contrary to the SOP, Rudolph did not enter the address into the computer. He left the call, after Farmer joined and she then asked Ms. Ford her other information. Farmer never ascertained or verified Ms. Ford's address, and entered an incorrect address in the computer and relayed the same to EMS.

16. After Ms. Ford's death, the prior complaints made by City law enforcement and first responders against the County run 911 dispatch were the subject of one or more public meetings, and a committee of the officials was formed to address these issues.

* * * * *

27. In Indiana, there is no precedent addressing the willful or wanton exception of I.C. [§] 36-8-16.7-43, which became effective July 1, 2012. Prior to the enactment of this statutory exception, the Indiana appellate courts found governmental entities immune from liability for tortious acts committed in the operation of 911 systems no matter how egregious the employee's conduct. Barnes v. Antich, 700 N.E.2d 262 (Ind. Ct. App. 1998;) Burns v. City of Terre Haute, 744 N.[E].2d 1038 (Ind. Ct. App. 2001). Such cases are not applicable here.

* * * * *

36. In the mishandling of Ms. Ford's call, Howard County 911 employees violated the SOP. They had been trained and acknowledged that not following the SOP in processing a 911 call for emergency aid could result in injury to someone. Indiana law has defined willful or wanton misconduct as an omission or failure to act when the actor has actual knowledge of the natural and probable consequence of injury and his opportunity to avoid the risk. Ellis v. City of Martinsville, 940 N.E.2d 1197, 1204-05 (Ind. Ct. App. 2011).

37. There are genuine issues of material fact as to whether the actions of the Howard County employees constituted willful or wanton misconduct so as to except the Howard County defendants from governmental immunity.

38. The genuine issues of material fact preclude summary judgment. The motion for summary judgment by defendants Howard County Sheriff's Department and Howard County 911 Communications is denied.

(App. Vol. 2 at 21, 24, 26).

[13] Thereafter, the County filed a motion seeking to have the trial court certify its order, and the trial court granted the motion. The County then sought permission to file this interlocutory appeal, and this Court granted its request. The County now appeals.

Decision

[14] The County challenges the trial court's interlocutory order denying the County's summary judgment motion.

[15] Our standard of review for summary judgment cases is well-settled. When we review a trial court's grant of a motion for summary judgment, our standard of review is the same as it is for the trial court. *Knighten v. E. Chi. Hous. Auth.,* 45 N.E.3d 788, 791 (Ind. 2015). Summary judgment is appropriate only where the moving party has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). "All factual inferences must be construed in favor of the non-moving party, and all doubts as to the existence of a material issue must be resolved against the moving party." *Ellis v. City of Martinsville*, 940 N.E.2d 1197, 1201 (Ind. Ct. App. 2011). Summary judgment is a "high bar" for the moving party to clear in Indiana. *Hughley*, 15 N.E.3d at 1004.

[16] Where, as here, a trial court enters findings of fact and conclusions thereon in denying a motion for summary judgment, the entry of specific findings and conclusions does not alter the nature of our review. *Ellis*, 940 N.E.2d at

1201. We are not bound by the trial court's specific findings of fact and conclusions thereon; instead, they merely aid our review by providing us with a statement of reasons for the trial court's actions. *Id.*

[17] There are two statutes that form the basis for the County's summary judgment motion and the Ford Estate's opposition thereto: (1) INDIANA CODE § 34-13-3-3(a)(19), which provides immunity to a governmental entity for loss resulting from the use of a 911 system;[2] and (2) INDIANA CODE § 36-8-16.7-43, which sets forth a willful or wanton exception that precludes the application of 911 system immunity.[3] Neither party disputes the relevance or the interpretation of these two statutes. Instead, the dispute lies in whether the actions of the County's 911 Dispatch employees constituted willful or wanton misconduct

---

[2] INDIANA CODE § 34-13-3-3(a)(19) provides that "[a] governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the . . . [d]evelopment, adoption, implementation, operation, maintenance, or use of an enhanced emergency communication system." (Format altered).

[3] INDIANA CODE § 36-8-16.7-43 provides:

> Notwithstanding any other law:
>
> (1) the board;
> (2) a PSAP;
> (3) a political subdivision;
> (4) a provider;
> (5) an employee, director, officer, or agent of a PSAP, a political subdivision, or a provider; or
> (6) an employee or member of the board, the board chair, the executive director, or an employee, agent, or representative of the board chair;
>
> is not liable for damages in a civil action or subject to criminal prosecution resulting from death, injury, or loss to persons or property incurred by any person in connection with establishing, developing, implementing, maintaining, operating, and providing 911 service, except in the case of willful or wanton misconduct.

A PSAP "refers to a public safety answering point: (1) that operates on a twenty-four (24) hour basis; and (2) whose primary function is to receive incoming requests for emergency assistance and relay those requests to an appropriate responding public safety agency." I.C. § 36-8-16.7-20 (format altered).

under INDIANA CODE § 36-8-16.7-43, thereby precluding the application of governmental immunity under INDIANA CODE § 34-13-3-3(a)(19) in this case.

[18] "Willful or wanton misconduct consists of either: '1) an intentional act done with reckless disregard of the natural and probable consequence of injury to a known person under the circumstances known to the actor at the time; or 2) an omission or failure to act when the actor has actual knowledge of the natural and probable consequence of injury and his opportunity to avoid the risk.'" *Ellis*, 940 N.E.2d at 1204-05 (quoting *U.S. Auto Club, Inc. v. Smith*, 717 N.E.2d 919, 924 (Ind. Ct. App. 1999), *trans. denied*). "Whether the party has acted or failed to act, willful and wanton misconduct has 'two elements: 1) the defendant must have knowledge of an impending danger or consciousness of a course of misconduct calculated to result in probable injury; and 2) the actor's conduct must have exhibited an indifference to the consequences of his own conduct.'" *Miner v. Sw. Sch. Corp.*, 755 N.E.2d 1110, 1113 (Ind. Ct. App. 2001) (quoting *Witham v. Norfolk & W. Ry. Co.*, 561 N.E.2d 484, 486 (Ind. 1990), *reh'g denied*). The question of whether a party has engaged in willful or wanton misconduct is "typically a function of the trier of fact." *Sharp v. Town of Highland*, 665 N.E.2d 610, 617 n.3 (Ind. Ct. App. 1996), *trans. denied*. *See also Clouse v. Peden*, 243 Ind. 390, 399, 186 N.E.2d 1, 5 (1962) (explaining that the issue of whether a defendant's actions amounted to willful or wanton misconduct "should be left to the jury in all cases where there is any conflict in the evidence").

[19] Here, the County argues that the dispatchers' actions were merely a "simple mistake[.]" (The County's Br. 13). The County also suggests that the Ford Estate had the burden of proving that the County's actions constituted willful or wanton misconduct. Additionally, the County asserts that "there is no credible evidence to support a finding of willful or wanton misconduct by the dispatchers in handling Ford's cell phone call to 911." (The County's Br. 19).

[20] The County's arguments reveal an apparent misunderstanding, both as to the parties' burden on summary judgment and as to what the trial court found. As to the County's last argument, our review of the trial court's order reveals that the trial court did not find that the dispatchers engaged in willful or wanton misconduct. Indeed, the trial court made no definitive findings—either way—regarding willful or wanton misconduct. Instead, the trial court determined that there were "genuine issues of material fact as to whether the actions of the Howard County employees constituted willful or wanton misconduct so as to except the Howard County defendants from governmental immunity." (App. Vol. 2 at 26).

[21] Next, because this appeal stems from a summary judgment motion, the Ford Estate did not need to prove, at this juncture, that the County's actions constituted willful or wanton misconduct. Rather, that will be the Ford Estate's burden at trial. Furthermore,"'[m]erely alleging that the plaintiff has failed to produce evidence on each element of [his cause of action against the defendant] is insufficient to entitle the defendant to summary judgment under Indiana law.'" *Drendall Law Office, P.C.*, 77 N.E.3d 846, 854 (Ind. Ct. App. 2017)

(quoting *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994), *reh'g denied*), *trans. denied*. The County, as the party moving for summary judgment based on an affirmative defense of governmental immunity for the use of a 911 system, had the initial burden of showing that it had a "factually unchallenged affirmative defense that bars the plaintiff[']s claim." *See Sheets v. Birky*, 54 N.E.3d 1064, 1069 (Ind. Ct. App. 2016) ("When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiffs claim.").

[22] Since 2012, when the legislature enacted INDIANA CODE § 36-8-16.7-43, there is no longer unlimited immunity to a governmental entity or its employees for the use of a 911 system under INDIANA CODE § 34-13-3-3(a)(19). That 911 system immunity can be precluded in a case where there is willful or wanton misconduct. *See* I.C. § 36-8-16.7-43. Thus, in this specific case, to meet the burden of showing that it had a factually unchallenged affirmative defense that barred the Ford Estate's claim, the County was required to show that it fell within the purview of the 911 system immunity statute and that it did not engage in acts constituting willful or wanton misconduct. *See Sharp*, 665 N.E.2d at 617 (discussing a defendant's burden on summary judgment when asserting an affirmative defense based on immunity). Here, there is no dispute that 911 system immunity under INDIANA CODE § 34-13-3-3(a)(19) would be applicable to the County but only as long as there was no willful or wanton

misconduct by the County's 911 Dispatch when it took Ford's 911 call and initially failed to dispatch emergency personnel to Ford's apartment. The County designated evidence to suggest that the dispatchers' actions were a mistake, but, as the trial court concluded, the Ford Estate designated evidence to show that there were "genuine issues of material fact as to whether the actions of the Howard County employees constituted willful or wanton misconduct so as to except the Howard County defendants from governmental immunity." (App. Vol. 2 at 26). Specifically, the Ford Estate designated an incident report concluding that the failure to dispatch KFD to Ford's address played a "big role" in her death, and evidence that KFD and KPD had reported of prior reported problems with the County's 911 dispatch prior to the 2015 incident with Ford. As a result, summary judgment should not be granted where material facts conflict or conflicting inferences are possible. *See Hughley*, 15 N.E.3d at 1003-04 (explaining that "summary judgment is not a summary trial"). Because there was a genuine issue of material fact on the willful or wanton exception to governmental immunity for the use of a 911 system, we conclude that the trial court did not err by denying the County's summary judgment motion. Accordingly, we affirm the trial court's interlocutory order and remand for further proceedings.

[23] Affirmed.

Najam, J., and Tavitas, J., concur.