IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

JENNIFER PARTIN,	:	APPEAL NO. C-140461 TRIAL NO. A-1203491
and	:	
LARRY PARTIN,	:	*O P I N I O N.*
Plaintiffs-Appellees,	:	
vs.	:	
CITY OF NORWOOD,	:	
and	:	
JIM STITH,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: April 29, 2015

Robert G. Kelly, for Plaintiffs-Appellees,

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere and *John W. Hust*, for Defendants-Appellants.

Please note: this case has been removed from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Defendants-appellants the City of Norwood and Jim Stith, Norwood's elected auditor, have appealed from the trial court's entry denying their motions for summary judgment on claims raised by a city employee, plaintiff-appellee Jennifer Partin, and her husband plaintiff-appellee Larry Partin, relating to Jennifer Partin's retirement. Because Stith was entitled to immunity on all claims raised by Jennifer Partin, and because both Norwood and Stith were entitled to immunity on the claim raised by Larry Partin, we hold that the trial court erred in denying summary judgment on those claims.

Factual and Procedural Background

{¶2} In 1997, Norwood City Council passed an ordinance establishing an Early Retirement Incentive Plan ("ERIP"). As relevant to this appeal, the ERIP provided that it was available to all Norwood employees who were members of the Ohio Public Employees Retirement System ("OPERS") and who met particular eligibility requirements. Under the ERIP, Norwood would purchase for an eligible employee the lesser of three years of service credit or one-fifth of the employee's total service credit, thus allowing them to retire early. The ERIP further provided that all covered OPERS employees would receive 30 days' written notice if Norwood terminated the ERIP.

{¶3} The ERIP was renewed by Norwood on several occasions, but it expired on December 31, 2008, when no steps were taken by Norwood to renew the plan. No eligible employees received notice that the plan had expired.

{¶4} On January 28, 2008, Jim Stith was sworn in as Auditor of Norwood. Sometime in 2009, Stith discovered that the ERIP had expired. He communicated this to Norwood City Council on several occasions in 2009 and 2010. In October of 2010, Norwood's Assistant Law Director, Christopher Brown, faxed to OPERS a draft ERIP for review. OPERS's records indicate that an OPERS employee reviewed necessary plan corrections with Brown, and that Brown indicated that he would inform OPERS whether Norwood would be adopting an ERIP following an upcoming board meeting. In February of 2011, Brown communicated to OPERS that Norwood City Council had not yet determined whether they would implement an ERIP.

{¶5} Jennifer Partin, a long-time Norwood employee for the Norwood Recreation Department, began to consider retiring early under the terms of the ERIP in the fall of 2010. Partin testified in her deposition that she had been unaware of the ERIP until Stith suggested to her during an unrelated meeting that she might be eligible to participate in the plan. According to Partin, Stith had indicated that she could possibly retire under the ERIP and then return to work for the recreation department at 30 hours a week. At that time, she had accumulated just under 28 years of service credit with OPERS.

{¶6} On September 8, 2010, Partin contacted OPERS to look into her eligibility for early retirement. OPERS's records regarding her call indicate that Partin had been advised that OPERS did not show an ERIP for Norwood. Partin communicated this information to Stith, who responded by telling her that "it was a matter of them just sending a letter up there and taking care of that." Following this communication, Partin had no further communication with Stith regarding the ERIP.

{¶7} In January of 2011, Partin again contacted OPERS to initiate her retirement process. She attended a meeting with OPERS on January 26, 2011. OPERS's records regarding this meeting indicate that they "advised member [that] without the ERI[P] she is not eligible for retirement," and that "member has not received any information from employer regarding ERI[P], just verbal discussion." After advising her that there currently was not an ERIP in place, OPERS calculated Partin's potential retirement benefits based on an assumption that Norwood would purchase three years of service credit for her under the ERIP.

{¶8} After meeting with OPERS, Partin filled out the necessary paperwork for her retirement. In early February of 2011, she and Bob Laake, Norwood's Deputy Auditor, signed a document to be submitted to OPERS that indicated that "[t]he undersigned agree that the employee * * * is eligible to retire with an age and service retirement benefit from OPERS, or will qualify to retire with the purchase of service credit under the retirement incentive plan * * *."

{¶9} On February 15, 2011, OPERS sent Partin a letter informing her that, in order for her to receive a monthly retirement benefit, her employer needed to purchase additional service under an ERIP. The letter warned her that for these reasons, she may be delayed in attaining eligibility for her retirement benefits, and it informed her that she would be notified when her benefit eligibility was established.

{¶10} Despite receiving this letter, Partin retired as planned on March 31, 2011, and returned to work part-time for Norwood on April 4, 2011. She testified that she had first become aware that there was a problem with her retirement when she received a letter dated June 1, 2011, from OPERS, informing her that she was ineligible for benefits because Norwood did not have an approved ERIP with OPERS.

{¶11} Following her unsuccessful retirement, Partin remained employed by Norwood part-time. As a part-time employee, she was not eligible for dental and vision benefits, sick time, or paid vacations or holidays.

{¶12} Partin and her husband filed suit against Norwood and Stith. Partin raised various claims relating to Norwood's failure to renew the ERIP, its failure to notify eligible employees that the ERIP had expired, its failure to supervise the conduct of its employees, and the defendants' practice of intentionally misrepresenting to Norwood employees that the ERIP was still in place. Partin's husband asserted a derivative claim, alleging that the actions of Norwood and Stith had deprived him of money and the support of his wife and had required him to use his own sick and vacation time to provide for needs that would have been provided for by his wife if she had received her retirement benefits. The Partins requested that the trial court issue a declaratory judgment ordering Norwood to contribute to OPERS an amount equal to the time required for Jennifer Partin to receive her full pension and to immediately notify its employees that the ERIP was in effect until such time as Norwood terminated the plan in compliance with the law.

{¶13} Norwood and Stith filed a motion for summary judgment. They argued that they were entitled to a grant of immunity on the Partins' claims and, in the alternative, that they were entitled to summary judgment on the merits of the claims. The trial court denied the motion, and this appeal ensued.

{¶14} We note that the denial of a motion for summary judgment is not typically a final appealable order. But R.C. 2744.02(C) states that "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of

an alleged immunity from liability * * * is a final order." Consequently, this court has jurisdiction over this appeal.

{¶15} In one assignment of error, Norwood and Stith argue that the trial court erred in denying summary judgment. Norwood contends that it was entitled to a grant of immunity on the claim raised by Larry Partin. And Stith contends that he was entitled to a grant of immunity on all claims raised by the Partins. We note that Norwood has not challenged the trial court's denial of immunity on claims against the city raised by Jennifer Partin.

Standard of Review

{¶16} We review a trial court's grant of summary judgment de novo. *See Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriately granted when there exist no genuine issues of material fact, the party moving for summary judgment is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to that party. *See State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

Norwood's Immunity

{¶17} We first consider whether Norwood was entitled to a grant of immunity on the claim brought forth by Larry Partin.

{¶18} A three-tiered analysis is employed to determine whether a political subdivision is immune from liability under R.C. Chapter 2744. *See Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10. Under the first tier of the analysis, a political subdivision is entitled to an initial grant

of immunity and will not be liable "for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a government or proprietary function." *See* R.C. 2744.02(A)(2). The second tier of the analysis determines whether any of the exceptions provided for in R.C. 2744.02(B) apply to remove the initial grant of immunity. *Elston* at ¶ 11. If no exceptions apply, the political subdivision is immune from liability, and the analysis ends. But if immunity is removed by an exception in R.C. 2744.02(B), the third tier of the analysis requires a determination of whether a grant of immunity is reinstated by one of the defenses to liability provided in R.C. 2744.03(A). *Id.* at ¶ 12.

{¶19} Larry Partin's claim against the city is derivative of his wife's claims, which concern Norwood's failure to renew the ERIP and the city's actions regarding her retirement. Because the enactment of an ERIP, or the failure to maintain an ERIP, was a governmental function, Norwood was entitled to an initial grant of immunity. *See Gamel v. Cincinnati*, 2012-Ohio-5152, 983 N.E.2d 375, ¶ 21 (1st Dist.) (holding that the funding of a retirement system is a governmental function subject to immunity). And because no exceptions provided for in R.C. 2744.02(B) apply to remove that grant of immunity, we hold that the trial court erred in denying Norwood summary judgment on Larry Partin's claim.

Stith's Immunity

{¶20} Before we determine whether Stith was entitled to a grant of immunity on the Partins' claims, we must first ascertain whether he was sued in his individual or official capacity. This determination controls the appropriate R.C. Chapter 2744

immunity analysis to be applied. *See Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585, ¶ 12.

{¶21} The Partins contend that Stith had been sued in his individual capacity, but Stith asserts that the lawsuit was brought against him in his official capacity as the Norwood Auditor. The complaint listed "Jim Stith" as a defendant, and the line underneath Stith's name stated, "City of Norwood Auditor." The complaint further listed Stith's business address.

{¶22} While the complaint did not state that Stith was being sued "personally" or "individually," all allegations in the complaint concerned specific actions taken by Stith individually, rather than general practices of the Norwood Auditor's office. *See id.* at ¶ 15-16. And Stith answered the complaint as "Jim Stith," not as "Jim Stith, City of Norwood Auditor." Consequently, we conclude that the Partins filed the complaint against Stith in his individual capacity as an employee of Norwood.

{¶23} Because Stith was sued in his individual capacity, we employ the immunity analysis applicable to employees of a political subdivision provided for in R.C. 2744.03(A)(6). But the Partins contend that this court should not employ an immunity analysis, because this action and the claims asserted therein are exempt from the provisions of R.C. Chapter 2744 under R.C. 2744.09. R.C. 2744.09, titled "[a]ctions and claims exempted from provisions," provides as follows:

> This chapter does not apply to, and shall not be construed to apply to, the following:
>
> (A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;

> (B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;
>
> (C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;
>
> (D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;
>
> (E) Civil claims based upon alleged violations of the constitution or statutes of the United States * * *.

{¶24} The Partins contend that both R.C. 2744.09(A) and (B) apply to exempt their claims against Stith from being subject to an immunity defense. But R.C. 2744.09(B) concerns civil actions against a political subdivision and is inapplicable to claims against employees such as Stith. *See Zumwalde v. Madeira and Indian Hill Joint Fire Dist.*, 128 Ohio St.3d 492, 2011-Ohio-1603, 946 N.E.2d 748, ¶ 27.

{¶25} Further, we determine that R.C. 2744.09(A), which exempts from the provisions of R.C. Chapter 2744 claims against a political subdivision and its employees seeking damages for contractual liability, is inapplicable to the facts of this case. The Partins assert that Norwood was contractually obligated to offer Jennifer Partin an ERIP under Norwood Codified Ordinance 159.01. This ordinance, pertaining to the fringe benefits of certain Norwood employees, provides that "[b]enefits such as but not limited to: vacation, holidays, sick leave, terminal leave,

on-duty injury and medical coverage shall be the same as those outlined in the current contract with Local 3278." According to the Partins, because Norwood's contract with Local 3278 provided for an ERIP, Norwood Codified Ordinance 159.01 contractually obligated Norwood to offer Jennifer Partin an ERIP as well.

{¶26} This argument is not well-taken. To fall under the purview of R.C. 2744.09(A), a plaintiff must be a party to the contract upon which he or she seeks to recover damages for contractual liability. *See Eller Media Co. v. DGE Ltd.*, 8th Dist. Cuyahoga Nos. 83272 and 83286, 2004-Ohio-4748, ¶ 48. Here, Jennifer Partin was not a party to the contract between Norwood and Local 3278 that provided for an ERIP. Thus, the Partins' claims against Stith are not exempt from the provisions of R.C. Chapter 2744.

{¶27} We now consider whether Stith, as an employee of a political subdivision, was immune from liability on the Partins' claims. R.C. 2744.03 provides that an employee of a political subdivision will be immune from liability unless, as relevant to this appeal, the employee's actions were manifestly outside the scope of employment or were conducted with a malicious purpose, in bad faith, or in a wanton or reckless manner. *See* R.C. 2744.03(A)(6)(a) and (b).

{¶28} We have previously defined malice, for purposes of determining statutory immunity, 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*, 133 Ohio App.3d 790, 813, 729 N.E.2d 1223 (1st Dist.1999), quoting *Cole v. Crowthers*, 1st Dist. Hamilton No. C-930767, 1994 Ohio App LEXIS 4588, * 8-9 (Oct. 12, 1994). And we have described bad faith in this context as "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 actual intent to mislead or deceive another." *Id.,* citing *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45 (1962), paragraph two of the syllabus. With respect to an employee who acts in a wanton or reckless manner, the Ohio Supreme Court has explained that one acts with wanton misconduct when he or she fails "to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph three of the syllabus. And last, reckless conduct is "the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Id.* at paragraph four of the syllabus.

{¶29} Following our review of the record, we cannot say that Stith's actions support a determination that statutory immunity is unavailable to him. The Partins contend that Stith's act of encouraging Jennifer Partin to retire, when he knew that the ERIP had lapsed, demonstrated malice and bad faith. While the record indicates that Stith was aware that the ERIP had lapsed, it also indicates that he actively tried to facilitate the implementation of a new ERIP. Once Stith became aware that the ERIP had expired, he brought the matter to the attention of Norwood City Council, the body with the authority to reenact the ERIP. And around the same time that Stith discussed the ERIP with Partin, Norwood's Assistant Law Director had sent a proposed ERIP to OPERS for review. Stith's attempts to facilitate implementation of a new ERIP negate any finding that he had a willful or intentional desire to harm Partin or that he acted with a dishonest purpose or conscious wrongdoing.

{¶30} Bob Laake's signing on behalf of Norwood a document indicating that Partin either was eligible to retire, or would be eligible to retire upon Norwood's purchasing of additional service credit, was an action taken by Laake, not Stith, and is not relevant to an analysis of Stith's immunity.

{¶31} Jennifer Partin's own actions lend further support to our determination that Stith's conduct did not rise to the level necessary to remove a grant of immunity. Partin disregarded several notifications from OPERS that Norwood did not currently have an ERIP, including a letter received in February of 2011, informing her that she would not receive monthly retirement benefits unless her employer purchased additional service credit for her. Further, OPERS informed Partin that she would be notified when she became retirement-eligible. Partin never received such notification.

{¶32} Because Stith's actions were not manifestly outside the scope of his employment or committed with malice, in bad faith, or in a wanton or reckless manner, he was entitled to a grant of immunity under R.C. 2744.03(A)(6) on the claims raised by both Jennifer and Larry Partin.

Conclusion

{¶33} The trial court erred in denying summary judgment for Stith on Jennifer Partin's claims and for Norwood and Stith on Larry Partin's claim, because Norwood and Stith are immune from liability on these claims. Therefore, we sustain the assignment of error and remand this cause to the trial court for further proceedings consistent with the law and this opinion.

Judgment reversed and cause remanded.

MOCK and **HILDEBRANDT, JJ.,** concur**.**

LEE H. HILDEBRANDT, JR., retired, from the First Appellate District, sitting by assignment.

Please note:

The court has recorded its own entry on the date of the release of this opinion.