

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

MIKEENA FITZGERALD,	)	CASE NO. CV 13 799091
	)	
Plaintiff,	)	
	)	JUDGE BRENDAN J. SHEEHAN
v.	)	
	)	
PATROLMAN BRANDON SMITH, <i>et</i>	)	
<i>al.</i> ,	)	<b>OPINION AND JUDGMENT</b>
	)	<b>ENTRY</b>
Defendants.	)	

I. FACTS AND ISSUES PRESENTED.

This matter is before the Court on cross-Motions for Declaratory Judgment filed by Defendants Brandon Smith and Matthew Ferrell and Defendant City of East Cleveland. The issues have been fully briefed and argued to the Court.

This matter arises out of a series of events that occurred on January 10, 2012 in the City of East Cleveland when Plaintiff Mikeena Fitzgerald, driving a Ford Explorer, drove through a red light without stopping. An East Cleveland police officer began following Plaintiff's vehicle as it drove through another red light. Although the police officer turned his vehicle's emergency lights, Plaintiff failed to stop and a low speed chase ensued with an additional police vehicle joining the chase. The officer in charge ordered the pursuit to be discontinued.

Shortly thereafter, Defendants Smith and Ferrell, both then on duty as police officers for the City of East Cleveland, identified the Ford Explorer at a traffic light. They reported the vehicle to the dispatcher and pulled their vehicle behind Plaintiff's vehicle. Two other patrol cars arrived and pulled up on either side of Plaintiff's vehicle. Defendants Smith and Ferrell maintain that Plaintiff then backed her vehicle into the patrol car at least twice and, when she

appeared to be backing into the patrol car a third time, they discharged their service weapons at the vehicle. Plaintiff was not struck by any of the bullet. Plaintiff was arrested and charged with felonious assault of a police officer, assault of a police officer and failure to comply. All charges against Plaintiff were dismissed at trial pursuant to Crim.R.29.

Plaintiff has asserted three causes of action: 1) malicious prosecution, 2) false imprisonment, and 3) intentional infliction of emotional distress. Plaintiff asserts that Defendants Ferrell and Smith, while acting in the course and scope of their employment with the City of East Cleveland, provided false information and/or testimony to have Plaintiff indicted, provided a false account of the events leading to Plaintiff's arrest to justify discharging their weapons, and seized and confined Plaintiff without probable cause.

Defendants Ferrell and Smith seek a declaration that the City of East Cleveland must provide for their defense pursuant to R.C. 2744.07 while Defendant City of East Cleveland seeks a declaration that it is not required to provide a defense.

The parties agree that Defendants Ferrell and Smith will continue to be represented by current counsel; the issue here is the allocation of costs arising out of the defense.

## II. LAW AND ANALYSIS.

R.C. 2744.07 provides in pertinent part:

(A) (1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. ...

(C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this section, upon the motion of the political subdivision, the court shall conduct a hearing regarding the political subdivision's duty to defend the employee in that civil action. The political subdivision shall file the motion within thirty days of the close of discovery in the action. After the motion is filed, the employee shall have not less than thirty days to respond to the motion.

At the request of the political subdivision or the employee, the court shall order the motion to be heard at an oral hearing. At the hearing on the motion, the court shall consider all evidence and arguments submitted by the parties. In determining whether a political subdivision has a duty to defend the employee in the action, the court shall determine whether the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. The pleadings shall not be determinative of whether the employee acted in good faith or was manifestly outside the scope of employment or official responsibilities.

If the court determines that the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities, the court shall order the political subdivision to defend the employee in the action.

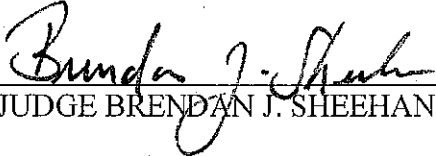
The governing case law interpreting R.C. 2744.07(A)(1) is set forth in *Rogers v. Youngstown*, 61 Ohio St. 3d 205, 574 N.E.2d 451 (1991). In *Rogers*, the Ohio Supreme Court stated that "R.C. 2744.07(A)(1) is clear and unequivocally sets forth that 'a political subdivision shall provide for the defense of an employee, in any state or federal court \* \* \* if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment.' As can be gleaned, the duty of a political subdivision to defend one of its employees may arise from a reading of allegations contained in a complaint filed by a plaintiff who seeks redress from the subdivision's employee." *Id.*, 61 Ohio St. 3d at 208, 574 N.E.2d at 453-454.

The Ohio Supreme Court further explained in *Whaley v. Franklin County Bd. of Comm'rs*, 92 Ohio St. 3d 574, 576, 2001-Ohio-1287, 752 N.E.2d 267 that "R.C. 2744.07(A)(1) sets forth a two-prong test to determine when the political subdivision's duty to defend one of its employees is triggered. The first prong of R.C. 2744.07(A)(1) provides that the duty to defend attaches if the act or omission actually occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. The second prong of the test provides that the political subdivision's statutory duty to defend is triggered if the act or omission is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities." When evaluating the "allegation" prong of the statute, the test to be employed is pleadings test and a court may consider all pleadings filed in the action. *Id.* at 577-578.

Defendant City of East Cleveland relies on the findings of an arbitration held to determine the propriety of Defendant Ferrell's discharge from employment. Its position is similar to that presented in *Rogers* where the city of Youngstown relied on evidence obtained from an internal affairs investigation and on evidence secured during discovery in a federal civil rights lawsuit. The Ohio Supreme Court specifically reject this argument noting that "for the most part, the city chooses not to focus on the allegations contained in the complaint itself, but, rather, finds support for its position by dwelling upon matters that transpired prior to and after the federal complaint was filed. In so doing, the city ignores the mandatory and disjunctive language contained in R.C. 2744.07(A)(1)." *Rogers* at 208, 574 N.E.2d at 453. Additionally, the arbitration concerned only whether Defendant Ferrell's discharge of his firearm provided good cause for termination of his employment. It did not address Plaintiff's arrest, Defendant Ferrell's conduct related to charges brought against Plaintiff, or Defendant Smith's actions.

Upon review of the record before it, the Court finds that the issue of whether Defendants Ferrell and Smith acted in good faith is a primary issue of fact for each of Plaintiff's claims. Plaintiff's pleadings assert that Defendants Ferrell and Smith acted maliciously, in bad faith, and wantonly and/or recklessly in detaining her and causing charges to be filed against her. Defendants deny that they acted with malice or bad faith. Plaintiff has a right to have these issues tried to a jury, as she has requested. The Court cannot make a determination on the issue of good faith without deciding a critical element of Plaintiff's claims.

Accordingly, because the parties agree that the defense of Defendants Ferrell and Smith will proceed unaltered with only allocation of attorneys' fees to be made, the Court will issue its ruling consistent with the jury's finding upon trial of this matter.

  
JUDGE BRENDAN J. SHEEHAN

Dated: 4/25/14

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 25th day of April, 2014:

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