[Cite as *Craycraft v. Simmons*, 2010-Ohio-5518.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

AARON CRAYCRAFT, et al.	:	
	:	Appellate Case No. 23755
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2008-CV-04049
v.	:	
	:	
JOHN C. SIMMONS, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
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O P I N I O N

Rendered on the 12th day of November, 2010.

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BROGAN, J.

{¶ 1} Aaron Craycraft appeals from the trial court's entry of summary judgment against him on his complaint against appellee John Simmons alleging various torts.

{¶ 2} Craycraft advances five assignments of error on appeal. First, he contends the trial court erred in finding Simmons entitled to summary judgment on

the basis of R.C. Chapter 2744 immunity. Second, he claims the trial court erred in finding that certain statements Simmons made about him to the police were protected by a qualified or conditional privilege. Third, he asserts that the trial court erred in finding that Simmons did not act maliciously in initiating a criminal action against him. Fourth, he argues that the trial court erred in entering summary judgment against him on a claim alleging intentional infliction of emotional distress. Fifth, he maintains that the trial court erred in finding Simmons entitled to summary judgment on a false-light invasion of privacy claim.

{¶ 3} The present appeal stems from an incident that occurred on November 1, 2006 at the Miami Valley Career Technology Center (CTC), a two-year public joint vocational school. On that date, Craycraft, who was a student at the school, became angry in a class taught by Peggy Livingston and "pushed" his computer to the floor. (Craycraft affidavit, attached to Doc. #40 at Exh. A). He stood up and "accidentally stepped on the screen and broke the computer." (Id.). He proceeded to leave the classroom and went elsewhere in the building to calm down. (Id.).[1]

{¶ 4} Simmons is employed as the safety coordinator at CTC. At the time of the incident, he was in Columbus giving a work-related presentation. (Simmons depo. at 85). One of his assistants, Marilyn Jones, a safety officer at the school, began an investigation of the incident in his absence. She talked to students, obtained written statements, and conveyed the information to Simmons that same

[1]Although other evidence in the record indicates that Craycraft intentionally threw his computer and stomped on it, the matter is before us in the context of a summary judgment ruling against him. In that context, we must construe the facts and all reasonable inferences in a light most favorable to Craycraft.

day. (Simmons affidavit, attached to Doc. #14 at Exh. 1). One of the written statements collected that day reads:[2]

{¶ 5} "Aaron today backed talk to the teacher usually giving his normal tantrum and then the teacher sends him somewhere, I don't know, but today he threw his computer and stopped on it. I became very scared and I heard a lot that he is saving for a gun and kill us. I don't know who but I know I'm scared for Mrs. Livingston because he always talks about how he hates Mrs. Livingston. I never really talked to Aaron but he sits at our table sometimes and he is nice. But in class he says some disturbing things and you think OK that's weird. Please do the best you can to protect us. I am very scared and now I feel like I should go back to school.

{¶ 6} "People you might want to talk to who know more info * * * they said that he's saving up for a gun and that if you expel him HE WILL COME BACK!! Please take severe caution with this. Thank you."

{¶ 7} Another student's statement reads:

{¶ 8} "[Aaron's] said he has a 1,000 dead body in his garage. I feel very threaten. We just had an [incident] today with him. I think he is really capable of doing the thing he's said's. Like he will shoot everyone."

{¶ 9} A third statement reads:

{¶ 10} "We were in Mrs. Livingston's class. [Aaron] got outraged and threw his laptop at teacher's desk and stomped on it and then started cussing and then ran out and slammed the door.

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[2]For present purposes, we have not attempted to correct any grammatical errors in the students' statements. Nor have we inserted "[sic]" where a grammatical error

{¶ 11} "A few weeks ago he told the class that if by some chance he would bring a gun to school he wouldn't shoot any of us.

{¶ 12} "Then he was talking about 1000 dead babies in his garage."

{¶ 13} A fourth statement reads:

{¶ 14} "On 11-1-06 in Mrs. Livingston's class 7th period Aaron Craycraft got mad and through his computer at her desk because Mrs. Livingston told Micheal to sit down and Aaron told her he was just asking Mike for help. Then he stomped on it and started cussing. He slammed open the door and left.

{¶ 15} "A couple weeks ago Aaron said we didn't have to worry because if he ever brought a gun to school he wouldn't shoot us."

{¶ 16} As a result of the incident in Livingston's class, CTC assistant superintendent Sam Custer called Simmons in Columbus and asked him to return to the school. (Simmons depo. at 87). Custer asked Simmons "to come back to the school and be there because of the situation that had occurred and that there was a concern that Aaron was coming back with a gun." (Id. at 88-89). Simmons arrived at CTC around 6:00 p.m. and met with Custer and another assistant superintendent, Mary Beth Freeman. They discussed "[t]he situation that occurred, the panic that had become involved, parents being called, parents calling in and expressing their concern on whether or not they should send their kids to school and whether or not [Simmons] was going to contact the Englewood Police Department and get them involved." (Id. at 89). During the meeting, Freeman and Custer directed Simmons to contact the police. (Id. at 90, 93). They made that decision based on the contents of

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exists. The statements are presented here just as they were written.

the students' written statements, which, according to Simmons, implied "that they have heard Aaron talk about bringing guns to school and talk about shooting people." (Id. at 135).

{¶ 17} Simmons first called the Englewood police chief on the telephone. The police chief directed him to go to the police station. (Id. at 98). After arriving at the station, Simmons spoke on the phone with a student, Jennifer Fitzgerald, and then gave police a handwritten statement. (Id. at 99-104). In relevant part, Simmons' police statement reads:

{¶ 18} "Ms. Fitzgerald advised that she was present in the classroom when Aaron Craycraft exploded smashing his school-issued laptop computer onto the floor. She further stated to me that she had heard Aaron make a statement that he was going to bring a gun to school and shoot people. And Ms. Livingston was on his list.

{¶ 19} "Ms. Fitzgerald was requested to report in the morning and give a written statement at that time. She agreed. She further stated that she was fearful of Aaron carrying out his threats." (Id. at 107; see, also, Simmons depo. Exh. 1).

{¶ 20} As noted above, before writing his police statement, Simmons had spoken with CTC safety officer Marilyn Jones and had been made aware of the written statements from several students at CTC. (Id. at 109, 115-116, 135). When providing his statement to the police, however, he did not list all of the students who had given written statements to Jones. He only listed Fitzgerald as a reference in his police statement because he personally had spoken to her, and she had promised to provide her own written statement to school officials the following day. (Simmons affidavit, at ¶13).

{¶ 21} Fitzgerald did provide a written statement at CTC the following day. It reads:

{¶ 22} "I don't know Aaron persay, but I know that he's been known to flip out and recently he's been talking about guns and he is very serious about it all. He's got a bad temper I guess you could say and he's serious. He doesn't like Mrs. Livingston and he's mentioned she'd be first on the list. Things have gotten worse since him and his girlfriend broke up and more than just me has noticed it. [R]ecently he made a comment to a student who was pregnant about punching her in the stomach because no one should want to have a stupid baby. He likes to dress as a pirate and he wears big combat boots that were very expensive. Along with his jacket. So he could easily have money for a gun. Another comment he's made was a joke saying what's the difference between a Mercedes and 1000 dead babies and he said he didn't have a Mercedes in his garage. He's crazy and after yesterday, I could see him doing something crazy like bringing a gun to school. He wouldn't think twice." (Fitzgerald statement, attached to Doc. #14 at Exh. 2).

{¶ 23} Although Simmons did not ask for Craycraft to be arrested, he nevertheless was arrested in the evening after Simmons' police report. (Craycraft affidavit, at ¶15; Simmons affidavit, at ¶15). Craycraft learned that he had been "accused of threatening to bring a gun to school and shoot people on a 'list.'" (Craycraft affidavit at ¶15.). He was detained in the Montgomery County juvenile detention center for more than a week. (Id. at ¶16). He was charged with criminal damaging, aggravated menacing, and inducing a panic. He ultimately pled guilty to "reduced charges." (Id. at ¶18). He also was expelled from school. (Id. at ¶17).

{¶ 24} In his affidavit Craycraft stated he "never threatened to bring a gun to school to shoot people." The only gun he ever discussed at school was a replica Prussian revolutionary pistol. (Id. at ¶8, 19). Craycraft never told people he would shoot them and never created a list of people he would shoot. (Id. at ¶20). He did not make any statement on November 1, 2006 that he would bring a gun to school and shoot people and that Mrs. Livingston was on his list. (Id. at ¶21).

{¶ 25} In April 2008, Craycraft and his parents filed the present action against Simmons, alleging claims for false imprisonment, malicious prosecution, intentional infliction of emotional distress, defamation, false-light invasion of privacy, and loss of consortium. (Doc. #1). Accompanying the complaint is an affidavit from Jennifer Fitzgerald in which she avers:

{¶ 26} "1. I am a full adult and have personal knowledge of all matters herein contained;

{¶ 27} "2. I was present in Mrs. Livingston's class at Miami Valley Career Technology Center on November 1, 2006 and witnessed Aaron Craycraft throw a computer to the ground, stomp on it, then leave the classroom;

{¶ 28} "3. I have never personally heard Aaron Craycraft state that he would bring a gun to school;

{¶ 29} "4. I have never personally heard Aaron Craycraft state that he would or desired to shoot Mrs. Livingston or any other person;

{¶ 30} "5. I never stated to John C. Simmons or any other person that I heard Aaron Craycraft state that he would bring a gun to school, that he wanted to shoot Mrs. Livingston, or that he had a 'list' that included Mrs. Livingston."

{¶ 31} In his deposition, Simmons addressed the discrepancy between his police statement and what Fitzgerald stated in her affidavit. Simmons asserted that Fitzgerald told him she had been threatened with a lawsuit, badgered, and coerced by the law firm representing Craycraft into signing the affidavit. (Simmons depo. at 140). According to Simmons, Fitzgerald told him that she had signed under duress and that she was willing to "sign anything" just to get Craycraft's attorney "off her back." (Id. at 141).

{¶ 32} In April 2009, Simmons moved for summary judgment on all the claims against him. Before responding, Craycraft filed an amended complaint, adding CTC, Marilyn Jones, and the State of Ohio as defendants.[3] The amended complaint also added general negligence and negligence per se claims against Simmons. The trial court later sustained Simmons' summary judgment motion in October 2009, finding him entitled to statutory immunity as an employee of a political subdivision. The trial court nevertheless proceeded to address each of the claims, finding that Simmons would be entitled to summary judgment on all but the false-imprisonment claim. The trial court's summary judgment ruling contained Civ.R. 54(B) certification.[4] This

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[3]The State of Ohio appears to have been added because the amended complaint challenged the constitutionality of Ohio's sovereign immunity statute.

[4]Following Craycraft's appeal in this case, the trial court issued another summary judgment ruling in March 2010, entering summary judgment in favor of the State of Ohio on Craycraft's request for a declaratory judgment regarding the constitutionality of Ohio's sovereign immunity statute. That ruling likewise contained Civ.R. 54(B) certification. Finally, on September 27, 2010, the trial court filed a third summary judgment ruling, this time entering summary judgment in favor of CTC and Marilyn Jones on all of Craycraft's claims against them *and* in favor of Simmons on the negligence and negligence per se claims against him in Craycraft's amended complaint. This ruling also included Civ.R. 54(B) certification, although it is not apparent what remains to be litigated.

timely appeal followed.

{¶ 33} In his first assignment of error, Craycraft contends the trial court erred in entering summary judgment in favor of Simmons on the basis of sovereign immunity. In finding Simmons entitled to immunity, the trial court relied on R.C. 2744.03(A)(6), which provides:

{¶ 34} "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶ 35} "(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

{¶ 36} "(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

{¶ 37} "(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶ 38} "(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code."

{¶ 39} Craycraft claims the trial court improperly found Simmons entitled to immunity under R.C. 2744.03(A)(6) because genuine issues of material fact exist as to (1) whether he was an employee of CTC or an independent contractor, (2) whether

his acts in connection with his investigation and report to the police were manifestly outside the scope of his employment, and (3) whether he performed those acts recklessly.

{¶ 40} Our de novo review of the trial court's ruling follows Civil Rule 56. Under the rule, "[s]ummary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law." *Hubbell v. Xenia,* 175 Ohio App.3d 99, 2008-Ohio-490, ¶15, citing Civ.R. 56. "The burden of showing that no genuine issue of material fact exists is on the moving party ." Id, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Summary judgment may not be granted unless, construing the evidence most strongly in the non-moving party's favor, reasonable minds must conclude adverse to the nonmoving party. Civ.R. 56(C).

{¶ 41} With the foregoing standards in mind, we conclude that Simmons was entitled to summary judgment on the basis of R.C. Chapter 2744 immunity. We see no genuine issue of material fact as to whether Simmons was an employee or independent contractor of CTC, a public joint vocational school. The record reflects that Simmons maintains an office at CTC, and he receives a salary and benefits like the rest of the faculty and staff. (Simmons depo. at 52-53). He has regularly scheduled work hours five days a week. (Id. at 59-60). He normally gets weekends and holidays off. (Id. at 60-61). As CTC's safety coordinator, Simmons supervises two full-time and eight part-time safety officers. (Expulsion hearing transcript at 60).

{¶ 42} Craycraft's only argument is that Simmons has no preset protocol to

follow regarding how he performs his investigations. Rather, he has discretion to develop his own protocol to determine how to investigate allegations against a student. (Simmons depo. at 56-57). Simmons also has some discretion, typically in consultation with and at the ultimate direction of his supervisors, regarding whether to contact the police about an incident. (Id. at 63). In light of the discretion that Simmons enjoys regarding his investigation of student incidents, Craycraft argues that he is an independent contractor, not an employee. At a minimum, Craycraft insists a genuine issue of material fact exists. In support, he relies on *Behner v. Industrial Commission* (1951), 154 Ohio St. 433.

{¶ 43} In *Behner*, the Ohio Supreme Court explained:

{¶ 44} "Whether an individual performing service for another does so as an independent contractor or as an employee is ordinarily a question of fact, *the deciding factor being in whom is vested the right of control* or *superintence* as to the details of the work. It is not the fact of *actual interference in control* on the part of the one for whom the work is performed*, but the right to interfere therewith* which distinguishes the relationship of an independent contractor from that of a servant or agent. *If the right to control the manner or means of performing the work is in the person for whom the work is performed, the relationship is that of employer and employee or master and servant*; but if the control of the manner or means of performing the work is delegated to the person performing the work, the relationship is that of independent contractor." Id. at 436-437 (emphasis added).

{¶ 45} In our view, *Behner* fails to support Craycraft's argument. Although Simmons was granted the discretion to conduct investigations as he saw fit, nothing

in the record suggests that his superiors did not retain the *right to control or superintendence* over those investigations, even though they seldom may have interfered. Simmons testified that he typically conducts an investigation and refers the matter to the principal. (Simmons depo. at 57). When Simmons makes a such a referral, he generally does not make recommendations regarding what violations a student should be charged with. (Id. at 61). He leaves it to the principal or other higher-level administrator to determine discipline. (Id. at 61-62). With regard to the particular activity in this case, contacting the police, Simmons made clear that two administrators made that determination in consultation with him and ultimately directed him to contact the police. (Id. at 63). To us, this does not suggest the type of unfettered discretion that might characterize an individual as an independent contractor rather than an employee. The mere fact that Simmons' supervisors at CTC entrust him with some discretion to conduct his investigations does not raise a genuine issue of material fact as to whether he is an employee or an independent contractor. If the rule were otherwise, any white-collar employee who enjoys a measure of autonomy or who has been delegated some job-related responsibility potentially would be transformed from an employee into an independent contractor. We are unconvinced that this is the law.

{¶ 46} "Whether a person is an independent contractor or an employee depends on the specific facts in the case, with the key question being who has the right to control the manner or means of performing the work." *Brown v. CDS Transport, Inc*., Franklin App. No. 10AP-46, 2010-Ohio-4606, ¶9, citing *Bostic v. Connor* (1988), 37 Ohio St.3d 144. "Factors that are considered in determining who

has the right of control include: who controls the details and quality of the work; who controls the hours worked; who selects the materials, personnel, and tools used; who selects the routes traveled; length of employment; the type of business; the method of payment; and any pertinent agreements or contracts." Id.

{¶ 47} "Generally, the independent contractor-employee issue is one that must be determined by the trier of fact. * * * However, when the evidence is not in conflict or where the facts are not in dispute, the issue becomes a matter of law that may be decided by the trial court." Id. at ¶10. In the present case, the record persuades us that Simmons' supervisors retained the right to control the manner or means of how he performed his work. The fact that Simmons' position allowed for some discretion, without more, does not raise a genuine issue of material fact. We find no error in the trial court's determination that Simmons qualified as a CTC employee as a matter of law.

{¶ 48} The trial court also correctly determined that Simmons did not act manifestly outside the scope of his employment when he investigated the Craycraft incident and made a report to the police. With regard to the scope of Simmons' duties, Craycraft argues that the incident "was already under investigation by Marilyn Jones and had already been referred to the principal by the time Simmons became involved." Craycraft asserts that he already had been suspended from school for several days. He reasons that "Simmons' employment duties would seem to have ended at that point, or at least required him to actually investigate the matter before taking further action."

{¶ 49} Upon review, we find no genuine issue of material fact as to whether

Simmons was acting within the scope of his employment. His job responsibilities included maintaining a safe campus, investigating incidents, and reporting those incidents to his supervisors and, sometimes, to the police. (Simmons depo. at 33-34, 62-64). As set forth above, Simmons was summoned back from Columbus to discuss the Craycraft incident with his two assistant superintendents, Mary Beth Freeman and Sam Custer. He reviewed the written statements that had been obtained by Marilyn Jones in his absence. He then met with Freeman and Custer to discuss the incident further and to decide what to do. As explained above, Freeman and Custer ultimately directed him to contact the Englewood police department. While at the police station, Simmons spoke with a witness, student Jennifer Fitzgerald, and then filed a written statement.

{¶ 50} In our view, the foregoing activities manifestly were *within* the scope of Simmons' employment as CTC's head safety coordinator. The fact that one of Simmons' subordinates, Jones, already had commenced an investigation does not take his additional investigative activities outside the scope of his employment. Nor does the fact, stressed by Craycraft, that Simmons conceivably could have conducted a more thorough investigation. The question is not whether Simmons could have done more. Rather, the question is whether the acts he did perform were within the scope of his employment. The trial court correctly concluded that they were.

{¶ 51} The remaining issue is whether Simmons acted recklessly in making his report to the police. "An individual acts 'recklessly' when he 'does an act or intentionally fails to do an act which is in his duty to the other to do, knowing or

having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.'" *Carder v. Kettering*, Montgomery App. No. 20219, 2004-Ohio-4260, ¶ 22, quoting *Hunter v. Columbus* (2000), 139 Ohio App.3d 962, 969. "[W]hile the line between negligence and recklessness is often fine, we previously have found an employee entitled to summary judgment on the basis of immunity under R.C. Chapter 2744 when his 'conduct constituted at most negligence.'" *Nolan v. Citywide Development Corp., Inc*., Montgomery App. No. 22675, 2009-Ohio-65, ¶27, citing *Weber v. Haley* (May 1, 1998), Clark App. No. 97CA108.

{¶ 52} In the present case, Craycraft asserts that Simmons acted recklessly with regard to his police report in two respects: (1) he failed to inform police that Craycraft had been diagnosed with a condition known as Asperger's Syndrome, and (2) he attributed certain statements to Jennifer Fitzgerald that she later denied making. As for the former issue, the record does reflect that Craycraft had been diagnosed with Asperger's Syndrome and that Simmons was aware of the diagnosis. (Simmons depo. at 78).[5] Asperger's Syndrome causes Craycraft to have behavioral issues and difficulty interacting with others. (Beth Craycraft affidavit, attached to Doc. #40 at Exh. B). On appeal, Craycraft asserts that the condition also causes "extreme impulsivity" and "inability to understand another's point of view[.]" (Appellant's brief at

[5]Craycraft apparently also had other conditions, including ADHD, anxiety, and depression. Simmons was unaware of these other conditions at the time of the incident

7-8).

{¶ 53} We do not see how Simmons' failure to mention Craycraft's diagnosis with Asperger's Syndrome is evidence of recklessness, at least *against* Craycraft. If anything, the existence of a medical condition that renders Craycraft extremely impulsive and somewhat anti-social would seem to make him *more* dangerous, not less. Therefore, including this information in Simmons' police report could not possibly have benefitted Craycraft. Although Craycraft contends students should not be punished for having a condition such as Asperger's Syndrome, the issue confronting Simmons and his supervisors concerned the potential security of CTC's students. It is unreasonable to suggest that Simmons should have overlooked, or taken less seriously, the potential security threat Craycraft posed simply because that threat may have been attributable in some measure to Asperger's Syndrome.

{¶ 54} As for the statements that Simmons attributed to Jennifer Fitzgerald in his police report, the issue is a closer one. In finding that Simmons did not act recklessly when he gave his police statement, the trial court reasoned:

{¶ 55} "For purposes of the statutory immunities provided in R.C. 2744.03(A)(6): 'Malice' is the willful intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified. * * * 'Reckless conduct' is used interchangeably with willful misconduct. *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 516. 'Willful misconduct' is also something more than negligence. It involves a positive mental state prompting the injurious act that does wanton misconduct. * * * [T]he intention relates to the

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in question. (Simmons depo. at 78-79).

misconduct, not to the result, and therefore, an intent to injure need not be shown. Id. at 515. 'The Ohio Supreme Court has defined "willful misconduct" as an intentional deviation from a clear duty, from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.' Id. 'Reckless' is defined as a perverse disregard of the known risk. *Poe v. Hamilton* (1990), 56 Ohio [App.3d] 139, 138 [sic].

{¶ 56} "The evidence does not support a determination that Mr. Simmons intended to injure Plaintiff or purposely acted with appreciation of the likelihood of resulting injury to Plaintiff. Prior to giving a statement to the Englewood Police, Mr. Simmons and his assistant investigated the incident by taking both verbal and written statements from witnesses. The written statements showed that students believed that Plaintiff had contemplated bringing a gun to school. One student claimed Plaintiff said he would shoot everyone, and another student begged the school to 'protect us' and 'take severe caution' claiming Plaintiff was saving for a gun to kill us. In addition, Mr. Simmons had verbally interviewed Jennifer Fitzgerald on her observations of the incident, which confirmed that there was a possibility of a school shooting. Plaintiff's statements to Jennifer Fitzgerald which she disclosed to Mr. Simmons involved rather bizarre analogies to death. These statements referenced '1,000 dead babies' and punching a 'pregnant student in the stomach.' Certainly, by inference, Plaintiff was indicating a disregard for life and his apparent approval of an execution of killing.

{¶ 57} "* * *

{¶ 58} "Although he had been involved with Plaintiff's discipline on a number

of occasions, there was no evidence that Plaintiff and Mr. Simmons had a particularly hostile relationship. There is no evidence that they had become involved in any physical or verbal threatening. There is nothing to suggest that Mr. Simmons had some personal animosity against Plaintiff and would be out to harm him or get revenge. There is no indication of any particular ill will or hatred between Plaintiff and Mr. Simmons.

{¶ 59} "Mr. Simmons, having some notice of Aaron's physical and mental health issues, should treat him somewhat differently. He would, as indicated, have to act with care, but the conditions do not alone eliminate the prospect of risk to faculty, staff and fellow students. Although one has an illness or condition which could potentially limit their responsibility for adverse behavior, safety personnel still must try to prevent injury which is foreseeable. The evidence here is that Mr. Simmons acted out of concern for faculty, staff and students, not in any punitive manner against Plaintiff. Just because Plaintiff has some health or personal disabilities, does not mean that one charged with insuring safety must act overly cautious when some of the overt manifestations of Plaintiff's conditions indicate danger to others.

{¶ 60} "Plaintiff makes the assertion that Mr. Simmons' statement to the police was made maliciously or recklessly because the substance of such statement was false. That is not correct. Mr. Simmons cited Jennifer Fitzgerald as a reference in his police report because he had personally spoken to her that day. His assistant took the other witnesses' statements and then relayed that information to him. Because Mr. Simmons was not there to personally witness Plaintiff's behavior, it was necessary for him to rely on statements provided by witnesses, in order to comply

with the police's [request] for a written statement. Mr. Simmons makes no misrepresentations as to the firmness of Ms. Fitzgerald's testimony, explaining that Ms. Fitzgerald had been asked to reduce her statements to writing, but had not yet done so. Mr. Simmons' statement serves as a summary of the information Ms. Fitzgerald firmly related to him.

{¶ 61} "The substance of Mr. Simmons' statement to the police is confirmed by the written statement provided the next day. In both, Ms. Fitzgerald agreed she heard Plaintiff say that Ms. Livingston would be the first on his 'list.' In both, Ms. Fitzgerald relates that she is afraid that Plaintiff will carry out his threats. In both, she relates her suspicions that Plaintiff will bring a gun to school. For whatever reason, Ms. Fitzgerald later states in her affidavit that she never directly heard plaintiff say he would bring a gun to school and shoot people. Ms. Fitzgerald does not retract, however, that she had reason to believe that Plaintiff was capable of bringing a gun to school and shooting people.

{¶ 62} "Mr. Simmons and his assistant investigated the incident by speaking to multiple witnesses. These statements caused Mr. Simmons to believe Plaintiff posed a threat to the safety and security of MVCTC. Based on these statements, Mr. Simmons reasonably concluded that Plaintiff either had plans to or was contemplating bringing a gun to school. It was further reasonable for Mr. Simmons to believe that students felt endangered by Plaintiff. Accordingly, Mr. Simmons' act of contacting the local police was to ensure the safety of the students he was charged with protecting. Such conduct under those circumstances was not unlawful or unjustified.

{¶ 63} "To strip Mr. Simmons of immunity, there must be evidence of 'malice.' The intent to do serious harm to another which is unjustified; or 'recklessness.' An intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of a likelihood of a resulting injury. There is no evidence of either. Accordingly, immunity applies and Plaintiff's claims are barred as a matter of law, entitling Mr. Simmons to summary judgment." (Doc. #75 at 7-10).

{¶ 64} Upon review, we likewise find no genuine issue of material fact on the issue of recklessness. With images of the 1999 Columbine High School shooting and similar incidents etched in the nation's memory, we agree with the trial court that Simmons, the head safety coordinator at CTC, did not act recklessly in filing his police report. As the trial court noted, when he filed the report, Simmons had reviewed several written statements from students who expressed fear about Craycraft returning to school with a gun. One of the students had "heard a lot that he is saving for a gun and kill us." The same student wrote that others had "said that he's saving up for a gun and that if you expel him HE WILL COME BACK!!" A second student wrote: "I think he is really capable of doing the thing he's said's. Like he will shoot everyone." A third student stated: "A few weeks ago he told the class that if by some chance he would bring a gun to school he wouldn't shoot any of us." A fourth student gave a similar statement, noting that "Aaron said we didn't have to worry because if he ever brought a gun to school he wouldn't shoot us." Although Simmons did not cite each of these statements in his police report, he was aware of them and

they were part of the reason he contacted the Englewood police and filed the statement he did. (Simmons affidavit at ¶7, 9, 11, 13).

{¶ 65} Craycraft makes much of the fact that Simmons' police report attributes certain statements to Jennifer Fitzgerald that she later denied in her affidavit. We do recognize one significant discrepancy, namely whether Fitzgerald ever personally heard Craycraft say he was going to bring a gun to school and shoot people. In her affidavit, she denied telling Simmons that she personally heard this. We note, however, that the written statement Fitzgerald provided for CTC the day after the incident did express her serious concern about Craycraft bringing a gun to school and shooting people. As noted above, Fitzgerald reported that Craycraft had "been known to flip out and recently he's been talking about guns and he is very serious about it all." She added: "He's got a bad temper I guess you could say and he's serious. He doesn't like Mrs. Livingston and he's mentioned she'd be first on the list." Finally, she expressed her opinion that "he could easily have money for a gun" and that "[h]e's crazy and after yesterday, I could see him doing something crazy like bringing a gun to school." Although this written statement does not reference the unambiguous, direct threat mentioned in Simmons' police report (which Simmons concedes was not a verbatim recitation of what Fitzgerald told him), it is consistent with much of the other students' written statements about Craycraft bringing a gun to school and shooting people. It also corroborates the part of Simmons' police report in which he mentioned Fitzgerald telling him a teacher, Peggy Livingston, was on Craycraft's "list."

{¶ 66} Even if we assume, as we must for summary judgment purposes, that

Simmons inaccurately quoted Fitzgerald in his police report, based on all of the evidence before us we find no genuine issue of material fact as to whether Simmons, CTC's head security official, acted recklessly in filing the report. Accordingly, we agree with the trial court that Simmons is entitled to R.C. Chapter 2744 immunity, as a matter of law. The first assignment of error is overruled.

{¶ 67} Our resolution of the immunity issue renders moot Craycraft's remaining assignments of error, which presume that R.C. Chapter 2744 immunity does not apply and address the merits of his intentional tort claims. Based on our finding of immunity under R.C. Chapter 2744, we therefore overrule Craycraft's second, third, fourth, and fifth assignments of error as moot.

{¶ 68} The judgment of the Montgomery County Common Pleas Court is affirmed.

. . . . . .

CANNON, J., concurs.

GRADY, J., concurring:

{¶ 69} I understand Craycraft's argument that Simmons was reckless in failing to inform police that Craycraft has been diagnosed with Asperger's Syndrome to be a contention that his resulting behavior would cause others to perceive Craycraft to be dangerous when he is not. Had Simmons made police aware of that fact, they might have proceeded differently, instead of arresting Craycraft. However, Simmons's failure is, at most, a matter of negligence. Reasonable minds could not find that it rose to the level of recklessness.

. . . . . .

(Hon. Timothy P. Cannon, Eleventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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