

ORIGINAL

IN THE SUPREME COURT OF OHIO

Lea D. Smith,

Appellant,

v.

Vashawn L. McBride, et al.,

Appellees.

: 10-0809

: On Appeal from the Franklin
: County Court of Appeals,
: Tenth Appellate District

: Court of Appeals
: Case No. 09APE-06-0571

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LEA D. SMITH

Brian G. Miller (0063241) (COUNSEL OF RECORD)

Brian G. Miller Co., L.P.A.

326 South High Street, Suite 500

Columbus, Ohio 43215

Telephone: 614-221-4035

Facsimile: 614-222-1899

Email: bgm@bgmillerlaw.com

COUNSEL FOR APPELLANT, LEA D. SMITH

Joshua R. Schierloh (0078325)

Boyd W. Gentry (0071057)

Surdyk Dowd & Turner Co. L.P.A.

1 Prestige Place, Suite 700

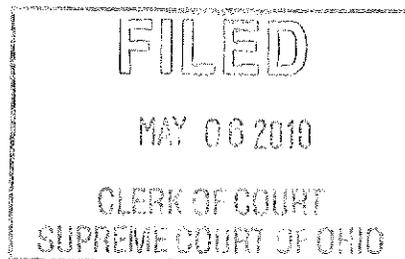
Miamisburg, Ohio 45342

Telephone: (937) 222-2333

Facsimile: (937) 222-1970

Email: jschierloh@sdtlawyers.com

bgentry@sdtlawyers.com



COUNSEL FOR APPELLEES, CLINTON TOWNSHIP POLICE DEPARTMENT AND SGT.
TRAVIS D. CARPENTER

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EXPLANATION OF WHY THIS CASE PRESENTS ISSUES OF PUBLIC AND GREAT
GENERAL INTEREST

This case presents critical issues with respect to police officers' powers and obligations when responding to situations outside of their own jurisdictions. It avails the Court an opportunity to define the nature and requirements of so-called Mutual Aid Pacts and the import of such pacts upon extra-jurisdictional responses. It further avails the Court an opportunity to clarify and create a bright line test with respect to when such extra-jurisdictional responses will enjoy certain protections of immunity contemplated by R.C. §2744.02. In establishing such a bright line test, and its necessary reliance upon a well-defined Mutual Aid Pact, the Court will provide a benefit to police officers and citizens, alike, throughout Ohio.

Underlying the analysis of the issues presented by this case is the question of whether police officers' *professional obligations* are defined by, and limited to, their jurisdictional authority. The answer to this question is especially important when determining if an officer was on an "emergency call" and, ultimately, whether or not the officer is entitled to immunity under R.C. §2744.02.

R.C. §2744.02(B)(1)(a) states that immunity does not apply unless "a member of a municipal corporation, police department or any other police agency was operating a motor vehicle *while responding to an emergency call* and the operation of the vehicle did not constitute willful or wanton conduct." (Emphasis added.) An "emergency call" means "a call to duty, including, but not limited to, communications from citizens, police dispatches and observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer." R.C. §2744.01(A). This Court has further defined a "call to duty", explaining that a call to duty "involves a situation to which a response by a peace officer is

required by the officer's professional obligation." *Colbert v. City of Cleveland* 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

The legislature did not intend to provide immunity for every situation when a police officer operates a vehicle while on duty. Although the definition of "emergency call" is broad, Ohio has long recognized that not every call to duty is an emergency call. *Lingo v. Hoekstra*, 176 Ohio St. 417, 200 N.E.2d 325, 1964 Ohio LEXIS 989. In order for immunity to apply, certain requirements must be met.¹ The "professional obligation" requirement articulated by this Court in *Colbert* establishes a threshold issue with respect to emergency call analysis under R.C. §2744.

With this threshold inquiry in mind, this Court has also held that when an officer acts *outside* of his jurisdiction, *absent a "Mutual Aid Pact"*, he acts without authority as a police officer, and thus has no professional obligation whatsoever. See *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 226-227, 525 N.E.2d 468, 474. This Court stressed that because "Ohio statutes rendered out-of-jurisdiction police responders virtually powerless arrest * * * *This cannot equate to a duty to respond.*" (Emphasis added.) *Id.* at 227.

By affirming the trial court's decision, the Tenth District Court of Appeals has ignored certain requirements under Ohio law, which are necessary for immunity to apply. These requirements were carefully constructed in order to provide guidance for police officers engaged in emergency situations and, when followed, to protect the public. The Court of Appeals' decision on March 25, 2010, has expanded the grant of immunity far beyond what the legislature intended. The danger of the appellate court's decision, which improperly relies upon an ill-defined if not altogether non-existent Mutual Aid Pact, is that it will allow for a lack of clarity

¹This case involves a non-"hot pursuit" response of a police officer outside of his jurisdiction. Appellant's propositions of law should be considered within this context.

among inter-jurisdictional police procedures, and potential complication of the same, thus compromising efficient and safe police response situations. It also allows for abuses in that officers can justify otherwise inappropriate or invalid “emergency” responses by loosely referencing “mutual aid doctrines” or “pacts” which do not really exist or which do not clearly define situations in which officers should be responding outside their own jurisdiction and how they should be doing so.

If permitted to stand, the decision of the Court of Appeals would circumvent long-standing jurisprudence regarding governmental immunity. A political subdivision cannot hide under an omnipresent blanket of immunity. Obviously there must be some discretion provided to individual officers with respect to how and when to respond to certain situations. There must be clear guidance, however, as to how and when a person can respond as a police officer, as opposed to as an ordinary citizen.

For these reasons, these matters are of public and great general interest. Thus, this Court should accept jurisdiction of this appeal and clarify the impact of this Court’s opinion in *Sawicki* on political subdivision immunity analysis under R.R.C. §2744.01 et seq.²

STATEMENT OF THE CASE AND FACTS

This case arises from an automobile accident that occurred on the night of March 14, 2006, when Appellee Clinton Township’s police officer, Sgt. Travis D. Carpenter’s, police cruiser collided with the vehicle in which Appellant Lea D. Smith was riding as a passenger. At

²Appellant recognizes, as noted by the Court of Appeals, that *Sawicki* was decided before the enactment of R.C. 2744, and that the *Sawicki* Court was primarily concerned with the application of the “public duty rule.” As such, Appellant does not suggest that *Sawicki* is applicable or controlling *in toto*. Appellant simply asks that a distinct principle of law, as outlined in *Sawicki*, and heretofore unreversed, be applied to the immunity analysis.

the time of the collision, Sgt. Carpenter was operating his vehicle nearly 20 m.p.h. over the posted speed limit at night *without* emergency lights or sirens, in a mixed residential and commercial area of Morse Road while responding to a general call – not specifically directed toward him – which aired over a Franklin County Sheriff’s broadcast. The call involved a traffic violation suspect running on foot from a stop without mention of any weapons or threat of harm. As a result of the collision, all parties involved were seriously injured.

As a result of the accident, Appellant filed suit on March 13, 2008. Appellant alleged that: 1) Sgt. Carpenter was not on an emergency call when he collided with Appellant; and 2) Sgt. Carpenter’s misconduct rose to such a level that it should be characterized as wanton and reckless such that Appellee Clinton Township and Sgt. Carpenter should be held liable for such conduct.

Depositions of Sgt. Carpenter and Appellant were taken on October 30, 2008. Subsequently, on December 15, 2008, Appellees filed their motion for summary judgment. Appellant responded and filed her memorandum contra on January 15, 2009.

On May 14, 2009, the Franklin County Court of Common Pleas, J. Holbrook, issued its decision granting Appellees’ motion for summary judgment. The court held that Sgt. Carpenter was on an emergency call when he collided with the vehicle in which Appellant was a passenger, and that he was not willful, wanton, or reckless in the operation of his police cruiser. The trial court relied almost exclusively on *VanDyke v. Columbus*, 2008 Ohio 2652, 2008 Ohio App. LEXIS 2221, ignoring material facts and misapplying long-held principles of law.

Appellant had highlighted that the call to which Sgt. Carpenter responded was outside of his jurisdiction. Appellant argued that Sgt. Carpenter had no duty or *professional obligation* to respond outside of his jurisdiction, and thus could not have been on an “emergency call” as

defined under R.C. §2744.01(A). Appellee countered by attempting to create a professional obligation through proximity – that Sgt. Carpenter had a duty to respond because he was only two miles from the scene. The trial court improperly found merit in Appellee’s “duty through proximity” argument, stating “based on the decision in *VanDyke*, it is clear that *if* Sgt. Carpenter *had been* responding to an identical call *in his own jurisdiction*, his actions *would be* protected. (Emphasis added.) *Smith v. McBride* (May 14, 2009), Franklin Ct. C.P. No. 08CV03-3907 at p. 6-7.

On July 13, 2009, Appellant appealed to the Tenth District Court of Appeals. The trial court’s conditional statement alone should have raised a red flag about the issue of immunity outside of an officer’s own jurisdiction. The Appellate Court acknowledged the principle of law central to this case, highlighting that “*Sawicki* stated that an officer who responds to a situation outside of his jurisdiction would do so only with the authority and insurance protection of an ordinary citizen.”³ *Id.* Moreover, the court also recognized “it is undisputed in the matter before us that the dispatched location of the Franklin County deputy sheriff [to which Sgt. Carpenter was responding] was outside the jurisdiction of Clinton Township.” *Id.*

However, the Court seemingly avoided the matters central to this appeal, and Appellant’s propositions of law, by affirming the trial Court’s decision.⁴ In so doing, the Appellate Court relied *entirely* on Sgt. Carpenter’s self-serving testimony that he believed a mutual aid doctrine existed, and the Court rendered an unsupported factual determination that a Mutual Aid Pact existed in this case. See *Smith* Decision at p. 8-9, Appx. 8-9. This reliance was misfounded because the record also shows that Appellee was unable to provide any documentation or other

³The court correctly explained that “Mutual Aid Pacts . . . allow a police officer to respond to an out-of-jurisdiction request for help.” *Id.*

⁴*Smith v. McBride* (March 25, 2010), 10th Dist. No. 09AP-571. (Appx. 1-17, 18).

evidentiary support that such a Mutual Aid Pact did in fact exist despite Appellant's request for the same. The Appellate Court failed to fully consider disputed issues of material fact about the existence of and/or nature of the alleged Mutual Aid Pact⁵ and the common and statutory law pertaining to the same. Moreover, rather than addressing whether in the absence of a written contract substantiating a Mutual Aid Pact a police officer would proceed without immunity outside of his jurisdiction based upon the law outlined in *Sawicki*, above, the Appellate Court simply decided that *Sawicki* should not be applied because "the *Sawicki* Court's concern was the application of the public duty rule." *Id.* at P. 8.

On April 7, 2010, Appellant moved the Appellate Court to reconsider its decision.⁶ Appellant's motion brought to the Appellate Court's attention significant gaps in the record which create the above-referenced genuine issues of material fact as to the existence of such an agreement. Independent of said Motion for Reconsideration filed with the Appellate Court, Appellant now files this Memorandum in Support of Jurisdiction as it relates to Appellee's two propositions of law outlined below.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Absent a "Mutual Aid Pact", or an equivalent legislative resolution, a police officer who is not engaged in "hot pursuit" has no professional obligation to respond to a call outside of his jurisdiction, and thus cannot be deemed to be on an "emergency call" for purposes of R.C. §2744 immunity when responding to such a call.

⁵When asked to verify the existence of the Mutual Aid Pact, Sgt. Carpenter explained that it was described within the Clinton Township Police Rules & Procedures. (See Carpenter Depo. at p. 66). After a short recess in which Sgt. Carpenter was provided an opportunity to review the Rules & Procedures, Sgt. Carpenter was asked to state if in-fact the Mutual Aid Agreement was listed anywhere in the Rules & Procedures. He responded definitively, "No sir." (*Id.* at pp. 66-67); (See also Clinton Township Rules & Procedures). Furthermore, Sgt. Carpenter was asked to provide documentation verifying the existence of a Mutual Aid Pact, but no such documentation was ever provided.

⁶See *Smith v. McBride et al*, 10 Dist. No. 09AP-571, April 7, 2010 (Appellant's Motion For Reconsideration).

This Court has explained that in order to be on an emergency call as defined in R.C. §2744.01(A), an officer must be responding to a call to duty which “involves a situation to which a response is *required* by the officer’s *professional obligation*.” (Emphasis added.) *Colbert*, 99 Ohio St. 3d at syllabus. This Court’s holding established a threshold inquiry with respect to immunity analysis: did the officer have a duty to respond? If the answer is no, the officer cannot be on an emergency call, regardless of the most altruistic intentions.

An officer’s professional obligation to respond is typically construed broadly and may be triggered in several ways. However, this Court has held that when an officer acts *outside* of his jurisdiction, *without* a “Mutual Aid Pact”, he does so “with only the authority and the insurance protection of an ordinary citizen.” *Sawicki*, 37 Ohio St.3d at 227. Generally, in order to have any duty or authority to act as a peace officer, the officer must be within his jurisdictional limits. See R.C. §2935.03(A). Moreover, proximity cannot create the requisite obligation, no matter how close. In *Sawicki*, the Ottawa Hills Police Dept. was a mere 300 yards outside of the jurisdiction where an attempted rape and murder just occurred. *Id.* at 222. Yet, the Court stressed that because “Ohio statutes rendered out-of-jurisdiction police responders virtually powerless to arrest * * * *This cannot equate to a duty to respond.*” (Emphasis added.) *Id.* at 227.

As such, when an officer acts outside his jurisdiction he acts without authority, and without *authority* to act, logically there can be no duty or “*professional obligation*.” See *Sawicki*, 37 Ohio St.3d at 226-227. Consequently, per *Colbert*, without any professional obligation to respond, the acting officer cannot be on an “emergency call,” and therefore neither he nor the political subdivision is entitled to immunity. See R.C. §2744.02; see also *Colbert*.

Sgt. Carpenter *knew* that responding to the call would take him outside of his jurisdiction. (Carpenter Depo. at p. 66.) It is undisputed that his response leading to the accident did in fact

occur outside of his jurisdiction. (See *Smith*, at p. 8). The fact that Sgt. Carpenter’s jurisdiction was only a few miles outside the scene is entirely irrelevant. Sgt. Carpenter did not have undisputed direction from a Mutual Aid Pact that gave him a defined basis to pursue this general call outside his jurisdiction.⁷ Without the authority to do so, Sgt. Carpenter’s extra-jurisdictional response to a call for aid “cannot equate to a duty to respond.” See *Sawicki*, 37 Ohio St.3d at 227.⁸ Therefore, Sgt. Carpenter cannot be considered to have been on an “emergency call” for immunity purposes.

A. Not every call to duty is a professional-obligation triggering event such that it constitutes an “emergency call” under R.C. 2744.01(A).

Ohio has long recognized that not every call to duty is an emergency call. *Lingo v. Hoekstra*, 176 Ohio St. 417, 200 N.E.2d 325, 1964 Ohio LEXIS 989. An emergency call does not go so far as to include any situation in which a peace officer responds to stimuli while on or off duty. *Carter v. Columbus*, 10th Dist. No. 96APE01-103, 1996 Ohio App. LEXIS 3444. Instead, the inquiry turns again on whether or not the officer had a *professional obligation* to respond. *Colbert*.

Lower courts interpreting this Court’s “professional obligation” requirement have determined that an on-duty police officer’s civic obligations must be distinguished from his *professional obligation*. *Burnell v. Dulle*, 169 Ohio App.3d 792, 2006 Ohio 7044. In *Burnell*, Deputy Dulle was on-duty and driving to testify in response to a subpoena. When Dulle pulled into the parking lot, his cruiser struck a pedestrian walking out of the courthouse. The Twelfth

⁷See FN 6 and the discussion under Proposition of Law No. 2 with respect to what specifically should be required for purposes of a Mutual Aid Pact and the fact that there is an absence of the same in this case. There is at best a genuine issue of material fact as to whether any such pact or doctrine actually existed.

⁸This Court also rejected the notion of public policy creating a duty to respond extra-jurisdictionally stating that it would be *unreasonable* to allow public policy “to function apart from a duty premised upon a general empowering statute.” *Sawicki*, 37 Ohio St.3d at 232.

Dist. Court of Appeals acknowledged that the definition of an emergency call is not limited to inherently dangerous situations, but held that “an on-duty police officer driving to court to testify at the time of the incident does not make this an emergency call.” *Burnell*, 169 Ohio App.3d at 795.

That Court referenced this Court’s “professional obligation” requirement and determined that “[i]t was not Deputy Dulle’s professional duty, but his civic duty, to respond to the subpoena.” *Id.* at 796. Similarly, even though on duty, because of the nature of the call which was not specifically directed to him, Sgt. Carpenter’s professional obligations were not engaged while responding to the Franklin County dispatch. Appellee has been unable to produce sufficient evidence of an identifiable, well-defined, written contractual agreement in place constituting a Mutual Aid Pact. Therefore, in the absence of such a pact creating an otherwise absent obligation to respond outside his jurisdiction, the capacity in which he responded does not meet the technical requirements of responding to an emergency call under the immunity statute. See *Burnell*, *supra*.

B. Public policy supports this Court rendering a rule of law which would establish clear-cut guidelines and practices for extra-jurisdictional emergency responses.

Appellant recognizes the importance of efficient and effective law enforcement. Appellant does not seek the jurisdiction of this Court to request a rule of law that would have a chilling effect upon law enforcement activities. To the contrary, Appellant asks this Court to clarify a peace officer’s extra-jurisdictional authority and obligations.

A concrete rule of law stating that an officer has no authority and thus no professional obligation to respond to a call outside of his jurisdiction, without an identifiable and clearly outlined Mutual Aid Pact as discussed in Appellant’s Second Proposition of Law, below, will

establish clear-cut guidelines for extra-jurisdictional emergency responses. In effect, this bright line rule will: 1) promote and facilitate the establishment of Mutual Aid Pacts among contiguous political subdivisions; 2) alleviate any confusion or second guessing with respect to responding to extra-jurisdictional calls; and, ultimately 3) increase the safety of officers and the motoring public as a result of emergency responders following definitive guidelines.

Ohio courts have indicated that police rules and procedures for responding to an emergency call are “designed to protect [emergency] personnel, other motorists, and the person to whom emergency aid is to be rendered.” *Hunter v. Columbus*, 139 Ohio App.3d 962, 970, 746 N.E.2d 246, 253. In drafting R.C. 2744, the legislature recognized that “there are numerous calls to duty which do not involve an emergency response *with the inherent danger than emanates from such a response.*” *Posner v. Dept. of Pub. Safety*, 2000 Ohio App. LEXIS 4496. Naturally, the more explicit and comprehensive emergency response rules are, and the more defined an area of response is, the safer all those involved become.

A simple hypothetical helps illustrate the benefit of having a bright line rule defining the limits of an officer’s jurisdictional authority and obligations. What if Sgt. Carpenter overheard a call for assistance from a Dayton dispatcher? Sgt. Carpenter testified that “I would truly hope that if I’m out on foot and I’m chasing somebody and I’m asking for help from other agencies that those agencies would respond to help me. It’s protocol.” (Carpenter Depo. at p. 66). It may be “protocol” if the discussion is about lending a helping hand in an altruistic sense, or even articulating his civic duties as a police officer. See *Burnell*, supra. But to say Sgt. Carpenter has a *professional obligation* to respond to such a call in Dayton would be unreasonable and it would be detrimental to effective law enforcement. Not to mention the danger posed to all the motorists Sgt. Carpenter would encounter speeding along the 60 mile stretch of Interstate 70.

Where does Sgt. Carpenter's duty to respond stop? Cincinnati? Indiana? Without a rule specifically defining if and when a professional obligation is triggered, "the exception [to immunity] becomes virtually meaningless." *Hunter*, 139 Ohio App.3d at 970. Thus, a clear cut rule such as the one proposed herein is necessary for guidance to law enforcement and clear direction as to when obligations exist and when they do not exist.

Proposition of Law No. 2: Ohio law requires that the existence of a "Mutual Aid Pact" between political subdivisions be substantiated by a written contractual agreement or resolution in order to provide a police officer with the authority to act outside of his jurisdiction.

The Court in *Sawicki* recognized that a "Mutual Aid Pact" among contiguous municipalities may establish extra-jurisdictional authority to act. This Court explained that a

"Mutual Aid Pact" is an agreement between municipalities which:

Requires that, under specified circumstances, one municipality may request and receive aid from an adjoining municipality. It allows a municipality's police officer to respond to an out of jurisdiction request for aid, when the request is made by a command officer of the adjoining municipality.

Sawicki, 37 Ohio St.3d at 226 fn.3. Whether or not immunity applies to a police officer responding *outside* of his jurisdiction is directly dependent on the existence of a Mutual Aid Pact.

A. A Mutual Aid Pact must be in place before an employee of a political subdivision may receive extra-jurisdictional immunity.

The immunity statute contemplates employees of one political subdivision acting on behalf of another political subdivision. See R.C. §2744.02(A)(2). However, the only time an employee acting *outside* of his political subdivision would be entitled to the protection of the immunity he receives within his own jurisdiction is when "such function is otherwise within the

fulcrum of proper police activity.” *Perry v. City of East Cleveland*, 1996 Ohio App. LEXIS 507 at *11.

Such authority may be granted by a Mutual Aid Pact. The statute providing for “Mutual Aid” contracts between political subdivisions states in relevant part:
the legislative authority of any municipal corporation, in order to obtain police protection or to obtain additional police protection . . . may enter into contracts with one or more municipal corporations . . . upon any terms that are agreed upon . . . for the interchange of services of police departments. R.C. §737.04.

With respect to immunity, R.C. §737.04 also states:

Chapter 2744 of the Revised Code, insofar as it applies to the operation of police departments, shall apply to the *contracting political subdivisions* and to the police department members *when they are rendering service* outside their own subdivisions *pursuant to the contracts*. (Emphasis added).

The language of R.C. §737.04 yields the logical conclusion that a police officer does not have authority to provide police services outside of his jurisdiction absent a Mutual Aid Pact. Moreover, this statute clearly contemplates agreed-upon terms – reflected in writing, as discussed further below – as necessary for the formation and framework of such a Mutual Aid Pact. Without an actual *contract* no extra-jurisdictional authority (or obligation) is established. Therefore, the application of immunity to a police officer acting outside of his jurisdiction depends on the existence of a Mutual Aid Pact between the requesting political subdivision and the responding political subdivision.

Notwithstanding the above, in the absence of an executed contract, R.C. §737.041 provides that: “the police department of any municipal corporation may provide police protection to any county, municipal corporation, township . . . [etc.] . . . without a contract to provide police protection, upon the approval, **by resolution**, of the legislative authority of the municipal corporation . . .” This, and all other Ohio Revised Code Sections addressing Mutual Aid Pacts, or related relationships among political subdivisions, contemplate agreed-upon terms

reflected *in writing*. See R.C. §737.04, §737.041, and §505.431, which addresses townships.

These revised code sections also all contemplate agreements that should be recognized by and verified by representatives of the political subdivisions that entered them – not by a police officer who generally thinks such a thing may be in place, but has no authority to verify such an assertion.

B. The existence of a Mutual Aid Pact must be proven with concrete evidence of a contract between participating political subdivisions and cannot be determined based solely on the testimony of an officer seeking the protection of such an agreement.

No written contract or documented evidence reflecting any agreed-upon terms between Appellee and the political subdivision within which Appellee’s employee was responding, and ultimately was involved in the collision at issue, exists in this case. Therefore, affirming summary judgment in Appellee’s favor was improper. Ohio courts have consistently held that “when the resolution of a material fact issue raised upon a motion for summary judgment depends solely upon the credibility of a witness, summary judgment generally should not be granted.” *McGuire v. Lovell*, 128 Ohio App.3d 473, 715 N.E.2d 587, 1998 Ohio App. LEXIS 1522. The *only* evidence of a Mutual Aid Pact in this case was Sgt. Carpenter’s self-serving testimony. Notably, after reviewing the Clinton Township Police Rules & Procedures, Sgt. Carpenter retracted his initial statement and admitted that the Rules & Procedures did *not* provide for a Mutual Aid Pact. Appellees failed, upon request by Appellant, to provide any other evidence to support Sgt. Carpenter’s contention that he acted pursuant to a Mutual Aid Pact. The record has never been supplemented with any such evidence.

A determination that an officer responds under a blanket of immunity without sufficient evidence to establish that a Mutual Aid Pact existed, under the circumstances already outlined, creates a matter of public and great general interest for the same reasons as outlined above. A

nebulous reference to some sort of agreement without any proof of the actual guidelines provided by such an agreement (if in fact such an agreement even exists) only leads to confusion and opportunity for error or abuse. Opportunity for error and/or abuse in the context of the exercise of police power is a matter of great general importance and interest. Addressing those issues within the context of not only law enforcement, but also all Ohio citizens and their motor safety, only increases the level of importance and interest.

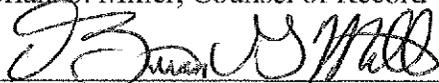
Valid Mutual Aid Pacts should clearly outline the terms agreed upon, in writing, which define a proper interchange of police services. In the absence of such specific terms, there can be no duty to provide extra-jurisdictional police services. Unequivocally establishing a rule that requires Mutual Aid Pacts to be substantiated in writing will not only facilitate a better understanding of the agreement between participants, but will also assist courts in cases similar to this one where the existence of a Mutual Aid Pact is a key material issue.

Therefore, Appellant respectfully requests that this Court hold, as a matter of law, that the existence of a Mutual Aid Pact between political subdivisions must be substantiated by a written contractual agreement or resolution in order to provide a police officer the authority to act outside of his jurisdiction.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

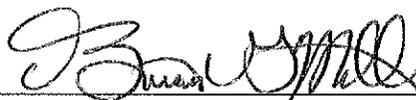
Respectfully submitted,
Brian G. Miller, Counsel of Record



Brian G. Miller
Counsel for Appellant Lea D. Smith

Certificate of Service

I hereby certify that a true and exact copy of the foregoing was served upon Joshua R. Schierloh and Boyd W. Gentry, trial attorneys for Defendants/Appellees, 1 Prestige Place, Suite 700, Miamisburg, Ohio 45342, by ordinary U.S. mail, postage prepaid, this 6th day of May, 2010.



Brian G. Miller
Counsel for Appellant Lea D. Smith

cc: Lea D. Smith
Craig T. Smith, Esquire
Christina L. Corl, Esquire

APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Lea D. Smith.	:	
	:	
Plaintiff-Appellant,	:	No. 09AP-571
	:	(C.P.C. No. 08CVC-03-3907)
v.	:	
	:	(REGULAR CALENDAR)
Vashawn L. McBride et al.,	:	
	:	
Defendants-Appellees.	:	

DECISION

Rendered on March 25, 2010

Brian G. Miller Co., L.P.A., and Brian G. Miller, Scott Schiff & Associates and Craig T. Smith, for appellant.

Surdyk Dowd & Turner Co., L.P.A., Boyd W. Gentry and Joshua R. Schierloch, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiff-appellant, Lea D. Smith ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Clinton Township and Clinton Township Police Sergeant Travis Carpenter ("appellees").

{¶2} This matter arises out of an automobile accident that occurred on March 14, 2006, at approximately 11:45 p.m., when Sergeant Carpenter's police cruiser collided with a vehicle driven by defendant Vashawn L. McBride ("McBride"). Appellant was a sleeping passenger in McBride's vehicle at the time of the accident.

{¶3} Sergeant Carpenter, a 16-year member of the Clinton Township Police Department, was at police headquarters when he heard a dispatch call from a Franklin County Sheriff's Deputy who was involved in a foot chase with a fleeing suspect. Upon hearing the dispatch, Sergeant Carpenter immediately proceeded to the deputy's location. As Sergeant Carpenter was traveling eastbound on Morse Road, however, he collided with McBride, who was attempting to turn left from westbound Morse Road onto southbound Chesford Road.

{¶4} A personal injury complaint was filed on March 13, 2008, naming McBride, Sergeant Carpenter, the Clinton Township Police Department and Safeco Insurance Company as defendants. On December 7, 2008, Sergeant Carpenter and the police department filed motions for summary judgment. The police department argued that it was not sui juris, and even if appellant's complaint could be construed as a complaint against Clinton Township, it was entitled to immunity under R.C. 2744.01(A). Sergeant Carpenter argued he was entitled to immunity as well. On May 14, 2009, the trial court granted the motion for summary judgment as to both parties. Thereafter, on June 11, 2009, appellant filed a motion to amend the complaint to substitute Clinton Township for the police department. Also on this date, because there were claims pending with respect to the other defendants, appellant filed a motion for Civ.R. 54(B) certification. Appellant then filed a notice of appeal on June 12, 2009. Thereafter, on June 18, 2009, the trial court granted the motions for Civ.R. 54(B) certification and to amend the complaint, and stayed remaining claims pending appeal.

{¶5} On appeal, appellant brings three assignments of error for our review:

1. The trial court erred by sustaining Defendants-Appellees' motion for summary judgment based upon the determination that Defendant-Appellee Sgt. Travis D. Carpenter was on an emergency call, as defined under R.C. 2744.01(A), when he collided with Appellant's vehicle.

2. The trial court erred by sustaining Defendants-Appellees' motion for summary judgment, pursuant to R.C. 2744.02, based upon the determination that there is no evidence to support a finding that Defendant-Appellee Sgt. Travis D. Carpenter's actions constituted wanton misconduct.

3. The trial court erred by sustaining Defendants-Appellees' motion for summary judgment, pursuant to R.C. 2744.03, based upon the determination that there is no evidence to support a finding that Defendant-Appellee Sgt. Travis D. Carpenter's actions rose to the level of recklessness.

{¶6} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C), may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Id.*

{¶7} An appellate court's review of summary judgment is *de novo*. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an

independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 108 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher, Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶8} In the interest of clarity, we first address a portion of this matter's procedural history. The complaint before us named Sergeant Carpenter and the Clinton Township Police Department as defendants. As raised in their motion for summary judgment, however, as a department of Clinton Township, the police department is not sui juris and cannot sue or be sued as a separate entity. Though the trial court recognized this, it continued to review the summary judgment motion and construed the claims as if they had been made against Clinton Township and granted summary judgment in appellees' favor. Thereafter, appellant moved the trial court to amend the complaint to substitute Clinton Township for the police department. Prior to that motion being granted, however, appellant filed a notice of appeal.

{¶9} While the filing of a notice of appeal generally divests the trial court of jurisdiction to act except over issues not inconsistent with the appellate court's jurisdiction, appellate jurisdiction is limited to review of final orders or judgments that are appealable. *Klein v. Bendix-Westlinghouse Automotive Air Brake Co.* (1968), 13 Ohio St.2d 85, 86; *Ford Motor Credit Co. v. Ryan & Ryan, Inc.*, 10th Dist. No. 06AP-1239, 2007-Ohio-5658.

{¶5. To be final and appealable, a court order must satisfy the requirements of R.C. 2505.02. If the action involves multiple claims and the order does not enter judgment on all of the claims, the order must also satisfy Civ.R. 54(B) by including express language

that there is no just reason for delay. *Internatl. Bhd. Of Electrical Workers, Local Union No. 8 v. Vaughn Industries, LLC*, 116 Ohio St.3d 335, 2007-Ohio-6439, ¶7, citing *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, ¶5-7.

{¶10} Here, the entry granting summary judgment did not dispose of all claims pending before the trial court, hence appellant's moving the trial court for Civ.R. 54(B) certification. Thus, the judgment entry of May 14, 2009, from which appellant filed an appeal, was not a final, appealable order, and appellant's filing of the same was premature. " '[A] premature notice of appeal * * * does not divest the trial court of jurisdiction to proceed because the appeal has not yet been perfected.' " *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 2008-Ohio-2023, ¶76, quoting *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, ¶14. Therefore, the trial court retained jurisdiction to consider the motion to amend the complaint and the motion for Civ.R. 54(B) certification. Further, even though the notice of appeal was premature, the trial court did grant the motion for Civ.R. 54(B) certification rendering the judgment entry final and appealable on June 18, 2009. Under App.R. 4, a premature notice of appeal is treated as filed immediately after the entry of the judgment or order; therefore, the notice of appeal in the instant case was timely.

{¶11} We now proceed with the merits of this appeal in which appellant contends the trial court erred in finding appellees were entitled to immunity pursuant to Ohio's Political Subdivision Tort Liability Act.

{¶12} Pursuant to the Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744, we utilize a three-tiered analysis to determine the immunity of a political subdivision. *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶7, citing *Greene*

Cty. Agriculture Soc. v. Liming, 89 Ohio St.3d 551, 2000-Ohio-486. First, we begin with the general rule that political subdivisions are not liable generally for injury or death to persons in connection with a political subdivision's performance of a governmental or proprietary function. *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶18; see R.C. 2744.02(A)(2). Next, we consider whether any of the enumerated exceptions to the general rule of immunity applies. *Howard*; R.C. 2744.02(B). If there is an applicable exception, we then proceed to a third inquiry of whether any of the statutory defenses of R.C. 2744.03 apply. *Howard*.

{¶13} As is provided in R.C. 2744.02(A)(1), "[e]xcept as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action 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 governmental or proprietary function." The only exception relevant to this case states, "[e]xcept as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." R.C. 2744.02(B)(1). However, R.C. 2744.02(B)(1)(a) provides a full defense to liability where "[a] member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct."

{¶14} In her first assignment of error, appellant contends the trial court erred in finding Sergeant Carpenter was on an emergency call at the time of the collision thereby

providing a defense to political subdivision tort liability. Pursuant to R.C. 2744.01(A), emergency call means, "a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer." Rejecting the plaintiff's argument that the legislature intended only those calls to duty concerning "inherently dangerous situations" to constitute emergency calls, the Supreme Court of Ohio held a call to duty involves a situation to which a response by a peace officer is required by the officer's professional obligation. *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, syllabus.

{¶15} While generally the question of whether particular situations constitute an emergency call is a question of fact, a court may determine whether a police officer is on an emergency call as a matter of law where triable questions of fact are not present. *Hewitt v. City of Columbus*, 10th Dist. No. 08AP-1087, 2009-Ohio-4486, ¶10, citing *Longley v. Thalling*, 8th Dist. No. 91661, 2009-Ohio-1252, ¶20 (summary judgment appropriate for defendants where trial court properly found the police officer was responding to an emergency call at the time of the collision); see also *VanDyke v. City of Columbus*, 10th Dist. No. 07AP-918, 2008-Ohio-2652, appeal not allowed by 2008-Ohio-5273 (affirming trial court's entry of summary judgment concluding in part that the trial court properly determined the officer was responding to an emergency call at the time of the collision).

{¶16} Relying on *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, appellant argues Sergeant Carpenter's actions could not constitute an emergency call because he was acting outside of his jurisdiction at the time of the accident and,

therefore, acted not only without authority, but also with no professional obligation whatsoever. First we note that the events giving rise to *Sawicki* occurred prior to the enactment of Ohio's Political Subdivision Tort Liability Act; therefore, the *Sawicki* court's concern was the application of the public duty rule to preclude liability against a municipality on a negligence claim based on the alleged failure of a municipal police department to respond to an emergency call originating from outside the city's municipal jurisdiction. While *Sawicki* stated that an officer who responds to a situation outside of his jurisdiction would do so with only the authority and insurance protection of an ordinary citizen, it also recognized that "Mutual Aid Pacts," which are in essence agreements between contiguous municipalities wherein one may request and receive aid from an adjoining municipality, allow a police officer to respond to an out-of-jurisdiction request for aid. Additionally, *Sawicki* was rendered not only prior to the enactment of R.C. Chapter 2744, but also prior to the enactment of R.C. 737.04, which allows political subdivisions to enter into mutual aid contracts with other political subdivisions for law enforcement purposes. R.C. 737.04 also states:

Chapter 2744, of the Revised Code, insofar as it applies to the operation of police departments, shall apply to the contracting political subdivisions and to the police department members when they are rendering service outside their own subdivisions pursuant to the contracts.

{¶17} It is undisputed in the matter before us that the dispatched location of the Franklin County deputy sheriff was outside the jurisdiction of Clinton Township. However, Sergeant Carpenter testified that pursuant to mutual aid, he has a duty to respond to incidents outside of his jurisdiction. Specifically, with respect to the dispatching agency here, Sergeant Carpenter testified, "[w]e have mutual aid with the sheriff's office if they

request aid from us to help them somewhere within the county, we can do that just like we have mutual aid with Columbus Police Department and other police agencies." (Carpenter Depo. at 66.) Thus, the record contains evidence Sergeant Carpenter was authorized to act outside of his jurisdiction pursuant to a mutual aid agreement between Clinton Township and Franklin County, and the fact that Sergeant Carpenter was outside of his jurisdiction is not fatal to the determination that he was on an emergency call.

{¶18} Appellant next contends there was no professional obligation to respond because Sergeant Carpenter did not actually observe a situation to trigger such response, the dispatch did not require an immediate response, and he was not personally called to duty. Based on prior precedent from this court, we do not find appellant's position well-taken.

{¶19} In *Hewitt*, supra, Columbus Police Officer Baughman heard a dispatch over the police radio of a request for assistance by an officer pursuing a vehicle that fled from an attempted traffic stop. The plaintiff argued that because the officer did not report that he was responding to a call for assistance and because police protocol did not authorize activation of lights and sirens in response to such call, there was a genuine issue of material fact regarding whether or not the matter constituted an emergency call. This court disagreed, finding that based on unrebutted evidence in the record, Officer Baughman was involved in a situation to which his professional obligation required a response and that he was responding to an emergency call as defined by R.C. 2744.01.

{¶20} Likewise in *VanDyke*, supra, the plaintiff was injured when his car was struck by a police cruiser driven by Columbus Police Officer Shannon who was responding to a call for assistance by a fellow officer pursuing a suspected felon on foot.

Officer Shannon proceeded to the officer's location without lights and sirens, and the dispatch did not communicate the presence of immediate harm to the officer or others. Yet, this court found as a matter of law that those two facts did not take Officer Shannon's response out of the description of an emergency call.

{¶21} The evidence before us indicates Sergeant Carpenter was on duty and responding to a radio dispatch of a deputy sheriff in a foot chase with a suspect who had fled the scene of a traffic stop. Because Sergeant Carpenter knew the area in which the deputy was located is known for crimes involving guns and drugs, and because Sergeant Carpenter was within just a few miles of said location, he responded. Pursuant to department procedures, Sergeant Carpenter was required to proceed without lights and sirens. Consistent with this court's precedent, we find the trial court correctly concluded Sergeant Carpenter was on an emergency call as he was involved in a situation in which his professional obligation required a response. Accordingly, we overrule appellant's first assignment of error.

{¶22} We must now consider the trial court's determination that Sergeant Carpenter's operation of the police cruiser in this instance did not constitute willful or wanton misconduct as a matter of law, which is the basis of appellant's second assignment of error.

{¶23} "The term 'willful and wanton misconduct' connotes behavior demonstrating a deliberate or reckless disregard for the safety of others." *Moore v. City of Columbus* (1994), 98 Ohio App.3d 701, 708. This court has defined willful misconduct to mean conduct involving "the intent, purpose, or design to injure." *Robertson v. Dept. of Pub. Safety*, 10th Dist. No. 06AP-1064, 2007-Ohio-5080, ¶14, quoting *Byrd v. Kirby*, 10th Dist.

No. 04AP-451, 2005-Ohio-1261. "Wanton misconduct is the failure to exercise any care toward one to whom a duty of care is owed under circumstances in which there is a great probability that harm will result and the tortfeasor knows of that probability." *Robertson* at ¶18, citing *Hunter v. Columbus* (2000), 139 Ohio App.3d 962, 969. "A wanton act is an act done in reckless disregard of the rights of others, which reflects a reckless indifference on the consequences to the life, limb, health, reputation, or property of others." *Byrd* at ¶23, citing *State v. Earlenbaugh* (1985), 18 Ohio St.3d 19, 21. "[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury." *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97.

{¶24} Under this assigned error, appellant contends Sergeant Carpenter's actions constituted wanton conduct¹ because he was operating his vehicle at night at excessive speeds, failed to use evasive maneuvers, had reduced reaction time and had an obstructed view of the intersection. In support of her position, appellant relies on *Robertson* and *Hunter*.

{¶25} In *Robertson*, this court was asked to review a judgment rendered against the Ohio State Highway Patrol after a trial in the Court of Claims of Ohio. Upon such review, we found there was competent, credible evidence in the record to support the trial court's finding that the trooper failed to show any care for the decedent in the operation of

¹ Appellant makes no argument on appeal that the trial court erred in finding Sergeant Carpenter's actions did not amount to willful misconduct. Rather, appellant contends Sergeant Carpenter operated his vehicle in a wanton manner. Therefore, our discussion focuses likewise.

his cruiser. Supporting such finding was evidence that the trooper proceeded into an intersection against a red light at over 70 m.p.h. where the posted speed limit was only 35 m.p.h. There was also evidence the trooper was familiar with the area and knew he could not see the intersection in question until he crested the hill immediately before it. Additionally, it was undisputed that because of his high rate of speed, the trooper had only split seconds to recognize the potential crash situation.

{¶26} In *Hunter*, this court reversed a trial court's grant of summary judgment in favor of the city of Columbus, whose fire truck hit the decedent's vehicle resulting in her death. We found there were genuine issues of material fact relating to whether the truck's operator exhibited willful or wanton misconduct because the evidence established the truck was traveling 61 m.p.h. in a 35 m.p.h. zone, was left of center, and was in violation of a Columbus Fire Department rule that stated a vehicle operator should not travel more than 20 m.p.h. when in the wrong lane.

{¶27} As will be established, however, the facts before us are easily distinguishable from both *Robertson* and *Hunter* and, in contrast, are analogous to *Hewitt* and *VanDyke*, the cases upon which appellees rely.

{¶28} In *VanDyke*, the plaintiff was injured when he pulled from a side street onto West Broad Street and his car was struck by a police cruiser responding to an emergency call. The city conceded the officer was traveling in excess of the speed limit at night without lights and sirens, but with headlights. The area of travel was a well-lit six-lane roadway with sparse traffic at the time. The officer had the right-of-way, and the plaintiff faced a stop sign and obligation to yield. Though there was testimony the officer's speed was between 47 and 50 m.p.h., the plaintiff's affidavit indicated the officer's speed was

between 60 to 70 m.p.h. This court stated, "[g]iven the wide, broad, and well-lit roadway described in the record, flat approaches on either side of the intersection, and the fact that Officer Shannon was proceeding with headlights, appellant was not deprived of the opportunity to yield even if Officer Shannon was proceeding at a speed in excess of the posted limit and without lights or sirens." *Id.* at ¶11. Thus, this court found the trial court did not err in concluding there was no genuine issue of material fact that the officer was not proceeding in a manner arising to willful or wanton misconduct.

{¶29} Similarly, in *Hewitt*, the plaintiff was injured when he turned left from a driveway into the path of an officer responding to an emergency call. On appeal, the plaintiff argued summary judgment was not appropriate because genuine issues of material fact remained as to whether the officer's conduct of exceeding the speed limit without lights or sirens was willful or wanton. In rejecting the plaintiff's argument, this court noted the facts were "nearly identical" to those of *VanDyke* in that though it was dark, the five-lane road was in good, dry condition with light traffic. Additionally, the officer had the right-of-way, had his headlights illuminated, and was traveling between 55 and 60 m.p.h. in a 45 m.p.h. zone.

{¶30} In the matter before us, the area in which the accident occurred is described as a "flat open stretch of road" consisting of seven lanes. (Carpenter Depo. at 40.) Traffic conditions were described as light, and Sergeant Carpenter was traveling between 55 and 58 m.p.h. in a 45 m.p.h. zone. There is no evidence in the record of inclement weather. Though it was night and lights and sirens were not activated, Sergeant Carpenter's headlights were illuminated. According to Sergeant Carpenter, he had the green light indicating his right-of-way, and as he approached the intersection he observed

a vehicle turn left in front of him, causing him to remove his foot from the accelerator. However, a second car, driven by McBride, turned left immediately after the first car, and Sergeant Carpenter stated he was not able to observe the second car until the time of impact. As in *VanDyke*, given the described roadway, flat approaches to the intersection, and the fact that Sergeant Carpenter was proceeding with headlights and the right-of-way, there is no evidence that appellant was deprived of an opportunity to yield even if Sergeant Carpenter was proceeding at a speed in excess of the posted limit and without lights and sirens.

{¶31} Based on the unrefuted evidence in the record, we find appellees met their burden of identifying those portions of the record that demonstrate the absence of a *genuine issue of material fact* as to whether Sergeant Carpenter's operation of his cruiser amounted to willful or wanton misconduct, and that appellant failed to meet her reciprocal burden as outlined by Civ.R. 56(E). Accordingly, we overrule appellant's second assignment of error.

{¶32} In her final assignment of error, appellant contends the trial court erred in finding that Sergeant Carpenter was entitled to personal immunity under R.C. 2744.03(A)(6), which provides immunity to an employee of a political subdivision from liability caused by an act or omission in connection with a governmental or proprietary function, subject to certain exceptions. The relevant exception to immunity in the matter before us is if "the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.] R.C. 2744.03(A)(6)(b).

{¶33} Appellant does not allege that Sergeant Carpenter acted with malicious purpose or in bad faith, and we have already determined that he did not act in a wanton

manner. Therefore, we consider whether the evidence demonstrates a genuine issue of material fact as to whether Sergeant Carpenter's conduct rose to the level of recklessness.

{¶34} One acts recklessly "if he doesn't act or intentionally fails to do an act which it is 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.'" *VanDyke* at ¶13, quoting *Thompson v. McNeill* (1990), 53 Ohio St 3d 102, 104-05. For purposes of R.C. 2744.03(A)(6)(b), recklessness has also been defined as a "'perverse disregard of a known risk.'" *Byrd* at ¶27, quoting *Lipscomb v. Lewis* (1993), 85 Ohio App.3d 97, 102.

{¶35} As we have already discussed under appellant's second assignment of error, Sergeant Carpenter was responding to an emergency call at the time of the collision. Sergeant Carpenter was traveling with the right-of-way and headlights illuminated on an unobstructed flat stretch of roadway with light traffic. Sergeant Carpenter's speed and lack of lights and sirens were consistent with his directives. As reiterated by this court in *Hewitt*, " [b]ecause the law and current police and emergency practice clearly contemplate the necessity in some circumstances of * * * emergency runs, a responding officer does not create an "unreasonable" risk of harm by engaging in an emergency run merely because such a response creates a greater risk than would be incurred by traveling at normal speed.' " *Id.* at ¶33, quoting *Byrd* at ¶28. Based on precedent from this court, the evidence here does not demonstrate a genuine issue of

material fact as to whether Sergeant Carpenter's conduct rose to the level of recklessness. Accordingly, we overrule appellant's third assignment of error.

{¶36} Based on the foregoing, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT, J., concurs.

TYACK, P.J., dissents.

TYACK, P.J., dissenting.

{¶1} I respectfully dissent.

{¶2} I do not see a call to help apprehend someone who has run away from a deputy sheriff after a traffic stop as a call to respond to an inherently dangerous situation. I also do not see such a call as involving a situation where a response is required. Sergeant Carpenter did not need to leave his office and respond to a separate jurisdiction where a deputy was pursuing a suspect and other police officers were already responding. Sergeant Carpenter especially did not need to respond without lights and siren at speeds 10 to 15 m.p.h. over the posted speed limit.

{¶3} I do not feel that Sergeant Carpenter had the right-of-way due to his excessive speed.

{¶4} For similar reasons, I believe a trier of fact could find that Sergeant Carpenter was acting recklessly.

{¶5} I believe that there are genuine issues of material fact both as to immunity and as to recklessness. I would therefore reverse the summary judgment granted by the

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trial court and remand the case for further appropriate proceedings. Since the majority of this panel does not, I respectfully dissent.

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Lea D. Smith,

:

Plaintiff-Appellant,

:

v.

:

Vashawn L. McBride et al.,

:

Defendants-Appellees.

:

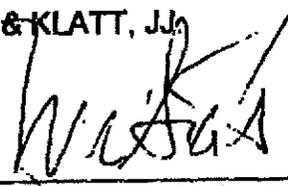
No. 09AP-571
(C.P.C. No. 08CVC-03-3907)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 25, 2010, appellant's three assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

McGRATH & KLATT, J.J.

By



Judge Patrick M. McGrath