

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

Lea D. Smith,	:	
	:	
Appellant,	:	Case No. 10-0809
	:	
v.	:	
	:	On Appeal from the Franklin
Vashawn L. McBride, et al.,	:	County Court of Appeals,
	:	Tenth Appellate District
Appellees.	:	

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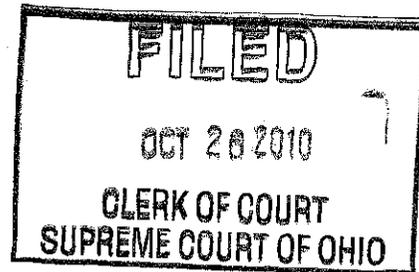
MERIT BRIEF OF APPELLANT LEA D. SMITH

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## STATEMENT OF THE CASE

This case arises from an automobile accident that occurred on March 14, 2006. Within her complaint, Appellant Lea D. Smith alleged, *inter alia*, that Appellee Sergeant Travis D. Carpenter negligently operated his police cruiser. Appellant further alleged that Sergeant Carpenter's misconduct rose to such a level that it should be characterized as wanton and reckless and that Appellees Clinton Township and Sergeant Carpenter should be held liable for his conduct. On December 15, 2008, Appellees filed their Motion for Summary Judgment, and on May 14, 2009, the Trial Court granted Appellees' Motion. The Trial Court held that Sergeant 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.

On June 12, 2009 Appellant filed her Notice of Appeal with the Tenth District Court of Appeals. Appellant contended that the Trial Court erred in finding that Sergeant Carpenter was on an emergency run and that it erred in finding that there was no evidence that Sergeant Carpenter was wanton or reckless in the operation of his police cruiser. Briefs were filed, and on January 5, 2010, oral arguments were held. On March 25, 2010, the Tenth District sustained the ruling of the Trial Court, in a 2-1 decision, finding that there was no issue of material fact as to whether Sergeant Carpenter was acting pursuant to a mutual aid agreement and that he was, therefore, on an emergency run. The Tenth District further held that Appellees had demonstrated that there was no issue of material fact indicating that Sergeant Carpenter had operated his police cruiser in a wanton or reckless manner.

On May 6, 2010, Appellant filed a Notice of Appeal with this Court along with a Memorandum in Support of Jurisdiction, and on August 25, 2010, this Court accepted the appeal. Consistent with her Notice of Appeal and Memorandum in Support of Jurisdiction, Appellant presents this case raising the issues of law outlined herein and contesting the decision of the

Tenth District Court of Appeals sustaining the Trial Court's granting of Appellees' Motion for Summary Judgment.

### **STATEMENT OF FACTS**

On the night of March 14, 2006, at approximately 11:44 p.m., Sergeant Travis Carpenter's Clinton Township police cruiser collided with the vehicle in which Appellant was a passenger.<sup>1</sup>

Just prior to the collision, Sergeant Carpenter was at his desk doing paperwork when he *overheard* a dispatch call from the Franklin County Sheriff's Office.<sup>2</sup> The Franklin County dispatch was a general one disseminated to nearly thirty police agencies; it was not specifically directed to Clinton Township or Sergeant Carpenter.<sup>3</sup>

Sergeant Carpenter initially testified that the call was "an officer in trouble" call.<sup>4</sup> However, when asked why he did not activate his lights or sirens, he changed his testimony and stated that the dispatch was not an "officer in trouble" call.<sup>5</sup> Sergeant Carpenter further testified that the call did not involve a shooting, a stabbing, a robbery, domestic violence, or a vehicular pursuit.<sup>6</sup> To the contrary, the dispatch concerned an officer on a routine traffic stop where the driver of the vehicle fled on foot.<sup>7</sup> Thus, under Clinton Township Police Rules & Procedures, this type of call was not characterized as an "emergency call."<sup>8</sup> In fact, Sergeant Carpenter, himself, eventually testified that he was not on an emergency run.<sup>9</sup>

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<sup>1</sup> Supp. p. 6; Carpenter Depo. pp. 19-20

<sup>2</sup> Supp. p. 83, Appellee's Motion for Summary Judgment; p. 2

<sup>3</sup> Supp. p. 17, Carpenter Depo. pp. 63-65

<sup>4</sup> Supp. p. 17, Carpenter Depo. p. 63

<sup>5</sup> Supp. p. 23, Carpenter Depo. pp. 86-87

<sup>6</sup> Supp. p. 21, Carpenter Depo. pp. 79-80

<sup>7</sup> Supp. p. 21, Carpenter Depo. p. 80

<sup>8</sup> Supp. p. 23, Carpenter Depo. pp. 87-88; see also Supp. pp. 61-62, Clinton Township Division of Police Rules, Regulations & Procedures

<sup>9</sup> Supp. p. 22, Carpenter Depo. p. 84 and Supp. p. 25, Carpenter Depo. p. 95

Nonetheless, Sergeant Carpenter responded to this call, which he knew was *outside* of his jurisdiction,<sup>10</sup> although neither he nor the Clinton Township Police Department was *personally* requested to respond.<sup>11</sup> Sergeant Carpenter also acknowledged that at least two other officers were already en route when he proceeded outside of his jurisdiction.<sup>12</sup> Initially, Sergeant Carpenter claimed a duty to respond arose by way of “mutual aid”<sup>13</sup> and that the terms for such “mutual aid” were outlined within the Rules, Regulations and Procedures Manual for Clinton Township.<sup>14</sup> However, upon reviewing said manual, he later admitted that neither a mutual aid agreement, nor even a reference to or explanation of the same, was contained within the Manual.<sup>15</sup> Although documented evidence of the mutual aid agreement was requested,<sup>16</sup> *neither an agreement nor any other similar document was ever produced.*

Without any actual mutual aid agreement, or equivalent legislative resolution, Sergeant Carpenter proceeded, on his own accord, to the location of the Franklin County Sheriff’s deputy at Morse Road and Westerville Road, a location outside of his jurisdiction.<sup>17</sup> The collision occurred at the intersection of Morse Road and Chesford Road, in a mixed commercial and residential area with open businesses. This intersection is also outside of the boundaries of Clinton Township.<sup>18</sup> Sergeant Carpenter admitted there was other traffic in the area prior to the collision, and he even observed a different vehicle turn in the intersection, in front of his vehicle, just before he collided with Appellant’s vehicle.<sup>19</sup>

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<sup>10</sup> Supp. p. 18, Carpenter Depo. p. 66

<sup>11</sup> Supp. p. 20, Carpenter Depo. p. 75

<sup>12</sup> Supp. pp. 31-32, Carpenter Depo. pp. 121-122

<sup>13</sup> Supp. p. 18, Carpenter Depo. p. 66

<sup>14</sup> Supp. p. 18, Carpenter Depo. p. 67

<sup>15</sup> Supp. p. 18, Carpenter Depo. pp. 68-69

<sup>16</sup> Supp. p. 32, Carpenter Depo. p. 122

<sup>17</sup> Supp. pp. 20-21, Carpenter Depo. pp. 75-78

<sup>18</sup> Supp. p. 26, Carpenter Depo. pp. 98-100; and also Supp. p. 8, Carpenter Depo. p. 28

<sup>19</sup> Supp. p. 10, Carpenter Depo. p. 37; and also Supp. p. 11, Carpenter Depo. p. 41

Immediately prior to the collision, while proceeding on this non-emergency call outside of his jurisdiction, Sergeant Carpenter traveled at speeds nearing 65 m.p.h., nearly 20 m.p.h. over the posted speed limit.<sup>20</sup> Despite driving in an area of residences and open businesses, and observing traffic in his direct line of travel, Sergeant Carpenter *never* activated his emergency lights or siren to warn other motorists of his presence.<sup>21</sup> He operated his vehicle in this fashion, at night, even though he *knew* other motorists would not be able to recognize him as an officer on a run.<sup>22</sup>

Due to his excessive rate of speed and his own professed limited view, Sergeant Carpenter was unable to timely react to Appellant's vehicle. Sergeant Carpenter admitted he was unable to recognize any distinct features on Appellant's vehicle<sup>23</sup> before colliding with it and testified that he "was unable to have enough reactionary time to apply the brakes."<sup>24</sup> In fact, even though he was in the outside eastbound lane,<sup>25</sup> which means the vehicle in which Appellant was a passenger turned and crossed three lanes of traffic *prior to* the collision, Sergeant Carpenter's conduct was so miscalculated that he testified, "I truly don't remember seeing a whole lot of anything other than impact."<sup>26</sup>

This cause is now before the Court upon acceptance of a discretionary appeal, subject to *de novo* review<sup>27</sup> of all facts in the light most favorable to Appellant<sup>28</sup> and of all questions of law presented.

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<sup>20</sup> Supp. p. 77, Ashton Report, p. 8

<sup>21</sup> Supp. p. 23, Carpenter Depo. pp. 86-87

<sup>22</sup> Supp. p. 26, Carpenter Depo. p. 100

<sup>23</sup> Supp. p. 11, Carpenter Depo. pp. 38-40; and also Supp. pp. 13-14, Carpenter Depo. pp. 47-51

<sup>24</sup> Supp. p. 14, Carpenter Depo. pp. 50-51; and also Supp. 34, Carpenter Depo. p. 130

<sup>25</sup> Supp. pp. 15-16, Carpenter Depo. pp. 55-58

<sup>26</sup> Supp. p. 11, Carpenter Depo. p. 40

<sup>27</sup> *Comer v. Risko* (2005), 106 Ohio St.3d 185, ¶8, 2005-Ohio-4559; see also *Hudson v. Petrosurance, Inc.* (2010), 2010 Ohio LEXIS 2287, 2010 Ohio 4505, ¶29

<sup>28</sup> *Ohio Civ.R. 56*; see also *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 87

## ARGUMENT

**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.**

Passed into law in 1985 and codified as R.C. § 2744.01, *et seq.*, Ohio’s Political Subdivision Tort Liability Act was enacted to conserve the fiscal resources of political subdivisions and to allow injured persons to recover for torts committed by political subdivisions.<sup>29</sup> In order to protect political subdivisions, the Act provides them with immunity from tort liability under certain circumstances. This Court has held that the determination of whether a political subdivision is immune from tort liability involves a three-tiered analysis.<sup>30</sup> Initially, there is the general presumption that political subdivisions are immune from liability when performing either a governmental or proprietary function.<sup>31</sup> This immunity, however, is not absolute, and the next step requires a determination of whether any of the exceptions to immunity found in R.C. § 2744.02(B) apply.<sup>32</sup> Finally, if an exception to immunity does apply, it must be ascertained whether any defense set forth in R.C. § 2744.02(B) or R.C. § 2744.03 applies to protect the political subdivision.<sup>33</sup>

The case at bar involves a collision between a vehicle being operated by Sergeant Carpenter, an employee of Appellee Clinton Township, and a vehicle in which Appellant was a passenger. At the time, Sergeant Carpenter was responding to a general request for assistance issued by the Franklin County Sheriff’s Office (the “FCSO”). As this was, arguably, a governmental or proprietary function, Appellee is generally presumed to be immune. However, at the time of the collision Sergeant Carpenter was traveling at speeds nearing 65 m.p.h. – 20

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<sup>29</sup> *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29

<sup>30</sup> *Colbert v. Cleveland* (2003), 99 Ohio St.3d 215, ¶7, 2003-Ohio-3319

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, ¶¶ 7-8

<sup>33</sup> *Id.*, ¶ 9

m.p.h. over the posted speed limit.<sup>34</sup> He also *never* activated his emergency lights or siren to warn other motorists of his presence, or more specifically, to warn them that he might be travelling in a fashion not otherwise expected of motorists obeying the speed limits and other traffic laws.<sup>35</sup> He operated his vehicle in this fashion at night, and he never applied his brakes prior to the collision.<sup>36</sup> Consequently, it is clear that Sergeant Carpenter was negligent. Therefore, pursuant to R.C. § 2744.02(B)(1), Appellee is liable for injuries sustained by Appellant as a result of Sergeant Carpenter's negligence. Appellee, however, has asserted a defense to such liability. Specifically, although he was responding outside of his jurisdiction, according to Sergeant Carpenter, he was responding pursuant to "mutual aid with the sheriff's office".<sup>37</sup> As such, Appellee sought immunity from liability pursuant to R.C. §2744.02(B)(1)(a).

Ohio Revised Code § 2744.02(B)(1)(a) provides a defense to civil liability for a police officer's political subdivision if, at the time of the accident, the police officer was on an emergency call **and** the officer was not operating his vehicle in a manner that would constitute willful or wanton misconduct.<sup>38</sup> Paramount to this grant of immunity is the requirement that the police officer be on an emergency call. The Political Subdivision Tort Liability Act defines "emergency call" as "a call to duty. . . ."<sup>39</sup> Although construed broadly, this Court has explained that in order to be on an emergency call, as defined in R.C. § 2744.01, an officer must be responding to a call to duty which "involves a situation to which a response by a peace officer is **required by the officer's professional obligation.**"<sup>40</sup> It is, therefore, axiomatic that if an officer's professional obligation does not require him to respond, that officer cannot be on an

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<sup>34</sup> Supp. p. 77, Ashton Report, p. 8

<sup>35</sup> Supp. p. 23, Carpenter Depo. pp. 86-87

<sup>36</sup> Supp. p. 14, Carpenter Depo. pp. 50-51; and also Supp. p. 34, Carpenter Depo. p. 130

<sup>37</sup> Supp. 18, Carpenter Depo. p. 66

<sup>38</sup> O.R.C. § 2744.02(B)(1)(a)

<sup>39</sup> O.R.C. § 2744.01(A)

<sup>40</sup> *Colbert, supra*, at syllabus (emphasis added)

emergency call, irrespective of the most altruistic intentions. Logically, then, if an officer is not on an emergency call, neither the officer nor his political subdivision is entitled to immunity under the Act.

Generally, in order to have any duty or authority to act as a police officer, the officer must be within his jurisdictional limits. In *Sawicki v. Ottawa Hills*<sup>41</sup>, this Court emphasized that pursuant to R.C. § 2935.03, “police officers had no arrest powers, as police officers, when acting outside the boundaries of their political subdivisions.”<sup>42</sup> However, this Court also acknowledged that a “Mutual Aid Pact” among contiguous political subdivisions may establish extra-jurisdictional authority and duty to act.<sup>43</sup>

A “Mutual Aid Pact” is, in essence, an agreement between contiguous municipalities. It 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.<sup>44</sup>

While *Sawicki* has been superseded on a separate matter, it remains good law as to the issue presented in the case at bar. In the absence of a mutual aid pact or similar agreement, there can be no requirement or professional obligation to respond, and therefore, any “officer who respond[s] [will do] so with only the authority and the insurance protection of an ordinary citizen.”<sup>45</sup>

Seizing upon the “mutual aid pact” language in *Sawicki*, the Tenth District Court of Appeals in its decision in this case, cited and relied upon R.C. § 737.04.<sup>46</sup> This code section governs mutual aid pacts involving municipal corporations and reads, in pertinent part:

The legislative authority of any **municipal corporation**, in order to obtain police protection or to obtain additional police protection, or to allow its police officers

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<sup>41</sup> (1988), 37 Ohio St.3d 222

<sup>42</sup> *Id.*, 226

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, FN.3

<sup>45</sup> *Id.*, 227

<sup>46</sup> Appx. pp. 13-14, *Smith v. McBride* Decision, ¶ 16

to work in multi-jurisdictional drug, gang, or career criminal task forces, may enter into contracts with one or more \* \* \* county sheriffs in this state, \* \* \* upon any terms that are agreed upon, for services of police departments or the use of police equipment or for the interchange of services of police departments or police equipment within the several territories of the contracting subdivisions.<sup>47</sup>

Ohio Revised Code § 737.04 is one of a handful of statutes that create the legal foundation for extra-jurisdictional authority and cooperation among counties, townships, municipalities and other political subdivisions.<sup>48</sup> This “mutual aid” law is addressed in the Ohio Revised Code, inclusive of R.C. §§ 311.29, 505.43, 505.431, 737.04, and 737.041. Collectively, these statutes provide a framework which allows counties, townships, and other similar political subdivisions to provide police protection to and receive police protection from other political subdivisions.

Title 3 of the Revised Code deals with counties and Title 5 deals with townships, whereas Title 7 deals with municipal corporations. In the present case, the call for assistance was issued by the FCSO and responded to by Sergeant Carpenter on behalf of the Clinton Township Police Department.<sup>49</sup> In fact, neither Franklin County nor Appellee Clinton Township is a municipal corporation. Franklin County is, obviously, a county and therefore governed by Title 3 of the Ohio Revised Code, while Appellee Clinton Township is a township and governed by Title 5 of the Revised Code. Arguably, then, despite the Tenth District’s reference to R.C. § 737.04 and, in fact some arguments made by the parties below, R.C. § 737.04 and 737.041 are not directly applicable to the facts of the case *sub judice*.

The Revised Code section that is most directly applicable to this situation is R.C. § 505.431. This statute allows *townships* to *provide* additional police support to, among others, a

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<sup>47</sup>O.R.C. § 737.04 (emphasis added)

<sup>48</sup>Curiously, the Tenth District wrote that this Court’s decision in *Sawicki* “was rendered \* \* \* prior to the enactment of R.C. 737.04” when, in fact, R.C. § 737.04 (or its equivalent) was codified as early as 1953, over 35 years prior to this Court’s decision in *Sawicki*. *Id.*

<sup>49</sup>The response by the township officer, to the call from the county, was directed to a location in Columbus.

county. The authority by which they may do so, as outlined in R.C. §505.431, is a *resolution of the township's board of trustees* and approval by a designated member of the township's police department.

The police department of any township \* \* \* may provide police protection to any county \* \* \* without a contract to provide police protection, **upon the approval, by resolution, of the board of township trustees** of the township in which the department is located **and upon authorization by an officer or employee of the police department providing the police protection who is designated by title of office or position**, pursuant to the resolution of the board of township trustees, to give such authorization.<sup>50</sup>

Thus, in the absence of a resolution by Appellee Clinton Township's Board of Trustees, the Clinton Township Police Department has no authority to provide assistance to the Franklin County Sheriff's Office outside of the Township's borders.

Moreover, this code section clearly establishes that in order for Appellee Clinton Township to be entitled to the immunity provided under R.C. § 2744, Sergeant Carpenter must have been rendering police services pursuant to this code section.

**Chapter 2744.** of the Revised Code, insofar as it applies to the operation of police departments, **shall apply** to any township police department or township police district and to its members **when such members are rendering police services pursuant to this section** outside the township or township police district by which they are employed.<sup>51</sup>

Other related revised code sections – R.C. § 505.43 (allowing townships to obtain police protection via a mutual aid agreement), R.C. § 737.04 (allowing municipalities to obtain police protection via a mutual aid agreement), and R.C. § 737.041 (allowing municipalities to provide police protection via legislative resolution) – all incorporate the same requirement that in order to receive immunity under R.C. § 2744 the officer must have been rendering services pursuant to the provisions and requirements of those respective code sections.

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<sup>50</sup> *O.R.C. § 505.431* (emphasis added)

<sup>51</sup> *Id.* (emphasis added)

While the language of the respective sections varies slightly from one to another, they are all consistent in establishing that a contract or a resolution must be in place to grant authority for extra-jurisdictional police authority and conduct. Thus, in the absence of a mutual aid pact or agreement, or a legislative resolution, an officer does not have extra-jurisdictional authority or duty to act, and therefore, cannot be considered on an emergency call with the protection of R.C. § 2744 immunity.<sup>52</sup> Furthermore, the language of these provisions collectively make it clear that the actual existence of a “mutual aid” agreement is dependent upon much more than the mere contention of an officer that he believed one was in place. Specifically, each section clearly references agreements made *in writing*.

In the present case, Sergeant Carpenter initially claimed, in his deposition, that he was responding to the Franklin County’s call for assistance pursuant to “mutual aid”<sup>53</sup> and that he, therefore, was on an emergency run and entitled to immunity under R.C. § 2744. When questioned as to where the mutual aid pact information might be found, Sergeant Carpenter testified that it was in the Rules, Regulations and Procedures Manual for Clinton Township.<sup>54</sup> Yet when asked to point out exactly where in the Manual it was, Sergeant Carpenter recanted his testimony and admitted that it was not in the Manual.<sup>55</sup> Instead, he testified that he “would have to believe it exists within the department heads. . . .”<sup>56</sup>

Evidence of the *written* document outlining the “mutual aid” agreement (resolution) was requested; no documentation was provided.<sup>57</sup>

As discussed above, R.C. § 505.431 and *Sawicki, supra*, establish that in order for a *township’s* police department to have authority to *provide* aid outside of its own borders there

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<sup>52</sup> This assumes no exception for “hot pursuit,” which will be discussed further below.

<sup>53</sup> Supp. p. 18, Carpenter Depo. p. 66

<sup>54</sup> Supp. p. 18, Carpenter Depo. p. 67

<sup>55</sup> Supp. p. 18, Carpenter Depo. pp. 68-69

<sup>56</sup> Supp. p. 18, Carpenter Depo. p. 69

<sup>57</sup> Supp. p. 32, Carpenter Depo. p. 122

must first be a resolution authorizing the extra-jurisdictional provision of police protection. Without such a resolution, Sergeant Carpenter had no authority and thus no professional obligation to respond to a call from the FCSO and, consequently, he was not on an “emergency call” for purposes of R.C. § 2744. Because the “emergency run” aspect of the statute creates a *defense* to liability, it is incumbent upon Appellee to establish this defense through credible evidence.<sup>58</sup>

Proof of extra-jurisdictional police authority requires more than Sergeant Carpenter’s unsubstantiated and self-serving testimony that some sort of general “mutual aid” agreement existed.<sup>59</sup> In truth, there is no reliable, credible evidence that Appellee Clinton Township ever passed a resolution pursuant to R.C. § 505.431. This alone established a disputed issue of material fact that required that this matter be presented to a jury<sup>60</sup>. The lack of such evidence, however, also suggests that Sergeant Carpenter had no duty to respond to the call from the FCSO and, consequently, that he was not on an emergency run.<sup>61</sup> As such, neither he nor Appellee Clinton Township is entitled to immunity under R.C. § 2744 and the ruling of the Tenth District Court of Appeals must be reversed.

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

Furthermore, while the Political Subdivision Tort Liability Act defines “emergency call” as “a call to duty”,<sup>62</sup> this Court has long recognized that not every call to duty is an emergency call.<sup>63</sup> An emergency call does not go so far as to include any situation in which a peace officer

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<sup>58</sup> The burden of proof lies with Appellee to establish this affirmative defense to the exception to immunity in R.C. § 2722.02(B)(1) *et. seq.* See Ohio Civ.R. 8(C); see also *Hawk v. Ketterer* (3rd Dist., 2003), 2003 Ohio App. LEXIS 5735, \*5, 2003-Ohio-6389; see also *Sparks v. Edingfield* (2nd Dist., 1995), 2nd Dist. No. 94-CA-78, \*1, 1995 Ohio App. LEXIS 1367

<sup>59</sup> This will be discussed further in Proposition of Law II, below.

<sup>60</sup> *Killilea v. Sears, Roebuck & Co.* (10<sup>th</sup> Dist., 1985), 27 Ohio App. 3d 163, 167

<sup>61</sup> *Sawicki, supra*, 226-227

<sup>62</sup> O.R.C. § 2744.01(A)

<sup>63</sup> *Lingo v. Hoekstra* (1964), 176 Ohio St. 417

responds to stimuli while on or off duty.<sup>64</sup> Instead, the inquiry turns again on whether or not the officer had a **professional obligation** to respond.<sup>65</sup>

When asked, in his deposition, why he made the decision to respond to the FCSO's call for assistance, Sergeant Carpenter stated, "I would truly hope if I'm out on foot and I'm chasing somebody and asking for help from other agencies that those agencies would respond to help me."<sup>66</sup> While certainly laudable, Sergeant Carpenter's intentions are, in the end, irrelevant to the analysis that is required with respect to professional immunity.

The facts that gave rise to *Sawicki, supra*, involved nothing as benign as a foot chase of a non-violent traffic offender who presented no weapons or threat of imminent harm to an officer, such as the circumstances to which Sergeant Carpenter was responding in this case. Rather, *Sawicki* involved a gun, an attempted rape, physical confrontation, and ultimately murder.<sup>67</sup> Despite those facts, this Court determined that police officers whose jurisdictional limits were a mere 300 yards from the scene of the crime had no obligation and, in fact, no authority to respond.<sup>68</sup> Thus, in the absence of an agreement granting such authority, one may respond and offer help as a citizen, but one may not offer help with the protection (immunity) of a police officer.<sup>69</sup>

Moreover, in *Brown v. City of Cuyahoga Falls*,<sup>70</sup> the Ninth District was recently faced with a strikingly similar situation as is presented in the case at bar. In *Brown*, the Cuyahoga

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<sup>64</sup> *Carter v. Columbus* (10th Dist., 1996), 10th Dist. No. 96APE-01-103, 1996 Ohio App. LEXIS 3444

<sup>65</sup> *Colbert, supra*, syllabus (emphasis added)

<sup>66</sup> Supp. p. 18, Carpenter Depo. p. 66

<sup>67</sup> *Sawicki, supra*, 222-224

<sup>68</sup> *Id.*, 222

<sup>69</sup> *Id.*, 227; see also *Burnell v. Dulle* (12<sup>th</sup> Dist., 2006), 2006 Ohio App. LEXIS 7033, esp \*15-\*16, 2006-Ohio-7044 for a discussion of one's volunteer or civic duty vis-à-vis one's professional duty as a police officer.

<sup>70</sup> (9<sup>th</sup> Dist., 2010), 2010 Ohio App. LEXIS 3659, 2010-Ohio-4330

Falls Police Department received a call concerning a fight at an apartment complex.<sup>71</sup> Two cars were dispatched to the scene and appellant Officer Brandon Good was not in either of those cars.<sup>72</sup> Nonetheless, Officer Good elected to respond to the scene.<sup>73</sup> While en route to the scene, Officer Good struck appellee, Timothy Brown, a pedestrian who was not in a cross-walk.<sup>74</sup> Appellee Brown sued Officer Good and appellant City of Cuyahoga Falls, both of whom sought immunity pursuant to R.C. § 2744.02(B)(1)(a).<sup>75</sup> The trial court determined that there was an issue of fact as to whether Officer Good was responding to an emergency call and denied Officer Good's and the City's Motion for Summary Judgment.<sup>76</sup>

In upholding the trial court's ruling, the Ninth District set forth several facts in support of its decision. First, the Court noted that Officer Good did not actually observe any potentially illegal conduct but, instead, heard a radio dispatch.<sup>77</sup> Moreover, Officer Good was not specifically dispatched to the scene.<sup>78</sup> Rather, he unilaterally decided to respond.<sup>79</sup> While proceeding to the scene, he did not activate the lights or sirens on his cruiser but was traveling at a speed of around 60 m.p.h.<sup>80</sup> Based on all of this, and construing the evidence in a light most favorable to appellee Brown, the Ninth District concluded:

... reasonable minds could differ with respect to whether Officer Good was required by his professional obligation to respond to the call. Viewing the facts in a light favorable to Brown, reasonable minds could conclude, even without the advantage of hindsight, that Officer Good's participation in the call was not required, or even necessary, given the number of cruisers that responded via radio to the dispatch and the fact that two cars were specifically dispatched ahead of Officers Good and Quior to the scene. Moreover, Officer Good did not even

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<sup>71</sup> *Brown, supra.*, ¶2

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, ¶3

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*, ¶15

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

choose to inform dispatch that he was responding to the call, further calling into question whether he was required by a professional obligation to respond.<sup>81</sup>

Interestingly, in *Brown*, there was no question that Officer Good was within his department's jurisdictional borders. Yet the Ninth District still found a question of fact as to whether he was on an emergency call.

The facts of *Brown* are analogous to the facts of the case at bar. As in *Brown*, Sergeant Carpenter did not observe any potentially illegal conduct. He also was not personally requested or instructed to respond. Rather, he heard a general radio call and, while not being specifically dispatched to the scene, and realizing that other officers were responding, he unilaterally chose to respond.<sup>82</sup> He traveled to the scene at nearly 65 m.p.h. without his lights and sirens activated.<sup>83</sup>

<sup>84</sup> Given the nature of the circumstances (no "officer in trouble call" and no inherently dangerous situation involving weapons or threat of imminent harm) and the fact that other officers were responding, the situation did not require Sergeant Carpenter's immediate response. Sergeant Carpenter even testified he was not on an emergency run just like Officer Good did in *Brown*.<sup>85 86</sup>

Sergeant Carpenter's testimony that he was not on an emergency run is also supported by law. Ohio Revised Code § 4513.21 states that an emergency vehicle on an emergency run "**shall sound [its siren]** when it is necessary to warn pedestrians and other drivers of the approach thereof."<sup>87</sup> In the present case, prior to colliding with the vehicle in which Appellant was a

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<sup>81</sup> *Brown, supra.*, ¶16

<sup>82</sup> Supp. p. 17, Carpenter Depo. pp. 63-64

<sup>83</sup> Supp. p. 23, Carpenter Depo. pp. 86-87

<sup>84</sup> Supp. p. 16, Carpenter Depo. p. 59

<sup>85</sup> Supp. p. 23, Carpenter Depo. p. 88; and also Supp. p. 25, Carpenter Depo. pp. 94-95

<sup>86</sup> Interestingly, when asked why he was speeding Sergeant Carpenter responded "There was an officer in trouble call. . . ." (Supp. p. 17, Carpenter Depo. p. 63.) Yet under the Policies and Procedures Manual an officer in trouble call is one of the calls allowing for the use of lights and sirens. Again, Sergeant Carpenter utilized neither his lights nor his sirens. (*Id.*; also Supp. pp. 61-62.)

<sup>87</sup> *O.R.C. § 4513.21(A)* (emphasis added)

passenger, Sergeant Carpenter observed another car at the intersection of Morse Road and Chesford Road.<sup>88</sup> He saw this vehicle's headlights and watched it turn in front of him from westbound Morse Road to southbound Chesford Road.<sup>89</sup> Thus, Sergeant Carpenter knew or should have known that it was necessary to warn other drivers that he was approaching the intersection, and had he been on an emergency run, R.C. § 4513.21 mandated that he sound his siren. He did not, because, as he testified, he was not on an emergency run.<sup>90</sup> Frankly, Sergeant Carpenter was operating his vehicle – at night – with no readily outwardly observable distinctions from a citizen-operated vehicle and thus should be granted no more immunity than an ordinary citizen.

In light of the stark similarities between the facts of *Brown, supra*, and those in the present case, it is clear that reasonable minds could conclude that Sergeant Carpenter was not on an emergency call. That he did not use his siren as would have been required under R.C. § 4513.21 certainly emphasizes this point, as does his own testimony that he was not on an emergency run. In order for immunity under R.C. § 2744.02(B)(1)(a) to apply, the officer involved must be on an emergency call. In this case, because Sergeant Carpenter was not on an emergency call, neither he nor Appellee Clinton Township is entitled to immunity under R.C. § 2744. As such, the Tenth District's decision must be reversed.

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

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.”<sup>91</sup> In drafting R.C. § 2744, the Legislature recognized

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<sup>88</sup> Supp. pp. 10-11, Carpenter Depo. pp. 37-38; and also Supp. p. 11, Carpenter Depo. pp. 38-39

<sup>89</sup> Supp. pp. 10-11, Carpenter Depo. pp. 37-38; and also Supp. p. 11, Carpenter Depo. pp. 38-39

<sup>90</sup> Supp. p. 25, Carpenter Depo. pp. 94-95

<sup>91</sup> *Hunter v. Columbus* (10<sup>th</sup> Dist., 2000), 139 Ohio App.3d 962, 970

that police runs “inevitably entail some degree of risk both to the responding officer and affected traffic”.<sup>92</sup> Inherent danger necessarily emanates from such circumstances. Naturally, then, the more explicit and comprehensive emergency response rules are, and the more defined an area of response is, the safer it is for all those involved.

Because a police officer’s ability to act outside of his own jurisdiction goes against the traditional rule, there must be a clearly defined rule regarding the extra-jurisdictional authority of law enforcement stating that a police officer has no authority, and thus no professional obligation, to respond to a call outside of his jurisdiction without a written, identifiable, and clearly outlined mutual aid agreement or other, similar legislative resolution. Such a concrete rule of law 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 agreements among contiguous political subdivisions; 2) alleviate any confusion or second-guessing with respect to responding to extra-jurisdictional calls; 3) ensure police accountability and eliminate potential for abuse and after-the-fact justification of runs; and, ultimately 4) increase the safety of officers and the motoring public as a result of emergency responders following definitive guidelines.

Appellant recognizes the importance of efficient and effective law enforcement and that there may be specific occasions and circumstances which justify police authority and activity outside of one’s normal jurisdictional confines. Consequently, Appellant is not asking this Court to craft a rule of law that would have a chilling effect upon law enforcement activities. To the contrary, Appellant asks this Court to clearly define the circumstances under which a law enforcement officer may act, with all of the authority and protections normally conferred upon

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<sup>92</sup> *Byrd v. Kirby*, 2005 Ohio App. LEXIS 1234, ¶ 28, 2005-Ohio-1261

him, outside of his own jurisdiction, not only to protect the public but also to protect law enforcement.

In doing so, however, this Court must consider the fact that the Ohio Legislature has also contemplated that there may be specific occasions and situations which justify police authority and activity outside of one's normal jurisdictional confines. Significantly, the Legislature has already specifically addressed the occasions and circumstances which merit such engagement. Ohio Revised Code § 2935.03, which requires a police officer to be within his jurisdictional limits in order to have any arrest power, also recognizes an exception for "hot pursuit."<sup>93</sup> This exception allows a police officer to pursue, arrest, and detain a suspect outside of the officer's jurisdiction for certain crimes<sup>94</sup> if the pursuit takes place without unreasonable delay and the pursuit is initiated within the officer's jurisdiction.<sup>95</sup> In the present case, however, there was no hot pursuit.

More germane to the present case, the Ohio Legislature has also recognized the need for "mutual aid" agreements. While not always utilizing the exact term, such cooperative agreements are discussed in multiple code sections, chief among them the ones cited heretofore: R.C. §§ 311.29, 505.43, 505.431, 737.04 and 737.041. When read in tandem, these statutes allow counties, cities and other similar political subdivisions to provide police protection to and receive police protection from other political subdivisions.

It is these two statutorily recognized sets of occasions and circumstances – "hot pursuit" and action taken pursuant to the statutory agreements – that demonstrate that the Legislature has already contemplated a situation such as the one present in this case where Sergeant Carpenter

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<sup>93</sup> *O.R.C. § 2935.03(A)*

<sup>94</sup> Per *O.R.C. § 2935.03(D)(3)*, the offense involved must be a felony, a misdemeanor of the first or second degree, or a traffic offense for which points are chargeable pursuant to *O.R.C.*

*§4510.036.*

<sup>95</sup> *O.R.C. § 2935.03(D)*; see also *State v. Wurth* (3<sup>rd</sup> Dist., 2006), 2006 Ohio App. LEXIS 549, ¶8, 2006-Ohio-608

was acting outside of his jurisdiction. Consequently, these statutes and their purposes cannot be ignored. In reviewing statutes, the legislative intent must be of paramount concern.<sup>96</sup> In determining such intent, statutes “may not be restricted, constricted, qualified, narrowed, enlarged or abridged”<sup>97</sup> and “no clause, sentence, or word shall be superfluous, void, or insignificant.”<sup>98</sup> Thus, to suggest that a police officer has an obligation and the authority to respond outside of his jurisdiction under circumstances other than those specifically prescribed by the Legislature improperly eviscerates the purpose for enacting the hot pursuit exception and the statutory “mutual aid” provisions.

The Tenth District’s decision in this case has expanded the grant of immunity far beyond what the Legislature intended. The danger of this decision, which wrongly relies upon an ill-defined, if not altogether non-existent, mutual aid agreement, is that it muddies the waters regarding inter-jurisdictional police procedures, thereby compromising efficient and safe police response situations. The Appellate Court’s decision also allows for abuse and lack of accountability in that police officers could justify otherwise inappropriate or invalid “emergency” responses by doing exactly what Sergeant Carpenter did in this case – 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.

If permitted to stand, the decision of the Tenth District 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

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<sup>96</sup> *Boley v. Goodyear Tire & Rubber Co.* (2010), 125 Ohio St.3d 510, ¶ 20, 2010-Ohio-2550

<sup>97</sup> *Id.*, ¶ 21 (quoting *Weaver v. Edwin Shaw Hosp.* (2004), 104 Ohio St.3d 390, 2004-Ohio-6549)

<sup>98</sup> *Balt. Ravens v. Self-Insuring Emplrs. Evaluation Bd.* (2002), 94 Ohio St.3d 449, 466, 2002-Ohio-1362 (quoting *TRW Inc. v. Andrews* (2001), 534 U.S. 19, 31)

clear guidance, however, as to how and under what circumstances a police officer can respond as a police officer, as opposed to as an ordinary citizen.

Long-standing Ohio law requires that, absent hot pursuit, mutual aid agreements or equivalent legislative resolutions be in effect in order for police officers to have authority outside of the jurisdictional boundaries of their political subdivision. To allow law enforcement to act without such sufficient proof of written agreements or resolutions would render statutes such as R.C. §§ 311.29, 505.43, 505.431, 737.04 and 737.041 superfluous and completely contravene the legislative intent behind the statutes. By confirming a rule of law that police officers may act extra-jurisdictionally only when written mutual aid agreements or equivalent legislative resolutions are in place, this Court will not only “protect [emergency] personnel, other motorists, and the person to whom emergency aid is to be rendered”<sup>99</sup> but will also assist courts in cases similar to this one where the existence of a mutual aid agreement or legislative resolution is a key material issue.

**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.**

As noted above, the establishment of a bright-line rule regarding the extra-jurisdictional authority of law enforcement will act to protect both political subdivisions and the general public and, therefore, such a rule is supported by public policy. This purpose would be furthered by requiring valid mutual aid agreements or similar legislative resolutions to be in writing, clearly outlining the terms agreed upon and unambiguously defining the proper interchange of police services. Moreover, this is also required by law.

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<sup>99</sup> *Hunter, supra*, 139 Ohio App.3d at 970

As has been discussed, the code section regarding mutual aid that applies directly to this case is R.C. § 505.431. This law clearly states that if a township wishes to provide police protection to another jurisdiction it may do so, but only “**upon the approval, by resolution, of the board of township trustees. . . .**”<sup>100</sup> Without such a resolution, a township police officer has no authority outside of his jurisdiction and is not entitled to immunity under R.C. § 2744 if he acts outside of his jurisdiction.

The other statutes discussed also establish that some writing is necessary to affirm the mutual aid agreements between jurisdictions. Ohio Revised Code § 311.29 authorizes a county sheriff to *enter into contracts* with other political subdivisions wherein the county sheriff agrees to “perform any police function, exercise any police power, or render any police service [on] behalf of the contracting subdivision. . . .”<sup>101</sup> This statute works in tandem with R.C. §§ 737.04 and 505.43, which allow municipal corporations and townships to obtain police protection or additional police protection *by contract*. R.C. § 311.29 specifically states “Upon the **execution of an agreement** under this division and within the limitations prescribed by it, the sheriff may exercise the same powers as the contracting subdivision. . . .”<sup>102</sup> Thus, R.C. § 311.29, and, consequently, R.C. §§ 737.04 and 505.43, contemplate the execution of a *written* contract.

As supplements to R.C. §§ 737.04 and 505.43, the Ohio Legislature passed R.C. §§ 737.041 and 505.431. As noted above, R.C. § 505.431 authorizes a township to provide extra-jurisdictional police protection, but only upon approval, *by resolution*, of the township trustees.<sup>103</sup> Similarly, R.C. § 737.041 authorizes a municipal corporation to provide extra-

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<sup>100</sup> *O.R.C. § 505.431* (emphasis added)

<sup>101</sup> *O.R.C. § 311.29*

<sup>102</sup> *Id.* (emphasis added)

<sup>103</sup> *O.R.C. § 505.431*

jurisdictional protection, but R.C. § 737.041 requires a resolution by the municipal corporation's legislative body in order to do so.<sup>104</sup>

When reading these statutes together, it is clear that Ohio law requires the approval of extra-jurisdictional law enforcement authority to be in writing, whether by written contract as provided for in R.C. §§ 311.29, 505.43 and 737.04 or by legislative resolution as provided for in R.C. §§ 505.431 and 737.041. This, of course, makes sense, as any grant of extra-jurisdictional authority to law enforcement would be contrary to the traditional rule that police officers have no power as police officers outside of the boundaries of their political subdivisions.<sup>105</sup> The interrelationship of these statutes with the application of R.C. §2744 also reflects the fact that *written* agreements are required:

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.**<sup>106</sup>

Ohio case law that addresses matters involving police engagement outside one's own jurisdiction also reflects references to *written* agreements dealing with such engagement, which are part of the record in those cases. In *Estate of Owensby v. City of Cincinnati*,<sup>107</sup> the Sixth Circuit noted that "the City of Cincinnati and the Village of Golf Manor [were] **signatories to a 'Hamilton County Local Government Mutual Aid Agreement for Law Enforcement.'**"<sup>108</sup> Similarly, in *State v. Junk*,<sup>109</sup> there was a written mutual aid agreement as the court noted, "In this case appellant does not cite **any language in the agreement** between the police and sheriff's

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<sup>104</sup> O.R.C. § 737.041

<sup>105</sup> *Sawicki, supra*, at 226; see also O.R.C. § 2935.05; see also *City of Lyndhurst v. Sadowski* (8<sup>th</sup> Dist., 1999), 8th Dist. No. 74313, 1999 Ohio App. LEXIS 4079, \*6 ("R.C. 2935.03(A) states the general rule that limits a police officer's authority to the arrest and detention of persons committing a crime within the officer's jurisdiction.")

<sup>106</sup> O.R.C. §§505.43 and 737.04 (emphasis added)

<sup>107</sup> (6<sup>th</sup> Cir., 2005), 414 F.3d 596

<sup>108</sup> *Id.*, 600 (emphasis added)

<sup>109</sup> (6<sup>th</sup> Dist., 2008), 2008 Ohio App. LEXIS 1335, 2008-Ohio-1564

departments to indicate that the officers acted outside of the parameters of the agreement.”<sup>110</sup> Likewise, in *State v. Biehl*,<sup>111</sup> the Ninth District, referencing R.C. § 3345.041, another “mutual aid” section in the Ohio Revised Code, held “. . . the University of Akron’s security officers may exercise police powers on properties beyond the University confines, so long as they are within the **specified geographic boundaries of the Agreement.**”<sup>112</sup> In *Robertson v. Roberts*,<sup>113</sup> it was noted that one of the officers involved “**was shown the Trumbull County Mutual Aid Pact when all of the departments heads got together and drafted it. . . .**”<sup>114</sup>

In the case at bar, the Tenth District found that Sergeant Travis Carpenter’s testimony that he was responding pursuant to “mutual aid” was enough to establish that a mutual aid agreement existed between Appellee Clinton Township and the Franklin County Sheriff’s Office.<sup>115</sup> Yet when Sergeant Carpenter was asked to identify where, in writing, the mutual aid agreement could be found, he was unable to do so.<sup>116</sup> Moreover, when Appellant requested the mutual aid agreement from Appellee, none was ever provided. Ohio case law holds that:

If an issue is raised on summary judgment, which manifestly turns on the credibility of the witness because his testimony must be believed in order to resolve the issue, and the surrounding circumstances place the credibility of the witness in question -- for example, where the potential for bias and interest is evident -- then, the matter should be resolved at trial, where the trier of facts has an opportunity to observe the demeanor of the witness.<sup>117</sup>

In the present case, the only testimony suggesting that any sort of mutual aid agreement existed between Appellee Clinton Township and the FCSO is Sergeant Carpenter’s self-serving, unsubstantiated and, ultimately, unreliable testimony. In the absence of the production of such

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<sup>110</sup> *State v. Junk, supra.*, ¶ 18 (emphasis added)

<sup>111</sup> (9<sup>th</sup> Dist., 2005), 2005 Ohio App. LEXIS 5983, 2005-Ohio-6655

<sup>112</sup> *Id.*, ¶ 2 (emphasis added)

<sup>113</sup> (11<sup>th</sup> Dist., 2004), 2004 Ohio App. LEXIS 6729, 2004-Ohio-7231

<sup>114</sup> *Id.*, fn 2 (emphasis added)

<sup>115</sup> Appx. pp. 14-15, *Smith v. McBride* Decision, ¶ 17

<sup>116</sup> Supp. p. 18, Carpenter Depo. pp. 67-69

<sup>117</sup> *Killilea, supra*, 27 Ohio App. 3d at 167

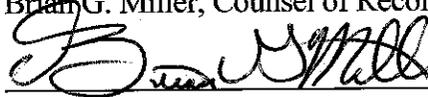
written resolution in response to Appellant's request for the same, there remains a disputed issue of material fact with respect to an issue critical to the analysis of this matter. To allow township police officers, in this case or any other, to allude generally to "mutual aid" to justify actions taken outside of their jurisdictions, without actually having and producing the authority as required by statute to take such actions, would create a system with no real checks on potential abuse of authority. It would also be contrary to the letter and the spirit of the law established by the Legislature. Therefore, in the absence of sufficient proof of a written resolution as required by R.C. § 505.431, it is clear that the Appellate Court erred and its ruling must be reversed.

### CONCLUSION

For these reasons, the Appellate Court's decision is in error and its ruling must be reversed. Appellant respectfully requests this Court to confirm that Ohio law requires that the existence of a "mutual aid" agreement 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.

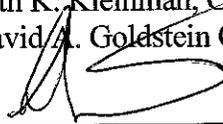
Appellant further respectfully requests that this Court find that in this case there is insufficient evidence to establish for purposes of summary judgment that a written legislative resolution existed. In the absence of such legislative resolution, Sergeant Carpenter had no authority and thus no professional obligation to respond to a call outside of his jurisdiction and thus cannot be deemed to have been on an "emergency run" for purposes of R.C. § 2744 immunity when responding to such call. Thus, Appellant respectfully requests that this Court reverse the decision of the Tenth District Court of Appeals and remand this matter to the trial court for a jury's determination of material issues of fact pertaining to Appellee's liability for damages.

Respectfully submitted,  
Brian G. Miller, Counsel of Record



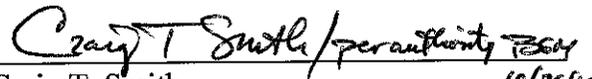
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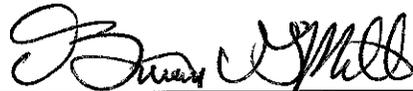
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**CERTIFICATE OF SERVICE**

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 Appellees, 1 Prestige Place, Suite 700, Miamisburg, Ohio 45342, by ordinary U.S. mail, postage prepaid, this 26<sup>th</sup> day of October, 2010.



Brian G. Miller  
Counsel for Appellant Lea D. Smith

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

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IN THE SUPREME COURT OF OHIO

Lea D. Smith, : **10-0809**  
: :  
Appellant, : On Appeal from the Franklin  
: : County Court of Appeals,  
: : Tenth Appellate District  
v. : :  
: : Court of Appeals  
Vashawn L. McBride, et al., : : Case No: 09APE-06-0571  
: :  
Appellees. : :

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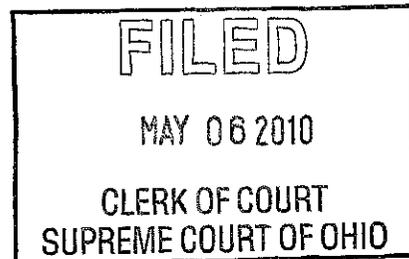
NOTICE OF APPEAL OF APPELLANT LEA D. SMITH

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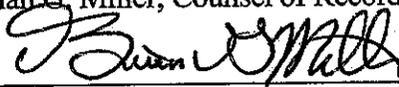
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TRAVIS D. CARPENTER

Notice of Appeal of Appellant Lea D. Smith

Pursuant to S. Ct. Prac. R. 2.2(A)(1), Appellant Lea D. Smith gives notice of her appeal to the Supreme Court of Ohio from the decision and judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Case No. 09APE-06-0571, on March 25, 2010.

This case is one of public or great general interest. S. Ct. Prac. R. 2.2(B)(1)(d)(v).

Respectfully submitted,  
Brian G. Miller, Counsel of Record



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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 6<sup>th</sup> day of May, 2010.



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Brian G. Miller  
Counsel for Appellant Lea D. Smith

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

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FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO

2010 MAY 11 PM 12:54

TENTH APPELLATE DISTRICT

CLERK OF COURTS

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)

## MEMORANDUM DECISION

Rendered on May 11, 2010

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*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.*

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## ON APPLICATION FOR RECONSIDERATION

McGRATH, J.

{¶1} On April 7, 2010, plaintiff-appellant, Lea D. Smith ("appellant"), filed an application for reconsideration pursuant to App.R. 26, requesting that this court reconsider its decision rendered on March 25, 2010, that affirmed the trial court's judgment granting summary judgment in favor of the defendants-appellees Clinton Township and Clinton Township Police Sergeant Travis Carpenter ("appellees"). *Smith v. McBride*, 10th Dist. No. 09AP-571, 2010-Ohio-1222.

{¶2} The test generally applied in reviewing a motion for reconsideration is whether the motion "calls to the attention of the court an obvious error in its decision or

raises an issue for our consideration that was either not considered at all or was not fully considered by the court when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, paragraph two of the syllabus; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 69. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1997), 112 Ohio App.3d 334, 336, dismissed, appeal not allowed, 77 Ohio St.3d 1487.

{¶3} In our March 25, 2010 decision, this court determined that the trial court did not err in finding that political subdivision immunity applied where the officer was responding to an emergency call and did not display willful, wanton, or reckless conduct in the operation of his cruiser at the time of the collision. In her application for reconsideration, appellant contends there are genuine issues of material fact with respect to the existence of a Mutual Aid Agreement between Clinton Township and the Franklin County Sheriff's Office, and that this court failed to give due consideration to all of the evidence in our analysis of whether the officer's conduct was wanton or reckless.

{¶4} First we note that our finding that Sergeant Carpenter was on an emergency call was not based solely on the existence of a Mutual Aid Agreement. Secondly, we note that Sergeant Carpenter testified as to the existence of a Mutual Aid Agreement. Appellant, however, presented no evidence to the contrary, not even an affidavit from one connected with either law enforcement agency stating that such agreement failed to exist. Instead, appellant relied solely on the unsupported statement in her brief, which is not sufficient to require the denial of summary judgment. *Wyche v. Kessler* (May 9, 1989), 10th Dist. No. 89AP-51.

{¶5} With respect to our analysis of whether Sergeant Carpenter's actions constituted wanton or reckless conduct, we do not find appellant calls to our attention an obvious error, nor does she raise an issue not considered at all, or not fully considered by this court. *Matthews*, supra. Instead, appellant is attempting to re-argue the merits of her appeal. Contrary to appellant's assertions, this court fully considered the arguments advanced in appellant's merit brief, including all the evidence pertaining to the speeds of the vehicle, which are now re-asserted in her application for reconsideration. Disagreement with this court's conclusions and analysis is insufficient to meet the test for granting reconsideration. See *Nunley v. Wayne Builders Corp.* (Aug. 12, 1999), 10th Dist. No. 98AP-1202.

{¶6} For the foregoing reasons, appellant's application for reconsideration is hereby denied.

*Application for reconsideration denied.*

KLATT, J., concurs.

TYACK, P.J., dissents.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

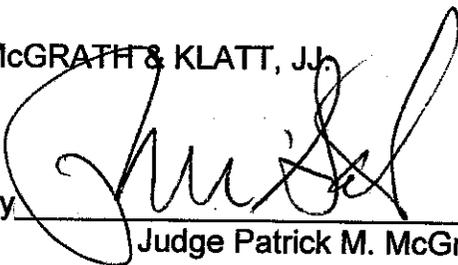
Lea D. Smith,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 09AP-571
	:	(C.P.C. No. 08CVC-03-3907)
Vashawn L. McBride et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on May 11, 2010, it is the order of this court that appellant's application for reconsideration is denied. Costs are assessed against appellant.

McGRATH & KLATT, J.J.

By



\_\_\_\_\_  
Judge Patrick M. McGrath

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), 106 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-Westinghouse 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. Thailing*, 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 un rebutted 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.<sup>1</sup> 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 conduct<sup>1</sup> 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

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<sup>1</sup> 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

*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.

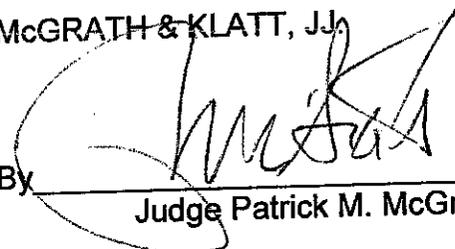
No. 09AP-571  
(C.P.C. No. 08CVC-03-3907)  
(REGULAR CALENDAR)

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, JJ.

By

  
\_\_\_\_\_  
Judge Patrick M. McGrath

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

FILED

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CLERK OF COURTS

LEA D. SMITH,

PLAINTIFF,

v.

CASE NO. 08CVC 03-3907

: JUDGE HOLBROOK

VASHAWN L. MCBRIDE,

DEFENDANT,

**DECISION AND ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This case arises from a March 14, 2006 collision between a Clinton Township Police cruiser and a vehicle driven by Defendant McBride, in which the Plaintiff was a passenger. Plaintiff seeks damages from the officer operating the patrol car, Sgt. Carpenter, and the Clinton Township Police Department for injuries sustained as a result of the collision.

Defendants Sgt. Carpenter and the Clinton Township Police Department move the Court for judgment as a matter of law. The Defendants argue that the Clinton Township Police Department is improperly named as a party to this action as the Police Department is not sui generis, and therefore, must be dismissed. In the alternative, the Defendants argue that both Clinton Township and Sgt. Carpenter are entitled to immunity pursuant to R.C. Ch. 2744.

**SUMMARY JUDGMENT STANDARD**

A motion for summary judgment may be granted where there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which conclusion is adverse to the non-moving party. Civ. R. 56(C). Summary judgment is a procedural device designed

to terminate litigation where a resolution of factual disputes is unnecessary. However, summary judgment must be granted with caution, resolving all doubts and construing all evidence against the moving party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46.

A conclusory assertion that the non-movant does not have sufficient evidence to prove its case will not discharge the movant's initial burden under Civ. R. 56(C). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 274. Instead, the movant "must be able to specifically point to some *evidence* of the type listed in Civ. R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claim." *Id.* The motion for summary judgment must be denied if the movant fails to satisfy its initial burden. However, if the initial burden is met, the non-movant must satisfy its burden, as set forth in Civ. R. 56(E). The non-movant must produce, by affidavit "made on personal knowledge" setting forth "such facts as would be admissible in evidence" or as otherwise provided in Civ. R. 56, specific facts demonstrating a genuine issue for trial. If the non-movant fails to respond in such a manner, a granting of summary judgment for the movant may be appropriate. *Id.*

#### CLINTON TOWNSHIP POLICE DEPARTMENT IS NOT SUI GENERIS

The Plaintiff's Complaint asserts claims against Clinton Township Police Department, and does not assert claims against Clinton Township. The Police Department is not sui generis, and is not capable of being sued. *Richardson v. Grady* (Dec. 18, 2000), 8th Dist. Nos. 77381, 77403.

Rather than formally moving to amended the pleadings, in her response to the motion for summary judgment the Plaintiff moves the Court to, sua sponte "make the appropriate change in party identification such that the real party in interest is properly designated as the defendant in this action." It is not for the Court to "sua sponte" correct deficiencies in the Plaintiff's pleadings.

While the Court agrees with the moving Defendants' that the Clinton Township Police Department was improperly named as a party, had the Plaintiff taken the correct steps to name Clinton Township as a party to this action, Clinton Township would be entitled to immunity, as set forth in greater detail below.

#### POLITICAL SUB-DIVISION IMMUNITY

R.C. 2744.02(A)(1), states in pertinent part:

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except 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 statute contains five limited exceptions to the grant of general immunity set forth in R.C. 2744.02(A)(1). The relevant exception is set forth below in R.C. 2744.02(B)(1)(a), which provides:

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except 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. The following are full defenses to that liability:

- (a) 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.

While a political subdivision is generally entitled to immunity under R.C. 2744.02(A), the court must determine whether an exception to immunity exists under R.C. 2744.02(B), and further must determine whether a defense to the exception exists within the statute. *Colbert v. City of Cleveland*, 99 Ohio St. 3d 215, 2003-Ohio-3319, 790 N.E.2d 781. In the case at bar, the moving Defendants argue that Sgt. Carpenter was responding to an emergency call at the time of the accident, and that there is no evidence that Sgt. Carpenter's actions constitute willful or wanton misconduct.

R.C. 2744.01(A) defines an emergency call as "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." An emergency call "involves a situation to which a response by a peace officer is required by the officer's professional obligation." *Colbert*, supra at syllabus. The absence of emergency lights and sirens does not preclude a finding an officer was responding to an emergency call. See *Id.*; *Moore v. Columbus* (1994), 98 Ohio App.3d 701, 649 N.E.2d 850. Further, the failure of an officer who is requesting help to indicate that he or others were in immediate danger of harm also does not preclude a finding of an emergency call. *VanDyke v. City of Columbus*, Tenth App. No. 07AP-0918, 2008-Ohio-2652, at ¶10.

Neither a police officer responding to an emergency call, nor the political subdivision are not entitled to immunity if the officer's actions constitute willful or wanton misconduct. "Willful or wanton misconduct" is characterized as behavior which demonstrates a deliberate or reckless disregard for the safety of others. *Moore*, at 708, 649 N.E.2d 850. As explained by the Tenth District Court of Appeals in *VanDyke*, "[t]his court has in this context defined willful misconduct to mean conduct involving 'the intent, purpose, or design to injure.' As such, wanton misconduct is a degree of reprehensible or miscalculated action that rises well above negligence." *VanDyke*, at ¶11 (internal citations omitted).

While the Plaintiff argues that the issue of whether Sgt. Carpenter was responding to an emergency call is a question of fact for the jury to decide, the Tenth District Court of Appeals has repeatedly recognized that the issue may be resolved upon summary judgment. See e.g. *Moore v. Columbus* (1994), 98 Ohio App.3d 701, 649 N.E.2d 850; *VanDyke v. City of Columbus*, Tenth App. No. 07AP-0918, 2008-Ohio-2652.

The facts of the case at bar are strikingly similar to the facts in *VanDyke*. The main difference between the two cases is that in the case at bar, the responding officer was from a neighboring police department.

As in *VanDyke*, it is undisputed that Sgt. Carpenter was exceeding the posted speed limit, and that while the headlights were on, Sgt. Carpenter had not engaged either the police siren, or the police lights. The collision occurred during the night at the intersection of a multi-laned street, and there is no allegation that inclement weather contributed to the accident. Sgt. Carpenter testified that he saw the car in front of

Defendant McBride's vehicle at the intersection, and took the proper precaution to allow the car to safely turn. Sgt. Carpenter further testified that he did not see Defendant McBride's vehicle until it turned into his lane of traffic immediately after the vehicle in front of it. It is beyond dispute that Sgt. Carpenter had the right of way, and that Defendant McBride had an obligation to yield prior to turning left at the intersection.<sup>1</sup>

The Plaintiff argues that Sgt. Carpenter's excessive speed of up to twenty miles per hour over the posted speed limit, without police lights or sirens, creates a genuine issue of material fact as to whether Sgt. Carpenter acted willfully, wantonly, or recklessly. However, in *VanDyke*, the Tenth District Court of Appeals found, as a matter of law, that under similar circumstances, an officer responding to an emergency call traveling at up to thirty-five miles per hour over the speed limit (double the actual limit) was not willful, wanton or reckless. Similar to *VanDyke*, the undisputed evidence establishes that, Sgt. Carpenter saw the vehicle in front of Defendant McBride's vehicle and made the proper precautions to allow it to safely make a left turn in front of him. Sgt. Carpenter testified that he did not see Defendant McBride's vehicle prior to impact. The fact that the officer in *VanDyke* may have swerved to avoid the collision is not relevant in light of testimony of Sgt. Carpenter that Defendant McBride's vehicle was obscured by the vehicle in front of it, which Sgt. Carpenter saw and took the necessary actions to avoid hitting.

It is undisputed that Sgt. Carpenter, a police officer employed by Clinton Township, was responding to a dispatch from the Franklin County Sheriff's Department. Based upon the decision in *VanDyke*, it is clear that if Sgt. Carpenter had been

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<sup>1</sup> While the issue of whether or not Defendant McBride had been drinking alcohol prior to the collision was disputed, this fact has no relevance to the issue of immunity, and therefore was not considered.

responding to an identical call in his own jurisdiction, his actions would be protected. Sgt. Carpenter was located within two-miles of the location where an officer was chasing a suspect on foot. Sgt. Carpenter identified the area as a high-crime area. Under the facts of this case, the Court finds that Sgt. Carpenter did have a professional obligation to respond to the dispatch. The fact that the officer chasing the suspect on foot did not indicate that either he or anyone else was under an imminent threat of danger does not negate the urgency of the situation. Sgt. Carpenter's decision not to operate the police lights and siren is consistent with the rules and regulations of the Clinton Township Police Department. The Court finds that facts of this case clearly demonstrate that Sgt. Carpenter was responding to an "emergency call," both within the letter and spirit of the law. Public policy further dictates that, under the facts of this case, where Sgt. Carpenter was in such close proximity to the location of the call, and a fellow officer was chasing a suspect on foot in a known high-crime area, that his actions also be protected.

Accordingly, the Court finds that, as Sgt. Carpenter was on an emergency call at the time of the collision, and as there is no evidence to support a finding at Sgt. Carpenter's actions constituted willful or wanton misconduct, Clinton Township is entitled to immunity pursuant to R.C. 2744.02(A)(1).

EMPLOYEE OF POLITICAL SUB-DIVISION IMMUNITY

R.C. 2744.03 provides, in relevant part:

(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 any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

\* \* \*

(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:

- (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
- (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
- (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. \* \* \*

R.C. 2744.03(A)(6) provides immunity for employees of political sub-divisions unless the employee's acts or omissions were committed with a malicious purpose, in bad faith, or in a wanton or reckless manner.

As set forth above, the Court has found that there is no evidence that the actions of Sgt. Carpenter at the time of the accident were willful or wanton. Moreover, there is no allegation that Sgt. Carpenter acted in bad faith or with malicious purpose. That leaves the Court to determine if a question of fact remains as to whether Sgt. Carpenter acted in a reckless manner.

In regards to R.C. 2744.03(A)(6), "recklessness" requires more than mere negligence. *O'Toole v. Denihan*, 118 Ohio St. 3d 374, 2008-Ohio-2574, 889 N.E.2d 505 at ¶74. A determination of "recklessness" requires a finding that "the actor must be conscious that his conduct will in all probability result in injury." *Id.*, quoting *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. While stating that the determination of recklessness is typically left to a jury, the Supreme Court noted that the standard for establishing recklessness is so high, "summary

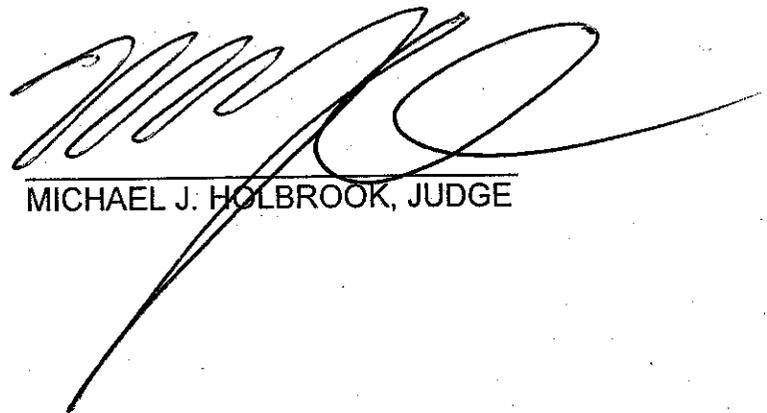
judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity." Id. at ¶75.

In construing the facts in the light most favorable to the Plaintiff, the Court finds that the actions of Sgt. Carpenter simply do not rise to the level of recklessness. As such, Sgt. Carpenter is entitled to immunity from the Plaintiff's claims pursuant to R.C. 2744.03(A)(6).

CONCLUSION

Upon careful review and consideration of the evidence presented by the parties, the court finds the motion for summary judgment of Defendants' Clinton Township Police Department and Sgt. Carpenter to be well taken. Said motion is hereby **GRANTED**. Defendants' Clinton Township Police Department and Sgt. Carpenter are hereby granted summary judgment in their favor upon the claims set forth against them in the Plaintiff's Complaint.

**IT IS SO ORDERED.**



MICHAEL J. HOLBROOK, JUDGE

Copies to:

Brian G. Miller, Esq.  
Counsel for Plaintiff

Boyd W. Gentry, Esq.  
Joshua R. Schierloh, Esq.  
Counsel for Defendants Carpenter and Clinton Township Police Dept.

Christina L. Corl, Esq.  
Counsel for Defendant McBride

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

LEA D. SMITH, : **FINAL APPEALABLE ORDER**  
 :  
 Plaintiff, :  
 :  
 vs. : Case No. 08CVC-03-3907  
 :  
 VASHAWN L. MCBRIDE, et al., : Judge Holbrook  
 :  
 Defendants. :

**JUDGMENT ENTRY GRANTING CIVIL RULE 54(B) CERTIFICATION**

On December 12, 2008, this matter came before the Court on the Motion for Summary Judgment filed by Defendants, Sgt. Carpenter and Clinton Township. On May 14, 2009, after consideration of the motion and the supporting materials attached in accordance with Rule 56, this Court found Defendants' motion to be well taken and entered a Decision and Order granting Defendants' motion.

On June 11, 2009, Plaintiff filed a motion for Rule 54(B) certification. Upon additional consideration, this Court now finds that the May 14, 2009 Decision and Order granting Defendants' Motion for Summary Judgment terminates the Plaintiff's entire action against Sgt. Carpenter and Clinton Township. Because a separate and distinct branch of Plaintiff's claims has been fully disposed of, this Court's Order is, in fact, final and appealable. Therefore, in accordance with Ohio Civil Rule 54(B), this Court hereby GRANTS Plaintiff's Motion requesting Civ. R. 54(B) certification of this Court's May 14, 2009 Decision and Order and further expressly determines that there is no just reason for delay.

**IT IS SO ORDERED.**

\_\_\_\_\_  
Judge Holbrook

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cc: Brian G. Miller, Trial Attorney for Plaintiff  
Christina L. Corl, Trial Attorney for Defendant Vashawn L. McBride  
Joshua R. Schierloh and Boyd W. Gentry, Trial Attorneys for Defendants Travis D.  
Carpenter and Clinton Township Police Department

## **311.29 Contracts for police services.**

(A) As used in this section, "Chautauqua assembly" has the same meaning as in section 4511.90 of the Revised Code.

(B) The sheriff may, from time to time, enter into contracts with any municipal corporation, township, township police district, metropolitan housing authority, port authority, water or sewer district, school district, library district, health district, park district created pursuant to section 511.18 or 1545.01 of the Revised Code, soil and water conservation district, water conservancy district, or other taxing district or with the board of county commissioners of any contiguous county with the concurrence of the sheriff of the other county, and such subdivisions, authorities, and counties may enter into agreements with the sheriff pursuant to which the sheriff undertakes and is authorized by the contracting subdivision, authority, or county to perform any police function, exercise any police power, or render any police service in behalf of the contracting subdivision, authority, or county, or its legislative authority, that the subdivision, authority, or county, or its legislative authority, may perform, exercise, or render.

Upon the execution of an agreement under this division and within the limitations prescribed by it, the sheriff may exercise the same powers as the contracting subdivision, authority, or county possesses with respect to such policing that by the agreement the sheriff undertakes to perform or render, and all powers necessary or incidental thereto, as amply as such powers are possessed and exercised by the contracting subdivision, authority, or county directly.

Any agreement authorized by division (A), (B), or (C) of this section shall not suspend the possession by a contracting subdivision, authority, or county of any police power performed or exercised or police service rendered in pursuance to the agreement nor limit the authority of the sheriff.

(C) The sheriff may enter into contracts with any Chautauqua assembly that has grounds located within the county, and the Chautauqua assembly may enter into agreements with the sheriff pursuant to which the sheriff undertakes to perform any police function, exercise any police power, or render any police service upon the grounds of the Chautauqua assembly that the sheriff is authorized by law to perform, exercise, or render in any other part of the county within the sheriff's territorial jurisdiction. Upon the execution of an agreement under this division, the sheriff may, within the limitations prescribed by the agreement, exercise such powers with respect to such policing upon the grounds of the Chautauqua assembly, provided that any limitation contained in the agreement shall not be construed to limit the authority of the sheriff.

(D) Contracts entered into under division (A), (B), or (C) of this section shall provide for the reimbursement of the county for the costs incurred by the sheriff for such policing including, but not limited to, the salaries of deputy sheriffs assigned to such policing, the current costs of funding retirement pensions and of providing workers' compensation, the cost of training, and the cost of equipment and supplies used in such policing, to the extent that such equipment and supplies are not directly furnished by the contracting subdivision, authority, county, or Chautauqua assembly. Each such contract shall provide for the ascertainment of such costs and shall be of any duration, not in excess of four years, and may contain any other terms that may be agreed upon. All payments pursuant to any such contract in reimbursement of the costs of such policing shall be made to the treasurer of the county to be credited to a special fund to be known as the "sheriff's policing revolving fund," hereby created. Any moneys coming into the fund shall be used for the purposes provided in divisions (A) to (D) of this section and paid out on vouchers by the county commissioners as other

funds coming into their possession. Any moneys credited to the fund and not obligated at the termination of the contract shall be credited to the county general fund.

The sheriff shall assign the number of deputies as may be provided for in any contract made pursuant to division (A), (B), or (C) of this section. The number of deputies regularly assigned to such policing shall be in addition to and an enlargement of the sheriff's regular number of deputies. Nothing in divisions (A) to (D) of this section shall preclude the sheriff from temporarily increasing or decreasing the deputies so assigned as emergencies indicate a need for shifting assignments to the extent provided by the contracts.

All such deputies shall have the same powers and duties, the same qualifications, and be appointed and paid and receive the same benefits and provisions and be governed by the same laws as all other deputy sheriffs.

Contracts under division (A), (B), or (C) of this section may be entered into jointly with the board of county commissioners, and sections 307.14 to 307.19 of the Revised Code apply to this section insofar as they may be applicable.

(E)(1) As used in division (E) of this section:

(a) "Ohio prisoner" has the same meaning as in section 5120.64 of the Revised Code.

(b) "Out-of-state prisoner" and "private contractor" have the same meanings as in section 9.07 of the Revised Code.

(2) The sheriff may enter into a contract with a private person or entity for the return of Ohio prisoners who are the responsibility of the sheriff from outside of this state to a location in this state specified by the sheriff, if there are adequate funds appropriated by the board of county commissioners and there is a certification pursuant to division (D) of section 5705.41 of the Revised Code that the funds are available for this purpose. A contract entered into under this division is within the coverage of section 325.07 of the Revised Code. If a sheriff enters into a contract as described in this division, subject to division (E)(3) of this section, the private person or entity in accordance with the contract may return Ohio prisoners from outside of this state to locations in this state specified by the sheriff. A contract entered into under this division shall include all of the following:

(a) Specific provisions that assign the responsibility for costs related to medical care of prisoners while they are being returned that is not covered by insurance of the private person or entity;

(b) Specific provisions that set forth the number of days, not exceeding ten, within which the private person or entity, after it receives the prisoner in the other state, must deliver the prisoner to the location in this state specified by the sheriff, subject to the exceptions adopted as described in division (E)(2)(c) of this section;

(c) Any exceptions to the specified number of days for delivery specified as described in division (E)(2)(b) of this section;

(d) A requirement that the private person or entity immediately report all escapes of prisoners who are being returned to this state, and the apprehension of all prisoners who are being returned and who have escaped, to the sheriff and to the local law enforcement agency of this state or another state that has jurisdiction over the place at which the escape occurs;

(e) A schedule of fines that the sheriff shall impose upon the private person or entity if the private person or entity fails to perform its contractual duties, and a requirement that, if the private person or entity fails to perform its contractual duties, the sheriff shall impose a fine on the private person or entity from the schedule of fines and, in addition, may exercise any other rights the sheriff has under the contract.

(f) If the contract is entered into on or after the effective date of the rules adopted by the department of rehabilitation and correction under section 5120.64 of the Revised Code, specific provisions that comport with all applicable standards that are contained in those rules.

(3) If the private person or entity that enters into the contract fails to perform its contractual duties, the sheriff shall impose upon the private person or entity a fine from the schedule, the money paid in satisfaction of the fine shall be paid into the county treasury, and the sheriff may exercise any other rights the sheriff has under the contract. If a fine is imposed under this division, the sheriff may reduce the payment owed to the private person or entity pursuant to any invoice in the amount of the fine.

(4) Upon the effective date of the rules adopted by the department of rehabilitation and correction under section 5120.64 of the Revised Code, notwithstanding the existence of a contract entered into under division (E)(2) of this section, in no case shall the private person or entity that is a party to the contract return Ohio prisoners from outside of this state into this state for a sheriff unless the private person or entity complies with all applicable standards that are contained in the rules.

(5) Divisions (E)(1) to (4) of this section do not apply regarding any out-of-state prisoner who is brought into this state to be housed pursuant to section 9.07 of the Revised Code in a correctional facility in this state that is managed and operated by a private contractor.

Effective Date: 03-15-2001

## **505.43 Police protection.**

In order to obtain police protection, or to obtain additional police protection, any township may enter into a contract with one or more townships, municipal corporations, park districts created pursuant to section 511.18 or 1545.01 of the Revised Code, or county sheriffs or with a governmental entity of an adjoining state upon any terms that are agreed to by them, for services of police departments or use of police equipment, or the interchange of the service of police departments or use of police equipment within the several territories of the contracting subdivisions, if the contract is first authorized by respective boards of township trustees or other legislative bodies. The cost of the contract may be paid for from the township general fund or from funds received pursuant to the passage of a levy authorized pursuant to division (J) of section 5705.19 and section 5705.25 of the Revised Code.

Chapter 2744. of the Revised Code, insofar as it is applicable to the operation of police departments, applies to the contracting political subdivisions and police department members when the members are rendering service outside their own subdivision pursuant to the contract.

Police department members acting outside the subdivision in which they are employed may participate in any pension or indemnity fund established by their employer to the same extent as while acting within the employing subdivision, and are entitled to all the rights and benefits of Chapter 4123. of the Revised Code, to the same extent as while performing service within the subdivision.

The contract may provide for a fixed annual charge to be paid at the times agreed upon and stipulated in the contract.

Effective Date: 12-31-1997

## **505.431 Resolution to provide police protection to other public entity.**

The police department of any township or township police district may provide police protection to any county, municipal corporation, or township of this state, to a park district created pursuant to section 511.18 or 1545.01 of the Revised Code, or to a governmental entity of an adjoining state without a contract to provide police protection, upon the approval, by resolution, of the board of township trustees of the township in which the department is located and upon authorization by an officer or employee of the police department providing the police protection who is designated by title of office or position, pursuant to the resolution of the board of township trustees, to give such authorization.

Chapter 2744. of the Revised Code, insofar as it applies to the operation of police departments, shall apply to any township police department or township police district and to its members when such members are rendering police services pursuant to this section outside the township or township police district by which they are employed.

Police department members acting, as provided in this section, outside the township or township police district by which they are employed shall be entitled to participate in any pension or indemnity fund established by their employer to the same extent as while acting within the township or township police district by which they are employed. Those members shall be entitled to all the rights and benefits of Chapter 4123. of the Revised Code to the same extent as while performing services within the township or township police district by which they are employed.

Effective Date: 07-31-1992

## **737.04 Mutual aid contracts for police protection.**

The legislative authority of any municipal corporation, in order to obtain police protection or to obtain additional police protection, or to allow its police officers to work in multijurisdictional drug, gang, or career criminal task forces, may enter into contracts with one or more municipal corporations, townships, township police districts, or county sheriffs in this state, with one or more park districts created pursuant to section 511.18 or 1545.01 of the Revised Code, with one or more port authorities, or with a contiguous municipal corporation in an adjoining state, upon any terms that are agreed upon, for services of police departments or the use of police equipment or for the interchange of services of police departments or police equipment within the several territories of the contracting subdivisions.

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.

Police department members acting outside the subdivision in which they are employed, pursuant to a contract entered into under this section, shall be entitled to participate in any indemnity fund established by their employer to the same extent as while acting within the employing subdivision. Those members shall be entitled to all the rights and benefits of Chapter 4123. of the Revised Code, to the same extent as while performing service within the subdivision.

The contracts may provide for:

- (A) A fixed annual charge to be paid at the times agreed upon and stipulated in the contract;
- (B) Compensation based upon:
  - (1) A stipulated price for each call or emergency;
  - (2) The number of members or pieces of equipment employed;
  - (3) The elapsed time of service required in each call or emergency.
- (C) Compensation for loss or damage to equipment while engaged in rendering police services outside the limits of the subdivision owning and furnishing the equipment;
- (D) Reimbursement of the subdivision in which the police department members are employed for any indemnity award or premium contribution assessed against the employing subdivision for workers' compensation benefits for injuries or death of its police department members occurring while engaged in rendering police services pursuant to the contract.

Effective Date: 12-31-1997; 2007 HB67 07-03-2007

## **737.041 Providing police service without contract.**

The police department of any municipal corporation may provide police protection to any county, municipal corporation, township, or township police district of this state, to a park district created pursuant to section 511.18 or 1545.01 of the Revised Code, to a port authority, to any multijurisdictional drug, gang, or career criminal task force, or to a governmental entity of an adjoining state without a contract to provide police protection, upon the approval, by resolution, of the legislative authority of the municipal corporation in which the department is located and upon authorization by an officer or employee of the police department providing the police protection who is designated by title of office or position, pursuant to the resolution of the legislative authority of the municipal corporation, to give the authorization.

Chapter 2744. of the Revised Code, insofar as it applies to the operation of police departments, shall apply to any municipal corporation and to members of its police department when the members are rendering police services pursuant to this section outside the municipal corporation by which they are employed.

Police department members acting, as provided in this section, outside the municipal corporation by which they are employed shall be entitled to participate in any pension or indemnity fund established by their employer to the same extent as while acting within the municipal corporation by which they are employed. Those members shall be entitled to all the rights and benefits of Chapter 4123. of the Revised Code to the same extent as while performing services within the municipal corporation by which they are employed.

Effective Date: 12-31-1997; 2007 HB67 07-03-2007

## 2744.01 Political subdivision tort liability definitions.

As used in this chapter:

(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.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets,

avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

- (q) Urban renewal projects and the elimination of slum conditions;
- (r) Flood control measures;
- (s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;
- (t) The issuance of revenue obligations under section 140.06 of the Revised Code;
- (u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:
  - (i) A park, playground, or playfield;
  - (ii) An indoor recreational facility;
  - (iii) A zoo or zoological park;
  - (iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;
  - (v) A golf course;
  - (vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;
  - (vii) A rope course or climbing walls;
  - (viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.
- (v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
- (w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;
- (ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

Effective Date: 04-09-2003; 04-27-2005; 10-12-2006

## **2744.02 Governmental functions and proprietary functions of political subdivisions.**

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except 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.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except 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. The following are full defenses to that liability:

(a) 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;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political

subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

Effective Date: 04-09-2003; 2007 HB119 09-29-2007

## **2744.03 Defenses - immunities.**

(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 any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(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:

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

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

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

Effective Date: 04-09-2003

## **2935.03 Authority to arrest without warrant - pursuit outside jurisdiction.**

(A)(1) A sheriff, deputy sheriff, marshal, deputy marshal, municipal police officer, township constable, police officer of a township or joint township police district, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, member of a police force employed by a regional transit authority under division (Y) of section 306.35 of the Revised Code, state university law enforcement officer appointed under section 3345.04 of the Revised Code, veterans' home police officer appointed under section 5907.02 of the Revised Code, special police officer employed by a port authority under section 4582.04 or 4582.28 of the Revised Code, or a special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in section 119.3 of Title 14 of the Code of Federal Regulations, 14 C.F.R. 119.3, as amended, and that is required to be under a security program and is governed by aviation security rules of the transportation security administration of the United States department of transportation as provided in Parts 1542. and 1544. of Title 49 of the Code of Federal Regulations, as amended, shall arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the political subdivision, metropolitan housing authority housing project, regional transit authority facilities or areas of a municipal corporation that have been agreed to by a regional transit authority and a municipal corporation located within its territorial jurisdiction, college, university, veterans' home operated under Chapter 5907. of the Revised Code, port authority, or municipal airport or other municipal air navigation facility, in which the peace officer is appointed, employed, or elected, a law of this state, an ordinance of a municipal corporation, or a resolution of a township.

(2) A peace officer of the department of natural resources, a state fire marshal law enforcement officer described in division (A)(23) of section 109.71 of the Revised Code, or an individual designated to perform law enforcement duties under section 511.232, 1545.13, or 6101.75 of the Revised Code shall arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the peace officer's, state fire marshal law enforcement officer's, or individual's territorial jurisdiction, a law of this state.

(3) The house sergeant at arms if the house sergeant at arms has arrest authority pursuant to division (E)(1) of section 101.311 of the Revised Code and an assistant house sergeant at arms shall arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the sergeant at arms's or assistant sergeant at arms's territorial jurisdiction specified in division (D)(1)(a) of section 101.311 of the Revised Code or while providing security pursuant to division (D)(1)(f) of section 101.311 of the Revised Code, a law of this state, an ordinance of a municipal corporation, or a resolution of a township.

(B)(1) When there is reasonable ground to believe that an offense of violence, the offense of criminal child enticement as defined in section 2905.05 of the Revised Code, the offense of public indecency as defined in section 2907.09 of the Revised Code, the offense of domestic violence as defined in section 2919.25 of the Revised Code, the offense of violating a protection order as defined in section 2919.27 of the Revised Code, the offense of menacing by stalking as defined in section 2903.211 of the Revised Code, the offense of aggravated trespass as defined in section 2911.211 of the Revised Code, a theft offense as defined in section 2913.01 of the Revised Code, or a felony drug abuse offense as defined in section 2925.01 of the Revised Code, has been committed within the limits of the political subdivision,

metropolitan housing authority housing project, regional transit authority facilities or those areas of a municipal corporation that have been agreed to by a regional transit authority and a municipal corporation located within its territorial jurisdiction, college, university, veterans' home operated under Chapter 5907. of the Revised Code, port authority, or municipal airport or other municipal air navigation facility, in which the peace officer is appointed, employed, or elected or within the limits of the territorial jurisdiction of the peace officer, a peace officer described in division (A) of this section may arrest and detain until a warrant can be obtained any person who the peace officer has reasonable cause to believe is guilty of the violation.

(2) For purposes of division (B)(1) of this section, the execution of any of the following constitutes reasonable ground to believe that the offense alleged in the statement was committed and reasonable cause to believe that the person alleged in the statement to have committed the offense is guilty of the violation:

(a) A written statement by a person alleging that an alleged offender has committed the offense of menacing by stalking or aggravated trespass;

(b) A written statement by the administrator of the interstate compact on mental health appointed under section 5119.51 of the Revised Code alleging that a person who had been hospitalized, institutionalized, or confined in any facility under an order made pursuant to or under authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code has escaped from the facility, from confinement in a vehicle for transportation to or from the facility, or from supervision by an employee of the facility that is incidental to hospitalization, institutionalization, or confinement in the facility and that occurs outside of the facility, in violation of section 2921.34 of the Revised Code;

(c) A written statement by the administrator of any facility in which a person has been hospitalized, institutionalized, or confined under an order made pursuant to or under authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code alleging that the person has escaped from the facility, from confinement in a vehicle for transportation to or from the facility, or from supervision by an employee of the facility that is incidental to hospitalization, institutionalization, or confinement in the facility and that occurs outside of the facility, in violation of section 2921.34 of the Revised Code.

(3)(a) For purposes of division (B)(1) of this section, a peace officer described in division (A) of this section has reasonable grounds to believe that the offense of domestic violence or the offense of violating a protection order has been committed and reasonable cause to believe that a particular person is guilty of committing the offense if any of the following occurs:

(i) A person executes a written statement alleging that the person in question has committed the offense of domestic violence or the offense of violating a protection order against the person who executes the statement or against a child of the person who executes the statement.

(ii) No written statement of the type described in division (B)(3)(a)(i) of this section is executed, but the peace officer, based upon the peace officer's own knowledge and observation of the facts and circumstances of the alleged incident of the offense of domestic violence or the alleged incident of the offense of violating a protection order or based upon any other information, including, but not limited to, any reasonably trustworthy information given to the peace officer by the alleged victim of the alleged incident of the offense or any witness of the alleged incident of the offense, concludes that there are reasonable grounds to believe that the offense of domestic violence or the offense of

violating a protection order has been committed and reasonable cause to believe that the person in question is guilty of committing the offense.

(iii) No written statement of the type described in division (B)(3)(a)(i) of this section is executed, but the peace officer witnessed the person in question commit the offense of domestic violence or the offense of violating a protection order.

(b) If pursuant to division (B)(3)(a) of this section a peace officer has reasonable grounds to believe that the offense of domestic violence or the offense of violating a protection order has been committed and reasonable cause to believe that a particular person is guilty of committing the offense, it is the preferred course of action in this state that the officer arrest and detain that person pursuant to division (B)(1) of this section until a warrant can be obtained.

If pursuant to division (B)(3)(a) of this section a peace officer has reasonable grounds to believe that the offense of domestic violence or the offense of violating a protection order has been committed and reasonable cause to believe that family or household members have committed the offense against each other, it is the preferred course of action in this state that the officer, pursuant to division (B)(1) of this section, arrest and detain until a warrant can be obtained the family or household member who committed the offense and whom the officer has reasonable cause to believe is the primary physical aggressor. There is no preferred course of action in this state regarding any other family or household member who committed the offense and whom the officer does not have reasonable cause to believe is the primary physical aggressor, but, pursuant to division (B)(1) of this section, the peace officer may arrest and detain until a warrant can be obtained any other family or household member who committed the offense and whom the officer does not have reasonable cause to believe is the primary physical aggressor.

(c) If a peace officer described in division (A) of this section does not arrest and detain a person whom the officer has reasonable cause to believe committed the offense of domestic violence or the offense of violating a protection order when it is the preferred course of action in this state pursuant to division (B)(3)(b) of this section that the officer arrest that person, the officer shall articulate in the written report of the incident required by section 2935.032 of the Revised Code a clear statement of the officer's reasons for not arresting and detaining that person until a warrant can be obtained.

(d) In determining for purposes of division (B)(3)(b) of this section which family or household member is the primary physical aggressor in a situation in which family or household members have committed the offense of domestic violence or the offense of violating a protection order against each other, a peace officer described in division (A) of this section, in addition to any other relevant circumstances, should consider all of the following:

(i) Any history of domestic violence or of any other violent acts by either person involved in the alleged offense that the officer reasonably can ascertain;

(ii) If violence is alleged, whether the alleged violence was caused by a person acting in self-defense;

(iii) Each person's fear of physical harm, if any, resulting from the other person's threatened use of force against any person or resulting from the other person's use or history of the use of force against any person, and the reasonableness of that fear;

(iv) The comparative severity of any injuries suffered by the persons involved in the alleged offense.

(e)(i) A peace officer described in division (A) of this section shall not require, as a prerequisite to arresting or charging a person who has committed the offense of domestic violence or the offense of violating a protection order, that the victim of the offense specifically consent to the filing of charges against the person who has committed the offense or sign a complaint against the person who has committed the offense.

(ii) If a person is arrested for or charged with committing the offense of domestic violence or the offense of violating a protection order and if the victim of the offense does not cooperate with the involved law enforcement or prosecuting authorities in the prosecution of the offense or, subsequent to the arrest or the filing of the charges, informs the involved law enforcement or prosecuting authorities that the victim does not wish the prosecution of the offense to continue or wishes to drop charges against the alleged offender relative to the offense, the involved prosecuting authorities, in determining whether to continue with the prosecution of the offense or whether to dismiss charges against the alleged offender relative to the offense and notwithstanding the victim's failure to cooperate or the victim's wishes, shall consider all facts and circumstances that are relevant to the offense, including, but not limited to, the statements and observations of the peace officers who responded to the incident that resulted in the arrest or filing of the charges and of all witnesses to that incident.

(f) In determining pursuant to divisions (B)(3)(a) to (g) of this section whether to arrest a person pursuant to division (B)(1) of this section, a peace officer described in division (A) of this section shall not consider as a factor any possible shortage of cell space at the detention facility to which the person will be taken subsequent to the person's arrest or any possibility that the person's arrest might cause, contribute to, or exacerbate overcrowding at that detention facility or at any other detention facility.

(g) If a peace officer described in division (A) of this section intends pursuant to divisions (B)(3)(a) to (g) of this section to arrest a person pursuant to division (B)(1) of this section and if the officer is unable to do so because the person is not present, the officer promptly shall seek a warrant for the arrest of the person.

(h) If a peace officer described in division (A) of this section responds to a report of an alleged incident of the offense of domestic violence or an alleged incident of the offense of violating a protection order and if the circumstances of the incident involved the use or threatened use of a deadly weapon or any person involved in the incident brandished a deadly weapon during or in relation to the incident, the deadly weapon that was used, threatened to be used, or brandished constitutes contraband, and, to the extent possible, the officer shall seize the deadly weapon as contraband pursuant to Chapter 2981. of the Revised Code. Upon the seizure of a deadly weapon pursuant to division (B)(3)(h) of this section, section 2981.12 of the Revised Code shall apply regarding the treatment and disposition of the deadly weapon. For purposes of that section, the "underlying criminal offense" that was the basis of the seizure of a deadly weapon under division (B)(3)(h) of this section and to which the deadly weapon had a relationship is any of the following that is applicable:

(i) The alleged incident of the offense of domestic violence or the alleged incident of the offense of violating a protection order to which the officer who seized the deadly weapon responded;

(ii) Any offense that arose out of the same facts and circumstances as the report of the alleged incident of the offense of domestic violence or the alleged incident of the offense of violating a protection order to which the officer who seized the deadly weapon responded.

(4) If, in the circumstances described in divisions (B)(3)(a) to (g) of this section, a peace officer described in division (A) of this section arrests and detains a person pursuant to division (B)(1) of this section, or if, pursuant to division (B)(3)(h) of this section, a peace officer described in division (A) of this section seizes a deadly weapon, the officer, to the extent described in and in accordance with section 9.86 or 2744.03 of the Revised Code, is immune in any civil action for damages for injury, death, or loss to person or property that arises from or is related to the arrest and detention or the seizure.

(C) When there is reasonable ground to believe that a violation of division (A)(1), (2), (3), (4), or (5) of section 4506.15 or a violation of section 4511.19 of the Revised Code has been committed by a person operating a motor vehicle subject to regulation by the public utilities commission of Ohio under Title XLIX of the Revised Code, a peace officer with authority to enforce that provision of law may stop or detain the person whom the officer has reasonable cause to believe was operating the motor vehicle in violation of the division or section and, after investigating the circumstances surrounding the operation of the vehicle, may arrest and detain the person.

(D) If a sheriff, deputy sheriff, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, member of a police force employed by a regional transit authority under division (Y) of section 306.35 of the Revised Code, special police officer employed by a port authority under section 4582.04 or 4582.28 of the Revised Code, special police officer employed by a municipal corporation at a municipal airport or other municipal air navigation facility described in division (A) of this section, township constable, police officer of a township or joint township police district, state university law enforcement officer appointed under section 3345.04 of the Revised Code, peace officer of the department of natural resources, individual designated to perform law enforcement duties under section 511.232, 1545.13, or 6101.75 of the Revised Code, the house sergeant at arms if the house sergeant at arms has arrest authority pursuant to division (E)(1) of section 101.311 of the Revised Code, or an assistant house sergeant at arms is authorized by division (A) or (B) of this section to arrest and detain, within the limits of the political subdivision, metropolitan housing authority housing project, regional transit authority facilities or those areas of a municipal corporation that have been agreed to by a regional transit authority and a municipal corporation located within its territorial jurisdiction, port authority, municipal airport or other municipal air navigation facility, college, or university in which the officer is appointed, employed, or elected or within the limits of the territorial jurisdiction of the peace officer, a person until a warrant can be obtained, the peace officer, outside the limits of that territory, may pursue, arrest, and detain that person until a warrant can be obtained if all of the following apply:

- (1) The pursuit takes place without unreasonable delay after the offense is committed;
- (2) The pursuit is initiated within the limits of the political subdivision, metropolitan housing authority housing project, regional transit authority facilities or those areas of a municipal corporation that have been agreed to by a regional transit authority and a municipal corporation located within its territorial jurisdiction, port authority, municipal airport or other municipal air navigation facility, college, or university in which the peace officer is appointed, employed, or elected or within the limits of the territorial jurisdiction of the peace officer;
- (3) The offense involved is a felony, a misdemeanor of the first degree or a substantially equivalent municipal ordinance, a misdemeanor of the second degree or a substantially equivalent municipal

ordinance, or any offense for which points are chargeable pursuant to section 4510.036 of the Revised Code.

(E) In addition to the authority granted under division (A) or (B) of this section:

(1) A sheriff or deputy sheriff may arrest and detain, until a warrant can be obtained, any person found violating section 4503.11, 4503.21, or 4549.01, sections 4549.08 to 4549.12, section 4549.62, or Chapter 4511. or 4513. of the Revised Code on the portion of any street or highway that is located immediately adjacent to the boundaries of the county in which the sheriff or deputy sheriff is elected or appointed.

(2) A member of the police force of a township police district created under section 505.48 of the Revised Code, a member of the police force of a joint township police district created under section 505.481 of the Revised Code, or a township constable appointed in accordance with section 509.01 of the Revised Code, who has received a certificate from the Ohio peace officer training commission under section 109.75 of the Revised Code, may arrest and detain, until a warrant can be obtained, any person found violating any section or chapter of the Revised Code listed in division (E)(1) of this section, other than sections 4513.33 and 4513.34 of the Revised Code, on the portion of any street or highway that is located immediately adjacent to the boundaries of the township police district or joint township police district, in the case of a member of a township police district or joint township police district police force, or the unincorporated territory of the township, in the case of a township constable. However, if the population of the township that created the township police district served by the member's police force, or the townships that created the joint township police district served by the member's police force, or the township that is served by the township constable, is sixty thousand or less, the member of the township police district or joint township police district police force or the township constable may not make an arrest under division (E)(2) of this section on a state highway that is included as part of the interstate system.

(3) A police officer or village marshal appointed, elected, or employed by a municipal corporation may arrest and detain, until a warrant can be obtained, any person found violating any section or chapter of the Revised Code listed in division (E)(1) of this section on the portion of any street or highway that is located immediately adjacent to the boundaries of the municipal corporation in which the police officer or village marshal is appointed, elected, or employed.

(4) A peace officer of the department of natural resources, a state fire marshal law enforcement officer described in division (A)(23) of section 109.71 of the Revised Code, or an individual designated to perform law enforcement duties under section 511.232, 1545.13, or 6101.75 of the Revised Code may arrest and detain, until a warrant can be obtained, any person found violating any section or chapter of the Revised Code listed in division (E)(1) of this section, other than sections 4513.33 and 4513.34 of the Revised Code, on the portion of any street or highway that is located immediately adjacent to the boundaries of the lands and waters that constitute the territorial jurisdiction of the peace officer or state fire marshal law enforcement officer.

(F)(1) A department of mental health special police officer or a department of developmental disabilities special police officer may arrest without a warrant and detain until a warrant can be obtained any person found committing on the premises of any institution under the jurisdiction of the particular department a misdemeanor under a law of the state.

A department of mental health special police officer or a department of developmental disabilities special police officer may arrest without a warrant and detain until a warrant can be obtained any

person who has been hospitalized, institutionalized, or confined in an institution under the jurisdiction of the particular department pursuant to or under authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code and who is found committing on the premises of any institution under the jurisdiction of the particular department a violation of section 2921.34 of the Revised Code that involves an escape from the premises of the institution.

(2)(a) If a department of mental health special police officer or a department of developmental disabilities special police officer finds any person who has been hospitalized, institutionalized, or confined in an institution under the jurisdiction of the particular department pursuant to or under authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code committing a violation of section 2921.34 of the Revised Code that involves an escape from the premises of the institution, or if there is reasonable ground to believe that a violation of section 2921.34 of the Revised Code has been committed that involves an escape from the premises of an institution under the jurisdiction of the department of mental health or the department of developmental disabilities and if a department of mental health special police officer or a department of developmental disabilities special police officer has reasonable cause to believe that a particular person who has been hospitalized, institutionalized, or confined in the institution pursuant to or under authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code is guilty of the violation, the special police officer, outside of the premises of the institution, may pursue, arrest, and detain that person for that violation of section 2921.34 of the Revised Code, until a warrant can be obtained, if both of the following apply:

(i) The pursuit takes place without unreasonable delay after the offense is committed;

(ii) The pursuit is initiated within the premises of the institution from which the violation of section 2921.34 of the Revised Code occurred.

(b) For purposes of division (F)(2)(a) of this section, the execution of a written statement by the administrator of the institution in which a person had been hospitalized, institutionalized, or confined pursuant to or under authority of section 2945.37, 2945.371, 2945.38, 2945.39, 2945.40, 2945.401, or 2945.402 of the Revised Code alleging that the person has escaped from the premises of the institution in violation of section 2921.34 of the Revised Code constitutes reasonable ground to believe that the violation was committed and reasonable cause to believe that the person alleged in the statement to have committed the offense is guilty of the violation.

(G) As used in this section:

(1) A "department of mental health special police officer" means a special police officer of the department of mental health designated under section 5119.14 of the Revised Code who is certified by the Ohio peace officer training commission under section 109.77 of the Revised Code as having successfully completed an approved peace officer basic training program.

(2) A "department of developmental disabilities special police officer" means a special police officer of the department of developmental disabilities designated under section 5123.13 of the Revised Code who is certified by the Ohio peace officer training council under section 109.77 of the Revised Code as having successfully completed an approved peace officer basic training program.

(3) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(4) "Family or household member" has the same meaning as in section 2919.25 of the Revised Code.

(5) "Street" or "highway" has the same meaning as in section 4511.01 of the Revised Code.

(6) "Interstate system" has the same meaning as in section 5516.01 of the Revised Code.

(7) "Peace officer of the department of natural resources" means an employee of the department of natural resources who is a natural resources law enforcement staff officer designated pursuant to section 1501.013 of the Revised Code, a forest officer designated pursuant to section 1503.29 of the Revised Code, a preserve officer designated pursuant to section 1517.10 of the Revised Code, a wildlife officer designated pursuant to section 1531.13 of the Revised Code, a park officer designated pursuant to section 1541.10 of the Revised Code, or a state watercraft officer designated pursuant to section 1547.521 of the Revised Code.

(8) "Portion of any street or highway" means all lanes of the street or highway irrespective of direction of travel, including designated turn lanes, and any berm, median, or shoulder.

Amended by 128th General Assembly ch. 7, SB 79, § 1, eff. 10/6/2009.

Effective Date: 01-01-2004; 05-17-2006; 07-01-2007; 2007 HB119 09-29-2007; 2008 HB562 09-22-2008

## **3345.041 Agreements to provide police services to political subdivision or another state university or college - civil liability.**

(A) The board of trustees of a state university or college may enter into an agreement with one or more townships, municipal corporations, counties, park districts created under section 1545.04 of the Revised Code, township park districts created under section 511.18 of the Revised Code, or other state universities or colleges and a township, municipal corporation, county, park district, or township park district may enter into an agreement with a state university or college upon such terms as are agreed to by them, to allow the use of state university law enforcement officers designated under section 3345.04 of the Revised Code to perform any police function, exercise any police power, or render any police service on behalf of the contracting political subdivision, or state university or college, that it may perform, exercise, or render.

(B) Chapter 2743. of the Revised Code applies to a state university or college when its law enforcement officers are serving outside the university or college pursuant to an agreement entered into pursuant to division (A) of this section. State university law enforcement officers acting outside the state university or college by which they are employed, pursuant to an agreement entered into pursuant to division (A) of this section, shall be entitled to participate in any indemnity fund established by their employer to the same extent as while acting within the employing state university or college and are entitled to all the rights and benefits of Chapter 4123. of the Revised Code. The state university law enforcement officers also retain their personal immunity from civil liability specified in section 9.86 of the Revised Code. A township, municipal corporation, county, park district, or township park district that enters into an agreement pursuant to division (A) of this section is not subject to civil liability under Chapter 2744. of the Revised Code as the result of any action or omission of any state university law enforcement officer acting pursuant to the agreement.

(C) Agreements entered into pursuant to division (A) of this section may provide for the reimbursement of the state university or college providing police services under such agreement for the costs incurred by its law enforcement officers for the policing of the political subdivision, or of the state university or college to which such services are provided. Each contract may provide for the ascertainment of costs and shall be of a duration not in excess of four years. All payments pursuant to any agreement in reimbursement of the costs of policing shall be held and administered as provided by section 3345.05 of the Revised Code.

(D) An agreement entered into pursuant to division (A) of this section shall specify whether the political subdivision or the state university or college to which police services are provided under such agreement will or will not indemnify and hold harmless the state university or college providing police services under such agreement for any damages awarded by the court of claims in any civil action arising from any action or omission of any state university law enforcement officer acting pursuant to the agreement.

(E) As used in this section, "state university or college" means any state university or college identified in section 3345.04 of the Revised Code.

Effective Date: 11-06-1996

## **4513.21 Horns, sirens, and warning devices.**

(A) Every motor vehicle or trackless trolley when operated upon a highway shall be equipped with a horn which is in good working order and capable of emitting sound audible, under normal conditions, from a distance of not less than two hundred feet.

No motor vehicle or trackless trolley shall be equipped with, nor shall any person use upon a vehicle, any siren, whistle, or bell. Any vehicle may be equipped with a theft alarm signal device which shall be so arranged that it cannot be used as an ordinary warning signal. Every emergency vehicle shall be equipped with a siren, whistle, or bell, capable of emitting sound audible under normal conditions from a distance of not less than five hundred feet and of a type approved by the director of public safety. Such equipment shall not be used except when such vehicle is operated in response to an emergency call or is in the immediate pursuit of an actual or suspected violator of the law, in which case the driver of the emergency vehicle shall sound such equipment when it is necessary to warn pedestrians and other drivers of the approach thereof.

(B) Whoever violates this section is guilty of a minor misdemeanor.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

Effective Date: 01-01-2004

**RULE 8. General Rules of Pleading**

**(A) Claims for relief.** A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. If the party seeks more than twenty-five thousand dollars, the party shall so state in the pleading but shall not specify in the demand for judgment the amount of recovery sought, unless the claim is based upon an instrument required to be attached pursuant to Civ. R. 10. At any time after the pleading is filed and served, any party from whom monetary recovery is sought may request in writing that the party seeking recovery provide the requesting party a written statement of the amount of recovery sought. Upon motion, the court shall require the party to respond to the request. Relief in the alternative or of several different types may be demanded.

**(B) Defenses; Form of denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make the denials as specific denials or designated averments or paragraphs, or the pleader may generally deny all the averments except the designated averments or paragraphs as the pleader expressly admits; but, when the pleader does intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Civ. R. 11.

**(C) Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

**(D) Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

**(E) Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

**(F) Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

**(G) Pleadings shall not be read or submitted.** Pleadings shall not be read or submitted to the jury, except insofar as a pleading or portion thereof is used in evidence.

**(H) Disclosure of minority or incompetency.** Every pleading or motion made by or on behalf of a minor or an incompetent shall set forth such fact unless the fact of minority or incompetency has been disclosed in a prior pleading or motion in the same action or proceeding.

[Effective: July 1, 1970; amended effective July 1, 1994.]

## **RULE 56. Summary Judgment**

**(A) For party seeking affirmative relief.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

**(B) For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

**(C) Motion and proceedings.** The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(D) Case not fully adjudicated upon motion.** If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(E) Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit

affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

**(F) When affidavits unavailable.** Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

**(G) Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Effective: July 1, 1970; amended effective July 1, 1976; July 1, 1997; July 1, 1999.]

**Staff Note (July 1, 1999 Amendment)**

**Rule 56(C) Motion and proceedings thereon**

The prior rule provided that "transcripts of evidence in the pending case" was one of the items that could be considered in deciding a motion for summary judgment. The 1999 amendment deleted "in the pending case" so that transcripts of evidence from another case can be filed and considered in deciding the motion.

**Staff Note (July 1, 1997 Amendment)**

**Rule 56(A) For party seeking affirmative relief.**

The 1997 amendment to division (A) divided the previous first sentence into two separate sentences for clarity and ease of reading, and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**Rule 56(B) For defending party.**

The 1997 amendment to division (B) added a comma after the "may" in the first sentence and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**Rule 56(C) Motion and proceedings thereon.**

The 1997 amendment to division (C) changed the word "pleading" to "pleadings" and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**Rule 56(E) Form of affidavits; further testimony; defense required.**

The 1997 amendment to division (E) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**Rule 56(F) When affidavits unavailable.**

The 1997 amendment to division (F) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**Rule 56(G) Affidavits made in bad faith.**

The 1997 amendment to division (G) replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.