

IN THE SUPREME COURT OF OHIO

REGINA HARDESTY) CASE NO. _____
)
Plaintiff-Appellee) On Appeal from the Cuyahoga County
) Court of Appeals, Eighth Appellate
vs.) District
)
OFFICER JOSE ALCANTARA) Court of Appeals
) Case No. CA-15-102684
Defendant-Appellant)

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF DEFENDANT-APPELLANT OFFICER JOSE ALCANTARA**

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents several issues of extreme interest and importance to citizens, political subdivisions and law enforcement personnel throughout the entire State of Ohio. A police officer who, during a pursuit of a suspected dangerous felon, operates his police cruiser with due care and diligence and never strikes another vehicle, pedestrian or object, is entitled to immunity under the Political Subdivision Tort Liability Act, Chapter 2744 of the Ohio Revised Code. The officer's immunity should not be forfeited because the fleeing felon crashed and caused injuries to a third party. To hold otherwise would be tantamount to granting a "free pass" to all those criminals who wish to evade capture by fleeing from the police. If liability is to be imposed upon the police officer – and, by extension, to the political subdivision pursuant to Ohio Revised Code §2744.07(A)(1),(2) - then the police officer and political subdivision become the insurers of fleeing motorists. As a result, political subdivisions will be forced to preclude the pursuit of any fleeing motorist – thereby granting criminals a "free pass" to evade capture. This cannot be the public policy of the State of Ohio or the rule of law in a just, orderly and lawful society.

The Political Subdivision Tort Liability Act, Chapter 2744 of the Ohio Revised Code, grants immunity to police officers unless their "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." O.R.C. §2744.03(A)(6)(b). In addition, Ohio Revised Code §2744.07(A)(1) and (2) require that a "political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result

of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.” As such, a political subdivision is financially responsible for a judgment against the municipal employee resulting from wanton or reckless conduct. Therefore, each and every citizen, law enforcement officer, and political subdivision throughout the State of Ohio has great interest in this appeal.

The United States Supreme Court, in Scott v. Harris, 550 U.S. 372, 385-86, 127 S. Ct. 1769, 1778-79, 167 L. Ed. 2d 686 (2007), was presented with the issue of whether an officer used excessive force by ramming a fleeing vehicle off the roadway. The Supreme Court concluded that the officer acted reasonably. In reaching its conclusion, the Supreme Court rejected the argument that the officer should have simply ceased the pursuit and explained:

But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas Scott's action—ramming respondent off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Cf. Brower, 489 U.S., at 594, 109 S.Ct. 1378. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.

Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

Scott v. Harris, 550 U.S. 372, 385-86, 127 S. Ct. 1769, 1778-79, 167 L. Ed. 2d 686 (2007). See also the United States Supreme Court holdings in Plumhoff v. Rickard, 572 U.S. _____, 134 S. Ct. 2012, 188 L.Ed. 2d 1056 (2014); Mullenix v. Luna, 577 U.S. _____, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) recognizing that police pursuits are necessary and that the officers who utilize deadly force against the fleeing suspect are entitled to qualified immunity.

If this scenario seems implausible – consider the testimony of defendant Antoine Howard, the fleeing suspect in this matter. Defendant Howard explained why he refused to pull over after seeing Officer Alcantara's overhead lights and hearing the siren:

They [defendant Howard's passengers] say run, it's rush hour traffic and the chase won't – they can't chase you – they can't go – they can't do a police chase in rush hour traffic.

I was trying to get away from the police officer. I knew – I was told. Well they are not supposed to chase you during rush hour traffic.

Howard Tr. at p. 40, l. 2-5; p. 78, l. 6-9 (R. .

A denial of immunity to Officer Alcantara will cause the exact “perverse” result which the United States Supreme Court was “loath” to do – the imposition of “a rule requiring the

police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger.” It is therefore respectfully requested that this Honorable Court reject such a “perverse” result and to declare, as a matter of law or a *per se* rule, that when a law enforcement officer pursues a fleeing violator and the violator injures a third party during the pursuit, the officer is entitled to immunity against liability to the third party.

STATEMENT OF THE CASE

On March 28, 2012, Plaintiff-Appellee Regina Hardesty suffered serious personal injuries when her vehicle was struck by a vehicle operated by defendant Antoine R. Howard. Prior to the collision, defendant Howard was fleeing from Euclid Police Officer Jose Alcantara – the Appellant herein. Officer Alcantara was attempting to stop defendant Howard after observing traffic violations and discovering the existence of a felony domestic violence warrant.

On August 20, 2013, Appellee filed a Complaint in the Court of Common Pleas for Cuyahoga County naming as defendants Antoine R. Howard, Officer Alcantara and Euclid Police Officer Donna Holden. On January 23, 2014, plaintiff filed a Notice of Voluntary Dismissal of defendant Antoine R. Howard.

On October 10, 2014, Officer Alcantara and Officer Holden filed a Motion For Summary Judgment. On February 11, 2015, the trial court granted the Motion For Summary Judgment as to Officer Holden but denied the Motion For Summary Judgment as to Officer Alcantara. On March 3, 2015, Officer Alcantara filed a timely Notice of Appeal to the Eighth District Court of Appeals.

On November 5, 2015, the Eighth District Court of Appeals affirmed the decision of the trial court.

STATEMENT OF FACTS

On March 28, 2012, shortly before 5:00 p.m., Euclid Police Officer Jose Alcantara and his K9 partner Max were on patrol in a white, marked Euclid Police Department patrol car on Euclid Avenue westbound within the City of Euclid. Officer Alcantara turned northbound from Euclid Avenue onto East 193rd Street. As he made the turn, Officer Alcantara observed a black Cadillac impeding the flow of traffic in violation of Euclid Codified Ordinance §333.04. The black Cadillac was stopped in the roadway and remained there while the occupants were speaking with a male standing outside the vehicle before the male eventually entered the black Cadillac. According to Officer Alcantara, the area of East 193rd Street and Euclid Avenue is well-known to him for drug activity and the conduct of the occupants of the black Cadillac is consistent with that of a drug transaction. See Affidavit of Officer Alcantara, attached as **Exhibit D** to Motion For Summary Judgment of Defendants Officer Jose Alcantara and Officer Holden (R. 27).

After impeding the flow of traffic, the black Cadillac proceeded northbound on East 193rd Street, then turned into the circular driveway of the apartment building located at 19301 Euclid Avenue, and then re-entered East 193rd Street heading southbound. As the Cadillac made its turn into the circular drive, Officer Alcantara observed that the Cadillac was being driven by a young, black male – later determined to be defendant Antoine R. Howard. Officer Alcantara likewise

turned around in the circular driveway and entered East 193rd Street directly behind the black Cadillac. See Affidavit of Officer Alcantara.

At 4:59:12 p.m., while the Cadillac was stopped at the traffic signal at East 193rd Street and Euclid Avenue, Officer Alcantara entered the temporary license plate of the black Cadillac – V131433 - into the mobile data terminal of his police cruiser to conduct a search of LEADS. The LEADS search revealed a warrant for the arrest of Antoine R. Howard for *felony domestic violence*. The LEADS report described Antoine R. Howard as a 28 year old black male. Officer Alcantara observed that the driver of the Cadillac matched the description of Antoine R. Howard – the individual wanted for felony domestic violence. See Affidavit of Officer Alcantara.

Lester Reel, Administrator of LEADS, in his affidavit, confirmed that Officer Alcantara entered temporary license plate V131433 into LEADS at 4:49:12 p.m. on March 28, 2012 and that Officer Alcantara’s LEADS search revealed the warrant for the arrest of Antoine R. Howard for *felony domestic violence*. See Affidavit of Lester Reel (R. 37).

As the Cadillac turned right onto westbound Euclid Avenue, Officer Alcantara activated the overhead lights and siren of his cruiser to conduct a stop of the Cadillac. At 5:02:01 p.m., Officer Alcantara radioed to Euclid Police Dispatch that he was on “Euclid Avenue westbound trying to get a vehicle to stop for me at 191. Victor-131433.” See Affidavit of Officer Alcantara. Defendant Howard testified that after turning right (westbound) onto Euclid Avenue, defendant Howard heard the police cruiser’s siren, looked in his rearview mirror, and saw the police cruiser’s overhead lights were on. Howard Tr. at p. 52-53 (R. 40).

The black Cadillac continued westbound on Euclid Avenue and rolled slowly to a stop near the intersection of East 191st Street where the passenger door of the Cadillac swung open as if its occupants were going to run from the vehicle. However, the Cadillac sped off westbound on Euclid Avenue before any of the occupants could exit the Cadillac. See Affidavit of Officer Alcantara. At 5:02:47 p.m., Officer Alcantara radioed to Euclid Police Dispatch that that the vehicle was “taking off” westbound on Euclid Avenue passing Upper Valley Drive. Defendant Howard fled westbound on Euclid Avenue at speeds between 80 to 100 miles per hour (“mph”). Defendant Howard drove through traffic signals and intersections without slowing. The speed limit on Euclid Avenue is 35 mph. See Affidavit of Officer Alcantara.

At the intersection of Euclid Avenue and Ivanhoe Road/Belvoir Road, the black Cadillac veered left into the oncoming lane of travel and crashed into Appellee Regina Hardesty’s vehicle which was stopped, facing eastbound, in the center turning lane of Euclid Avenue.

Defendant Howard testified at his deposition that, *immediately* prior to Officer Alcantara attempting to pull defendant Howard over on Euclid Avenue, defendant Howard had smoked marijuana laced with “water” which is “the street term for embalming fluid” – “formaldehyde.” See Howard Tr. at p. 16-17; p. 44-45. Defendant Howard testified that he was “incoherent” as a result of smoking the marijuana laced with formaldehyde. Howard Tr. at p. 45-49; p. 67, l. 10-15 (R.40).

As Officer Alcantara pursued the Cadillac, the weather was clear, visibility was excellent and the roadway was dry. Euclid Avenue – between Upper Valley and Ivanhoe/Belvoir – is flat and relatively straight. During the pursuit, Officer Alcantara maintained his position in the

second westbound lane from the curb and never entered the eastbound lanes of traffic. The highest speed Officer Alcantara reached – for a brief instance - was approximately 70 mph. However, Officer Alcantara slowed to approximately thirty-five (35) mph at all traffic signals and intersections and maintained a constant look-out for other vehicles and pedestrians. As he pursued the black Cadillac, the overhead lights and siren of the patrol car were activated. The only time the siren was not activated was while Officer Alcantara radioed to Euclid Police Dispatch. Due to the constant barking from his K9 partner, Officer Alcantara toggled the siren off while he communicated with Dispatch so that his radio communications could be heard by Euclid Police Dispatchers. When not communicating to Dispatch, Officer Alcantara’s siren was activated. See Affidavit of Officer Alcantara.

It is important to note that Officer Alcantara did not collide with Appellee’s vehicle. Nor did Officer Alcantara collide with, ram, or strike defendant Howard’s vehicle or otherwise push defendant Howard’s vehicle into plaintiff’s vehicle. In fact, Officer Alcantara did not strike any vehicle, pedestrian or object. During the entire pursuit, Officer Alcantara maintained control of his patrol car and acted with due care for the safety of others. See Affidavit of Officer Alcantara.

It is also important to note that the entire pursuit lasted less than 59 seconds and less than 1.2 miles. Officer Alcantara initially radioed to Euclid Police Dispatch at 5:02:47 p.m. that that the black Cadillac was “taking off” westbound on Euclid Avenue passing Upper Valley Drive. At 5:03:46 p.m., Officer Alcantara radioed that the Cadillac had crashed at the intersection of Euclid Avenue and Ivanhoe/Belvoir. Therefore, from the point defendant Howard began to flee to the point defendant Howard crashed into plaintiff’s vehicle – a total of less than 59

SECONDS had passed and defendant Howard had travelled a DISTANCE OF 1.2 MILES.

See Affidavit of Officer Alcantara.

Finally, defendant Howard testified:

Q: Let me ask you this: If you had brought your vehicle to a stop at 191st and Euclid, this crash never would have happened, right?

A: Correct.

Q: At some point in time during your travel down Euclid Avenue you could have pulled over at any time, right?

A: Sure I could. You know, yeah, could have.

Howard Tr. at p. 40, l. 7-10; p. 58, l. 21-24; p. 59, l. 1 (R.40).

Defendant Howard then explained why he did not pull over after seeing Officer Alcantara's overhead lights and hearing the siren:

They [defendant Howard's passengers] say run, it's rush hour traffic and the chase won't – they can't chase you – they can't go – they can't do a police chase in rush hour traffic.

I was trying to get away from the police officer. I knew – I was told. Well they are not supposed to chase you during rush hour traffic.

Howard Tr. at p. 40, l. 2-5; p. 78, l. 6-9.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Appellant's Proposition of Law No. I

WHEN A LAW ENFORCEMENT OFFICER PURSUES A FLEEING VIOLATOR AND THE VIOLATOR INJURES A THIRD PARTY DURING THE PURSUIT, AS A MATTER OF LAW, THE OFFICER'S CONDUCT IS NOT WANTON OR RECKLESS AND THE OFFICER IS ENTITLED TO THE IMMUNITY PROVIDED BY OHIO REVISED CODE §2744.03(A)(6)

It is respectfully requested that this Honorable Court declare, as a matter of law or a *per se* rule, that when a law enforcement officer pursues a fleeing violator and the violator injures a third party during the pursuit, the officer is entitled to immunity against liability to the third party.

It has been held that it is the duty of law enforcement officials who observe reckless motorists to apprehend those motorists who make the highways dangerous to others. Lewis v. Bland, 75 Ohio App. 3d 453, 456 (Ohio Ct. App., Summit County 1991); jurisdictional motion overruled, Lewis v. Bland (1991), 62 Ohio St.3d 1478; motion for rehearing denied, Lewis v. Bland (1991), 63 Ohio St.3d 1407. Likewise, an officer is duty-bound to apprehend suspects for whom arrest warrants have been issued.

The Ninth District Court of Appeals in Lewis further held that:

When a law enforcement officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the officer's pursuit is ***not*** the proximate cause of those injuries unless the circumstances indicate extreme or outrageous conduct by the officer, ***as the possibility that the violator will injure a third party is too remote to create liability until the officer's conduct becomes extreme.***

Id. at 456. While couched in terms of proximate cause, the decision in Lewis recognizes that where an officer pursues a fleeing violator, "***the possibility that the violator will injure a third***

party is too remote to create liability [to the pursuing officer]". It necessarily follows that when a law enforcement officer, during a pursuit of a suspected dangerous felon, operates his police cruiser with due care and diligence and never strikes another vehicle, pedestrian or object, and the fleeing violator injures a third party during the pursuit, the officer's conduct is not wanton or reckless and the officer is entitled to immunity pursuant to Ohio Revised Code §2744.03(A)(6).

The Second District Court of Appeals in Argabrite v. Neer (Jan. 16, 2015), 2015-Ohio-125, recently stated that the "law of Ohio" is that set forth in Lewis v. Bland and Whitfield v. Dayton (Jun. 9, 2006), Montgomery App. No. 21072, 2006-Ohio-2917, jurisdictional motion overruled, Whitfield v. Dayton (Oct. 18, 2006), 111 Ohio St.3d 1433, 2006-Ohio-5351. The Argabrite Court held that:

We adhered to this [Lewis v. Bland no proximate cause] holding in Whitfield because we recognized it as "established law" in Ohio. Whitfield, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 59. "Ohio appellate districts, including our own," we said, "* * * apply the 'no proximate cause' holding of Lewis to cases where pursuits end in injury to innocent third parties or to occupants of the pursued vehicle without direct contact with a police vehicle." Id. at ¶ 57, citing Jackson v. Poland Twp., 7th Dist. Mahoning, 1999-Ohio-998, 1999 WL 783959 (1999); Pylypiv v. Parma, 8th Dist. Cuyahoga No. 85995, 2005-Ohio-6364; Shalkhauser v. Medina, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129 (9th Dist.); Heard v. Toledo, 6th Dist. Lucas No. L-03-1032, 2003-Ohio-5191, ¶ 12 (rejecting an argument that Lewis is "outdated, contrary to sound public policy and should no longer govern Ohio cases"); and Sutterlin v. Barnard, 2d Dist. Montgomery No. 13201, 1992 Ohio App. LEXIS 5170, 1992 WL 274641 (Oct. 6, 1992) (a previous case in which this district followed Lewis's approach).

The "no proximate cause" rule is still the established law in this state. Since Whitfield, no Ohio court has questioned the rule, and at least one has rejected an argument not to follow it, see Perry v. Liberty Twp., 11th Dist. Trumbull, 2013-Ohio-741, ¶ 18-21. We are not convinced that this is the case in which to reconsider the rule.

Argabrite at ¶5, ¶7. Again, while couched in an analysis of proximate cause, Argabrite stands for the proposition that when a law enforcement officer pursues a fleeing violator and the violator injures a third party during the pursuit, the officer's conduct is not wanton or reckless and the officer is entitled to immunity pursuant to Ohio Revised Code §2744.03(A)(6).

Here, Officer Alcantara did not collide with Appellee's vehicle. Nor did Officer Alcantara collide with, ram, or strike defendant Howard's vehicle or otherwise push defendant Howard's vehicle into plaintiff's vehicle. In fact, Officer Alcantara did not strike any vehicle, pedestrian or object. During the entire pursuit, Officer Alcantara maintained control of his patrol car and acted with due care for the safety of others. Despite these facts, the Eighth District Court of Appeals has stripped Officer Alcantara of the immunity to which he is entitled pursuant to Ohio Revised Code §2744.03(A)(6). And, in light of Ohio Revised Code §2744.07, the Eighth District Court of Appeals has likewise stripped the City of Euclid of its immunity.

Appellant's Proposition of Law No. II

WHEN A LAW ENFORCEMENT OFFICER PURSUES A FLEEING VIOLATOR – FOR LESS THAN 59 SECONDS OVER A DISTANCE OF 1.2 MILES, WITH THE POLICE CRUISER'S OVERHEAD LIGHTS AND SIREN ACTIVATED, WITH CLEAR VISIABILITY, ON A DRY, STRAIGHT ROADWAY, WHILE SLOWING AT INTERSECTIONS, WHILE MAINTAINING CONSTANT LOOK-OUT FOR OTHER VEHICLES AND PEDESTRIANS, AND NEVER STRIKES ANOTHER VEHICLE, PEDESTRIAN OR OBJECT, AS A MATTER OF LAW, THE OFFICER'S CONDUCT IS NOT WANTON OR RECKLESS AND THE OFFICER IS ENTITLED TO THE IMMUNITY PROVIDED BY OHIO REVISED CODE §2744.03(A)(6)

In Anderson v. City of Massillon (2012), 134 Ohio St.3d 380, this Court clarified that:

Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm

will result. Hawkins, 50 Ohio St.2d at 117-118, 363 N.E.2d 367; see also Black's Law Dictionary 1613-1614 (8th Ed.2004) (explaining that one acting in a wanton manner is aware of the risk of the conduct but is not trying to avoid it and is indifferent to whether harm results).

Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. Thompson v. McNeill, 53 Ohio St.3d at 104-105, 559 N.E.2d 705, adopting 2 Restatement of the Law 2d, Torts, at 587 (1965); see also Black's Law Dictionary 1298-1299 (8th Ed.2004) (explaining that reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the risk, but the actor does not desire harm).

Anderson at ¶¶33-34.

Officer Alcantara exercised reasonable care and due regard for the safety of the public while also fulfilling his duty to pursue and apprehend defendant Howard – for whom a warrant had been issued for a violent felony offense. The weather was clear, visibility was excellent and the roadway was dry, flat and straight. During the pursuit, the patrol car's lights and siren were activated. Officer Alcantara maintained his position in the second westbound lane from the curb and never entered the eastbound lanes of traffic. Officer Alcantara slowed to approximately 35 mph at all traffic signals and intersections and maintained a constant look-out for other vehicles and pedestrians. Officer Alcantara maintained control of his patrol car and never collided with plaintiff's vehicle or any other vehicle or any person or thing. Clearly, Officer Alcantara acted with reasonable caution and due regard for the safety of the public while also fulfilling his duty to pursue and apprehend a violent felon.

Officer Alcantara did not act with “malicious purpose, in bad faith, or in a wanton or reckless manner.” Therefore, Officer Alcantara is entitled to immunity pursuant to Ohio Revised Code §2744.03(A)(6).

Appellant’s Proposition of Law No. III

WHEN A LAW ENFORCEMENT OFFICER PURSUES A FLEEING VIOLATOR AND THE VIOLATOR INJURES A THIRD PARTY DURING THE PURSUIT, AS A MATTER OF LAW, THE OFFICER’S CONDUCT IS NOT THE PROXIMATE CAUSE OF THE INJURIES TO THE THIRD PARTY AND THE OFFICER IS ENTITLED TO THE IMMUNITY PROVIDED BY OHIO REVISED CODE §2744.03(A)(6)

As stated, the Second District Court of Appeals in Argabrite v. Neer (Jan. 16, 2015), 2015-Ohio-125, recently concluded that the “law of Ohio” is that set forth in Lewis v. Bland and Whitfield v. Dayton (Jun. 9, 2006), Montgomery App. No. 21072, 2006-Ohio-2917, jurisdictional motion overruled, Whitfield v. Dayton (Oct. 18, 2006), 111 Ohio St.3d 1433, 2006-Ohio-5351. The Ninth District Court of Appeals in Lewis further held that:

When a law enforcement officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the officer’s pursuit is not the proximate cause of those injuries unless the circumstances indicate extreme or outrageous conduct by the officer, **as the possibility that the violator will injure a third party is too remote to create liability until the officer’s conduct becomes extreme.**

Id. at 456.

Clearly, the sole and proximate cause of the injuries suffered by Appellee was the conduct of defendant Antoine Howard. The actions of Officer Alcantara had no causal relationship to defendant Howard’s decision to flee or defendant Howard’s crash into Appellee’s vehicle. Officer Alcantara’s conduct was not the proximate cause of Appellee’s injuries.

CONCLUSION

For the reasons set forth above, this case involves matters of public and great general interest and involves a substantial constitutional question.

WHEREFORE, Appellant Officer Jose Alcantara respectfully request that this Court grant jurisdiction and allow this case for full consideration on the merits.

/s/ Patrick J. Gallagher

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Certificate of Service

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102684

REGINA HARDESTY

PLAINTIFF-APPELLEE

vs.

OFFICER JOSE ALCANTARA, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-812523

BEFORE: Boyle, J., Celebrezze, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 5, 2015

A

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Officer Jose Alcantara, appeals the trial court's decision denying his motion for summary judgment based on immunity provided to an employee of a political subdivision under R.C. 2744.03(A)(6)(b) if the employee's actions are not "with malicious purpose, in bad faith, or in a wanton or reckless manner." The trial court found that genuine issues of material fact remain regarding whether Officer Alcantara's actions amounted to wanton or reckless conduct under R.C. 2744.03(A)(6)(b). Officer Alcantara raises one assignment of error for our review:

The trial court erred by denying the motion for summary judgment of Officer Jose Alcantara as Officer Alcantara is entitled to immunity pursuant to R.C. Chapter 2744.

{¶2} Finding no merit to his arguments, we affirm.

A. Procedural History and Factual Background

{¶3} Officer Alcantara is a police officer for the city of Euclid. On March 28, 2012, just before 5:00 p.m., Officer Alcantara was on routine patrol in the area of Euclid Avenue and East 193rd Street. As he turned onto East 193rd Street from Euclid Avenue, he observed a black Cadillac, which he stated in his affidavit was "impeding the flow of traffic in violation of Euclid Codified Ordinance 333.04." Officer Alcantara stated that the black Cadillac "was stopped in the roadway and remained there while the occupants were speaking with a male standing outside the vehicle before the male eventually entered the

black Cadillac.” Officer Alcantara averred in his affidavit that “[t]he conduct of the occupants of the Cadillac is consistent with that of a drug transaction.”

{¶4} After the male who had been standing on the street entered the black Cadillac, Officer Alcantara observed the Cadillac proceed north on East 193rd Street, but then it turned around in a circular driveway, and reentered East 193rd Street heading southbound toward Euclid Avenue. Officer Alcantara also turned around in the same driveway, and was immediately behind the black Cadillac at the traffic light at the corner of Euclid Avenue and East 193rd Street.

{¶5} Officer Alcantara said that when the Cadillac turned around, he was able to see that the driver of the vehicle was “a young, black male.”

{¶6} At 4:59:12 p.m., while directly behind the Cadillac at the traffic light, Officer Alcantara entered the license plate of the vehicle into his mobile data terminal to conduct a search of the Law Enforcement Automated Data System (“LEADS”). The LEADS search revealed that there was an outstanding warrant for the arrest of Antoine Howard for felony domestic violence out of Akron. The LEADS report described Howard as a 28-year-old black male.

{¶7} As soon as the Cadillac turned right onto Euclid Avenue, Officer Alcantara activated his overhead lights and siren of his patrol car to conduct a traffic stop of the black Cadillac for “impeding traffic and to determine whether the driver was Antoine Howard.” At 5:02:01 p.m., Officer Alcantara radioed Euclid police dispatch that he was on “Euclid Avenue westbound trying to get a

vehicle to stop for [him] at 191. Victor-131433.” Officer Alcantara said the Cadillac “rolled slowly to a stop near the intersection of Euclid Avenue and East 191st Street where the passenger door of the Cadillac swung open as if its occupants were going to bail-out and run from the vehicle.” But at that point, the Cadillac “sped off westbound on Euclid Avenue before any of the occupants could exit the Cadillac.”

{¶8} At 5:02:47, Officer Alcantara radioed dispatch that the vehicle was “taking off on me,” and “[w]e are westbound on Euclid — Upper Valley. Traffic’s heavy.” At 5:03:01 p.m., Officer Alcantara stated “I’m still going to lights. Still going westbound.”

{¶9} Officer Alcantara averred that the Cadillac “continued to flee westbound on Euclid Avenue at speeds between 80 to 100” m.p.h., driving “through traffic signals and intersections without slowing.” The speed limit on Euclid Avenue in that area is 35 m.p.h.

{¶10} At 5:03:11 p.m., Officer Alcantara said, “Let Cleveland know and East Cleveland radio. Doing about 80 miles an hour radio. Still westbound. 80 miles an hour.” At 5:03:35 p.m., Officer Alcantara informed dispatch, “Still westbound. Doing about 100 radio. 100 miles an hour. Still westbound. Traffic’s very heavy.” In his deposition, Officer Alcantara stated that when he said 80 and 100 m.p.h., he was giving the Cadillac’s estimated speed, not his own.

{¶11} Officer Alcantara stated that “[b]ecause he slowed at all traffic signals and intersections, the Cadillac quickly pulled away from [his] patrol car.” Officer Alcantara averred that “near the intersection of Euclid Avenue and London Road, [he] observed that the Cadillac was at least a third (1/3) of a mile ahead and was pulling [farther] away from [him].” Officer Alcantara said that he “terminated the pursuit of the Cadillac in the area of Euclid Avenue and London Road.” Officer Alcantara stated that he slowed his patrol car and deactivated his overhead lights and siren. He stated that he lost sight of the Cadillac at that point.

{¶12} Officer Alcantara said that he continued traveling westbound on Euclid Avenue. He stated that as he neared the intersection of Ivanhoe Road and Belvoir Boulevard, he “observed a cloud of black smoke and then saw the Cadillac had crashed into another vehicle.”

{¶13} At 5:03:46 p.m., Officer Alcantara reported to dispatch: “Going right. They just wrecked. They just wrecked radio. Just wrecked. Vehicle just wrecked radio. We’re at Ivanhoe and Belvoir. Ivanhoe Belvoir. They’re bailing. They are bailing out. Bailing out.” In his deposition, Officer Alcantara could not explain why he said “going right,” because he said he “was nowhere near the vehicle when it wrecked.” Also in his deposition, Officer Alcantara denied seeing the wreck, even though he transmitted to dispatch that the vehicle “just wrecked.”

{¶14} The driver of the Cadillac, who was later identified as Antoine Howard, took off running after he crashed. When Officer Alcantara reached the scene of the accident, he saw Howard running away from the scene. Officer Alcantara chased Howard on foot until he caught him. Howard crashed into a vehicle being driven by plaintiff-appellee, Regina Hardesty, who was seriously injured in the accident.

{¶15} Officer Alcantara stated in his affidavit that “the highest speed [he] reached during the pursuit was 70 m.p.h. — for a brief moment.” He also said that the weather was clear, visibility was excellent, and the road was flat and straight. He further averred that he “slowed to approximately 35 m.p.h. at all traffic signals and intersections and maintained a constant look-out for other vehicles and pedestrians during the pursuit.”

{¶16} In his deposition, Officer Alcantara explained that the reason one could not hear his siren in the dispatch recording was because when he transmitted information to dispatch, he “toggled the siren off.” He stated that he did so because his K9 partner was barking in the back seat, and thus, he did not think dispatch would hear what he was saying if the siren was activated. Officer Alcantara stated that he activated his “horn” siren (siren is activated when the horn on steering wheel is pressed), not the continuous siren that is activated from the console of his patrol car.

{¶17} Hardesty stated in her deposition that when her vehicle was struck by the black Cadillac, she did not see a police car or hear any sirens.

{¶18} Officer Alcantara was disciplined for his actions on March 28, 2012. In a letter dated April 5, 2012, Lieutenant (at the time of the pursuit) Robert Payne informed Officer Alcantara that he was receiving an oral reprimand because he "failed to terminate the pursuit." Lieutenant Payne further stated that based on "all the circumstances; the crime, the warrant, the time of day, the location, the vehicular traffic, and the actions of the fleeing vehicle, it would have been prudent and advisable to end the pursuit in a timely fashion. The risk to the public was too high."

{¶19} Lieutenant Payne stated in his deposition that he reviewed the incident within a week of it occurring. As part of his review, he reviewed the police report, talked to the sergeant on the scene and Officer Alcantara. Lieutenant Payne also listened to the dispatch recording, and reviewed police policies and procedures. Lieutenant Payne testified that after reviewing everything, he concluded that Officer Alcantara failed to terminate the pursuit. Lieutenant Payne issued an oral reprimand to Officer Alcantara because he failed to terminate the pursuit.

{¶20} The Euclid police driving committee also reviewed the pursuit, and issued a formal criticism to Officer Alcantara regarding the events of March 28, 2012. After reviewing the facts and Euclid police policies and procedures, it

concluded that "[t]ermination of this pursuit was the better course of action in this pursuit due to traffic conditions."

{¶21} In his deposition, Lieutenant Payne reviewed the relevant Euclid police policies and procedures. Euclid police's "Policy Statement" regarding pursuit states:

Ours is a highly mobile society and this fact, coupled with the desire of a law violator to avoid arrest, may often result in the situations that suggest the necessity of pursuit. Given the obvious hazards of conducting a pursuit, certain basic philosophical positions must be considered: first, human life has immeasurable worth and must be foremost in considering the pursuit circumstances, and second, society's interest in capturing a serious offender may be so great that at times a certain amount of risk may be required to protect the welfare of others.

A pursuit may be initiated whenever a law violator clearly exhibits the intention of avoiding arrest by using a vehicle to flee and elude an officer. This pursuit, however, shall be conducted in a manner consistent with existing state statutes and guidelines established herein.

{¶22} Euclid Police Standard Operating Procedure ("S.O.P.") 08-001-442

states:

Responsibility: A pursuit is a rare occurrence, and one that should not be taken lightly. Officer(s) will initiate or continue a pursuit of a suspect fleeing in a motor vehicle only when justified by the illegal flight of a law violator, and then only when the pursuit will be executed with caution so as not to create extreme or unreasonable danger for either police or the public. Officers and supervisors should constantly evaluate whether it is in the best interests of the community and police to terminate or continue with a pursuit.

Procedure:

I. Determining When to Initiate or Continue Pursuit.

Among the factors that must be considered before pursuing or continuing a pursuit of a suspect fleeing in a motor vehicle are (but not limited to):

A. The seriousness of the violation as known by the officer at the initiation of the pursuit.

Due to the inherent danger of any pursuit, officers will continually evaluate the seriousness of the known violation against the risks of continuing the pursuit.

B. The condition of the roadway surface(s), the weather, and the traffic.

C. Direction of traffic flow.

1. AT NO TIME WILL OFFICERS PURSUE THE WRONG WAY ON A FREEWAY OR ONE WAY STREET.

2. OFFICERS ARE STILL REQUIRED BY THE OHIO REVISED CODE TO "DRIVE WITH DUE REGARD FOR THE SAFETY OF OTHERS."

(Emphasis sic.)

{¶23} Under Section IV of S.O.P. 08-001-442, "Pursuit Driving Guidelines," it states in relevant part: "All police vehicles involved in a pursuit will use emergency lights and sirens throughout the pursuit. Siren should be in continuous operation mode throughout (ORC 4513.21)."

{¶24} Under Section VI of S.O.P. 08-001-442, "Notifying the Dispatcher," further provides, among other things, that "[t]he initiating officers must keep dispatch continually updated regarding the progress of the pursuit."

{¶25} In August 2013, Hardesty filed a personal injury complaint against Officer Alcantara.¹ Hardesty alleged that as a direct and proximate result of Officer Alcantara's "negligent, willful, wanton, reckless, intentional, extreme and/or outrageous high speed chase," the black Cadillac driven by Howard foreseeably continued to speed, passing through intersection after intersection, eventually striking her vehicle and causing her multiple and serious injuries.

{¶26} After discovery was completed, Officer Alcantara moved for summary judgment in October 2014. Hardesty opposed his motion. The trial court denied Officer Alcantara's motion, finding that genuine issues of material fact existed as to whether Officer Alcantara's actions amounted to wanton or reckless conduct under R.C. 2744.03(A)(6)(b). It is from this judgment that Officer Alcantara filed this interlocutory appeal, which is a final appealable order under *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d

¹Hardesty also brought her complaint against Howard and Officer Donna Holden. Hardesty voluntarily dismissed Howard from the case. Officer Holden was on her way to assist Officer Alcantara in his pursuit of Howard; at the time of the crash, she was still two miles away from the scene. The trial court granted Officer Holden's motion for summary judgment. Thus, neither Howard nor Officer Holden are part of this appeal.

878, and R.C. 2744.02(C). In his sole assignment of error, Officer Alcantara argues that the trial court erred when it denied his summary judgment motion.

B. Summary Judgment Standard and Appellate Review

{¶27} Under Civ.R. 56(C), summary judgment is proper if:

- (1) No genuine issue as to any material fact remains to be litigated;
- (2) the moving party is entitled to judgment as a matter of law; and
- (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶28} Appellate review of a lower court's decision on summary judgment is de novo, and thus, we apply the same standard used by the trial court. *McKay v. Cutlip*, 80 Ohio App.3d 487, 491, 609 N.E.2d 1272 (9th Dist.1992). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the

pleadings but instead must point to or submit some evidentiary material that shows a genuine dispute over the material facts exists. *Henkle v. Henkle*, 75 Ohio App.3d 732, 735, 600 N.E.2d 791 (12th Dist.1991).

C. Immunity of Political Subdivision Employees

{¶29} At issue in this appeal is R.C. 2744.03(A)(6). This provision provides in relevant part that an employee of a political subdivision 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.

{¶30} In this case, Officer Alcantara argues that he was acting within the scope of his employment, and thus, R.C. 2744.03(A)(6)(a) does not apply. He further maintains that R.C. 2744.03(A)(6)(c) does not apply because there is no section of the Ohio Revised Code that expressly imposed liability on him. Hardesty does not dispute these claims. Thus, the only real issue is whether Officer Alcantara's actions were "with malicious purpose, in bad faith, or in a

wanton or reckless manner.” We note, however, that there are no issues of fact as to whether Officer Alcantara acted with malicious purpose or in bad faith — the real issue being whether his actions were wanton or reckless.

{¶31} In *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, the Ohio Supreme Court set forth the meaning of the terms wanton and reckless conduct. The Supreme Court held:

Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. (*Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), approved and followed.)

Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.)

Anderson at paragraphs two and three of the syllabus.

{¶32} Officer Alcantara contends that no reasonable factfinder could conclude that he acted “in a wanton or reckless manner.” He argues that there are no material issues of genuine fact as to his conduct. He points to his evidence that he exercised reasonable care for the safety of others by slowing down to 35 m.p.h. through all intersections, watching for pedestrians the entire time. He asserts that he was exercising his call of duty to pursue and apprehend Howard, for whom a felony warrant had been issued. He argues that the fact that the weather was clear and the roads were flat and straight support his

contention that he acted reasonably in pursuing Howard. He further points to his testimony that he activated his lights and siren throughout the pursuit, except for the “brief moments” where he transmitted calls to dispatch. Finally, Officer Alcantara argues that the evidence shows that he only pursued Howard for 0.6 miles, terminating the pursuit once he realized that it was too dangerous to continue. He maintains that this evidence, taken together as a whole, establishes that his actions amounted to negligence at best.

{¶33} Hardesty first argues that Officer Alcantara did not have a “duty to pursue the vehicle” because he was not responding to an “emergency call.” This argument — that this was not an “emergency call” — is not relevant to the issues in this case. Hardesty cites to R.C. 2744.02(B)(1)(a) in support of this argument.² But this provision relates only to situations where a political subdivision is liable under R.C. Chapter 2744; it has nothing to do with an employee’s liability.

²R.C. 2744.02(B)(1)(a) states:

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[.]

{¶34} Hardesty further argues that Officer Alcantara did not have *any duty* to pursue Howard. We disagree with her on this point as well. Officer Alcantara activated his lights and sirens after he discovered that there was a felony arrest warrant associated with the Cadillac's license plate number. He also knew that the warrant was for Antoine Howard, described as a young black male. Officer Alcantara said that he saw that a young black male was driving the Cadillac. He attempted to stop the Cadillac to determine if the driver of the Cadillac was Howard. Officer Alcantara had a duty to apprehend Howard, if he was, in fact, the one driving the Cadillac. When Howard "took off" at a high rate of speed, Officer Alcantara's initial decision to pursue him at that point was reasonable.

{¶35} We further agree with Officer Alcantara that his belief that Howard was impeding traffic was also a valid reason to stop Howard. And even under this scenario (meaning if this was the only reason for which Officer Alcantara had to pull the Cadillac over and Howard fled), Officer Alcantara's initial decision to pursue Howard at that point would have still been reasonable.

{¶36} We do, however, agree with Hardesty's remaining arguments, i.e., that genuine issues of material fact remain regarding whether Officer Alcantara's actions — after he made the initial decision to pursue Howard — were "in a wanton or reckless manner."

{¶37} Although Officer Alcantara testified in his deposition that traffic was light when he initiated the pursuit around East 191st Street, he admitted that traffic soon became very heavy. Indeed, when Officer Alcantara communicated to dispatch at 5:02:47 p.m. that the Cadillac was "taking off" on him, he also stated in the same transmission, "We are westbound on Euclid — Upper Valley. Traffic's heavy." It was right around 5:00 p.m., on a busy road, during rush hour traffic.

{¶38} We also agree with Hardesty that genuine issues of material fact remain as to how fast Officer Alcantara traveled during the pursuit. Officer Alcantara stated that he went as fast as 70 m.p.h., and slowed to 35 m.p.h. through all intersections, looking for traffic and pedestrians. But his communication updates to dispatch raise genuine issues of material fact as to what his actual speed was during the pursuit. Officer Alcantara told dispatch at 5:03:01 p.m., "I'm going to lights. Still going westbound." At 5:03:11 p.m., Officer Alcantara stated, "Doing about 80 miles an hour radio. Still westbound. 80 miles an hour." At 5:03:35 p.m., almost 25 seconds later, "Still westbound. Doing about 100 radio. 100 miles an hour. Still westbound. Traffic's very heavy." At 5:03:46 p.m., Officer Alcantara transmitted to dispatch "Going right. They just wrecked. They just wrecked radio. Just wrecked. Vehicle just wrecked radio. We're at Ivanhoe and Belvoir. Ivanhoe Belvoir. They're bailing. They are bailing out. Bailing out."

{¶39} Officer Alcantara's final radio transmission about the wreck appears to be 11 seconds after his previous one, where he said, "Still westbound. Doing about 100 radio. 100 miles an hour. Still westbound. Traffic's very heavy." But in listening to the dispatch recording, it was actually only three to four seconds between the two communications — meaning from the time the previous call ended and the final call began was only three to four seconds, not 11 seconds. The 11 seconds appears to be from the time the previous call began and the final call began, not the actual time between the two.

{¶40} We further note that in listening to the dispatch recording, Officer Alcantara's voice was in a very excited state at the moment he says, "They just wrecked." It is our view that reasonable minds could differ as to whether Officer Alcantara was nearly one-third of a mile back at the time of the crash because he slowed down through intersections and terminated the pursuit, or whether he actually witnessed the crash because he was traveling at speeds of 80 to 100 m.p.h., and was right behind Howard at the time of the crash because he had not terminated the pursuit.

{¶41} Significantly, Officer Alcantara never communicated to dispatch that he terminated the pursuit. Lieutenant Payne testified in his deposition that Officer Alcantara was given an oral reprimand because — "the truth was he failed to terminate the pursuit."

{¶42} Howard also testified in his deposition that he looked in his rearview mirror late in the chase and Officer Alcantara's police vehicle was right behind him.

{¶43} The final fact that is significant — and undisputed — is that Officer Alcantara did not continuously run his siren; rather, he admittedly toggled it on and off during the pursuit when he transmitted information to dispatch. He stated that he did so because his K9 partner was barking and he was concerned that the dispatcher would not hear what he was saying. While this may be true, it is our view that whether it was reasonable to do so, in light of the fact that traffic was heavy and speeds were very high, raises a genuine issue of material fact. If the factfinder decided that it was not reasonable to do so, it would be another important point to consider in determining whether Officer Alcantara's actions were wanton or reckless.

{¶44} Hardesty argues that the evidence even suggests that Officer Alcantara did not use his siren at all. She points to Howard's testimony in his deposition where he stated that he could not recall hearing a siren. She further points to the fact that when listening to the dispatch recording, there are "no siren sounds bleeding onto the start or end" of the radio transmission. We agree that these discrepancies would be for the factfinder to determine.

{¶45} We further note that the Ohio Supreme Court made clear that "[t]he violation of a statute, ordinance, or department policy enacted for the safety of

the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct.” *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at paragraph five of the syllabus.

{¶46} In this case, it is undisputed that Officer Alcantara violated several department policies, including toggling off his siren when he communicated to dispatch during the pursuit, not informing dispatch regarding the reason for the pursuit, and the fact that he terminated the pursuit (if he did). But most notably was the fact that Officer Alcantara was disciplined under Euclid police standard operating procedures for failing to terminate the pursuit. Thus, these facts would also have to be considered by the factfinder when determining whether Officer Alcantara’s actions were wanton and reckless.

{¶47} Officer Alcantara cites to several cases in support of his argument that he is entitled to immunity. We note, however, that many of these cases (and indeed much of his brief) deal with the issue of proximate cause, not immunity. The issue of proximate cause, however, is not yet ripe for review as we only have jurisdiction to address the issue of immunity in this interlocutory appeal.

{¶48} The cases cited by Officer Alcantara that do address the issues related to immunity are distinguishable from the facts in the instant case. For example, in *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 772 N.E.2d 129 (9th Dist.2002), the police pursued a vehicle at high speeds that eventually resulted

in the vehicle crashing into a third party. The court held that the officer did not act "with malicious purpose, in bad faith, or in a wanton and reckless manner." But significantly, this chase occurred at 1:20 a.m., when there was likely hardly any traffic on the roadways. It did not occur on a busy road during heavy traffic. In *Sutterlin v. Barnard*, 2d Dist. Montgomery No. 13201, 1992 Ohio App. LEXIS 5170 (Oct. 6, 1992), the police officer used his lights and sirens throughout the chase, putting the public on notice that he was pursuing the vehicle. Moreover, the speeds in *Sutterlin* only reached 60 m.p.h., not 80 to 100 m.p.h.

{¶49} Accordingly, we agree with the trial court that genuine issues of material fact remain regarding whether Officer Alcantara's actions were wanton and reckless under R.C. 2744.03(A)(6)(b). If a factfinder determines that his actions were wanton and reckless, then he will not be entitled to immunity under this statute. If the factfinder determines that his actions were not wanton and reckless, he will be afforded the protection of immunity.

{¶50} Officer Alcantara's sole assignment of error is overruled.

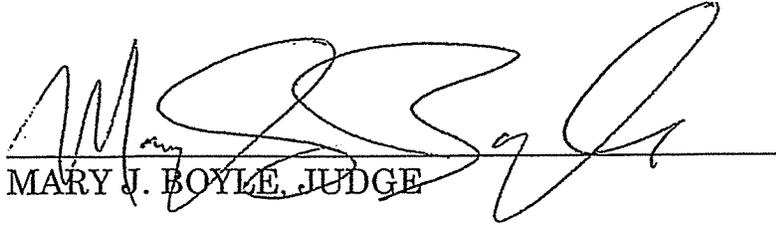
{¶51} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


MARY J. BOYLE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
PATRICIA ANN BLACKMON, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV 05 2015

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

REGINA HARDESTY
Plaintiff

Case No: CV-13-812523

Judge: PAMELA A BARKER

OFFICER JOSE ALCATARA ET AL
Defendant

JOURNAL ENTRY

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS OFFICER JOSE ALCANTARA AND OFFICER HOLDEN, FILED 10/10/2014, IS GRANTED AND DENIED IN PART. GRANTED AS TO OFFICER HOLDEN, DENIED AS TO OFFICER ALCANTARA. SEPARATE OPINION AND JOURNAL ENTRY TO BE DOCKETED. THIS CASE IS CLOSED AS TO OFFICER HOLDEN. THE CLERK OF COURT'S IS ORDERED TO UPDATE THE DOCKET AS TO THE CHANGE OF PARTY STATUS.

Pamela A. Barker

Judge Signature

02/11/2015

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02/11/2015

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KELLEY A. SWEENEY, CLERK



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

REGINA HARDESTY

Plaintiff,

v.

OFFICER JOSE ALCANTARA, et al.

Defendants

CASE NO. CV-13-812523

2015 FEB 11 A 10:46

CLERK OF COURTS
CUYAHOGA COUNTY
OPINION AND JOURNAL ENTRY ON
MOTION FOR SUMMARY JUDGMENT
OF DEFENDANT OFFICER JOSE ALCANTARA
AND OFFICER HOLDEN

This matter is before the Court on the Motion For Summary Judgment Of Defendants Officer Jose Alcantara And Officer Holden filed on 10/10/2014 (hereinafter "Defendants' Motion"), Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment filed on December 10, 2015 (hereinafter "Plaintiff's Memorandum"), Reply Of Defendants Officer Jose Alcantara And Officer Holden To Plaintiff's Opposition To Defendants' Motion For Summary Judgment filed on 1/20/2015 (hereinafter, "Defendants' Reply"), and Plaintiff's Surreply filed on 2/10/2015.

The Evidence

The evidence submitted demonstrates the following relevant or material facts. On March 28, 2012, while on patrol in a marked Euclid Police Department cruiser, Defendant Officer Alcantara (hereinafter "Officer Alcantara"), observed a Cadillac stopped in the roadway on E. 193rd Street and remain there while occupants spoke with a male standing outside of the Cadillac, and then the male eventually get into the Cadillac.¹ Officer Alcantara observed the Cadillac proceed northbound on E. 193rd Street, turn around in a circular driveway, and then

¹ Affidavit of Officer Alcantara, attached as Exhibit "D" to Defendants' Motion, at ¶¶6, 8.

head southbound on E. 193rd Street.² As the Cadillac made the turn into the circular driveway, Officer Alcantara observed that the driver of the Cadillac was a young, black male.³ Officer Alcantara followed the Cadillac and while both were stopped at a traffic light on E. 193rd Street at Euclid Avenue, at 4:59:12 p.m., Officer Alcantara entered the temporary license plate of the Cadillac into LEADS, which showed an arrest warrant for felony domestic violence and interference with custody out of Akron for a black male, Antoine R. Howard, dob 10/22/1983.⁴

As the Cadillac turned right onto Euclid Avenue, Officer Alcantara activated the overhead lights and siren on his cruiser to conduct a stop of the Cadillac for impeding traffic and to determine whether the driver was Antoine R. Howard.⁵ At 5:02:01 p.m., Officer Alcantara radioed to Euclid Police Dispatch; at 5:02:16 p.m., the dispatcher said "go ahead"; and at 5:02:21, Officer Alcantara relayed that he was on "Euclid Avenue westbound. Trying to get a vehicle to stop for me. At 191. Victor-131433."⁶ Officer Alcantara observed the Cadillac

² *Id.* at ¶9.

³ *Id.*

⁴ *Id.* at ¶¶10, 11; Exhibit "F1" (filed under Seal to support Defendants' Motion).

⁵ Exhibit "D" at ¶12. Plaintiff submits that, with regard to the event of a person speaking with the Cadillac's occupants and getting into the Cadillac, the Euclid Police Report completed by Officer Alcantara, and his deposition testimony and Affidavit testimony – to include the Affidavit testimony that the conduct of the Cadillac's occupants was consistent with a drug transaction – demonstrate different versions or inconsistencies. Further, Plaintiff cites to the deposition testimonies of Antoine Howard and Officer Alcantara to cast doubt on Officer Alcantara's opinion that the Cadillac was impeding traffic – one reason, but not the sole reason – which Officer Alcantara set forth in his Affidavit formed the basis for his decision to initiate a stop of the Cadillac. However, the relevant or material fact that remains undisputed is that Officer Alcantara decided to stop the Cadillac to determine if the young, black male that Officer Alcantara had seen driving it was Antoine Howard who, according to the LEADS report linking the license plate to him, had an outstanding arrest warrant for felony domestic violence and interference with custody. If Officer Alcantara was going to attempt a stop of the Cadillac for the sole reason that he believed it was impeding traffic, he could have done so, and arguably would have done so, at the very place and time when he initially pulled his patrol car directly behind it. At his deposition, Officer Alcantara admitted that there was not any indication that the man driving the black Cadillac was dangerous. Alcantara Deposition, page 45, lines 1-16. Yet, the LEADS report does indicate that Antoine Howard, has "violent tendencies". Exhibit "F-1".

⁶ Affidavit of Officer Alcantara, Exhibit "D" at ¶13. Affidavit of Kelly Parton, Supervisor of the 911/Dispatch Center and Records Division, attached to Defendants' Motion as Exhibit "G".

continue westbound on Euclid Avenue and roll slowly to a stop near the intersection of East 191st Street, the passenger door swing open,⁷ and then the Cadillac speed off again.⁸

At 5:02:47 p.m., Officer Alcantara radioed to Euclid Police Dispatch and stated, "It's taking off on me radio. Taking off on me. We are westbound on Euclid – Upper Valley. Traffic's heavy."⁹ According to Officer Alcantara, the Cadillac continued westbound on Euclid Avenue, in a 35 mph speed zone, at speeds between 80 and 100 mph and traveled through traffic signals and intersections without slowing.¹⁰ At 5:03:01 p.m. Officer Alcantara radioed Dispatch and stated in relevant part "I'm going to lights. Still going westbound."¹¹ At 5:03:11 p.m. Officer Alcantara radioed Dispatch and stated in relevant part "Doing about 80 miles an hour radio," and at 5:03:35, he communicated to Dispatch "Doing about a 100 radio. 100 miles an hours. Still westbound. Traffic's very heavy."¹² At 5:03:46 p.m. Officer Alcantara communicated to

⁷ At page 7 of Plaintiff's Memorandum, Plaintiff points out that Antoine Howard testified at pages 17-18 of his deposition that although he stopped the Cadillac briefly, the "door never opened". The Court acknowledges that the evidence submitted demonstrates that this is a disputed issue of fact, but whether or not the car door opened is not material or relevant to the issues presented.

⁸ Exhibit "D" at ¶13.

⁹ Exhibit "D", at ¶14. Exhibit "G". Plaintiff points out that at his deposition Officer Alcantara testified that at the start of the chase, there was "[n]ot a lot of traffic, no, not at all," or inconsistently with his representation to Dispatch, thereby undermining his credibility and creating an issue of fact as to whether traffic was or was not heavy. Alcantara Deposition, page 56, lines 12-13.

¹⁰ Exhibit "D", at ¶14. *See, also*, Exhibit "G" or the Dispatch communication log which demonstrates that Officer Alcantara was reporting the speed of the Cadillac at 80 mph and then 100 mph. This Court interprets the Dispatch tape as evidencing that Officer Alcantara was reporting the speed of the Cadillac, not the speed of his police cruiser, which reported speeds are consistent with those set forth in his Affidavit. Officer Alcantara specifically testified at his deposition that he was describing the speed of the Cadillac, and not his speed, when he reported speeds of 80 mph and 100 mph to Dispatch. (Alcantara Deposition, page 60, lines 12-20.) Thus, Plaintiff's argument at page 9 of Plaintiff's Memorandum that the Dispatch communications by Officer Alcantara create a genuine issue of material fact as to the speed of Officer Alcantara's cruiser is not supported by the evidence. Moreover, Officer Alcantara has acknowledged traveling as much as 70 mph in a 35 mph zone or at twice the speed limit. (Alcantara Deposition, page 60, lines 7-11.) And, coupled with his testimony that the Cadillac was traveling as much as 80 to 100 mph, in effect, Officer Alcantara acknowledged or does not dispute that this was, at least in part, a high speed chase.

¹¹ Exhibit "G"

¹² *Id.*

Dispatch in relevant part, "Going right. They just wrecked."¹³ The crash between the Cadillac and Plaintiff's vehicle occurred at the intersection of Euclid Avenue and Ivanhoe/Belvoir.¹⁴

Accordingly, from the point in time when Officer Alcantara radioed that the Cadillac was "taking off" until the point in time he radioed that there was a "wreck[]", 59 seconds elapsed, and according to Officer Alcantara, the Cadillac had traveled 1.2 miles.¹⁵ However, according to his Affidavit testimony, Officer Alcantara terminated the pursuit near the intersection of Euclid Avenue and London Road, a distance of .6 miles from the start of the pursuit, and therefore, his pursuit of the Cadillac actually lasted less than 59 seconds.¹⁶

According to Plaintiff's testimony, just before the wreck she was on Euclid Avenue intending to make a left turn onto Ivanhoe and noticed a black car "coming so fast", but at that point she was not aware of any police vehicles in the area, meaning she did not see any police cars or overhead lights of a police car, and she did not hear any sirens.¹⁷

Although Officer Alcantara testified that he terminated the pursuit, he admitted that he did not notify Dispatch that he had terminated the pursuit at about Euclid Avenue and London Road.¹⁸ Indeed, at one point in his deposition, Antoine Howard testified that he looked in his rear view mirror "way past London Avenue" and Officer Alcantara was "right behind me."¹⁹ Moreover, Officer Alcantara received an oral reprimand letter from Lieutenant Robert Payne

¹³ *Id.*

¹⁴ *Id.* Exhibit "D" at ¶19.

¹⁵ Exhibit "D" at ¶21. In the Euclid Police Department Vehicle Pursuit Form, marked and identified as Plaintiff's Exhibit 6 at Officer Alcantara's deposition, the length of the pursuit is noted as being 1.3 miles.

¹⁶ *Id.* at ¶¶17, 22, 23.

¹⁷ Deposition of Regina Hardesty, at page 14, lines 19-25, page 15, lines 1-25, page 16, lines 1-2, 8-12, 23-25, and page 17, lines 1-8.

¹⁸ *Id.* at ¶24. Exhibit "G" attached to Defendants' Motion. Alcantara Deposition, at page 61, line 19, page 62, line 15.

¹⁹ Howard Deposition, at page 18-21, and Exhibit "1" marked and identified at Howard's deposition.

because he failed to terminate the pursuit.²⁰ Also, a "Review and Critique of Pursuit" was prepared and reads in relevant part: "*Termination of this pursuit was the better course of action in this pursuit due to the traffic conditions.*"²¹ Thus, the evidence presented demonstrates an issue of fact with regard to whether or not Officer Alcantara had terminated the pursuit prior to the crash.

According to Officer Alcantara, as he followed, and where he followed the Cadillac, the weather was clear, visibility was excellent, the roadway was dry and the roadway is flat and relatively straight.²² During the pursuit, he maintained his position in the second westbound lane from the curb, the highest speed his patrol car reached for a brief moment was 70 mph, and he slowed to approximately 35 mph at all traffic signals and intersections and maintained a constant look-out for other vehicles and pedestrians during the pursuit.²³ His patrol car did not collide with Plaintiff's vehicle.²⁴

According to Officer Alcantara, during the entire pursuit the lights of the patrol car were activated, and the siren was activated except when he was communicating with Dispatch "[d]ue to the constant barking of [his] K9 partner Max," and so that his "radio communications could

²⁰ Exhibit "A" attached to Alcantara deposition. The reprimand letter reads in relevant part: "Given all the circumstances, the crime, the warrant, the time of day, the location, the vehicular traffic, and the actions of the fleeing vehicle, it would have been **prudent and advisable** to end the pursuit in a timely fashion." (Emphasis added by bold print.) The words "prudent" and "advisable" connote reasonable, i.e., what a reasonably prudent person would do, a term used or applied in the context of evaluating negligence, not reckless and wanton misconduct.

²¹ Exhibit "4" attached to Alcantara Deposition

²² *Id.* at ¶16.

²³ *Id.* at ¶16. At page 10 of Plaintiff's Memorandum, Plaintiff argues that since Officer Alcantara reported, and Antoine Howard admitted, that Antoine Howard drove through every red light as he fled, it necessarily follows then, that "Alcantara had no choice but to similarly run red lights and weave in and out of the heavy traffic and pedestrians." This evidence submitted by Plaintiff to support a possible inference is insufficient to overcome a summary judgment motion. See *Leach v. City of Toledo*, 6th Dist. No. L-98-1227, 1999 Ohio App. LEXIS 94, at *6. This Court cannot infer from this evidence that Officer Alcantara was traveling as fast as Antoine Howard or that he was failing to slow at intersections/red lights.

²⁴ *Id.* at ¶20. Deposition of Plaintiff Regina Hardesty, at page 14, lines 19-25.

be heard by the Dispatchers."²⁵ During his deposition, Antoine Howard testified that after turning right onto Euclid he heard the cruiser's siren and looked in his rear view mirror and saw that the cruiser's overhead lights were on.²⁶ According to Antoine Howard, as he fled down Euclid Avenue he looked in his rear-view mirror just once and believed that the overhead lights of the cruiser were on but could not recall or be sure if the siren was on.²⁷ Thus, there is no dispute that Officer Alcantara did not have his siren activated during the entire pursuit.

Euclid Police Standard Operating Procedure 08-001-442 reads that pursuits may be initiated "when the pursuit will be executed with caution so as not to create extreme or unreasonable danger for either the police or the public."²⁸ According to Lieutenant Payne, Officer Alcantara had not attended a mandatory driving in-service in 2011, which included training for vehicle pursuits.²⁹

Officer Alcantara did not personally alert Dispatch that there was a felony warrant associated with the Cadillac that he was pursuing, and when asked why, he testified in his deposition that he did not have a chance to do so.³⁰ The Dispatch tape demonstrates that 15 seconds elapsed from the point in time when Officer Alcantara first radioed Dispatch until the point in time when Dispatch acknowledged his communication with "Go ahead."³¹ Within a

²⁵ *Id.* at ¶15. Pursuant to Euclid Police Standard Operating Procedure 08-001-442 at Section IV.B., "[a]ll police vehicles involved in a pursuit will use Emergency lights and sirens throughout the pursuit" and "[s]irens should be in continuous operation mode throughout. (ORC 4513.21)."

²⁶ Howard deposition, at pages 52-53.

²⁷ *Id.* at page 49, lines 9-13, page 58, lines 3-19, Pages 23-24.

²⁸ Alcantara Deposition, Exhibit "5". Assessing "extreme or unreasonable danger" in initiating a pursuit requires an officer to consider several factors including, but not limited to: (A) The seriousness of the violation as known by the officer at the initiation of the pursuit. Due to inherent danger of any pursuit, officers will continually evaluate the seriousness of the known violation against the risks of continuing the pursuit. (B) The condition of the roadway surface(s) the weather and the traffic. (C) Direction of traffic flow. *Id.* at Section I.

²⁹ Deposition of Lieutenant Payne, at page 16 and Exhibit "7" attached thereto.

³⁰ Exhibit "G". Exhibit "D", at ¶24. Deposition of Officer Alcantara, page 49, lines 2-10.

³¹ Exhibit "G". Exhibit "D", at ¶24.

few seconds Officer Alcantara responded that he was trying to get a vehicle to stop, twenty seconds later "Felony Akron" is heard in the background of the Dispatch tape, and a few seconds after that, Officer Alcantara relays that the car is taking off on him.³² So, Dispatch was aware of a felony warrant associated with the Cadillac before the pursuit was initiated.

Attached to Plaintiff's Memorandum as Exhibit "1" is an Affidavit and attached report prepared by Geoffrey P. Alpert providing his expert opinions that: 1.) Officer Alcantara's actions were willful and wanton; and 2.) the continued pursuit was a proximate cause of the crash.³³

The role of Defendant Officer Donna Holden (hereinafter "Officer Holden") was to proceed from her location in the area of the Euclid Metroparks to provide back-up to Officer Alcantara, but she had managed to travel only as far as just west of the intersection of Euclid Avenue and Dille Road/Highland Road, or approximately two miles from the crash site, when she heard the radio broadcast about the crash.³⁴ It follows, then, that Officer Holden was not involved in the pursuit, and Plaintiff has not asserted facts to support, or argued, otherwise.³⁵ Accordingly, that part of Defendants' Motion asking for summary judgment in favor of Officer Holden is unopposed and **GRANTED**.

Summary Judgment Standard

Civ. R. 56(C) provides in relevant part as follows:

³² *Id.*

³³ Affidavit and Report of Geoffrey P. Alpert, attached as Exhibit "1" to Plaintiff's Memorandum, at page 3, ¶¶12 and 17. However, this evidence does not create any issues of fact, but merely states Plaintiff's position with respect to Defendant Alcantara's culpability, which is a legal conclusion. *Argabrite v. Neer*, 2nd Dist. Montgomery No. 26220, 2015-Ohio-125, at ¶25, citing *Shalkhauser v. City of Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129 (9th Dist. 2002), at ¶41.

³⁴ Affidavit of Officer Holden, Exhibit "E", at ¶¶4, 5, 8. *See, also*, Exhibit "G".

³⁵ *Id.* At page 20 of Plaintiff's Memorandum, Memorandum submits that this Court "should deny Defendants' Motion for Summary Judgment with respect to Alcantara."

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. 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.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: *** (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials

which *directly negate* its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

A summary judgment motion must be overcome by specific and provable facts and not mere allegations; evidence of a possible inference is insufficient. *Leach v. City of Toledo*, 6th Dist. No. L-98-1227, 1999 Ohio App. LEXIS 94, at *6, citing *Jackson v. Alert Fire and Safety Equip. Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027; *Cox v. Commercial Parts & Serv.* (1994), 96 Ohio App.3d 417, 421, 645 N.E.2d 123. As explained by the Court in *Leach, supra* at *6-7:

"The key to the grant of a summary judgment motion is that there must be no genuine issue as to a *material* fact. Material facts are determined by substantive law. Only disputes over facts that might affect the outcome of a suit under governing law will properly preclude the grant of a motion for summary judgment. Irrelevant and unnecessary factual disputes will not be counted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 91 L. Ed. 2d 202, 106 S. Ct. 2505; *Perez v. Scripps-Howard Broadcasting* (1988), 35 Ohio St.3d 215, 520 N.E.2d 198.

The Law as applied to the undisputed material facts

Defendants argue that Officer Alcantara had a duty to pursue Antoine Howard. Plaintiff responds by asserting that an "emergency call" to duty, as that term is used in R.C. 2744.02(B)(1)(a)³⁶, only arises in "inherently dangerous situations" and since no such situation existed at the time Officer Alcantara decided to pursue Howard, he had no duty to pursue him. Although technically R.C. 2744.02(B)(1)(a) does not apply in the specific context of determining

³⁶ R.C. 2744.02(B)(1)(a) is applicable in determining, or provides a defense to, a political subdivision's liability, and does not apply to determine whether immunity for a political subdivision's employee police officer is removed.

whether an employee police officer is immune from liability, the statutory definition of “emergency call” and the case law interpreting it, are instructive and support Defendants’ argument that Officer Alcantara had a duty to pursue Howard.

An emergency call is defined in R.C. 2744.01(A) 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.” In *Colbert v. Cleveland* (2003), 99 Ohio St.3d 215, 790 N.E.2d 781, 2003 Ohio 3319, the Ohio Supreme Court held, at the syllabus that “[a]s defined in R.C. 2744.01(A), ‘emergency call’ involves a situation to which a response by a peace officer is required by the officer’s professional obligation.” As noted therein by the Ohio Supreme Court, the situation need not be inherently dangerous to demand a response by the officer.³⁷ It is the urgent call to duty, not the degree of actual danger, which triggers immunity under R.C. 2744.02(B)(1)(a).³⁸ The issue of whether an emergency call situation existed may be determined by summary judgment or as a matter of law where triable questions of fact are not present.³⁹

Plaintiff argues that Officer Alcantara was not responding to an “emergency call” when he attempted to stop the Cadillac for a traffic violation of impeding traffic. This Court’s response is three-fold. First, Officer Alcantara did not attempt to stop the Cadillac just for impeding traffic. It is undisputed that he attempted to stop it to determine if Antoine Harold, who Officer Alcantara knew at that time had an outstanding felony warrant, was the driver of the Cadillac. Second, law enforcement officers have no duty to refrain from chasing a person

³⁷ *Colbert v. Cleveland, supra*, at ¶14. See, *Heard v. City of Toledo*, 6th Dist. No. L-03-1032, 2003-Ohio-5191 at ¶10.

³⁸ *Leach v. City of Toledo*, 6th Dist. No. L-98-1227, 1999 Ohio App. LEXIS 94, at *10.

³⁹ *Id.*, 75 Ohio App.3d at 457, citing and relying upon *Ladina v. Medina* (Jan. 31, 1990), Medina App. No. 1825, unreported, 1990 WL 7993.

who violates the traffic laws.⁴⁰ Third, it was when Officer Alcantara activated his lights and siren in an attempt to conduct a stop of the Cadillac to determine the identity of the driver that the Cadillac “took off”; at a minimum, then, it was the act of the Cadillac “taking off” that began the call to duty.⁴¹ Accordingly, this Court’s conclusion that Officer Alcantara did have a duty to pursue Howard is one factor to be considered in evaluating whether or not his conduct was with malicious purpose, in bad faith, or in a wanton or reckless manner.

Defendants argue that Officer Alcantara’s conduct was not the proximate cause of Plaintiff’s injuries and that his conduct was not with malicious purpose, in bad faith, or in a wanton or reckless manner so as to remove the immunity provided to him under R.C. 2744.03(A)(6).

Defendants rely upon *Lewis v. Bland* (1991), 75 Ohio App.3d 453, 456, 599 N.E.2d 814 for the following proposition:

When a law enforcement officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the officer’s pursuit is not the proximate cause of those injuries unless the circumstances indicate extreme or outrageous conduct by the officer, as the possibility that the violator will injure a third party is too remote to create liability until the officer’s conduct becomes extreme.

Thus, according to Defendants, Officer Alcantara’s conduct must rise to the level of extreme or outrageous to impose liability upon him for Plaintiff’s injuries and damages. Defendants cite and discuss other Ohio court cases⁴², including the Eighth District Court of

⁴⁰ *Leach v. City of Toledo*, *supra*, at *10, citing *Rahn v. Whitehall* (1989), 62 Ohio App.3d 62, 65-66, 574 N.E.2d 567.

⁴¹ See *Johnson v. Patterson, et al.*, 8th Dist. Cuyahoga No. 66327, 1994 Ohio App. LEXIS 4855, at *6.

⁴² The “extreme and outrageous conduct” standard has been applied by the Courts of Appeals for the Sixth and Second Districts in *Heard v. City of Toledo*, 6th Dist. No. L-03-1032, 2003-Ohio-5191 at ¶¶12, 13; *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2nd Dist.); *Argabrite v. Neer*, 2nd Dist. Montgomery No. 26220, 2015-Ohio-125 at ¶8; and *Sutterlin v. Barnard*, 2nd Dist. Montgomery No. 13201, 1992 Ohio App. LEXIS 5170, at *12.

Appeals decisions in *Johnson v. Patterson*, 8th Dist. Cuyahoga No. 66127, 1994 Ohio App. LEXIS 4855, and *Pylypiv v. Parma*, 8th Dist. Cuyahoga No. 85995, 2005-Ohio-6364, to further support their position. However, a close review of *Lewis*, *Johnson*, and *Pylypiv* reveals that the “extreme and outrageous conduct” standard was not applied in the context of determining the removal of an individual police officer’s immunity, or liability.

In *Lewis* and *Johnson*, it was the political subdivision and not the individual police officers involved in the pursuits that were named as defendants, and the applicable statutory provision that the Ninth and Eighth District Court of Appeals interpreted was R.C. 2744.02(B)(1), specifically the City’s defense to liability set forth under R.C. 2744.02(B)(1)(a), i.e., “the vehicle was operated by a police officer while responding to an emergency call if the operation of the vehicle did not constitute **willful or wanton misconduct**.” (Emphasis added.) And, in applying this provision to the facts, each Court did conclude that the officers’ conduct was not the proximate cause of the crash.⁴³ Also, in *Pylypiv*, the Eighth District Court of Appeals applied the “wanton, reckless manner or in bad faith” standard set forth in R.C. 2744.03(6)(b) to determine the individual police officers’ liability or lack thereof.⁴⁴

⁴³ *Johnson v. Patterson, supra*, at *6.

⁴⁴ *Pylypiv v. City of Parma, supra*, at ¶¶25 and 27. R.C. 2744.03(A)(6) sets forth the immunity of political-subdivision employees and the exceptions thereto:

“(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 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.”

More importantly, however, in *Lewis, Johnson, and Pylypiv* – and indeed, in every case cited and relied upon by Defendants- the police officers had their lights and sirens – and in some cases grill lights, horn and/or loudspeaker - activated at all times during the pursuits.⁴⁵ In *Lowry v. Drennen*, 10th Dist. Franklin No. 92-AP-1173, at *3, the appellate court affirmed a directed verdict in favor of the defendant Columbus police officer, noting that “[f]rom a point in time prior to the ramming on I-70 to the moment of fatal impact, the Columbus police cruiser had its lights and sirens activated.” Indeed, in *Sanchez v. City of Canton*, 5th Dist. No. 1997 CA 00187, at *5-6, the appellate court affirmed the trial court’s decision denying summary judgment in favor of the defendants, City of Canton and police officers, stating in relevant part:

The issue *sub judice* is whether appellate officers were pursuing Mr. Hunter with their lights and sirens activated and if not, was such omission willful or wanton misconduct. *** Under the holding of *Lewis*, the issue of whether the lights and siren were activated is pivotal to causation and liability.

And, in *Brown v. City of Cuyahoga Falls*, 9th Dist. No. 24914, 2010-Ohio-4330, the very appellate court that decided *Lewis v. Bland*, found that reasonable minds could come to more than one conclusion concerning whether Officer Good’s actions were reckless as that term is used in the standard applicable to police officer employees under R.C. 2744.03(A)(6)(b), noting in relevant part, that he did not have his lights or sirens on except briefly to pass a vehicle in the road along the way. *Id.* at ¶15.

See *Anderson v. The City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266 at ¶21; and *Pylypiv v. City of Parma, et al.*, 8th Dist. Cuyahoga No. 85995, 2005-Ohio-6364, at ¶25. Pursuant to R.C. 2744.03(A)(6)(b), immunity for employees of a political subdivision is expressly removed for wanton or reckless conduct and by implication, an employee is immune from liability for negligent acts or omissions. *Anderson v. The City of Massillon, id.*

⁴⁵ *Argabrite v. Neer, supra*, at ¶15; *Perry v. Liberty Township*, 11th Dist. No. 2012-T-0056, 2013-Ohio-741 at ¶¶4-5; *Whitfield v. City of Dayton, supra*, at ¶8; *Pylypiv v. City of Parma, supra* at ¶3; *Heard v. City of Toledo, supra*, at ¶13; *Shalkhauser v. City of Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129, ¶29; *Leach v. City of Toledo, supra*, at *2; *Johnson v. Patterson, supra*, at *2; *Sutterlin v. Barnard*, 2nd Dist. Montgomery No. 13201, at *1; and *Lewis v. Bland, supra*, 75 Ohio App.3d 453, 457. *Lowry v. Drennen*, 10th Dist. Franklin No. 92-AP-1173, *3

According to the Ohio Supreme Court:

"Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. (*Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), approved and followed.)

Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.)

The violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct."⁴⁶

Anderson v. The City of Massillon, *supra*, at paragraphs 3, 4 and 5 of the Syllabus. Indeed, according to the Ohio Supreme Court, willful or wanton misconduct referred to in R.C. 2744.02(B)(1)(b) is not the functional equivalent of recklessness; and these three degrees of care have different meanings and are not interchangeable. *Id.* at ¶13.

For the reasons set forth above, this Court finds that reasonable minds could come to the conclusion that Officer Alcantara's conduct, specifically not using the siren and lights at all times during his pursuit of Howard⁴⁷ - whether traffic was or was not heavy⁴⁸ - was reckless, and therefore Defendant Alcantara's Motion is **DENIED**.

⁴⁶ In *Anderson*, the Ohio Supreme Court explained: "Thus, as we concluded in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008 Ohio 2574, 889 N.E.2d 505, '[w]ithout evidence of an accompanying knowledge that the violations 'will in all probability result in injury,' *Fabrey [v. McDonald Village Police Dept.]*, 70 Ohio St.3d [351] at 356, 639 N.E.2d 31, 1994 Ohio 368 [(1994)] evidence that policies have been violated demonstrates negligence at best."

⁴⁷ And the jury will have to decide whether the length of the pursuit was 1.2 miles and lasted .59 seconds or the length was approximately .6 miles and lasted less than .59 seconds because Officer Alcantara terminated it.

⁴⁸ The issue of whether traffic was heavy or there was not a lot of traffic at the initiation of the suit is another question of fact for the jury that is material to the issue of whether or not Defendant Alcantara's conduct was reckless.

Conclusion

Defendants' Motion for Summary Judgment in favor of Defendant Officer Holden is **GRANTED**; and Defendants' Motion for Summary Judgment in favor of Defendant Officer Alcantara is **DENIED**.

The Clerk of Courts is ordered to update the docket to reflect the change in the remaining parties to this action.

IT IS SO ORDERED.

Pamela A. Barker 2-11-15
Judge Pamela A. Barker Dated

FILED
2015 FEB 11 A 10:46
CLERK OF COURTS
CUYAHOGA COUNTY