[Cite as *Hewitt v. Columbus*, 2009-Ohio-4486.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael Hewitt,	:	
Plaintiff-Appellant,	:	No. 08AP-1087
v.	:	(C.P.C. No. 07CVC-01-1553)
The City of Columbus, Division of Police, and Matthew R. Baughman,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 1, 2009

Lamkin, Van Eman, Trimble, Beals & Dougherty, LLC, and *David A. Beals*, for appellant.

Richard C. Pfeiffer, Jr., City Attorney, and *Bradley Hummel*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Plaintiff-appellant, Michael Hewitt ("Hewitt"), appeals the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendants-appellees, City of Columbus, Division of Police, and Columbus Police Officer Matthew R. Baughman ("Officer Baughman") (collectively, "defendants"), on Hewitt's claims arising

out of his automobile collision with a police cruiser operated by Officer Baughman. For the following reasons, we affirm.

{¶2} On December 17, 2005, at approximately 9:20 p.m., Officer Baughman was operating a police cruiser northbound on South High Street in Columbus when he collided with a vehicle driven by Hewitt, who was attempting to execute a left turn from the driveway of the Rainbow Lanes Bowling Alley onto southbound South High Street. Hewitt initiated this action for injuries he sustained in the collision by filing a complaint in the Franklin County Court of Common Pleas on January 31, 2007. Defendants filed an answer, denying liability, and, on September 12, 2008, they moved for summary judgment, asserting that they are entitled to political subdivision immunity, as codified in R.C. Chapter 2744. The trial court granted defendants' motion and entered summary judgment in their favor on December 2, 2008.

{¶3} Hewitt filed a timely notice of appeal from the trial court's entry of summary judgment, and he now asserts the following three assignments of error:

> **FIRST ASSIGNMENT OF ERROR**
>
> The trial court erred in granting summary judgment when the record presents factual issues as to whether Office[r] Baughman was responding to an "emergency call[."]
>
> **SECOND ASSIGNMENT OF ERROR**
>
> The trial court erred in granting summary judgment when the record presents factual issues as to whether Officer Baughman's actions in traveling in excess of the legal speed limit without sirens or flashers constituted willful or wanton misconduct.

THIRD ASSIGNMENT OF ERROR

> The trial court erred in granting summary judgment in favor of Officer Baughman when the record presents factual issues as to whether his actions in traveling in excess of the legal speed limit without sirens or flashers constituted willful, wanton, or reckless misconduct.

{¶4} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶5} Pursuant to Civ.R. 56(C), 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds

can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶6} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. Id. at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶7} Hewitt's overarching contention in this appeal is that the trial court erred in determining that defendants are entitled to immunity from Hewitt's tort claims under R.C. Chapter 2744, which provides for tort liability and immunity from tort liability for political subdivisions. "Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis." *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶7, citing *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-57, 2000-Ohio-486. "The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function." *Colbert* at ¶7; see R.C. 2744.02(A)(1). The second tier requires the court to determine whether any of the five enumerated exceptions to

immunity in R.C. 2744.02(B) apply and if any of the defenses in that section again protect the political subdivision from liability. Where an exception to immunity under R.C. 2744.02(B) applies, and no defense in that section protects the political subdivision from liability, the third tier of analysis requires the court to determine whether any of the defenses in R.C. 2744.03 apply. *Colbert* at ¶9.

{¶8} The only exception to immunity under R.C. 2744.02(B) relevant to this case states that, "[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). Although that statutory section generally provides for political subdivision liability arising out of an employee's negligent operation of a motor vehicle within the scope of employment, it goes on to list three complete defenses to that liability. As relevant here, 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."

{¶9} Hewitt's first and second assignments of error take issue with the trial court's determination that R.C. 2744.02(B)(1)(a) cloaked defendants with immunity from Hewitt's claims. In this regard, the trial court concluded that Officer Baughman was responding to an emergency call at the time of the collision and that his operation of the police cruiser did not amount to willful or wanton misconduct. By his first assignment of

error, Hewitt maintains that the trial court erred in concluding, as a matter of law, that Officer Baughman was responding to an emergency call at the time of the collision. By his second assignment of error, Hewitt maintains that the trial court erred in concluding, as a matter of law, that Officer Baughman's operation of his police cruiser did not constitute willful or wanton misconduct. We will address Hewitt's two contentions regarding the applicability of R.C. 2744.02(B)(1)(a) in turn.

{¶10} Hewitt first maintains that a genuine issue of material fact exists as to whether Officer Baughman was responding to an emergency call at the time of the collision. R.C. 2744.01(A) defines "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." (Emphasis added.) Generally, the question of whether a particular situation constitutes an emergency call is a question of fact. See *Carter v. Columbus* (Aug. 15, 1996), 10th Dist. No. 96APE01-103, citing *Horton v. Dayton* (1988), 53 Ohio App.3d 68, 72-73. Nevertheless, " '[j]ust because a particular element of a claim or defense involves a question of fact does not automatically preclude the claim or defense from a determination under summary judgment.' " *Butler v. Peck* (May 29, 2001), 10th Dist. No. 00AP-851, quoting *Wagner v. Heavlin* (2000), 136 Ohio App.3d 719, 727. Indeed, 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. *Longley v. Thailing*, 8th Dist. No. 91661, 2009-Ohio-1252, ¶20; *Howe v. Henry Cty. Bd. of Commrs.*, 167 Ohio App.3d 865, 2006-Ohio-3893, ¶13; *Martin v. Ironton*, 4th Dist.

No. 07CA37, 2008-Ohio-2842, citing *Howe*. Thus, in *VanDyke v. Columbus*, 10th Dist. No. 07AP-918, 2008-Ohio-2652, this court affirmed the entry of summary judgment in favor of the city of Columbus and one of its police officers, concluding, in part, that the trial court properly determined that the officer was responding to an emergency call at the time of the underlying collision.

{¶11} The Supreme Court of Ohio addressed the meaning of "emergency call" under R.C. 2744.02(B)(1)(a) in *Colbert*. In that case, after observing what they believed was a drug deal, two Cleveland police officers intended to pursue the suspects in their cruiser, using a parallel route. The officers did not activate the cruiser's overhead lights or siren or call for backup. While pursuing the suspects, the officers were involved in a collision with a vehicle driven by Colbert. On summary judgment, the trial court held that the officers were responding to an emergency call, and the Eighth District Court of Appeals affirmed. The Supreme Court of Ohio likewise affirmed. The Supreme Court noted that the examples listed in the R.C. 2744.01(A) definition of "emergency call" are illustrative and non-exhaustive and held that emergency calls are not limited to inherently dangerous situations. The Supreme Court reasoned, at ¶13, as follows:

> R.C. 2744.01(A) states that "emergency call" means "a *call to duty*." (Emphasis added.) "Duty" is defined as "obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession." Webster's Third New International Dictionary (1986) 705. Thus, a "call to duty" involves a situation to which a response by a peace officer is required by the officer's professional obligation.

The Supreme Court stated that the officers believed they had witnessed a drug deal in a high-drug, high-crime area and that the officers' need to investigate this possible crime was a call to duty. Therefore, the Supreme Court concluded that the officers were responding to an emergency call at the time of the collision.

{¶12} Hewitt contends that reasonable minds, viewing the evidence in his favor, could conclude that Officer Baughman was not responding to an emergency call because he did not report to the dispatcher that he was responding to a call for assistance and because police protocol did not authorize activation of overhead lights or sirens in response to such call. We disagree with Hewitt's contention and conclude that neither of those facts creates a genuine issue as to whether Officer Baughman was responding to an emergency call.

{¶13} On the evening of December 17, 2005, Officer Baughman was on patrol in precinct 13 when he heard, over the police radio, a request for assistance by Officer Sean Noltemayer, who was pursuing a vehicle that fled from an attempted traffic stop. Officer Baughman asked for Officer Noltemayer's location so that he could assist with the apprehension of the fleeing motorist. Officer Noltemayer understood Officer Baughman's request for his location as an indication that Officer Baughman was coming to assist him. Officer Baughman stated that, in responding to Officer Noltemayer's request, he was operating "pursuant to Police Division Patrol S.O.P. Code 10-57, Request for Assistance (Back-up)," and Officer Noltemayer confirmed that statement. Officer Baughman stated that a Code 10-57 required him to respond immediately and

directly without lights and siren. Officer Baughman characterized his response as "an emergency run, a call to duty, to assist another officer."

{¶14} According to Kimberly Jacobs, the Division of Police Training Bureau Commander, the Patrol Standard Operating Procedure for a Code 10-57 requires that the nearest available officer respond immediately and directly. Jacobs stated that, although categorized as a priority two call, a Code 10-57 is considered an emergency call. A Code 10-57 does not require a responding officer to observe the speed limit, but does not permit the officer to activate overhead lights or sirens. Officers are trained to remain off the radio or to make minimal contact when responding to a Code 10-57 so that the officer involved can continue to air evolving information about the subject, location, and circumstances.

{¶15} Officer Baughman and Commander Jacobs' statements that a Code 10-57 is an emergency call, requiring immediate and direct response, is unrebutted. Additionally, the fact that Officer Baughman did not expressly report to the dispatcher that he was responding is irrelevant to the characterization of the Code 10-57 as an emergency call. Moreover, even if that fact were relevant, it would not create a genuine issue of fact as to whether Officer Baughman was responding to an emergency call. Upon hearing Officer Noltemayer's request for assistance, Officer Baughman asked the dispatcher for Officer Noltemayer's location, from which Officer Noltemayer understood that Officer Baughman was en route to assist him. Officer Baughman's limitation of his radio response was consistent with police instructions that officers minimize radio contact when responding to another officer's request to assist with an evolving situation

to allow the initiating officer to update information about the subject, location or circumstances.

{¶16} Lastly, the fact that police protocol prohibits activation of overhead lights and sirens in response to a Code 10-57 and categorizes a Code 10-57 as a priority two call does not create a question of fact as to whether Officer Baughman was responding to an emergency call. This court has previously stated that "R.C. 2744.02 simply does not require that the police officers operate their sirens or overhead lights in order to be deemed to be responding to an 'emergency call,' for purposes of invoking immunity from civil liability." *Moore v. Columbus* (1994), 98 Ohio App.3d 701, 709. Moreover, the priority classification that the police department assigns to types of calls is not determinative of a call's characterization as an emergency call. Other priority two calls include drowning, bomb threat, and person with a gun. There can be no doubt that those calls, although classified as priority two, would constitute emergency calls.

{¶17} Based on the unrebutted affidavit testimony, we conclude that, in responding to the Code 10-57 initiated by Officer Noltemayer, Officer Baughman was involved in a situation to which his professional obligation required a response and that Officer Baughman was responding to an "emergency call" at the time of the collision. Accordingly, we overrule Hewitt's first assignment of error.

{¶18} Because immunity under R.C. 2744.02(B)(1)(a) also requires that Officer Baughman's operation of his cruiser did not constitute willful or wanton misconduct, we must now examine the nature of Officer Baughman's conduct, which is the subject of Hewitt's second assignment of error. Hewitt maintains that genuine issues of material

fact remain as to whether Officer Baughman's conduct, specifically in exceeding the speed limit without activating the cruiser's overhead lights and siren, was willful or wanton.

{¶19} "The term 'willful and wanton misconduct' connotes behavior demonstrating a deliberate or reckless disregard for the safety of others." *Moore* at 708. This court has defined willful misconduct to mean conduct involving " 'the intent, purpose, or design to injure.' " *Robertson v. Dept. of Public Safety*, 10th Dist. No. 06AP-1064, 2007-Ohio-5080, ¶14, quoting *Byrd v. Kirby*, 10th Dist. No. 04AP-451, 2005-Ohio-1261. "Wanton misconduct is the failure to exercise any care toward one to whom a duty of care is owed under circumstances in which there is a great probability that harm will result and the tortfeasor knows of that probability." *Robertson* at ¶18, citing *Hunter v. Columbus* (2000), 139 Ohio App.3d 962, 969. "A wanton act is an act done in reckless disregard of the rights of others, which reflects a reckless indifference on the consequences to the life, limb, health, reputation, or property of others." *Byrd* at ¶23, citing *State v. Earlenbaugh* (1985), 18 Ohio St.3d 19, 21. " '[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury." *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97.

{¶20} Hewitt argues that the evidence before the trial court reveals a genuine issue of material fact as to whether Officer Baughman's operation of his police cruiser

amounted to willful or wanton misconduct where he was traveling in excess of the speed limit without activating his overhead lights or siren, and where he accelerated and swerved left after noticing Hewitt's vehicle in the roadway. Defendants, on the other hand, maintain that the record contains no evidence from which a trier of fact could conclude that Officer Baughman engaged in willful or wanton misconduct. In support of their opposing contentions, Hewitt and defendants each cite a recent Ohio appellate court decision. Hewitt relies on *Thompson v. Smith*, 178 Ohio App.3d 656, 2008-Ohio-5532, whereas defendants rely on this court's opinion in *VanDyke*. Both cases involve facts similar to those in this case.

{¶21} In *Thompson*, a police officer struck a pedestrian with his police cruiser while responding to a dispatch relating to a possible fight. As here, the officer had not activated the cruiser's overhead lights or siren. Although there was some dispute about the officer's speed at the time of the collision, it was undisputed that the officer was traveling in excess of the speed limit. In that case, the trial court denied the defendants' motion for summary judgment, based on R.C Chapter 2744 immunity, finding that a genuine issue of material fact remained as to whether the officer operated his cruiser in a willful, wanton or reckless manner. After noting the importance of evaluating each case in light of its own circumstances and stating that the characterization of conduct as willful or wanton should not be withheld from the jury where reasonable minds might differ, the Eleventh District Court of Appeals affirmed the denial of summary judgment. With respect to the evidence in that case, the court stated, at ¶44-45, as follows:

> * * * [U]ncontroverted evidence shows that the incident occurred around midnight on a well-lit street, Ms. Thompson failed to use a pedestrian crossing while crossing the street, and Officer Smith did not utilize his emergency lights or sirens en route to a dispatched call. However, conflicting evidence exists as to the speed of Officer Smith's vehicle before it struck Ms. Thompson. While the road had a posted speed limit of 35 m.p.h., Officer Smith testified he was traveling between 35 to 45 m.p.h. The State Highway Patrol's investigation of the incident, however, indicated a speed of at least 38 m.p.h. and probably within a range of 59 m.p.h. to 66 m.p.h.
>
> Furthermore, the record includes an affidavit by plaintiff's expert, Officer Glenn McHenry, who opined that Officer Smith willfully and wantonly operated his vehicle by traveling at an excessive speed without using his emergency equipment.

The court concluded that "the speed at which Officer Smith travelled, coupled with the lack of the use of the emergency lights and sirens, creates a genuine issue of material fact as to whether his conduct was 'willful' or 'wanton' while responding to an emergency call." Id. at ¶46. Of course, as a decision of the Eleventh District Court of Appeals, *Thompson* is not controlling authority for this court. See *State v. Dovangpraseuth*, 10th Dist. No. 05AP-88, 2006-Ohio-1533, ¶36 (stating that another appellate district's decisions, reported or not, are not controlling authority in this district).

{¶22} While Hewitt urges this court to follow the *Thompson* court's analysis, defendants point to this court's treatment of an analogous situation in *VanDyke*. VanDyke, a civilian, was injured when he turned his vehicle from a side street onto West Broad Street in Columbus and was struck by a police cruiser operated by Officer Michael Shannon. At the time, Officer Shannon was responding to a call for assistance

from a fellow officer and was traveling in excess of the speed limit at night, without his overhead lights or siren. This court stated, at ¶11, as follows:

> * * * The city concedes that Officer Shannon was responding at a speed in excess of the speed limit at night without lights and sirens. Broad Street was described in this section as a well-lit six-lane roadway with sparse traffic at the hour. Officer Shannon was proceeding with the right-of-way, and appellant faced a stop sign and concommitment obligation to yield. Given 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. * * * Appellant's own deposition describes his view in all directions as unobstructed by traffic or other features. Given the state of the evidence before the trial court, we cannot say that the trial court erred in concluding that there remain no genuine issue of material fact on the question of whether Officer Shannon was proceeding in response to an emergency call, but was not proceeding in a manner arising to willful or wanton misconduct, and that the city was entitled to immunity pursuant to R.C. 2744 as a matter of law. * * *

Thus, on facts nearly identical to those here, this court concluded that the record did not demonstrate a genuine issue of material fact as to whether the officer's conduct amounted to willful or wanton misconduct. Upon review, we discern no basis for distinguishing *VanDyke* or for reaching a different conclusion here.

{¶23} First, the record is devoid of evidence from which reasonable minds could conclude that Officer Baughman acted with the intent, purpose or design to injure. Accordingly, Officer Baughman did not act willfully, and we consider only whether his operation of the police cruiser amounted to wanton misconduct.

{¶24} Officer Baughman's uncontradicted affidavit and deposition testimony describes the conditions at the time and place of the collision. Although it was dark, South High Street was illuminated by street lights, and visibility was good. The weather was clear, and the five-lane road was in good condition and dry, with light traffic. Officer Baughman described the area as open and free from obstructions. Officer Baughman was proceeding with the right-of-way and driving with his headlights illuminated. Officer Baughman stated that he was traveling between 55 and 60 m.p.h. in a 45 m.p.h. speed zone and characterized that speed as "not excessive" given the road conditions. Hewitt confirmed that he could see in both directions before beginning his left turn and, in fact, saw Officer Baughman's headlights approaching from the south. In his deposition, Hewitt testified that he waited for a single car traveling southbound to pass and saw a single set of headlights (from Officer Baughman's cruiser) traveling northbound while waiting to make his left turn onto South High Street.[1] He mistakenly believed, however, that the northbound headlights were far enough away for him to safely execute his turn.

{¶25} It is undisputed that Officer Baughman was responding to a Code 10-57 call at the time of the collision. A Code 10-57 requires an immediate and direct response, but does not permit an officer's use of a siren or overhead lights. A Code 10-57 does not require observation of the speed limit, but it does not supersede an officer's obligation to give due regard for the safety of other lawful users of the roadway. Thus,

[1] A complete transcript of Hewitt's deposition testimony was not filed with the trial court, although the trial court considered, without objection from any party, the excerpts from that transcript submitted with defendants' reply memorandum in support of their motion for summary judgment.

Officer Baughman's speed and lack of overhead lights and siren were consistent with police department policies.

{¶26} Officer Baughman stated that there was neither enough time nor distance to avoid a collision by braking when Hewitt pulled into the roadway to execute his turn. Officer Baughman nevertheless attempted to avoid the collision or minimize its impact by swerving to the left and accelerating, a maneuver he learned during driver training at the Police Academy. Yvonne Jordan, a Basic Training Officer employed by the Division of Police, confirmed that officers are trained to avoid an imminent right-angle collision or to minimize its impact by swerving and accelerating.

{¶27} Defendants met their burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact as to whether Officer Baughman's operation of his cruiser amounted to willful or wanton misconduct. Therefore, to avoid entry of summary judgment, Hewitt was required to meet the reciprocal burden outlined in Civ.R. 56(E) by setting forth specific facts demonstrating a genuine issue of fact for trial. *Dresher* at 293.

{¶28} In response to defendants' evidence, Hewitt submitted the expert affidavit of John Wiechel, Ph.D., a professional engineer qualified in accident reconstruction. Dr. Wiechel opined that Officer Baughman's cruiser was traveling at 67 m.p.h. at the time of the collision and was traveling at 63 m.p.h. before Officer Baughman accelerated. Dr. Wiechel also opined that the collision would not have occurred had Officer Baughman been traveling at the speed limit and that the collision would have been avoided or minimized had Officer Baughman braked and not swerved to the left. We conclude that

Dr. Wiechel's affidavit does not create a genuine issue of material fact as to whether Officer Baughman's actions amounted to willful and/or wanton misconduct.

{¶29} Aside from Officer Baughman's attempt to evade or minimize the collision by accelerating and swerving, the facts of this case are, for all practical purposes, identical to those in *VanDyke*, in which we concluded that the officer did not act in a wanton manner. The fact that Officer Baughman was exceeding the speed limit without his overhead lights or siren activated does not rise to the level of wanton misconduct, especially where that conduct is expressly permitted or required by police department protocol. Officer Baughman was traveling with the right-of-way, and Hewitt, having seen Officer Baughman's approaching headlights, was not deprived of the opportunity to yield, even if Officer Baughman was proceeding at a speed in excess of the posted limit. Moreover, there is no dispute that, when he believed a collision was inevitable, Officer Baughman's actions complied with training he received as a Columbus police officer. That Officer Baughman's evasive actions did not, in this instance, prove successful does not create a genuine issue of material fact as to whether his conduct was wanton. Where Officer Baughman acted to avoid or minimize the impact of the collision, and did so in a manner consistent with his training as a police officer, we cannot conclude that those actions show a failure to exercise any care whatsoever or a reckless disregard of the rights of others. Nor do Officer Baughman's actions demonstrate a disposition to perversity. Accordingly, the trial court did not err in concluding that Officer Baughman's operation of his police cruiser did not rise to the

level of willful or wanton misconduct, and we overrule Hewitt's second assignment of error.

{¶30} Having overruled Hewitt's first two assignments of error, we conclude that the trial court properly concluded that the city of Columbus was entitled to immunity from Hewitt's claims, pursuant to R.C. 2744.02(B)(1)(a), and properly entered summary judgment in favor of the city.

{¶31} Finally, we turn to Hewitt's third assignment of error, which relates to Officer Baughman's personal immunity under R.C. 2744.03(A)(6). That section provides a presumption that an employee of a political subdivision is immune from liability caused by an act or omission in connection with a governmental or proprietary function, subject to certain exceptions. The exception relevant here is R.C. 2744.03(A)(6)(b), which provides an exception to immunity when "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." Hewitt does not allege that Officer Baughman acted with malicious purpose or in bad faith, but, simply, that he acted in a wanton or reckless manner. Based solely on the Eleventh District's *Thompson* decision, Hewitt argues that a genuine issue of material fact remains regarding whether Officer Baughman acted in a wanton or reckless manner by traveling in excess of the speed limit without his siren or overhead lights activated.

{¶32} 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.

{¶33} Because we have already determined that Officer Baughman did not act in a wanton manner in our discussion of R.C. 2744.02(B)(1)(a) under Hewitt's second assignment of error, we consider whether the evidence demonstrates a genuine issue of material fact as to whether his conduct rose to the level of recklessness. Officer Baughman was responding to an emergency call and was traveling with the right-of-way with his headlights illuminated on an unobstructed, illuminated roadway with sparse traffic. Officer Baughman's speed and lack of overhead lights and sirens was consistent of division of police policies and protocol. This court has previously stated that, "[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." *Byrd* at ¶28. Additionally, Officer Baughman's decision to accelerate and swerve to the left when he believed that he could not avoid a collision by braking, does not create a genuine issue of fact as to whether that conduct rose to the level of recklessness where his actions were consistent with his training as a police officer. The evidence here simply does not demonstrate that Officer Baughman knew or had reason

to know that his actions created an unreasonable risk of physical harm substantially greater than that necessary to make his conduct negligent.

{¶34} Without further reiterating the facts addressed in relation to Hewitt's second assignment of error, we conclude that Officer Baughman's conduct no more satisfies the "wanton or reckless" standard of R.C. 2744.03(A)(6)(b) than it did the "willful or wanton" standard of R.C. 2744.02(B)(1)(a). The evidence does not present a genuine issue of material fact as to whether Officer Baughman's conduct was wanton or reckless, as required to satisfy the relevant exception to the general grant of immunity to employees of a political subdivision. Accordingly, we overrule Hewitt's third assignment of error.

{¶35} For these reasons, and having overruled each of Hewitt's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.