[Cite as *Sparks v. Klempner*, 2011-Ohio-6456.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sylvia L. Sparks et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 11AP-242 (C.P.C. No. 08CVC- 02-2220)
Matthew L. Klempner et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(City of Columbus & Officer P.J. Belmonte,	:	
Defendants-Appellants).	:	

D E C I S I O N

Rendered on December 15, 2011

Hyslop & Hyslop Co., L.P.A., and *Bruce A. Hyslop*, for appellees Sylvia Sparks and Proctor Sparks.

M. Andrew Sway, for appellee Owners Insurance Co.

Richard C. Pfeiffer, Jr., City Attorney, *Lara N.* Baker, City Prosecutor, and *Janet R. Hill*, for appellants.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendants-appellants, the City of Columbus ("City") and Officer P.J. Belmonte ("Belmonte"), appeal a judgment of the Franklin County Court of Common Pleas denying defendants immunity from the claims of plaintiffs-appellees, Sylvia L. Sparks and Proctor C. Sparks. For the following reasons, we reverse that judgment.

{¶2} The City's division of police employs Belmonte as a police officer. On the morning of February 17, 2006, Belmonte was patrolling the west side of the City in a police cruiser. Belmonte noticed a red 1995 Chevrolet Monte Carlo with a smashed rear wing window. To Belmonte, the broken window indicated that the Monte Carlo was possibly stolen, so she ran the automobile's license plate number through the Law Enforcement Automated Data System ("LEADS"). Data from LEADS confirmed that the Monte Carlo had been reported stolen. Belmonte later learned that the driver of the Monte Carlo was Matthew Klempner, who subsequently pled guilty to theft of the automobile.

{¶3} Once LEADS verified her suspicion that the Monte Carlo was stolen, Belmonte aired the automobile's description and direction of travel over the police radio. By that point, Belmonte no longer had the Monte Carlo in sight. She activated her beacons and drove her cruiser in the direction she last saw Klempner driving. Belmonte's cruiser was equipped with a video camera that automatically began recording when she triggered her beacons. The City submitted the video recording of the subsequent events with its motion for summary judgment.

{¶4} When the video starts, Belmonte is driving down an alley. The Monte Carlo is not in sight. Belmonte turns left (north) onto South Davis Avenue. Another police cruiser, driven by Officer James Thomas, is stopped at the next intersection, where South Davis Avenue crosses Hawkes Avenue. Before Belmonte passes Thomas' cruiser, she sees the Monte Carlo to her left, driving westbound on Cherry Alley, which runs parallel to

Hawkes Avenue. Belmonte then deactivates her beacons, turns left (west), and follows the Monte Carlo. In the meantime, Thomas drives his cruiser west on Hawkes Avenue.

{¶5} The Monte Carlo becomes discernable in the video seconds after Belmonte turned to follow it. Neither Klempner nor Belmonte appears to be violating any traffic laws as they travel down Cherry Alley. When the Monte Carlo reaches the T-shaped intersection with West Rich Street, it stops. Belmonte, now within feet of the Monte Carlo, reactivates her beacons. The Monte Carlo hesitates for a few seconds, then turns right (north) onto Hawkes Avenue. Belmonte follows.

{¶6} Once Belmonte completes the right turn, the viewer can see Thomas' cruiser, with its beacons activated, blocking the intersection of West Rich Street and Hawkes Avenue. Klempner evades the cruiser by driving over the curb and turning left (west) onto Hawkes Avenue. At that point, Belmonte activates her siren and also turns left onto Hawkes Avenue. Thomas follows.

{¶7} Once on Hawkes Avenue, Klempner speeds up so that Belmonte is far behind him. Belmonte does not attempt to catch up with the Monte Carlo. At this point, according to Belmonte's later affidavit testimony, she was no longer following Klempner to get him to stop. Instead, she was attempting to keep him in sight so she could air his location and direction of travel to allow other police officers in the area to watch for him.

{¶8} About 20 seconds after turning onto Hawkes Avenue, the Monte Carlo reaches the T-shaped intersection at South Glenwood Avenue. Klempner runs the stop sign at that intersection, and turns left (south) onto South Glenwood Avenue. Klempner's illegal turn causes another motorist to take evasive action to avoid a collision.

{¶9} Now over five seconds behind the Monte Carlo, Belmonte stops at the intersection. After Belmonte turns left (south) onto South Glenwood Avenue, the video shows Officer Gary Mayle's cruiser, with beacons flashing, making a U-turn in the middle of South Glenwood Avenue. Belmonte slows to allow Mayle to pull in front of her. According to Mayle's later affidavit testimony, when he completed his U-turn, the Monte Carlo was already approximately four and one-half city blocks away at the intersection of South Glenwood Avenue and West Mound Street.

{¶10} Almost immediately after Mayle takes the lead, Mayle and Belmonte both slow for a red light at the intersection of South Glenwood Avenue and Sullivant Avenue. Both cruisers proceed when the light turns green. About 20 seconds after that, Mayle and Belmonte reach the T-shaped intersection of South Glenwood Avenue and West Mound Street.

{¶11} At that intersection, Klempner had attempted to turn right (west) onto West Mound Street. Klempner turned so widely that the Monte Carlo struck the driver-side, front end of a 1997 Nissan Maxima located in the eastbound lane of West Mound Street. The collision totally destroyed the Maxima and significantly injured Sylvia Sparks, the driver of the Maxima. Klempner ran from the accident scene, but police apprehended him.

{¶12} On February 13, 2008, plaintiffs filed suit against Klempner, the City, Belmonte, Auto Owners Insurance, and United Healthcare Insurance Company. With regard to the City and Belmonte, plaintiffs alleged that Belmonte acted negligently in initiating and continuing the pursuit of Klempner, and that Belmonte's negligence caused

Klempner to collide with Sylvia Sparks' automobile. Sylvia Sparks sought damages arising from her injuries and inability to work, and her husband, Proctor Sparks, sought damages for loss of consortium.

{¶13} The City and Belmonte moved for summary judgment, asserting immunity from plaintiffs' claims under R.C. Chapter 2744, the Political Subdivision Tort Liability Act. In a judgment issued February 11, 2011, the trial court denied the motion. The trial court refused to grant summary judgment to Belmonte because it found that a genuine issue of material fact existed regarding whether Belmonte acted in a reckless manner. With regard to the City, the trial court found summary judgment inappropriate because questions of fact remained about whether Belmonte was responding to an emergency call and whether Belmonte acted in a wanton manner.

{¶14} The City and Belmonte now appeal from the February 11, 2011 judgment,[1] and they assign the following errors:

> [I.] The trial court erred in concluding that Officer Belmonte is not entitled to immunity pursuant to R.C. 2744.03(A)(6).
>
> [II.] The trial court erred in concluding that there is a genuine issue of material fact as to whether Officer Belmonte violated an internal policy.
>
> [III.] The trial court erred in concluding that the City of Columbus is not immune from plaintiffs-appellees' claims pursuant to R.C. 2744.

[1] Generally, the denial of a motion for summary judgment does not qualify as a final appealable order. However, the denial of motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744 constitutes a final appealable order pursuant to R.C. 2744.02(C). *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, syllabus.

{¶15} Each of these assignments of error challenges the denial of summary judgment. Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶5; *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶6.

{¶16} By the first assignment of error, appellants argue that the trial court erred in finding summary judgment inappropriate due to the existence of a genuine issue of material fact regarding Belmonte's entitlement to immunity. We agree.

{¶17} R.C. Chapter 2744 addresses when political subdivisions, their departments and agencies, and their employees are immune from liability for their actions. *Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, ¶8. Under R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless: (1) the employee's acts or omissions are manifestly outside the scope of the employee's employment or official responsibilities; (2) the employee's acts or omissions were malicious, in bad faith, or wanton or reckless; or (3) liability is expressly imposed on the employee by a section of

the Ohio Revised Code. *Lambert* at ¶10. Here, plaintiffs assert that Belmonte acted recklessly, and thus, the second exception divests her of immunity.

{¶18} A person is reckless when he acts " '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.' " *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-05 (quoting Restatement (Second) of Torts (1965), Section 500). Distilled to its essence, recklessness is a perverse disregard of a known risk. *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, ¶73. Such perversity is exhibited when a person is conscious that his conduct will, in all probability, result in injury. Id. at ¶74; *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, ¶37.

{¶19} Generally, whether conduct is reckless is a question of fact for a jury to decide. *O'Toole* at ¶74. However, the standard for proving recklessness is high, so a court may enter summary judgment in those cases where the conduct does not indicate a disposition to perversity. Id.

{¶20} By itself, the fact that danger arises when a police officer pursues a fleeing driver is insufficient to present a genuine issue of material fact concerning whether the officer acted recklessly. *Elsass v. Crockett*, 9th Dist. No. 22282, 2005-Ohio-2142, ¶29; *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, ¶40. To find otherwise would effectively impose a duty on police officers to refrain from ever pursuing criminal suspects. Courts have refused to establish such a limitation. *Sutterlin v. Barnard* (Oct. 6,

1992), 2d Dist. No. 13201; *Rahn v. Whitehall* (1989), 62 Ohio App.3d 62, 66. See also *Lewis v. Bland* (1991), 75 Ohio App.3d 453, 456 (" 'The duty of police officers is to enforce the law and to make arrests in proper cases, not to allow one being pursued to escape because of the fear that the flight may take a course that is dangerous to the public at large.' ").

{¶21} Here, given the caution Belmonte displayed in following Klempner, reasonable minds could only conclude that Belmonte's conduct did not rise to the level of recklessness. When Klempner dodged Thomas' cruiser and sped away, Belmonte did not speed after him. Although Belmonte followed Klempner, she did so solely to keep him in sight so she could continue to radio his location. Thus, Belmonte tempered her pursuit of Klempner to lessen his motivation to drive recklessly in order to evade her. Moreover, while following Klempner, Belmonte was mindful of the safety of other drivers—she slowed or stopped for intersections and continued to run her lights and sirens. Due to Belmonte's cautious driving, at the time Klempner collided with Sylvia Sparks' automobile, Belmonte lagged approximately four city blocks and 20 seconds behind Klempner. Based on Belmonte's circumspect conduct, no reasonable juror could find that she perversely disregarded the risk that the pursuit posed to other drivers.

{¶22} Plaintiffs, however, argue that Belmonte acted recklessly because she did not immediately desist from following the Monte Carlo once Klempner began driving erratically. We find this argument unavailing. As we stated above, police officers do not have a duty to refrain from all pursuit. Additionally, if we accepted plaintiffs' argument, we would reach a holding that would encourage suspects to drive recklessly so that police

officers would be forced to stop any pursuit or face liability for harm caused by the suspects' driving. We refuse to create such a perverse incentive for suspects. See *Scott v. Harris* (2007), 550 U.S. 372, 385, 127 S.Ct. 1769, 1779 ("[W]e 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."). (Emphasis sic.)

{¶23} Plaintiffs also argue that Belmonte's violation of Columbus Police Division Directive No. 3.27, entitled "Vehicular Pursuits and Stopping Tactics," proves that she acted recklessly. We are not persuaded. A violation of directives or policies does not rise to the level of reckless conduct unless a plaintiff can establish that the violator acted with a perverse disregard of the risk. *O'Toole* at ¶92. See also *Elsass* at ¶25; *Shalkhauser* at ¶41; *Jackson v. Poland Twp.*, 7th Dist. No. 96 CA 261, 1999-Ohio-998; *Ferrell v. Windham Twp. Police Dept.* (Mar. 27, 1998), 11th Dist. No. 97-P-0035; *Johnson v. Patterson* (Oct. 27, 1994), 8th Dist. No. 66327; *Rodgers v. DeRue* (1991), 75 Ohio App.3d 200, 205. "Without evidence of an accompanying knowledge that the violations 'will in all probability result in injury,' evidence that policies have been violated demonstrates negligence at best." *O'Toole* at ¶92 (citation omitted) (quoting *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368). As we concluded above, no reasonable juror could find that Belmonte's actions during the pursuit displayed a perverse disregard of the risk that the pursuit presented to other

drivers. Therefore, assuming that Belmonte violated Directive No. 3.27, we conclude that that violation only established negligence, not recklessness.

{¶24} Finally, plaintiffs argue that Belmonte potentially violated the Fourth Amendment when she ran Klempner's license plate through LEADS without a reasonable and articulable suspicion of criminal activity. Plaintiffs apparently believe that this alleged violation is evidence of recklessness. We decline to address this argument because plaintiffs failed to assert it before the trial court. A party who fails to raise an argument before the trial court waives its right to assert that argument in the appellate court. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶34.

{¶25} In sum, because reasonable minds could only conclude that Belmonte did not act recklessly, she is entitled to immunity from liability under R.C. 2744.03(A)(6). We thus conclude that the trial court erred in denying Belmonte summary judgment. Accordingly, we sustain the first assignment of error.

{¶26} We next turn to appellants' third assignment of error. By that assignment of error, appellants argue that the trial court erred in denying the City summary judgment based on sovereign immunity. We agree.

{¶27} Courts employ a three-tier analysis to determine whether a political subdivision is immune from liability under R.C. 2744.02. *Smith v. MacBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, ¶13; *Lambert* at ¶8. The analysis begins with a general grant of immunity that affords the political subdivision protection from liability "in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in

connection with a governmental or proprietary function." R.C. 2744.02(A)(1). This grant of immunity, however, is not absolute. The second tier of the analysis focuses on the five exceptions to immunity listed in R.C. 2744.02(B), which can expose a political subdivision to liability. *Smith* at ¶14; *Lambert* at ¶9. If any of the R.C. 2744.02(B) exceptions apply, then the third tier of the analysis requires an assessment of whether any defenses in R.C. 2744.03 apply to reinstate immunity. *Smith* at ¶15; *Lambert* at ¶9.

{¶28} In the case at bar, no one contests that Belmonte's allegedly tortious acts occurred in connection with a governmental function, i.e., "[t]he provision * * * of police * * * services or protection." R.C. 2744.01(C)(2)(a). Thus, in the first tier of the analysis, R.C. 2744.02(A)(1) cloaks the City with a general grant of immunity. The parties, however, dispute whether R.C. 2744.02(B)(1) negates that immunity. Pursuant to R.C. 2744.02(B)(1):

> Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:
>
> (a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct[.]

{¶29} The City argues that it presented evidence establishing each element of the R.C. 2744.02(B)(1)(a) defense: (1) the motor vehicle's operator, Belmonte, was a member of its police department, (2) Belmonte was responding to an emergency call, and (3) Belmonte's operation of the vehicle did not constitute willful or wanton misconduct.

Plaintiffs, on the other hand, argue that genuine issues of material fact remain regarding whether there was an emergency call and whether Belmonte acted wantonly.

{¶30} 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." As used in R.C. 2744.01(A), a "call to duty" "involves a situation to which a response by a peace officer is required by the officer's professional obligation." *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶13. Thus, the inquiry into whether an officer is on an emergency call centers on whether the officer was required to respond by the officer's professional obligation. *Smith* at ¶23. Importantly, an emergency call need not arise from an inherently dangerous situation. *Colbert* at ¶14.

{¶31} Generally, the question of whether a particular situation presents an emergency call is a question of fact. *Smith v. McBride*, 10th Dist. No. 09AP-571, 2010-Ohio-1222, ¶15, affirmed, 130 Ohio St.3d 51, 2011-Ohio-4674; *Hewitt v. Columbus*, 10th Dist. No. 08AP-1087, 2009-Ohio-4486, ¶10. Nevertheless, a court may determine whether a police officer is on an emergency call when no genuine issues of material fact exist. Id.

{¶32} In the case at bar, Belmonte received information that a Monte Carlo she observed while on patrol was a stolen vehicle. The need to investigate the theft, a criminal act, was a call to duty. *Colbert* at ¶16. See also *Jackson* (police officer's observation of a cracked window and punched-out trunk lock were sufficient to present

the officer with a call to duty). Belmonte, therefore, was responding to an emergency call when the accident occurred.

{¶33} Plaintiffs assert that the situation here did not amount to an emergency call because pursuit of Klempner violated Directive No. 3.27. The directive at issue designates those circumstances under which a City police officer may initiate a vehicular pursuit. Thus, Directive No. 3.27 governs the manner in which a police officer carries out a call to duty; it does not dictate the circumstances under which a call to duty arises. We therefore find Directive No. 3.27 inapplicable to whether an emergency call existed in this case.

{¶34} The trial court found that a jury should decide whether Belmonte was on an emergency call because a question of fact remained regarding whether an inherently dangerous situation arose when Belmonte discovered that the Monte Carlo had been reported stolen. According to the statutory definition of "emergency call," a "call to duty" expressly includes "personal observations by peace officers of inherently dangerous situations that demand an immediate response[.]" R.C. 2744.01(A). However, that situation is but an illustration of a "call to duty," and it does not limit the definition of the term. *Colbert* at ¶14. Therefore, the existence of an inherently dangerous situation is not necessary for the circumstances to qualify as a call to duty. Id. We thus find that a question of fact over whether the circumstances here constituted an inherently dangerous situation does not preclude summary judgment.

{¶35} Having determined that the evidence demonstrates that Belmonte was responding to an emergency call, we must next consider whether she acted wantonly.

The Supreme Court of Ohio has defined "reckless" and "wanton" in a virtually identical manner. *O'Toole* at ¶73-75; *Fabrey* at 356; *Thompson* at 104, fn. 1 (recognizing that courts use the terms "reckless," "willful," "wanton" interchangeably). Consequently, pursuant to the analysis we set forth above, we conclude that no reasonable juror could find Belmonte's conduct wanton. See also *Pylypiv v. Parma*, 8th Dist. No. 85995, 2005-Ohio-6364, ¶23-24 (upholding summary judgment in favor of a municipality on the question of immunity where the police cruiser was so far behind the suspect's motorcycle that it arrived at the crash site 15 to 20 seconds after the crash, the police officer did not excessively speed while following the suspect, and the officer slowed through all intersections); *Jackson* (holding reasonable minds could only conclude that police officers did not act willfully or wantonly when "[t]here [was] no evidence that the officers attempted to run the [suspect's] vehicle off the road, followed too close a distance causing the driver to crash, or acted in any way other than to follow the vehicle"); *Vince v. Canton* (Apr. 13, 1998), 5th Dist. No. 1997CA00299 (same).

{¶36} In sum, we conclude that the City presented evidence from which reasonable minds could only conclude that the R.C. 2744.02(B)(1) exception to immunity does not apply. Accordingly, we sustain the third assignment of error.

{¶37} Based on our rulings on the first and third assignments of error, we conclude that the second assignment of error is moot. We thus decline to address it.

{¶38} For the foregoing reasons, we sustain the first and third assignments of error, and we find the second assignment of error moot. We reverse the judgment of the

Franklin County Court of Common Pleas, and we remand this matter to that court for further proceedings consistent with law and this opinion.

Judgment reversed; cause remanded.

FRENCH and CONNOR, JJ., concur.

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