[Cite as *Thompson v. Smith*, 2011-Ohio-1587.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

WILLIAM DALE THOMPSON, ADMINISTRATOR OF THE ESTATE OF CASSANDRA NICOLE THOMPSON, DECEASED,	:	**O P I N I O N**
	:	**CASE NO. 2010-T-0047**
Plaintiff-Appellant,	:	
- vs -	:	
JASON SMITH, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2006 CV 3046.

Judgment: Affirmed.

Lee J. Bell, 400 Crescent Pointe Building, 4774 Munson Street, N.W., Canton, OH 44718, *William J. Urban*, *Jr.*, Urban Co., L.P.A., 434 High Street, N.E., P.O. Box 792, Warren, OH 44482-0792, and *Justin S. Greenfelder*, Buckingham, Doolittle & Burroughs, L.L.P., 4518 Fulton Drive, N.W., P.O. Box 35548, Canton, OH 44735-5548 (For Plaintiff-Appellant).

Craig G. Pelini and *Kristen E. Campbell*, Pelini, Campbell, Williams & Traub, L.L.C., Bretton Commons, #400, 8040 Cleveland Avenue, N.W., North Canton, OH 44720 (For Defendants-Appellees).

MARY JANE TRAPP, J.

{¶1} William Dale Thompson, the Administrator of the estate of Cassandra Nicole Thompson, deceased, appeals from a judgment of the Trumbull County Court of Common Pleas which, pursuant to a jury verdict, found the city of Cortland, the Cortland

Police Department, and Officer Jason Smith not liable in a wrongful death action filed by the estate. Officer Smith was responding to an emergency call when his vehicle struck Ms. Thompson, while she was crossing a street without using a pedestrian crossing. The defendants had moved for summary judgment asserting immunity pursuant to Chapter 2744 of the Ohio Revised Code. The trial court denied the motion, and we affirmed, in *Thompson v. Smith*, 178 Ohio App.3d 656, 2008-Ohio-5532. We concluded the evidence in this case created a genuine issue of material fact as to whether the officer operated his vehicle in a willful, wanton, or reckless manner. Upon remand, the jury found his conduct not willful, wanton, or reckless.

{¶2} In this appeal, Mr. Thompson claims an abuse of discretion by the trial court in its jury instructions and in its exclusion of certain expert testimony. For the following reasons, we affirm the trial court's judgment.

{¶3} **Substantive Facts and Procedural History**

{¶4} Around 11:30 p.m. on July 25, 2006, Officer Smith, an officer of the Cortland Police Department, received a call from a dispatcher while at a gas station. The dispatch call related to a possible fight on Stahl Avenue in Cortland. In response, Officer Smith drove toward the location, but did not activate his overhead flashing lights or sirens, apparently because he did not want to disturb the residential neighborhood in the middle of the night. As he approached South High Street, he slowed for a red light, which turned green when he was 50 yards from the intersection. He started to accelerate again and drove through the intersection, turning right into the northbound lane of South High Street. Shortly afterwards, as he approached a Circle K store on South High Street, he spotted a pedestrian in the southbound lane running across the

street, heading toward the other side of the street. Officer Smith immediately applied his brakes, but could not avoid striking the pedestrian, 16-year-old Cassandra Thompson, who died from the injuries sustained in the accident. Ms. Thompson did not use the pedestrian crossing nearby to cross South High Street, which Officer Smith described as well-lit.

{¶5} The posted speed limit for the street is 35 m.p.h., but there is conflicting evidence as to the speed at which Officer Smith was traveling. He testified he was traveling at no more than 45 m.p.h. before the impact. The Ohio State Highway Patrol, however, estimated his speed to be at least 38 m.p.h. and probably within a range of 59 to 66 m.p.h.

{¶6} Mr. Thompson, Cassandra's father and the Administrator of her estate, filed a wrongful death action against Officer Smith, the Cortland Police Department, and the city of Cortland. The defendants filed a motion for summary judgment, asserting they were entitled to immunity pursuant to R.C. 2744.02 and R.C. 2744.03. The trial court denied the defendants' motion for summary judgment, finding that a genuine issue of material fact remained as to whether Officer Smith operated his vehicle in a willful, wanton, or reckless manner.

{¶7} **Prior Appeal**

{¶8} On appeal, we affirmed the trial court's finding that a genuine question of material fact existed regarding whether the officer's operation of his patrol car constituted willful or wanton misconduct.

{¶9} Pursuant to R.C. 2744.02(B)(1)(a), a political subdivision is not liable for injury caused by its police officer's negligent operation of a motor vehicle while

responding to an emergency call if the operation of the vehicle "did not constitute willful or wanton misconduct." We concluded summary judgment in favor of the defendants was properly denied because there was a genuine issue of material fact as to whether the officer operated his vehicle in a willful, wanton, or reckless manner.

{¶10} We stated the determination of whether the officer's conduct rose to the level of "wanton" involves a two-part test: (1) whether there is a failure to exercise any care whatsoever by those who owe a duty of care to the injured party; and (2) whether this failure occurs under circumstances in which there is great probability that harm will result from the lack of care. The first prong of the test requires that we determine the duty owed and the extent of care exercised. Then, we must consider the nature of the hazard created by the circumstances. *Thompson* at ¶40.

{¶11} As to "willful" misconduct, "it implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Thompson* at ¶41 (citation omitted). Finally, as to whether a person acted recklessly, an actor's conduct is "in reckless disregard of the safety of others if he does an 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." Id. at ¶66 (citation omitted).

{¶12} In the prior appeal we also reviewed R.C. 2744.03(A)(3), which grants immunity to the political subdivision if the employee's action was within his or her

discretion with respect to policy-making, planning, or enforcement powers. We concluded this defense does not apply here because responding to an emergency call does not involve policy-making, planning, or enforcement powers.

{¶13} **Trial**

{¶14} Upon remand, the case was tried to a jury. Officer Smith testified he received a call about a dispute while on his midnight shift.[1] He drove toward the location without activating his overhead flashing lights or siren. During cross-examination, he testified regarding the use of equipment when responding to an emergency call:

{¶15} "Q. Is it your understanding if you respond to a dispatch without using your emergency equipment that you need to obey the traffic laws?

{¶16} "A. Here again, it's discretionary.

{¶17} "Q. Well, if you can turn to page 75 of your deposition, please, Jason. On page 75 you see where I ask you the question, 'If you do respond to a dispatch or an emergency call without using your emergency equipment, is it your understanding that you must obey the traffic laws?' And what was your answer?

{¶18} "A. 'Correct.'

{¶19} "Q. And there's no doubt the speed limit on South High Street is 35, correct?

{¶20} "A. That's correct."

1. As we noted in a footnote in our opinion for the prior appeal, the trial court found Officer Smith was responding to an emergency call when the accident occurred and, on appeal, plaintiff-appellee did not challenge this finding by the trial court in a cross-appeal.

{¶21} Jessica Dawson, a friend of Ms. Thompson, lived in a house across the street from the Circle K on South High Street. She and Ms. Thompson had gone to the store earlier to buy soft drinks. They walked back to her house together. Ms. Thompson's soda was leaking, so she went back to the other side of the street to dispose of it in a trash bin in front of the store. She then tried to cross the street to head back to the house. Ms. Dawson testified she saw Ms. Thompson stop at the curb and look both ways before she crossed the road, and, after she passed the turning lane and entered the northbound lane of the road, she picked up her pace, turning it into a "power walk." Ms. Dawson then saw a police vehicle in front of her house and saw Ms. Thompson go up in the air. She estimated the police vehicle was traveling between 65 and 70 m.p.h.

{¶22} State Trooper Mark Majetich, who investigated the incident, testified that he determined the speed of Officer Smith's vehicle to be 59 to 66 m.p.h. at first braking, and 46 to 55 m.p.h. at point of impact.

{¶23} Glenn McHenry, a former police officer trained in traffic investigation and reconstruction and an instructor on driving skills, testified as an expert for the plaintiff. He calculated Officer Smith's speed to be 63 to 68 m.p.h. before braking and 46 to 55 m.p.h. at impact. Plaintiff's counsel attempted to elicit certain testimony from him based on his analysis of distance and a witness's testimony that Ms. Thompson looked to the left and to the right before she walked into the street. The defense objected and the court sustained the objection. Plaintiff proffered Mr. McHenry's testimony that based on his estimation of distance and testimony that Ms. Thompson looked both ways before walking into the street, she would have seen the traffic light controlling Officer Smith's

lane of travel as a red light, presumably causing her to feel secure enough to cross the street.

{¶24} The trial court also sustained several objections by the defense when plaintiff's counsel attempted to elicit testimony from Mr. McHenry regarding whether Officer Smith was required to use his lights and siren when traveling at the speed he traveled and whether his lack of use of the emergency equipment amounted to a "much higher level of culpability than negligence."

{¶25} **Jury Charge**

{¶26} After testimony from eleven witnesses on behalf of plaintiff and one witness for the defense, the trial court charged the jury as follows, in pertinent part:

{¶27} "*** In order to hold the city of Cortland liable the Plaintiffs must prove by a preponderance of the evidence that Jason Smith's operation of the motor vehicle constituted willful or wanton misconduct or reckless conduct.

{¶28} "***

{¶29} "Willful misconduct. Willful misconduct is an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. Willful misconduct implies intent, but the intention relates to the misconduct and not merely to the fact that some specific act, such as operating an automobile, was intentionally done.

{¶30} "Wanton misconduct is the failure to exercise any care whatsoever and consequently leads to a great probability that harm will result. Wanton misconduct

comprehends an entire absence of all care for the safety of others and an indifference to consequences.

{¶31} "A person acts recklessly if he does an act or intentionally fails to do an act which is [] his duty to the other to do. Knowing or having reason to know facts which would lead a reasonable man to realize not only that his or her conduct creates an unreasonable risk of physical harm to another, but that such risk is substantially greater than that which is necessary to make his conduct negligent.

{¶32} "*The city of Cortland may also be immune from liability if the injury, death or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire or how to use equipment, supplies, materials, personnel, facilities and other resources unless the judgment or discretion was exercised in a wanton or reckless manner*.

{¶33} "***

{¶34} "As the employer, the city of Cortland is immune from negligent conduct of a police officer responding to an emergency call, but is legally liable when the police officer's operation of the motor vehicle was willful or wanton misconduct or reckless misconduct.

{¶35} "Ohio Revised Code section 4511.24 allows emergency vehicles to exceed the speed limit when responding to emergency calls provided that the vehicle emergency lights and siren are [] operating. This section does not relieve the driver of an emergency vehicle or public safety vehicle from the duty to drive with due regard for the safety of all persons using the street or highway." (Emphasis added.)

{¶36} The jury returned a unanimous verdict in favor of the defendants. In response to an interrogatory, the jury found, again unanimously, that "[t]he conduct of Defendant Jason Smith was not willful, and not wanton, and not reckless."

{¶37} Mr. Thompson now appeals, raising the following two assignments of error:

{¶38} "[1.] The Trial Court committed prejudicial error when it gave the jury an instruction that the Defendants may be immune from liability if the death resulted from the exercise of judgment or discretion in how to use equipment under Ohio Revised Code 2744.03(A)(5), since that statute does not have application as to the obligation to comply with a statutory duty under Ohio Revised Code 4511.24.

{¶39} "[2.] The Trial Court committed prejudicial error by excluding the expert testimony of Glenn McHenry who would have testified that it is not discretionary for a police officer as to whether he complies with Ohio Revised Code 4511.24 (which allows police officers to exceed the speed limit when responding to emergency calls, provided that the vehicle emergency lights and siren are operating)."

{¶40} **Jury Instruction Based on R.C. 2744.03(A)(5)**

{¶41} Mr. Thompson argues the court erred in giving a jury instruction regarding the defense and immunity provided in R.C. 2744.03(A)(5).

{¶42} "Requested jury instructions should be given if they are (1) correct statements of the applicable law, (2) relevant to the facts of the case, and (3) not included in the general charge to the jury." *State v. Mitchell*, 11th Dist. No. 2001-L-042, 2003-Ohio-190, ¶10, citing *State v. DeRose*, 11th Dist. No. 2000-L-076, 2002-Ohio-4357, ¶33. "An appellate court is to review a trial court's decision regarding a jury

instruction to determine whether the trial court abused its discretion." Id., citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

{¶43} First, we note the applicability of R.C. 2744.03(A)(5) was not an issue raised by the parties in the prior appeal, and therefore we did not address its applicability in the prior opinion. That statute states:

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

{¶45} The trial court gave an instruction based on the statute. On appeal, Mr. Thompson argues the trial court committed prejudicial error in giving the instruction. He claims when an officer violates R.C. 4511.24, i.e., exceeds the speed limit while responding to an emergency call without activating the flashing lights or siren, R.C. 2744.03(A)(5) is *per se* inapplicable. He argues the jury charge based on R.C. 2744.03(A)(5) constituted a prejudicial error in this case.

{¶46} **Applicability of R.C. 2744.03(A)(5) in Negligent Operation of Vehicle Cases**

{¶47} The framework of the immunity statute begins with R.C. 2744.02, which is a general grant of immunity to political subdivisions and their employees. See R.C. 2744.02(A)(1). R.C. 2744.02(B) then establishes several qualifications or statutory exceptions to that grant of immunity. One of those qualifications or exceptions relates to the operation of motor vehicles: under R.C. 2744.02(B)(1), a political subdivision *is*

liable for injuries caused by its employees' negligent operation of a vehicle. The statute *then* provides three defenses to this liability. One of these defenses is pertinent to the instant case: under R.C. 2744.02(B)(1)(a), a political subdivision is *not* liable when police officers respond to an emergency call, *unless* their operation of a vehicle constituted willful or wanton misconduct.

{¶48} Consistent with the statutory scheme, the jury, at the outset, should be charged that (1) the governmental unit will be liable if its employee acting within the course and scope of employment negligently operates a motor vehicle and causes harm, and that (2) plaintiff has the burden to prove that negligence by the greater weight of the evidence. Then, the burden shifts to the governmental unit to prove, by the greater weight of the evidence, that the employee's emergency situation excused its responsibility for the negligent conduct. Then, if that burden is met by the defense, the jury should be charged that plaintiff can still recover if plaintiff proves by the greater weight of the evidence that the employee operated the motor vehicle in a willful or wanton manner. See, generally, 1 CV 425 OJI CV 425.01.

{¶49} We note the statutory framework for governmental immunity is further developed with R.C. 2744.03, which provides certain defenses or immunities relating to acts or omissions not protected under the general grant of immunity. *However*, as several appellate districts have observed, by the enactment of R.C. 2744.02(B)(1), the General Assembly has already specifically provided for a comprehensive scheme for determining liability regarding the employees' *negligent operations of a motor vehicle*. Thus, even though the decision to operate the vehicle in a certain manner, including the speed and use of emergency equipment in any given situation, necessarily involves a

"discretionary" decision on the part of the driver, it is not the kind of discretionary act contemplated by R.C. 2744.03(A)(3), which involves policy-making or planning and which this court and the trial court had already determined to be inapplicable here. Neither is it the kind of discretionary act contemplated by R.C. 2744.03(A)(5), which involves the use of equipment, supplies, materials, and other resources. See *Griner v. Minster Bd. of Edn.* (1998), 128 Ohio App.3d 425, 434 ("a decision made by a bus driver regarding whether or not to pass a bicyclist is not the sort of discretionary act contemplated by the defense set out in R.C. 2744.03(A)(5)"); *Siders v. Reynoldsburg School Dist.* (1994), 99 Ohio App.3d 173, 197 (because the legislature specifically provided for liability against a political subdivision for injury caused by the negligent operation of motor vehicles, the legislature could not have intended that the act of a school bus driver in deciding whether to pass a bicycle rider constitutes a discretionary act involving policy-making or planning activities for which immunity is provided under R.C. 2744.03(A)(3)).

{¶50} Thus, the added "discretion in the use of equipment" charge pursuant to R.C. 2744.03(A)(5) should *not* have been given in this case.

{¶51} **Charge of R.C. 2744.03(A)(5) not Prejudicial**

{¶52} However, regardless of whether the jury considers R.C. 2744.02(B)(1)(a) or R.C. 2744.03(A)(5), plaintiff cannot prevail if the jury finds that the conduct of the employee was not willful, wanton, or reckless. As the case law indicates, a traffic law violation is but one factor for the jury to consider in determining whether an officer's operation of his vehicle was in a wanton or willful manner; the violation in itself does not automatically render an officer's conduct wanton or willful precluding a claim of

immunity provided in Chapter 2744. See, e.g., *Whitley v. Progressive Preferred Ins. Co.*, 1st Dist. Nos. C-090240 and C-090284, 2010-Ohio-356; *Neuman v. Columbus* (Aug. 31, 1995), 10th Dist. No. 95APE02-161, 1995 Ohio App. LEXIS 3810; *Lipscomb v. Lewis* (1993), 85 Ohio App.3d 97.

{¶53} Here, the jury was charged as to R.C. 4511.24, which permits emergency vehicles to exceed the posted speed limit only when lights and siren are used. The jury was also instructed that plaintiff had the burden to prove that Officer Smith's operation of the vehicle constituted willful or wanton or reckless misconduct. It was properly charged as to the meaning of these words as well.

{¶54} The jury charge in this case was far from perfect, but the law does not require a perfect charge. "Where a trial court misstates the law or creates ambiguity in a portion of its jury instructions, it is not reversible error where the court's instructions, considered as a whole, are not prejudicial to the objecting party." *Clements v. Lima Memorial Hosp.*, 3rd Dist. No.1-09-24, 2010-Ohio-602, ¶75, citing *Snyder v. Stanford* (1968), 15 Ohio St.2d 31. Given the entirety of the jury charge, we cannot conclude that but for this error in giving an inapplicable charge on R.C. 2744.03(A)(5), the outcome of the trial would have been different. The jury specifically found that Officer Smith's conduct did not rise to a level of willfulness, wantonness or recklessness, a finding that provided immunity under R.C 2744.02(B)(1)(a), regardless of the applicability of R.C. 2744.03(A)(5).

{¶55} Mr. Thompson's first assignment of error is without merit.

{¶56} **Expert Testimony**

{¶57} "A trial court's ruling as to the admission or exclusion of expert testimony is within its broad discretion and will not be disturbed absent an abuse of discretion." *Biro v. Biro*, 11th Dist. No. 2006-L-068 and 2006-L-236, 2007-Ohio-3191, ¶28. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶58} Evid.R. 702 governs the admission of expert testimony. It provides:

{¶59} "A witness may testify as an expert if all of the following apply:

{¶60} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶61} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶62} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

{¶63} "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

{¶64} "(2) The design of the procedure, test, or experiment reliably implements the theory;

{¶65} "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶66} "'To qualify as an expert, the witness need not be the "best witness" on the particular subject in question. *** However, expert testimony must assist the jury in determining a fact issue or understanding the evidence.'" *State v. Poling*, 11th Dist. No. 2008-A-0071, 2010-Ohio-1155, ¶58, quoting *State v. Rhodes* (Dec. 14, 2001), 11th Dist. No. 2000-L-089, Ohio App. LEXIS 5650, *5. "The determination of whether expert testimony is relevant and will assist the jury is within the discretion of the trial court." *State v. Poole*, 8th Dist. No. 80250, 2002-Ohio-5326, ¶35, citing *State v. Buell* (1986), 22 Ohio St.3d 124.

{¶67} The ultimate issue in this case is whether Officer Smith's operation of his vehicle was willful, wanton, or reckless. Before trial, the defendants moved to preclude plaintiff's expert, Mr. McHenry, from providing his opinion regarding this issue, and the trial court excluded this specific testimony. Mr. Thompson does not challenge this exclusion on appeal. Rather, he claims the trial court abused its discretion in excluding testimony from Mr. McHenry regarding whether the officer had discretion not to use his emergency equipment while traveling at the speed he did. The transcript reveals Officer Smith testified it was "discretionary" as to whether he needed to obey the traffic law in response to a dispatch without using the emergency equipment. He was, however, impeached by the defense counsel with his admission at deposition that he was required to obey the traffic law if no emergency equipment was utilized. Therefore, the jury was well aware Officer Smith provided conflicting testimony regarding whether he had discretion to exceed the speed limit. Furthermore, the trial court properly instructed the jury on R.C. 4511.24, which prohibits a police officer from exceeding the speed limit when responding to an emergency call without using the emergency equipment.

{¶68} Plaintiff also proffered testimony from Mr. McHenry that if an officer is responding to an emergency call while speeding, he is required to comply with the statute and turn on his emergency equipment; and that Officer Smith's conduct of driving at the speed he did without using the emergency equipment "amounts to a much higher level of culpability than negligence." The proffered expert testimony is in effect a jury instruction as to the law, couched as an expert opinion. The trial court recognized it and properly excluded it.

{¶69} Finally, Mr. Thompson argues on appeal that the trial court excluded the expert testimony under a mistaken belief that the expert was to offer a legal conclusion on the ultimate issue to be determined by the jury. Mr. Thompson is correct that under Evid.R. 704, testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact. However, our review of the transcript does not indicate the trial court excluded the expert's testimony on this ground. In any event, the ultimate question to be determined by the jury in this case was whether the officer's conduct was willful, wanton, or reckless, not whether he had discretion to operate the equipment in the manner he did, or whether he breached an officer's standard of conduct. Mr. McHenry did *not* provide testimony on the ultimate issue due to a pretrial ruling by the trial court, and therefore, the court could not have excluded part of the expert's testimony on this ground.

{¶70} The second assignment of error is without merit.

{¶71} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, P.J., concurs with Concurring Opinion.

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TIMOTHY P. CANNON, P.J., concurring.

{¶72} I concur with the judgment of the majority. I write separately to address issues concerning the treatment of the jury instructions.

{¶73} I agree with the majority that the decision about *how to operate* the vehicle is not the kind of discretion contemplated by the defense set forth in R.C. 2744.03(A)(5). It became an issue in this case whether the officer should have proceeded to the emergency with or without emergency lights and siren. I believe the instruction to the jury would have been proper with two clear limitations. First, there was evidence that the officer had discretion in regard to *whether he would choose to use the emergency equipment* while driving to the scene. I believe the defense set forth in R.C. 2744.03(A)(5) is appropriate for the exercise of this discretion. Second, the instruction must be further clarified that if the officer responds to an emergency without lights and siren, *he does not have discretion*. He must proceed in a lawful manner, just like any other vehicle on the highway. If he operates without lights and siren in a willful, wanton, or reckless manner, liability attaches.

{¶74} Further, the majority opines that the jury, at the outset, should be charged concerning negligent operation of a motor vehicle; then, the burden shifts to the government to prove it was an emergency; then, the burden essentially shifts back to the plaintiff to prove the operation was willful, wanton, or reckless. This is consistent with the 1 CV 425 OJI 425.01. However, I believe it should be noted that this exercise should be performed in only one circumstance, i.e., if there is an issue whether the officer was responding to an emergency. In most cases of this type, the fact there was

an emergency is either stipulated to or judicially resolved. In such a case, it is too confusing to inject instructions concerning negligence (and potentially corresponding comparative negligence) for the jury to analyze. If the response is clearly to an emergency, the plaintiff should simply bear the burden of establishing willful, wanton, and/or reckless conduct. Issues concerning negligence and/or any comparative negligence simply do not apply in that type of case.

{¶75} Finally, appellee cites to this court's opinion in *Ferrell v. Windham Twp. Police Dept.* (Mar. 27, 1998), 11th Dist. No. 97-P-0035, 1998 Ohio App. LEXIS 1269 for the proposition that deviation from an operations manual or departmental policy is "irrelevant" to the determination of whether a police officer's conduct is willful, wanton, or reckless. I do not agree that either the opinion in *Ferrell* or common sense foreclose examination of a department policy or manual in every case. In many cases it may be quite relevant that an officer egregiously fails to follow procedures on which he or she was specifically trained.