[Cite as *Bricker v. State Farm Ins.*, 2010-Ohio-3047.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

KAREN S. BRICKER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2009-L-087**
- vs -	:	
STATE FARM INSURANCE,	:	
Defendant-Appellee,	:	
CARL H. DONDORFER, IV, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 000375.

Judgment: Reversed.

David H. Davies, Law Firm of David H. Davies, 38108 Third Street, P.O. Box 1264, Willoughby, OH 44096 (For Plaintiffs-Appellees).

Joseph H. Wantz, Williams, Moliterno & Scully Co., L.P.A., 2241 Pinnacle Parkway, Twinsburg, OH 44087-2367 (For Defendant-Appellee).

John T. McLandrich and *Frank H. Scialdone*, Mazanec, Raskin, Ryder & Keller Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Solon, OH 44139 (For Defendants-Appellants).

TIMOTHY P. CANNON, J.

{¶1} The Lake County Sheriff's Department and Lake County Sheriff's Lieutenant Carl H. Dondorfer, IV appeal from the denial by the Lake County Court of Common Pleas of their motion for summary judgment, based on sovereign immunity, in

this action by Karen S. and Arthur L. Bricker, III for damages and loss of consortium, arising from an automobile accident between Lt. Dondorfer and Mrs. Bricker. For the following reasons, we reverse the judgment of the trial court.

{¶2} On February 8, 2006, Lt. Dondorfer was working as patrol shift commander for the Lake County Sheriff when the department received a call from a woman hiding in her basement, who reported an intruder on the second floor of her house. Lt. Dondorfer responded personally, in a marked patrol car, as he was concerned that other responding officers were too distant from the potential crime scene. Lt. Dondorfer activated his overhead lights and siren immediately. He was traveling westbound on Mentor Avenue in the city of Painesville. Traffic was light, the pavement, wet. Approaching the intersection of Mentor Avenue with Walnut Street, Lt. Dondorfer saw the traffic light turn red and a vehicle headed southbound at the intersection, with a green light, yielding to him.

{¶3} Lt. Dondorfer is in charge of training for the Lake County Sheriff. He admitted that department policy requires a deputy to use "due care" if he or she intends to pass through an intersection against a red light without stopping. This is accomplished by "clearing" the intersection. "Clearing" evidently involves performing a full visual inspection of the intersection to make sure no cars or pedestrians are within it. On the morning of February 8th, Lt. Dondorfer stated that he started decelerating his car about five seconds before reaching the intersection, which he started to "clear," left to right, starting with Walnut Street. He did not see any vehicles approaching. On entering the intersection, Lt. Dondorfer noticed a white minivan, driven by Mrs. Bricker, coming out of Walnut Street. He braked fully, but was unable to stop before striking the

minivan. The minivan rolled over and struck a vehicle driven by Adan Ortiz Figueroa, which was the stopped, southbound vehicle on Walnut Street.

{¶4} In his statement to investigating officers, Mr. Figueroa stated he noticed Lt. Dondorfer's car approaching the intersection and he remained stopped, even though the light for him had turned green. Mr. Figueroa stated Lt. Dondorfer's car was about 75 to 100 feet from the intersection when he noticed it and that its lights and siren were on. He also saw Mrs. Bricker's minivan approaching the intersection from Walnut Street. He stated her minivan neither slowed nor stopped.

{¶5} Adam S. Lehner was on his front porch at 19 Grant Street when he saw Lt. Dondorfer's patrol car about 150 feet away. Mr. Lehner estimated Lt. Dondorfer was traveling about 40 miles per hour. He stated Lt. Dondorfer had his lights and siren activated.

{¶6} Brian C. Waite was plowing snow in the northeast parking lot of the Spear-Mulqueeny funeral home when he heard a siren. Looking, he saw Lt. Dondorfer's patrol car, with lights and siren activated, approaching the intersection. He believed the car was traveling about 35 miles per hour. He stated it "hesitated" before entering the intersection. Mr. Waite did not notice Mrs. Bricker's minivan until it entered the intersection. He estimated Lt. Dondorfer was traveling about 30 miles per hour at the time of the collision, and Mrs. Bricker, about 20.

{¶7} In her statement to police, Mrs. Bricker agreed she was traveling about 15 to 20 miles per hour when she entered the intersection. It was not until then that she heard the siren.

{¶8} Testimony of Scott Knoll of SEA Ltd. regarding the data recorder in the Lt. Dondorfer's car indicates he was traveling at approximately 65 miles per hour, five seconds out from the intersection. Mr. Knoll further testified that between second five and second four, the data recorder indicated Lt. Dondorfer removed his foot from the accelerator and placed it on the brake, slowing his car to 62 miles per hour. Between seconds four and three, Lt. Dondorfer's foot remained on the brake, slowing his car to 56 miles per hour. Between seconds three and two, the car slowed to 53 miles per hour. At two seconds, Lt. Dondorfer evidently applied maximum brake pressure, slowing his car to 36 miles per hour. At the time of impact, it was traveling approximately 19 miles per hour.

{¶9} Mrs. Bricker was charged with failure to yield to an emergency vehicle. Although it is not clear from the record, it appears she was acquitted at trial.

{¶10} The Brickers filed their complaint for personal injury and loss of consortium against the Lake County Sheriff's Department and Lt. Dondorfer and for uninsured/underinsured motorist coverage against State Farm Insurance on January 30, 2008. On March 3, 2008, the sheriff's department and Lt. Dondorfer answered. On April 2, 2008, State Farm answered and filed its cross-claim for indemnity and subrogation against the sheriff's department and Lt. Dondorfer. The sheriff's department and Lt. Dondorfer moved for summary judgment on the basis of sovereign immunity, which the trial court denied by a judgment entry filed June 8, 2009. The sheriff's department and Lt. Dondorfer timely noticed this appeal, assigning three errors:

{¶11} "[1.] The lower court erred in denying the appellants' motion for summary judgment because the Lake County Sheriff's Department is immune.

{¶12} "[2.] The lower court erred in denying the appellants' motion for summary judgment because Lt. Dondorfer is immune.

{¶13} "[3.] The lower court also erred in denying the appellants' motion for summary judgment as to Appellee State Farm's crossclaim for indemnification and subrogation because Deputy Dondorfer [sic] and the Lake County Sheriff's Department are immune."

{¶14} "'Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, ***. 'In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.' Id. citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is de novo. Id. citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, ***.

{¶15} "Accordingly, '(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis of the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. 'Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary

judgment, if appropriate, shall be entered against the nonmoving party.' Id., citing *Dresher* at 293.

{¶16} "***

{¶17} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***.

{¶18} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*. (Emphasis added.)

{¶19} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.)

{¶20} By their first assignment of error, the sheriff's department and Lt. Dondorfer raise two arguments. First, they note that this court has held that "[a] sheriff's department is not a legal entity subject to suit." *Ciganik v. Kaley*, 11th Dist. No. 2004-P-0001, 2004-Ohio-6029, at ¶40. (Citations omitted.) Consequently, they contend the sheriff's department was entitled to judgment as a matter of law.

{¶21} On this point, we respectfully disagree. In the trial court, the parties appear to have treated Lake County, not the sheriff's department, as the party sued. Given the great latitude trial courts have to amend pleadings and substitute parties under the civil rules, we shall consider the county's liability for purposes of this appeal.

We further note this argument appears not to have been raised before the trial court and is waived. *Arrich v. Moody*, 11th Dist. No. 2004-T-0100, 2005-Ohio-6152, at ¶26.

{¶22} Counties are political subdivisions pursuant to R.C. 2744.01(F). As we stated in the recent case of *Thompson v. Smith*, 178 Ohio App.3d 656, 2008-Ohio-5532, involving the liability of the city of Cortland, Ohio, and one of its police officers arising from a car accident involving the officer:

{¶23} "Chapter 2744 of the Ohio Revised Code, the Political Subdivision Tort Liability Act, contains a comprehensive statutory scheme for the tort liability of political subdivisions and its employees. R.C. 2744.02(A)(1), which grants immunity to a political subdivision from civil liability, provides:

{¶24} "'For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.'

{¶25} "Section (B) of R.C. 2744.02 enumerates five exceptions to the general grant of immunity. Of the five exceptions, only (B)(1*)* is applicable in the instant case. Pursuant to R.C. 2744.02(B)(1), although a political subdivision generally enjoys immunity from civil tort liability, it is nonetheless held liable for its employees' negligent operation of a motor vehicle, with certain exceptions. R.C. 2744.02(B) provides, in pertinent part:

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

{¶27} "'(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.'

{¶28} "R.C. 2744.02(B)(1) goes on to enumerate three full defenses to that liability. Of the three defenses, only section (a) is applicable in the instant case. R.C. 2744.02(B)(1)(a) states:

{¶29} "'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.'

{¶30} "***

{¶31} "As summarized by the court in *Colbert v. Cleveland*, 99 Ohio St.3d 215, ***, at ¶7-9, the following three-tiered analysis applies in matters implicating political subdivision immunity:

{¶32} "'Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis. 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. However, that immunity is not absolute. The second tier of the analysis requires a court to determine whether any of

the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. At this tier, the court may also need to determine whether specific defenses to liability for negligent operation of a motor vehicle listed in R.C. 2744.02(B)(1)(a) through (c) apply.

{¶33} "'If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability.' (Citations omitted).

{¶34} "***

{¶35} "In *Ferrell v. Windham Twp. Police Dept.* (Mar. 27, 1998), 11th Dist. No. 97-P-0035, 1998 WL 156889, this court summarized the law regarding political subdivision immunity in a tort action specifically involving a police officer's operation of a motor vehicle:

{¶36} "'R.C. 2744.02(B)(1) provides that a political subdivision is liable for a death caused by the negligent operation of a motor vehicle by one of its employees within the scope of his or her employment. However, R.C. 2744.02(B)(1)(a) states that a political subdivision has a complete defense to liability if a member of its police department "was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct." Therefore, the two issues to be analyzed here are (1) whether (the police officer) was responding to an emergency call; and (2) whether (the police officer's) actions constituted wanton

and willful misconduct.' Id. at *3." *Thompson* at ¶19-25, 27-29, 31-32. (Parallel citation omitted.)

{¶37} Consequently, the issues before us now, as in *Thompson*, are whether Lt. Dondorfer was responding to an emergency call and whether his operation of his car constituted "willful or wanton misconduct."

{¶38} "R.C. 2744.01(A) defines an 'emergency call' as 'a call to duty including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.' The Supreme Court of Ohio, in *Colbert*, further interpreted an 'emergency call' as 'involv(ing) a situation to which a response by a peace officer is required by the officer's professional obligation.' Id. at syllabus." *Thompson* at ¶35.

{¶39} In this case, we find that Lt. Dondorfer was responding to an emergency call. A citizen had reported that she was alone in her house, with an intruder. The situation as reported was inherently dangerous; Lt. Dondorfer's professional obligation required him to respond.

{¶40} The question remains whether there is a genuine issue of fact if Lt. Dondorfer's operation of his car amounted to willful or wanton misconduct. *Thompson* is, again, instructive:

{¶41} "A two-part test has been applied for a determination of 'wanton' misconduct, 'First, there is a failure to exercise any care whatsoever by those who owe a duty of care to the appellant. Secondly, 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 appellees owed appellant, and also the extent of care exercised by appellees. Then, we must consider the nature of the hazard created by the circumstances.' *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210, 212, ***. See also *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, ***, syllabus (where the driver of an automobile fails to exercise any care whatsoever toward those to whom he owes a duty of care, and his failure occurs under circumstances in which there is great probability that harm will result, such failure constitutes wanton misconduct); *Tighe v. Diamond* (1948), 149 Ohio St. 520, 526, *** (wanton misconduct 'comprehends an entire absence of all care for the safety of others and an indifference to consequences'; 'it implies a failure to exercise any care toward those to whom a duty of care is owing when the probability that harm will result from such failure is great, and such probability is known to the actor. It is not necessary that an injury be intended or that there be any ill will on the part of the actor toward the person injured as a result of such conduct'); *Brockman v. Bell* (1992), 78 Ohio App.3d 508, ***.

{¶42} "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.' *Tighe*, 149 Ohio St. at 527, ***; see, also, *Brockman*, 78 Ohio App.3d at 515, ***.

{¶43} "When determining whether a political subdivision employee's conduct was willful or wanton as to remove the immunity afforded under R.C. 2744.02, the

courts have emphasized the importance of evaluating each case under its own circumstances." *Thompson* at ¶40-42. (Citations omitted.)

{¶44} Generally, the question of whether conduct was willful or wanton is one for the jury. *Thompson* at ¶43.

{¶45} In *Thompson*, we affirmed the trial court's finding that based on the evidence in the record, a genuine question of material fact existed regarding whether the appellant police officer's operation of his car was willful or wanton misconduct. The facts of *Thompson*, however, are distinguishable from those in the instant case and, thus, it is not dispositive of the scenario at issue. In *Thompson*, the officer was responding to a call from a dispatcher without activating his lights or siren. Id. at ¶4. The officer was driving at night, around 11:30 p.m., in a residential neighborhood. Id. The Ohio State Highway Patrol estimated the officer's speed between 59 and 66 miles per hour at the time his vehicle struck the pedestrian. Id. at ¶5. Also, and of equal importance, the plaintiff presented expert testimony that the conduct of the officer operating at such a high rate of speed with no emergency lights or siren was a substantial departure from department standards and amounted to willful and wanton misconduct. Id. at ¶45.

{¶46} Unlike *Thompson*, the Brickers presented no such evidentiary material as to whether Lt. Dondorfer's conduct failed to meet accepted or written standards. Lt. Dondorfer testified the sheriff's department has a "policy and procedures" manual that establishes the procedure an officer is to employ in situations such as this, when he or she is traveling into an intersection against a red light. This manual would supply this court with his initial, defining standard of care. It would be logical to assume that unless

the procedure itself was flawed, if the officer complied with the manual, he would not even be considered negligent. If he departed in some small measure from the standard, he may be *negligent*, but nevertheless immune. However, if he departed a great deal from the standard, we would analyze if the departure was so great that there is a factual question as to whether it constitutes conduct that is reckless, willful, or wanton.

{¶47} The absence of such "policy and procedures" manual begs us to ask, in a request for summary judgment, which party has the burden of providing such information in this type of case. The answer lies in the examination of the summary judgment exercise. As in every summary judgment case, if the moving party meets its initial burden, a shift then occurs placing the burden on the nonmoving party to establish a genuine issue of material fact. See *Dresher v. Burt*, supra.

{¶48} As mentioned earlier, there is no real dispute that Lt. Dondorfer was, in fact, responding to an emergency. In his motion for summary judgment, Lt. Dondorfer, as the moving party, established the following with respect to the level of care exercised: (1) he employed both his lights *and* siren as he approached the intersection; (2) he was traveling in his proper lane of travel; (3) he had "cleared" the intersection sufficiently to establish he could enter the intersection; and (4) he began to brake as he approached, slowing considerably over a five-second span. An eye-witness to the accident also stated that as Lt. Dondorfer's vehicle approached the intersection, "it hesitated" and then proceeded into the intersection.

{¶49} We, therefore, hold that the evidence of emergency response and the level of care exercised in the instant case was sufficient to shift the burden to the

Brickers to present sufficient evidentiary material that, when viewed in a light most favorable to the nonmoving party, presents a question of fact whether Lt. Dondorfer's conduct amounted to willful, wanton, or reckless. In this case, we hold that the Brickers did not meet that burden. Unlike the plaintiff in *Thompson*, supra, the Brickers presented no evidentiary testimony or documents that would establish Lt. Dondorfer's conduct amounted to willful, wanton, or reckless. In the absence of such evidence and without any verifiable standard which to judge, the Brickers are asking this court to conclude that, based on the standards of emergency responders, Lt. Dondorfer acted in such a manner as to have "perversely" disregarded a known risk or "failed to exercise any care whatsoever." Based on the evidence in the record, we decline to adopt this conclusion.

{¶50} Other appellate courts have found the operator of an emergency vehicle was entitled to summary judgment when evidence of less care was present in the record. The First Appellate District, in *Herweh v. Bailey* (Oct. 23, 1996), 1st Dist. No. C-960177, 1996 Ohio App. LEXIS 4621 and *Whitely v. Progressive Preferred Ins. Co.*, 1st Dist. Nos. C-090240 & C-090284, 2010-Ohio-356, affirmed the judgments of the trial courts in finding the police officers did not act wantonly or willfully as a matter of law. In *Herweh*, the court determined the evidence insufficient to establish willful or wanton misconduct when the police officer proceeded through a red light at an intersection, without activating the siren on his cruiser, and collided into another vehicle. *Herweh*, supra, at syllabus. In *Whitely*, the court determined the evidence was insufficient as a matter of law to demonstrate a police officer had acted in a willful and wanton manner when the police officer's cruiser collided with a motorcycle. The evidence presented

during summary judgment "showed that the officer, in responding to an emergency call, had collided with the motorcycle while traveling at approximately 20 to 30 m.p.h. through a red light at a busy intersection with multiple lanes, without seeing all the lanes of incoming traffic and without activating the siren on his cruiser[.]" Id. at syllabus.

{¶51} In *Neuman v. Columbus* (Aug. 31, 1995), 10th Dist. No. 95APE02-161, 1995 Ohio App. LEXIS 3810, at *13, the court determined that an officer did not act wantonly and willfully as a matter of law when the officer was responding to an emergency call without activating his siren. Attempting to make a left-hand turn, the plaintiff bicyclist collided with the officer's vehicle, which was traveling at an estimated 45 to 55 miles per hour in a 25 miles per hour zone. Id. at *4. The *Neuman* Court did find a genuine issue of material fact as to whether the officer's conduct constituted recklessness, as the court considered the officer's failure to activate an audible signal, in violation of R.C. 4511.041, noting "that non-compliance with R.C. 4511.041 (including failure of a driver on an emergency call to activate an audible signal), while not establishing recklessness *per se*, would obviously be a relevant factor to be considered." Id. at *14.

{¶52} Based on the foregoing, the first assignment of error has merit.

{¶53} By their second assignment of error, the sheriff's department and Lt. Dondorfer argue the trial court erred in failing to grant Lt. Dondorfer summary judgment on the basis of immunity.

{¶54} "R.C. 2744.03(A)(6) sets forth the circumstances under which an employee of a political subdivision is immune from civil liability for damages for injury, death, or loss to person or property allegedly caused by any act or omission in

connection with a governmental or proprietary function." *Thompson* at ¶58. R.C. 2744.03(A)(6)(b) provides that an employee may be held liable if his or her acts or omissions "were with malicious purpose, in bad faith, or [conducted] in a wanton or reckless manner." In this case, it is undisputed that Lt. Dondorfer was acting within the scope of his employment at the time of the accident. There is no contention that he acted with malicious purpose or bad faith. We have already determined that no genuine issue of material fact exists regarding whether his conduct was willful or wanton. Consequently, the sole question presented is whether the operation of his car was "reckless."

{¶55} In *Thompson*, we stated:

{¶56} "*** [A]n 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.'"' *O'Toole v. Denihan*, 118 Ohio St.3d 374, ***, at ¶73, quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105, ***." *Thompson* at ¶66. (Parallel citations omitted.)

{¶57} The determination of whether an actor's conduct is reckless is generally for the jury. *Thompson* at ¶67. (Citations omitted.) However, the same analysis applies here as in the first assignment of error. Lt. Dondorfer presented sufficient documentary evidence to establish that he exercised enough care to invoke the immunity afforded under 2744.03(A)(6) and, therefore, is entitled to judgment as a

matter of law. As a result, the burden shifted to the Brickers who failed to produce sufficient evidentiary material that, when construed most favorably to them, presented a departure from care sufficient to warrant any finding of willful, wanton, or reckless misconduct on the part of Lt. Dondorfer. The second assignment of error has merit.

{¶58} By their third assignment of error, the sheriff's department and Lt. Dondorfer contend the trial court erred in failing to grant their motion for summary judgment on State Farm's claims for indemnity and subrogation. They cite to R.C. 2744.05(B)(1), which provides, in relevant part:

{¶59} "If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to those benefits."

{¶60} State Farm counters that the sheriff's department and Lt. Dondorfer failed to raise this defense in the trial court, thus waiving it. Appellants reply that the defense of sovereign immunity was raised in their answer to the Brickers' complaint, which defense was incorporated in their answer to State Farm's cross-claim.

{¶61} We find merit in the position of the sheriff's department and Lt. Dondorfer. They did not specifically argue R.C. 2744.05(B)(1) in their motion for summary judgment. As a result, the trial court did not specifically address this argument. However, our review is de novo, and since this additional basis for summary judgment has been raised in appellants' brief, and State Farm has had an opportunity to respond,

we should consider it on appeal. Under the statutory scheme set forth in R.C. 2744 et. seq., the state, while waiving immunity in certain instances, has clearly not waived it for subrogation claims such as that presented by State Farm. The summary judgment on State Farm's cross-claim is appropriate, as the cross-claim is clearly barred. *Hall v. Columbus (*S.D.Ohio 1998), 2 F.Supp.2d 995, 996-997.

{¶62} The third assignment of error has merit.

{¶63} The judgment of the Lake County Court of Common Pleas is reversed, and judgment is entered in favor of appellants. The trial court is instructed to proceed with disposition of the remaining claims of the Brickers against State Farm.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.