[Cite as *Gattrell v. Utica*, 2016-Ohio-792.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RACHEL GATTRELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HANNAH GATTRELL, DECEASED, ET AL.	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiffs-Appellees/Cross-Appellants	:	
-vs-	:	
	:	Case No. 15-CA-26
VILLAGE OF UTICA, ET AL.	:	
Defendants-Appellants/Cross-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Case No. 13 CV 00754

JUDGMENT: AFFIRMED IN PART; REVERSED IN PART; REMANDED

DATE OF JUDGMENT ENTRY: February 26, 2016

APPEARANCES:

For Plaintiffs-Appellees/Cross-Appellants:

JOHN J. REAGAN
CHRISTOPHER J. VAN BLARGAN
3412 West Market Street
Akron, OH 44333

For Defendants-Appellants/Cross-Appellees:

MICHAEL J. VALENTINE
MELVIN J. DAVIS
65 East State Street, 4th Floor
Columbus, OH 43215

Delaney, J.

{¶1} Defendants-Appellants/Cross-Appellees the Village of Utica, Former Officer Kevin Wolfe, and Former Chief Robert Curtis appeal the April 28, 2015 judgment entry of the Licking County Court of Common Pleas. Plaintiff-Appellees/Cross-Appellants Rachel Gattrell, individually and as administratrix of the estate of Hannah Gattrell, deceased, also appeals the July 9, 2015 nunc pro tunc judgment of the Licking County Court of Common Pleas, which included Civ.R. 54(B) language.

FACTS AND PROCEDURAL HISTORY

Fight at the Football Game

{¶2} On September 2, 2011, Hannah Gattrell, age 16, attended a Utica High School football game with her boyfriend, Defendant Spencer Lorenza, age 17. Lorenza drove Gattrell to the football game in his black Dodge Dakota pickup truck. While at the football game, Lorenza's friends pointed out Mark Woodruff, a high school classmate. It was rumored that Woodruff had a relationship with Gattrell while Lorenza was away for the summer.

{¶3} Lorenza's friends encouraged Lorenza to fight Woodruff. Lorenza happened to be walking around and Woodruff was in front of him. Lorenza stated he "zoned out a little bit" and he punched Woodruff in the face. Woodruff and Lorenza started fighting. Woodruff said a police officer pulled Lorenza off him. Woodruff's nose, knuckles, and knees were bleeding because of the fight. Woodruff did not seek medical attention for his injuries.

{¶4} Woodruff recalls Lorenza getting up and immediately running toward the parking lot. Woodruff saw Gattrell chase after Lorenza.

{¶5} Former Village of Utica Police Officer Jerry L. Smith was on a special duty assignment at the Utica High School football game on September 2, 2011. At approximately 9:40 p.m., he was alerted to a fight at the football game by commotion and yelling. He saw a boy and a girl run past him. Woodruff then came down, covered in blood, and said to Officer Curtis, "That guy just beat me up." Officer Curtis yelled, "Stop. Police," and started pursuing the boy and girl. Jason Villa with the Utica EMS was standing with Officer Curtis when the pair ran by. Villa heard Officer Curtis yell at the couple to stop. Lorenza testified he did not hear the officer tell him to stop. Officer Curtis said the couple had a significant lead on him. Woodruff followed Officer Curtis and pointed out Lorenza's Dodge Dakota pickup truck. Officer Curtis saw the boy get into the driver's seat and the girl get into the passenger's seat. Officer Curtis saw the boy start the pickup truck, peel out of the parking lot, and spin sideways when it hit the road. The Dodge Dakota took off down Church Street.

{¶6} As the Dodge Dakota was pulling out of the parking lot, Officer Curtis transmitted information over the police radio. Officer Curtis gave a description of the vehicle as a black Dodge Dakota with large primer spots. Off the radio, Officer Curtis asked Woodruff who it was and Woodruff identified the person who hit him and the driver of the Dodge Dakota as Spencer Lorenza. Officer Curtis then announced on the police radio that he believed the suspect was Spencer Lorenza.

Police Pursuit

{¶7} Former Village of Utica Police Chief Robert W. Curtis was on duty at the Utica High School football game on September 2, 2011. He was in his parked police cruiser in the parking lot. Chief Curtis heard a police radio transmission that there was an

incident and there were people running towards the front of the building. Chief Curtis pulled his cruiser out of the parking lot and headed westbound on Church Street.

{¶8} Former Village of Utica Police Officer Kevin D. Wolfe was on patrol in his cruiser on September 2, 2011. He was alerted on the police radio that Officer Smith was in foot pursuit of a white male wearing a black shirt and blue jeans because the male just assaulted an individual at the football game. A white female was reported to be running with the white male. Officer Wolfe reported to the football game to look for the individuals, but Officer Smith stated on the police radio that the individuals left the high school in a black Dodge Dakota pickup truck, heading west on Church Street. Officer Wolfe pulled out on Jefferson Street and headed south to the stop sign on Church Street. Officer Wolfe turned west on Church Street and followed Chief Curtis.

{¶9} Chief Curtis continued west on Church Street to Washington Street. He was two or three cars from the intersection when he saw the black Dodge Dakota pickup truck turn south on to North Washington Street. Chief Curtis noticed the black pickup truck because when it turned southbound, the truck sped up, started throwing gravel, and slid sideways. When Chief Curtis reached the intersection of Church and Washington, he saw the truck drive at a high rate of speed. Officer Wolfe recalled that he and Chief Curtis discussed that the black pickup truck was the suspect's vehicle.

{¶10} Chief Curtis turned left behind the pickup truck, accelerated and turned on his overhead lights. He did not recall turning on his siren with his lights. Officer Wolfe observed Chief Curtis turn on his lights and siren. Chief Curtis intended to initiate a traffic stop. After Chief Curtis turned on his overhead lights, he saw the truck come up to the

intersection of Spring Street and North Washington Street. Lorenza made a right turn at the intersection without first stopping at the stop sign.

{¶11} Chief Curtis and Officer Wolfe followed the truck down Spring Street. Lorenza turned left onto an alley and turned right when the alley ended. Chief Curtis followed Lorenza through the alley and Lorenza was aware there was police vehicle behind him that had activated its lights. Lorenza did not stop because "he wasn't thinking." He thought that if he could get out of the jurisdiction and go home, they could talk about it later. Officer Wolfe saw Lorenza accelerate as Chief Curtis followed him. Chief Curtis instructed Officer Wolfe to go around the block to see if Officer Wolfe could get in front of the truck and block it. Officer Wolfe proceeded west on Spring Street to Central Avenue to try to meet the truck at Mill Street. As Officer Wolfe was coming up to the stop sign at Central and Mill, he saw Lorenza pass by Central Avenue at a high rate of speed travelling west on Mill Street. Officer Wolfe then turned west on Mill Street in front of Chief Curtis. He activated his lights and siren.

{¶12} Officer Wolfe followed Lorenza south on Main Street. Lorenza was traveling at a high rate of speed. Lorenza came to the intersection of State Route 62 and Route 13 where there was a red light. Lorenza approached the intersection and instead of stopping, he turned right and drove through a gas station near the gas pumps. Lorenza did not want to stop at the light because of the police vehicles behind him. Officer Wolfe, with Chief Curtis behind him, turned west on State Route 62, instead of cutting through the gas station. Lorenza was a significant distance ahead of the officers when he turned left onto Reynold Road. Lorenza increased his speed on Reynolds Road and Officer Wolfe attempted to catch up to the truck. Officer Curtis fell behind and followed the vehicles.

There was no testimony from the parties as to the exact speed Lorenza or the police officers were traveling during the pursuit. All parties estimated they were traveling over the posted speed limit.

{¶13} As Lorenza and Officer Wolfe drove on Reynolds Road, Officer Wolfe slowed his speed to negotiate an "S curve" on the road. Lorenza did not slow down and Officer Wolfe observed him somewhat slide off the road. Officer Wolfe attempted to get close enough to read the license plate of the pickup truck, but he estimated he was several car lengths away because he could not read the license plate. Cheif Curtis instructed Officer Wolfe to watch out for the hill coming up on Reynolds Road. Officer Wolfe slowed down, but Lorenza proceeded down the hill and failed to negotiate a curve at the bottom of the hill. Lorenza lost control of his vehicle, went off to the right, and up an embankment. The vehicle struck a tree and rolled to the left, coming to a rest on the driver's side of the vehicle. When Officer Wolfe saw the vehicle leave the roadway, he took his foot off the accelerator and then applied the brakes when it looked like the vehicle was going to come back out into the middle of the road. The front wheels locked up and the police vehicle spun around. The trunk lid of the police vehicle came in contact with the rear bumper of the pickup truck. The crash reconstructionist report provided by Rachel Gattrell stated the impact by Officer Wolfe into Lorenza's vehicle was at less than 5 mph and caused no damage.

{¶14} The posted speed limit on Reynolds Road is 55 mph. There is an advisory speed reduction sign posted before the curves that recommends a speed of 35 mph. The expert reports provided by Rachel Gattrell estimated that Lorenza was traveling 61 to 64

mph when he entered the curve. The expert estimated Officer Wolfe was traveling 49 mph.

{¶15} Lorenza and Gattrell were not wearing seatbelts at the time of the accident. After the pickup came to a stop, Lorenza found Gattrell laying on top of him. Gattrell was unconscious and unresponsive when Lorenza tried to speak to her. Lorenza suffered severe injuries and was taken from the scene by helicopter. Gattrell was killed in the accident.

{¶16} Lorenza was charged with assault based on the incident with Mark Woodruff.

Village of Utica Police Department Vehicle Pursuit Policy

{¶17} The Village of Utica adopted official rules of conduct for the personnel of the Village of Utica Police Department. Included in those rules are policies and procedures regarding vehicle pursuits. The vehicle pursuit policy states in pertinent part:

> A. The vehicle pursuit policy shall be followed very stringently. Pursuits are prohibited, unless the offense involved is a felony, misdemeanor of the first degree, or any offense for which points are chargeable pursuant to section 4507.021 of the Ohio Revised Code. Although considerations are not limited to the following, the following must be considered when engaging in a pursuit:
>
> 1. The pursuit should take place without unreasonable delay after the offense occurs.
>
> * * *

3. The pursuing officer is expected to terminate the pursuit when the risks to officer safety and the safety of others outweigh the danger to the community if the suspect is not apprehended.

4. An officer will not operate a police vehicle at a rate of speed that may cause the officer to lose control of the vehicle.

* * *

9. In the course of the pursuit a safe distance must be maintained at all times.

10. Officers shall not attempt to duplicate imperiling changes taken by the fleeing driver.

11. Consideration must be given to the road and weather conditions, density and flow of traffic, school and residential areas, and the time of day when deciding to engage in or continue in the pursuit.

B. Procedures of the Pursuit

* * *

2. Assigned Supervisor

The Assigned Supervisor of the pursuit will normally maintain control of and responsibility for the pursuit until its conclusion. When possible the supervisor should ensure that:

a. There is a clear reason for the pursuit.

b. The supervisor knows the number of occupants in the vehicle being pursued.

* * *

e. The Assigned Supervisor and pursuing officers are prepared to terminate the pursuit at any given time.

Civil Action

{¶18} Plaintiff-Appellant Rachel Gattrell, individually and as administratrix of the Estate of Hannah Gattrell, deceased, filed a complaint on August 2, 2013 against Defendants Spencer Lorenza, Ottis Lorenza, Village of Utica, Officer Wolfe, Chief Curtis, and Officer Smith. Gattrell filed a first amended complaint on August 30, 2013. Count One and Two of the complaint alleged a survival and wrongful death claims against Spencer Lorenza and his father, Ottis Lorenza, whom owned the Dodge Dakota pickup truck. Count Three of the complaint alleged negligence against Chief Curtis and Officer Wolfe. Count Four of the complaint brought a claim of negligence against Officer Smith. Count Five and Six of the complaint alleged the Village of Utica was liable for the actions of its employees, and that it and Chief Curtis were liable for negligent hiring, training, and supervision. Counts Seven and Eight alleged claims for UM/UIM coverage.

{¶19} Rachel Gattrell dismissed Ottis Lorenza and Officer Smith from the complaint without prejudice.

{¶20} Defendants Village of Utica, Chief Curtis, and Officer Wolfe filed a motion for summary judgment on March 12, 2015. Defendants argued they were immune from liability pursuant to Ohio Revised Code Chapter 2744. They also argued they were entitled to summary judgment because the officers' conduct was not the proximate cause of the injuries to Hannah Gattrell. Rachel Gattrell responded to the motion for summary judgment on April 2, 2015.

{¶21} On April 28, 2015, the trial court ruled on the motion for summary judgment. The trial court determined Chief Curtis was entitled to summary judgment because there was no genuine issue of material fact that his conduct was not the proximate cause of Hannah Gattrell's injuries as a result of the pursuit. The trial court granted summary judgment in favor of the Village of Utica on Count Six of the first amended complaint alleging negligent supervision. Finally, the trial court found there were genuine issues of material fact whether Officer Wolfe and the Village of Utica were liable for the injuries suffered by Hannah Gattrell because Officer Wolfe's vehicle made contact with the pickup truck after the accident.

{¶22} On July 9, 2015, the trial court filed a nunc pro tunc judgment entry that included Civ.R. 54(B) language.

{¶23} It is from these judgments the parties appeal.

ASSIGNMENTS OF ERROR

{¶24} The Village of Utica, Chief Curtis, and Officer Wolfe raise four Assignments of Error:

{¶25} "I. THE TRIAL COURT ERRED BY DENYING POLITICAL SUBDIVISION IMMUNITY TO THE VILLAGE OF UTICA BECAUSE NO REASONABLE JUROR COULD CONCLUDE THAT OFFICER KEVIN WOLFE OPERATED HIS VEHICLE IN A WILLFUL OR WANTON MANNER.

{¶26} "II. THE TRIAL COURT ERRED BY DENYING OFFICER KEVIN WOLFE IMMUNITY, AS AN EMPLOYEE OF A POLITICAL SUBDIVISION, BECAUSE NO REASONABLE JUROR COULD CONCLUDE THAT HE ACTED WANTONLY OR RECKLESSLY WHILE PURSUING SPENCER LORENZA.

{¶27} “III. THE TRIAL COURT ERRED BY DENYING OFFICER KEVIN WOLFE SUMMARY JUDGMENT BECAUSE HIS CONDUCT WAS NOT EXTREME OR OUTRAGEOUS AND, THEREFORE, NOT THE PROXIMATE CASE OF HANNAH GATTRELL’S INJURIES.

{¶28} “IV. THE TRIAL COURT ERRED BY FAILING TO ADDRESS WHETHER RACHEL GATTRELL COULD PURSUE A SURVIVORSHIP CLAIM IN THE ABSENCE OF EVIDENCE THAT HANNAH GATTRELL SUFFERED CONSCIOUS PAIN AND SUFFERING.”

CROSS-ASSIGNMENTS OF ERROR

{¶29} Rachel Gattrell raises three Cross-Assignments of Error:

{¶30} “I. THE TRIAL COURT ERRED IN GRANTING CHIEF ROBERT CURTIS SUMMARY JUDGMENT BASED ON ITS FINDING NO GENUINE ISSUE OF MATERIAL FACT REMAINED AS TO WHETHER CHIEF ROBERT CURTIS’ PURSUIT OF SPENCER LORENZA WAS WILLFUL, WANTON AND/OR RECKLESS.

{¶31} “II. THE TRIAL COURT ERRED IN GRANTING CHIEF ROBERT CURTIS SUMMARY JUDGMENT BASED ON ITS CONCLUSION THAT CURTIS’ WILLFUL, WANTON AND/OR RECKLESS CONDUCT WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT BECAUSE SUCH CONDUCT WAS NOT EXTREME OR OUTRAGEOUS.

{¶32} “III. THE TRIAL CURT ERRED IN GRANTING CHIEF ROBERT CURTIS SUMMARY JUDGMENT BASED ON ITS CONCLUSION THAT HE COULD NOT, AS A MATTER OF LAW, BE HELD LIABLE HIS TRAINING AND/OR SUPERVISION OF UTICA’S POLICE OFFICERS BECAUSE SUCH FUNCTIONS ARE GOVERNMENTAL AND ENTITLED TO ABSOLUTE IMMUNITY AND, EVEN IF HE WAS NOT ENTITLED

TO ABSOLUTE IMMUNITY, THE GATTRELLS FAILED TO PRESENT ANY EVIDENCE THAT CURTIS' HIRING, TRAINING OR SUPERVISION OF WOLFE WAS WILLFUL, WANTON OR RECKLESS."

ANALYSIS

Summary Judgment Standard of Review

{¶33} The Assignments of Error of the parties concern the trial court's judgment entry granting in part and denying in part the motion for summary judgment filed by the Village of Utica, Chief Curtis, and Officer Wolfe. This court reviews summary judgment rulings applying the same standards as the trial court: de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We afford the lower court's decision no deference and independently review the record to determine whether summary judgment is appropriate. *Melling v. Scott*, 8th Dist. Cuyahoga No. 103007, 2016-Ohio-112, ¶ 20. We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is

made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶34} 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 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, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶35} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt,* 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

R.C. 2744.02 and Governmental Immunity

{¶36} The issue of governmental immunity is raised in the first and second Assignments of Error of Village of Utica, Chief Curtis and Officer Wolfe and the first Cross-Assignment of Error of Rachel Gattrell. R.C. 2744.02 establishes governmental immunity for political subdivisions and their employees: " * * * [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."

{¶37} A three-tiered analysis is required to determine whether a political subdivision is immune from tort liability pursuant to R.C. 2744. *Green Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556–557, 733 N.E.2d 1141 (2000); *Smith v. McBride*, 130 Ohio St.3d 51, 2011–Ohio–4674, 955 N.E.2d 954, ¶ 13–15. The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental or a proprietary function. *Green Cty. Agricultural Society*, at 556–557, 733 N.E.2d 1141; R.C. 2744.02(A)(1). That immunity, however, is not absolute. R.C. 2744.02(B); *Carter v. Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 610 (1998). "The second tier of the analysis requires a court to determine whether any of the five listed exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability." Id. "In cases involving the alleged negligent operation of a motor vehicle by an employee of a political subdivision, the second tier of the analysis includes consideration of whether the specific defenses of R.C. 2744.02(B)(1)(a) through (c) apply to negate the immunity exception of R.C. 2744.02(B)(1)." *Smith v. McBride*, 2011–Ohio–4674, ¶ 14 citing *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003–Ohio–3319, 790 N.E.2d 781, ¶ 8. "If any of the exceptions to immunity of R.C. 2744.02(B) do apply, and if no defense in that section applies to negate the liability of the political subdivision under that section, then the third tier of the analysis requires an assessment of whether any defenses in R.C. 2744 .03 apply to reinstate immunity." *Id*. at ¶ 15 citing *Colbert* at ¶ 9.

R.C. 2744.02(B)(1)(a) and The Full Defense to Liability

{¶38} The first statute relevant to the resolution of this case is R.C. 2744.02(B). R.C. 2744.02(B) addresses the liability of a political subdivision and the full defenses to liability for the operation of a motor vehicle by employees. It states:

(B) 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:

(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;

* * *

R.C. 2744.03(A)(6)(b) and Employee Immunity

{¶39} The three-tiered analysis of liability applicable to a political subdivision as set forth above does not apply when determining whether an employee of a political subdivision will be liable for harm caused to an individual. *Mashburn v. Dutcher*, 5th Dist. Delaware No. 12 CAE 010003, 2012–Ohio–6283, 14 N.E.3d 383 ¶ 33 citing *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007–Ohio–1946, 865 N.E.2d 9, ¶ 17. We review the next statute relevant to this case, R.C. 2744.03(A)(6), to determine the liability of an employee of a political subdivision. Pursuant to R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless: (a) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities or (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. An employee is immune from liability for negligent acts or omissions. *Anderson v. Massillon,* 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266*,* ¶ 23 ("*Anderson II*").

Degrees of Care

{¶40} The Ohio Supreme Court stated in *Anderson II* that the General Assembly set forth three different degrees of care in R.C. 2744.02(B)(1)(a) and 2744.03(A)(6)(b) to impose liability on a political subdivision or an employee of a political subdivision. *Anderson II, supra* at ¶ 23. The degrees of care found in the statutes are "willful," "wanton," and "reckless." The *Anderson II* court clarified that the terms "willful," "wanton," and "reckless" used in the statutes are not interchangeable and it set forth the following definitions:

Willful misconduct 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 purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. *Tighe v. Diamond*, 149 Ohio St. at 527, 80 N.E.2d 122; *see also Black's Law Dictionary* 1630 (8th Ed.2004) (describing willful conduct as the voluntary or intentional violation or disregard of a known legal duty).

Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. *Hawkins*, 50 Ohio St.2d at 117–118, 363 N.E.2d 367; *see also Black's Law Dictionary* 1613–1614 (8th Ed.2004) (explaining that one acting in a wanton manner is aware of the risk of the conduct but is not trying to avoid it and is indifferent to whether harm results).

Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. *Thompson*, 53 Ohio St.3d at 104–105, 559 N.E.2d 705, adopting 2 Restatement of the Law 2d, Torts, Section 500, at 587 (1965); *see also Black's Law Dictionary* 1298–1299 (8th Ed.2004) (explaining that reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the risk, but the actor does not desire harm).

Anderson II, supra at ¶ 32–34.

{¶41} R.C. 2744.02(B)(1)(a) states that in order to negate the immunity of the political subdivision when its employee is operating a motor vehicle and responding to a an emergency call, the conduct of the employee when operating the motor vehicle must be willful or wanton. R.C. 2744.03(A)(6)(b) states that an employee of a political subdivision can be liable if the employee's acts or omissions were done in a wanton or reckless manner. The only overlap between the statutes is for acts committed in a wanton manner.

{¶42} Utilizing the *Anderson II* definitions for wanton, willful, or reckless conduct, we conduct a de novo review of the Civ.R. 56 evidence to determine whether there are genuine issues of material fact as to the liability of the Village of Utica, Chief Curtis, and Officer Wolfe under R.C. 2744.02(B)(1)(a) or R.C. 2744.03(A)(6)(b).

{¶43} In this case, the parties do not dispute that Chief Curtis and Officer Wolfe were responding to an emergency call on September 2, 2011.

The Village of Utica's Liability

{¶44} The Village of Utica argues in its first Assignment of Error that the trial court erred when it found that the Village was not entitled to governmental immunity. We agree.

{¶45} Under R.C. 2744.02(B)(1)(a), a political subdivision has a full defense to liability for the operation of a motor vehicle by its employees when responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct. The *Anderson II* court reaffirmed that willful and wanton misconduct describe two distinct legal standards. *See Mashburn v. Dutcher, supra* at ¶ 41 citing *Gardner v. Ohio Valley Region Sports Car Club of Am.*, 10th Dist. Franklin No. 01 AP–1280, 2002–

Ohio–3556, at ¶ 11. "Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result." *Anderson II, supra* at ¶ 33. Wanton misconduct has been likened to conduct that manifests a "disposition to perversity," but the Supreme Court abandoned "disposition to perversity" as an element of the definition of wanton misconduct in *Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977). *Anderson II, supra* at ¶ 28. " '[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' " *Fabrey v. McDonald Village Police Dept*., 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994), quoting *Roszman, supra*. *See Gardner v. Ohio Valley Region Sports Car Club of Am*., 10th Dist. No. 01 AP–1280, 2002–Ohio–3556, at ¶ 13. "[I]t must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all common probability result in injury." *Anderson II, supra* at ¶ 25 citing *Universal Concrete Pipe Co. v. Bassett*, 130 Ohio St. 567, 200 N.E. 843 (1936), paragraph two of syllabus.

{¶46} "Willful conduct 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 purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Anderson II, supra* at ¶ 32. Willful misconduct involves "an intent, purpose, or design to injure." *Zivich v. Mentor Soccer Club, Inc*., 82 Ohio St.3d 367, 375, 696 N.E.2d 201 (1998), quoting *McKinney v. Hartz & Restle Realtors, Inc*., 31 Ohio St.3d 244, 246, 510 N.E.2d 386 (1987). Willful misconduct is something more than

negligence and it imports a more positive mental condition prompting an act than does the term wanton misconduct. *Phillips v. Dayton Power & Light Co*., 93 Ohio App.3d 111, 119, 637 N.E.2d 963 (2nd Dist.1994), citing *Tighe v. Diamond*, 149 Ohio St. 520, 526–527, 80 N.E.2d 122 (1948). "Willful misconduct" involves a more positive mental state prompting the injurious act than wanton misconduct, but the intention relates to the misconduct, not the result. *Mashburn v. Dutcher*, *supra* at ¶ 45.

{¶47} Both wanton and willful describes conduct that is greater than negligence and can be summarized as follows: willful conduct is the intent to harm someone and wanton misconduct is the failure to exercise any care whatsoever. *Anderson II, supra* at ¶ 48.

{¶48} In the present case, the alleged violations of the Village of Utica Police Department vehicle pursuit policy are relevant to, but not determinative of willful, wanton, or reckless misconduct. The *Anderson II* court stated as to the consideration of the violation of statutes, ordinances, or departmental policies in determining whether there is willful or wanton conduct:

> [I]t is well established that the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct.
>
> However, as the Restatement explains,
>
> > In order that the breach of [a] statute constitute reckless disregard for the safety of those for whose protection it is enacted, the statute must not only be intentionally violated, but the precautions required

> must be such that their omission will be recognized as involving a high degree of probability that serious harm will result.
>
> Thus, as we concluded in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008–Ohio–2574, 889 N.E.2d 505, "[w]ithout evidence of an accompanying knowledge that the violations 'will in all probability result in injury,' evidence that policies have been violated demonstrates negligence at best." *Id*. at 92.

(Citations omitted.) *Anderson II, supra* at ¶ 37–38.*

{¶49} After a thorough review of the record pursuant to our de novo standard of review, this Court concludes that reasonable minds could only conclude that the operation of the police cruisers by Chief Curtis and Officer Wolfe during the pursuit of Lorenza was not willful or wanton. The events in this case began at 9:40 p.m. After being alerted to look for a black Dodge Dakota pickup truck, Chief Curtis observed Lorenza driving his vehicle recklessly within the Village limits. Chief Curtis activated his lights and sirens to initiate a traffic stop. When Lorenza did not stop, Chief Curtis instructed Officer Wolfe to attempt to block Lorenza at another intersection, which would have ended the pursuit. Lorenza evaded Officer Wolfe, causing Officer Wolfe to activate his lights and sirens to pursue Lorenza.

{¶50} During the pursuit, Lorenza cut through a gas station to avoid a red light and evade the police. Officer Wolfe did not follow Lorenza through the gas station, but proceeded through the intersection, causing Lorenza to gain a significant lead on Officer Wolfe. Chief Curtis dropped back from the pursuit and allowed Officer Wolfe to take the lead. As Lorenza travelled on Reynolds Road, Officer Wolfe reduced his speed.

{¶51} There is no testimony or evidence in this case as to the actual speed the vehicles were traveling during the entire course of the pursuit, other than being above the posted speed limits. Officer Wolfe stated he was several car lengths behind Lorenza and he could not read Lorenza's license plate. There is no testimony or evidence that the parties encountered other vehicles on the roads during the pursuit.

{¶52} Based on the Civ.R. 56 evidence, we find that Rachel Gattrell has failed to demonstrate the existence of a genuine issue of material fact as to whether Chief Curtis's or Officer Wolfe's operation of their police cruisers during the pursuit constituted willful or wanton misconduct.

{¶53} The first Assignment of Error of the Village of Utica is sustained.

Individual Liability of Chief Curtis and Officer Wolfe

{¶54} R.C. 2744.03(A)(6)(b) provides immunity to political subdivision employees for acts or omissions not committed in a wanton or reckless manner. Chief Curtis, Officer Wolfe, and Rachel Gattrell raise in their second and first Assignments of Error respectively that the trial court erred as to its decision on the individual liability of the officers.

{¶55} We defined wanton misconduct under our analysis of R.C. 2744.02(B)(1)(a). The *Anderson II* court defined reckless misconduct:

> Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. Thompson, 53 Ohio St.3d at 104–105, 559 N.E.2d 705, adopting 2 Restatement of the Law 2d, Torts, Section 500, at 587 (1965);

> *see also Black's Law Dictionary* 1298–1299 (8th Ed.2004) (explaining that reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the risk, but the actor does not desire harm).

Anderson II, supra at ¶ 34.

{¶56} The Restatement of Torts 2d defines "recklessness" as follows: "The 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." 2 Restatement of the Law 2d, Torts, Section 500 at 587 (1965). Comment f to Section 500 contrasts recklessness and intentional misconduct: "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." *Id*. at 590. Comment a to Section 500 adds that " * * * the risk must itself be an unreasonable one under the circumstances." *Id*. at 588.

{¶57} We found under R.C. 2744.02(B)(1)(a) that reasonable minds could only conclude that the conduct of Chief Curtis and Officer Wolfe during the police pursuit was not wanton misconduct. Chief Curtis and Officer Wolfe are therefore entitled to judgment as a matter of law as to whether their conduct was wanton under R.C. 2744.03(A)(6)(b).

{¶58} As to reckless misconduct, Rachel Gattrell argues the facts that create a genuine issue of material fact as to wanton misconduct also support a finding there is a genuine issue of material fact whether Chief Curtis and Officer Wolfe were reckless.

Rachel Gattrell asserts that based upon the danger to the public and Lorzena's passenger, Hannah Gattrell, the officers should have not initiated the chase and should have abandoned the pursuit before Lorenza wrecked his vehicle. Rachel Gattrell further argues the officers failed to adequately balance the seriousness of Lorenza's offense which gave rise to the pursuit and the danger to the public and Hannah Gattrell because of the pursuit.

{¶59} "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." *Sparks v. Kempler*, 10th Dist. Franklin No. 11AP-242, 2011-Ohio-6456, ¶ 20 citing *Elsass v. Crockett*, 9th Dist. No. 22282, 2005-Ohio-2142, ¶ 29; *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129, ¶ 40. "To find otherwise would effectively impose a duty on police officers to refrain from ever pursuing criminal suspects." *Id*. While it was the assault at the high school football game that caused Chief Curtis and Officer Wolfe to look for the black Dodge Dakota pickup truck, Chief Curtis attempted to initiate a traffic stop based on his observations of Lorenza's reckless driving. Lorenza knew Chief Curtis was behind him with lights and siren activated, but Lorenza chose not to stop. Chief Curtis and Officer Wolfe attempted to block Lorenza to end the pursuit, but Lorenza evaded the officers. Our review of the record shows there is no testimony that Chief Curtis or Officer Wolfe failed to exercise caution when they attempted to stop or when they pursued Lorenza.

{¶60} Rachel Gattrell argues, however, that the officers acted recklessly because they did not stop their pursuit of Lorenza when he began driving erratically. The Tenth

District Court of Appeals addressed a similar argument in *Sparks v. Klempner*, 10th Dist. Franklin No. 11AP-242, 2011-Ohio-6456, ¶ 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, 167 L.Ed.2d 686 ("[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.)

{¶61} Rachel Gattrell argues the officers violated the Village of Utica Police Department vehicle pursuit policy in their pursuit of Lorenza. As stated above, the alleged violations of departmental policies are relevant to, but not indicative of reckless misconduct. A violation of departmental policies does not rise to the level of reckless conduct unless a claimant can establish that the violator acted with a perverse disregard

of the risk. *O'Toole v. Denihan*, 118 Ohio St.3d 374, 390, 2008-Ohio-2574, 889 N.E.2d 505, 519, 2008 WL 2315718, ¶ 92. A review of the vehicle pursuit policy compared to the actions of Chief Curtis and Officer Wolfe does not create a genuine issue of fact that there was a perverse disregard of the risk that the pursuit presented to other drivers or passengers.

{¶62} In this case, our de novo review of the record demonstrates Chief Curtis's and Officer Wolfe's operation of their police cruisers during the pursuit did not constitute wanton or reckless misconduct.

{¶63} The second Assignment of Error of Officer Wolfe is sustained. The first Cross-Assignment of Error of Rachel Gattrell is overruled.

Proximate Cause

{¶64} The trial court determined the actions of Chief Curtis were not the proximate cause of the injuries to Hannah Gattrell, but there was a genuine issue of material fact whether the actions of Officer Wolfe were the proximate cause of the injuries to Hannah Gattrell. In *Lewis v. Bland*, 75 Ohio App.3d 453, 599 N.E.2d 814 (9th Dist.1991), the Ninth District Court of Appeals held: "When a law enforcement officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the officer's pursuit is not the proximate cause of those injuries unless the circumstances indicate extreme or outrageous conduct by the officer, as the possibility that the violator will injure a third party is too remote to create liability until the officer's conduct becomes extreme." *Id*. at 456.

{¶65} Rachel Gattrell asserts there was sufficient evidence before the trial court from which a reasonable jury could conclude that the conduct of Chief Curtis and Officer Wolfe during the pursuit was extreme and outrageous. We have determined there was

no genuine issue of material fact that the officers' conduct was willful or wanton, or was with malicious purpose, in bad faith, or in a wanton or reckless manner. We find that reasonable minds could only conclude that the officers' conduct was also not extreme or outrageous.

{¶66} The third Assignment of Error of Officer Wolfe is sustained. The second Cross-Assignment of Error is overruled.

Negligent Supervision

{¶67} Rachel Gattrell argues in her third Cross-Assignment of Error that the trial court erred in granting judgment in favor of Chief Curtis on her claim of negligent training and supervision. We disagree.

{¶68} We have determined no reasonable juror could find that the actions of the police officers during the pursuit demonstrated willful, wanton, or reckless misconduct. Included in this analysis was consideration of the Village of Utica Police Department vehicle pursuit policy. Accordingly, we find no genuine issue of material fact that Chief Curtis or the Village of Utica is liable for negligent supervision.

{¶69} The third Cross-Assignment of Error of Rachel Gattrell is overruled.

Survivorship Claim

{¶70} The Village of Utica, Chief Curtis, and Officer Wolfe argue in their fourth Assignment of Error that the trial court erred in failing to address their motion for summary judgment as to Rachel Gattrell's survivorship claims. Rachel Gattrell does not respond to the fourth Assignment of Error in her appellate briefs.

{¶71} In their motion for summary judgment, Village of Utica, Chief Curtis, and Officer Wolfe argued Rachel Gattrell's claim for survivorship must be dismissed because

there was no evidence in the record that Hannah Gattrell suffered conscious pain and suffering. Rachel Gattrell stated in her response to the motion for summary judgment that she no longer wished to pursue her claim.

{¶72} We find the fourth Assignment of Error to be moot.

CONCLUSION

{¶73} Upon our de novo review, we find that the Village of Utica, Former Chief Robert Curtis, and Former Officer Kevin Wolfe are entitled to judgment as a matter of law pursuant to Ohio Revised Code Chapter 2744.

{¶74} We affirm in part and reverse in part the judgment of the Licking County Court of Common Pleas. We remand the matter to the trial court for further proceedings consistent with this opinion and law.

By: Delaney, J.,

Farmer, P.J. and

Wise, J., concur.