[Cite as *Bowersock v. Addlesburger*, 2019-Ohio-5447.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

MARIAH BOWERSOCK, et al.,	:	
Plaintiffs-Appellants,	:	Case No. 19CA13
vs.	:	
GEORGE ADDLESBURGER, et al.,	:	DECISION & JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

Ethan Vessels, Marietta, Ohio for appellants.

Gregory A. Beck, Andrea K. Ziarko, and Daniel D. Eisenbrei, North Canton, Ohio, for appellees.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-27-19
ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court summary judgment in favor of George Addlesburger, Grandview Township Volunteer Fire Department and Grandview Township, defendants below and appellees herein. Mariah Bowersock (by her father, Zachary Bowersock), Zachary Bowersock, and Mandy Bowersock, plaintiffs below and appellants herein, assign the following error for review:

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS GEORGE ADDLESBURGER, GRANDVIEW TOWNSHIP VOLUNTEER FIRE DEPARTMENT, AND GRANDVIEW TOWNSHIP."

{¶ 2} On April 20, 2018, Breckin Hoff, Connie Merckle (Breckin's grandmother), and Mariah (Breckin's girlfriend) sustained serious injuries in an automobile accident. Before the accident, Hoff's vehicle had been stopped at a stop sign located at the corner of Merchant Street and State Route 7. As Hoff attempted to cross State Route 7, Addlesburger's vehicle collided with Hoff's vehicle. At the time of the accident, Addlesburger, a volunteer firefighter with the Grandview Township Volunteer Fire Department, was driving his personal vehicle while responding to a reported structural fire.

{¶ 3} Appellants filed a personal injury complaint against multiple parties and alleged that Mariah's injuries resulted from Addlesburger's wanton and reckless operation of his vehicle. Appellants averred that, at the time of the accident, Addlesburger's vehicle was not equipped with a siren and did not display activated emergency lights. Appellants further asserted that Addlesburger did not attempt to slow down and did not attempt to clear the intersection before he continued through the intersection where the accident occurred. Appellants further claimed that Addlesburger did not have the vehicle inspected for at least two years before the crash, and the failure to have his vehicle inspected demonstrated a willful, deliberate, wanton, and reckless disregard for public safety.

{¶ 4} Appellees later requested summary judgment and argued that they are immune from liability under R.C. Chapter 2744. Appellees contended that even if an exception to immunity applies, appellants cannot present any evidence to demonstrate a genuine issue of material fact as to whether any of appellees' conduct could be construed as willful, wanton, or reckless so as to impose liability. In opposition, appellants asserted that genuine issues of material fact remain

regarding whether Addlesburger acted wantonly or recklessly. Appellants alternatively asked the court to find that Addlesburger's conduct was wanton and reckless as a matter of law. Appellants claimed that Addlesburger wantonly or recklessly operated the vehicle by speeding and by failing to use a siren and emergency lights. Appellants additionally argued that Addlesburger's failure to have his vehicle annually inspected shows that he engaged in wanton or reckless conduct because if Addlesburger had his vehicle inspected, the vehicle would have been equipped with a working siren and emergency lights. Appellants further claimed that an inspection would have revealed that the vehicle had purportedly faulty brakes.

{¶ 5} To support their arguments, the parties referred to the depositions filed in the case. Fire Chief Roger Weddle stated that Addlesburger violated a departmental rule by not having an operational siren when responding to the fire. The chief explained that part of the reason for the vehicle inspections is to ensure that the lights and sirens are in proper working order.

{¶ 6} Addlesburger stated that on the date of the accident, he used his personal vehicle to respond to the fire. Addlesburger claimed that his emergency lights were activated and that they remained activated until the collision. He explained that his siren had been inoperable for approximately two weeks before the collision. Addlesburger also agreed that he had been speeding before the accident, but he did not believe that speeding on State Route 7 en route to a fire without a siren was unsafe. Addlesburger explained that he had a clear view of the roadway and that nothing obstructed his vision.

{¶ 7} Addlesburger indicated that he did not slow down before approaching Merchant Street because he did not see a reason to slow down. Addlesburger had been driving straight ahead and, with his eyes focused upon the roadway in front of him, as he "was approaching the

intersection [with Merchant Street] and all of a sudden, boom, the car is there." Addlesburger reported that as soon as he saw Hoff's vehicle, he slammed on the brakes so hard that it felt as if a brake line had broken.

{¶ 8} Hoff stated that before he attempted to cross State Route 7, he looked both ways and believed that he could safely cross State Route 7. Hoff explained that he did not notice any oncoming traffic, that he did not hear any sirens or see any flashing lights.

{¶ 9} After the trial court considered the summary judgment request and the evidentiary materials, the court determined that appellants failed to present any evidence to show that Addlesburger acted willfully, wantonly, or recklessly. The court thus entered summary judgment in appellees' favor. This appeal followed.

{¶ 10} In their sole assignment of error, appellants assert that the trial court erred by entering summary judgment in appellees' favor. Appellants contend that the following circumstances demonstrate that genuine issues of material fact remain as to whether Addlesburger acted wantonly or recklessly: (1) Addlesburger "was speeding at double the speed limit in the middle of New Matamoras in the middle of the day"; (2) Addlesburger did not look "to the left or right for any other vehicles that may enter his path"; (3) Addlesburger's vehicle had defective brakes; (4) Addlesburger's vehicle lacked a working siren; (5) Addlesburger was speeding toward a fire that did not involve a danger to life; and (6) Addlesburger's vehicle had not been inspected in the year before the accident. Appellants additionally argue that the failure to perform maintenance of a firefighter's vehicle constitutes a proprietary function and the failure to inspect the vehicle is one of the circumstances that a court may consider when it reviews whether Addlesburger wantonly or recklessly operated his motor vehicle.

{¶ 11} Initially, we note that appellate courts conduct a de novo review of trial court summary judgment decisions. *E.g., State ex rel. Novak, L.L.P. v. Ambrose*, 156 Ohio St.3d 425, 2019-Ohio-1329, 128 N.E.3d 1329, ¶ 8; *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 13; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. *Grafton*, 77 Ohio St.3d at 105.

{¶ 12} Civ.R. 56(C) provides, in relevant part, as follows:

> * * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶ 13} Accordingly, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Pelletier* at ¶ 13; *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12; *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 14} R.C. Chapter 2744 sets forth the rules to determine whether a political subdivision

and its employees are immune from liability. *McConnell v. Dudley,* Slip Opinion, — Ohio St.3d —, 2019-Ohio4740, — N.E.3d. —, ¶ 20; *Argabrite v. Neer,* 149 Ohio St.3d 349, 2016-Ohio-8374, 75 N.E.3d 161, ¶ 6. A three-step analysis applies when determining a political subdivision's immunity from liability. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 270, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 14; *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7; *Leasure v. Adena Local School Dist.*, 2012-Ohio-3071, 973 N.E.2d 810, ¶ 13–14 (4th Dist.). First, R.C. 2744.02(A)(1) sets forth the general rule that a political subdivision is immune from tort liability for acts or omissions connected with governmental or proprietary functions. *Cramer* at ¶ 14; *Colbert* at ¶ 7; *Harp v. Cleveland Hts.*, 87 Ohio St.3d 506, 509, 721 N.E.2d 1020 (2000). Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). *Cramer* at ¶ 15; *Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St.3d 467, 470, 2002-Ohio-2584, 769 N.E.2d 372, ¶ 25. Finally, R.C. 2744.03(A) sets forth several defenses that a political subdivision may assert if R.C. 2744.02(B) imposes liability. *Cramer* at ¶ 16; *Colbert* at ¶ 9. The R.C. 2744.03(A) defenses then re-instate immunity.

{¶ 15} In the case at bar, the parties agree that R.C. 2744.02(B)(1)(b) defines the extent of the political-subdivision-appellees' immunity.

{¶ 16} R.C. 2744.02(B)(1)(b) states:

> (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:
>
> * * * *
>
> (b) A member of a municipal corporation fire department or any other

> firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct[.]

{¶ 17} R.C. 2744.02(B)(1), therefore, generally allows political subdivisions to be held liable for a firefighter's negligent operation of a motor vehicle while responding to a fire or emergency alarm. The statute does not, however, permit political subdivisions to be held liable for a firefighter's negligent operation of a motor vehicle while responding to a fire or to an emergency alarm, unless the firefighter operated the vehicle in a willful or wanton manner. R.C. 2744.02(B)(1)(b).

{¶ 18} The three-tier analysis does not apply to the individual employees of political subdivisions. *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶ 36; *Cramer* at ¶ 17. Instead, R.C. 2744.03(A)(6)(b) governs a political subdivision employee's individual immunity. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994) (stating that R.C. 2744.03(A)(6)(b) applies to individual employees). R.C. 2744.03(A)(6) sets forth a presumption of immunity and states that a political subdivision "employee is immune from liability unless * * * * [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." *See Cook v. Cincinnati*, 103 Ohio App.3d 80, 90, 658 N.E.2d 814 (1st Dist. 1995) (stating that political-subdivision-employee immunity analysis "begin[s] with a presumption of immunity"); *accord David v. Matter*, 96 N.E.3d 1012, 2017-Ohio-7351 (6th Dist.), ¶ 11 (explaining that R.C. 2744.03(A)(6) "gives rise to a presumption of immunity"); *Vlcek v. Chodkowski*, 2015-Ohio-1943, 34 N.E.3d 446 (2nd Dist.), ¶ 41 (stating that the

"immunity statute creates a presumption of immunity" for political subdivision employees); *MacCabee v. Mollica*, 4th Dist. Athens No. 09CA32, 2010-Ohio-4310, ¶ 16, 2010 WL 3532089 (stating that political subdivision employee presumed immune).

{¶ 19} "Volunteer firefighters are considered 'employees' for purposes of" R.C. Chapter 2744. *Bowlander v. Ballard*, 6th Dist. Sandusky No. S-02-029, 2003-Ohio-2907, 2003 WL 21299931, ¶ 21, citing *Salmon v. Jordan* (Nov. 12, 1999), Portage App. No. 98-P-0096; *accord Reyes v. Lochotzki*, 6th Dist. Ottawa No. OT-05-034, 2006-Ohio-1404, 2006 WL 751375, ¶ 9. Thus, under R.C. 2744.06(A)(6)(b), volunteer firefighters "are immune from liability unless they act maliciously, in bad faith or in a wanton or reckless manner." *Argabrite* at ¶ 31. Consequently, a volunteer firefighter's mere negligence in the performance of official duties does not give rise to personal liability. *See Fabrey*, 70 Ohio St.3d at 357 ("mere negligence in [officer's] official duties should not give rise to personal liability").

{¶ 20} Whether a political subdivision or its employee may invoke statutory immunity under R.C. Chapter 2744 generally presents a question of law. *E.g., McConnell* at ¶ 17; *Nease v. Med. College Hosp.*, 64 Ohio St.3d 396, 400, 596 N.E.2d 432 (1992), quoting *Roe v. Hamilton Cty. Dept. Of Human Servs.*, 53 Ohio App.3d 120, 126, 560 N.E.2d 238 (1st Dist. 1988) (citations omitted) ("'Whether immunity may be invoked is a purely legal issue, properly determined by the court prior to trial, and preferably on a motion for summary judgment'"); *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992) (same); *accord Hoffman v. Gallia Cty. Sheriff's Office*, 2017-Ohio-9192, 103 N.E.3d 1 (4th Dist.), ¶ 38. However, whether a political subdivision employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner generally are questions of fact. *Cannavino v. Rock Ohio Caesars*

Cleveland, L.L.C., 8th Dist. Cuyahoga No. 103566, 83 N.E.3d 354, 2017-Ohio-380, 2017 WL 444320, ¶ 26; *Long* at ¶ 17, citing *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, 857 N.E.2d 573; *Fabrey*, 70 Ohio St.3d at 356, 639 N.E.2d 31. Thus, a trial court may not grant summary judgment on the basis of R.C. 2744.02(B)(1)(b) or 2744.03(A)(6)(b) immunity unless reasonable minds can only conclude that the employee did not act willfully, wantonly, maliciously, reckless, or in bad faith. *Hoffman* at ¶ 38, citing *Argabrite* at ¶ 15 (stating that summary judgment standard in statutory immunity context requires court to examine whether reasonable minds could conclude that the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner); *Gates v. Leonbruno*, 70 N.E.3d 1110, 2016-Ohio-5627 (8th Dist.), ¶ 37. If reasonable minds could disagree on these issues, then a court may not grant summary judgment based upon statutory immunity. *Gates* at ¶ 37.

{¶ 21} The standard for showing that a political subdivision employee acted with malicious purpose, in bad faith, or in willful, wanton, or reckless manner is "rigorous" and "will in most circumstances be difficult to establish * * *." *Argabrite* at ¶ 8 (citation omitted); *accord Caudill v. Columbus*, 10th Dist. Franklin No. 17AP-129, 2017-Ohio-7617, 2017 WL 4074583, ¶¶ 23–24. Consequently, summary judgment usually is appropriate if the employee's conduct does not, as a matter of law, rise to the level of maliciousness, bad faith, willfulness, wantonness, or recklessness. *Caudill* at ¶ 24, citing *Scott v. Kashmiry*, Franklin No. 15AP-139, 2015-Ohio-3902, 42 N.E.3d 339 (10th Dist.), ¶ 20 (where "reasonable minds could only conclude that [an officer's] conduct was, at worst, negligent," then "the issue of immunity is an appropriate issue for resolution on summary judgment"). Accordingly, a court ordinarily may enter summary judgment in favor of a political subdivision and its employee if the employee's

actions "showed that [the employee] did not intend to cause harm, * * * did not breach a known duty through an ulterior motive or ill will, did not have a dishonest purpose, and did not create an unnecessary risk of physical harm greater than that necessary to establish negligence." *Hackathorn v. Preisse*, 104 Ohio App.3d 768, 772, 663 N.E.2d 384 (9th Dist.1995). Moreover, "'the standard for proving recklessness is high, so a court may enter summary judgment in those cases where the conduct does not indicate a disposition to perversity.'" *Caudill v. City of Columbus*, 10th Dist. No. 17AP-129, 2017-Ohio-7617, 97 N.E.3d 800, 2017 WL 4074583, ¶ 24, quoting *Sparks v. Klempner*, 10th Dist. No. 11AP-242, 2011-Ohio-6456, 2011 WL 6294496, ¶ 19.

{¶ 22} In the case sub judice, appellants did not allege that Addlesburger engaged in any willful conduct. We therefore limit our review to whether any genuine issues of material fact remain as to whether Addlesburger engaged in wanton or reckless conduct.

{¶ 23} Wanton misconduct means "'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.'" *Argabrite* at ¶ 8, quoting *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph three of the syllabus; *accord Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), 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."); *see Tighe v. Diamond*, 149 Ohio St. 520, 526, 80 N.E.2d 122 (1948) (defining wanton misconduct as "an entire absence of all care for the safety of others and an indifference to the consequences").

{¶ 24} "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.'" *Argabrite* at ¶ 8, quoting *Anderson*, paragraph four of the syllabus. "[Recklessness] requires a finding that the probability of harm occurring is great and that the harm will be substantial. A possibility or even probability is not enough as that requirement would place the act in the realm of negligence." *Preston v. Murty*, 32 Ohio St.3d 334, 336, 512 N.E.2d 1174, 1176 (1987). "Recklessness, therefore, necessarily requires something more than mere negligence. In fact, 'the actor must be conscious that his conduct will in all probability result in injury.'" *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 74, quoting *Fabrey*, 70 Ohio St.3d at 356, 639 N.E.2d 31.

{¶ 25} Courts have identified several factors that may be relevant when determining if a law enforcement officer operated a motor vehicle willfully, wantonly, recklessly, or simply negligently. Courts also have considered some combination of the same factors when determining if a firefighter operated a motor vehicle willfully, wantonly, recklessly, or simply negligently. The factors include the following: (1) the driver's speed; (2) whether the driver traveled in the correct lane of travel; (3) whether the driver had the right-of-way; (4) the time of day; (5) the weather; (6) the driver's familiarity with the road; (7) the road contour and terrain; (8) whether traffic was light or heavy; (9) whether the driver made invasive maneuvers (i.e., attempting to force the vehicle from the road) or evasive maneuvers (i.e., attempting to avoid a collision); (10) the nature and seriousness of the emergency; (11) whether the driver possessed a safer alternative; (12) whether the driver admitted disregarding the consequences of his actions; (13) whether the driver activated the vehicle's lights and sirens; and (14) whether the driver

violated any applicable departmental policy. *E.g., Hoffman v. Gallia Cty. Sheriff's Office*, 2017-Ohio-9192, 103 N.E.3d 1 (4th Dist.), ¶ 49, citing *Gates v. Leonbruno*, 2016-Ohio-5627, 70 N.E.3d 1110, ¶ 40 (8th Dist.); *Adams v. Ward*, 7th Dist. Mahoning No. 09MA25, 2010-Ohio-4851, ¶ 28, 2010 WL 3861142; *Campbell v. Massucci*, 11th Dist. Ashtabula 2009-A-0040, 2010-Ohio-4084, ¶ 69; *accord Argabrite* (considering weather and traffic conditions, as well as speed, pursuit policy, and activation of police cruiser's lights and sirens); *Ceasor v. City of E. Cleveland*, 112 N.E.3d 496, 2018-Ohio-2741 (8th Dist.) (determining that "speeding through a dark intersection known to be frequently populated with pedestrians in a vehicle with one working headlight" and without overhead lights or sirens created genuine issues of material fact as to whether officer operated vehicle in wanton or reckless manner). "No one factor is determinative, however." *Hoffman* at ¶ 49, citing *Argabrite* at ¶ 16 and 21 (declining to adopt any per se rules and concluding that neither speed nor policy violation alone sufficient to demonstrate wanton or reckless conduct); *Gates* at ¶ 45 (noting that neither speed nor violation of departmental policy sufficient, on their own, to illustrate that officer operated vehicle in willful, wanton, or reckless manner). "Instead, courts must consider the totality of the circumstances surrounding the accident." *Id.*, citing *Argabrite* (considering the totality of the circumstances surrounding the pursuit, instead of examining any one factor in isolation).

{¶ 26} In general, courts have been unwilling to impose liability upon a political subdivision and its police officer or firefighter when the officer or firefighter responding to the emergency possessed the right-of-way and the injured party failed to yield, despite the lack of any obstructions. Courts have applied this rule even if the officer or firefighter had been speeding and did not have lights and/or a siren activated.

{¶ 27} For example, in *Smith v. McBride*, 10th Dist. Franklin No. 09AP-571, 2010-Ohio-1222, 2010 WL 1138977, the court determined that the following circumstances failed to create a genuine issue of material fact as to whether the officer willfully, wantonly, or recklessly operated his cruiser: (1) the officer was responding to an emergency call; (2) the accident occurred on a "flat stretch of road" that consisted of seven lanes; (3) traffic conditions were light; (4) there was no evidence of adverse weather conditions; (5) it was nighttime; (6) the officer was traveling between 55 and 58 mph in a 45 mph zone; (7) the officer did not activate his lights and sirens, but his headlights were illuminated; (8) the officer had the right-of-way; and (9) the officer removed his foot from the accelerator when he noticed a car turning in front of him. *Id.* at ¶ 30–31 and ¶ 35. The court additionally noted that the record did not contain any evidence that the plaintiff "was deprived of an opportunity to yield" to the officer's vehicle. *Id.* at ¶ 30. The court thus affirmed the trial court's decision entering summary judgment in favor of a political subdivision and its law enforcement officer.

{¶ 28} Likewise, in *VanDyke v. Columbus*, 10th Dist. Franklin No. 07AP-0918, 2008-Ohio-2652, 2008 WL 2252558, the court determined that a police officer did not willfully or wantonly operate his police vehicle by speeding at night without his lights and sirens activated. In *VanDyke*, the accident resulted when the plaintiff, who had been stopped at a stop sign, pulled into the street in front of the officer's oncoming vehicle. In concluding that the officer did not act willfully or wantonly, the court noted that the accident occurred on a lighted and flat six-lane roadway with sparse traffic, the officer had the right-of-way, the officer had his headlights illuminated, and the plaintiff had an obligation to yield to oncoming traffic. The court concluded that "[g]iven the wide, broad, and well-lit roadway described in the record, flat

approaches on either side of the intersection, and the fact that [the officer] was proceeding with headlights, [the plaintiff] was not deprived of the opportunity to yield even if [the officer] was proceeding at a speed in excess of the posted limit and without lights or sirens." *Id.* at ¶ 11.

{¶ 29} The court reached a similar conclusion in *Hewitt v. Columbus*, 10th Dist. Franklin No. 08AP-1087, 2009-Ohio-4486, 2009 WL 2759735. In *Hewitt*, the accident resulted when the plaintiff turned into the path of an oncoming police officer's vehicle that was en route to an emergency call. The court determined that no genuine issues of material fact remained as to whether the officer willfully or wantonly operated the vehicle. The court refused to recognize that the officer acted willfully or wantonly by speeding and by failing to activate his vehicle's lights and sirens. The court observed that, even though the accident occurred at night, the roadway was well-lit, visibility clear, traffic light, and the officer had his headlights illuminated. The court additionally pointed out that the officer had the right-of-way and nothing obstructed the plaintiff's view of oncoming traffic.

{¶ 30} More recently, the Ohio Supreme Court in *Argabrite* indicated that neither a high-speed police pursuit nor a violation of departmental policy equates to per se recklessness or demonstrates the existence of "a genuine issue of material fact concerning whether an officer has acted with a malicious purpose, in bad faith or in a wanton or reckless manner." *Id.* at ¶ 16 and 21. In *Argabrite*, the plaintiff, an innocent third-party, sustained injuries following a high-speed police chase that resulted in a motor vehicle collision. The plaintiff filed a complaint against the law enforcement officers involved in the high-speed pursuit and asserted that the officers were not entitled to statutory immunity because their conduct was wanton or reckless. *Argabrite v. Neer*, 26 N.E.3d 879, 2015-Ohio-125 (2d. Dist), ¶ 2 (*Argabrite I*). The plaintiff alleged that the

officers acted wantonly or recklessly by engaging in a high-speed pursuit "through commercial and residential areas during heavy traffic when the suspect was not violent and could have been later apprehended with a warrant." *Id.* at ¶ 2. The plaintiff further claimed that the officers violated departmental policy during the pursuit. *Id.* at ¶ 22. The officers requested summary judgment and argued, in part, that they were entitled to R.C. 2744.03(A)(6)(b) immunity because they did not act maliciously, in bad faith, wantonly, or recklessly. Both the trial and appellate courts applied a "no-proximate-cause rule" to determine that the officers were entitled to summary judgment and did not address the R.C. 2744.03(A)(6)(b) immunity issue.

{¶ 31} On appeal to the Ohio Supreme Court, the court rejected the no-proximate-cause rule and instead determined that R.C. 2744.03(A)(6)(b) governs the immunity analysis. *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, 75 N.E.3d 161, ¶ 12 (*Argabrite II*). The court independently reviewed whether the evidence created any issue of fact as to whether the law enforcement officers acted maliciously, in bad faith, wantonly, or recklessly. The court recognized that the evidence indicated that one officer violated departmental policy in pursuing the suspect's vehicle, but stated, that violating departmental policy "does not equate to per se recklessness." *Id.* at ¶ 21. Instead, the evidence must also show that the officer knows that violating the departmental policy at issue "'will in all probability result in injury.'" *Id.* at ¶ 21, quoting *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, paragraph three of the syllabus. The court explained that if the evidence fails to show that the officer knows that violating the departmental policy at issue "'will in all probability result in injury,'" then "evidence of a policy violation demonstrates negligence, at best." *Id.*

{¶ 32} The *Argabrite* court additionally observed that the pursuing officers followed the

suspect during light traffic and sunny weather conditions and that they activated their overhead lights and sirens throughout the pursuit. Furthermore, the evidence showed that the officers' rate of speed varied from 45 to 80 miles per hour in zones with speed limits ranging from 25 to 55 miles per hour. *Argabrite I* at ¶ 23. The court concluded that the foregoing evidence failed to support any finding that the officers engaged in wanton or reckless conduct. *Argabrite II* at ¶ 30. The court thus determined that the officers were statutorily immune from liability under R.C. 2744.03(A)(6)(b). *Id.* at ¶ 30.

{¶ 33} Other courts have concluded that genuine issues of material fact may exist regarding the wanton or reckless operation of a motor vehicle when a firefighter speeds to the scene of an emergency or a fire and enters an intersection without the right of way and without lights and a siren. For example, in *Campbell v. Massucci*, 190 Ohio App.3d 718, 2010-Ohio-4084, 944 N.E.2d 245 (11th Dist.), the court determined that genuine issues of material fact remained as to whether a firefighter willfully or wantonly operated his personal vehicle while responding to a fire. In *Campbell*, the accident resulted when a firefighter's personal vehicle struck a pedestrian in an intersection controlled by a stoplight. At the time of the accident, the firefighter had been speeding–traveling up to 51 miles per hour in a 35-mile-per-hour zone. Additionally, the firefighter's vehicle did not have overhead lights or a siren. Some evidence also suggested that the firefighter, rather than slowing upon approaching the intersection, accelerated through the intersection even though the light was red or maybe yellow. The evidence also indicated that the firefighter may have been traveling in the wrong lane of travel. The appellate court determined that all of the foregoing facts could support a finding that the firefighter willfully or wantonly operated his vehicle. The court, however,

cautioned that it did not intend to conclude that "any violation of a traffic law * * * constitutes willful and wanton misconduct per se." *Id.* at ¶ 69. Instead, the court explained that when a firefighter "commits a minor traffic violation, the conduct of the employee may amount to negligence." *Id.*

{¶ 34} The court nevertheless determined that the facts suggested that the firefighter involved in *Campbell* "may have intentionally violated several traffic laws." *Id.* The court thus refused to hold that a firefighter is entitled to immunity when the firefighter responds to the fire by traveling "50 m.p.h., through a red light, in the wrong lane, in a private vehicle, [and] with no lights or siren." *Id.* The court also noted that "in addition to the excessive speed, there was expert testimony and evidence of clear violations of the department policy manual." *Id.* at ¶ 70.

{¶ 35} Speeding through a controlled-device intersection with obstructed views may also constitute wanton or reckless operation of a motor vehicle. In *Anderson v. Massillon*, 5th Dist. Stark No. 2013CA00144, 2014-Ohio-2516, 2014 WL 2601688, following the Ohio Supreme Court's remand, the court of appeals continued to believe that genuine issues of material fact remained as to whether the firefighter wantonly or recklessly operated the fire truck. In *Anderson*, the evidence suggested that the fire truck had been traveling 49 to 52 miles per hour in a 25-mile-per-hour zone, the accident occurred at an intersection containing a traffic control device for all approaching traffic, and the plaintiffs introduced some evidence to indicate that the fire truck did not stop. Furthermore, the intersection contained "a tree, utility pole, bushes, parked cars, and a house close to the street [that] partially obstructed the view of the traffic." Id. at ¶ 54. The court thus concluded that this particular combination of factors, together with violations of departmental policies, created genuine issues of material fact.

{¶ 36} After our review of the evidentiary materials submitted in the case sub judice, we believe that the facts here more closely align with the facts in those cases that declined to find a triable issue regarding whether a political subdivision employee wantonly or recklessly operated a vehicle. *Smith*; *VanDyke*; *Hewitt.* In *Smith*, *VanDyke*, and *Hewitt*, the officers involved possessed the right of way, no traffic control devices required the officers to slow down or stop, the officers did not activate their lights and sirens, visibility was clear despite it being nighttime, and no obstructions blocked either the officers' or the injured parties' views of the intersections. Likewise, in the case at bar, Addlesburger possessed the right-of-way, the weather was dry and sunny, visibility clear, and no obstructions blocked either Hoff's or Addlesburger's view of the intersection. We also recognize that, for purpose of our summary judgment analysis, Addlesburger did not activate his siren and may not have activated his emergency lights and no traffic control device required Addlesburger to slow down as he approached Merchant Street, (although it appears that Addlesburger's vehicle traveled between 48 and 52 miles per hour in a 25 miles per hour zone). We, like the *Smith*, *VanDyke*, and *Hewitt* courts, do not believe that the foregoing combination of factors shows that Addlesburger failed to exercise any care or that he consciously disregarded a known risk that was unreasonable under the circumstances.

{¶ 37} Additionally, even though Addlesburger may have violated established policies by failing to have an operable siren and by failing to have his vehicle inspected, the evidence fails to show that Addlesburger knew that violating either policy would "'in all probability result in injury.'" *Argabrite* at ¶ 21, quoting *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, paragraph three of the syllabus. Indeed, Addlesburger specifically stated that he did not believe speeding on State Route 7 without his siren activated was unsafe. Thus,

evidence that Addlesburger violated the policies "demonstrates negligence at best." *Anderson* at ¶ 38, quoting *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, ¶ 92; *accord Hoffman v. Gallia Cty. Sheriff's Office*, 4th Dist. No. 17CA2, 2017-Ohio-9192, 103 N.E.3d 1, 2017 WL 6541029, ¶¶ 90-91.

{¶ 38} We also note that appellants make much of Addlesburger's statement that he slammed on the brakes so hard that Addlesburger thought that he broke a brake line. Appellants also contend that Addlesburger admitted in his deposition testimony that the brake line was broken. During his deposition, Addlesburger explained that immediately after the accident, he reported that he "slammed on [his] brakes" and that the "[b]rake line [he] felt was broke because the pedal went to the floor." Addlesburger indicated that he thought "a brake line busted" because "it went all the way to the floor when [he] slammed it."

{¶ 39} Appellants claim that Addlesburger's statement shows that Addlesburger's vehicle had defective brakes. However, appellants have not presented any evidence to show that Addlesburger, before the collision, had any knowledge whatsoever about defective brakes. Moreover, none of the physical, testimonial, or documentary evidence in this case shows that Addlesburger's vehicle had defective brakes. Unfortunately, the most appellants offer is speculation. Speculation is not sufficient to create a genuine issue of material fact so as to defeat a properly supported summary judgment motion. *E.g., Graf v. City of Nelsonville*, 4th Dist. Athens No. 18CA28, 2019-Ohio-2386, 2019 WL 2510281, ¶ 40.

{¶ 40} Moreover, we do not agree with appellants that *Folmer v. Meigs County Commissioners*, 4th Dist. Meigs 16CA17, 2018-Ohio-31, requires this court to conclude that genuine issues of material fact remain as to whether Addlesburger wantonly operated his motor

vehicle. In *Folmer*, we concluded that genuine issues of material fact remained regarding whether an ambulance driver willfully or wantonly operated the vehicle when the evidence showed that the ambulance driver did not activate the vehicle's lights or siren and drove left of center while speeding near an intersection controlled with a yellow flashing light. In *Folmer*, an emergency medical squad transported a non-critical patient from an urgent care facility to a medical center. Because the squad determined that the patient's condition was not critical, the squad driver did not activate the ambulance's lights and sirens. While en route to the medical center, the squad driver drove left of center and collided with another vehicle. The injured parties claimed that at the time of the collision, the squad driver had attempted to pass another vehicle in a no-passing zone. Also, an accident reconstruction expert reported that as the squad driver approached the intersection near the accident scene, the driver traveled at a minimum speed of 55 to 58 miles per hour and exceeded the 35 miles per hour posted speed limit. The expert further stated that the squad driver either "made an abrupt lane change in an attempt to pass the vehicle in front of him; or [the driver] swerved to the left to avoid a rear end collision with the vehicle in front of him." *Id.* at ¶ 13.

{¶ 41} The trial court denied the squad driver's and political subdivision's summary judgment request and determined that genuine issues of material fact remained as to whether the squad driver's conduct was willful, wanton, or reckless. The squad driver and political subdivision appealed the trial court's decision and, on appeal, we affirmed the trial court's judgment that genuine issues of material fact remained as to whether the squad driver willfully or wantonly operated the emergency vehicle. We explained:

> Here, the evidence indicates that [the driver] was exceeding the posted

> speed limit by at least twenty miles per hour at the time of the collision. He was also operating the ambulance without lights and sirens activated, thus providing no warning to fellow travelers. This fact is especially concerning because the collision occurred in the Village of Chesire while [the driver] was approaching an intersection. While [the driver] denied that he was in the process of passing the vehicle in front of him at the time of the collision, both [injured parties] claimed that he had passed or was in the process of passing the vehicle in front of him when the collision occurred. Furthermore, [the driver]'s own deposition testimony provides little detail of how he ended up in the opposite lane of travel.

Id. at ¶ 28.

{¶ 42} We concluded that the foregoing evidence would allow reasonable minds to conclude that the driver intentionally deviated "'from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or [a] purposefully * * * wrongful act[] with knowledge or appreciation of the likelihood of resulting injury,'" or that the driver "failed '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.'" *Id.* at ¶ 29, quoting *Anderson* at paragraphs two and three of the syllabus.

{¶ 43} Once again, we believe *Folmer* is distinguishable from the case at bar. In *Folmer*, the injured parties presented some evidence that (1) the driver of the emergency vehicle drove left of center while attempting to pass a vehicle in a no-passing zone, (2) the driver was speeding near an intersection with a yellow flashing light, (3) the driver did not have the vehicle's lights and sirens activated, and (4) the vehicle was not carrying a patient in critical condition. While the case at bar does bear some similarities–the lack of a siren, the alleged lack of emergency lights, and speeding–significant differences do, in fact, exist. For one, appellants did not present evidence that Addlesburger veered from his lane of travel. Instead, the evidence shows that Addlesburger had the right-of-way. Furthermore, no cautionary lights or other signals required

Addlesburger to yield to traffic approaching from Merchant Street, or otherwise cautioned Addlesburger to approach the intersection at a slower speed. Although Addlesburger had been speeding, he otherwise was proceeding lawfully. Also, the terrain offered a clear, unobstructed view of the roadway on a clear weather day. Moreover, in *Folmer*, the medical squad determined that the patient they were transporting was not critical. Thus, the evidence suggested that the driver did not have a need to rush to transport the patient to the medical center. In the case at bar, however, Addlesburger explained that even though the fire to which he was responding did not pose an immediate danger to human life, his duty required that he protect property as well as people. Consequently, Addlesburger, unlike the squad driver in *Folmer*, stated a reason for speeding while en route to the scene of the fire. Therefore, we do not believe that *Folmer* dictates the outcome of the case at bar.

{¶ 44} To the extent appellants claim that appellees acted wantonly or recklessly by failing to ensure Addlesburger's vehicle underwent an annual inspection, we observe that the Ohio Supreme Court recently held that the R.C. 2744.02(B)(1) exception to immunity involves a political subdivision's employee's operation of a motor vehicle. *McConnell v. Dudley*, Slip Opinion, 2019-Ohio-4740, — N.E.3d —. The court held that the exception does not "allow a political subdivision to be held liable for consequences arising from an employee's training or the supervision of that employee in operating the motor vehicle." *Id.* at ¶ 2. The court determined that the "training or supervision of a police officer does not constitute 'operation of the vehicle' for purposes of determining potential liability for an accident caused by the police officer." *Id.* at ¶ 4. The court additionally concluded that none of the other provisions contained in R.C. 2744.02 provided an exception from immunity based upon a political

subdivision's "hiring, training, or supervising an employee or entrusting him or her with a vehicle." *Id.* at ¶ 30.

{¶ 45} For similar reasons, we do not believe that the failure to ensure that Addlesburger's vehicle undergo annual inspections falls within the R.C. 2744.02(B)(1) exception to immunity. Ensuring that a vehicle undergoes an annual inspection "does not constitute 'operation of the vehicle' for purposes of determining potential liability for an accident caused by [a firefighter]." *Id.* at ¶ 4. Moreover, appellants have not suggested that appellees' failure to ensure that Addlesburger's vehicle underwent an annual inspection falls within some other immunity exception.

{¶ 46} Consequently, we do not agree with appellants that genuine issues of material fact remain as to whether Addlesburger wantonly or recklessly operated his motor vehicle. Thus, we agree with the court's determination to enter summary judgment in appellees' favor.

{¶ 47} Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.