[Cite as *Wrinn v. Ohio State Hwy. Patrol*, 2013-Ohio-1141.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Eugene Wrinn, Jr.,	:	
Plaintiff-Appellant,	:	
		No. 11AP-1006
v.	:	(C.C. No. 2006-05934)
Ohio State Highway Patrol,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 26, 2013

Cooper & Kowalski, L.P.A., Cary Rodman Cooper and *Sarah K. Skow*, for appellant.

Michael DeWine, Attorney General, *James P. Dinsmore* and *Eric A. Walker*, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶ 1} Plaintiff-appellant, Eugene Wrinn, Jr. ("appellant"), appeals from a judgment of the Court of Claims of Ohio granting civil immunity pursuant to R.C. 2743.02(F) and R.C. 9.86 for two state of Ohio employees named as individual defendants.

{¶ 2} This matter, along with a companion case in federal court, arises out of a traffic accident that occurred on September 16, 2005. Appellant does not assert claims with respect to the accident itself, but contends that he was unnecessarily beaten and tasered by responding law enforcement officers, including an Ohio State Highway Patrol officer and officers from several local jurisdictions.

{¶ 3} Appellant began litigation with two contemporaneous complaints in federal and state courts. On September 11, 2006, appellant filed a complaint in the Northern District of Ohio naming as defendants three Ohio State Highway Patrol officers, Sergeant Daren Johnson, Trooper T.K. Manley, and Lieutenant Kenneth Koverman; several city of Lima police officers; and several Allen County sheriff deputies. The federal complaint asserts claims for excessive use of force and other civil rights claims under 42 U.S.C. 1983. On September 13, 2006, appellant filed this action in the Court of Claims asserting claims for assault and battery, intentional infliction of emotional distress, failure to protect, and negligent training. In March 2010, appellant filed an amended complaint in the Court of Claims adding claims for negligent hiring, discipline, training, and retention, all relating to the patrol's continued employment of Sergeant Johnson. This claim asserts that the conduct of all three named patrol officers amounted to reckless conduct.

{¶ 4} The federal action against the individual patrol officers was dismissed by the Northern District because of the ongoing action in the Court of Claims.

{¶ 5} Pursuant to R.C. 2743.02(F), the Court of Claims undertook a four-day immunity hearing to determine whether the conduct of Sergeant Johnson and Lieutenant Koverman should deprive them of the personal immunity granted state employees in the exercise of their official duties under R.C. 9.86. At the close of the hearing the Court of Claims then rendered a decision and judgment, finding that Sergeant Johnson's conduct at the scene did not rise to the level that would deprive him of immunity. The court also concluded that Lieutenant Koverman's conduct in his supervision of Sergeant Johnson prior to the incident also did not meet the standard to deprive Lieutenant Koverman of civil immunity. As a result, the court found that the action must go forward against the state of Ohio in the Court of Claims, rather than against the individual defendants personally in the court of common pleas.

{¶ 6} Appellant has timely appealed, and brings the following two assignments of error:

> 1. Because Sergeant Johnson acted recklessly and wantonly towards Wrinn, the Court of Claims erred when it held that Johnson was entitled to immunity.

> 2. Because Lieutenant Koverman was reckless and wanton in his supervision, intervention, and management of Sgt. Johnson, which unnecessarily and unreasonably increased the risk of physical harm to Wrinn, the Court of Claims erred when it held that Koverman was entitled to immunity.

{¶ 7} Appellant's first assignment of error asserts that the Court of Claims erred in finding that Sergeant Johnson was entitled to immunity with respect to his actions toward appellant at the scene of the accident.

{¶ 8} R.C. 9.86 provides that "no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." A "state employee" for purposes of R.C. 9.86 is defined in R.C. 109.36(A)(1) as a " 'person who, at the time a cause of action against the person arises, is * * * employed by the state.' " *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14.

{¶ 9} Whether a state employee is entitled to personal immunity from liability under R.C. 9.86 involves a question of law, and this is an issue over which the Court of Claims has exclusive, original jurisdiction. *Nease v. Med. College Hosps.*, 64 Ohio St.3d 396, 400 (1992); *Johns v. Univ. of Cincinnati Med. Assocs.*, Inc., 101 Ohio St.3d 234, 2004-Ohio-824. If the Court of Claims determines that the employee is immune from liability, the plaintiff in the underlying action must assert his or her claims against the state, not the employee. R.C. 2743.02(A)(2).

{¶ 10} When an action, wherever brought, asserts that a state employee is not immune under R.C. 9.86, R.C. 2743.02(F) establishes the procedure for determining the immunity granted by R.C. 9.86. Pusuant to R.C. 2743.02(F), a "civil action against an officer or employee" alleging that "the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities" or alleging that "the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner" first must "be filed against the state in the court of claims that has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity" pursuant to R.C. 9.86 "and whether the courts of

common pleas have jurisdiction over the civil action." R.C. 2743.02(F). As a further safeguard for the rights of the employee, who is technically not yet a party in these court of claims proceedings, the section further provides that "[t]he officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity." R.C. 2743.02(F).

{¶ 11} The Court of Claims' analysis of immunity is divided into two parts. *Theobald* at ¶ 14. The court initially must determine whether the individual was a state employee. *Id*. That is not an issue in the case before us, as all parties agree that the state highway personnel were state employees. The court must then determine whether the individual was acting within the scope of employment when the cause of action arose. Whether the individual was acting within the scope of employment requires consideration of the specific facts. *Scarberry v. The Ohio State Univ. Hosps.*, 10th Dist. No. 98AP-143 (Dec. 3, 1998), citing *Lowry v. Ohio State Hwy. Patrol,* 10th Dist. No. 96API07-835 (Feb. 27, 1997), and *Brooks v. The Ohio State Univ*., 111 Ohio App.3d 342, 350 (10th Dist.1996).

{¶ 12} In addressing factual conflicts underlying this determination, matters involving credibility must be resolved by the trial court, and judgments supported by some competent, credible evidence going to all essential elements of the case will not be reversed. *Brooks.* In assessing whether an employee's conduct takes him outside the scope of immunity granted by R.C. 9.86, this court has observed as follows:

> In the context of immunity, an employee's wrongful act, even if it is unnecessary, unjustified, excessive, or improper, does not automatically take such act manifestly outside the scope of employment. *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775 * * *, citing *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App.3d 86, 89 * * *; and *Peppers v. Ohio Dept. of Rehab. & Corr.* (1988), 50 Ohio App.3d 87, 90 * * *; *Brooks* [*v. The Ohio State Univ*., 111 Ohio App.3d 342,] 350 * * *. It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment. *James H. v. Dept. of Mental Health and Mental Retardation* (1980), 1 Ohio App.3d 60, 61 * * *. The act must be so divergent that it severs the employer-employee relationship. *Elliott, at* 775 * * *, citing *Thomas, at* 89 * * *, and *Peppers, at* 90 * * *.

> Malicious purpose encompasses exercising "malice," which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified. *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453-54 * * *, citing *Teramano v. Teramano* (1966), 6 Ohio St.2d 117, 118 * * *; and *Bush v. Kelley's Inc.* (1969), 18 Ohio St.2d 89 * * *.
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> "Bad faith" has been defined as the opposite of good faith, generally implying or involving actual or constructive fraud or a design to mislead or deceive another. *Lowry* [*v. Ohio State Hwy. Patrol*, 10th Dist. No. 96API07-8350] (Feb. 27, 1997), quoting *Black's Law Dictionary* (5 Ed. 1979) 127. Bad faith is not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. *Id.*
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> Finally, "reckless conduct" refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that such risk is greater than that necessary to make the conduct negligent. *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 771 * * *, citing *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-05 * * *, citing 2 Restatement of the Law 2d, Torts (1965) 587, Section 500. The term "reckless" is often used interchangeably with the word "wanton" and has also been held to be a perverse disregard of a known risk. *Jackson*, citing *Thompson*, at 104 * * *, and *Poe v. Hamilton* (1990), 56 Ohio App.3d 137, 138 * * *. As to all of the above terms, their definitions connote a mental state of greater culpability than simple carelessness or negligence. See *Jackson, supra*, at 454 * * *.

Caruso v. State, 136 Ohio App.3d 616, 620-22 (10th Dist.2000).

{¶ 13} The Supreme Court of Ohio, in the recent case of *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, further examined the meaning of the terms willful, wanton, and reckless, in a similar but not identical statutory context. *Anderson* involved a law suit against the city of Massillon and two firefighter-employees. The Supreme Court considered the meaning of these terms as employed in R.C. 2744.02(B)(1)(b) and 2744.03(A)(6)(b), the provisions that correspond with the R.C. 9.86 grant of immunity for

state employees, by providing similar immunity to employees of political subdivisions in Ohio where their acts or omissions are not committed in a wanton or reckless manner. Because *Anderson* involves an immunity question for government employees, albeit under a different statute, we find that the Supreme Court's analysis of the relevant terms must be carefully noted and applied in the present case. In *Anderson*, the court first held that the terms "willful," "wanton," and "reckless" described different and distinct degrees of care and are not interchangeable. *Id*. at paragraph one of the syllabus. The court then applied the following definitions:

> 2. 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. 520 * * * (1948), approved and followed.)
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> 3. 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 v. Ivy*, 50 Ohio St.2d 114 * * * (1977), approved and followed.)
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> 4. 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. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.)

Id. at paragraphs two, three, and four of the syllabus.

{¶ 14} By way of background, certain general aspects of the events on the night in question were not disputed by the parties before the Court of Claims. Very early in the morning on September 15, 2005, appellant was driving his pickup truck with two passengers aboard. As he merged onto southbound I-75 at an entrance ramp near Lima, Ohio, his truck spun out on wet pavement and came to rest facing south in the left-hand northbound lane of I-75, where it was struck head-on by a northbound semi-truck. Witness testimony and medical tests would establish that appellant was not drinking or otherwise impaired on the night of the accident. The force of the head-on collision was

considerable, and the driver of the semi-truck, who was described as severely shaken, commented at the scene that based upon the violence of the impact, he initially believed that the wreck had probably killed the driver of the pickup truck.

{¶ 15} As a result of the collision, appellant appeared unconscious and his head came to rest on the leg of the front-seat passenger, Brian Meader. Meader and Travis Fanning, the other passenger, placed appellant in the passenger seat of the pickup truck, where he appeared unresponsive to both of them. They heard appellant faintly moaning and groaning at this time, and waited by the vehicle for emergency responders to arrive.

{¶ 16} Sergeant Johnson was the first on the scene, and our assessment of the disputed accounts of what followed must begin with his testimony.

{¶ 17} Sergeant Johnson testified at the hearing that he was an 18-year veteran of the Ohio State Highway Patrol and had been a sergeant for about nine years. At the time of the accident, he was assigned to the Lima patrol post, where his supervisor was Lieutenant Koverman. Sergeant Johnson stated that he was patrolling out of the highway patrol Lima post on the night in question. At approximately 1:45 a.m., the Lima patrol post issued a radio dispatch for the accident. Although the dispatch was directed to Trooper Manley, Sergeant Johnson notified the post that he was close to the location and would probably reach it before Trooper Manley. Sergeant Johnson arrived at the accident scene at 1:55 a.m. He was the first officer to arrive and, pursuant to highway patrol protocol, was therefore in charge of the scene through most of the incident.

{¶ 18} On arriving at the accident scene, he observed two stopped vehicles in the northbound lanes, appellant's pickup truck disabled and facing south in the left lane and a semi-truck stopped and facing north in the right lane. Traffic was already backing up because of the accident and he had minor difficulty reaching the scene because of backed-up trucks, eventually parking his cruiser in the left hand northbound lane south of appellant's disabled pickup truck. Trucks were passing the accident scene to the right of the stopped vehicles. Sergeant Johnson did not choose to stop northbound traffic from passing the vehicles by instituting a road block. After getting out of his cruiser, Sergeant Johnson observed a person walk toward him from among a group standing near the barrier wall. This person identified himself as a passenger in the disabled pickup truck and asked Sergeant Johnson to "check on his buddy." (Tr. 42.)

{¶ 19} This individual that approached Sergeant Johnson was injured to the extent that Sergeant Johnson observed blood on his face. On approaching the pickup truck, Sergeant Johnson observed appellant slumped over and motionless inside the pickup truck. Appellant did not have blood visible on his face. Sergeant Johnson at first thought it possible that appellant was dead, but as Sergeant Johnson further approached the pickup truck, appellant "came to and exited the vehicle." (Tr. 45.) Sergeant Johnson attempted to restrain appellant from exiting the vehicle, but appellant pushed Sergeant Johnson away and walked in a northerly direction on the interstate. Sergeant Johnson asked appellant several times to sit down so that he could assess his injuries. Appellant did not verbally acknowledge Sergeant Johnson's instructions. When he pushed Sergeant Johnson, "[i]t wasn't hard enough for [Sergeant Johnson] to lose [his] balance or anything like that." (Tr. 50.) At this point in his testimony, Sergeant Johnson acknowledged that his earlier deposition testimony was that appellant had simply brushed by him, rather than pushing.

{¶ 20} Appellant then continued away from the pickup truck and Sergeant Johnson attempted to grab him with two arms. Appellant shook off his grasp and continued to walk away, and continued to be unresponsive to Sergeant Johnson's verbal instructions. Appellant's passengers, at this time, were also yelling at appellant to heed Sergeant Johnson's instructions.

{¶ 21} Sergeant Johnson further testified that he received only limited training during his time on the highway patrol regarding symptoms of persons with closed-skull head injuries. Sergeant Johnson acknowledged that appellant was behaving differently from other accident victims in his experience, and that he subsequently learned that appellant had suffered injury to the frontal lobe of his brain and experienced intracranial bleeding.

{¶ 22} At some point during this episode, appellant turned and began walking back in the southerly direction. Sergeant Johnson again grabbed him to restrain him, believing that appellant was at risk of walking into traffic. Appellant did not appear angry or violent at any point during this period. Sergeant Johnson continued to pursue appellant and again grabbed him from behind. Appellant held Sergeant Johnson's arms and jacket sleeves. Appellant was again not verbally responsive to Sergeant Johnson's verbal

instructions. Sergeant Johnson requested that appellant let him go, which appellant did not do, although appellant did not otherwise push or apply physical force to Sergeant Johnson other than continuing to grasp his sleeves or arms. Sergeant Johnson ordered appellant to let go and told appellant that if he did not release him, he would strike him.

{¶ 23} Sergeant Johnson testified that appellant still did not release his grasp, and he then hit appellant with a two-pound patrol-issued metal flashlight, using an overhand downward motion to strike the left side of appellant's head and shoulder. Sergeant Johnson testified that he was aiming for appellant's brachial nerve in an attempt to disable him. Sergeant Johnson further testified that he was aware that highway patrol policy bars officers from hitting a subject in the head or the back of the neck with the flashlight even with light strikes if avoidable. Sergeant Johnson struck appellant three times in rapid succession, and after the third strike appellant fell to the ground on his knees. At this time, appellant held onto Sergeant Johnson's waist in a bear hug, but made no attempt to pick Sergeant Johnson up or take away Sergeant Johnson's gun or flashlight. At this time, Sergeant Johnson, rather than striking appellant again, asked a bystander for help and the bystander succeeded quickly in pulling appellant's arms off of Sergeant Johnson, whereupon appellant walked southward again around the stopped semi-truck.

{¶ 24} At this point, Sergeant Johnson pursued appellant, kicked appellant in the leg and applied a Taser against appellant's leg. Sergeant Johnson testified that this Taser shock temporarily stopped appellant but did not incapacitate him. Appellant was able to continue walking away at which time Sergeant Johnson went to his cruiser and issued a signal 88 radio dispatch, signifying that an officer was in distress. Sergeant Johnson testified that although he acknowledged that this signal generally would be sent for more serious or life-and-death situations, he justified in employing this signal 88 because he was tired and needed help.

{¶ 25} Sergeant Johnson acknowledged that a metal flashlight used to strike a subject in the head, throat, and back of the neck, can be a lethal weapon. He also admitted that appellant, other than attempting to hold Sergeant Johnson by the arms, at no time attempted to cause bodily harm to Sergeant Johnson, or contravene Sergeant Johnson's will other than by walking away. Sergeant Johnson used the Taser in order to

incapacitate appellant and apply handcuffs, but when the Taser failed to incapacitate appellant Sergeant Johnson made no further effort to handcuff him. Sergeant Johnson then applied knee and elbow strikes to appellant in an effort to incapacitate him, striking appellant in the thigh with his knee and applying forearm blows to appellant's shoulder blade.

{¶ 26} At this point, Sergeant Johnson stated, he was no longer attempting merely to keep appellant from wondering into traffic, but was trying to arrest appellant. At this time, Trooper Manley arrived at the scene in response either to the original call or to Sergeant Johnson's signal 88 transmission. Trooper Manley and Sergeant Johnson soon had appellant pinned to the ground, whereupon other officers from local jurisdictions arrived at the scene. Sergeant Johnson observed Trooper Manley strike appellant several times in the thigh with his flashlight. One of the local officers maced appellant. At this time, appellant began screaming, yelling, and crying, and a county deputy sheriff tasered appellant in the back of the neck.

{¶ 27} After other officers from local jurisdictions arrived, one or more of them used mace, which affected Sergeant Johnson. Eventually the other officers and some paramedics who had arrived at the scene managed to handcuff appellant and spine board him. Sergeant Johnson requested that the medics administer a sedative to appellant. Sergeant Johnson acknowledged that he had later learned that all charges involving resisting arrest brought against appellant had been dismissed based on medical evidence of appellant's condition at the scene.

{¶ 28} At the conclusion of his testimony, Sergeant Johnson was shown various police videos taken at the scene and verified that they accurately depicted the various recorded episodes. The video of Sergeant Johnson's cruiser dashboard camera shows appellant getting up from one knee after being clubbed with a flashlight, walking past his own disabled truck, and resting against the adjacent stopped semi-truck, where one of his friends supported him and wiped his face with a towel. The video then shows Sergeant Johnson again approaching appellant, and as appellant wanders away further, Sergeant Johnson repeatedly applying a Taser to appellant's leg.

{¶ 29} Trooper Manley also testified. Trooper Manley stated that Sergeant Johnson was his supervisor with the Lima patrol post on the night of the accident.

Trooper Manley answered various questions about his training in the use of Taser devices and his experience using the device with persons that he needed to immobilize. Trooper Manley testified that he never used force against a person unless he intended to arrest that person. He agreed that the use of flashlight blows against a person head would qualify as deadly force. Trooper Manley that he had not, in his career with the highway patrol, used the signal 88 call himself and only heard it used by another officer on one other occasion. More commonly, officers would use a code 20 signal to request assistance, which did not carry the significance of immediate threat of bodily harm to the calling officer. Trooper Manley recalled that the accident scene eventually saw responses from as many as seven state highway patrol members, four Lima police officers, and two Allen County sheriff deputies. In addition, there were several EMT squads at the scene.

{¶ 30} Upon arriving at the scene, Trooper Manley sprinted from his vehicle toward the immediate location of the accident because, based on the signal 88 call, he considered the situation to be an emergency. He saw that Sergeant Johnson was "engaged" with another individual, grappling and locked together. (Tr. 160.) Trooper Manley tackled appellant and knocked him to the ground, and then struck appellant several times in the thigh with his flashlight when appellant refused to stay down. Appellant was not threatening or verbally abusive at any point during the episode. Trooper Manley's forceful response to the situation was based upon his responding to a signal 88 call and finding Sergeant Johnson physically engaged with appellant, not upon any detailed description or explanation of the situation by Sergeant Johnson.

{¶ 31} Eventually, the other officers arrived at the scene and also began tasering or striking appellant while Trooper Manley held appellant's legs to restrain him from getting up. During this part of the episode, Trooper Manley observed no blows to appellant's head that would have caused scalp lacerations, and agreed that if appellant's scalp was lacerated, it must have occurred before Trooper Manley arrived. At one time there were as many as six officers lying on or holding appellant and appellant was groaning in pain. Although one of the other officers applied mace directly to appellant's face, this did not appear to significantly subdue appellant. At no time during the episode did appellant attempt to strike Trooper Manley, nor did Trooper Manley observe appellant attempting to strike Sergeant Johnson or any other officer.

{¶ 32} Appellant testified at the hearing that he had no recollection of the events on the night in question. He described and displayed various scars on his head, wrists, knees, and ankles, and stated that he had no independent knowledge of whether he had incurred these during the accident or at the hands of police officers after the accident. He stated that he typically wore glasses and had poor vision without them, and confirmed that the police video at the scene shows him not wearing his glasses after the accident.

{¶ 33} Appellant's father, Eugene Wrinn, Sr., testified that he arrived in Lima, Ohio on the afternoon after the accident and found his son in intensive care. Wrinn, Sr. stated that he is a police officer for the town of Brattleboro, Vermont, and has been chief of police for the town for the past three years, supervising 27 officers. Upon arriving at the hospital, he found his son in a medically-induced coma. His son had numerous lacerations on his head, principally on the back of his head, which were closed with staples. By Wrinn Sr.'s recollection, doctors would later remove 37 staples used to close the wounds in appellant's head.

{¶ 34} After the accident, Wrinn, Sr. located his son's truck and took some photographs. He found no evidence of blood inside the truck. Five days later, he was able to take his son back to Vermont.

{¶ 35} The court also considered the deposition of Brian Meader, a passenger in appellant's truck on the night of the accident, read and admitted in lieu of direct testimony in open court. Meader's deposition testimony stated that he befriended appellant and the other passenger on the night in question, Travis Fanning, when all three were students at the University of Northwestern Ohio. The three decided to go get something to eat the night of the accident and were riding in appellant's truck. As appellant proceeded on the entrance ramp to access I-75, the vehicle spun out on the wet pavement and wound up facing south in the northbound lane. None of the party had used alcohol or drugs on the night in question, and appellant's behavior was normal prior to the accident.

{¶ 36} After the impact, Meader came to and was relatively sure he had been knocked unconscious briefly. He looked to his left and saw the two other occupants of the truck. Fanning was crawling out the back window of the vehicle, and appellant was hunched over with his head on Meader's left leg. He exited the vehicle and helped

appellant to sit up in the passenger seat. Appellant was largely unresponsive, did not attempt to communicate but made faint groans and moans. Neither Fanning nor Meader were able to locate their cell phones, but a bystander told them that someone had already called 911.

{¶ 37} At that point, the truck driver walked over to the wrecked pickup truck. Meader described him as "panicking pretty much, because he was saying, oh, my God, please don't die." (Meader deposition, at 24.) Appellant's pickup truck was badly damaged, with a broken windshield, bent frame, smashed hood, and rear window popped out.

{¶ 38} Meader stated that the first officer on the scene was a state highway patrolman; although Meader's testimony by deposition did not allow a positive identification, there is no dispute at this point in the proceedings that this was Sergeant Johnson. This officer did not stop traffic, which continued to flow around the accident scene. Meader described this first highway patrolman on the scene a large man, even taller than appellant who stands 6'4. The officer walked right by Fanning and Meader without asking them if they were injured. As the officer addressed appellant, who was still seated in the passenger seat of the pickup truck, appellant got out and began wondering groggily around the scene. At this time, appellant had minor injuries to his face and was bleeding slightly from the mouth, but did not have freely-bleeding scalp lacerations that Meader later observed in the hospital.

{¶ 39} Meader heard the highway patrol officer tell appellant to stop, and then tell appellant sit down or the officer would hit him. From the way in which appellant was walking, he appeared disoriented, but did not seem angry, violent, or aggressive. As appellant continued to stumble about the scene, Meader saw the officer strike him with an object that looked like a flashlight. The officer brought it down at least twice on the back of the head or neck area, and appellant covered his head with his arms. At no time did Meader see appellant push, punch, grab, hit, or kick the highway patrol officer. As Meader and Fanning hesitated and contemplated intervening in the situation between appellant and the highway patrol officer, paramedics interrupted and hustled Meader and Fanning into the back of an ambulance.

{¶ 40} After Meader and Fanning were in the ambulance, they heard a Taser go off once and appellant yelling. This was followed by shouts, including "take that you motherfucker," and they heard a Taser go off again. (Meader deposition, at 39.) Meader had heard a Taser deployed before, and knew the sound. Appellant was groaning, and around this time Meader heard him say "why are you doing this to me." (Meader deposition, at 40.) Meader was upset with the way the situation was handled by the highway patrol officer who was too aggressive and did not seem to make allowances for dealing with someone who had just been in a collision with a semi-truck. After a while, Meader heard more scuffling and someone suggest getting something to knock out appellant, and from the silence that followed, Meader deduced that someone had given appellant an injection of some sort of sedative.

{¶ 41} At the hospital, doctors determined that Meader's injuries were minor and he was released that night. While he was awaiting treatment, he heard medical staff discussing the need to cut the handcuffs from appellant's wrists. Meader visited appellant in the hospital the next day and found that appellant had been put into a medically-induced coma. Appellant's face was swollen and the back of his head was bleeding through the bandages.

{¶ 42} To assess the above descriptions of events and support his claim that Sergeant Johnson had acted in the manner that would deprive him of civil immunity, appellant presented the expert testimony of Donald J. Van Meter, Ph.D. Dr. Van Meter provides training and consulting services for law enforcement and public safety organizations, including training in management, discipline, supervision, and use of force. He is a former lieutenant in the Ohio State Highway Patrol and is certified to train instructors at the Ohio Peace Officers Training Academy.

{¶ 43} Dr. Van Meter testified that he had examined reports and recording pertinent to the case and formed an opinion as to the actions of Sergeant Johnson and his supervisor, Lieutenant Koverman.

{¶ 44} With respect to Sergeant Johnson's actions, Dr. Van Meter opined that Sergeant Johnson had acted recklessly by not securing the scene to prevent traffic from progressing through or around the stopped vehicles and endangering those persons on foot at the scene. Dr. Van Meter stated that this should have been the first priority in

order to protect the integrity of the scene and guard against additional injuries, and that a reasonable officer would have known that this failure to properly secure the scene created an unnecessary risk of additional physical harm to those persons present. This failure to secure the scene created additional risk to a disoriented person, such as appellant, and proper steps in this regard would have forestalled Sergeant Johnson's avowed concern that appellant would wander into traffic.

{¶ 45} Dr. Van Meter further opined that Sergeant Johnson exhibited a complete lack of concern for the possibility that appellant had suffered a serious head injury in the accident and was impaired thereby. Instead, Sergeant Johnson treated appellant as if he were fully capable of understanding and following commands, and responded forcefully and inappropriately to appellant's inability to function in response to those commands. Dr. Van Meter concluded that Sergeant Johnson had acted improperly by physically grabbing appellant, and responding forcefully, treating appellant as if he was aggressive rather than merely dazed and unresponsive. This inappropriate forceful response culminated, and Dr. Van Meter testified, by the reckless act of striking appellant in the head and neck with a heave flashlight, which carried a high risk of serious injury or death. Dr. Van Meter opined that nothing in the encounter up to that point had supported Sergeant Johnson's decision to use this degree of force. This reckless response by Sergeant Johnson continued when Sergeant Johnson attempted to subdue appellant using a Taser in the least effective way and applying elbow and knee strikes to take appellant to the ground.

{¶ 46} Dr. Van Meter also opined that Sergeant Johnson's decision to issue a signal 88 call was not warranted, because this signal that an officer is in distress should be used only when an officer has been injured or is in serious danger. Because the situation did not warrant the signal 88 call, and it would have been more appropriate to call for backup, it caused the officers who responded to mistakenly assume that appellant posed a serious danger to Sergeant Johnson and to themselves. This caused the later-arriving officers to naturally assumed the worst upon arriving at the scene, and unnecessarily escalate their use of force against appellant.

{¶ 47} Major Kevin Teaford of the state highway patrol testified regarding his review of the post-incident investigation. He reviewed multiple internal reports prepared

by the highway patrol and gave his opinion regarding Sergeant Johnson's actions. Major Teaford testified that in his opinion, Sergeant Johnson had acted within the guidelines and policies of the state highway patrol and did not violate any rules or regulations in his conduct toward appellant. He further opined that Sergeant Johnson had acted reasonably at all times. Major Teaford testified that the responsibilities of the first officer at the scene of an accident are, in order, to assess the scene; secure the scene; attend to the injured; protect the scene from further damage; and collect evidence and take photographs. Major Teaford opined that he did not feel that Sergeant Johnson had violated any policy at the accident scene, other than failing to activate the microphone for his dash cam when he arrived in his vehicle. Finally, Major Teaford testified that the use of a flashlight strike as employed by Sergeant Johnson is classified highway patrol as "less than lethal" force, and that Sergeant Johnson had not violated any rule or regulation of the patrol when he used his flashlight to strike appellant.

{¶ 48} Based on the testimony and evidence introduced at the hearing, the Court of Claims concluded that Sergeant Johnson had not acted maliciously, in bad faith, or in a wanton or reckless manner, and was entitled to civil immunity. Reviewing the evidence in the case, we are compelled to disagree.

{¶ 49} Even by Sergeant Johnson's own description, and certainly by the description of others present, appellant was not abusive or aggressive in his conduct. In fact, the great preponderance of the testimony describes appellant as dazed, stumbling, and at worst passively non-compliant with Sergeant Johnson's instructions. The only even mildly aggressive behavior that Sergeant Johnson could describe occurred when appellant, after he had been beaten to his knees by flashlight strikes, held Sergeant Johnson's waist in a loose bear hug. At no time did appellant attempt to take Sergeant Johnson's weapon, strike back even after being hit with a flashlight, or take any action other than his confused attempts to wander away from Sergeant Johnson's aggressive presence.

{¶ 50} All police witnesses agreed that the signal 88 is an unusual call, and taken by anyone who receives it as a sign of significant danger to the officer sending the call. No expert witness or supervising officer testified that the call is justified merely because the officer at the scene is tired, which Sergeant Johnson gave as the reason for using a signal

88 call. While Sergeant Johnson testified that, later in the encounter when he struck appellant with multiple knee and elbow strikes, he was attempting to put appellant under arrest, no testimony reflects that Sergeant Johnson either formally told appellant he was under arrest or anyone did in fact place appellant under arrest.

{¶ 51} Based upon the signal 88 call received, Trooper Manley arrived at the scene believing it to be a life-and-death situation. He ran to where Sergeant Johnson and appellant were standing and tackled appellant, then struck appellant three or four times in the thigh with his metal flashlight. Trooper Manley was not told by Sergeant Johnson that appellant had been unconscious or otherwise injured in the collision.

{¶ 52} Nor did Sergeant Johnson advise local police officers of appellant's condition when they arrived at the scene. As a result, as many as seven officers piled on top of appellant, stepping on his head and administering blows, mace, and Taser applications.

{¶ 53} Both Sergeant Johnson and Trooper Manley clearly testified that appellant never made verbal threats to anyone, never struck anyone, and initiated no physical contact other than grabbing Sergeant Johnson's elbows or sleeves and loosely holding Sergeant Johnson's waist once he had been beaten to his knees with flashlight strikes. Despite the fact that Sergeant Johnson was the officer in charge at the scene as officers from other jurisdictions and the state highway patrol arrived, he never instructed any of the other responding officers of the circumstances that preceded his attempts to subdue appellant. Sergeant Johnson did testify that he instructed others to prevent media from accessing the scene. Sergeant Johnson claimed that he did not want the media to come to the scene because it was not secured and the media would disrupt what he considered to be a crime scene; presumably the crime in question, to his mind, was appellant's resisting arrest.

{¶ 54} While there was little or no blood in the driver's area inside appellant's pickup truck, appellant bled freely all over himself and the police officers after he was subdued. The hospital records showed six to eight lacerations of 2.5 cm each on appellant's head that required 37 staples to close.

{¶ 55} Lieutenant Koverman's report after the fact concluded that subsequent evaluations established that appellant had sustained a head injury during the crash and this had prompted his unresponsive and confused behavior.

{¶ 56} Based upon the descriptions at the hearing of Sergeant Johnson's actions, his conduct at the scene can be characterized as both wanton and reckless. If wanton misconduct is the failure to exercise care toward those to whom a duty of care is owed, *Anderson*, supra, then Sergeant Johnson's failure to secure the scene, failure to measure his forceful response to appellant's condition and conduct, and failure to measure the implications of issuing a signal 88 call, under the circumstances, is wanton conduct. Likewise, if reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm that is to another that is unreasonable under the circumstances, Sergeant Johnson's conduct was reckless. We accordingly find that Sergeant Johnson is not entitled to the privilege of immunity from personal liability under R.C. 9.86 and R.C. 2743.02(F). Appellant's first assignment of error has merit and is sustained, and the Court of Claims' judgment in this respect will be reversed. Sergeant Johnson's attempt to bootstrap his own violent conduct towards appellant into an accusation that appellant had resisted an officer is blatantly untenable under the circumstances.

{¶ 57} Appellant's second assignment of error asserts that Lieutenant Koverman must be deprived of immunity because his failure to supervise Sergeant Johnson and appreciate the risk of Sergeant Johnson's future misconduct was reckless or wanton. Lieutenant Koverman worked with Sergeant Johnson at the Lima patrol post for between three and four years. Lieutenant Koverman's responsibilities required him to directly supervise the sergeants at the Lima patrol post by holding supervisory meetings at least once a quarter. Testimony at the hearing established that Lieutenant Koverman had dealt with complaints or disciplinary interventions involving Sergeant Johnson in the past. These included an incident in which Sergeant Johnson was censured for unprofessional conduct and creating a hostile work environment after a verbal confrontation with another highway patrol sergeant at the patrol post. Another incident resulted in an investigation into Sergeant Johnson's use of a Taser on a person who was being booked at the patrol post. This resulted in a written reprimand. At some point, Sergeant Johnson

was directed to take courses that would instruct him on how better to deal with difficult persons encountered in the course of his duties.

{¶ 58} Lastly, and shortly before appellant's accident, Lieutenant Koverman received an anonymous letter accusing Sergeant Johnson of misconduct on duty, and further investigation resulted. Based on his prior formal and informal responses to discipline problems with Sergeant Johnson, Lieutenant Koverman forwarded the anonymous letter to district staff and an administrative investigation began.

{¶ 59} On balance, we find the evidence does not support a finding that Lieutenant Koverman acted in a wanton or reckless manner in his supervision of Sergeant Johnson. Lieutenant Koverman followed administrative procedures in addressing incidents with Sergeant Johnson. Pursuant to highway patrol policy, various responses, up to and including a written reprimand, ensued. While appellant's expert, Dr. Van Meter, did opine that Lieutenant Koverman's response to prior incidents was insufficient, Dr. Van Meter's suggestion that Lieutenant Koverman should have taken steps to terminate Sergeant Johnson or impose a last-chance agreement is contradicted by Lieutenant Koverman's description of the patrol's disciplinary process. Lieutenant Koverman described in detail the constraints imposed on him as post commander, and the formal administrative process by which disciplinary actions would refer from post to district, and then from district to patrol headquarters in Columbus for determination, with the results going back to the post commander for implementation.

{¶ 60} We defer to the trial court's resolution of this evidentiary conflict regarding the scope of Lieutenant Koverman's ability to effectively pursue any resolution that would have produced a different outcome on the night in question. There is credible evidence to establish that Lieutenant Koverman could not have legitimately imposed a disciplinary course of action that would have necessarily altered Sergeant Johnson's conduct or removed him from patrol duties. We accordingly find that the Court of Claims did not err in holding that Lieutenant Koverman is immune from civil liability, because Lieutenant Koverman has not been shown to have acted wantonly or recklessly in his supervision of Sergeant Johnson. Appellant's second assignment of error is overruled.

{¶ 61} In accordance with the foregoing, appellant's first assignment of error is sustained and the second assignment of error is overruled. The judgment of the Court of

Claims of Ohio is affirmed in part and reversed in part. The decision of the Court of Claims of Ohio granting civil immunity to Sergeant Daren Johnson is reversed and this cause is remanded for further proceedings.

Judgment affirmed in part and reversed in part; cause remanded.

KLATT, P.J., and BROWN, J., concur.
