[Cite as *Smith v. McBride*, 2010-Ohio-1222.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lea D. Smith,	:	
Plaintiff-Appellant,	:	
		No. 09AP-571
v.	:	(C.P.C. No. 08CVC-03-3907)
Vashawn L. McBride et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 25, 2010

Brian G. Miller Co., L.P.A., and *Brian G. Miller*; *Scott Schiff & Associates* and *Craig T. Smith*, for appellant.

Surdyk Dowd & Turner Co., L.P.A., Boyd W. Gentry and *Joshua R. Schierloch*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiff-appellant, Lea D. Smith ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Clinton Township and Clinton Township Police Sergeant Travis Carpenter ("appellees").

{¶2} This matter arises out of an automobile accident that occurred on March 14, 2006, at approximately 11:45 p.m., when Sergeant Carpenter's police cruiser collided with a vehicle driven by defendant Vashawn L. McBride ("McBride"). Appellant was a sleeping passenger in McBride's vehicle at the time of the accident.

{¶3} Sergeant Carpenter, a 16-year member of the Clinton Township Police Department, was at police headquarters when he heard a dispatch call from a Franklin County Sheriff's Deputy who was involved in a foot chase with a fleeing suspect. Upon hearing the dispatch, Sergeant Carpenter immediately proceeded to the deputy's location. As Sergeant Carpenter was traveling eastbound on Morse Road, however, he collided with McBride, who was attempting to turn left from westbound Morse Road onto southbound Chesford Road.

{¶4} A personal injury complaint was filed on March 13, 2008, naming McBride, Sergeant Carpenter, the Clinton Township Police Department and Safeco Insurance Company as defendants. On December 7, 2008, Sergeant Carpenter and the police department filed motions for summary judgment. The police department argued that it was not sui juris, and even if appellant's complaint could be construed as a complaint against Clinton Township, it was entitled to immunity under R.C. 2744.01(A). Sergeant Carpenter argued he was entitled to immunity as well. On May 14, 2009, the trial court granted the motion for summary judgment as to both parties. Thereafter, on June 11, 2009, appellant filed a motion to amend the complaint to substitute Clinton Township for the police department. Also on this date, because there were claims pending with respect to the other defendants, appellant filed a motion for Civ.R. 54(B) certification. Appellant then filed a notice of appeal on June 12, 2009. Thereafter, on June 18, 2009, the trial court granted the motions for Civ.R. 54(B) certification and to amend the complaint, and stayed remaining claims pending appeal.

{¶5} On appeal, appellant brings three assignments of error for our review:

> 1. The trial court erred by sustaining Defendants-Appellees' motion for summary judgment based upon the determination that Defendant-Appellee Sgt. Travis D. Carpenter was on an emergency call, as defined under R.C. 2744.01(A), when he collided with Appellant's vehicle.
>
> 2. The trial court erred by sustaining Defendants-Appellees' motion for summary judgment, pursuant to R.C. 2744.02, based upon the determination that there is no evidence to support a finding that Defendant-Appellee Sgt. Travis D. Carpenter's actions constituted wanton misconduct.
>
> 3. The trial court erred by sustaining Defendants-Appellees' motion for summary judgment, pursuant to R.C. 2744.03, based upon the determination that there is no evidence to support a finding that Defendant-Appellee Sgt. Travis D. Carpenter's actions rose to the level of recklessness.

{¶6} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C), may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

{¶7} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an

independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶8} In the interest of clarity, we first address a portion of this matter's procedural history. The complaint before us named Sergeant Carpenter and the Clinton Township Police Department as defendants. As raised in their motion for summary judgment, however, as a department of Clinton Township, the police department is not sui juris and cannot sue or be sued as a separate entity. Though the trial court recognized this, it continued to review the summary judgment motion and construed the claims as if they had been made against Clinton Township and granted summary judgment in appellees' favor. Thereafter, appellant moved the trial court to amend the complaint to substitute Clinton Township for the police department. Prior to that motion being granted, however, appellant filed a notice of appeal.

{¶9} While the filing of a notice of appeal generally divests the trial court of jurisdiction to act except over issues not inconsistent with the appellate court's jurisdiction, appellate jurisdiction is limited to review of final orders or judgments that are appealable. *Klein v. Bendix-Westinghouse Automotive Air Brake Co*. (1968), 13 Ohio St.2d 85, 86; *Ford Motor Credit Co. v. Ryan & Ryan, Inc*., 10th Dist. No. 06AP-1239, 2007-Ohio-5658, ¶5. To be final and appealable, a court order must satisfy the requirements of R.C. 2505.02. If the action involves multiple claims and the order does not enter judgment on all of the claims, the order must also satisfy Civ.R. 54(B) by including express language

that there is no just reason for delay. *Internatl. Bhd. Of Electrical Workers, Local Union No. 8 v. Vaughn Industries, LLC*, 116 Ohio St.3d 335, 2007-Ohio-6439, ¶7, citing *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, ¶5-7.

{¶10} Here, the entry granting summary judgment did not dispose of all claims pending before the trial court, hence appellant's moving the trial court for Civ.R. 54(B) certification. Thus, the judgment entry of May 14, 2009, from which appellant filed an appeal, was not a final, appealable order, and appellant's filing of the same was premature. " '[A] premature notice of appeal * * * does not divest the trial court of jurisdiction to proceed because the appeal has not yet been perfected.' " *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 2008-Ohio-2023, ¶76, quoting *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, ¶14. Therefore, the trial court retained jurisdiction to consider the motion to amend the complaint and the motion for Civ.R. 54(B) certification. Further, even though the notice of appeal was premature, the trial court did grant the motion for Civ.R. 54(B) certification rendering the judgment entry final and appealable on June 18, 2009. Under App.R. 4, a premature notice of appeal is treated as filed immediately after the entry of the judgment or order; therefore, the notice of appeal in the instant case was timely.

{¶11} We now proceed with the merits of this appeal in which appellant contends the trial court erred in finding appellees were entitled to immunity pursuant to Ohio's Political Subdivision Tort Liability Act.

{¶12} Pursuant to the Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744, we utilize a three-tiered analysis to determine the immunity of a political subdivision. *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶7, citing *Greene*

Cty. Agriculture Soc. v. Liming, 89 Ohio St.3d 551, 2000-Ohio-486. First, we begin with the general rule that political subdivisions are not liable generally for injury or death to persons in connection with a political subdivision's performance of a governmental or proprietary function. *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶18; see R.C. 2744.02(A)(2). Next, we consider whether any of the enumerated exceptions to the general rule of immunity applies. *Howard*; R.C. 2744.02(B). If there is an applicable exception, we then proceed to a third inquiry of whether any of the statutory defenses of R.C. 2744.03 apply. *Howard*.

{¶13} As is provided in R.C. 2744.02(A)(1), "[e]xcept as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." The only exception relevant to this case states, "[e]xcept 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." R.C. 2744.02(B)(1). However, R.C. 2744.02(B)(1)(a) provides a full defense to liability where "[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."

{¶14} In her first assignment of error, appellant contends the trial court erred in finding Sergeant Carpenter was on an emergency call at the time of the collision thereby

providing a defense to political subdivision tort liability. Pursuant to R.C. 2744.01(A), emergency call means, "a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer." Rejecting the plaintiff's argument that the legislature intended only those calls to duty concerning "inherently dangerous situations" to constitute emergency calls, the Supreme Court of Ohio held a call to duty involves a situation to which a response by a peace officer is required by the officer's professional obligation. *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, syllabus.

{¶15} While generally the question of whether particular situations constitute an emergency call is a question of fact, a court may determine whether a police officer is on an emergency call as a matter of law where triable questions of fact are not present. *Hewitt v. City of Columbus*, 10th Dist. No. 08AP-1087, 2009-Ohio-4486, ¶10, citing *Longley v. Thailing*, 8th Dist. No. 91661, 2009-Ohio-1252, ¶20 (summary judgment appropriate for defendants where trial court properly found the police officer was responding to an emergency call at the time of the collision); see also *VanDyke v. City of Columbus*, 10th Dist. No. 07AP-918, 2008-Ohio-2652, appeal not allowed by 2008-Ohio-5273 (affirming trial court's entry of summary judgment concluding in part that the trial court properly determined the officer was responding to an emergency call at the time of the collision).

{¶16} Relying on *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, appellant argues Sergeant Carpenter's actions could not constitute an emergency call because he was acting outside of his jurisdiction at the time of the accident and,

therefore, acted not only without authority, but also with no professional obligation whatsoever. First we note that the events giving rise to *Sawicki* occurred prior to the enactment of Ohio's Political Subdivision Tort Liability Act; therefore, the *Sawicki* court's concern was the application of the public duty rule to preclude liability against a municipality on a negligence claim based on the alleged failure of a municipal police department to respond to an emergency call originating from outside the city's municipal jurisdiction. While *Sawicki* stated that an officer who responds to a situation outside of his jurisdiction would do so with only the authority and insurance protection of an ordinary citizen, it also recognized that "Mutual Aid Pacts," which are in essence agreements between contiguous municipalities wherein one may request and receive aid from an adjoining municipality, allow a police officer to respond to an out-of-jurisdiction request for aid. Additionally, *Sawicki* was rendered not only prior to the enactment of R.C. Chapter 2744, but also prior to the enactment of R.C. 737.04, which allows political subdivisions to enter into mutual aid contracts with other political subdivisions for law enforcement purposes. R.C. 737.04 also states:

> Chapter 2744. of the Revised Code, insofar as it applies to the operation of police departments, shall apply to the contracting political subdivisions and to the police department members when they are rendering service outside their own subdivisions pursuant to the contracts.

{¶17} It is undisputed in the matter before us that the dispatched location of the Franklin County deputy sheriff was outside the jurisdiction of Clinton Township. However, Sergeant Carpenter testified that pursuant to mutual aid, he has a duty to respond to incidents outside of his jurisdiction. Specifically, with respect to the dispatching agency here, Sergeant Carpenter testified, "[w]e have mutual aid with the sheriff's office if they

request aid from us to help them somewhere within the county, we can do that just like we have mutual aid with Columbus Police Department and other police agencies." (Carpenter Depo. at 66.) Thus, the record contains evidence Sergeant Carpenter was authorized to act outside of his jurisdiction pursuant to a mutual aid agreement between Clinton Township and Franklin County, and the fact that Sergeant Carpenter was outside of his jurisdiction is not fatal to the determination that he was on an emergency call.

{¶18} Appellant next contends there was no professional obligation to respond because Sergeant Carpenter did not actually observe a situation to trigger such response, the dispatch did not require an immediate response, and he was not personally called to duty. Based on prior precedent from this court, we do not find appellant's position well-taken.

{¶19} In *Hewitt*, supra, Columbus Police Officer Baughman heard a dispatch over the police radio of a request for assistance by an officer pursuing a vehicle that fled from an attempted traffic stop. The plaintiff argued that because the officer did not report that he was responding to a call for assistance and because police protocol did not authorize activation of lights and sirens in response to such call, there was a genuine issue of material fact regarding whether or not the matter constituted an emergency call. This court disagreed, finding that based on unrebutted evidence in the record, Officer Baughman was involved in a situation to which his professional obligation required a response and that he was responding to an emergency call as defined by R.C. 2744.01.

{¶20} Likewise in *VanDyke*, supra, the plaintiff was injured when his car was struck by a police cruiser driven by Columbus Police Officer Shannon who was responding to a call for assistance by a fellow officer pursuing a suspected felon on foot.

Officer Shannon proceeded to the officer's location without lights and sirens, and the dispatch did not communicate the presence of immediate harm to the officer or others. Yet, this court found as a matter of law that those two facts did not take Officer Shannon's response out of the description of an emergency call.

{¶21} The evidence before us indicates Sergeant Carpenter was on duty and responding to a radio dispatch of a deputy sheriff in a foot chase with a suspect who had fled the scene of a traffic stop. Because Sergeant Carpenter knew the area in which the deputy was located is known for crimes involving guns and drugs, and because Sergeant Carpenter was within just a few miles of said location, he responded. Pursuant to department procedures, Sergeant Carpenter was required to proceed without lights and sirens. Consistent with this court's precedent, we find the trial court correctly concluded Sergeant Carpenter was on an emergency call as he was involved in a situation in which his professional obligation required a response. Accordingly, we overrule appellant's first assignment of error.

{¶22} We must now consider the trial court's determination that Sergeant Carpenter's operation of the police cruiser in this instance did not constitute willful or wanton misconduct as a matter of law, which is the basis of appellant's second assignment of error.

{¶23} "The term 'willful and wanton misconduct' connotes behavior demonstrating a deliberate or reckless disregard for the safety of others." *Moore v. City of Columbus* (1994), 98 Ohio App.3d 701, 708. This court has defined willful misconduct to mean conduct involving " 'the intent, purpose, or design to injure.' " *Robertson v. Dept. of Pub. Safety*, 10th Dist. No. 06AP-1064, 2007-Ohio-5080, ¶14, quoting *Byrd v. Kirby*, 10th Dist.

No. 04AP-451, 2005-Ohio-1261. "Wanton misconduct is the failure to exercise any care toward one to whom a duty of care is owed under circumstances in which there is a great probability that harm will result and the tortfeasor knows of that probability." *Robertson* at ¶18, citing *Hunter v. Columbus* (2000), 139 Ohio App.3d 962, 969. "A wanton act is an act done in reckless disregard of the rights of others, which reflects a reckless indifference on the consequences to the life, limb, health, reputation, or property of others." *Byrd* at ¶23, citing *State v. Earlenbaugh* (1985), 18 Ohio St.3d 19, 21. " '[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury." *Fabrey v. McDonald Village Police Dept*., 70 Ohio St.3d 351, 356, 1994-Ohio-368, quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97.

{¶24} Under this assigned error, appellant contends Sergeant Carpenter's actions constituted wanton conduct[1] because he was operating his vehicle at night at excessive speeds, failed to use evasive maneuvers, had reduced reaction time and had an obstructed view of the intersection. In support of her position, appellant relies on *Robertson* and *Hunter*.

{¶25} In *Robertson*, this court was asked to review a judgment rendered against the Ohio State Highway Patrol after a trial in the Court of Claims of Ohio. Upon such review, we found there was competent, credible evidence in the record to support the trial court's finding that the trooper failed to show any care for the decedent in the operation of

[1] Appellant makes no argument on appeal that the trial court erred in finding Sergeant Carpenter's actions did not amount to willful misconduct. Rather, appellant contends Sergeant Carpenter operated his vehicle in a wanton manner. Therefore, our discussion focuses likewise.

his cruiser. Supporting such finding was evidence that the trooper proceeded into an intersection against a red light at over 70 m.p.h. where the posted speed limit was only 35 m.p.h. There was also evidence the trooper was familiar with the area and knew he could not see the intersection in question until he crested the hill immediately before it. Additionally, it was undisputed that because of his high rate of speed, the trooper had only split seconds to recognize the potential crash situation.

{¶26} In *Hunter*, this court reversed a trial court's grant of summary judgment in favor of the city of Columbus, whose fire truck hit the decedent's vehicle resulting in her death. We found there were genuine issues of material fact relating to whether the truck's operator exhibited willful or wanton misconduct because the evidence established the truck was traveling 61 m.p.h. in a 35 m.p.h. zone, was left of center, and was in violation of a Columbus Fire Department rule that stated a vehicle operator should not travel more than 20 m.p.h. when in the wrong lane.

{¶27} As will be established, however, the facts before us are easily distinguishable from both *Robertson* and *Hunter* and, in contrast, are analogous to *Hewitt* and *VanDyke*, the cases upon which appellees rely.

{¶28} In *VanDyke*, the plaintiff was injured when he pulled from a side street onto West Broad Street and his car was struck by a police cruiser responding to an emergency call. The city conceded the officer was traveling in excess of the speed limit at night without lights and sirens, but with headlights. The area of travel was a well-lit six-lane roadway with sparse traffic at the time. The officer had the right-of-way, and the plaintiff faced a stop sign and obligation to yield. Though there was testimony the officer's speed was between 47 and 50 m.p.h., the plaintiff's affidavit indicated the officer's speed was

between 60 to 70 m.p.h. This court stated, "[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 Officer Shannon was proceeding with headlights, appellant was not deprived of the opportunity to yield even if Officer Shannon was proceeding at a speed in excess of the posted limit and without lights or sirens." Id. at ¶11. Thus, this court found the trial court did not err in concluding there was no genuine issue of material fact that the officer was not proceeding in a manner arising to willful or wanton misconduct.

{¶29} Similarly, in *Hewitt*, the plaintiff was injured when he turned left from a driveway into the path of an officer responding to an emergency call. On appeal, the plaintiff argued summary judgment was not appropriate because genuine issues of material fact remained as to whether the officer's conduct of exceeding the speed limit without lights or sirens was willful or wanton. In rejecting the plaintiff's argument, this court noted the facts were "nearly identical" to those of *VanDyke* in that though it was dark, the five-lane road was in good, dry condition with light traffic. Additionally, the officer had the right-of-way, had his headlights illuminated, and was traveling between 55 and 60 m.p.h. in a 45 m.p.h. zone.

{¶30} In the matter before us, the area in which the accident occurred is described as a "flat open stretch of road" consisting of seven lanes. (Carpenter Depo. at 40.) Traffic conditions were described as light, and Sergeant Carpenter was traveling between 55 and 58 m.p.h. in a 45 m.p.h. zone. There is no evidence in the record of inclement weather. Though it was night and lights and sirens were not activated, Sergeant Carpenter's headlights were illuminated. According to Sergeant Carpenter, he had the green light indicating his right-of-way, and as he approached the intersection he observed

a vehicle turn left in front of him, causing him to remove his foot from the accelerator. However, a second car, driven by McBride, turned left immediately after the first car, and Sergeant Carpenter stated he was not able to observe the second car until the time of impact. As in *VanDyke*, given the described roadway, flat approaches to the intersection, and the fact that Sergeant Carpenter was proceeding with headlights and the right-of-way, there is no evidence that appellant was deprived of an opportunity to yield even if Sergeant Carpenter was proceeding at a speed in excess of the posted limit and without lights and sirens.

{¶31} Based on the unrefuted evidence in the record, we find appellees met their burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact as to whether Sergeant Carpenter's operation of his cruiser amounted to willful or wanton misconduct, and that appellant failed to meet her reciprocal burden as outlined by Civ.R. 56(E). Accordingly, we overrule appellant's second assignment of error.

{¶32} In her final assignment of error, appellant contends the trial court erred in finding that Sergeant Carpenter was entitled to personal immunity under R.C. 2744.03(A)(6), which provides immunity to an employee of a political subdivision from liability caused by an act or omission in connection with a governmental or proprietary function, subject to certain exceptions. The relevant exception to immunity in the matter before us is if "the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.] R.C. 2744.03(A)(6)(b).

{¶33} Appellant does not allege that Sergeant Carpenter acted with malicious purpose or in bad faith, and we have already determined that he did not act in a wanton

manner. Therefore, we consider whether the evidence demonstrates a genuine issue of material fact as to whether Sergeant Carpenter's conduct rose to the level of recklessness.

{¶34} One acts recklessly " 'if he doesn't 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.' " *VanDyke* at ¶13, quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-05. For purposes of R.C. 2744.03(A)(6)(b), recklessness has also been defined as a " 'perverse disregard of a known risk.' " *Byrd* at ¶27, quoting *Lipscomb v. Lewis* (1993), 85 Ohio App.3d 97, 102.

{¶35} As we have already discussed under appellant's second assignment of error, Sergeant Carpenter was responding to an emergency call at the time of the collision. Sergeant Carpenter was traveling with the right-of-way and headlights illuminated on an unobstructed flat stretch of roadway with light traffic. Sergeant Carpenter's speed and lack of lights and sirens were consistent with his directives. As reiterated by this court in *Hewitt*, " '[b]ecause the law and current police and emergency practice clearly contemplate the necessity in some circumstances of * * * emergency runs, a responding officer does not create an "unreasonable" risk of harm by engaging in an emergency run merely because such a response creates a greater risk than would be incurred by traveling at normal speed.' " Id. at ¶33, quoting *Byrd* at ¶28. Based on precedent from this court, the evidence here does not demonstrate a genuine issue of

material fact as to whether Sergeant Carpenter's conduct rose to the level of recklessness. Accordingly, we overrule appellant's third assignment of error.

{¶36} Based on the foregoing, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT, J., concurs.

TYACK, P.J., dissents.

TYACK, P.J., dissenting.

{¶1} I respectfully dissent.

{¶2} I do not see a call to help apprehend someone who has run away from a deputy sheriff after a traffic stop as a call to respond to an inherently dangerous situation. I also do not see such a call as involving a situation where a response is required. Sergeant Carpenter did not need to leave his office and respond to a separate jurisdiction where a deputy was pursuing a suspect and other police officers were already responding. Sergeant Carpenter especially did not need to respond without lights and siren at speeds 10 to 15 m.p.h. over the posted speed limit.

{¶3} I do not feel that Sergeant Carpenter had the right-of-way due to his excessive speed.

{¶4} For similar reasons, I believe a trier of fact could find that Sergeant Carpenter was acting recklessly.

{¶5} I believe that there are genuine issues of material fact both as to immunity and as to recklessness. I would therefore reverse the summary judgment granted by the

trial court and remand the case for further appropriate proceedings. Since the majority of this panel does not, I respectfully dissent.

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