



as he approached the intersection of CR 135 with US 422 in Southington Township, Trumbull County. Trooper Hetzel testified that he began to slow his vehicle after he entered the fog because he lost his depth perception and became somewhat disoriented. When Trooper Hetzel saw the stop sign at the intersection of CR 135 and US 422, he realized that he was traveling too fast to stop before crossing the intersecting highway. At that same instance, plaintiff's vehicle was entering the intersection. Trooper Hetzel estimated that he was traveling between 35 and 40 mph when he passed the stop sign and decided to perform an "evasive maneuver" to avoid a broadside collision with any vehicle traveling on US 422. He then drove across the median and into the right eastbound lane of US 422 where it collided with plaintiff's vehicle.

{¶4} Plaintiff asserts that Trooper Hetzel was grossly negligent and that he acted in a wanton, willful, and reckless manner during the pursuit that led to the accident. Specifically, plaintiff asserts that Trooper Hetzel was not directly involved in pursuing the suspect and that he drove at an excessive rate of speed considering the circumstances. Defendant contends that it is immune from liability because Trooper Hetzel was responding to an emergency, and that his actions were not wanton, willful, or reckless.

{¶5} The Supreme Court of Ohio has held that the state is not liable for ordinary negligence arising from the actions of a state trooper when he is operating his vehicle while responding to an "emergency call." *Baum v. Ohio State Hwy. Patrol*, 72 Ohio St.3d 469, 1995-Ohio-155.<sup>1</sup> The state is immune from liability unless the

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The Supreme Court of Ohio recently expanded the definition of an "emergency call," as defined in

state trooper committed willful or wanton misconduct while responding to an emergency call. *Id.* On January 8, 2003, the parties filed a stipulation that Trooper Hetzel was responding to an emergency call when his patrol car struck plaintiff's vehicle. Therefore, the issue before the court is whether Trooper Hetzel was acting in a willful, wanton, or reckless manner at the time of the incident.

{¶6} In *Baum*, supra, two OSHP troopers had pursued a stolen vehicle on an interstate highway. At the time of the chase, the plaintiff's vehicle was stopped at a roadblock that had been set up by local police without the patrol's knowledge. The plaintiff's vehicle was struck from behind by one of the patrol vehicles as it entered the roadblock area. The Supreme Court of Ohio concluded that the patrol trooper's actions during a high speed chase were not willful and wanton.

{¶7} "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. In order to establish that Trooper Hetzel was acting in a willful and wanton manner, plaintiff would have to prove that Hetzel "acted with intent, purpose, or design to injure." *McGuire v. Lovell*, 85 Ohio St.3d 1216, 1219, 1999-Ohio-296 (Moyer, C.J., dissenting); *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 319, 1996-Ohio-137. Wanton misconduct refers to the failure to exercise any care whatsoever. *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, syllabus. In the context of an immunity determination, both reckless and wanton conduct

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R.C. 2744.01(A), to include "a situation to which a response by a peace officer is required by the officer's professional obligation." *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319.

"refer to conduct that causes risk 'substantially greater than that which is necessary to make [the] conduct negligent.'" *McGuire*, supra, quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105.

{¶8} In *Moore*, supra, the Tenth District Court of Appeals concluded that an officer who had responded to a burglary in progress was responding to an emergency call. The officer was traveling through an intersection when his cruiser struck another vehicle after he swerved to avoid a collision. Unlike the facts in this case, the officer in *Moore* had not activated his cruiser's emergency lights and he was traveling at approximately five mph over the speed limit when the collision occurred. Nevertheless, the Court of Appeals determined that the officer's conduct did not constitute a deliberate or reckless disregard for the safety of others. *Id.*

{¶9} Although the facts in both *Moore* and *McGuire*, supra, concern whether a political subdivision was entitled to immunity from civil liability pursuant to R.C. 2744.02, the analysis of the term "willful and wanton misconduct" reported in those decisions is equally applicable to the facts of this case. In deciding whether liability should be imposed upon patrol troopers on an emergency call, the Supreme Court of Ohio has recognized that OSHP troopers perform the same law enforcement duties as other officers in the state and, thus, it would be illogical to apply different standards in reviewing their immunity status. *Baum* at 472. Furthermore, the Court of Appeals relied on a case against the OSHP in its analysis of situations that constitute an "emergency call." *Moore* at 706 citing *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143

(addressing a pursuit of a reckless driver on a public roadway by an OSHP trooper).

{¶10} In this case, plaintiff contends that Trooper Hetzel was traveling unreasonably fast considering the circumstances of the pursuit and the highway conditions. Trooper Hetzel responded to a request from local law enforcement officials to assist in apprehending a carjacking suspect. It is undisputed that he was responding to an emergency call and that his overhead lights were activated at the time of the incident. Notwithstanding plaintiff's argument to the contrary, the court finds that Trooper Hetzel became a participant in the pursuit when he responded to the request to assist the local police in apprehending the carjacking suspect. In Trooper Hetzel's attempt to intercept the path of the suspect to place the road spikes, he was required to respond quickly. OSHP "troopers are expected to act promptly in emergency situations in order to protect the public." *Baum* at 472.

{¶11} With regard to the highway conditions, both plaintiff and Trooper Hetzel testified that there was some fog in the area at the time of the incident. Plaintiff testified that the fog had become "thinner" on US 422 and that there was adequate visibility on the highway. Trooper Hetzel testified that much of the morning fog had lifted but that there was still occasional fog in low lying areas. According to Trooper Hetzel, his visibility became obscured when he suddenly entered a patch of fog as he approached US 422. Trooper Hetzel was not certain of his speed prior to entering the fog; however, he testified that he slowed to below the posted speed limit when he entered the fog.

{¶12} The court finds that, despite the highway conditions, Trooper Hetzel had a duty to respond promptly to the request by

local law enforcement officials to assist in apprehending the fleeing suspect. Although Ohio courts have held that a motorist whose vision was obscured by heavy fog and who collided with another vehicle in an intersection may be found liable for negligence, it was also determined that the plaintiff's liability under those circumstances was based upon a failure to exercise ordinary care. See *Woods v Brown's Bakery* (1960) 171 Ohio St. 383, syllabus. Even if the court were to find that Trooper Hetzel should have reasonably anticipated encountering an isolated patch of fog on the highway, such a failure to anticipate road conditions constitutes ordinary negligence rather than wanton or reckless conduct. The circumstances in this case present a question of fact as to whether Trooper Hetzel's conduct constituted negligence; they do not support a finding of wanton and willful conduct. Accordingly, judgment is recommended in favor of defendant.

{¶13} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).*

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Magistrate

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MAGISTRATE DECISION

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