

to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct[.]” (Emphasis added.) R.C. 2744.02(B)(1)(a).

{¶ 5} In *Baum v. Ohio State Highway Patrol*, 72 Ohio St.3d 469, 472, 1995-Ohio-155, the Supreme Court of Ohio held that, while OSHP is clearly an agency of the state and not a political subdivision, “[i]t would be illogical and unfair to subject state troopers to greater liability than all other officers in the state performing the same duties in the public interest. *** Accordingly, public policy dictates that a trooper responding to an emergency call be cloaked with the same level of immunity as every other peace officer who might also be responding to that call.”

{¶ 6} The court therefore concluded that, in the absence of willful or wanton misconduct, OSHP is immune from liability for injuries caused by patrol officers in the operation of their vehicles while responding to an emergency call. *Id.* at the syllabus.

{¶ 7} There is no dispute that Sredniawa was involved in an emergency call at the time of the accident. The gravamen of this case is whether Sredniawa’s conduct was willful or wanton.¹

{¶ 8} The incident in question occurred on January 11, 2001, in Howland Township, Ohio. It was a Wednesday morning, traffic was light, and the roads were clear and dry. Shortly after 2:00 a.m., Sredniawa observed a vehicle running a red light. He began to follow the vehicle and when he was close enough to signal the driver to make a stop, he activated his overhead lights. The

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Subsequent to trial, plaintiff withdrew his claim of negligence against OSHP dispatcher Darlene Jones.

driver slowed down and pulled his vehicle into a nearby parking lot. As Sredniawa followed, he notified his post that he was making the stop and called in the vehicle's license number. However, the driver suddenly accelerated out of the parking lot. Sredniawa then informed his post that the driver was fleeing. Within approximately one minute after calling in the license number, Sredniawa was advised of the address of the individual to whom the vehicle was registered and the probable identity of the driver. It was suspected, and ultimately confirmed, that the driver was Colin Roberts.

{¶ 9} When Roberts accelerated out of the parking lot, he crossed two lanes of traffic, drove into a ditch, and went through a yard before heading northbound on State Route (S.R.) 46. Sredniawa suspected that Roberts was intoxicated. He then activated his siren and gave chase; his overhead lights were already operating. He called his dispatcher to give his location and the direction he was heading. The call put other law enforcement authorities who were monitoring their radios on notice that a pursuit was in progress. Roberts' vehicle was clocked at speeds of 80 to 85 miles per hour (mph) and Sredniawa observed that it was "all over the road" and nearly crashed several times.

{¶ 10} Roberts' vehicle then turned west onto North River Road. By this time, both Roberts and Sredniawa were driving at speeds in excess of 100 mph. Roberts' vehicle was weaving across the roadway and, at one point, drove left-of-center over the crest of a hill. As the chase continued along North River Road, the surroundings became less rural/residential and more commercial. There were two intersections ahead of the drivers. Roberts sped through the first intersection, at North River and North Roads,

still traveling at speeds of approximately 100 mph. Sredniawa noted a Howland police officer at the intersection, slowed somewhat to check for traffic, then continued his pursuit. As he accelerated through the intersection, Roberts gained almost 100 yards on Sredniawa.

{¶ 11} The vehicles then quickly approached the next intersection, at North River and Elm Roads. Joseph Robertson was in his vehicle, stopped for a red light, headed southbound, at that intersection. Also at the intersection was a Bazetta Township police cruiser, driven by Officer Nick Papalas. Papalas was stopped at Joseph's left, with his overhead lights and siren activated. Although he had proceeded to the intersection after hearing of the pursuit on his radio, he and Sredniawa had no means of direct radio communication. As Sredniawa approached the intersection, he noted Papalas' vehicle positioned beside plaintiff's, then went through the intersection against the red light to continue the pursuit. However, as the light turned green for the east and westbound lanes, Joseph drove his vehicle into the intersection where it was struck broadside by Sredniawa's. The two vehicles then struck another vehicle, driven by Bree Masaitas, that had been headed eastbound and was stopped west of the intersection. Joseph Robertson was killed, his passenger, Paul Ottum, was injured and Bree Masaitas was slightly injured.² The entire chase lasted two minutes and 27 seconds and covered an area of 3.1 miles.

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A collateral action was filed against Bazetta Township, et al., in the Trumbull County Court of Common Pleas on August 29, 2001. The trial court granted summary judgment in favor of defendants. The stay of proceedings was then set aside in this court and the case proceeded to trial. Subsequent to this court's liability trial, the Eleventh District Court of Appeals issued an opinion reversing the common pleas court's entry of judgment in favor of defendants. Thereafter, OSHP filed a "notice of change of status of connected case" in this court. As a

{¶ 12} Plaintiff contends that Sredniawa deliberately ignored mandatory duties imposed under OSHP policy and Ohio law and that his conduct was both willful and wanton.

{¶ 13} Defendants argue that Sredniawa had the authority to engage in each and every act that he undertook. Defendants also contend that, after the pursuit began, Sredniawa had the authority to continue the pursuit, to exceed the speed limit, and to go through red lights in the process; thus, he did not purposefully or willfully engage in any wrongful conduct. Further, defendants maintain that the applicable policies and state law do not contain specific limitations of authority but, rather, they encompass some reliance upon experience, judgment, and discretion in the course of a pursuit. It is defendants' position that Sredniawa was an experienced trooper and that he at all times exercised his judgment and discretion in a reasonable manner. Thus, defendants deny liability.

{¶ 14} Both parties presented expert witness testimony in addition to their fact witnesses. Plaintiff called two experts: Michael M. Cosgrove, Ph.D., and Michael J. Hunter. Defendants' expert was Sergeant Charles Jones of OSHP.³ The parties also

result of a status conference conducted with the parties on July 27, 2005, this court elected to issue its liability decision notwithstanding R.C. 2743.02(D) and the change of status of the connected case.

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All three experts were highly qualified and their credentials are well-documented in the record. Briefly, however, Dr. Cosgrove is a nationally recognized authority in police pursuit cases with more than 20 years experience in law enforcement. Michael Hunter is a retired, former OSHP trooper with 28 years of experience, including ten years as a post commander where he was a member of the internal review board for his district. Sergeant Jones received an appointment to OSHP Training Academy and served as course director for the division's Emergency Vehicle Operations course. He is also certified driving instructor for the Ohio Peace Officer Training Academy.

submitted numerous exhibits, including the videotape of the pursuit taken from Sredniawa's vehicle. Upon review of the evidence, the testimony, and post-trial briefs of the parties, the court makes the following determination.

{¶ 15} The parties do not dispute that there is a distinction between "willful" and "wanton" misconduct as those terms are used under R.C. 2744.02(B)(1)(a) and that there is no immunity if an officer's operation of his vehicle in response to an emergency call is either willful or wanton.

{¶ 16} The Supreme Court of Ohio addressed these distinctions in *Tighe v. Diamond* (1948), 149 Ohio St. 520. With respect to willful misconduct the court stated that it "*** imports a more positive mental condition prompting an act than does the term 'wanton misconduct.' 'Wilful 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 purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." (Citations omitted.) *Id.* at 527.

{¶ 17} Further, the court stated that "[i]n order that one may be guilty of 'wilful misconduct,' an actual intention to injure need not be shown." *Id.* Rather, the intention underlying such misconduct relates to the intent to commit misconduct, not the result. *Id.*

{¶ 18} With respect to wanton misconduct, the court stated that it "comprehends an entire absence of all care for the safety of others and an indifference to consequences. It implies a failure to exercise any care toward those to whom a duty of care is owing when the probability that harm will result from such failure

is great, and such probability is known to the actor. It is not necessary that an injury be intended or that there be any ill will on the part of the actor toward the person injured as a result of such conduct. Wanton misconduct is positive in nature while mere negligence is naturally negative in character." (Internal citations omitted.) Id. at 526.

{¶ 19} The duty of care owed by Sredniawa is set forth in both OSHP policies and Ohio law. The evidence is clear that he knew, understood, and was trained to follow the same. OSHP Procedure No. 200.06-01, concerning motor vehicle pursuits and roadblocks, states in pertinent part, at section B, that:

{¶ 20} "1. A primary goal of the Division is the protection of life and property while enforcing the traffic and criminal laws of the state.

{¶ 21} "2. Officers of this Division will pursue violators within the limits of safety, while using other methods to identify or arrest the individual.

{¶ 22} "3. A pursuit is only justified when the necessity of the apprehension outweighs the level of danger created by the pursuit.

{¶ 23} "4. The following information must be taken into consideration prior to initiating or continuing a pursuit:

- "a. Seriousness of the offense;
- "b. Possibility of apprehension;
- "c. Area the pursuit will take place in (e.g., business, residential, rural, etc.);
- "d. Current traffic volume;
- "e. Current road and weather conditions;
- "f. What, if any, assistance is available to the officer;

"g. Knowledge of the identify of the driver and/or occupants.

{¶ 24} ****

{¶ 25} "6. *** the intent [of the policy] is to provide general guidelines for pursuit that will help ensure apprehensions within the limit of safety."

{¶ 26} In addition, R.C. 4511.03, "Emergency vehicles to proceed cautiously past red or stop signal," provides that:

{¶ 27} "The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign *shall slow down as necessary* for safety to traffic, but *may proceed cautiously* past such red or stop sign or signal *with due regard* for the safety of all persons using the street or highway." (Emphasis added.)

{¶ 28} A review of the language of the above provisions of OSHP policy and Ohio law generally reveals that safety is the paramount concern during a police pursuit. Indeed, Procedure No. 200.06-01, section H.1., states that: "Pursuit at high speeds is extremely dangerous. Any tactic contemplated at high speed must take into consideration all of the factors surrounding the incident. Safety is always the foremost factor to be considered." Moreover, the evidence shows that OSHP trains its troopers that there are no exceptions to their mandatory duties during a high-speed pursuit and that adherence or non-adherence to these safety statutes may also impact whether an officer's conduct during a pursuit is deemed willful or wanton.

{¶ 29} In this case, the speed at which Sredniawa was driving when he entered the North River and Elm Road intersection is the

conduct of most concern. While there were no hazardous or adverse road or weather conditions, and other officers had heard of the pursuit on their radios and were available to assist, other factors warranted caution. Applying the criteria set forth in Procedure No. 200.06-01, Section B 4(a)-(g), Sredniawa's own testimony establishes that, by the time he reached this last intersection, he knew: 1) that he had been pursuing an offender who had committed only a minor traffic violation; that the offender might be driving under the influence; 2) that the offender had gained ground and that the possibility of apprehension had diminished; 3) that the area of the pursuit had changed from rural to a commercial; 4) that there was likely to be increased traffic in the area because of several 24-hour businesses located near the intersection; 5) that a well-known feature of the road was a hill approximately 200-300 feet from the intersection that limited the view of drivers approaching or waiting at the intersection; 6) that he did not know whether Papalas "was there" to join in the pursuit or whether he actually had the intersection secured; and 7) that he had been provided with identifying information concerning the registered owner of the vehicle which he was pursuing.

{¶ 30} Additionally, as Sredniawa approached the North River and Elm Road intersection, he knew that he had a mandatory duty under R.C. 4511.03 to slow down as necessary, proceed cautiously, and to act with due regard for the safety of the public. According to the testimony of both of plaintiff's experts, adherence to these mandates requires that an officer slow his vehicle to a speed which would permit him to stop if traffic came into the intersection.

{¶ 31} The testimony of plaintiff's expert Michael Hunter was particularly persuasive regarding the question of Sredniawa's speed

as he approached and drove through the North River and Elm Road intersection. Hunter noted that Sredniawa's vehicle was traveling at 71 mph, or 105 feet per second as it entered the intersection. According to his calculations, if Sredniawa had slowed to within the speed limit of 35 mph, or approximately 51 feet per second, it would have doubled his time to view and ascertain whether the intersection could be entered safely. Hunter opined that if Joseph Robertson had continued into the intersection at the speed he was traveling (about 10 mph), and Sredniawa had braked to the speed limit (but still traveled through the red light), no collision would have occurred, even if Sredniawa did not brake any further in reaction to the presence of Joseph's vehicle. Instead, however, the evidence shows that Sredniawa's vehicle actually accelerated two seconds prior to the collision, just as Joseph Robertson's vehicle was moving into the intersection.

{¶ 32} The testimony of plaintiff's expert Dr. Cosgrove was particularly persuasive on the question of whether Sredniawa complied with OSHP policies. For example, Cosgrove emphasized that Sredniawa knew and was trained to follow Procedure No. 200.06-01, section B(3), which clearly states that a pursuit is "only justified when the necessity of the apprehension outweighs the level of danger created by the pursuit." In Cosgrove's opinion, there was a low need to apprehend in this case compared with the high risk of danger to the public that Sredniawa's pursuit of Roberts involved. He stated with conviction that: "the only thing more dangerous than a drunk driver on the roads is an officer chasing a drunk driver." He also stated that once a pursuit is terminated, the recklessness of fleeing drivers typically decreases from the level generated by the pursuit. Cosgrove was critical of

Sredniawa's conduct and lack of adherence to OSHP policy and Ohio law at several points, not just at the North River and Elm Road intersection. He opined that the pursuit should have ended when Roberts turned left off S.R. 46 and on to North River Road because of the commercial area ahead.

{¶ 33} In contrast, defendants' expert, Sergeant Jones, opined that Sredniawa's conduct throughout the pursuit was reasonable, appropriate, and well within OSHP policy. He noted that Sredniawa had a duty under R.C. 5503.02 to enforce Ohio's criminal and traffic laws. In Jones' view, Sredniawa's decision to initiate the pursuit of Roberts was in accordance with that duty and was justified by probable cause. Jones maintained that, as the pursuit continued and Roberts' driving became increasingly reckless, it became more necessary to apprehend him. Jones opined that Sredniawa acted in accordance with his duty and in the public interest by continuing his efforts to apprehend Roberts. He also noted that knowledge of the registered owner of a vehicle was not enough for Sredniawa to make a positive identification because it was possible that the vehicle was stolen or illegally acquired. With respect to Sredniawa's conduct at the North River and Elm Road intersection, Jones noted that Roberts had sped through the intersection at more than 100 mph whereas Sredniawa's speed was calculated at about 70 mph at that point; he opined that the 30 mph speed difference demonstrated that Sredniawa did, in fact, reduce his speed before entering the intersection.

{¶ 34} As noted previously, all three experts were highly qualified, competent witnesses. However, the court finds that the testimony of plaintiff's experts was more consistent with the totality of the evidence and more credible than that of Sergeant

Jones. Based upon the totality of the evidence, the court finds that Sredniawa engaged in willful misconduct as he approached and entered the North River and Elm Road intersection. Until that point, the court finds that he acted reasonably and within his authority.

{¶ 35} The approach to the North River and Elm Road intersection is significant for several reasons. Foremost, there was the hill on North River Road of which Sredniawa was well aware. He was also well aware that the hill obstructed his view of vehicles at the intersection and limited those drivers' view of his approaching vehicle. Roberts had shown no sign of slowing down and was continuing to drive extremely dangerously. Sredniawa had already lost ground when he braked at the previous intersection. Sredniawa also knew that, unlike the previous intersections, there were 24-hour business establishments in the area where there was likely to be traffic. The evidence of record amply demonstrates that if Sredniawa was going to slow down significantly prior to entering the intersection, he needed to begin to do so very close to the time that he crested the North River Road hill.

{¶ 36} It is also significant that Sredniawa did not know for sure that Papalas had secured the intersection and that plaintiff was not going to proceed into the intersection when his light turned green. He had no direct communication with Papalas. He acknowledged that he had a duty to slow down as necessary for safety to other motorists and to proceed with due regard whether or not there was an officer present at the intersection. He acknowledged that he could not assume anything when engaged in a high-speed pursuit.

{¶ 37} Lastly, it is significant that Sredniawa was an experienced trooper with an exemplary record for identifying and apprehending drunk drivers. He was deservedly proud of his record.

However, the evidence is clear that he knew and understood that a high-speed pursuit is justified only when the necessity of the apprehension outweighs the level of danger created by the pursuit.

When asked whether the pursuit in question had been worth it, Sredniawa replied that the question was unfair; that he had arrested a lot of drunk drivers, had probably saved some lives as a result, that he would not do anything different in retrospect, and that he was doing his job.

{¶ 38} Based upon these factors, and considering all of the evidence and testimony presented, the court finds that Sredniawa did not simply make a bad judgment call at this point in the pursuit but, rather, that he had determined before he even crested the hill that he was going to continue to pursue Roberts instead of discharging the duties he knew that he was required to perform for the safety of motorists at the intersection. Instead of slowing down as necessary for safety to other motorists, the evidence establishes that Sredniawa chose to accelerate through the intersection in order to keep pace with the fleeing suspect. Accordingly, the court concludes that Sredniawa intentionally deviated from a clear duty, that he acted with a deliberate purpose not to discharge his mandatory safety duties, and that he purposefully engaged in wrongful conduct with full knowledge that high-speed pursuits are extremely dangerous and that the likelihood of injury was high if another motorist entered the intersection as he sped through it. As such, his conduct was willful. See *Tighe v. Diamond*, supra, at 527.

{¶ 39} As noted previously, the court must also examine the question whether Sredniawa engaged in wanton misconduct. In order to reach that conclusion, the court must find an entire absence of all care for the safety of others and an indifference to consequences. Defendants argue that the fact that Sredniawa had on his overhead lights and siren, and that he slowed to some degree before entering the intersection, demonstrates that he exercised some care. The court disagrees.

{¶ 40} In *Hunter v. City of Columbus* (2000), 139 Ohio App.3d 962, the Tenth District Court of Appeals rejected that same argument, stating that it was "a simplistic analysis." While recognizing that the fact that the lights and siren were on is a matter that can be considered, the court noted that "[u]nder that criteria, you could drive an emergency vehicle in any manner that you please and not be guilty of wanton or reckless misconduct simply because you activated your siren and lights. Even looking where you are going or applying one's brakes meets the literalistic, but not legal, definition of 'any care.' If 'any care' is construed in that fashion, the exception becomes virtually meaningless." *Id.* at 970. Thus, the court concluded that "the driver's conduct must be evaluated based upon all of the circumstances at the time." *Id.* at 971.

{¶ 41} While the standard for wanton misconduct is different than that for willful misconduct, many of the same facts are relevant to the analysis. For example, even though Sredniawa had on his lights and sirens, he knew that his view of the intersection was obstructed by the hill leading up to it. As such, the effectiveness of his lights and sirens as warning devices was at a minimum. Moreover, as in *Hunter*, *supra*, at 968, the conduct

occurred in the winter season; thus, "an operator of an emergency vehicle can reasonably assume that drivers have more difficulty hearing sirens because of the car windows being closed and radios and heaters being operated." The testimony shows that, as Sredniawa was approaching the intersection, he could not hear Papalas' siren because it was masked by his own; thus, it is reasonable that Joseph Robertson's ability to hear Sredniawa's siren would have been masked by the sound of Papalas'.

{¶ 42} Again, as discussed in connection with the analysis of willful misconduct, Sredniawa knew that he was required, without exception, to approach the intersection with caution and to slow down to a speed that would permit him to stop if traffic came into the intersection. He knew that there are no exceptions to the duties imposed on him under OSHP policy and Ohio law, and that R.C. 4511.03 prohibited heedlessly running a red light in the course of a high-speed pursuit. Nevertheless, Sredniawa acknowledged that, upon noticing Joseph Robertson's vehicle at the intersection, he could not make eye contact with the driver, or see that there was a passenger in the vehicle, because his view was blocked by Papalas' vehicle. He had no idea what Papalas' intentions were, and no idea what Joseph Robertson could or could not see.

{¶ 43} In light of this evidence, and considering all of the surrounding circumstances, the court concludes that Sredniawa also engaged in wanton misconduct in that he failed to exercise any care for the safety of others and his actions demonstrate an indifference to the consequences.

{¶ 44} In summary, the court concludes that Sredniawa engaged in both willful and wanton misconduct for which defendants can be held

liable. Judgment shall, therefore, be entered in plaintiff's favor.

{¶ 45} Finally, at the close of the proceedings, plaintiff asserted a claim of spoliation concerning the destruction of OSHP's internal investigation documents of Sredniawa's conduct.

{¶ 46} The elements of a claim for spoliation of evidence, are as follows: "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts[.]" *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 29, 1993-Ohio-229.

{¶ 47} Here, in light of the abundance of other evidence that plaintiff received and presented, it cannot be said that plaintiff was prejudiced or that his case was disrupted. Further, the court is not convinced that the destruction of the documents was "willful" in the sense that there was "an intentional and wrongful commission of the act." See *White v. Ford Motor Co.* (2001), 142 Ohio App.3d 384, 387. Accordingly, the spoliation claim is DENIED.

IN THE COURT OF CLAIMS OF OHIO
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JOHN D. ROBERTSON, Individ.,	:	
etc.	:	
Plaintiff	:	CASE NO. 2001-09214
	:	Judge J. Warren Bettis
v.	:	<u>JUDGMENT ENTRY</u>
DEPARTMENT OF PUBLIC SAFETY,	:	

etc., et al. :

Defendants :

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This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in an amount to be determined after the damages phase of the trial. The court shall issue a separate entry scheduling a date for the trial on the issue of damages.

J. WARREN BETTIS
Judge

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