[Cite as *Brannan v. Scioto Cty.*, 2014-Ohio-4453.]

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

TAMMY L. BRANNAN, Administratrix of the Estate of Derrick Lee Bradford Carver, Deceased,	:	Case No. 13CA3555
Plaintiff/Appellee,	:	DECISION AND JUDGMENT
vs.	:	ENTRY
Scioto County, et al.,	:	
Defendants/Appellants.	:	**Released: 09/30/14**

APPEARANCES:

Wilson G. Weisenfelder, Jr., Rendigs, Fry, Kiely & Dennis, LLP, Cincinnati, Ohio, for Appellants.

T. Jeffrey Beausay, The Donahey Law Firm, Columbus, Ohio, for Appellee.

McFarland, J.

{¶1} Defendants/Appellants, Scioto Ambulance District, Scioto Ambulance District Squad 2, Mark Byron Phipps, and Timothy Jones appeal the May 13, 2013 judgment entry of the Scioto County Common Pleas Court, finding Defendants not entitled to summary judgment as a matter of law. Defendants/Appellants contend the trial court erred to their prejudice and denied them statutory immunity under R.C. 2744.01 et seq., by overruling their motion for summary judgment. For the reasons which

follow, we agree. Accordingly, we sustain Appellants' sole assignment of error and reverse the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} This lawsuit arises subsequent to the death of a newborn infant, Derrick Lee Bradford Carver, on August 26, 2010. On that date, Appellant Mark Phipps (Phipps) and Appellant Timothy Jones (Jones), were both employed by Appellant Scioto Ambulance District Squad 2 (Squad 2). Squad 2 was formed in 1979, pursuant to R.C. 505.443, R.C. 505.71, and R.C. 505.72 of the Ohio Revised Code, and a joint resolution of several townships, to provide emergency medical services to portions of Scioto County.[1] On August 26, 2010, at approximately 8:02 a.m., Phipps and Jones were dispatched to the Brannan residence on Carpenter Road upon the report that a 14-year-old, "C.B." was in labor. At that time, written protocols specific to situations the squad members might face were in effect and kept at the Squad 2 squad house.[2]

{¶3} James Brannan, C.B.'s step-grandfather, testified he called 911 around 7:20 a.m. Tammy Brannan , C.B.'s grandmother, testified 911 was notified well in advance of the delivery, but Squad 2 did not arrive until 45

[1] The participating townships are Brush Creek, Morgan, Nile, Rarden, and Rush Township. The joint ambulance district further included the villages of Otway and Rarden.
[2] These protocols were referenced in Phipps' and Jones' testimony, but no written documentation of the protocols has been made part of this record

minutes after the call was placed. The distance between the squad house and the Brannan home is three miles. The infant was born shortly before Squad 2 arrived.

{¶4} Tammy testified she was present in the room with the baby and the Squad 2 members the entire time. When the baby was born, he had a pinkish color, he cried, and his bowels and kidneys moved. The baby was wrapped in a towel and breathing when the squad arrived. Kayla Brannan, a family member, massaged him. According to Tammy, the squad members took the baby out of the towel and put him on a pad. A squad member cut the umbilical cord and eventually performed the "blow-by" oxygen procedure.[3] Tammy testified Phipps and Jones did nothing to stimulate the baby. She never saw them take the newborn's vital signs. The baby's color changed from pink to blue. Tammy testified Squad 2 was there 30-35 minutes before the Life ambulance arrived.

{¶5} Jones testified he has been an Emergency Medical Technician (EMT) since 1979, and was considered an EMT-basic. At the time of his deposition, he had worked full-time for Squad 2 approximately five years. Jones had never been present at the delivery of a baby or taken care of a

[3] Jones testified "blow-by" was performed by using a small oxygen mask, held an inch or so to the face, so the oxygen is going towards the nose and mouth.

newborn. Jones testified due to Phipps superior training, he relied on Phipps' judgment as to the decision-making for care of the infant.

{¶6} Jones drove the Squad 2 ambulance. He testified there was some delay getting to the Brannan home, due to construction. It took approximately fifteen minutes because they took an alternate route. When they arrived at approximately 8:22 a.m., they were met at the door by a female who advised: "Hurry up guys, she just delivered." Shortly after their arrival, Jones got the OB kit and requested a backup ambulance.[4]

{¶7} When Jones entered the house, the mother was lying in bed with the baby between her legs and the umbilical cord intact. Jones testified the baby was uncovered, breathing, and his entire body had a pinkish color. Jones does not recall the baby cried, and he was not sure of its movement. Jones did not take any initial vital signs. The mother seemed all right and no vital signs were taken on her until the baby was turned over to the Life ambulance.

{¶8} However, the baby's condition deteriorated. Fifteen to twenty minutes after Jones and Phipps arrived, the baby's pinkish hue started turning blue. The baby was removed to the ambulance after approximately 30 minutes, for ventilations. Jones testified in the truck, Phipps handed the

[4] The OB kit contains a towel, a "chuck" (a large absorbent pad), an emergency blanket, bulb syringe, clamps for the umbilical cord, a bag for census storage, and a pair of scissors.

infant to him. Jones performed oxygen blow-by and Phipps went to get an infant bag-valve-mask when Life Ambulance arrived. Jones explained the situation and handed the baby to a crew member. At the time, the baby's respirations were around 12. The blow-by procedure did not seem to have any positive effect.

{¶9} Jones testified there was no contact with Life Ambulance until it arrived. Jones also testified the baby was not transported, prior to Life's arrival, because there were two patients. Pursuant to protocol, he would not want to leave one of the patients.

{¶10} There was no attempt to intubate the baby. Jones testified he discussed this with his partner after they returned to the squad house. Jones' understanding was that they did not intubate the baby because due to his premature status and lung development, intubation might do more damage than good.

{¶11} As of August 26, 2010, Phipps was an advanced EMT. He had participated in two or three infant deliveries in the years prior. He had participated in the care of three to four infants already delivered when he arrived.

{¶12} Phipps testified they left the Scioto Squad 2 station at 8:04 a.m. They had some difficulty getting to Carpenter Road, due to construction.

Once there, they had trouble locating the house because there was no address sign. According to the run sheet, they arrived at either 8:12 or 8:22. Once there, they were advised that the baby had just been delivered. At that point, Phipps told Jones to get the OB kit and call another ambulance.

{¶13} Upon entering the home, Phipps testified they went to a bedroom. An air conditioner was running. Phipps inquired of the mother's condition and then directed his attention to the newborn. It was naked and uncovered, the smallest child he had ever seen. The baby's body was warm and pink. Phipps recalled a grimace and a little movement from the child. Phipps cut the umbilical cord.

{¶14} Phipps testified the infant's respirations were 14 and his pulse, 90. Phipps did not record this.[5] Phipps sent Jones to get oxygen and something to wrap the baby in. Phipps wrapped the baby in a towel doubled over. He partly uncovered it to take the second set of vital signs. Phipps delivered oxygen to the baby by a mask. He described the mask as a plastic shield fitting over the nose and mouth, with a tube leading to the canister of oxygen. The mask was held 2-3 inches from the infant's nose and mouth, the blow-by method.

[5] There are no notes document the infant's vital signs or other care given to the infant. According to Phipps, this is because Squad 2 ultimately did not transport the child.

{¶15} Phipps testified the amount of respirations did not change, but they became shallower, approximately 5 minutes after giving the blow-by treatment. At this point, the infant's pulse was in the 80's. He was starting to turn blue. Phipps also testified he tried to stimulate the child by flicking his foot, but the child never responded. He recalled the child never cried, urinated, or had a bowel movement.

{¶16} Phipps testified at some point, he was handed a phone and told that "Jason" from the Southern Ohio Medical Center emergency room wanted to talk to him. Phipps gave Jason the vital signs. Phipps was advised to support the baby with oxygen and keep him warm. Phipps testified they did not take the child and leave for the hospital because it would be abandoning the mother and improper to do so. Phipps considered meeting the backup ambulance en route but he was afraid they would miss the other squad. He also did not consider taking both patients in the same ambulance because "there is supposed to be one EMS person per patient riding in the back." In his judgment, it was better to wait for the Life ambulance because the infant would get a higher level of care.

{¶17} Phipps testified he did not consider intubating the child because he could not intubate when the child is still breathing. He never considered giving chest compressions because the infant's heart rate was in

the 80's. Phipps decided the other ambulance would transport the baby and the Scioto Squad would transport C.B.

{¶18} Phipps explained his decision not to use the bag valve oxygen. He testified if any type of positive pressure is used, there is a risk of damaging a premature baby's lungs, "especially if you bag them." However, Phipps testified the baby's condition had worsened and it had gotten to the point where the infant's other respirations had become shallow, so they took the baby outside to "bag" him. The infant was in a towel and he was placed on a cot in the back of the Squad 2 ambulance. By the time Life arrived, at 8:53, the child was starting to get cyanotic. Life took over the care of the child.[6]

{¶19} Chris York, a paramedic since 2001, was employed with Life Ambulance on the relevant date. York testified when he arrived, he observed an EMT holding the baby in the chuck and administering blow-by oxygen. His testimony was that there was "no CPR, no bagging, no nothing in progress." The baby's head and face were blue. The baby's breaths were gasping. York grabbed the baby and headed to his own vehicle. York attached the child to a cardiac monitor, hooked the bag-valve-mask up to 15

[6] Phipps testified there was intubation equipment on the Squad 2 ambulance. There was also telemetry equipment to monitor heartbeat, but he did not hook it up. There was also an airway kit which was not used.

liters of oxygen and began bagging the child and performing CPR. York also attempted 3-4 times to intubate the baby.

{¶20} At Southern Ohio Medical Center, doctors and a nurse worked with the infant. The family was advised that the baby could not be stabilized for a flight to Children's Hospital in Columbus. Resuscitation efforts were stopped later in the day, and the infant died.

{¶21} Kayla Brannan, a relative of C.B.'s by marriage, assisted with the delivery and was present while Phipps and Jones were there. Kayla testified "they" cut the umbilical cord, checked the baby's pulse, and rubbed his feet. Kayla also testified "they" performed the blow-by oxygen and suctioned the baby's nose and mouth. She estimated Phipps and Jones were inside with the baby 15-20 minutes before removing him to the ambulance. Kayla also testified when they took the baby outside, his entire body appeared pink.

{¶22} C.B. testified she was in a lot of pain after the delivery and was not paying close attention. She testified the Squad 2 members cut the umbilical cord and put an air mask if front of the baby's face.

{¶23} Tammy L. Brannan, Administratrix of the Estate of Derrick Lee Bradford Carver, filed the complaint on September 26, 2011. All defendants filed timely answers. Eventually, the trial court granted a motion

for leave to file an amended complaint and the amended complaint was filed on June 18, 2012. All defendants again filed timely answers. Defendants Scioto Ambulance District, Scioto Ambulance District Squad 2, Phipps and Jones also filed a motion for summary judgment on March 4, 2013. Defendants argued the conduct of Phipps and Jones was not willful, wanton, or reckless.

{¶24} Plaintiff next filed a motion for leave to file a second amended complaint which was granted. The second amended complaint was filed on April 15, 2013, alleging conscious disregard malice and requesting punitive damages. Defendants again filed timely answers.

{¶25} Plaintiff also filed a memorandum in opposition to defendants' motion for summary judgment. In support of the memorandum, Plaintiff attached affidavits from Kenneth Williams, M.D., an emergency physician. Dr. Williams opined that Phipps and Jones had a duty to keep the baby warm, apply a bag-valve mask with supplemental oxygen, perform chest compressions, and transport the baby immediately. Dr. Williams ultimately opined the failure to do any of the aforementioned life-saving measures is "willful" and "wanton" as those terms have been defined by the Supreme Court of Ohio.

{¶26} Plaintiff also attached an affidavit of Guy Haskell, an EMT-paramedic with extensive experience in emergency services, instruction, and policy development. Mr. Haskell also opined the conduct of Phipps and Jones was "willful" and "wanton" as defined by the Supreme Court of Ohio.[7]

{¶27} The trial court overruled defendants' motion for summary judgment by judgment entry dated May 13, 2013. This timely appeal followed.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS IN DENYING THEM STATUTORY IMMUNITY UNDER R.C. 2744.01 ET SEQ., BY OVERRULING THEIR MOTION FOR SUMMARY JUDGMENT.

A. STANDARD OF REVIEW

{¶28} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R.56. *Today and Tomorrow Heating & Cooling*, 4th Dist. Highland No. 13CA14, 2013-Ohio-239, ¶10; *Vacha v. N.Ridgeville,* 136 Ohio St.3d 199, 2014-Ohio-3020, 992 N.E.2d 1126, ¶19. Summary judgment is proper if the party moving for summary judgment demonstrates that: (1) there is no genuine issue of material fact; (2) the

[7] On March 27, 2013, Defendants filed a motion to strike/objections to portions of the experts' opinions, but the trial court never ruled on this motion/objection.

moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made. *Today, supra;* Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler,* 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶24; *Bender v. Portsmouth*, 4th Dist. Scioto No. 12CA3491, 2013-Ohio-2023, ¶8.

B. LEGAL ANALYSIS

{¶29} Ordinarily, a decision to deny a summary judgment motion is not a final order. *Essman v. Portsmouth,* 4th Dist. Scioto No. 08CA3244, 2009-Ohio-3367, ¶10. See *Celebreeze v. Netzley*, 51 Ohio St.3d 89, 90, 554, N.E.2d 1292 (1990). A trial court's order to deny a summary judgment motion on the basis of sovereign immunity, however, does constitute a final order. *Essman, supra.* See R.C. 2744.02(C); *Sullivan v. Anderson Twp*., 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, syllabus; *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, syllabus; *CAC Bldg. Properties v. Cleveland,* 8th Dist. Cuyahoga No. 91991, 2009-Ohio-1786, at fn1. R.C. 2744.02(C) explicitly states that an order denying "a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other

provision of the law is a final order." *Essman, supra.* See, also, *Makowski v. Kohler,* 9th Dist. Summit No. 25219, 2011-Ohio-2382, ¶7.

> 1. Is the joint ambulance district herein to be considered a "political subdivision" pursuant to Chapter 2744 of the Ohio Revised Code, thus affording the Appellants immunity for their alleged misconduct?

{¶30} The General Assembly enacted R.C. Chapter 2744, Ohio's Political Subdivision Tort Liability Act, to reinstate the judicially abrogated common-law immunity of political subdivisions. *Today, supra,* at ¶12. See, *Riffle v. Physicians and Surgeons Ambulance Service, Inc.*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶14-15. R.C. 2744 establishes a three-step analysis for determining whether a political subdivision is immune from liability. *Leasure v. Adena,* 4th Dist. Ross No. 11CA3249, 2012-Ohio-3071, ¶13; *Cramer v. Auglaize Acres,* 113 Ohio St.3d 266, 270, 2007-Ohio-1946, 865 N.E.2d 9, ¶14. First, R.C. 2744.02(C) sets forth the general rule that a political subdivision is immune from tort liability for acts and omissions connected with governmental or proprietary functions. *Leasure, supra* at ¶13; *Cramer; Colbert v. Cleveland,* 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶7; *Harp v. Cleveland Hts.,* 87 Ohio St.3d 506, 509, 721 N.E.2d 1020 (2000). Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). *Leasure, supra*; *Cramer; Ryll v. Columbus Fireworks*

Display Co., 95 Ohio St.3d 467, 470, 2002-Ohio-2584, 769 N.E.2d 372, ¶25. Finally, R.C. 2744.03(A) sets for several defenses that a political subdivision may assert if R.C. 2744.02(B) imposes liability. *Leasure, supra; Cramer*; *Colbert* at ¶9. The R.C. 2744.03(A) defenses then re-instate immunity. Whether a political subdivision is entitled to statutory immunity under Chapter 2744 presents a question of law. E.g., *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992); *Williams v. Glouster*, 4th Dist. Athens No. 10CA58, 2012-Ohio-1283, ¶15.

{¶31} R.C. 2744.02(B)(5) establishes an exception to immunity when civil liability is expressly imposed upon a political subdivision by the Revised Code. The Supreme Court of Ohio in *Riffle, supra*, had the opportunity to address the interplay of the above statute and R.C. 4765.49(B), which provides that a political subdivision or joint ambulance district is liable for injury arising out of any actions taken by a first responder, EMT-basic, EMT-I, or paramedic when emergency medical services are provided in a manner that constitutes willful or wanton misconduct. *Riffle*, 986 N.E.2d 983. The *Riffle* court, after considering the plain meaning and reviewing the history of the statutes held:

> "There is no conflict between R.C. 2744.02(A) and R.C. 4765.49(B). R.C. 2744.02(A)(1) establishes a general grant of immunity to political subdivisions, but R.C. 2744.02(B)(5) creates an exception to that immunity 'when civil liability is

> expressly imposed upon the political subdivision by a section of the Revised Code….' It is manifest that the legislature intended R.C. 4765.49(B) to expressly impose liability on political subdivisions within the meaning of R.C. 2744.02(B)(5) by providing an exception to the immunity of political subdivisions when emergency medical services are provided in a manner that constitutes willful or wanton misconduct."

In *Riffle*, the City of Akron's fire department and EMS's status as a "political subdivision" was not at issue. Here, Appellee argues the Squad 2 joint ambulance district is not a "political subdivision" for purposes of sovereign immunity. Thus, we must first consider the parties' arguments on this issue.

{¶32} Appellants assert Squad 2 is a joint ambulance district created pursuant to statute and qualifies as a "political subdivision" under R.C. 2744.01(F). Appellants further assert Squad 2 performs a governmental function pursuant to its provision of emergency medical services, and, as such, Appellants are immune from Appellee's claims. R.C. 2744.01(F) defines "Political subdivision" as "[A] municipal corporation, township, county, school district or other body corporate and politic responsible for governmental activities in a geographical area smaller than that of a state." R.C. 2744.01(C)(2) provides: "A 'governmental function' includes, but is not limited to, the following: (a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection." We

agree with Appellants that Squad 2 does satisfy the requirements of R.C. 2744.01(F) to be considered a "political subdivision." It is obvious Squad 2 provides emergency medical services for Brush Creek, Morgan, Nile, Rarden, and Rush Townships, along with the villages of Otway and Rarden. The provision of said services is a governmental function. *Riffle*, 986 N.E.2d 983, ¶2. It is also obvious that the Squad 2 district provides its services in a geographical area smaller than a state. The resolution forming Squad 2 and identifying the participating townships, villages, and representatives demonstrates this.

{¶33} The final requirement in for Squad 2 to be considered a political subdivision is that the entity must be a "body corporate and politic." We also agree with Appellants' assertion that Squad 2 is a body corporate and politic. Appellants cite *Cincinnati v. Rose*, 63 Ohio Misc. 2d 1, 612 N.E.2d 819 (C.P.1992) where the issue was whether a volunteer fire department could be considered a political subdivision for purposes of immunity. The court determined the volunteer fire department did not qualify as a "political subdivision" since there was no governmental control over the operation and activities of the department. Our research has discovered a similar common pleas court decision in *Lish v. Coolville*, 70 Ohio Misc.2d 74, 69 N.E.2d 7(C.P. 1995).

{¶34} *In Lish,* a negligence action was brought against a volunteer fire department and one of its firefighters. The parties engaged in motion practice and the trial court held that the volunteer fire department was not a "body politic" and thus, not a "political subdivision." In reaching its decision, the court cited *Rose,* which noted that "Any definition of 'body politic' must include an element of governmental control." The *Rose* court reasoned:

> "No governmental entity controls the operations and activities of the Hartford Volunteer Fire Department, and the general public cannot directly or indirectly by vote or otherwise, control the operations, activities, and membership. It is rather obvious that the Hartford Volunteer fire Department does not want such control. If it did , it could organize as a township or joint-township firefighting agency under the applicable statutes."

{¶35} The *Lish* court also pondered the question as to what is sufficient to constitute governmental control, and found that the control sufficient for the Coolville Volunteer Fire Department (CVFD) to be a body politic was lacking. The *Lish* court reasoned:

> "CVFD is not under governmental control. CVFD may terminate the contract with reasonable notice. CVFD is free to contract or not to contract with Coolville or Troy and Carthage Townships or any other political subdivision. CVFD and not any political subdivision, controls the money that CVFD receives pursuant to the contracts with Troy and Carthage Townships. If CVFD wanted the control of Coolville or Troy and Carthage townships, it could have organized as a township or village agency under the applicable statutes."

{¶36} Appellants acknowledge while the joint ambulance district is not enumerated in R.C. 2744.01(F), there are numerous examples of entities which have deemed to satisfy the requirements of R.C. 2744.01(F) and thus, qualify as political subdivisions. See, *Makowski v. Kohler,* 9th Dist. Summitt No. 25219, 2011-Ohio-2382 (park district); *Souther v. Preble County District Library*, 12th Dist. Preble No. CA2005-04-006, 2006-Ohio-1893 (public library); *George v. Village of Newburgh Heights,* 8th Dist. Cuyahoga No. 97320, 2012-Ohio-2065 (village); *Gibbs v. Columbus Metropolitan Housing Authority*, 10th Dist. Franklin No. 11AP-711, 2012-Ohio-2271 (metropolitan housing authority); *Lamtman v. Ward*, 9th Dist. Summit No. 26156, 2012-Ohio-4801 (sheriff); and *Brantley v. Southwest Ohio Regional Transit Authority*, 1st Dist. Hamilton No. C-100214, 2010-Ohio-6290 (transit authority).

{¶37} The Supreme Court of Ohio had the opportunity to address a related question in *Greene County Agricultural Society v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, 733 N.E.2d 1141. The *Greene* Court began by noting R.C. 2744.01(F) defines "political subdivision" as a "municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state." R.C. 2744.01(F) then goes on to set forth a

nonexhaustive list of particular bodies that fall within the above definition. In *Greene*, the Supreme Court considered whether, since the Greene County Agricultural Society did not fall within any of the groups listed in R.C. 2744.01(F) in order to be considered a political subdivision, whether it was a "body corporate and political responsible for governmental activities." The *Greene* court looked to R.C. Chapter 1711 which provides for the establishment, organization, and functioning of county agricultural societies. It also noted that Black's Law Dictionary (7th Ed.1999) 167, defined "body politic" as "[a]group of people regarded in a political (rather than private) sense and organized under a single governmental authority." In *Greene*, the relevant statute which provided for the establishment of a county agricultural society explicitly provided that county agricultural societies are declared "bodies corporate and politic." The *Greene* court went on to examine whether or not the agricultural society was "responsible for governmental activities" and ultimately concluded the agricultural society's conducting a livestock competition was a proprietary function, not governmental, and thus afforded no immunity.

{¶38} Similarly, a "joint ambulance district" is not specifically enumerated in the R.C. 2744.01 definitions of "political subdivision." Here, we look to R.C. Chapter 505.71 which provides that "[T]he boards of

township trustees of two or more townships…may by adoption of a joint resolution by a majority of the members of each board…create a joint ambulance district." R.C. 505.71 provides for the establishment of joint ambulance districts, providing that the governing body shall be a board of trustees, which shall include one representative appointed by each board of trustees. R.C. 505.71 further states that, "[T]o provide the services and equipment it considers necessary for the district, the board may levy taxes….." The statute also provides that "[T]he district may purchase, lease, maintain, and use all vehicles, equipment, vehicles, buildings, and land necessary to perform its duties." R.C. 505.72, a correlating statute, provides for joint ambulance district employees. R.C. 505.72(C) states: "Ambulance services or emergency medical services rendered for a joint ambulance district under this section and 505.71 of the Revised Code shall be deemed services of the district." The resolution forming the Scioto Ambulance District Squad 2 demonstrates, as in *Greene,* the joint ambulance district here is organized and established pursuant to the Ohio Revised Code.

{¶39} And, in contrast to the *Rose* and *Lish* cases, the Squad 2 joint ambulance district is under governmental control. The resolution forming the Scioto Ambulance District Squad 2 in 1979 states in pertinent part:

> "The Board of Scioto County Commissioners present operators of the Scioto County Emergency Ambulance Service have

> agreed to relinquish their rights and operating authority; and Whereas, Said County Commissioners further agree to relinquish all funds, both those in the depository and those funds forth-coming from all sources to the Scioto County Emergency Ambulance Services…."
>
> "Whereas, the formation of a Joint Ambulance District is now authorized and made available to townships in Section 505.443, Section 404.71 and Section 505.72 of the Ohio Revised Code; and NOW THEREFORE, a Joint Township Ambulance District is hereby created by the aforementioned Townships and Villages, that action taken by a majority vote of the members of each Board of Township Trustees and by a majority of the members of each legislative authority of each Village Corporation."
>
> "[T]he governing body of this district shall be a Board of District Trustees, which shall include one representative appointed by each Board of Township Trustees and one representative appointed by the legislative authority of each Village."
>
> The resolution further states:
>
> "[T]he Clerks of the participating Townships and Villages be and hereby authorized and directed to pay to the clerk of the District, upon its organization any unencumbered funds arising from the proceeds of ambulance services levies and are further authorized and directed of[sic]to pay over to said Clerk of the District any further periodic distributions from said tax levies for the duration of said tax levies."

{¶40} The language of the resolution forming the Scioto Ambulance District Squad 2 demonstrates sufficient governmental control for us to conclude that the Scioto Ambulance District Squad 2 is "a body corporate and politic responsible for governmental activities." The resolution

demonstrates that Squad 2 was organized pursuant to the Ohio Revised Code. Squad 2 has a governing body. Pursuant to the board of district trustees, the general public has indirect control over the operations and activities of the joint ambulance district. And, the board of district trustees for the joint ambulance district controls money relinquished to it from the Scioto County Commissioners and distributed from tax levies.

{¶41} Having found the joint ambulance district here is a body corporate and politic responsible for governmental functions, we further find Squad 2 is a "political subdivision" for purposes of R.C. 2744.01(F). We turn now to consideration of the immunity afforded political subdivisions and employees of a political subdivision.

> 2. Did the alleged misconduct of Phipps and Jones rise to the level of "willful" and "wanton" conduct as those terms have been defined by the Supreme Court of Ohio in *Anderson v. Masillon*, 134 Ohio St. 3d 380, 2010-Ohio-5711, 983 N.E.2d 266?

{¶42} Pursuant to R.C. 2744.02(B)(5) and R.C. 4765.49, we must next consider whether the conduct of Phipps and Jones rose to a level of willful or wanton misconduct. The conduct of Phipps and Jones ultimately determines whether Squad 2 is also immune from Appellee's claims. *Riffle v. Physicians & Surgeons Amb. Servc. Inc.*,135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶24. The terms "willful," "wanton," and "reckless"

describe different and distinct degrees of care and are not interchangeable. *Anderson v. Masillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶31. "Willful misconduct" implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not do discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. *Id.*, citing *Tighe v. Diamond,* 149 Ohio St. 520, 527, 80 N.E.2d 122 (1948). "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. *Anderson, supra,* at ¶33, citing *Hawkins*, 50 Ohio St.2d 117-118, 363 N.E.2d 367 (1977). "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. *Anderson*, *supra*, at ¶ 34; *Thompsonv. McNeill*, 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705, adopting 2 Restatement of the Law 2d, Torts, Section 500, at 587 (1965)(abrogated by *Anderson,* 983 N.E.2d 266). When the General Assembly used the terms "willful" or "wanton" in R.C. 2744.02(B)(1)(b) to deny a full defense to liability for a political subdivision and the terms "wanton" or "reckless" in R.C. 2744.03(A)(6)(b) to remove the immunity of an employee of the

political subdivision, it intended different degrees of care. *Anderson*, *supra* at ¶36.

{¶43} Appellee's amended complaint alleges the omissions of Squad 2's employees, Phipps and Jones, amounted to negligent, willful, wanton, and reckless conduct. However, Phipps and Jones are immune from liability for negligent conduct. R.C. 2744.03(A)(6). Appellee bluntly argues Phipps and Jones did "virtually nothing" to care for the infant when they arrived. However, that statement completely disregards the testimony of Kayla Brannan. In construing the evidence in a light most favorable to Appellee, we conclude Phipps and Jones' conduct on August 26, 2010 did not rise to the level of willful or wanton. [8]

{¶44} Appellee relies upon the expert opinion testimony of Dr. Williams and Guy Haskell, that the conduct of Phipps and Jones was willful and wanton as the Supreme Court of Ohio has recently defined the terms. Dr. Williams' affidavit stated in particular:

> 8. The standard of care under these circumstances is to keep the baby warm, perform chest compressions if necessary, use a bag-valve mask with supplemental oxygen to breathe for the

[8] Plaintiff's second amended complaint further alleged "conscious disregard malice" and requested punitive damages. In *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), Chief Justice Moyer noted an award of punitive damages based on conscious disregard malice requires "a positive element of conscious wrongdoing. This element has been termed conscious, deliberate, or intentional. It requires the party to possess knowledge of the harm that might be caused by this behavior." *Malone v. Courtyard by Marriott Ltd. Ptshp.*, 74 Ohio St.3d 440, 1996-Ohio-311, 659 N.E.2d 1242, ¶4. However, our disposition of this case includes the finding that Appellants did not act "willfully" and thus, implicitly finds no "intentional" wrongdoing.

> baby if necessary, and transport the newborn as rapidly as possible to the nearest hospital. In this case, none of these essential measures were taken.
>
> 20. Any one of these failures constitutes willful and wanton conduct as defined by the Ohio Supreme Court. The combination of failures in this case goes beyond mere negligence (which I understand to mean the failure to exercise reasonable care).

{¶45} We observe that legal conclusions reached by experts do not always alter the outcome of the case. *Johnson v. Cleveland*, 194 Ohio App.3d 355, 2011-Ohio-2152, 956 N.E.2d 355 (8th Dist.), ¶27. See *Mitchell v. Norwalk Area Health Serv.*, 6th Dist. Huron No. H.-5-002, 2005-Ohio-5261, ¶141.[9] "[E]xpert-witness testimony stating that the actions of [* * *[were 'deliberate' willful or wanton [mis]conduct does not create any issue of fact, but merely states[Appellee's]position with respect to [Appellants'] culpability, which is a legal conclusion." *Blair v. Columbus Divison of Fire,* 10th Dist. Franklin No. 10AP-575, 2011-Ohio-3648, ¶33, quoting *Donlin v. Rural Metro. Ambulance, Inc.,*11th Dist. Trumbull No. 2002-T-0148, 2004-Ohio-1704, ¶26, citing *Hackathorn*, 663 N.E.2d 384. Here, we must analyze the facts underlying Dr. Williams and Mr. Haskell's conclusions.

[9] Just because a plaintiff can find an expert to state in an affidavit that an act was reckless does not mean there is a genuine issue for trial as to whether immunity is lost due to recklessness. *Fediaczo v. Mahoning Cty. Children Servcs.*, 7th Dist. Mahoning No. 11MA186, 2012 Ohio-6090, ¶31; *Lindsey v. Summit Cty. Children's Serv. Bd.* 9th Dist. Summit No. 24352, 2009-Ohio-245777, ¶24; *Hackathorn v. Preisse*, 104 Ohio App.3d 768, 772, 663 N.E.2d 384 (9th Dist. 1995). See also *Pope v. Trotwood-Madison City School Dist. Bd. of Edn.* 2nd Dist. No. 20072, 2004-Ohio-1314, ¶17-18.

{¶46} Appellee first contends the infant should have been transported immediately, and the failure to do so constitutes willful and wanton misconduct. The standard of care expected of a paramedic making a decision whether to transport a patient to the hospital is not sufficiently obvious that nonprofessionals could reasonably evaluate the defendants' conduct, expert testimony is necessary to establish the appropriate standard of care. *Wright v. Hamilton*, 12th Dist. Butler No. CA2000-07-152, 141 Ohio App.3d 296, 750 N.E.2d 1190, 2001-Ohio-4194, ¶11, 12; *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130, 346 N.E.2d 673, 676-677 (1976). Here, on the issue of transport, Dr. Williams testified in pertinent part:

> "18. * * *An EMT exercising ordinary skill and common sense would transport this baby rapidly to the nearest hospital capable of caring for a premature newborn while making alternative/backup arrangements for the mother. That also was not done here. The excuse provided is that the EMTs were concerned about the mother of the baby, who by all accounts was much more stable than the baby. Under these circumstances, rapidly taking this newborn to the hospital, either by transporting both patients in the same ambulance if possible and necessary, or relying on backup (already en route) to care for the mother, would have been preferable to abandoning the baby's care to focus on the mother."

{¶47} Dr. Williams' affidavit criticizes Phipps and Jones for lack of ordinary care and common sense in not transporting the baby rapidly, however, the testimony of Phipps and Jones reveals they used ordinary care in their decision-making. After assessing the situation, and within moments

of their arrival at the Brannan residence, Phipps advised Jones to get the OB kit from the ambulance and to call for a backup ambulance. Furthermore, Phipps and Jones evaluated the unfolding situation since they were called to the home for one patient and now had two. Jones testified he would feel uncomfortable leaving the young mother as this could be considered abandoning the mother and was against protocol. They elected not to transport the infant and leave the mother.

{¶48} Phipps and Jones also considered transporting the patients and attempting to meet Life Ambulance en route. However, they were unable to make contact with Life Ambulance. Testimony showed they initially had difficulty reaching the Brannan home due to construction. The testimony further indicates Phipps was afraid they would miss the Life ambulance and end up causing further delay in the child receiving care. Phipps decided the backup ambulance would transport the infant because the Life ambulance was staffed with a paramedic who could provide a higher level of care.

{¶49} Under these circumstances, we cannot say Phipps or Jones intentionally deviated from a clear duty or acted with a deliberate purpose not to discharge a duty. They immediately called for backup, while administering treatment at the scene. Simply put, Phipps and Jones' conduct

in failing to immediately transport the newborn infant does not rise to the level of willful misconduct.

{¶50} Nor can we say that Appellants' Phipps and Jones' conduct was wanton, a failure to exercise any care to one to whom a duty of care is owed, with a knowledge that a great probability of harm will result. Phipps and Jones' actions or omissions do not exhibit a conscious disregard or an indifference to a known risk of harm. Under the circumstances, we do not find their conduct to be reckless.

{¶51} In *Bush v. Community Care Ambulance Network*, 11th Dist. Ashtabula No. 2011-A-0072, 2012-Ohio-4458, the appellate court affirmed the finding of the trial court paramedics' conduct was not willful or wanton. In *Bush,* paramedics were called to Bush's home. Upon arrival, they discovered Bush had passed out on the floor due to a syncopal episode. Bush weighed approximately 350 pounds. Upon arrival, the first squad phoned in for assistance with lifting Bush. The paramedics worked pursuant to a written protocol that certain bariatric equipment be used to transport patients over 200 pounds. However, no such equipment was used. Instead Bush was loaded onto a standard backboard and lifted onto a wheeled cot. While leaving Bush's home, the cot tipped and was dropped with Bush falling to the ground. Later, the testimony differed with regard to how Bush

was secured, how many people assisted in carrying the cot, and exactly how the cot ended up on the ground. The trial court accepted Bush's version of the events, that not enough people were assisting in transporting the cot. In construing the evidence, the appellate court noted that the relevant section of protocol relied upon by Bush, the number of persons used to transport a person over 300 pounds, 4 persons, was recommended and therefore discretionary. The appellate court noted the record indicated the paramedics evaluated the situation and performed emergency services that they felt would most likely result in a safe transport. The appellate court noted the record was devoid of evidence that the paramedics intentionally deviated from the standard of care or deliberately failed to discharge their duty. They declined to consider the paramedics inaction, if any, "willful."

{¶52} Additionally, the appellate court in *Bush* found no issue as to whether the paramedic's conduct constituted wanton misconduct. The court found no evidence to support the proposition that there was a failure to exercise any care or that there was a complete indifference to any consequence. The court emphasized the undisputed fact the paramedics recognized they might have difficulty transporting Bush and called for a backup unit shortly after arrival. The *Bush* court found this established the exercise of some care.

{¶53} Here, we observe Phipps and Jones requested a backup ambulance almost immediately. They testified as to their reasoning for not taking both C.B. and the infant in one unit, that it was against written protocol to essentially abandon one patient. They also testified as to why they chose not to leave and attempt to meet the Life ambulance en route. While in hindsight, these choices may appear to be negligent or have in fact been negligent, we find the request for backup, immediately forwarded, was evidence of some degree of care. We decline to find the failure to immediately transport the infant rises to the level of willful, wanton, or reckless conduct.

{¶54} Appellee next contends the Squad 2 members, Jones and Phipps, "stood by and watched the baby die." Appellee specifically contends Phipps and Jones failed: (1) to keep the baby warm; (2) to perform chest compressions; and (3) to administer bag valve oxygen. However, this construal of the testimony given is simply not accurate. The testimony of Kayla Brannan actually corroborates the testimony given by Jones and Phipps.

{¶55} We will first review the care we know that the infant was given by Phipps and Jones. Kayla Brannan testified:

> (1) "They" cut the umbilical cord. (Phipps testified he cut the umbilical cord.)

> (2) "They" checked the infant's pulse and respirations. (Phipps testified he took the vital signs and continued to monitor the pulse and respirations.)
>
> (3) "They" suctioned the baby's nose and mouth with a bulb syringe. (Phipps testified he performed this action.)
>
> (4) "They" flicked the newborn's feet for the purpose of stimulating him. (Phipps testified he attempted to stimulate the baby.)
>
> (5) "They" administered the blow-by-oxygen. (The record is unclear but indicates both Phipps and Jones administered blow-by oxygen to the newborn.)

{¶56} We next analyze Appellee's contention that Phipps and Jones' conduct rose to the level of willful and wanton by a failure to keep the baby warm. Dr. Williams opined:

> "19. In addition, the family members testified that the baby was kept uncovered in a cold, air conditioned room this entire time. It is very important to keep a newborn warm under any circumstances, but especially when his cardio-pulmonary system is weak or failing. That the baby died of hypothermia is consistent with the family's testimony that the baby was not kept warm and that no efforts were undertaken to maintain his cardio-pulmonary functions."

{¶57} Tammy testified after the baby was born, he was placed in a towel, which the Squad 2 members removed. This contradicts the testimony of both Phipps and Jones, who said they initially saw the baby uncovered. Phipps later testified the baby was wrapped in a towel "doubled over." Phipps removed a portion of the covering when he took the second set of

vital signs. Kayla Brannan was massaging the baby when Squad 2 arrived and she testified one of the EMTs also attempted to stimulate the baby.

{¶58} The record indicates the baby possibly uncovered at times in an air-conditioned room. Had the baby been completely covered, it would seem logical that it would had to have been partially uncovered in order to check the vital signs, stimulate the feet, and administer the blow-by oxygen, as Kayla Brannan indicated occurred. Under the heightened and emergent circumstances, Phipps and Jones may have overlooked asking the Brannan family members to turn off the air conditioning in the room. However, any failure on Phipps and Jones' part to keep the baby warm would be negligence at best.

{¶59} In *Mitchell v. Norwalk*, 6th Dist. Huron No. H-05-002, 2005-Ohio-5261, ¶141, plaintiffs complained that the squad's "choice" to continue using a Zoll monitor and heart defibrillation unit which did not function well, instead of switching to a Lifepack defibrillator unit immediately upon its being brought to the scene by a backup ambulance was willful and/or wanton misconduct. The appellate court, however, characterized the failure to switch units as being "negligent" or "inept." In its opinion, the *Mitchell* court commented:

> "[W]hile a choice may be made intentionally, it may be made unreflectively or thoughtlessly; that is, the intention necessary

> to constitute willful misconduct implies a reflective mental state; these circumstances evidence an unskillful and ineffectual knee-jerk reaction under life and death circumstances. While the consequences of harm in these circumstances is and will always be great, the squad members here continued to deliver care, even though some aspects of the care rendered here can readily be seen as thoughtless." Nonetheless, "thoughtless is the opposite of "deliberation.'" *Mitchell*, *supra* at 141.

{¶60} We find no merit to the allegation that Phipps and Jones willfully failed to keep the baby warm. The actions of taking the child's vital signs, attempting to stimulate his feet, and holding onto the baby to administer the blow-by oxygen had to provide so degree of warmth. We do not find Phipps and Jones intentionally deviated from a clear duty in this regard. We further do not find they acted in a wanton manner, a failure to exercise any care when there is great probability that harm will result. Nor do we find Phipps and Jones acted recklessly, with conscious disregard or indifference to a known or obvious risk of harm that is unreasonable under the circumstances. As in *Mitchell*, *supra,* the failure of Phipps and Jones, here, to keep the infant warm perhaps implies "thoughtlessness" or "ineptitude," but does not imply an intent or deliberate act.

{¶61} We next review Phipps and Jones' conduct with regard to the failure to perform chest compressions. Dr. Williams testified:

> "17. * * * If the baby's heart rate or rhythm is inadequate, the EMT must give chest compressions to assist the baby with his circulatory demands. Here again, the Squad 2 EMTs in this

> case never did give chest compressions although clearly the baby required them while in their care."

On this issue, Phipps testified he never considered giving chest compressions to the infant because the child's heart rate was in the 80's when he checked it the second time.

{¶62} In *Blair v. Columbus Division of Fire,* 10th Dist. Franklin No. 1-AP-575, 2011-Ohio-3648, the administrator of a motorist's estate filed suit against the City of Columbus and its paramedics, arising from the motorist's death after emergency medical care was rendered by paramedics. The 10th District Court of Appeals held that the paramedics did not engage in willful or wanton misconduct in rendering emergency medical care. In that case, the motorist, Mrs. Blair was driving her daughter to work when she pulled her vehicle over to the side and her daughter called 911 for assistance, reporting an asthma attack. A firefighter/paramedic, Mr. Windegardner, arrived at the scene to find Mrs. Blair standing, breathing, speaking normally, and responding coherently. She primarily complained of shortness of breath. Her daughter explained a history of asthma and COPD. Mr. Windegardner perceived Blair was experiencing a moderate asthma attack and provided a breathing treatment with a nebulizer mask. Another crew, Medic 2, of firefighter/paramedics arrived. One of the paramedics was a student who had completed only half of his training. Mrs. Blair was

placed on a cot and it became clear the nebulizer treatment was not helping. She was next given a nonbreather mask of 100 per cent oxygen, but her situation continued to decline. Mrs. Blair was transported in Medic 2. She was hooked up to a monitor. An EKG demonstrated she had sinus bradycardia with a heart rate in the 3's. She also had an oxygen saturation of 48 percent. A medic listened to her breathing and found indications of fluid buildup in the lungs. Congestive heart failure was a possible diagnosis. The medics considered using continuous positive airway pressure ("CPAP") but decided against it because she was unconscious. Mrs. Blair was given nitrous spray, but her heart rate and respiratory rate continued to drop. The medics decided she was a candidate for endotracheal intubation.

{¶63} As the medics prepared intubation materials, Mrs. Blair was ventilated with a bag-valve-mask. The paramedic student asked if he could perform the intubation. However, within 10-15 seconds, the student realized the task of intubating Mrs. Blair was going to be beyond his training. The other paramedic then attempted it. Mrs. Blair immediately vomited and the medics realized the ET tube was in the esophagus, rather than being properly inserted in the trachea. The medics removed the tub and suctioned the airway. Another paramedic continued ventilation via the bag-valve-mask, as a new ET tube was prepared. A second attempt at intubation was performed.

At this point, Mrs. Blair became asystolic. As a result, CPR was initiated. A second ET tube was placed and the medics proceeded to determine wither it was properly in the trachea. There were several evaluation criteria, including verifying the placement by using capnography. None of the medics knew how to enable the capnography function on their equipment. By this time, they had arrived at Grant Hospital's ER. They concluded they had proper placement of the ET tube, although they did not verify it by capnography. CPR was continuing as Mrs. Blair was rushed into Grant. At Grant, an emergency room physician had difficulty intubating Mrs. Blair. In spite of continued resuscitation efforts, Mrs. Blair died. On appeal, Appellant argued the paramedics' wanton and wilful misconduct was based upon: (1) failure to recognize Mrs. Blair's respiratory distress was imminent and failure to use CPAP; (2) permitting a paramedic student to attempt the intubation; (3) failure to follow standard operating procedures, requiring the use of capnography to verify an ET tube's proper placement; and (4) the fact the capnography display had been disabled on the ambulance. Despite having expert conclusions attached in support of Appellant's arguments, the appellate court analyzed the underlying facts.

{¶64} In particulate, the appellate court noted appellants' expert criticized the paramedics' decision not to use CPAP because it "may have

negated or delayed the need for mechanical ventilation and endotracheal intubation." However, the court concluded the statement failed to created genuine issues of material fact. The court reasoned:

> "First, Dr. Bledsoe does not state with any sort of certainty that using CPAP would have changed the course of the treatment or its outcome. Indeed, with respect to the use of CPAP, Dr. Bledsoe's opinion is riddled with reservations. Secondly, and more importantly, the evidence demonstrates that the paramedics considered using CPAP, but because of Mrs. Blair's unconsciousness, CPAP was contraindicated because it requires some degree of responsiveness."

{¶65} Here, Dr. Williams' affidavit stated that chest compressions were required to support circulation. However, Phipps articulated his reasoning for failing to perform CPR. He testified he never considered performing chest compressions because they baby's heart rate was always in the 80's. As in *Blair,* Dr. Williams does not state with any sort of medical certainty that performing chest compressions would have changed the course of treatment or its outcome. Given these circumstances, we do not find Phipps and Jones acted with deliberate purpose, nor do we find purposeful doing of a wrong act with knowledge and appreciation of the resulting injury. The failure to perform chest compressions does not rise to the level of willful misconduct. We further decline to find wanton misconduct, a failure to exercise any care. We also cannot say Phipps and Jones' actions amounted to a conscious disregard or indifference to a known or obvious

risk of harm that is unreasonable under the circumstances, and therefore, reckless conduct.

{¶66} Finally, Appellee contends Phipps and Jones conduct was willful and wanton by their failure to administer bag valve oxygen. Dr. Williams opined:

> "16. In this case, the EMT gave only "blow by oxygen, "which will not help a newborn who is not breathing or not breathing adequately. It merely increases the oxygen concentration in the air near the baby, doing nothing to assist the baby's breathing mechanism. If the patient is not breathing adequately, which this baby clearly was not shortly after birth, the EMT must utilize a bag-valve mask with supplemental oxygen to assist with breathing. This was not done."

{¶67} Phipps again articulated why he chose not to use a bag valve mask, for fear of injuring the premature baby's lungs. Again, Dr. Williams did not testify to a certainty that utilizing the bag-valve-mask with supplemental oxygen to assist with breathing would have changed the course of treatment or the outcome for the infant here. We do not find Phipps' conduct to be intentional and thus, willful. We also do not find his failure to utilize the bag-valve-mask created a failure to exercise any care, and thus, to be wanton. He explained his reason for his choice and his decision does not evidence conscious disregard or indifference to a known or obvious risk of harm, unreasonable under the circumstances and greater than negligence.

{¶68} Appellee's argument that Phipps and Jones "sat there and watched as this baby died" is based on the failure to transport the infant immediately; failure to keep the baby warm; failure to perform chest compressions; and failure to apply the bag-valve-oxygen. Dr. Williams concluded "anyone of [the]failures constitutes willful and wanton conduct as defined by the Ohio Supreme Court. The combination of failures in this case goes beyond mere negligence." Based on our analysis above, we must disagree. We are also mindful that "[T]he mere piling up of negligent acts does not, by virtue of sheer volume, thereby convert negligence into willful or wanton acts. *Mitchell, supra,* at ¶137.

{¶69} It is undeniable that the death of this baby, Derrick Lee Bradford Carver, was a tragic event for all involved, and an indescribable loss for his family. However, we do not find that Appellants Phipps and Jones' actions rose to the level of willful, wanton, or reckless. Because Phipps and Jones actions did not rise to the level of willful or wanton, Appellant Squad 2 is also immune from liability. We find all Appellants are entitled to immunity with regard to the transport and treatment of the infant, Derrick Lee Bradford Carver. As such, we find the trial court erred by denying Appellants' motion for summary judgment. We hereby sustain

Appellants' sole assignment of error and reverse the judgment of the trial court.

JUDGMENT REVERSED.

Harsha, J., concurring in part and dissenting in part:

{¶70} I conclude the summary judgment evidence establishes that Phipps and Jones acted recklessly in failing to transport the baby to the hospital when the baby's heart rate dropped, his breathing became shallow and he was turning blue. Therefore I conclude Phipps and Jones were not entitled to immunity at this stage of the proceedings. However, because the summary judgment evidence fails to establish willful or wanton conduct by Phipps and Jones, there is no "vicarious liability" for Squad 2 under R.C. 4765.49(B). So, I agree the trial court erred in not granting summary judgment to Squad 2.

{¶71} In reaching these conclusions I have conducted my review with the belief that the question of political subdivision immunity remains a question of law to be decided before trial in a motion for summary judgment. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992). The necessity to consider facts in deciding a question of law does not render the question factual rather than legal. *Martin v. Lambert*, 2014-Ohio-715, 8 N.E.3d 1024, ¶ 17 (4th Dist). Thus, disputed facts and opinions do not preclude summary judgment in this context.

{¶72} Applying these two rules leads me to the conclusion that the EMTs acted recklessly, i.e. their decision not to transport the baby when his

condition deteriorated to a critical point can only be characterized as a "conscious disregard of * * * a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligence." *Anderson, supra*, at ¶ 34. It was clearly unreasonable not to transport both patients or allow the noncritical patient to wait for later transport in the face of impending catastrophic risk to the baby.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED. Appellants shall recover costs from Appellee.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Part and Dissents in Part with Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

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