[Cite as *Lewis v. Toledo*, 2014-Ohio-1672.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Nathaniel Lewis	Court of Appeals No. L-12-1360
Appellee	Trial Court No. CI0201201353
v.	
The City of Toledo, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: April 18, 2014

* * * * *

Michael A. Bruno, Charles E. Boyk and Zachary J. Murry, for appellee.

Adam W. Loukx, Director of Law, Jeffrey B. Charles and Merritt W. Green, III, for appellants.

* * * * *

JENSEN, J.

{¶ 1} Defendants-appellants, the city of Toledo and Officer Diane Chandler, appeal the December 5, 2012 judgment of the Lucas County Court of Common Pleas which rejected their claim that they were statutorily immune from liability for the

personal injuries sustained by plaintiff-appellee, Nathaniel Lewis, when he was struck by a police cruiser while attempting to elude police. For the reasons that follow, we reverse the trial court's judgment.

I. Background

{¶ 2} On January 28, 2010, appellee, Nathaniel Lewis, was a passenger in a vehicle driven by Quentin Kenny. Toledo police officers, Robert Leiter and Scott Bailey, discovered that the vehicle was stolen and initiated a traffic stop to question the occupants. As they approached the vehicle on foot, Kenny sped away. Officers Leiter and Bailey followed and other units were dispatched to assist. After a brief chase, Kenny crashed the stolen vehicle into a brick wall. Lewis and Kenny exited the vehicle and fled. They were pursued by uniformed officers who were on foot and others in police cruisers. Officer Chandler and her partner, Officer Reuben Jurva, assisted in the pursuit in a cruiser. She activated her lights and siren when she began pursuit.

{¶ 3} In an effort to elude police, Lewis ran through a nearby parking lot. Office Chandler entered the parking lot driving her vehicle at a rate of speed that was estimated by witnesses to be somewhere between 25 to 45 m.p.h. (25 m.p.h. by Officer Chandler's estimate; 35-45 m.p.h. per Roosevelt Riley, a lay witness who submitted an affidavit on Lewis' behalf). Her view was obstructed by another police cruiser that was also in the parking lot trying to corral Lewis. As she pulled in, Lewis changed direction to evade an officer who was chasing him on foot, and Officer Chandler's cruiser struck him. Lewis sustained injuries to his neck, head, and lower back. Witnesses who allegedly observed

the incident from across the street claimed that Officer Chandler did not attempt to slow down or apply her brakes before striking Lewis. Officer Chandler denies these allegations.

{¶ 4} Lewis filed suit in the United States District Court for the Northern District of Ohio, alleging that appellants violated his constitutional rights under the Fourth and Fourteenth Amendments to the U.S. Constitution. He also included state law tort claims for negligence, assault, and battery. Judge James G. Carr dismissed Lewis' federal law claims on summary judgment, finding that the evidence failed to establish that Officer Chandler intentionally struck him. Judge Carr dismissed the pendent state law claims without prejudice.

{¶ 5} Lewis filed the present action in the Lucas County Court of Common Pleas against Officer Chandler, alleging two causes of action: (1) assault, battery, recklessness, and gross negligence and (2) negligence, and against the city for failure to train. Lewis also sued the Toledo Police Department ("TPD"), but the trial court dismissed the claims against it because it concluded that TPD was not a political subdivision capable of being sued.

{¶ 6} The city and Officer Chandler moved for summary judgment, primarily arguing that they are immune from liability under R.C. Chapter 2744. The trial court granted their motion for summary judgment on all claims except Lewis' first cause of action against Officer Chandler. The court held that there was a question of fact as to whether Officer Chandler acted maliciously, in bad faith, wantonly, or recklessly, and,

therefore, whether she was afforded immunity under R.C. 2744.03(A)(6)(b). It permitted Lewis time to file an amended complaint to plead a claim for secondary liability against the city.

{¶ 7} The city and Officer Chandler filed this timely appeal to challenge the court's conclusion that a question of fact remained as to whether Officer Chandler's conduct precluded her claim of statutory immunity and potentially subjected the city to secondary liability. They assign the following errors for our review:

> ASSIGNMENT OF ERROR NO. 1: The trial court erred by essentially ignoring Chandler's duty regarding the circumstances of Lewis' arrest, thereby incorrectly finding unreasonable conduct where there is none.
>
> ASSIGNMENT OF ERROR NO. 2: The trial court erred by incorrectly permitting lay opinion testimony as to the issue of "conscious disregard."

II. Standard of Review

{¶ 8} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 9} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

III. Analysis

{¶ 10} This case requires us to determine whether Lewis provided evidence sufficient to create a genuine question of material fact as to whether Officer Chandler acted with malicious purpose, in bad faith, or in a wanton or reckless manner when she struck him with her police cruiser while assisting in apprehending him. Unless Lewis can establish that Officer Chandler's conduct rose to one of these levels, she, and by extension, the city, is immune from liability under Ohio's political subdivision immunity statutes.

{¶ 11} It is undisputed that Officer Chandler is an employee of a political subdivision, as defined under R.C. 2744.01(F). Where a person is an employee of a political subdivision, under R.C. 2744.03(A)(6), he or she will be immune from liability for "injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function," except under limited circumstances. That statute provides:

> (6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:
>
> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code.

"R.C. 2744.03(A)(6) operates as a presumption of immunity." (Citation omitted.) *Jackson v. McDonald*, 144 Ohio App.3d 301, 308, 760 N.E.2d 24 (5th Dist.2001).

{¶ 12} Lewis concedes that Officer Chandler's actions were within the scope of her employment as a police officer. He does not argue that liability is expressly imposed under another section of the revised code. His claim revolves around whether Officer Chandler's efforts to apprehend him were performed "with malicious purpose, in bad faith, or in a wanton or reckless manner," under subsection (b).

{¶ 13} "Malicious purpose" is the "willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through * * * unlawful or unjustified" conduct. *Schoenfield v. Navarre*, 164 Ohio App.3d 571, 2005-Ohio-6407, 843 N.E.2d 234, ¶ 22 (6th Dist.), quoting *Cook v. Hubbard Exempted Village Bd. of Edn.*, 116 Ohio App.3d 564, 569, 688 N.E.2d 1058 (11th Dist.1996). "Bad faith" connotes a "dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." *Id.*, quoting *Jackson v. McDonald*, 144 Ohio App.3d 301, 309, 760 N.E.2d 24 (5th Dist.2001). "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 v. Massillon, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 33, *reconsideration denied*, 133 Ohio St.3d 1511, 2012-Ohio-6209, 979 N.E.2d 1289. And "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." *Id*. Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. *Schoenfield* at ¶ 24.

{¶ 14} The trial court held that Lewis presented evidence that created a genuine issue of material fact as to whether Officer Chandler's conduct rose to one of these levels, thereby precluding summary judgment on her immunity claim. But we believe that the facts presented in this case require us to first examine the duty of care required of a police officer who is pursuing a fleeing suspect before reaching the issue of whether Officer Chandler's conduct fell into one of the categories described in R.C. 2744.03(A)(6)(b).

{¶ 15} "The duty of police officers is to enforce the law and to make arrests in proper cases, not to allow one being pursued to escape because of the fear that the flight may take a course that is dangerous to the public at large." *Lewis v. Bland*, 75 Ohio App.3d 453, 456, 599 N.E.2d 814, (9th Dist.1991), citing *Nevill v. Tullahoma*, 756 S.W.2d 226, 232 (Tenn.1988). *But see Haynes v. Hamilton Cty.*, 883 S.W.2d 606 (Tenn.1994) (reversing the holding in *Nevill* to the extent it concluded that as a matter of law, police conduct in initiating or continuing chase is not proximate cause). It is undisputed on appeal that Officer Chandler had a duty to assist in apprehending Lewis, a

fleeing suspect. *Hale v. Dept. of Pub. Safety*, Ct. of Claims No. 2011-11251, 2003-Ohio-5620, ¶ 12, adopted by *Hale v. Dept. of Pub. Safet*y, Ct. of Claims No. 2011-11251, 2003-Ohio-6574. Lewis must, therefore, provide evidence that Officer Chandler breached the standard of care required in carrying out this duty. This, we believe, is beyond the knowledge or experience possessed by lay persons and must be established by a witness qualified as an expert by specialized knowledge, skill, experience, training, or education regarding proper police procedure. Evid.R. 702. Although a lay person may be qualified to determine whether a civilian driver's conduct is unreasonable when he or she strikes a pedestrian, we do not believe the same to be true where the driver is a police officer and the injured party is a person leading the police officer on a chase, seeking to elude the officer.

{¶ 16} Under circumstances where the situation requires the officer to abide by ordinary traffic laws, a lay juror may be qualified to make a judgment as to whether an officer's driving was reckless, wanton, malicious, or in bad faith. But where, as here, the officer is attempting to apprehend a fleeing suspect, the average juror is without the knowledge or experience to evaluate first, what is required and expected of the officer under the circumstances and, second, whether the officer's conduct comported with those duties and expectations. Lewis has submitted no evidence establishing that Officer Chandler breached proper police procedure under the circumstances.

{¶ 17} The only evidence Lewis offered in response to appellants' motion for summary judgment was his own deposition testimony and the affidavits of three lay

witnesses who had a partial view of the incident. None of these witnesses purports to be or is qualified to establish the standard of care required of a police officer engaged in the pursuit of a fleeing suspect. Without admissible evidence of this standard, we believe it was improper for the trial court to conclude that there exists a genuine issue of material fact as to whether Officer Chandler maliciously, in bad faith, wantonly, or recklessly breached any duty owed to Lewis.

{¶ 18} The Eleventh District reached a similar conclusion in *Bricker v. State Farm Ins. Co.*, 11th Dist. Lake No. 2009-L-087, 2010-Ohio-3047. In that case, while responding to a call regarding a possible home invasion, the officer was involved in an automobile accident with a third party. The court acknowledged that the question of whether conduct is willful or wanton is generally one for the jury. *Id.* at ¶ 44. However, because the plaintiff presented no evidentiary material as to the standard of care to be employed under the circumstances, in the form of either expert testimony or written or accepted policies and procedures, there was no way to measure whether the officer departed from the standard. *Id.* at ¶ 45-46. Even if she had, the court explained, a "small" departure from the standard would constitute simple negligence. Only if the officer departed "a great deal" from the standard would the court analyze whether the departure was "so great that there is a factual question as to whether it constitutes conduct that is reckless, willful, or wanton." *Id.*

{¶ 19} Lewis cites a number of cases which he believes support the court's denial of the summary judgment motion. These cases are all factually distinguishable from the

present case. For instance, in *Fogle v. Vill. of Bentleyville,* 8th Dist. Cuyahoga No. 88375, 2008-Ohio-3660, the court found that there was a genuine issue of material fact precluding summary judgment where an officer caused an accident with another police vehicle while speeding through a construction zone. In that case, the officer was on his way to pick up an inmate as part of his duties that day, he conceded that there was no reason to speed and that he did not use his lights or siren, and, as alluded to in the concurring opinion, under the police department's policies and procedures, that particular assignment required him to obey all traffic laws.

{¶ 20} In *Brown v. City of Cuyahoga Falls*, 9th Dist. Summit No. 24914, 2010-Ohio-4330, the appellate court upheld the trial court's denial of summary judgment where an officer caused an accident with an innocent third party while en route to an apartment complex where a fight was reported to be taking place. In that case, the officer was not called to respond to the fight but chose to do so on his own, and there was no chase involved, yet the officer was traveling at 55-65 m.p.h. in a 35 m.p.h. zone at the time of impact. He conceded that he was not responding to an emergency which would have required him to use his lights or sirens or to disregard traffic laws. There was also testimony presented of a police captain as to what level of urgency was required in the situation.

{¶ 21} In *Gregory v. Phillips*, 5th Dist. Fairfield No. 2008 CA 00058, 2009-Ohio-4854, the officer caused an accident between two vehicles by improperly directing traffic following a Fourth of July fireworks display. In that case, there was testimony from an

officer trained in directing traffic who opined that the officer's conduct in directing traffic was reckless.

{¶ 22} In *Carder v. City of Kettering*, 2d Dist. Montgomery No. 20219, 2004-Ohio-4260, an officer responding to a call about a robbery struck another vehicle while traveling 84 m.p.h. in a residential area with a 35 m.p.h. posted speed while his view of the intersection was obstructed by a hill. He was not chasing the suspect at the time of the collision, but was merely driving to the area where the robbery occurred so he could assist in searching for the suspect. The injured person in *Carder* was an innocent third party.

{¶ 23} And *MacNamara v. Gustin*, 2d Dist. Montgomery No. 17575, 1999 WL 355844 (June 4, 1999) was essentially an excessive force case and did not involve the issue of proper police pursuit techniques. In *MacNamara*, the plaintiff claimed that the officer caused her wrists to be bloodied and bruised after tightening handcuffs after she expressed that they were already too tight. She also claimed that the officer shoved her and pulled her arm causing her shoulder to "pop." The officer allegedly told the plaintiff and her husband that he "did not like" them. The combination of these injuries and the officer's alleged statements caused the court to find an issue of fact as to whether the officer acted "with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶ 24} These cases provide no support for Lewis' position. To the contrary, in most of the cases he cites, the plaintiff presented evidence of the standard required of the officer under the circumstances at issue.

{¶ 25} We also find that it was error for the trial court to consider the opinions of bystanders who characterized Officer Chandler's conduct as "intentional." Affidavits must be made on personal knowledge. *Van Dyke v. Columbus*, 10th Dist. Franklin App. No. 07AP-0918, 2008-Ohio-2652, ¶ 15. Although it may be proper for a witness who observed an accident to provide information about what he observed, (e.g., the car was headed northbound, the car did not slide, the car was traveling at approximately 35-45 m.p.h., I did not see brake lights, etc.), conclusory statements about another person's intentions are not within a witness's personal knowledge. Thus, insofar as the trial court held that the three affidavits averring that Officer Chandler intentionally hit Lewis "may be admissible as opinion testimony by lay witnesses pursuant to Evid.R. 701 to determine the non-intentional allegations," we disagree. These allegations were made without personal knowledge and constitute inadmissible opinion testimony.

{¶ 26} Because Lewis offered no evidence of the standard required of Officer Chandler during her pursuit of him and that she breached that standard, we find that he has failed to present evidence sufficient to create a genuine issue of material fact as to whether Officer Chandler lost political subdivision immunity from liability under R.C. 2744.03(A)(6)(b). We find both assignments of error well-taken.

III. Conclusion

{¶ 27} The trial court erred in denying Officer Chandler's and the city's motion for summary judgment. We find their assignments of error well-taken and we reverse the

December 5, 2012 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE

Stephen A. Yarbrough, P.J.,
DISSENTS.

YARBROUGH, J.

{¶ 28} Because I would affirm the judgment of the Lucas County Court of Common Pleas denying appellants' motion for summary judgment, I respectfully dissent. Specifically, I would hold that expert testimony is not required to establish the relevant "duty of care required of a police officer who is pursuing a fleeing suspect." Relevant to this argument, the Ohio Supreme Court has held that "matters of common knowledge and

experience, subjects which are within the ordinary, common and general knowledge and experience of mankind, need not be established by expert opinion testimony." *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 103, 592 N.E.2d 828 (1992).

{¶ 29} In their opinion, the majority states: "Although a lay person may be qualified to determine whether a civilian driver's conduct is unreasonable when he or she strikes a pedestrian, we do not believe the same to be true where the driver is a police officer and the injured party is a person leading the police officer on a chase, seeking to elude the officer." The majority opinion concludes that Lewis was required to introduce expert testimony to establish "what is required and expected of [Officer Chandler] under the circumstances." I disagree.

{¶ 30} As an initial matter, I do not believe the character of the victim, whether he is an innocent bystander or the suspect who is attempting to evade the police, should alter the duty that applies to police officers when they are in pursuit of a fleeing suspect. Further, because I believe the trier-of-fact, employing common knowledge and experience, could determine whether Officer Chandler's conduct constituted recklessness, I conclude that Lewis was not required to submit expert testimony in order to survive summary judgment.

{¶ 31} I believe that the majority's conclusion, if taken to its extreme, has the potential to require expert testimony in a vast array of cases that currently need no such testimony. Indeed, if a layperson is not qualified to determine the standard of care applicable to a police officer who is chasing a fleeing suspect, what else might be deemed

beyond the common knowledge of laypersons? Is expert testimony required to establish the standard of care applicable to a construction worker who injures someone while operating a piece of construction equipment simply because the operation of the equipment is something a layperson does not ordinarily engage in? Of course, to some degree, almost every act of negligence is unique. However, Ohio law limits the expert requirement to a narrow set of cases involving subjects that are outside the ordinary, common and general knowledge and experience of mankind. I do not believe a police officer's operation of a cruiser, whether in pursuit of a fleeing suspect or otherwise, is a subject that only an expert can understand.

{¶ 32} Ultimately, I conclude that Lewis provided sufficient evidence to create a genuine issue of material fact as to whether Officer Chandler acted recklessly. In particular, the record establishes, and the majority concedes, that Officer Chandler entered a parking lot at a high rate of speed and drove directly into Lewis. Eyewitness testimony further establishes that Officer Chandler did not attempt to evade Lewis.

{¶ 33} In light of the foregoing, I conclude that the trial court properly denied appellants' motion for summary judgment. Accordingly, I would affirm.