

[Cite as *Hardesty v. Alcantara*, 2015-Ohio-4591.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102684

REGINA HARDESTY

PLAINTIFF-APPELLEE

vs.

OFFICER JOSE ALCANTARA, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-812523

BEFORE: Boyle, J., Celebrezze, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 5, 2015

ATTORNEYS FOR APPELLANT

Patrick J. Gallagher
L. Christopher Frey
Euclid Department of Law
585 East 222nd Street
Euclid, Ohio 44123

ATTORNEYS FOR APPELLEE

Terry H. Gilbert
Friedman & Gilbert
55 Public Square
Suite 1055
Cleveland, Ohio 44113

Jeffrey H. Friedman
Brian Palmer
Friedman Domiano & Smith
55 Public Square
Suite 1055
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Officer Jose Alcantara, appeals the trial court's decision denying his motion for summary judgment based on immunity provided to an employee of a political subdivision under R.C. 2744.03(A)(6)(b) if the employee's actions are not "with malicious purpose, in bad faith, or in a wanton or reckless manner." The trial court found that genuine issues of material fact remain regarding whether Officer Alcantara's actions amounted to wanton or reckless conduct under R.C. 2744.03(A)(6)(b). Officer Alcantara raises one assignment of error for our review:

The trial court erred by denying the motion for summary judgment of Officer Jose Alcantara as Officer Alcantara is entitled to immunity pursuant to R.C. Chapter 2744.

{¶2} Finding no merit to his arguments, we affirm.

A. Procedural History and Factual Background

{¶3} Officer Alcantara is a police officer for the city of Euclid. On March 28, 2012, just before 5:00 p.m., Officer Alcantara was on routine patrol in the area of Euclid Avenue and East 193rd Street. As he turned onto East 193rd Street from Euclid Avenue, he observed a black Cadillac, which he stated in his affidavit was "impeding the flow of traffic in violation of Euclid Codified Ordinance 333.04." Officer Alcantara stated that the black Cadillac "was stopped in the roadway and remained there while the occupants were speaking with a male standing outside the vehicle before the male eventually entered the black Cadillac." Officer Alcantara averred in his affidavit that

“[t]he conduct of the occupants of the Cadillac is consistent with that of a drug transaction.”

{¶4} After the male who had been standing on the street entered the black Cadillac, Officer Alcantara observed the Cadillac proceed north on East 193rd Street, but then it turned around in a circular driveway, and reentered East 193rd Street heading southbound toward Euclid Avenue. Officer Alcantara also turned around in the same driveway, and was immediately behind the black Cadillac at the traffic light at the corner of Euclid Avenue and East 193rd Street.

{¶5} Officer Alcantara said that when the Cadillac turned around, he was able to see that the driver of the vehicle was “a young, black male.”

{¶6} At 4:59:12 p.m., while directly behind the Cadillac at the traffic light, Officer Alcantara entered the license plate of the vehicle into his mobile data terminal to conduct a search of the Law Enforcement Automated Data System (“LEADS”). The LEADS search revealed that there was an outstanding warrant for the arrest of Antoine Howard for felony domestic violence out of Akron. The LEADS report described Howard as a 28-year-old black male.

{¶7} As soon as the Cadillac turned right onto Euclid Avenue, Officer Alcantara activated his overhead lights and siren of his patrol car to conduct a traffic stop of the black Cadillac for “impeding traffic and to determine whether the driver was Antoine Howard.” At 5:02:01 p.m., Officer Alcantara radioed Euclid police dispatch that he was on “Euclid Avenue westbound trying to get a vehicle to stop for [him] at 191.

Victor-131433.” Officer Alcantara said the Cadillac “rolled slowly to a stop near the intersection of Euclid Avenue and East 191st Street where the passenger door of the Cadillac swung open as if its occupants were going to bail-out and run from the vehicle.”

But at that point, the Cadillac “sped off westbound on Euclid Avenue before any of the occupants could exit the Cadillac.”

{¶8} At 5:02:47, Officer Alcantara radioed dispatch that the vehicle was “taking off on me,” and “[w]e are westbound on Euclid — Upper Valley. Traffic’s heavy.” At 5:03:01 p.m., Officer Alcantara stated “I’m still going to lights. Still going westbound.”

{¶9} Officer Alcantara averred that the Cadillac “continued to flee westbound on Euclid Avenue at speeds between 80 to 100” m.p.h., driving “through traffic signals and intersections without slowing.” The speed limit on Euclid Avenue in that area is 35 m.p.h.

{¶10} At 5:03:11 p.m., Officer Alcantara said, “Let Cleveland know and East Cleveland radio. Doing about 80 miles an hour radio. Still westbound. 80 miles an hour.” At 5:03:35 p.m., Officer Alcantara informed dispatch, “Still westbound. Doing about 100 radio. 100 miles an hour. Still westbound. Traffic’s very heavy.” In his deposition, Officer Alcantara stated that when he said 80 and 100 m.p.h., he was giving the Cadillac’s estimated speed, not his own.

{¶11} Officer Alcantara stated that “[b]ecause he slowed at all traffic signals and intersections, the Cadillac quickly pulled away from [his] patrol car.” Officer Alcantara

averred that “near the intersection of Euclid Avenue and London Road, [he] observed that the Cadillac was at least a third (1/3) of a mile ahead and was pulling [farther] away from [him].” Officer Alcantara said that he “terminated the pursuit of the Cadillac in the area of Euclid Avenue and London Road.” Officer Alcantara stated that he slowed his patrol car and deactivated his overhead lights and siren. He stated that he lost sight of the Cadillac at that point.

{¶12} Officer Alcantara said that he continued traveling westbound on Euclid Avenue. He stated that as he neared the intersection of Ivanhoe Road and Belvoir Boulevard, he “observed a cloud of black smoke and then saw the Cadillac had crashed into another vehicle.”

{¶13} At 5:03:46 p.m., Officer Alcantara reported to dispatch: “Going right. They just wrecked. They just wrecked radio. Just wrecked. Vehicle just wrecked radio. We’re at Ivanhoe and Belvoir. Ivanhoe Belvoir. They’re bailing. They are bailing out. Bailing out.” In his deposition, Officer Alcantara could not explain why he said “going right,” because he said he “was nowhere near the vehicle when it wrecked.” Also in his deposition, Officer Alcantara denied seeing the wreck, even though he transmitted to dispatch that the vehicle “just wrecked.”

{¶14} The driver of the Cadillac, who was later identified as Antoine Howard, took off running after he crashed. When Officer Alcantara reached the scene of the accident, he saw Howard running away from the scene. Officer Alcantara chased

Howard on foot until he caught him. Howard crashed into a vehicle being driven by plaintiff-appellee, Regina Hardesty, who was seriously injured in the accident.

{¶15} Officer Alcantara stated in his affidavit that “the highest speed [he] reached during the pursuit was 70 m.p.h. — for a brief moment.” He also said that the weather was clear, visibility was excellent, and the road was flat and straight. He further averred that he “slowed to approximately 35 m.p.h. at all traffic signals and intersections and maintained a constant look-out for other vehicles and pedestrians during the pursuit.”

{¶16} In his deposition, Officer Alcantara explained that the reason one could not hear his siren in the dispatch recording was because when he transmitted information to dispatch, he “toggled the siren off.” He stated that he did so because his K9 partner was barking in the back seat, and thus, he did not think dispatch would hear what he was saying if the siren was activated. Officer Alcantara stated that he activated his “horn” siren (siren is activated when the horn on steering wheel is pressed), not the continuous siren that is activated from the console of his patrol car.

{¶17} Hardesty stated in her deposition that when her vehicle was struck by the black Cadillac, she did not see a police car or hear any sirens.

{¶18} Officer Alcantara was disciplined for his actions on March 28, 2012. In a letter dated April 5, 2012, Lieutenant (at the time of the pursuit) Robert Payne informed Officer Alcantara that he was receiving an oral reprimand because he “failed to terminate the pursuit.” Lieutenant Payne further stated that based on “all the circumstances; the crime, the warrant, the time of day, the location, the vehicular traffic, and the actions of

the fleeing vehicle, it would have been prudent and advisable to end the pursuit in a timely fashion. The risk to the public was too high.”

{¶19} Lieutenant Payne stated in his deposition that he reviewed the incident within a week of it occurring. As part of his review, he reviewed the police report, talked to the sergeant on the scene and Officer Alcantara. Lieutenant Payne also listened to the dispatch recording, and reviewed police policies and procedures. Lieutenant Payne testified that after reviewing everything, he concluded that Officer Alcantara failed to terminate the pursuit. Lieutenant Payne issued an oral reprimand to Officer Alcantara because he failed to terminate the pursuit.

{¶20} The Euclid police driving committee also reviewed the pursuit, and issued a formal criticism to Officer Alcantara regarding the events of March 28, 2012. After reviewing the facts and Euclid police policies and procedures, it concluded that “[t]ermination of this pursuit was the better course of action in this pursuit due to traffic conditions.”

{¶21} In his deposition, Lieutenant Payne reviewed the relevant Euclid police policies and procedures. Euclid police’s “Policy Statement” regarding pursuit states:

Ours is a highly mobile society and this fact, coupled with the desire of a law violator to avoid arrest, may often result in the situations that suggest the necessity of pursuit. Given the obvious hazards of conducting a pursuit, certain basic philosophical positions must be considered: first, human life has immeasurable worth and must be foremost in considering the pursuit circumstances, and second, society’s interest in capturing a serious offender may be so great that at times a certain amount of risk may be required to protect the welfare of others.

A pursuit may be initiated whenever a law violator clearly exhibits the intention of avoiding arrest by using a vehicle to flee and elude an officer. This pursuit, however, shall be conducted in a manner consistent with existing state statutes and guidelines established herein.

{¶22} Euclid Police Standard Operating Procedure (“S.O.P.”) 08-001-442 states:

Responsibility: A pursuit is a rare occurrence, and one that should not be taken lightly. Officer(s) will initiate or continue a pursuit of a suspect fleeing in a motor vehicle only when justified by the illegal flight of a law violator, and then only when the pursuit will be executed with caution so as not to create extreme or unreasonable danger for either police or the public.

Officers and supervisors should constantly evaluate whether it is in the best interests of the community and police to terminate or continue with a pursuit.

Procedure:

I. Determining When to Initiate or Continue Pursuit.

Among the factors that must be considered before pursuing or continuing a pursuit of a suspect fleeing in a motor vehicle are (but not limited to):

A. The seriousness of the violation as known by the officer at the initiation of the pursuit.

Due to the inherent danger of any pursuit, officers will continually evaluate the seriousness of the known violation against the risks of continuing the pursuit.

B. The condition of the roadway surface(s), the weather, and the traffic.

C. Direction of traffic flow.

1. AT NO TIME WILL OFFICERS PURSUE THE WRONG WAY ON A FREEWAY OR ONE WAY STREET.

2. OFFICERS ARE STILL REQUIRED BY THE OHIO REVISED CODE TO “DRIVE WITH DUE REGARD FOR THE SAFETY OF OTHERS.”

(Emphasis sic.)

{¶23} Under Section IV of S.O.P. 08-001-442, “Pursuit Driving Guidelines,” it states in relevant part: “All police vehicles involved in a pursuit will use emergency lights and sirens throughout the pursuit. Siren should be in continuous operation mode throughout (ORC 4513.21).”

{¶24} Under Section VI of S.O.P. 08-001-442, “Notifying the Dispatcher,” further provides, among other things, that “[t]he initiating officers must keep dispatch continually updated regarding the progress of the pursuit.”

{¶25} In August 2013, Hardesty filed a personal injury complaint against Officer Alcantara.¹ Hardesty alleged that as a direct and proximate result of Officer Alcantara’s “negligent, willful, wanton, reckless, intentional, extreme and/or outrageous high speed chase,” the black Cadillac driven by Howard foreseeably continued to speed, passing through intersection after intersection, eventually striking her vehicle and causing her multiple and serious injuries.

{¶26} After discovery was completed, Officer Alcantara moved for summary judgment in October 2014. Hardesty opposed his motion. The trial court denied Officer Alcantara’s motion, finding that genuine issues of material fact existed as to whether Officer Alcantara’s actions amounted to wanton or reckless conduct under R.C.

¹Hardesty also brought her complaint against Howard and Officer Donna Holden. Hardesty voluntarily dismissed Howard from the case. Officer Holden was on her way to assist Officer Alcantara in his pursuit of Howard; at the time of the crash, she was still two miles away from the scene. The trial court granted Officer Holden’s motion for summary judgment. Thus, neither Howard nor Officer Holden are part of this appeal.

2744.03(A)(6)(b). It is from this judgment that Officer Alcantara filed this interlocutory appeal, which is a final appealable order under *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, and R.C. 2744.02(C). In his sole assignment of error, Officer Alcantara argues that the trial court erred when it denied his summary judgment motion.

B. Summary Judgment Standard and Appellate Review

{¶27} Under Civ.R. 56(C), summary judgment is proper if:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶28} Appellate review of a lower court's decision on summary judgment is de novo, and thus, we apply the same standard used by the trial court. *McKay v. Cutlip*, 80 Ohio App.3d 487, 491, 609 N.E.2d 1272 (9th Dist.1992). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.* The nonmoving

party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that shows a genuine dispute over the material facts exists. *Henkle v. Henkle*, 75 Ohio App.3d 732, 735, 600 N.E.2d 791 (12th Dist.1991).

C. Immunity of Political Subdivision Employees

{¶29} At issue in this appeal is R.C. 2744.03(A)(6). This provision provides in relevant part that an employee of a political subdivision 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. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

{¶30} In this case, Officer Alcantara argues that he was acting within the scope of his employment, and thus, R.C. 2744.03(A)(6)(a) does not apply. He further maintains that R.C. 2744.03(A)(6)(c) does not apply because there is no section of the Ohio Revised Code that expressly imposed liability on him. Hardesty does not dispute these claims. Thus, the only real issue is whether Officer Alcantara's actions were "with malicious purpose, in bad faith, or in a wanton or reckless manner." We note, however, that there

are no issues of fact as to whether Officer Alcantara acted with malicious purpose or in bad faith — the real issue being whether his actions were wanton or reckless.

{¶31} In *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, the Ohio Supreme Court set forth the meaning of the terms wanton and reckless conduct. The Supreme Court held:

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. (*Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), approved and followed.)

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. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.)

Anderson at paragraphs two and three of the syllabus.

{¶32} Officer Alcantara contends that no reasonable factfinder could conclude that he acted “in a wanton or reckless manner.” He argues that there are no material issues of genuine fact as to his conduct. He points to his evidence that he exercised reasonable care for the safety of others by slowing down to 35 m.p.h. through all intersections, watching for pedestrians the entire time. He asserts that he was exercising his call of duty to pursue and apprehend Howard, for whom a felony warrant had been issued. He argues that the fact that the weather was clear and the roads were flat and straight support his contention that he acted reasonably in pursuing Howard. He further points to his testimony that he activated his lights and siren throughout the pursuit, except for the “brief moments” where he transmitted calls to dispatch. Finally, Officer Alcantara

argues that the evidence shows that he only pursued Howard for 0.6 miles, terminating the pursuit once he realized that it was too dangerous to continue. He maintains that this evidence, taken together as a whole, establishes that his actions amounted to negligence at best.

{¶33} Hardesty first argues that Officer Alcantara did not have a “duty to pursue the vehicle” because he was not responding to an “emergency call.” This argument — that this was not an “emergency call” — is not relevant to the issues in this case. Hardesty cites to R.C. 2744.02(B)(1)(a) in support of this argument.² But this provision relates only to situations where a political subdivision is liable under R.C. Chapter 2744; it has nothing to do with an employee’s liability.

{¶34} Hardesty further argues that Officer Alcantara did not have *any duty* to pursue Howard. We disagree with her on this point as well. Officer Alcantara activated his lights and sirens after he discovered that there was a felony arrest warrant associated with the Cadillac’s license plate number. He also knew that the warrant was for Antoine Howard, described as a young black male. Officer Alcantara said that he

²R.C. 2744.02(B)(1)(a) states:

Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct[.]

saw that a young black male was driving the Cadillac. He attempted to stop the Cadillac to determine if the driver of the Cadillac was Howard. Officer Alcantara had a duty to apprehend Howard, if he was, in fact, the one driving the Cadillac. When Howard “took off” at a high rate of speed, Officer Alcantara’s initial decision to pursue him at that point was reasonable.

{¶35} We further agree with Officer Alcantara that his belief that Howard was impeding traffic was also a valid reason to stop Howard. And even under this scenario (meaning if this was the only reason for which Officer Alcantara had to pull the Cadillac over and Howard fled), Officer Alcantara’s initial decision to pursue Howard at that point would have still been reasonable.

{¶36} We do, however, agree with Hardesty’s remaining arguments, i.e., that genuine issues of material fact remain regarding whether Officer Alcantara’s actions — after he made the initial decision to pursue Howard — were “in a wanton or reckless manner.”

{¶37} Although Officer Alcantara testified in his deposition that traffic was light when he initiated the pursuit around East 191st Street, he admitted that traffic soon became very heavy. Indeed, when Officer Alcantara communicated to dispatch at 5:02:47 p.m. that the Cadillac was “taking off” on him, he also stated in the same transmission, “We are westbound on Euclid — Upper Valley. Traffic’s heavy.” It was right around 5:00 p.m., on a busy road, during rush hour traffic.

{¶38} We also agree with Hardesty that genuine issues of material fact remain as to how fast Officer Alcantara traveled during the pursuit. Officer Alcantara stated that he went as fast as 70 m.p.h., and slowed to 35 m.p.h. through all intersections, looking for traffic and pedestrians. But his communication updates to dispatch raise genuine issues of material fact as to what his actual speed was during the pursuit. Officer Alcantara told dispatch at 5:03:01 p.m., “I’m going to lights. Still going westbound.” At 5:03:11 p.m., Officer Alcantara stated, “Doing about 80 miles an hour radio. Still westbound. 80 miles an hour.” At 5:03:35 p.m., almost 25 seconds later, “Still westbound. Doing about 100 radio. 100 miles an hour. Still westbound. Traffic’s very heavy.” At 5:03:46 p.m., Officer Alcantara transmitted to dispatch “Going right. They just wrecked. They just wrecked radio. Just wrecked. Vehicle just wrecked radio. We’re at Ivanhoe and Belvoir. Ivanhoe Belvoir. They’re bailing. They are bailing out. Bailing out.”

{¶39} Officer Alcantara’s final radio transmission about the wreck appears to be 11 seconds after his previous one, where he said, “Still westbound. Doing about 100 radio. 100 miles an hour. Still westbound. Traffic’s very heavy.” But in listening to the dispatch recording, it was actually only three to four seconds between the two communications — meaning from the time the previous call ended and the final call began was only three to four seconds, not 11 seconds. The 11 seconds appears to be from the time the previous call began and the final call began, not the actual time between the two.

{¶40} We further note that in listening to the dispatch recording, Officer Alcantara’s voice was in a very excited state at the moment he says, “They just wrecked.”

It is our view that reasonable minds could differ as to whether Officer Alcantara was nearly one-third of a mile back at the time of the crash because he slowed down through intersections and terminated the pursuit, or whether he actually witnessed the crash because he was traveling at speeds of 80 to 100 m.p.h., and was right behind Howard at the time of the crash because he had not terminated the pursuit.

{¶41} Significantly, Officer Alcantara never communicated to dispatch that he terminated the pursuit. Lieutenant Payne testified in his deposition that Officer Alcantara was given an oral reprimand because — “the truth was he failed to terminate the pursuit.”

{¶42} Howard also testified in his deposition that he looked in his rearview mirror late in the chase and Officer Alcantara’s police vehicle was right behind him.

{¶43} The final fact that is significant — and undisputed — is that Officer Alcantara did not continuously run his siren; rather, he admittedly toggled it on and off during the pursuit when he transmitted information to dispatch. He stated that he did so because his K9 partner was barking and he was concerned that the dispatcher would not hear what he was saying. While this may be true, it is our view that whether it was reasonable to do so, in light of the fact that traffic was heavy and speeds were very high, raises a genuine issue of material fact. If the factfinder decided that it was not

reasonable to do so, it would be another important point to consider in determining whether Officer Alcantara's actions were wanton or reckless.

{¶44} Hardesty argues that the evidence even suggests that Officer Alcantara did not use his siren at all. She points to Howard's testimony in his deposition where he stated that he could not recall hearing a siren. She further points to the fact that when listening to the dispatch recording, there are "no siren sounds bleeding onto the start or end" of the radio transmission. We agree that these discrepancies would be for the factfinder to determine.

{¶45} We further note that the Ohio Supreme Court made clear that "[t]he violation of a statute, ordinance, or department policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct." *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at paragraph five of the syllabus.

{¶46} In this case, it is undisputed that Officer Alcantara violated several department policies, including toggling off his siren when he communicated to dispatch during the pursuit, not informing dispatch regarding the reason for the pursuit, and the fact that he terminated the pursuit (if he did). But most notably was the fact that Officer Alcantara was disciplined under Euclid police standard operating procedures for failing to terminate the pursuit. Thus, these facts would also have to be considered by the factfinder when determining whether Officer Alcantara's actions were wanton and reckless.

{¶47} Officer Alcantara cites to several cases in support of his argument that he is entitled to immunity. We note, however, that many of these cases (and indeed much of his brief) deal with the issue of proximate cause, not immunity. The issue of proximate cause, however, is not yet ripe for review as we only have jurisdiction to address the issue of immunity in this interlocutory appeal.

{¶48} The cases cited by Officer Alcantara that do address the issues related to immunity are distinguishable from the facts in the instant case. For example, in *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 772 N.E.2d 129 (9th Dist.2002), the police pursued a vehicle at high speeds that eventually resulted in the vehicle crashing into a third party. The court held that the officer did not act “with malicious purpose, in bad faith, or in a wanton and reckless manner.” But significantly, this chase occurred at 1:20 a.m., when there was likely hardly any traffic on the roadways. It did not occur on a busy road during heavy traffic. In *Sutterlin v. Barnard*, 2d Dist. Montgomery No. 13201, 1992 Ohio App. LEXIS 5170 (Oct. 6, 1992), the police officer used his lights and sirens throughout the chase, putting the public on notice that he was pursuing the vehicle. Moreover, the speeds in *Sutterlin* only reached 60 m.p.h., not 80 to 100 m.p.h.

{¶49} Accordingly, we agree with the trial court that genuine issues of material fact remain regarding whether Officer Alcantara’s actions were wanton and reckless under R.C. 2744.03(A)(6)(b). If a factfinder determines that his actions were wanton and reckless, then he will not be entitled to immunity under this statute. If the factfinder

determines that his actions were not wanton and reckless, he will be afforded the protection of immunity.

{¶50} Officer Alcantara's sole assignment of error is overruled.

{¶51} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

MARY J. BOYLE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
PATRICIA ANN BLACKMON, J., CONCUR