[Cite as *Hale v. Toth*, 2023-Ohio-2954.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

BETHANY HALE, ET AL.,	:	
Plaintiffs-Appellees,	:	Nos. 112030
v.	:	
JOHN P. TOTH, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: August 24, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-936763

Appearances:

Jonathan E. Rosenbaum, *for appellees*.

Mazanec, Raskin, & Ryder Co., L.P.A., James A. Climer, Frank H. Scialdone, John D. Pinzone, and Edmond Z. Jaber, *for appellants*.

MARY J. BOYLE, J.:

{¶ 1} Defendants-appellants, John P. Toth ("Officer Toth"), Gregory Urbanski ("Sgt. Urbanski"), and the city of Westlake ("Westlake") (collectively "defendants"), appeal the trial court's denial of the benefit of immunity from liability

under R.C. Chapter 2744 in a lawsuit filed by plaintiffs-appellees, Bethany Hale ("Hale") and her husband, Michael Hale. Hale was the driver of a vehicle involved in a collision with a police vehicle driven by Officer Toth, who was responding to a dispatch call at that time. Defendants also appeal the trial court's denial of their motion for judgment on the pleadings. For the reasons set forth below, we reverse the trial court's judgment denying summary judgment and remand to the trial court with instructions to enter judgment in favor of the defendants based on the immunity provided in R.C. Chapter 2744. Furthermore, we find that this court lacks jurisdiction to consider the trial court's denial of the defendants' motion for judgment on the pleadings and the trial court's denial of summary judgment as it relates to Count 6 of Hale's complaint seeking declaratory judgment that R.C. Chapter 2744 is unconstitutional.

I. Facts and Procedural History

{¶ 2} On February 23, 2019, Officer Toth, who is employed by the Westlake Police Department, was on duty and had finished with a call at the Promenade shopping center in Westlake. Officer Toth exited the Promenade, heading east-bound on Detroit Road. At that time, Officer Toth was driving a Chevy Tahoe outfitted as police cruiser, which was equipped with red and blue overhead, rear passenger, and driver side window emergency lights as well as a siren mounted to the left front grill area. As he approached the intersection of Detroit Road and Crocker Road, Officer Toth observed a vehicle directly in front of him and vehicles to his left. Officer Toth received a dispatch call while stopped at the red light at this

intersection. Dispatch advised that there was an altercation involving a woman in the area of Canterbury Road and Westwood Road in Westlake. The female caller reported that a male in a burgundy Caravan ran up to her car and was trying to attack her and the male then got back into his car and followed her. Officer Toth then activated the police vehicle's emergency lights and siren while he was still stopped at the red light. The vehicle in front of him moved to the right to allow him to pass. He continued through and almost cleared the intersection, when he was struck by a vehicle driven by Hale on the right side of the police cruiser at the rear passenger door. The impact caused by the crash rendered Officer Toth's vehicle unsalvageable.

{¶ 3} Sgt. Urbanski of the Westlake Police Department investigated the accident and prepared the crash report. Officer Toth provided a written statement regarding the accident to Sgt. Urbanski the day after the accident occurred. Sgt. Urbanski submitted his report to Westlake's prosecutor, and Hale was issued a citation for failing to yield to a public safety vehicle. Hale pled no contest and was found guilty of the offense.

{¶ 4} In September 2020, Hale and her husband brought a six-count complaint for damages and a declaratory judgment against defendants.[1] In Count 1, Hale alleges Officer Toth's actions were negligent, wanton, and reckless. Hale

[1] Hale included the Ohio Attorney General as a defendant to her complaint, which appears to be based on R.C. 2721.12. R.C. 2721.12 requires the Attorney General to be served with a copy of declaratory judgment actions raising constitutional challenges. The Attorney General, however, was dismissed as a party in November 2020 because R.C. 2721.12 does not provide an independent basis for naming the Attorney General as a party.

alleges that Toth failed to proceed at a safe and slow speed and failed to operate his vehicle with due regard for the safety of Hale and others while proceeding through a red light. She further alleges that Toth's actions, in accelerating at the maximum rate his cruiser could travel against a red light through an extremely busy intersection, without activating his audible siren were in conscious disregard of the rights and safety of other persons and had a great probability of causing substantial harm. In Count 2, Hale alleges civil conspiracy. Hale alleges that Officer Toth and Sgt. Urbanski maliciously combined with themselves to cause injury to Hale and, as a result of the conspiracy, she was wrongfully charged and convicted of failing to yield the right of way to a public safety vehicle. Hale further alleges that she and her husband were prevented from obtaining a full recovery from their insurance company for property damage and bodily injury and loss of consortium. In Count 3, Hale alleges civil liability for criminal conduct. Hale alleges Sgt. Urbanski's conduct was willful, wanton, and malicious and violated multiple sections of the Ohio Revised Code and, as a result, he is liable to Hale for civil damages. In Count 4, Hale alleges fraud. Hale contends that Sgt. Urbanski concealed the facts supporting the conclusion that the collision was Officer Toth's fault and misrepresented that Hale was at fault. In Count 5, Hale alleges that Westlake is liable under the doctrine of respondeat superior for the damages caused by Officer Toth. In Count 6, Hale seeks a declaration that R.C. Chapter 2744 violates her constitutional rights to due process and equal protection. In response, the defendants filed an answer, asserting political subdivision immunity under R.C. Chapter 2744.

{¶ 5} Following discovery, the defendants moved for summary judgment, arguing that they are entitled to immunity on all counts under R.C. Chapter 2744. Hale opposed, arguing that defendants are not entitled to immunity because Officer Toth's actions were wanton and reckless and his failure to slow down caused the collision. The defendants also sought judgment on the pleadings with respect to Counts 2 and 3 of the complaint. The defendants argued that Hale's claim for civil conspiracy fails under the intracorporate conspiracy doctrine and her claim for civil liability for criminal conduct is barred by the one-year statute of limitations. Hale opposed, arguing that Ohio law does not recognize the intracorporate conspiracy doctrine and the statute of limitations is tolled due to defendants' continuing criminal conduct (the utilization of Sgt. Urbanski's false report to defeat liability).

{¶ 6} In September 2022, the trial court issued separate judgment entries denying the defendants' motion for judgment on the pleadings and their motion for summary judgment. In the entry denying summary judgment, the court found that when "construing the evidence in a light most favorable to the non-moving party, * * * genuine issues of material fact exist as [to] Plaintiffs' claims." (Judgment entry, Sept. 22, 2022.)[2]

{¶ 7} It is from these orders that the defendants appeal, raising the following two assignments of error for review:

[2] We note that in October 2022, the trial court stayed the case pending the defendants' appeal.

Assignment of Error One: The trial court erroneously denied these defendants the benefit of immunity under Revised Code Chapter 2744 when it denied defendants' motion for summary judgment.

Assignment of Error Two: The trial court erroneously denied these defendants the benefit of immunity when it denied defendants' motion for judgment on the pleadings.

II. Law and Analysis

A. Final Appealable Orders and R.C. Chapter 2744

{¶ 8} As an initial matter, we must address whether we have jurisdiction to review the trial court's judgment denying the defendants' motion for judgment on the pleadings and denying the defendants' motion for summary judgment as it relates to Count 6 of Hale's complaint seeking a declaration that R.C. Chapter 2744 violates her constitutional rights to due process and equal protection.

{¶ 9} The Ohio Constitution limits appellate jurisdiction to the review of final judgments. Article IV, Section 3(B)(2), Ohio Constitution. "If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and the appeal must be dismissed." *Assn. of Cleveland Firefighters, # 93 v. Campbell*, 8th Dist. Cuyahoga No. 84148, 2005-Ohio-1841, ¶ 6, citing *McKenzie v. Payne*, 8th Dist. Cuyahoga No. 83610, 2004-Ohio-2341. In the event that the parties involved in the appeal do not raise this jurisdictional issue, an appellate court must raise it sua sponte. *Whitaker-Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 186, 280 N.E.2d 922 (1972); *Assn. of Cleveland Firefighters* at ¶ 6, citing *Bautista v. Kolis*, 142 Ohio App.3d 169, 2001-Ohio-3159, 2001-Ohio-3240, 754 N.E.2d 820 (7th Dist.).

{¶ 10} Ordinarily, a trial court order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Madfan, Inc. v. Makris*, 8th Dist. Cuyahoga No. 102179, 2015-Ohio-1316, ¶ 6, citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). With regard to final appealable orders and political-subdivision immunity, "the General Assembly enacted R.C. 2744.02(C), which provides that an order denying a political subdivision the benefit of immunity is a final order that may be appealed immediately." *Riscatti v. Prime Properties Ltd. Partnership*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 18, citing R.C. 2744.02(C); *Supportive Solutions, L.L.C., v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 11; *Sullivan* at syllabus.

{¶ 11} R.C. 2744.02(C) provides that "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of any alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." Thus, "R.C. 2744.02(C) carves out an exception and permits a political subdivision or an employee of a political subdivision to appeal an order that denies it the benefit of an alleged immunity under R.C. Chapter 2744, 'even when the order makes no determination that there is no just cause for delay pursuant to Civ.R. 54(B).'" *Johnson-Newberry v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 107424, 2019-Ohio-3655, ¶ 8, quoting *Sullivan* at syllabus. We note, however, that appellate review under R.C. 2744.02(C) is limited to review of only alleged errors involving the denial of "'the benefit of an alleged immunity from liability' and does

not authorize appellate courts to otherwise review alleged errors that do not involve claims of immunity." *Johnson-Newberry* at ¶ 9, quoting *Windsor Realty & Mgt., Inc. v. N.E. Ohio Regional Sewer Dist.*, 2016-Ohio-4865, 68 N.E.3d 327, ¶ 15 (8th Dist.); *Riscatti* at ¶ 20. Therefore, alleged errors that do not involve claims of immunity are not final appealable orders.

1. Motion for Judgment on the Pleadings

{¶ 12} Here, the defendants sought judgment on the pleadings on Counts 2 and 3 of Hale's complaint, premising their arguments on the intracorporate conspiracy doctrine and the statute of limitations. The trial court denied defendants' motion, and defendants appealed. In *Riscatti*, the Ohio Supreme Court reviewed whether the denial of a public subdivision's motion for judgment on the pleadings based a statute-of-limitations defense under R.C. 2744.04 is a final appealable order and found that it is not. *Id.* at ¶ 2. The Ohio Supreme Court, agreeing with this court in *Riscatti v. Prime Properties Ltd. Partnership*, 8th Dist. Cuyahoga Nos. 97270 and 97274, 2012-Ohio-2921, found that "an order denying a motion for judgment on the pleadings that is predicated on a statute-of-limitations defense does not deny the benefit of immunity and is not a final, appealable order even though it arose along with a political subdivision's immunity claim." *Id.*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, at ¶ 19. Indeed, "the fact that a political subdivision is the party that raises a statute-of-limitations defense does not change the general rule that the ruling on that defense is not a final, appealable order." *Id.* at ¶ 21, citing *Riscatti*, 8th Dist. Cuyahoga Nos. 97270 and 97274, 2012-Ohio-2921, at ¶ 17.

{¶ 13} Here, because the errors alleged by defendants in their motion for judgment on the pleadings do not involve claims of immunity, this portion of the appeal cannot be addressed. Therefore, the second assignment of error is overruled.

2. Declaratory Judgment

{¶ 14} In Count 6 of her complaint, Hale seeks a declaratory judgment that R.C. Chapter 2744 violates her constitutional rights to due process and equal protection. As stated above, alleged errors that do not involve claims of immunity are not final appealable orders. Additionally, we note that the trial court did not rule on Hale's request for declaratory judgment and, as a result, it is not appropriate for us to review it for the first time on appeal. *See State v. Slagle*, 65 Ohio St.3d 597, 605 N.E.2d 916 (1992) (where the Ohio Supreme Court stated, "[a]n appellate court is not to be the first court to decide an issue; it is to review decisions made by the trial court after the lower court has had an opportunity to hear the arguments of the parties." *Id.* at 604.); *see also Fayak v. Univ. Hosps.*, 8th Dist. Cuyahoga No. 109279, 2020-Ohio-5512 (where this court stated, "[i]ssues in ruling on the motion for summary judgment that are not considered by the trial court should not be determined by an appellate court in the first instance." *Id.* at ¶ 28, citing *Meekins v. Oberlin*, 8th Dist. Cuyahoga No. 106060, 2018-Ohio-1308, ¶ 24-26; *Ocwen Loan Servicing, L.L.C. v. McBenttes*, 9th Dist. Summit No. 29343, 2019-Ohio-4884, ¶ 8; *Montville Lakes Cluster Homeowners Assn. Phase One v. Montville Lakes Homeowners Assn.*, 9th Dist. Medina No. 16CA0082-M, 2017-Ohio-7920, ¶ 17).

Therefore, we cannot address Count 6 of the complaint seeking a declaration on the constitutionality of R.C. Chapter 2744.

{¶ 15} We now turn to the defendants' argument that the trial court erroneously denied them the benefit of immunity by denying their motion for summary judgment.

B. Motion for Summary Judgment

1. Standard of Review

{¶ 16} An appellate court reviews the grant or denial of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). In a de novo review, this court affords no deference to the trial court's decision and independently reviews the record to determine whether the denial of summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12 (8th Dist.).

{¶ 17} Summary judgment is appropriate if (1) no genuine issue of any material fact remains; (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 construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Id.*, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 631 N.E.2d 150 (1994).

{¶ 18} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio

St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party must then point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293.

2. R.C. Chapter 2744 — Political Subdivision Immunity

{¶ 19} "R.C. Chapter 2744, Ohio's Political Subdivision Tort Liability Act, was enacted in response to the judicial abrogation of the common-law immunity of political subdivisions." *Riscatti*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, at ¶ 15, citing *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 558, 733 N.E.2d 1141 (2000). The purpose of R.C. Chapter 2744 is to shield political subdivisions from tort liability in order to preserve their fiscal integrity. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 23, citing *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 453, 639 N.E.2d 105 (1994).

{¶ 20} In enacting R.C. Chapter 2744, the General Assembly made clear that "'the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services to their residents.'" *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 38, quoting Am.Sub.H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733.

{¶ 21} In recognizing this purpose, the Ohio Supreme Court has also recognized that immunity determinations are vitally important to the parties' interests and to judicial economy:

> "'"[D]etermination of whether a political subdivision is immune from liability is usually pivotal to the ultimate outcome of a lawsuit. Early resolution of the issue of whether a political subdivision is immune from liability pursuant to R.C. Chapter 2744 is beneficial to both of the parties. If the appellate court holds that the political subdivision is immune, the litigation can come to an early end, with the same outcome that otherwise would have been reached only after trial, resulting in a savings to all parties of costs and attorney fees. Alternatively, if the appellate court holds that immunity does *not* apply, that early finding will encourage the political subdivision to settle promptly with the victim rather than pursue a lengthy trial and appeals. Under either scenario, both the plaintiff and the political subdivision may save the time, effort, and expense of a trial and appeal, which could take years.'" (Emphasis sic.) [*Hubbell*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878,] at ¶ 25, quoting *Burger v. Cleveland Hts.* (1999), 87 Ohio St.3d 188, 199-200, 1999-Ohio-319, 718 N.E.2d 912 (Lundberg Stratton, J., dissenting)."

Riscatti at ¶ 17, quoting *Summerville* at ¶ 39.

{¶ 22} The Ohio Supreme Court has delineated a three-tiered analysis in determining whether a political subdivision has immunity. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 13, citing *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781; *Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585. First, the party alleging immunity enjoys a general grant of immunity under R.C. 2744.02(A)(1), which provides that "'a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political

subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.'" *Id.*, quoting R.C.2744.02(A)(1).

{¶ 23} Political-subdivision immunity, however, is not absolute. *Cater v. Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 610 (1998), citing R.C. 2744.02(B); *Hill v. Urbana*, 79 Ohio St.3d 130, 679 N.E.2d 1109 (1997). The second tier of the analysis focuses on the five exceptions to immunity listed in R.C. 2744.02(B), which can expose the political subdivision to liability. *Smith* at ¶ 14, citing *Colbert* at ¶ 8; *Lambert* at ¶ 9. If none of the exceptions in R.C. 2744.02(B) apply, and if no defense in that section applies to negate the liability of the political subdivision, then the third tier of the analysis requires an assessment of whether any defenses in R.C. 2744.03 apply to reinstate immunity. *Smith* at ¶ 15. In the instant case, we must determine whether immunity applies to Westlake, Officer Toth, and Sgt. Urbanski.

a. Westlake

{¶ 24} The parties agree that Westlake is a "political subdivision" under R.C. 2744.02(A)(1). Therefore, our analysis will begin with the second tier, which requires us to determine whether Hale has established that an exception to immunity applies. Hale contends that the exceptions set forth in R.C. 2744.02(B)(1) and (5) apply to Westlake.

i. R.C. 2744.02(B)(1) — Emergency Call and Willful and Wanton Conduct

{¶ 25} R.C. 2744.02(B)(1) provides that a political subdivision is generally liable for injury, death, or loss caused by the negligent operation of a motor vehicle by one of its employees acting in the scope of employment. However, a political subdivision is granted a full defense to this liability by R.C. 2744.02(B)(1)(a) if the employee was "[a] member of [the] municipal corporation police department or any other police agency [and] was operating [the] motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct." Therefore, R.C. 2744.02(B)(1)(a) provides a full defense to a political subdivision for motor-vehicle liability when the following three conditions are met: "(1) the vehicle's operator was a member of the municipal corporation's police department, (2) the officer was responding to an emergency call, and (3) the operation of the vehicle did not constitute willful or wanton misconduct." *Smith*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, at ¶ 18.

{¶ 26} Hale argues that genuine issues of material fact exist as to whether there was an "emergency call" and whether Officer Toth's actions were "wanton and willful." In support of her "emergency call" argument, Hale relies on Sgt. Urbanski's deposition where he stated that the call Officer Toth received from the dispatcher advised that the caller was in her car and the would-be perpetrator was in his car, and there was no ongoing assault at the time of the call. While Sgt. Urbanski acknowledged that there was no ongoing assault at the time of the call, a review of

his deposition testimony reveals that when asked if the call presented an imminent threat of injury or death, Sgt. Urbanski replied, "[y]es." (Urbanski depo., pg. 23.). Additionally, Officer Toth averred that he "received a call over police radio dispatch regarding an altercation involving a woman in the area of Canterbury Road and Westwood Road in Westlake; and [he] was advised by the dispatcher that the female caller reported that a male in a burgundy Caravan ran up to her car and was trying to attack her and the male then got back into his car and followed the female caller." (Toth affidavit, para. 5.) Officer Toth further averred that the "call demanded an immediate response because I believed there was an imminent threat of injury or death to the female caller given the severity of the situation relayed to me; and I then advised the radio dispatcher that I would be responding 'Code 3', which means initiating an emergency response by activating the police vehicle's emergency lights and siren." (Toth affidavit, para. 6.)

{¶ 27} R.C. 2744.01(A) defines "emergency call" as "a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer." In *Colbert*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, the Ohio Supreme Court defined "duty" as "obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession." *Id.* at ¶ 13, citing *Webster's Third New International Dictionary* 705 (1986). The *Colbert* Court did not limit calls to duty to "inherently dangerous" situations. *Id.* at ¶ 13-14. Rather, it adopted a broad

interpretation of "call to duty" and found that it included situations "to which a response by a peace officer is required by the officer's professional obligation." *Id.* at ¶ 13.

{¶ 28} In the instant case, Officer Toth averred that he believed there was an imminent threat of injury or death to the female caller given the severity of the situation relayed to him. He was responding to a police dispatch of a potential assault as required by his professional obligation. In light of the foregoing, we find that Officer Toth was responding to an emergency call.

{¶ 29} Having found that Officer Toth was responding to an emergency call, we must next examine whether his conduct was willful or wanton to determine if the "emergency call" defense affords Westlake immunity. Hale argues Officer Toth engaged in "wanton or willful misconduct" by rapidly accelerating through an extremely busy intersection against a red light and while only "chirping" his siren under conditions when a siren would not be heard.

{¶ 30} In *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, the Ohio Supreme Court clarified the meaning of willful and wanton conduct:

> Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. *Tighe v. Diamond*, 149 Ohio St. at 527, 80 N.E.2d 122; *see also Black's Law Dictionary* 1630 (8th Ed.2004) (describing willful conduct as the voluntary or intentional violation or disregard of a known legal duty).

> 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, 117-118, 363 N.E.2d 367 (1977)]; *see also Black's Law Dictionary* 1613-1614 (8th Ed.2004) (explaining that one acting in a wanton manner is aware of the risk of the conduct but is not trying to avoid it and is indifferent to whether harm results).

Id. at ¶ 32-33.

{¶ 31} Here, believing that the dispatch call demanded an immediate response, Officer Toth activated his overhead and rear passenger and driver side emergency lights and the "wail" siren mode while he was stopped at the red light. After the vehicle ahead of him moved to the right to allow him to pass him, he visually cleared the intersection of traffic before proceeding through it. This meant that he "looked in all directions and no vehicles were obstructing [his] view or coming towards [him] that would cause [him] to not proceed safely through the intersection." (Toth depo., p. 12.) Officer Toth believed that all traffic had stopped and that he could proceed safely through the intersection. As he accelerated through the intersection, he continued to look for other traffic for the safety of other drivers and himself. He was struck by Hale when he was almost through the intersection.

{¶ 32} Hale testified that she was heading northbound on Crocker Road. She had just picked up her dog from the groomer's and was heading to her mother's house. Hale's car windows were up, and she was talking to her husband on her cellphone via her car's Bluetooth system before the accident. Hale did not hear the siren until she was already in the intersection, and "seconds later, the air bags blew up in [her] face so simultaneously." (Hale depo., p. 54.) Hale further testified that

she could not recall if there was any southbound traffic through the intersection, nor if there were any other cars on the northbound side of Crocker Road. (Hale depo., p. 53, 56-57.) She did recall that the car in front of her had already gone through the light. (Hale depo., p. 56.)

{¶ 33} Based on the foregoing, there is no evidence in the record demonstrating that Officer Toth intentionally deviated from a clear legal duty or acted purposefully with knowledge of the likelihood of resulting injury. Likewise, there is no evidence that Officer Toth failed to exercise any care toward those to whom a duty of care is owed. Rather, the evidence demonstrates that Officer Toth exercised care when responding to the dispatch call. He activated his overhead, rear passenger, and driver side emergency lights and siren while he was stopped at the red light. After visually clearing the intersection, he entered the intersection and accelerated at a rate of 6 m.p.h., reaching a maximum speed of approximately 30 m.p.h. at the point of impact. While Officer Toth accelerated his vehicle, reaching a maximum accelerator pedal percentage of 99 percent at 2.5 seconds prior to the crash until .05 seconds before the crash, the maximum rate of his speed was approximately 30 m.p.h., which is under the posted speed limit of 35 m.p.h.

{¶ 34} Therefore, we find that there are no genuine issues of material fact and R.C. 2744.02(B)(1)(a) provides a full defense to Westlake for Officer Toth's accident with Hale.

ii. R.C. 2744.02(B)(5) — Expressly Imposed Civil Liability

{¶ 35} R.C.2744.02(B)(5) provides that "a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code." The General Assembly, however, stated that

> [c]ivil 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 a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

R.C. 2744.02(B)(5).

{¶ 36} Hale contends that R.C. 4511.03 and 2307.60 provide an exception to immunity under R.C. 2744.02(B)(5). R.C. 4511.03 requires the driver of an emergency vehicle to proceed cautiously past a red light and imposes criminal liability upon the offender. R.C. 2307.60 creates a civil cause of action for damages to anyone injured by a criminal act. Hale contends genuine issues of material fact exist as to whether Office Toth violated these sections and, as a result, Westlake is liable for Officer Toth's actions.

{¶ 37} However, the plain language of R.C. 2744.02(B)(5) requires a statute to "expressly impose" civil liability upon the political subdivision. Hale fails to support her argument with authority that R.C. 4511.03 and 2307.60 impose liability on Westlake. A plain reading of R.C. 4511.03 reveals that it does not apply to a "political subdivision" and does not impose "civil liability." Similarly, R.C. 2307.60

does not expressly impose civil liability on a "political subdivision." Therefore, the exception in R.C. 2744.02(B)(5) does not apply to the instant case.

{¶ 38} Based on the foregoing, we find that the evidence, when construed most favorably for Hale, does not raise any genuine issues of material fact that would defeat immunity for Westlake. Accordingly, we find that trial court erred by denying Westlake summary judgment on immunity grounds pursuant to R.C. 2744.02.

b. Officer Toth and Sgt. Urbanski

{¶ 39} Hale first contends that Officer Toth and Sgt. Urbanski are not entitled to immunity in their official capacities. We note that a complaint against an employee of a political subdivision in the employee's official capacity is an action against the entity itself and the employees are entitled to the same immunity due the political subdivision as set forth in R.C. 2744.02. *Lambert*, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585, at ¶ 1. Having found that Westlake is entitled to immunity under R.C. 2744.02, we likewise find that this immunity is extended to Officer Toth and Sgt. Hale in their official capacities. Our analysis, however, does not end here because Hale also contends that Officer Toth and Sgt. Urbanski are not entitled to immunity in their individual capacities.

{¶ 40} For claims against employees acting in an individual capacity, the three-tiered analysis used to determine whether a political subdivision is immune is not used. *Id.* at ¶ 10, citing *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 17. Instead, R.C. 2744.03(A)(6) provides that an employee is personally 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; [or] (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code."

{¶ 41} Thus, the degree of care in imposing liability for an employee of a political subdivision in his or her individual capacity is slightly different than the above-stated standard for the liability of a political subdivision. While a political subdivision has a full defense to liability when the conduct involved is not willful or wanton, the employee is immune if the conduct involved is not willful, wanton, or reckless. "By implication, an employee is immune from liability for negligent acts or omissions." *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at ¶ 23. In *Anderson*, the Ohio Supreme Court explained that 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. [*Thompson v. McNeill*, 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705 (1990)], adopting 2 Restatement of the Law 2d, Torts, Section 500 at 587 (1965); *see also Black's Law Dictionary* 1298-1299 (8th Ed.2004) (explaining that reckless conduct is characterized by a substantial and unjustifiable risk of harm to others and a conscious disregard of or indifference to the risk, but the actor does not desire harm).

Id. at ¶ 34.

{¶ 42} With regard to Officer Toth, Hale argues he was reckless for rapidly accelerating though a red light at the busiest intersection in Westlake during the busiest time of day while only chirping his siren. A review of the record, however,

reveals otherwise. There is no evidence demonstrating that Officer Toth's conduct exhibited a conscious disregard of an obvious risk. Rather, after turning on his lights and siren, Officer Toth waited for the vehicle in front of him to move to the right to allow him to pass and then visually cleared the intersection for safety before proceeding. The dash cam footage demonstrates that traffic was stopped on all sides before Officer Toth proceeded through the intersection. The fact that Officer Toth accelerated quickly is not improper under these circumstances. In light of the foregoing, it cannot be said that Officer Toth acted recklessly, wantonly, or willfully.

{¶ 43} Hale also argues that Officer Toth is not afforded immunity because he conspired with Sgt. Urbanski to avoid liability for his wanton, willful, and reckless conduct. There is no evidence in the record, however, indicating that Officer Toth conspired with Sgt. Urbanski with "malicious purpose, in bad faith, or in a wanton or reckless manner" to subject Hale to a traffic charge. Officer Toth averred that he provided a truthful statement regarding the accident in good faith and in furtherance of his duties and responsibilities as a Westlake police officer. Officer Toth did not discuss the contents of his statement with Sgt. Urbanski, nor was Sgt. Urbanski present when Officer Toth prepared his statement. Officer Toth further averred that he did not conspire with Sgt. Urbanski against Hale. As a result, there is no basis to deny Officer Toth of immunity in his individual capacity.

{¶ 44} With regard to Sgt. Urbanski, Hale argues that his conduct was wanton, willful, and reckless for conspiring with Officer Toth, creating a false police report, and concealing facts from his investigation. For the same reasons set forth

above, we likewise find that there is no evidence in the record indicating that Sgt. Urbanski conspired with Officer Toth with "malicious purpose, in bad faith, or in a wanton or reckless manner" to subject Hale to a traffic charge. Rather, the record reveals that Sgt. Urbanski did not conspire with anyone in the investigation and preparation of the crash report, he did not conceal any facts in his investigation, and he did not misrepresent any facts in his report as to Hale's culpability for the accident.

{¶ 45} Hale next argues Sgt. Urbanski is liable under R.C. 2307.60, which imposes civil liability for committing criminal conduct. Hale's complaint alleges that Sgt. Urbanski violated R.C. 2923.21(A)(1), (2), (7), and (11), which prohibits the sale of any firearm to a person under 18 years of age; sale of any handgun to a person under 21 years of age; and purchase or attempt to purchase any handgun with the intent to sell or furnish the handgun in violation of subsection (A)(2) or (A)(3). This statute is not applicable as there is no evidence in this case involving the sale of firearms or handguns. Furthermore, R.C. 2923.21(A)(11) does not exist. The statute only consists of subsections (A)(1)-(A)(7).

{¶ 46} Hale next alleges that Sgt. Urbanski violated R.C. 2913.31 (A)(1) and (2), which prohibit the forgery of any writing of another without the other person's consent and the forgery of any writing so that it purports to be genuine. The instant case does not involve the "forgery" of any writing by Sgt. Urbanski. Lastly, Hale alleges Sgt. Urbanski violated R.C. 2913.42(A)(1) and (2), which prohibit tampering

with records. Again, there is no evidence in the record demonstrating that Sgt. Urbanski tampered with any records related to the investigation.

{¶ 47} Sgt. Urbanski cannot be held liable under R.C. 2307.60 when the record demonstrates that he did not commit an underlying criminal offense. As with Officer Toth, there is no evidence in the record that Sgt. Urbanski acted willfully, with malicious purpose, or in a wanton or reckless manner when he conducted the investigation into the accident and completed his report of the investigation. Without such evidence, Hale has failed to rebut Sgt. Urbanski's entitlement to immunity and there is no basis to deny Sgt. Urbanski of immunity in his individual capacity.

{¶ 48} Therefore, when construing the foregoing evidence in a light most favorable to Hale, we find nothing to suggest that Officer Toth's and Sgt. Urbanski's actions were malicious, wanton, reckless, or in bad faith. Consequently, we find that the trial court erred by denying Officer Toth and Sgt. Urbanski summary judgment under R.C. Chapter 2744.

{¶ 49} Having found that summary judgment is proper on Hale's claims, we likewise find that Hale's loss of consortium claim fails as a matter of law. *Mota v. Gruszczynski*, 197 Ohio App.3d 750, 2012-Ohio-275, 968 N.E.2d 631, ¶ 24 (8th Dist.), citing *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 585 N.E.2d 384 (1992) (if the underlying tort claim fails on the merits, so does the loss-of-consortium claim).

{¶ 50} Accordingly, the first assignment of error is sustained.

III. Conclusion

{¶ 51} Because the errors alleged by defendants in their motion for judgment on the pleadings do not involve claims of immunity, this portion of the interlocutory appeal is not a final appealable order and cannot be addressed. We likewise cannot address the trial court's denial of summary judgment as it relates to Count 6 of Hale's complaint seeking a declaratory judgment that R.C. Chapter 2744 violates plaintiff's constitutional rights because it is also not a final appealable order. Furthermore, after construing the evidence most favorably for Hale, reasonable minds can reach only one conclusion — there are no genuine issues of material fact and the defendants are entitled to summary judgment as a matter of law. The record is devoid of any evidence demonstrating that any of the exceptions to immunity set forth in R.C. 2744.02(B) apply to expose Westlake to liability, and Officer Toth and Sgt. Urbanski acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 52} Accordingly, the trial court's judgment denying defendants' motion for summary judgment is reversed. The matter is remanded to the trial court with instructions to enter judgment in favor of the defendants based on the immunity provided in R.C. Chapter 2744 and to proceed on Count 6 (Declaratory Judgment) of Hale's complaint.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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MARY J. BOYLE, JUDGE

LISA B. FORBES, P.J., and
EILEEN T. GALLAGHER, J., CONCUR