To the Clerk: THIS IS A FINAL APPEALABLE ORDER. Please serve upon all parties not in default for failure to appear; Notice of the Judgment and its date or entry upon the Journal

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date May 1, 2019 Case No. 18CV194655

BETHANY ANDERSON, *et al.*
Plaintiff

Nicholas DiCello
Plaintiff's Attorney

VS

CITY OF WESTLAKE, *et al.*
Defendant

James Popson & James Climer
Defendant's Attorney

This matter is before the Court on the following dispositive motions:

Defendant, City of Avon, *et al.'s* ("Avon"), Motion For Summary Judgment, filed February 6, 2019; Plaintiffs, Bethany Anderson's, *et al.'s,* Brief in Opposition, filed March 7, 2019; and Avon's Reply In Support, filed March 19, 2019.

And; Defendant, City of Westlake, *et al.'s* ("Westlake"), Motion For Summary Judgment, filed February 1, 2019; Plaintiffs, Bethany Anderson's, *et al.'s,* Brief in Opposition, filed March 7, 2019; Westlake's Reply In Support, filed March 18, 2019; and Plaintiffs Notice Of Filing *Amended* Declaration in Support Of Brief In Opposition To Westlake's Motion For Summary Judgment, filed April 17, 2019.

THE COURT RULES THAT:

Defendants, Avon's, Motion For Summary Judgment is hereby well-taken and GRANTED.

Defendants, Westlake's, Motion For Summary Judgment is hereby well-taken and GRANTED.

See Judgment Entry. No Record.

Case closed; costs to Plaintiffs.

IT IS SO ORDERED.

JUDGE D. Chris Cook

cc: DiCello, Esq.
Popson, Esq.
Climer, Esq.

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I. INTRODUCTION

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Oral hearing had on April 16, 2019.

II. STATEMENT OF PERTINENT FACTS

OVERVIEW

The facts of this case that give rise to the claims are not in material dispute.

This matter involves a series of events that began in Avon Lake, Ohio, near the Sweetbriar Golf Course ("Sweetbriar") on Jaycox Road in Lorain County, Ohio, when an individual by the name of Brandon Pawlak ("Pawlak"), stole a white pick-up truck ("The Vehicle").

A high-speed pursuit ensued through Avon, Ohio, into Westlake, Ohio, where The Vehicle ultimately crashed into an establishment called the Dover Gardens Tavern ("The Tavern").

The seven named Plaintiffs were inside The Tavern when The Vehicle crashed into it and all were injured. Two, Anderson and Deutschendorf, were employees, five, Masterson, Bush, Comer, Leece, and Winter, were patrons.

THE DETAILS

On October 23, 2014, at approximately 8:50 p.m., separate Defendant, Avon Police Officer Patrick Neuhoff ("Neuhoff") learned that a white pick-up truck had had been stolen from Sweetbriar and was heading toward Avon, his jurisdiction.

Shortly thereafter, Neuhoff observed The Vehicle traveling southbound on Jaycox and attempted to initiate a traffic stop by activating his lights and sirens. A few seconds later, separate Defendant, Avon Police Officer, Andy Kehl ("Kehl") responded and fell in behind Neuhoff as a secondary pursuit vehicle. At the time of these events, separate Defendant, Sergeant Robert Olds ("Olds") was supervising Neuhoff and Kehl. [1]

Pawlak refused to stop The Vehicle and traveled approximately one mile south on Jaycox towards the intersection of Jaycox and Detroit Road in Avon. At the intersection, The Vehicle turned left (or east) onto Detroit Road and continued towards Westlake, Ohio.

As the chase proceeded towards Westlake, The Vehicle ran one red light and proceeded through six green lights as it approached Dover Center Road.

While the pursuit was in progress and heading towards Westlake, Westlake police officers, separate Defendants, Mark Arcuri ("Arcuri") and Nathan Fox ("Fox") learned of it and proceeded to the intersection of Detroit and Dover Center Roads.[2]

Arcuri parked his cruiser near the intersection and deployed stop sticks[3] in order to stop The Vehicle from proceeding further into Westlake. Fox also parked his cruiser near the intersection, slightly behind and to the east of Arcuri's. The officers left open a lane of travel for The Vehicle to proceed.

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[1] At some point during these events, Avon Police detained a second suspect and had him in custody.

[2] There is some question as to whether Westlake Police Department Pursuit Policy allowed for Arcuri and/or Fox to engage in the pursuit. Similarly, there is a question about whether they violated departmental policy in the manner in which they deployed stop sticks and Arcuri's alleged failure to operate his overhead lights.

[3] Stop sticks are tire deflation devices or spikes that puncture a vehicle's tires.

A few seconds before the pursuit terminated, Neuhoff and Kehl learned that Westlake police officers had deployed the stop sticks in the upcoming intersection.

As The Vehicle approached the Detroit and Dover Center intersection, it passed the Westlake officers' vehicles and stop sticks, lost control and crashed into The Tavern injuring the seven Plaintiffs.

From the time Arcuri and Fox learned of the pursuit until The Vehicle lost control, approximately two minutes and fifty-five seconds elapsed. From the time the pursuit began in Avon Lake, the entire incident lasted about five minutes and covered approximately five miles. Speeds were reached between 50 miles per hour and 80 miles per hour.

Separate Defendant, Westlake Police Officer William Eschenfelder ("Eschenfelder"), was the officer in charge of Arcuri and Fox during the time of these events. Eschenfelder did not give any orders or directions to Arcuri and/or Fox on how (or how not) to proceed.

III. LAW AND ANALYSIS

STANDARD OF REVIEW – SUMMARY JUDGMENT

The standard of review for summary judgment in Ohio is well-settled. The Ninth District Court of Appeals has recently stated the standard of review for summary judgment.

> This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court uses the same standard that the trial court applies under Civ.R. 56(C), viewing the evidence in the light most favorable to the nonmoving party and resolving any doubt in favor of the non-moving party. See *Viock v. StoweWoodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).
>
> Pursuant to 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. Citing, *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).
>
> *Petroskey v. Martin,* 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445, at ¶ 15.

> The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence of the type listed in Civ.R. 56(C). *Id.* at 292-293. If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Id.* at 293. The non-moving party may not rest upon the mere allegations or denials in their pleadings, but must point to or submit evidence of the type specified in Civ.R. 56(C). Id. at 293; Civ.R. 56(E). *Petroskey* at ¶ 16.
>
> Once the moving party satisfies this burden, the non-moving party has a reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial. * * * The non-moving party may not rest upon the mere allegations or denials in his pleadings, but instead must submit evidence as outlined in Civ.R. 56(C)." *Id.* at 293; Civ.R. 56(E). Additionally, expressions of speculation or assumptions in deposition testimony and affidavits are insufficient to sustain the non-movant's burden. See *Dailey v. Mayo Family Ltd. Partnership*, 115 Ohio App.3d 112, 117 (7th Dist.1996), *Messer v. Summa Health System,* 9th Dist. Summit No. 28470, 2018-Ohio-372, at ¶ 31.

STANDARD OF REVIEW - POLITICAL SUBDIVISION TORT LIABILITY

STATUTORY CONSTRUCTION

R.C. Chapter 2744, "Political Subdivision Tort Liability" provides the statutory framework for determining when and under what circumstances a political subdivision has liability for itself and the acts or omissions of its employees.

Specifically, R.C. 2744.02 proscribes liability for political subdivisions for governmental and proprietary functions in most situations,

> Except as provided in division (B) of this section, 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. R.C. 2744.02(A)(1).

As relates to this case, R.C. 2744.02(B)(1)(a) provides immunity for police officers acting within the scope of their duty while operating a vehicle in response to an emergency, as long as the officers conduct did not constitute "willful or wanton misconduct."

And, R.C. 2744.03(A)(3) is also instructive in that it provides for immunity where the political subdivision's employee (or employees) has discretion in carrying-out the employee's duties,

> The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

Liability may be re-imposed or immunity overcome where,

> The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A)(6)(b)

Similarly, R.C. 2744.03(A)(5) provides immunity where discretion is granted for the use of ". . . equipment, supplies, materials, personnel . . ." unless the judgment or discretion was exercised with " . . . malicious purpose, in bad faith, or in a wanton or reckless manner."

The parties appear to concede that Avon and Westlake are political subdivisions; that the officers involved were their employees; that the officers were engaged in a governmental function; that the officers were acting within the course and scope of their duties; and, that they had (at least some) amount of discretion to continue or call-off the pursuit.[4]

THE OHIO SUPREME COURT

The Ohio Supreme Court has, on numerous occasions, addressed the issue of political subdivision immunity relative to police chases and vehicular accidents including a series of cases decided over the last few years.

As this Court sees it, the seminal Supreme Court case regarding police chases and immunity is *Argabrite v. Neer,* 149 Ohio St.3d 349, 2016-Ohio-8374. The facts in *Argabrite* are chillingly similar to the facts in the case at bar. Argabrite was seriously injured when a vehicle being chased at high speeds by two separate law enforcement agencies[5] collided head-on with her vehicle. The fleeing suspect was killed – Argabrite

[4] There is evidence in the record that the Westlake offices may not have had discretion to participate in the chase and violated departmental policy by doing so and in the manner in which they deployed the stop sticks.

[5] Miami Township Police Department and Montgomery County Sheriff's Department.

was seriously injured. She claimed that the officers were not entitled to governmental immunity because their actions were willful, wanton, reckless or malicious.

In affirming the trial court's grant of summary judgment to the officers, the Supreme Court held, "there was no evidence that officers who engaged in high-speed pursuit of suspect acted with malicious purpose, in bad faith, or in a wanton or reckless manner, so as to lose statutory immunity."[6]

In reaching this conclusion, the court engaged in a comprehensive analysis of the application of R.C. 2744, immunity for political subdivisions, during high-speed police chases. The court first noted,

> As relevant here, an employee of a political subdivision is immune from liability *unless* the employee's acts or omissions were "with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b). This standard applies to law-enforcement officers just as it applies to other employees of political subdivisions. *See Fabrey v. McDonald Village Police Dept.,* 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994). *Argabrite,* at ¶ 7.

The court then discussed the nuanced differences between "wanton misconduct" and "reckless conduct,"

> We focus here on the phrase "wanton or reckless manner." This court has defined "wanton misconduct" as "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." (Emphasis added.) *Anderson,* 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at paragraph three of the syllabus. And we have defined "reckless conduct" as conduct "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.* at paragraph four of the syllabus. **These are rigorous standards that will in most circumstances be difficult to establish, especially with respect to a law-enforcement officer carrying out the statutory duty to arrest and detain a person violating the law**. *See* R.C. 2935.03(A)(1). *Argabrite,* at ¶ 8, emphasis added.

The court then reviewed the summary judgment standard and its application to a police chase,

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[6] *Argabrite,* Para. 2, syllabus.

> . . . we must determine whether, based on the evidence in the record, reasonable minds could conclude that any of the officers acted "with malicious purpose, in bad faith, or in a wanton or reckless manner" so as to preclude immunity. In doing so, we bear in mind that while many public employees face the potential for liability under R.C. 2744.03, **no other public employee faces the potential danger, violence or unique statutory responsibilities a law-enforcement officer faces**. Not only does Ohio law require an officer to arrest and detain a person who is violating the law, R.C. 2935.03(A)(1), it also subjects that officer to potential criminal liability for negligently failing to do so, R.C. 2921.44(A)(2). *Argabrite,* at ¶ 15, emphasis added.

The court went even further in discussing the unique responsibility that police officers have when chasing a fleeing suspect and affirmed that a high-speed chase alone is not sufficient to overcome immunity,

> An officer's role in our society creates a unique lens through which to view his or her actions and through which to determine whether those actions may have been malicious, in bad faith, wanton or reckless. We expect law-enforcement officers to protect the public, but that expectation need not mean that an officer must sit idly by while a suspect flees the scene of a crime, particularly when the suspect's flight itself endangers the general public further. **The danger of a high-speed chase alone is not enough to present a genuine issue of material fact concerning whether an officer has acted with a malicious purpose, in bad faith or in a wanton or reckless manner.** *Shalkhauser v. Medina,* 148 Ohio App.3d 41, 50–51, 772 N.E.2d 129 (9th Dist.2002). *Argabrite,* at ¶ 16, emphasis added.

The court then analyzed the conduct of each individual officer in light of the standards enunciated above and determined that ". . . the officers are entitled to judgment . . . because there is no evidence that the officers acted with malicious purpose, in bad faith or in a wanton or reckless manner." *Id.* at ¶ 17.

Interestingly, another fact present in *Argabrite* is at play herein. Plaintiffs allege that the Westlake officers violated departmental policy by 1) inserting themselves into the chase; and 2) by deploying the stop sticks in the manner they did. The allegation in *Argabrite* was that a sheriff's deputy violated the sheriff's department's pursuit policy.

This Court agrees, at least when viewing the facts in a light most favorable to Plaintiffs, that there is evidence that the Westlake officers violated departmental policy. This determination, however, is not dispositive.

The *Argabrite* court addressed this issue thus,

> A violation of departmental policy, however, does not equate to per se recklessness. *Anderson,* 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at ¶ 37. Recklessness requires knowledge by the actor that his "conduct will in all probability ***355*** result in injury." *O'Toole v. Denihan,* 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, paragraph three of the syllabus. Without evidence of that knowledge, evidence of a policy violation demonstrates negligence, at best. *Argabrite* at ¶ 21.

And,

> Assuming, for purposes of summary judgment, that DiPietro violated the department's pursuit policy, as Argabrite's experts contend, evidence of a violation of departmental policy does not create a genuine issue of material fact as to whether the violator acted with malicious purpose, in bad faith or in a wanton or recklessness manner without evidence that the violator was aware that his "conduct [would] in all probability result in injury." *O'Toole,* 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, at paragraph three of the syllabus. *Argabrite,* at ¶ 25.

And finally,

> "even if there is a factual question that as to whether either Neer or Stites violated their pursuit policy, there is no evidence to conclude that either knew that the violation would probably cause someone injury." ***357*** 2015-Ohio-125, 26 N.E.3d 879, at ¶ 25. *Argabrite,* at ¶ 30.

A few years earlier, in *Anderson v. City of Massillon,* 134 Ohio St.3d 380, 2012-Ohio-5711, the Supreme Court clarified the distinctions between "willful," "wanton," and "reckless," conduct and found no liability on behalf of the City of Massillon or two of its firefighters when their fire truck collided with a vehicle in an intersection killing the vehicle's occupants.

Again finding that the plaintiff in that case failed to present any evidence that the firefighters ". . . had acted with malicious purpose, in bad faith, or in a wanton or reckless manner," the high court upheld the trial court's grant of summary judgment.

As to the political subdivision's liability, the *Anderson* court noted,

> . . . the General Assembly set forth different degrees of care that impose liability on a political subdivision or on an employee of a political subdivision. The legislature expressly stated that a political subdivision has a full defense to liability when the conduct involved is not willful or wanton, and therefore, if the conduct is only reckless, the political subdivision has a full defense to liability. In addition, the legislature expressly removed immunity from employees of a political subdivision for wanton or reckless conduct in R.C. 2744.03(A)(6)(b). By implication, an employee is immune from liability for negligent acts or omissions. *Anderson,* at ¶ 23.

Confirming that the three standard of care terms, willful, wanton, and reckless, are not interchangeable, the court said,

> . . . as the historical development of these terms in our jurisprudence demonstrates, "willful," "wanton," and "reckless" describe different and distinct degrees of care and are not interchangeable. * * * *Anderson,* at ¶ 31.
>
> 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. * * * *Anderson,* at ¶ 32.
>
> 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,* 50 Ohio St.2d at 117–118, 363 N.E.2d 367; *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). *Anderson,* at ¶ 33.
>
> 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,* 53 Ohio St.3d at 104–105, 559 N.E.2d 705, 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). *Anderson,* at ¶ 34.

Moreover, the *Anderson* court promulgated the concept that the violation of a departmental policy is not *per se* willful, wanton, or reckless conduct, which was reiterated, obviously, in *Argabrite, supra,*

> Further, it is well established that the violation of a statute, ordinance, or departmental 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,* at ¶ 37.

THE NINTH DISTRICT COURT OF APPEALS

The Ninth District Court of Appeals has also addressed the issue of political subdivision immunity in a number of tort cases, including cases involving police pursuits.

In a very factually similar case, *Shalkhauser v. City of Medina,* 148 Ohio App.3d 41, 2002-Ohio-222, the Ninth District affirmed summary judgment granted to the city and a police officer.[7]

In *Shalkhauser,* a Medina police officer attempted to stop a vehicle that was driving erratically and whose owner had an outstanding arrest warrant. As the officer attempted to initiate a traffic stop, the vehicle accelerated and began to flee. Other members of the Medina Police Department joined the pursuit as did the county sheriff's officers. The pursuit lasted for approximately eleven minutes at speeds in excess of eighty-five miles per hour. The pursuit ended when the fleeing vehicle collided with the plaintiff causing him serious injuries.

The Ninth District analyzed the three-step process a trial court must undergo when determining if the affirmative defense of immunity is available,

> Determining whether a political subdivision is immune from liability requires a three-tier analysis. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610. The starting point is the general rule that political subdivisions are immune from tort liability:
>
> * * *
>
> At the second tier, this comprehensive immunity can be abrogated pursuant to any of the five exceptions set forth at R.C. 2744.02(B). Finally, immunity lost to one of the R.C. 2744.02(B) exceptions may be reinstated if the political

[7] See also: *Wagner v. Heavlin* (2000), 136 Ohio App.3d 719, at 729.

subdivision can establish one of the statutory defenses to liability. *Cater,* 83 Ohio St.3d at 28, 697 N.E.2d 610. *Shalkhauser,* at ¶ 14, 16.

As to the political subdivisions immunity, the court held,

> Assimilating the foregoing provisions, summary judgment on the issue of the city's immunity is proper if reasonable minds could only conclude that (1) [the] Officer was responding to an emergency call, and (2) [the officer's] operation of his patrol car did not constitute willful or wanton misconduct.

As did the Supreme Court in *Argabrite,* the Ninth District noted a police officer's duty to apprehend reckless motorists,

> This court has previously stated: "It is the duty of law enforcement officials who observe reckless motorists to apprehend those motorists who make the highways dangerous to others. * * * *Shalkhauser,* at ¶ 25.

Regarding the political subdivision's liability, the *Shalkhauser* court stated the following,[8]

> The blanket immunity conferred by R.C. 2744.02(A)(1) in connection with governmental functions therefore applies to the decisions to initiate and continue the pursuit, as one governmental function of the city is "the provision of police services or protection and the regulation of the use of public roads and streets, including the regulation of traffic thereon. * * * *Shalkhauser,* at ¶ 28.

And, with regard to immunity for employees of political subdivision, the *Shalkauser* court held,

> R.C. 2744.03(A)(6) sets forth the circumstances under which employees of political subdivisions are immune from civil liability. In order to defeat summary judgment on his claim against [the] Officer under this statute, appellant must show some genuine issue of material fact as to whether [the] Officer acted with "malicious purpose, in bad faith, or in a wanton or reckless manner. * * * *Shalkauser,* at ¶ 30.

Finally, the court defined malice, bad faith, and reckless as follows,

> 'Malice' refers to the willful and intentional design to do injury. *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453, 602 N.E.2d 363. 'Bad

[8] See also: *Gilliam v. Vaughn's Auto Repair & Lorain County Sheriff,* 9th Dist. Lorain No. 18CA011340, 2019-Ohio-1392, at ¶ 5.

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.* at 454, 602 N.E.2d 363, quoting *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, 21 O.O.2d 420, 187 N.E.2d 45, paragraph two of the syllabus. 'Reckless' conduct refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that this risk is greater than that necessary to make the conduct negligent. * * * *Shalkhauser,* at ¶ 37.

ANALYSIS

CITY OF AVON & ITS THREE OFFICERS

The City of Avon, Ohio, seeks summary judgment for the municipality and its police officers. Avon argues that Plaintiffs cannot show that the officers acted in a willful or wanton manner such that immunity should be denied to the city nor can Plaintiffs show that the officers acted with malicious purpose, in bad faith, or in a wanton or reckless manner, such that immunity should be denied to them individually.

This Court agrees.

After reviewing the record in the light most favorable to Plaintiffs, I conclude that there are no genuine issues of material fact remaining and that the officers are entitled to judgment as a matter of law because there is no evidence that the officers acted with malicious purpose, in bad faith or in a wanton or reckless manner. The officers are therefore entitled to immunity under R.C. 2744.03(A)(6)(b) and to summary judgment.

The Court will address each officer, and the evidence related to his conduct, in turn.

I begin with Avon Police Department Officer Neuhoff who learned on October 23, 2014 at about 8:50 p.m., that a truck (The Vehicle) had been stolen from Sweetbriar Golf Club in Avon Lake, Ohio.

Neuhoff observed The Vehicle traveling southbound on Jaycox Road towards Avon so he activated his overhead lights and siren in order to effect a traffic stop. Despite being directed to stop, The Vehicle continued south on Jaycox for about one mile towards Detroit Road in Avon.

The evidence demonstrate that Neuhoff was following The Vehicle at a reasonable distance, that The Vehicle passed three vehicles on Jaycox, and that the driver of The Vehicle (Pawlak) activated The Vehicle's four-way hazards.

The Vehicle then proceeded to drive through a red light eastbound onto Detroit Road by going over the curb and through some landscaping. Neuhoff slowed his vehicle to allow motorists to proceed through the intersection in front of him and gave way to Officer Kehl to assume the lead position.

During the pursuit, Neuhoff observed that The Vehicle ran one red light on Detroit at Nagel Road and passed several vehicles without striking them or causing any accidents. He also observed that The Vehicle slowed at intersections, slowed in a construction zone, and evaded other motorists while keeping its four-way hazards active.

Officer Kehl became involved shortly after Neuhoff activated his lights and sirens by joining the pursuit as the second police vehicle. Kehl fell behind Neuhoff as the pursuit went down Jaycox and took over as lead vehicle once on Detroit.

Kehl made similar observations that Neuhoff did as to the operation of The Vehicle.

The officers testified that speeds reached between 50 and 80 miles per hour at times but were mostly in the lower range; that the pursuit occurred at night and that there were few motorists on the road and no pedestrians were observed; that the roads were relatively straight and flat; and, the roads were illuminated by streetlamps.[9]

Seconds before the pursuit terminated, Neuhoff and Kehl learned through dispatch that Westlake officers with stop sticks were setting-up at an upcoming point in the road.

The pursuit lasted a total of less than five minutes and covered an area of about five miles.

Sergeant Olds, the Avon officer in charge that evening, monitored the pursuit. After clearing a traffic stop at another location, Olds started driving towards the vicinity of the pursuit. He monitored the radio traffic and did not order the pursuit terminated.

Both officers engaged the pursuit at a reasonably safe distance, at reasonable speeds (for the conditions and circumstances), and made numerous efforts minimize risk to the public and other motorists. They properly and rationally balanced their duty to protect the public, apprehend felons, and arrest and detain the operator of The Vehicle while subjecting the public to as little danger as possible.

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[9] The parties submitted a copy of both Neuhoff's and Kehl's dash cam videos into evidence that show with striking clarity the entirety of the pursuit. The video footage collaborates the officer's testimony of the conditions and events generally. Both parties stipulated that the Court should watch the video for the purpose of determining the pending motions.

In the case at bar, the record contains no evidence that any one of the three Avon officers, Neuhoff, Kehl, or Olds, were violating departmental policy or that their actions in maintaining the pursuit would in all probability result in injury to the Plaintiffs; Plaintiffs, it should be noted, were not on the roadway but in a building adjacent to Detroit Road.

Moreover, the record is wholly devoid of any evidence that the officers acted with malice, that is, "with a willful intention to do injury." *Shalkhauser* at ¶ 37. Similarly, there is no evidence in the record that the Avon officers acted in bad faith. They were attempting to do their job, that is, stop a fleeing felon - hardly a "dishonest purpose . . . conscious wrongdoing, or breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." *Id.*

Finally, this Court finds no evidence of reckless conduct, though admittedly, this standard is a closer call. In order to find that the Avon officers acted recklessly, this Court would have to point to some evidence in the record that demonstrates that the officers ". . . consciously disregarded or were indifferent to a known or obvious risk of harm to another that [was] unreasonable under the circumstances and *is substantially greater than negligence.*" *Argabrite,* at ¶ 8, emphasis added.

Arguably, the Avon officers may have been negligent in engaging in the pursuit or in not terminating it (at some point). But negligence is not the standard of review, recklessness is. As noted by the Ohio Supreme Court, "**These are rigorous standards that will in most circumstances be difficult to establish, especially with respect to a law-enforcement officer carrying out the statutory duty to arrest and detain a person violating the law.**" *Id.*, emphasis added.

Accordingly, this Court concludes that no reasonable juror could find that any of the three Avon officers acted with malicious purpose, in bad faith or in a reckless manner. All three are therefore entitled to immunity.

Similarly, and for the same reasons noted above, this Court finds that there is no evidence in the record that the three Avon officers acted in a wanton manner.

Recall that wanton conduct is defined as "the failure to exercise *any* care towards one to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Id.* Clearly, the record is replete with examples of Neuhoff and Kehl exercising care while engaged in the pursuit and there is no evidence in the record that as a direct and proximate result of the pursuit there was a "great probability" that harm would result.

As such, like the individual officers, the City of Avon is also entitled to immunity.[10]

THE CITY OF WESTLAKE

The City of Westlake also seeks summary judgment for the same reasons, and on the same basis, as Avon.

Admittedly, the decision as to Westlake is a closer call, primarily because of the allegations that the Westlake officers violated a number of departmental policies regarding pursuits and the use of stop sticks.

As before, the Court will address each officer, and the evidence related to his conduct, in turn.

We begin with Officers Arcuri and Fox.

Westlake Police Officers Arcuri and Fox were in the Westlake Police Department's records room when Westlake dispatch received a call from Avon regarding the pursuit.

As soon as they received the dispatch, Arcuri and Fox both left the radio room and proceeded to go to their cruisers to respond. After some initial confusion as to the location of the pursuit, dispatch advised the officers that it was on Detroit Road (not I-90) heading into Westlake. During this time, Arcuri and Fox both believed that The Vehicle intended to enter I-90 at the Crocker Road on-ramp to the west of their position.

In order to prevent The Vehicle from traveling past Dover Center Road towards the more populous area located to the east, the Columbia Road intersection, Arcuri decided to use stop sticks in at the Detroit-Dover Center intersection in order to stop The Vehicle.

Arcuri positioned his cruiser facing westbound in the center turn lane near the Detroit-Dover intersection. As The Vehicle approached in the westbound lane, Arcuri deployed the stop sticks seconds before it passed him.

Meanwhile, Fox, who was located east and behind of Arcuri, also intended to deploy stop sticks, but was unable to do so.

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[10] This Court reviewed Plaintiffs' expert report, prepared by Charles W. Drago and attached to their Brief In Opposition at Exhibit "5." The Court does not find this expert's report compelling nor does it cite to any *specific* departmental policy that was violated. It merely opines that in Mr. Drago's opinion, the Avon Officers should have discontinued the chase. None of Mr. Drago's conclusions create a question of fact. See: *Shalkhauser, supra*; *Hackathorn v. Preisse,* 104 Ohio App.3d 768 (1995), and their progeny.

After passing Arcuri's cruiser and apparently striking the stop sticks[11], The Vehicle began to fishtail and ultimately lost control. About 500 feet later, it went off the road and crashed into The Tavern injuring the Plaintiffs.

From the time Arcuri and Fox received the Avon dispatch about the pursuit until the crash, approximately two minutes and fifty five seconds elapsed.

Regarding Westlake Officer Lt. Eschenfelder's involvement, he was the supervisor over Arcuri and Fox as these events unfolded. He did not instruct Arcuri or Fox to engage in the pursuit nor did he instruct them to use stop sticks. It appears from the evidence that he did not give any instructions to Arcuri or Fox and tacitly acquiesced to their conduct.

Like the situation involving the Avon Officers, the record contains no evidence that any one of the three Westlake officers, Arcuri, Fox, or Eschenfelder, knew or should have known that the pursuit would in all probability result in injury to the Plaintiffs.

Moreover, the record is wholly devoid of any evidence that the officers acted with malice, that is, "with a willful intention to do injury." *Shalkhauser* at ¶ 37. Similarly, there is no evidence in the record that the Westlake officers acted in bad faith. Like their Avon counterparts, the Westlake officers were attempting to do their job, that is, stop a fleeing felon - hardly a "dishonest purpose . . . conscious wrongdoing, or breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." *Id.*

Finally, this Court finds no evidence of reckless conduct, though admittedly, this standard is a closer call, particularly in light of the fact that there is evidence that the Westlake officers violated departmental policy in three ways, to wit: engaging in the pursuit, deploying stops sticks in the manner they did, and Arcuri's failure to have his overhead lights active.

Nevertheless, in order to find that the Westlake officers acted recklessly, this Court would have to point to some evidence in the record that demonstrates that the officers ". . . consciously disregarded or were indifferent to a known or obvious risk of harm to another that [was] unreasonable under the circumstances and *is substantially greater than negligence.*" *Argabrite,* at ¶ 8, emphasis added.

Again, arguably, the Westlake officers may have been negligent in attempting to stop the pursuit and may have been negligent in deploying stop sticks in the manner they did. This is particularly so given that Westlake Police Policy regarding pursuits in this situation appears to prohibit officers from engaging pursuits of this nature. And, it does

[11] The evidence is unclear, but it does not appear that the stop sticks actually punctured The Vehicle's tires.

appear that Arcuri did not deploy the stop sticks in a proper manner or have his overhead lights active.

Nevertheless, even if Arcuri and Fox violated departmental policy by their actions to stop The Vehicle, that fact alone is not fatal to their claimed immunity.

Recall that the Supreme Court has addressed this very issue in *Anderson, supra* and its progeny and most recently in *Argabrite*,

> A violation of departmental policy, however, does not equate to per se recklessness. * * * evidence of a policy violation demonstrates negligence, at best. *Id.* at ¶ 21.

And,

> Assuming, for purposes of summary judgment, that DiPietro violated the department's pursuit policy, as Argabrite's experts contend, evidence of a violation of departmental policy does not create a genuine issue of material fact as to whether the violator acted with malicious purpose, in bad faith or in a wanton or recklessness manner without evidence that the violator was aware that his "conduct [would] in all probability result in injury." *Id.* at ¶ 25.

And finally,

> "even if there is a factual question that as to whether either Neer or Stites violated their pursuit policy, there is no evidence to conclude that either knew that the violation would probably cause someone injury." *Id.* at ¶ 30.

Similar to *Argabrite* (and the expert in *Shalkhauser*), Plaintiffs' expert also opines that Arcuri failed to properly deploy the stop sticks[12] and failed to follow Westlake Policy by improperly positioning his vehicle in the intersection thereby creating a "roadblock."[13] (Interestingly, the Report is silent as to Arcuri and Fox's involvement in the pursuit to begin with and Arcuri's failure to activate his lights, points relied-upon heavily by Plaintiffs.)

Regardless, this Court cannot conclude, and Arcuri does not concede, that his conduct would "in all probability result in injury." Arcuri testified that he was aware that The Vehicle was likely ". . . to swerve into oncoming traffic, or into residential properties and/or would lose control . . ." and that he "wasn't surprised" when The Vehicle lost control and crashed. These admissions, however, are hardly illuminating. After all, the

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[12] See Report of Bethany Capasso, Exhibit "6," attached to Plaintiffs' Brief In Opposition, Paragraphs 42-63

[13] *Id.* at Paragraphs 64-67.

entire purpose of the stop sticks is to puncture a vehicle's tires which obviously will result in the loss of vehicular control.

Moreover, Arcuri's acknowledgment that his conduct in deploying the stop sticks or parking near the intersection would likely cause The Vehicle to crash *is not* tantamount to an admission that he knew it would probably cause someone injury.

Again somewhat interestingly, Plaintiffs reference Arcuri's prior use of stop sticks on I-90[14] that resulted in a vehicle losing control and ending-up in a ravine off the side of the freeway. It appears when reading between the lines, however, that that deployment *did not* result in injury.[15]

Regardless of the foregoing, and even conceding that the Westlake Officers (especially Arcuri) may have been negligent, that determination does not abrogate their immunity.

As noted above, negligence is not the standard of review, recklessness is. The Ohio Supreme Court has repeatedly stated, and this Court cannot emphasize enough, "**These are rigorous standards that will in most circumstances be difficult to establish, especially with respect to a law-enforcement officer carrying out the statutory duty to arrest and detain a person violating the law.**" *Agrabrite* at ¶ 8, emphasis added.

In reaching this conclusion, most compelling to this Court are two factors: 1) Arcuri and Fox had a total of less than *three minutes* in order to decide what to do; and 2) their primary concern was that the pursuit would enter the Columbia/Detroit intersection and surrounding area, heavily populated with vehicular traffic and business. There is simply no evidence that they "consciously disregarded or were indifferent to known or obvious risk of harm . . ." Instead they made a conscious, split-second decision to try to stop The Vehicle from reaching the Columbia/Detroit Road area. That decision, while open to being second-guessed, was not unreasonable under the circumstances.

Accordingly, this Court concludes that no reasonable juror could find that any of the three Westlake officers acted with malicious purpose, in bad faith or in a reckless manner. All three are therefore entitled to immunity.

Similarly, and for the same reasons noted above, this Court finds that there is no evidence in the record that the three Westlake officers acted in a wanton manner.

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[14] See Page 7 of Plaintiffs' Brief In Opposition.

[15] The Court reaches this conclusion only because Plaintiffs' do not allege any injuries resulting from that incident; a point they surely would have made had injuries resulted.

Recall that wanton conduct is defined as "the failure to exercise *any* care towards one to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Id.* The record demonstrates that the roadway where Arcuri and Fox positioned their cruisers was relatively straight, with only a slight bend; that the officers noted that there were not many people near the location as the incident unfolded; and, that while there were some businesses near the area, they were set back from the roadway; finally, the officers were aware and considered that further east from their location, where The Vehicle was heading, was a major intersection (Detroit and Columbia Roads) with a shopping plaza, multiple restaurants, and other stores.

While the decision to park their cruisers near the intersection[16] and deploy stop sticks may not have been well-planned or properly executed and may have even been negligent – it does not rise to the level of culpability necessary to overcome immunity.

As such, this Court cannot conclude that the Westlake Officers failed to exercise any care at all in determining to stop The Vehicle, in setting-up their vehicles on the roadway, and in the decision to deploy stop sticks. Accordingly, there is no evidence in the record that as a direct and proximate result of the Westlake Officer's actions, there was a "great probability" that harm would result.

To that end, like the individual officers, the City of Westlake is also entitled to immunity.

IV. CONCLUSION

To be fair, there are perhaps no more difficult decisions that a trial court faces when ruling on a motion for summary judgment than those occasioned by the factual situation posited herein.

The competing societal interests are manifest.

On the one hand, we task our police officers with the duty to serve and protect us, to apprehend criminals, and to keep our roads and communities safe. This responsibility is rife with opportunities for tragic results. Despite their ongoing training, ever-improving equipment, and best intentions, police officers are still human beings tasked with making life and death decisions, often in seconds.

We expect that those decisions be made based upon all of the training, factors, and information currently available to the officers and we are understandably reluctant to second-guess their judgment with the benefit of hindsight.

[16] As they left clear a lane of travel, contrary to Plaintiffs' argument Arcuri and Fox did not create a roadblock.

Nevertheless, police officers, like all members of society, must be held to certain standards and accountable when they fall short of them.

Police officers wield tremendous power and authority in our communities. They carry weapons, can arrest and restrain an individual's liberty, and they can cause serious injury or death by the decisions they make.

Recognizing this paradox, the General Assembly has crafted a statutory calculus to take into account these competing interests and the courts have applied these standards accordingly.

In general, municipalities and individual police officers are cloaked in immunity for their on the job activities while at the same time being liable, and losing that immunity, for conduct that rises to the level of malicious, bad faith, willful, wanton, or reckless misconduct.

The upshot of this trade-off is that we give officers wide latitude in order to carry out their duties, to protect us, and to apprehend criminals even in difficult or compromising situations and, even where that latitude results in injustice to innocent injured citizens.

Such is the situation here. The Plaintiffs were injured by the wanton, criminal misconduct of Pawlak by fleeing from the police and placing himself, the Plaintiffs, the officers, and the community in harm's way.

But this result, as unfortunate as it is, must yield to the greater flexibility embodied in the law for police officers to do their jobs.

As emphasized by Defendants, and recited in many cases, the imposition of a bright-line rule that requires the termination of all high-speed police pursuits on the basis that they could, or even likely will, result in injury to innocent third-parties is untenable. Such a rule would incentivize lawlessness and create additional motivation for any fleeing suspect to simply "speed away" to avoid apprehension.

Regardless of the harsh result this and similar decisions bring, the Court has no choice but to apply the facts at hand to the statutes and precedent that are controlling and to grant judgment to the officers and their respective communities.

Accordingly, after review of the pleadings and extensive briefing, the Affidavits and other Civ. R. 56(E) materials, including the expert reports and dashcam video, perusal of Civ. R 56(C) as well as the relevant case law supplied by the parties and Court, the Court finds the following:

Defendants, Avon's, Motion For Summary Judgment is hereby well-taken and GRANTED.

Defendants, Westlake's, Motion For Summary Judgment is hereby well-taken and GRANTED.

Case closed; costs to Plaintiffs.

JUDGE D. Chris Cook

THIS IS A FINAL APPEALABLE ORDER