Case Nos. 06-1528 and 06-1589

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
GREENE COUNTY, OHIO
CASE NO. 2005 CA 0099

DOTTIE HUBBELL,
Plaintiff-Appellee,

v.

CITY OF XENIA, OHIO
Defendant-Appellant.

APPELLANT'S LIST OF SUPPLEMENTAL AUTHORITY

LYNNETTE BALLATO (0065455)
Counsel of Record
TABITHA JUSTICE (0075440)
SUBASHI, WILDERMUTH & BALLATO
The Oakwood Building
2305 Far Hills Avenue
Dayton, Ohio 45419
(937) 534–0500 (phone)
(937) 534–0505 (fax)

Counsel for Appellant, City of Xenia, Ohio

MICHAEL P. MCNAMEE, ESQ.
GREGORY B. O'CONNOR, ESQ.
MCNAMEE & MCNAMEE, PLL
2625 Commons Boulevard
Beavercreek, OH 45431
(937) 427-1367 (phone
(937) 427-1369 (fax)
Counsel for Appellee, Dottie Hubbell

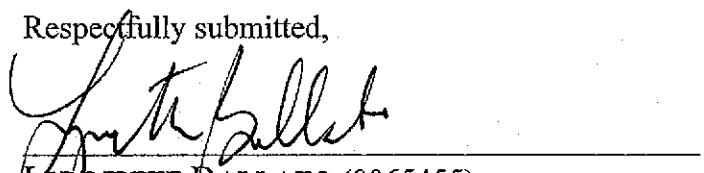
FILED
MAY 11 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

LIST OF SUPPLEMENTAL AUTHORITY

1. *Chesher v. Neyer* (6th Cir. 2007), 477 F.3d 784, 2007 WL 494965 (attached hereto); and

2. *Scott vs. Harris* (2007), 550 U.S. _____, 2007 WL 1237851 (attached hereto).

Respectfully submitted,



LYNNETTE BALLATO (0065455)
Counsel of Record
TABITHA JUSTICE (0075440)
SUBASHI, WILDERMUTH & BALLATO
The Oakwood Building
2305 Far Hills Avenue
Dayton, Ohio 45419
(937) 534–0500 (phone)
(937) 534–0505 (fax)
Counsel for Appellant, City of Xenia, Ohio

Proof of Service

I certify that a copy of this List of Supplemental Authority sent by ordinary U.S. mail to the following counsel on May 10th, 2007:

Michael P. McNamee, Esq.
Gregory B. O'Connor, Esq.
McNamee & McNamee, PLL
2625 Commons Boulevard
Beavercreek, OH 45431
Attorney for Appellee/Plaintiff

Greg Scott, Esq.
Scott, Scriven & Wahoff, LLP
50 West Broad Street, Suite 2600
Columbus, OH 43215
Amicus curiae for Ohio School Boards Association

Barry Byron, Esq.
Byron & Byron Co., LPA
Interstate Square Building I
4230 State Route 306
Willoughby, OH 44094
Amicus curiae for Ohio Municipal League

Frank H. Scialdone, Esq.
Mazanec, Raskin & Ryder Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
Amicus curiae for City of Circleville

LYNNETTE BALLATO
Counsel for Appellant, City of Xenia, Ohio

f:\^client files\hylant\xenia-hubbell\pldgs\supreme ct\supplemental authority.revised.doc

H
Chesher v. Neyer
C.A.6 (Ohio),2007.
2006 FED. App. 0063P
United States Court of Appeals,Sixth Circuit.
Jacqueline CHESHER et al., Plaintiffs-Appellees,
v.
Tom NEYER et al., Defendants,
Carl L. Parrott, Jr., M.D. (05-4256); Jonathan Tobias, M.D. (05-4257); Gary Utz, M.D. (05-4273); Terry Daly (05-4274); Robert Pfalzgraf, M.D.(05-4275); Hamilton County, Ohio (05-4332), Defendants-Appellants.
Nos. 05-4256, 4257, 4273, 4274, 4275, 4332.

Argued: Dec. 5, 2006.
Decided and Filed: Feb. 16, 2007.

Background: Family members of deceased relatives held in county's custody at county morgue brought action alleging § 1983 and state law claims against county, its employees, and photographer for either permitting or engaging in practice of posing, disrupting, and photographing remains of their relatives, and for illegally releasing crime scene photographs and autopsy photographs of their relatives to the public. The United States District Court for the Southern District of Ohio, Arthur Spiegel, Senior District Judge, 392 F.Supp.2d 939, denied employees' motion for summary judgment, and interlocutory appeal was taken.

Holdings: The Court of Appeals, Ronald Lee Gilman, Circuit Judge, held that:

(1) Court of Appeals had jurisdiction over interlocutory appeals brought by morgue employees;

(2) county morgue administrative aide was not entitled to immunity;

(3) county coroner's alleged conduct fell within the scope of his employment for purposes of Ohio's statutory immunity exception for acts manifestly outside the scope of employment;

(4) county coroner was not entitled to immunity;

(5) deputy chief coroner was not entitled to immunity; and

(6) county coroner's staff pathologist was not entitled to immunity.

Affirmed and remanded.

Rogers, Circuit Judge, concurred in part, dissented in part, and filed opinion.
West Headnotes
[1] Federal Courts 170B ⚷595

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk595 k. Summary Judgment; Judgment on Pleadings. Most Cited Cases
An order denying summary judgment is not ordinarily a final, appealable decision.

[2] Federal Courts 170B ⚷574

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk574 k. Other Particular Orders. Most Cited Cases
The "collateral order doctrine" provides that a

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

district court's denial of qualified immunity is an appealable final decision to the extent that it turns on an issue of law. 28 U.S.C.A. § 1291.

[3] Federal Courts 170B ⚷574

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk574 k. Other Particular Orders. Most Cited Cases
In the context of a diversity case or a federal-question action involving pendent state-law claims, the question of whether an interlocutory order denying immunity under state law is appealable turns on the nature of the immunity at issue. 28 U.S.C.A. § 1291.

[4] Federal Courts 170B ⚷574

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk574 k. Other Particular Orders. Most Cited Cases
An order denying statutory immunity is immediately appealable only if the state law provides immunity from suit, as opposed to immunity simply from liability. 28 U.S.C.A. § 1291.

[5] Appeal and Error 30 ⚷68

30 Appeal and Error
30III Decisions Reviewable
30III(D) Finality of Determination
30k67 Interlocutory and Intermediate Decisions
30k68 k. In General. Most Cited Cases
Under Ohio law, an amendment making a denial of immunity immediately appealable applies only prospectively to claims accruing after the effective date of the amendment. Ohio R.C. § 2505.03(A).

[6] Limitation of Actions 241 ⚷31

241 Limitation of Actions
241I Statutes of Limitation
241I(B) Limitations Applicable to Particular Actions
241k31 k. Injuries to the Person. Most Cited Cases
Under Ohio law, causes of action for emotional distress accrue not when the underlying activity occurs, but rather when the plaintiff suffers emotionally by learning of it.

[7] Federal Courts 170B ⚷770

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk768 Interlocutory, Collateral and Supplementary Proceedings and Questions
170Bk770 k. On Separate Appeal from Interlocutory Judgment or Order. Most Cited Cases
Court of Appeals had jurisdiction over interlocutory appeals brought by morgue employees with respect to infliction-of-emotional-distress claims brought by family members of deceased relatives held in county's custody at county morgue alleging that employees engaged in the practice of posing, disrupting, and photographing remains of their relatives and by those families whose relatives were housed in the morgue during the time the offending photographs were taken; Court of Appeals had interlocutory jurisdiction over the majority of the class's emotional-distress claims and all plaintiffs were similarly situated for purposes of resolving the immunity issues presented.

[8] Counties 104 ⚷93

104 Counties
104III Officers and Agents
104k87 Duties and Liabilities
104k93 k. Agents and Employees. Most Cited Cases
County morgue administrative aide was not entitled to immunity under Ohio political subdivision tort liability statute for his alleged role in cooperating

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

with photographer to photograph the deceased with a variety of props with goal of publishing a coffee table book; if true, the record would permit a jury finding that his conduct fell within the exception for wanton or reckless conduct. Ohio R.C. § 2744.03(A)(6)(b).

[9] Coroners 100 ⚷23

100 Coroners
100k23 k. Liabilities for Negligence or Misconduct. Most Cited Cases
County coroner's alleged conduct of involving photographer in his reelection campaign, seeking out and directing photographer's work in an effort to create an instructional video, and receiving a Christmas card and ham for the Coroner's Office holiday party fell within the scope of his employment under Ohio's statutory immunity exception for acts manifestly outside the scope of employment, for purposes of intentional-infliction-of-emotional-distress claims brought by relatives of deceased who were photographed in the morgue without permission. Ohio R.C. § 2744.03(A)(6)(a).

[10] Coroners 100 ⚷23

100 Coroners
100k23 k. Liabilities for Negligence or Misconduct. Most Cited Cases
County coroner was not entitled to immunity under Ohio political subdivision tort liability statute for his alleged role in cooperating with photographer to photograph the deceased with a variety of props with goal of publishing a coffee table book, allegedly knowing of the photographer's desire to take artistic photographs and giving photographer free rein over a prolonged period of time to take such photographs, against the legal advice that he had obtained from the Prosecutor's Office; if true, the record would permit a jury finding that his conduct fell within the exception for wanton or reckless conduct. Ohio R.C. § 2744.03(A)(6)(b).

[11] Coroners 100 ⚷23

100 Coroners
100k23 k. Liabilities for Negligence or Misconduct. Most Cited Cases
Deputy chief coroner was not entitled to immunity under Ohio political subdivision tort liability statute in intentional-infliction-of-emotional-distress claims brought by relatives of deceased for his alleged conduct of not requiring pathology fellow to note photographer's presence at the autopsies he witnessed and allowing photographer to witness the autopsy of a corpse, during which the photographer photographed the corpse with a doll house ladder propped against his open skull; if true, the record would permit a jury finding that his conduct fell within the exception for wanton or reckless conduct. Ohio R.C. § 2744.03(A)(6)(b).

[12] Counties 104 ⚷93

104 Counties
104III Officers and Agents
104k87 Duties and Liabilities
104k93 k. Agents and Employees. Most Cited Cases
County coroner's pathology fellow was not entitled to immunity under Ohio political subdivision tort liability statute in intentional-infliction-of-emotional-distress claims brought by relatives of deceased for his alleged conduct in acquiescing to photographer's presence at the morgue, leaving photographer alone with an autopsy subject even after viewing his offensive photographs, and his entrustment to photographer of crime-scene photographs; if true, the record would permit a jury finding that his conduct fell within the exception for wanton or reckless conduct. Ohio R.C. § 2744.03(A)(6)(b).

[13] Counties 104 ⚷93

104 Counties
104III Officers and Agents
104k87 Duties and Liabilities
104k93 k. Agents and Employees. Most Cited Cases
County coroner's staff pathologist was not entitled to immunity under Ohio political subdivision tort liability statute in intentional-infliction-of-emotional-distress claims brought by relatives of deceased for his alleged conduct of knowing of photographer's offending

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

photography of corpses, encouraging photographer by referring to the photographs as "cool", continuing to permit photographer to photograph his autopsies even after seeing the offending photographs, and never reported photographer's offending photographs to any superior or law-enforcement authority; if true, the record would permit a jury finding that his conduct fell within the exception for wanton or reckless conduct. Ohio R.C. § 2744.03(A)(6)(b).

[14] Conspiracy 91 ⚷1.1

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k1 Nature and Elements in General
91k1.1 k. In General. Most Cited Cases
Under Ohio law, a civil conspiracy is a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.

[15] Conspiracy 91 ⚷5

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k1 Nature and Elements in General
91k5 k. Overt Act. Most Cited Cases
Under Ohio law, the malice involved in the tort of conspiracy is that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another, and, an underlying unlawful act is required before a civil conspiracy claim can succeed.

ARGUED: Lawrence E. Barbiere, Schroeder, Maundrell, Barbiere & Powers, Cincinnati, Ohio, Glenn V. Whitaker, Vorys, Sater, Seymour & Pease, Cincinnati, Ohio, Jamie M. Ramsey, Keating, Muething & Klekamp, Cincinnati, Ohio, for Appellants. Alphonse A. Gerhardstein, Laufman & Gerhardstein, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Lawrence E. Barbiere, Schroeder, Maundrell, Barbiere & Powers, Cincinnati, Ohio, Glenn V. Whitaker, Victor A. Walton, Jr., Michael L. Rich, Vorys, Sater, Seymour & Pease, Cincinnati, Ohio, Jamie M. Ramsey, Louis Francis Gilligan, Keating, Muething & Klekamp, Cincinnati, Ohio, for Appellants. Alphonse A. Gerhardstein, Laufman & Gerhardstein, Cincinnati, Ohio, *787Stanley M. Chesley, Paul M. De Marco, Renee A. Infante, Waite, Schneider, Bayless & Chesley, Cincinnati, Ohio, for Appellees.

Before BATCHELDER, GILMAN, and ROGERS, Circuit Judges.
GILMAN, J., delivered the opinion of the court, in which BATCHELDER, J., joined.
ROGERS, J. (p. 806), delivered a separate opinion concurring in part and dissenting in part.

OPINION

RONALD LEE GILMAN, Circuit Judge.
In 2001, Jaqueline Chesher and other named plaintiffs initiated a class action lawsuit against Hamilton County, several individuals employed at the Hamilton County Morgue, and Thomas Condon, a private photographer. Chesher's claims stem from an "art project" that Condon undertook at the Morgue in which he photographed dead bodies without the knowledge or consent of the decedents' relatives. The employee defendants allegedly engaged in a civil conspiracy and inflicted emotional distress on the class members by facilitating the project and later covering up their involvement. Asserting statutory immunity under Ohio law, the employee defendants moved for summary judgment. The district court denied their motions.

Subsequently, the employee defendants filed these interlocutory appeals from the district court's judgment. Hamilton County also appealed, arguing that the district court improperly denied the County summary judgment regarding Chesher's negligent-infliction-of-emotional-distress claim, even though that issue was not before the court. For the reasons set forth below, we **AFFIRM** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

I. BACKGROUND

A. Factual background

The substance of Chesher's claims arises from the heavily publicized discovery in January of 2001 of at least 317 allegedly improper photographs of dead bodies taken at the Hamilton County Morgue. Taken between August of 2000 and mid-January of 2001, the photographs depict the bodies in unnatural "artistic" poses, often employing props for effect. In a prior appeal that resolved a disputed issue of attorney-client privilege, this court referred to the factual circumstances as "appalling," and then-Coroner Dr. Carl Parrott has characterized the photographs as "deplorable." *Chesher v. Allen,* 122 Fed.Appx. 184, 185 (6th Cir.2005). A criminal investigation and trial revealed that Condon had taken the vast majority of the offending photographs. Also found at Condon's studio were a small number of questionable photographs taken by Dr. Jonathan Tobias, a pathology fellow employed by the County Coroner's Office. Chesher alleges that the County defendants' involvement in Condon's actions, either through negligence, recklessness, or a cover-up effort, substantiates the civil claims asserted in this action.

1. Condon's introduction to Parrott and the Coroner's Office

At the time the offending photographs were taken, Parrott was the Hamilton County coroner. He testified in his deposition that, as coroner, he was the "top policy maker with respect to conducting any duties and faithfully preserving the integrity of those bodies while they are in the County's custody."

In 1999, Parrott began to explore the idea of creating an autopsy-training video for use by hospitals and law enforcement. He instructed Terry Daly, his administrative aide, to set up a ***788** meeting for the purpose of discussing this video project.

Daly invited Condon and film producer Ernie Waits, Jr. to meet with himself, Parrott, and Parrott's administrative assistant Rhonda Gros at the Coroner's Office in 1999. At that first meeting, Parrott explained to the group his idea for the training video and noted that he would seek legal counsel concerning issues of consent for the proposed video footage. As part of the instructional video or as a separate project, Parrott intended to showcase a rare neck-dissection procedure in which his office had developed a particular expertise.

Condon and Waits next met with representatives from the Coroner's Office in June or July of 2000. This meeting included the same attendees, except that Deputy Chief Coroner Dr. Robert Pfalzgraf attended in place of Gros. Daly and Waits testified in their depositions that, at either the first or second meeting, Condon mentioned that he would like to pursue an independent project of his own involving artistic photographs of dead bodies, and that he had brought along with him one or more books of such photographs to illustrate his intentions. Chesher alleges that one of these books was authored by Germano Celant, an Italian art critic, and included photographs of cadavers posed with props similar to the offending photographs later taken by Condon.

According to Daly, Parrott evinced little reaction to Condon's proposed art project, but stated something to the effect that "we can consider it" and that he had "seen things like that before." An audiotaped conversation between Daly and Staff Pathologist Dr. Gary Utz that took place later, after the discovery of the photographs, similarly refers to Condon's art-project proposal at the meeting:

Utz: Didn't he [Parrott] know that Thomas [Condon] had an interest in doing this stuff?

Daly: We all did ... verified that that goddamn book was in that first fucking meeting and everybody in that goddamn room looked at it.

(Omission in original.) Parrott claimed in his deposition that he could not remember whether Condon explained his individual project or exhibited any artistic books at the meetings, but added "I can't say that it was not [discussed]."

By the time of this second meeting, Parrott had solicited and received a legal opinion from the Hamilton County Prosecutor's Office advising him

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

that he could produce the training video without obtaining the consent of the families of the autopsy subjects so long as the video was not used for commercial purposes. The opinion further advised Parrott to take steps to obscure identifying features of any bodies filmed. Although Parrott discussed this advice at the meeting, he stated in his deposition that he instructed Daly and Pfalzgraf to allow Condon and Waits to "do whatever they needed to do to determine what resources would be needed" to produce a cost estimate for the proposed instructional film. As preliminary work began on the training-video project, Parrott assigned Daly and Pfalzgraf specific roles. Daly was to be in charge of the logistics, and Pfalzgraf was to perform the autopsy procedures to be filmed.

Condon stated at his sentencing hearing that he provided Daly with a list of "Symbolic Objects To Be Used And Their Intended Meanings" in regard to his art project. Daly, however, denies ever having seen such a list.

2. Condon begins photography at the Morgue

Chesher claims that, in the course of preparing to produce the instructional film, ***789** Condon was essentially given free rein to pursue his own art project using the Morgue and the bodies housed there. Security at the Morgue during this time consisted primarily of what Parrott characterized as "an internal security system based entirely on trust."

The Morgue is located on the first floor of the Coroner's Office. Two coolers house the bodies, and County staff perform the autopsies in a suite adjacent to the coolers. During the relevant time period, the door to the autopsy suite was secured with a keypad lock that prevented entry by anyone without a proper code. The cooler itself, however, which also provided access to the autopsy suite, was unlocked. Coroner's Office staff members were also aware that the characters " *7" could be entered on the keypad by anyone as a "shortcut" code. Condon used that code to enter the autopsy suite. Morgue employees stated that they received no training on who should be permitted to enter the Morgue.

In August of 2000, Daly explained to both Pfalzgraf and Tobias that Condon would be around the Morgue taking photographs for the training-video project. Pfalzgraf, Tobias, and Utz subsequently permitted Condon, beginning on August 16, to observe autopsies that they performed. Although standard practice required outside persons observing an autopsy to sign a "view sheet," Condon did not sign in for the autopsies that he observed on August 16, or for those that he observed and photographed during later visits.

Daly prepared a short outline of a script for the proposed video after the initial August 16 visit by Condon and Waits. Several weeks later, Condon and Waits provided Parrott with an estimate of $10,000 to produce the instructional video. Parrott, according to his deposition testimony, determined that the Coroner's Office could not afford the project based on this bid. In addition, Parrott had in the meantime obtained an alternate training video at a National Association of Medical Examiners meeting that lessened the need to produce his own.

Parrott said in his deposition that he decided not to proceed with the video project at that point, but he conceded that he did not "recall giving [Daly], you know, a specific statement that it's over, it's done and history." Pfalzgraf similarly said that he " never knew of the project being cancelled." Parrott could not recall precisely when he decided to cancel the project, but indicated in his deposition testimony that his County Coroner campaign for the November 7, 2000 election was underway at the time. He asserts that his involvement with Condon ceased at that point, but Chesher alleges otherwise. She claims that Condon later received and distributed yard signs supporting Parrott's candidacy during his reelection campaign. According to Chesher, Condon also sent Parrott a Christmas card and sent the Coroner's Office staff a spiral-sliced ham for their holiday party.

3. Project cancelled but offending photography continues

Despite Parrott's deposition testimony that the

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

project was cancelled, the Coroner's Office staff continued to permit Condon access to the Morgue and to the bodies housed there through 2000 and into January of 2001. Photographs later discovered in Condon's studio reveal that he had observed, and often arranged with props, numerous bodies at the Morgue during that time. Condon photographed bodies both in the autopsy suite and in the cooler. The bodies photographed included those on whom autopsies had been performed by Pfalzgraf, Tobias, and Utz. Although the employee defendants assert ***790** that Condon visited the Morgue no more than five times in all, the district court found that Chesher had "highlighted instances which reasonably could lead one to find that Condon frequented the morgue at least eleven times." During the time frame in question, 532 bodies were housed at the Morgue.

Several examples serve to illustrate the nature of the photographs at issue. One involved the body of John Brady, whose autopsy was performed by Pfalzgraf. Brady was shown on the autopsy table with props that included a dollhouse ladder placed against his open skull. Photographs of Thomas Senteney, whose autopsy was performed by Utz, depict his body with a cloth scarf placed over his eyes and an egg displayed nearby. Utz also performed the autopsy of Christina Folchi, who was photographed with sheet music placed on her body and a snail near her groin area as well as other items pressed into her hand and mouth. The photographs indicate Condon's presence at these and other autopsies. Autopsy view sheets for the photographed subjects, however, do not reflect his presence. According to Chesher, several of the offending photographs depict the hands of Morgue employees as they were performing the autopsies.

Chesher alleges that although Condon showed both Tobias and Utz samples of the offending photographs during this time, they continued to permit Condon to visit the Morgue and take photographs. In Tobias's case, he acknowledged that Condon showed him some of the offending propped photographs, including the Brady photo, first in September of 2000 and then again in January of 2001. According to Tobias, he trusted Condon to obtain proper authorization from Parrott for the taking of such photographs.

Tobias kept in personal contact with Condon and met with him two or three more times, including one event at a local bar. On December 6, 2000, Tobias met with Condon during Senteney's autopsy, but during the course of the meeting "left [Condon] alone in the morgue" with the body. Condon used the opportunity to take additional offending photographs, which Tobias claims was without his knowledge. When Condon again showed Tobias some of the offending photographs in January of 2001, Tobias instructed Condon to show his pictures to Utz and get permission before continuing his project. Tobias said that Condon complied and showed some of his propped photographs and an art book to Utz, to which Utz allegedly responded "[o]h, that's kind of cool."

Utz similarly testified in his deposition that, sometime in early January of 2001, he saw several of Condon's propped photographs, including an autopsy photograph showing Utz's hands. One of the propped photographs that Condon showed to Utz was that of Brady with the dollhouse ladder leaning against his open skull.

In addition to permitting Condon to take photographs at the Morgue, Tobias began using Condon's studio for printing some of his own offending photographs, including several from the death scene of a woman named Toby Malakoff. Tobias used a Morgue camera to take photographs of her body first as he found it at the scene, and then after he had turned the body over and lifted her shirt to reveal her breasts. Parrott testified in his deposition that Tobias's photographs "shouldn't have been at a commercial photographer's studio" such as Condon's. He added that Tobias's photographs of Malakoff could be interpreted as " souvenirs or, you know, an effort at art" and that he was not aware of any forensic purpose served by them. Tobias, on the other hand, maintains that the photographs were forensically necessary and ***791** that he developed them at Condon's studio because he believed Condon to be trusted by the Coroner's Office.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

4. Discovery of the photographs, prosecution, and the alleged cover-up

On January 8, 2001, Robin Imaging Services, a Cincinnati photo-developing studio, contacted the Cincinnati Police Department's vice squad regarding some unusual photographs in its possession that indicated the possible abuse of corpses. Sergeant Lovett of the vice squad dispatched officers to investigate the call. The officers obtained the photographs from Robin Imaging and learned that Condon was the customer who had dropped them off. A search warrant was then executed for Condon's personal photography studio. There the police discovered numerous other corpse photographs as well as a sheet of " symbols" listing props that appeared in the photographs. This initial investigation led police to the conclusion that the photographs were taken at the Hamilton County Morgue, so Lovett began contacting Morgue personnel. Lovett interviewed all of the Morgue staff members before handing the investigation over to the County Prosecutor's Office. Ultimately, the prosecutor charged Condon with eight counts of gross abuse of a corpse. *See State v. Condon,* 157 Ohio App.3d 26, 808 N.E.2d 912, 913 (2004).

The prosecutor also determined that Tobias had taken a personal interest in Condon's work and had conducted at least two of the autopsies during which Condon took offending photographs. *See State v. Tobias,* No. C-020261, 2003 WL 21034555, at *6 (Ohio Ct.App. May 9, 2003). Tobias was the only Coroner's Office staff member criminally charged, but his conviction was later overturned on appeal due to insufficient evidence to prove beyond a reasonable doubt that he had taken affirmative action to aid or abet Condon's corpse abuse. *Id.* at *7.

Chesher alleges that, upon discovery of the photographs, the County defendants and other County officials began a concerted effort to cover up and minimize any official involvement in Condon's art project. First, Chesher claims that County authorities suspended only Tobias, the lowest-level physician in the Coroner's Office, following the discovery of the photographs. According to Tobias, Gros informed him that he was being suspended in order to "protect the county, " and Tobias noted that "there was already speculation about a civil lawsuit." Tobias contends that, just after the Morgue photograph scandal became public, Parrott had assured him that "I know you did nothing wrong." According to Pfalzgraf, Parrott later stated that "his hand were tied" regarding Tobias's suspension, allegedly because the Prosecutor's Office had insisted on the measure. Furthermore, Tobias claims that Parrot told him that "they needed to protect the county, and that he couldn't talk to me because I knew that he knew about the art books."

Chesher alleges that the second step of the cover-up consisted of "block[ing] public access" to facts that demonstrated the involvement of County officials other than Tobias. She claims that in order to limit the County's exposure, the Prosecutor's Office purposefully withheld evidence from the criminal trial of Condon and Tobias, such as the taped conversation between Daly and Utz quoted above. Prosecutors similarly did not introduce into evidence the opinion letter that Parrott had obtained from the Prosecutor's Office advising him that he could go forward with the autopsy video project without obtaining the consent of the decedents' families.

Chesher also relies on a letter that Hamilton County Commissioner Todd Portune sent to the presiding judge during the criminal trial in June of 2002, suggesting ***792** that a cover-up may have occurred. In the letter, Portune asserted that the Coroner's Office personnel bore responsibility for the scandal. Portune also relayed to the judge a sworn statement from Condon's wife, Kelly Blank, in which she explains that Utz told her that prosecutors "came into the morgue and 'openly threatened people' as to what to say and how to testify." Blank claimed that Utz agreed that "there was a purposeful plan from the beginning to convict Condon and Tobias and protect higher-ranking officials."

5. Alleged conspiratorial acts in 2003

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Chesher's statement of the facts on appeal largely mirrors what she presented in her brief in opposition to the defendants' motions for summary judgment before the district court. Significantly, however, in Chesher's factual recitation in support of her conspiracy claim before the district court, she alleged conspiratorial events extending into May, June, and July of 2003. The dates of these acts in 2003 are relevant to the jurisdictional question addressed in Part III below. Chesher alleged that, in May of 2003, a member of the Prosecutor's Office demanded a "secret Sunday session with Tobias" shortly before his deposition. She asserted that this session amounted to an interrogation and was improperly concealed.

Furthermore, Chesher alleged that a representative of the Prosecutor's Office was present at Tobias's deposition on May 14, 2003 and June 25, 2003. She claimed that between those dates, the Prosecutor's Office sent Tobias a letter stating that the County had decided to provide him with counsel for his civil trial. Following the second day of Tobias's deposition, however, in which he testified that his suspension was merely an effort to "protect the county," the Prosecutor's Office allegedly sent him a second letter dated July 11, 2003 which " sharply attacked" his testimony and reminded him that provision for his defense in the civil case could be withdrawn. In the Joint Final Pretrial Order before the district court, Chesher identified these and other communications dated in May, June, and July of 2003. Counsel for Chesher also referred to these alleged acts of conspiracy before the district court in the Joint Final Pretrial Conference on October 6, 2005.

The portion of Chesher's brief on appeal that describes the alleged conspiracy omits any reference to the events occurring in 2003. Instead, Chesher now contends that the alleged cover-up activities concluded in 2002 "at the latest." She continues to assert, however, that the alleged conspiracy and cover-up "significantly compounded the injury to the plaintiffs."

B. Procedural background

The class action complaint in this litigation was initially filed in November of 2001. In March of 2002, Chesher filed an amended complaint, naming as defendants Hamilton County, Condon, Daly, Gros, Parrott, Pfalzgraf, Tobias, and Utz. The amended complaint asserted federal claims under 42 U.S.C. § 1983 and state-law claims for negligent and intentional infliction of emotional distress, as well as for a civil conspiracy to inflict such harm.

In May of 2003, the district court issued an order that conditionally certified the class under Rule 23(a) of the Federal Rules of Civil Procedure. Subsequently, in response to a motion by the defendants to decertify the class, the court split the class into two subclasses. Subclass One consists of

[t]he family members of all the deceased whose remains, for other than a proper government purpose, were *photographed* by Thomas Condon or Jonathan Tobias, M.D. or one of their agents between August 2000 and January 2001 (inclusive) while such bodies were in custody ***793** of the Hamilton County Coroner's office, without permission from the legal representatives of the deceased.

(Emphasis added.) Subclass Two consists of a corresponding group of family members of the deceased whose remains were *not* photographed, but were instead only "accessed, viewed or manipulated" by Condon or Tobias.

In December of 2004, the district court granted the County's motion to dismiss Chesher's claims for intentional infliction of emotion distress and for civil conspiracy, concluding that the County was immune from liability for the intentional tort claims. But the court held that the claim against the County for negligent infliction of emotional distress remained viable under an exception to the County's statutory immunity. That order has not been appealed.

Most recently, in September of 2005, the district court denied in part the various defendants' motions for summary judgment. Those motions were based in part on state-law immunity grounds, but the court found that the employee defendants were not entitled to immunity under Ohio law. The court

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

did dismiss, however, all of the claims against defendant Gros based on the lack of evidence supporting her involvement. In addition, the court reminded the County that the state-law intentional tort claims against it had already been dismissed. The County did not move for summary judgment based on state-law immunity regarding the negligence claim still pending against it.

Daly, Parrott, Pfalzgraf, Tobias, and Utz, as the remaining employee defendants, timely filed the present interlocutory appeal from the district court's denial of their motions for summary judgment. Hamilton County joined the appeal, contending that the district court's September 2005 order improperly denied the County summary judgment based on statutory immunity regarding Chesher's state-law negligence claims, despite the fact that the County never moved for summary judgment on that ground. The federal § 1983 claims have been dismissed with respect to all of the defendants except the County, and that claim is not at issue in this appeal.

II. JURISDICTION

[1][2][3][4] An order denying summary judgment is not ordinarily a final, appealable decision. *Hoover v. Radabaugh,* 307 F.3d 460, 465 (6th Cir.2002). The collateral order doctrine, however, provides that a district court's denial of qualified immunity is an appealable final decision under 28 U.S.C. § 1291 " 'to the extent that it turns on an issue of law.' " *Bradley v. City of Ferndale,* 148 Fed.Appx. 499, 504 (6th Cir.2005) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). In the context of a diversity case or a federal-question action involving pendent state-law claims, the question of whether an interlocutory order denying immunity under state law is appealable turns on the nature of the immunity at issue. *Id.* at 511, 105 S.Ct. 2806 (citing *Mitchell,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 and *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). An order denying statutory immunity is immediately appealable only if the state law provides immunity from suit, as opposed to immunity simply from liability. *See Estate of Owensby v. City of Cincinnati,* 414 F.3d 596, 605 (6th Cir.2005).

Prior to 2003, Ohio's immunity statutes, codified in Chapter 2744 of the Ohio Revised Code, provided immunity from liability only. An interim order denying immunity under that section was thus not immediately appealable. *See, e.g., id.* (holding that a district court's denial of immunity under § 2744.03 regarding ***794** claims that accrued in 2000 did not support jurisdiction for an interlocutory appeal because the statute provided immunity from liability only).

Ohio amended § 2744.02 in 2003, however, to provide that "[a]n order that denies ... the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." Ohio Rev.Code Ann. § 2744.02(C). Because Ohio Rev.Code Ann. § 2505.03(A) provides that every final order may be appealed, Ohio now clearly allows for an immediate appeal from the denial of immunity under Chapter 2744. This effectively provides political officials and subdivisions with immunity from suit, and thus warrants interlocutory appellate jurisdiction under the collateral order doctrine. *See Bradley,* 148 Fed.Appx. at 512 (determining that an analogous change in Michigan law making a denial of statutory immunity a final, appealable order created jurisdiction for an interlocutory appeal pursuant to the collateral order doctrine).

[5] Ohio courts have determined, however, that the amendment making a denial of immunity immediately appealable applies only prospectively to claims accruing after the effective date of the amendment. *See Jackson v. Columbus,* 156 Ohio App.3d 114, 804 N.E.2d 1016, 1019-1020 (2004). The amendment became effective on April 9, 2003. Our jurisdiction thus turns on whether the claims to which the denial of immunity applied accrued on or after that date. *See id.*

A. Jurisdiction with respect to the infliction-of-emotional-distress claims

[6][7] Chesher asserts that her claims must have

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

arisen prior to April 9, 2003 because the latest amended complaint in this action was filed in 2002. She therefore argues that this court lacks jurisdiction over the present interlocutory appeals. Causes of action for emotional distress, however, accrue not when the underlying activity occurs, but rather when the plaintiff suffers emotionally by learning of it. *See, e.g., Biro v. Hartman Funeral Home,* 107 Ohio App.3d 508, 669 N.E.2d 65, 68 (1995) (holding that an action for intentional infliction of emotional distress accrues "at the time the injury is incurred and the emotional impact is felt "). Class plaintiffs in this case include not only those families whose deceased relatives were photographed by Condon (Subclass One), but also all families whose relatives were housed in the Morgue during the time the offending photographs were taken and whose bodies thus may have been " accessed, viewed, or manipulated" by Condon (Subclass Two). According to their deposition testimony, many, if not all of the members of Subclass Two did not discover their injury until contacted by Chesher's counsel in 2004.

Chesher argues that, although the claims of some class members did not accrue until after April 9, 2003, the class representatives' claims accrued before that date. To hold that the claims accrued after that date, Chesher contends, would "let the tail wag the dog." But the defendants point out that even the chosen representatives of Subclass Two did not learn of their claims until after the effective date, and that the vast majority of that class is similarly situated. This would mean that we have jurisdiction over the majority of the class's claims.

Our sister circuits have recognized the problems inherent in ascertaining when claims accrue on a class-wide basis. *See, e.g., Thorn v. Jefferson-Pilot Life Ins. Co.,* 445 F.3d 311 (4th Cir.2006) (upholding the denial of class certification where a statute-of-limitations defense required an individualized examination of each plaintiff's knowledge to determine when their claims accrued). The present case, however, does ***795** not involve a statute-of-limitations defense as in *Thorn.* Because we have interlocutory jurisdiction over the majority of the class's emotional-distress claims and because all plaintiffs are similarly situated for purposes of resolving the immunity issues presented, we can properly take up the question presented. *Cf. Tucker v. City of Richmond,* 388 F.3d 216, 224 (6th Cir.2004) (addressing, in the context of an interlocutory qualified-immunity appeal, related but unappealable issues that were " inextricably intertwined" with the appealable issues).

B. Jurisdiction with respect to the conspiracy claims

Chesher's argument that we lack jurisdiction over the appeal with respect to her conspiracy claim belies her own expansive allegations regarding the misconduct at issue. Chesher successfully argued before the district court that the employee defendants had engaged in a continuing civil conspiracy (1) with one another and Condon in 2000 and 2001 to permit Condon to undertake his art project, and (2) with the County Prosecutor's Office to cover up their misconduct from 2001 until at least July of 2003.

Chesher attempts to distance herself from these arguments on appeal by shifting her factual allegations. She omits on appeal any reference to the overt acts allegedly committed in 2003. In addition, in the context of her jurisdictional argument, Chesher asserts that the alleged conspiracy relates only to the offending photographs, with no reference to the continuing cover-up. Chesher now questions "where in the record is there evidence that [the defendants] engaged in cover-up activities after April 9, 2003?"

The answer to her question lies in her successful opposition to the defendants' motions for summary judgment on the conspiracy claim, where she alleged that Tobias and others in the Coroner's Office engaged in a cover-up with the County prosecutors that extended beyond April 9, 2003. In *Williams v. Aetna Fin. Co.,* 83 Ohio St.3d 464, 700 N.E.2d 859, 868 (1998), the Ohio Supreme Court cited with approval Am.Jur.2d, *Conspiracy,* §§ 50-73 in defining Ohio civil conspiracy law. Section 65 provides, with regard to the accrual of civil conspiracy claims, as follows:

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

In determining when the period of limitations begins to run, the statute does not begin from the date of the conspiratorial agreement, but from the occurrence of damage pursuant to the conspiracy. However, under various decisions, the limitations period may run from the date of the last overt act done in furtherance of the conspiracy, or from the last overt act causing damage to the plaintiff, or from the date of each overt act causing damage.

16 Am Jur.2d, *Conspiracy* § 65 (2006) (footnotes omitted); *cf. State v. Tolliver,* 146 Ohio App.3d 186, 765 N.E.2d 894, 899-900 (2001) (holding in the context of a criminal conspiracy that the statute of limitations begins to run with the "last overt act in furtherance of the conspiracy").

Using any of the above measuring points, Chesher's conspiracy claim alleging acts in May, June, and July of 2003 accrued after April 9, 2003. Ohio law also establishes that acts of coconspirators are attributable to one another. *Williams,* 700 N.E.2d at 868. We therefore conclude that Chesher's allegations of conspiratorial acts that allegedly took place between May and July of 2003 acted as a de facto amendment to her complaint and establish our jurisdiction over the employee-defendants' interlocutory appeals.

Chesher's argument that her conspiracy claim accrued prior to April 9, 2003 is also untenable in light of our determination of when her infliction-of-emotional-distress ***796** claim accrued. Ohio does not recognize conspiracy as an independent tort. *See Orbit Elecs., Inc. v. Helm Instrument Co.,* 167 Ohio App.3d 301, 855 N.E.2d 91, 100 (2006) ("An action for civil conspiracy cannot be maintained unless an underlying unlawful act is committed."); *Putka v. First Catholic Slovak Union,* 75 Ohio App.3d 741, 600 N.E.2d 797, 803 (1991) (noting that an independent claim of " conspiracy is not a recognized tort under Ohio law") (quotation marks omitted). Here, where the underlying infliction of emotional distress did not accrue until after April 9, 2003, it would be incongruous to hold that the conspiracy claim premised on those tortious acts accrued earlier.

III. ANALYSIS

A. Standard of review

We review de novo a district court's denial of summary judgment based on immunity from suit. *Int'l Union v. Cummins, Inc.,* 434 F.3d 478, 483 (6th Cir.2006). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. Ohio's immunity statute

Ohio codified its governmental-immunity law in Chapter 2744 of the Ohio Revised Code. Section 2744.02 sets forth a grant of immunity to the state and its political subdivisions, and lays out specific exceptions. The following section, 2744.03, provides, among other things, similar immunity and exceptions for state or state-subdivision employees. Both sections of Ohio's immunity law are implicated in the present appeal.

1. The County's immunity under the statute

Hamilton County appeals what it describes as the district court's sua sponte denial of immunity under § 2744.02(B)(4). As a political subdivision of the state defined under § 2744.01(F), the County is enti tled to a broad grant of immunity from liability for " any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Ohio Rev.Code Ann. § 2744.02(A)(1).

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

That broad grant of immunity, however, is subject to the exceptions set forth in § 2744.02(B). One of those exceptions, § 2744.02(B)(4), revokes immunity "where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of governmental functions." *Hubbard v. Canton Bd. of Educ.*, 97 Ohio St.3d 451, 780 N.E.2d 543, 547 (2002) (defining the scope of § 2744.02(B)(4)). The County's argument on appeal centers on the applicability of this exception.

2. The employee-defendants' immunity under the statute

Section 2744.03 grants immunity to employees of political subdivisions acting within the scope of their employment, but provides that this immunity is subject to specific exceptions. Ohio Rev.Code Ann. § 2744.03(A)(6). Two listed exceptions are relevant to the present appeals. First, ***797** § 2744.03(A)(6)(a) provides that an employee is not immune if his or her "acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities." The other applicable exception is § 2744.03(A)(6)(b), which states that individual employee immunity does not apply if "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

Chapter 2744 does not further define the type of employee acts that fall "manifestly outside the scope of employment" under § 2744.03(A)(6)(a). The Ohio state courts, however, have generally drawn from agency-law principles to hold that " [c]onduct is within the scope of employment if it is initiated, in part, to further or promote the master's business." *Martin v. Cent. Ohio Transit Auth.*, 70 Ohio App.3d 83, 590 N.E.2d 411, 417 (1990). But "[a]n employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment." *Jackson v. McDonald*, 144 Ohio App.3d 301, 760 N.E.2d 24, 28 (2001). The court in *Jackson* held that "it is only where the acts of the state employees are motivated by actual malice or other situations giving rise to punitive damages that their conduct may be outside the scope of their state employment." *Id.* (brackets omitted).

Section 2744.03(A)(6)(b) differs from subpart (a) in that it explicitly focuses on the employee's state of mind rather than the employee-employer relationship. Most relevant for the purposes of this appeal is the exception for acts or omissions that were committed "in a wanton or reckless manner." Ohio Rev.Code Ann. § 2744.03(A)(6)(b). Under Ohio law, wanton and reckless conduct is defined as perversely disregarding a known risk, or acting or intentionally failing to act in contravention of a duty, knowing or having reason to know of facts which would lead a reasonable person to realize such conduct creates an unreasonable risk of harm substantially greater than the risk necessary to make the conduct negligent.

Webb v. Edwards, 165 Ohio App.3d 158, 845 N.E.2d 530, 536 (2005).

Ohio's immunity statute draws no distinction between suits against an individual government employee in his official as opposed to his personal capacity. The Ohio Court of Appeals has held that an action against an officer in his "official capacity" is simply another way of pleading an action against the governmental entity itself. *Norwell v. City of Cincinnati*, 133 Ohio App.3d 790, 729 N.E.2d 1223, 1232 (1999) (citing *Monell v. New York Dep't Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). If official-capacity claims are nothing more than claims against the county, then it would be appropriate to dismiss the official capacity claims against the employee defendants if such claims have been dismissed against the county. *See J & J Schlaegel, Inc. v. Bd. of Trustees of Union Twp.*, Nos.2005-CA-31/2005-CA-34, 2006 WL 1575036, at *10 (Ohio Ct.App. June 9, 2006); *Kammeyer v. City of Sharonville*, 311 F.Supp.2d 653, 661 (S.D.Ohio 2003). Whether the defendants are liable as individuals thus turns on the availability of statutory immunity as defined in Chapter 2744. For each employee defendant, we must determine whether any of the immunity exceptions under § 2744.03(A)(6) apply.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

C. The County's argument

Hamilton County's argument in this appeal presents an unusual issue. As outlined in the procedural history, the County originally moved to dismiss Chesher's claims based on immunity under Chapter ***798** 2744. The district court granted that motion as to the claims against the County for the intentional infliction of emotional distress and for civil conspiracy, but denied the motion as to Chesher's negligence claims in an order dated December 17, 2004. Its denial of immunity for the negligence claim was based on the exception to immunity found in § 2744.02(B)(4), which precludes immunity for acts of negligence that occur within or on the grounds of buildings used in connection with the performance of governmental functions. *See Hubbard,* 780 N.E.2d at 547. The County did not then and does not now appeal that order.

Moreover, as the County itself emphasizes, it has never moved for summary judgment on the remaining negligence claim based on statutory immunity. Logic dictates, then, that the negligence claim remains pending against the County. The County argues on appeal, however, that the district court erred by sua sponte denying the County summary judgment on the basis of statutory immunity when the court quoted from a portion of its prior December 2004 order in its more recent order issued in September of 2005. But that more recent order primarily concerned the employee-defendants' motions for summary judgment and the County defendants' motions for summary judgment based on grounds other than statutory immunity.

Because the County did not move for summary judgment on Chesher's negligence claim, the district court had no occasion to reconsider the earlier ruling on the County's motion to dismiss. The district court's quotation of its earlier order, when viewed in context, simply served to clarify to the multiple parties involved in this complex case which claims remained pending and which claims the court had earlier dismissed. Contrary to the County's argument, the district court did not sua sponte deny the County summary judgment on grounds that the County itself never asserted.

We therefore decline to address the County's immunity arguments at the present time. *See Wright v. Holbrook,* 794 F.2d 1152, 1157 (6th Cir.1986) ("[T]he general rule is that this court will not consider issues not raised in the district court."). The County remains free, of course, to move for summary judgment on Chesher's negligence claim upon remand of this case to the district court.

D. The employee-defendants' claims of immunity

Employee-defendants Daly, Parrott, Pfalzgraf, Tobias, and Utz appeal the district court's order denying their respective motions for summary judgment on the basis of immunity under Chapter 2744 of the Ohio Revised Code. The district court only briefly addressed their immunity defense, again quoting from its December 2004 order:

An exception found in section 2744.03 of the Ohio Revised Code, serves to eliminate the immunity of the individual defendants-specifically sub-sections 6(a & b)....

The actions of the individual County employees, if true, clearly were manifestly outside the scope of their employment or official responsibilities. As such, the individual County employees, named as Defendants in this case can not claim immunity under Chapter 2744.

Chesher v. Neyer, 392 F.Supp.2d 939, 962 (citations, brackets, and quotation marks omitted).

The court went on to explain that "[a]s the above quotation from the Court's earlier Order clearly states, the Court relied upon the exceptions found at ... 2744.03[A] (6)(a & b) to find the ... individual County Defendants liable for IIED [intentional infliction of emotional ***799** distress], NIED [negligent infliction of emotional distress], and Civil Conspiracy." (Bracketed material added.)

Thus, the court appeared to rest its denial of immunity on both the § 2744.03(A)(6)(a) exception for acts or omissions manifestly outside the scope of employment and the 2744.03(A)(6)(b) exception for reckless acts or omissions.

The likely explanation for the district court's brief

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

treatment of the employee-defendants' motions for summary judgment based on statutory immunity is that the court had essentially already performed the requisite analysis earlier in its order. Just as the § 2744.03(A)(6)(b) exception requires wanton or reckless acts, the employee-defendants' motions for summary judgment as to the sufficiency of Chesher's evidence regarding the intentional infliction of emotional distress similarly required the court to consider whether each defendant acted in "an extreme and outrageous manner, thus recklessly causing Plaintiffs' emotional distress." *Chesher,* 392 F.Supp.2d at 956. The court determined, after undertaking a lengthy analysis of the facts, that Chesher's allegations supported a finding of recklessness in the case of each defendant. Given those conclusions, § 2744.03(A)(6)(b) would preclude immunity for those same acts earlier found to be "reckless." For the reasons addressed below, however, we are of the opinion that the district court's application of the § 2744.03(A)(6)(a) exception for acts manifestly outside the scope of employment was erroneous.

Perhaps not surprisingly, no court has considered the applicability of Ohio's sovereign-immunity statute to facts sufficiently similar to Chesher's allegations to control the outcome in this case. Several recent cases, however, shed light on Ohio's interpretation of whether a defendant's acts are sufficiently egregious to sever the employer-employee relationship under § 2744.03(A)(6)(a) or to amount to recklessness under § 2744.03(A)(6)(b).

The Ohio Court of Appeals interpreted an immunity statute similar to Chapter 2744 in *Caruso v. State,* 136 Ohio App.3d 616, 737 N.E.2d 563 (2000). In *Caruso,* the court considered whether, under Ohio Rev.Code Ann. § 9.86, an employee of the Ohio State University Medical Center could be held liable for berating and threatening to slap his administrative assistant. The court reviewed several cases in which Ohio courts had found that " arguably more egregious" conduct did not amount to recklessness, and reached the same conclusion in the case before it. *Caruso,* 737 N.E.2d at 568. Among the cases cited were *Fabrey v. McDonald Village Police Dep't,* 70 Ohio St.3d 351, 639 N.E.2d 31, 35-36 (1994) (holding that a police chief's failure to maintain certain safety devices, which resulted in a police officer's injury when a prisoner set fire to his mattress, did not constitute wanton conduct); *Fuson v. Cincinnati,* 91 Ohio App.3d 734, 633 N.E.2d 612, 615 (1993) (concluding that the failure of emergency medical personnel to transport an uncooperative injured person to a hospital did not rise to the level of wanton misconduct where the medics had checked for vital signs, no request for transport was made, and the medics had instructed the family to come to the hospital if the condition worsened); and *Jackson v. Butler City Bd. of Comm'rs,* 76 Ohio App.3d 448, 602 N.E.2d 363, 366-68 (1991) (determining that a state agency's placement of a child with her father and its failure to check up on the child face-to-face prior to the child's being beaten to death was not reckless where the father was not a known placement risk that the agency disregarded).

The court in *Caruso* next addressed the question of whether the defendant's assault on his assistant fell " manifestly outside***800** the scope of his employment." *Caruso,* 737 N.E.2d at 566. At the outset of its discussion, the court cited *Byrd v. Faber,* 57 Ohio St.3d 56, 565 N.E.2d 584 (1991), for the principle that, in order for an intentional tort to be within the scope of employment, "the conduct giving rise to the tort must facilitate or promote the business for which the employee was employed or at least be calculated to do so." *Id.* at 567, 565 N.E.2d 584. The court determined, based on this principle, that whether immunity attached required an examination of the motives behind the alleged assault. *Id.* If the defendant's assault was merely to " gratify his own personal feelings of animosity and resentment," the court noted that he would not be entitled to immunity. *Id.* Ultimately, the court held that the defendant's outburst was instead motivated, at least in some "misguided" way, by his work-related concern for preventing needless interruptions by his assistant. *Id.* at 567-68, 565 N.E.2d 584. The assault thus fell within the scope of his employment and immunity attached. *Id.* This holding corresponds with the Ohio Supreme Court's statement that the scope of employment turns on the agency-law question of whether the conduct at issue

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

was initially motivated by a desire to promote the master's business. *Martin,* 590 N.E.2d at 417.

More recently, in *Thompson v. Bagley,* No. 11-04-12, 2005 WL 940872 (Ohio Ct.App. Apr.25, 2005), the Ohio Court of Appeals considered whether Drew Altimus, a physical education teacher, could be held liable for a child's drowning death in the school's swimming pool during a swimming class. Thompson alleged that Altimus had noticed the child floating face-down in the pool, but had simply assumed that the child was "only joking around." *Id.* at *1. Rather than rescuing the child himself, Altimus sent three different students in succession to attempt to pull the drowning student out of the water. *Id.* Finally, after the third student succeeded, Altimus began to perform CPR, but could not save the child. *Id.* The plaintiff produced an aquatic safety expert who testified that Altimus had failed to properly provide for the child's safety. *Id.* at *11. Ultimately, the court denied Altimus's motion for summary judgment based on statutory immunity, noting that "[w]hether such actions rises [sic] to the level of recklessness is normally a question to be determined by the trier of fact." *Id.; see also Fabrey,* 639 N.E.2d at 35 (noting that "the issue of wanton misconduct is normally a jury question").

With these principles of Ohio's statutory-immunity law in mind, we turn to the individual defendants' motions for summary judgment regarding Chesher's claim that they intentionally inflicted emotional distress on the class plaintiffs. A review of the employee-defendants' briefs in support of their motions reveals that they moved for summary judgment based on statutory immunity only as to Chesher's intentional-infliction-of-emotional-distress claims and her conspiracy claim. They specifically argued that "[i]n the absence of [the § 2744.03(a)(6) exceptions] ... it is appropriate for this Court to grant summary judgment to the individual County Defendants ... on Plaintiff's claims for intentional infliction of emotional distress and civil conspiracy. " Because these defendants did not assert statutory immunity as a grounds for summary judgment regarding Chesher's *negligent* -infliction-of-emotional-distress claim, the issues associated with that claim are beyond the scope of this interlocutory appeal. Our treatment of the facts in the following sections views them most favorably to the plaintiffs, as required by the summary-judgment standard of review, but should not otherwise be taken as an acceptance of that version.

801 *I. Daly

[8] Daly, like Parrott, attended the meetings at which Condon expressed an interest in undertaking an art project. Furthermore, Daly acknowledged in his deposition that it was his understanding that Condon's art project would involve taking photographs of dead bodies in posed positions. Condon also allegedly stated at his sentencing hearing that he provided Daly at some point with a list of "Symbolic Objects To Be Used And Their Intended Meanings" that is included in the record, although Daly denies ever having seen such a list. Finally, Parrott assigned Daly to be in charge of the logistics regarding the proposed film project.

Nothing in the record suggests that Daly acted outside the scope of his employment, particularly given Parrott's direct assignment for him to work with Condon. Subsection 2744.03(A)(6)(a) thus does not preclude Daly's immunity defense for reasons discussed more fully below in connection with Parrott. The record could, however, permit a jury finding that Daly "perversely disregard [ed] a known risk." *See Webb v. Edwards,* 165 Ohio App.3d 158, 845 N.E.2d 530, 536 (2005). Although Daly was an administrative aide rather than a doctor at the Morgue, Parrott nonetheless assigned him a lead role in dealing with Condon. Daly's deposition testimony reflects that he had every reason to know that Condon intended to take the offending photographs, but "never warned anyone" despite his role as the project coordinator. We thus conclude that Daly is not entitled to statutory immunity because the record would permit a jury finding that his conduct falls within the § 2744.03(A)(6)(b) exception for wanton or reckless conduct.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

2. Parrott

[9] Chesher alleges that Parrot, like the other employee defendants, both intentionally and negligently inflicted emotional distress on the class plaintiffs by facilitating Condon's access to the Morgue and by covering up the County's actions. In support of her claims, Chesher points out that Parrott attended the two introductory meetings with Condon prior to the preliminary work on the video project in August of 2000. Both Daly and Waits have stated that, during one of the meetings, Condon apprised Parrott of his intent to pursue an art project at the Morgue. Daly and Waits also testified in their depositions that Parrott made no objection to such a project at the time, noted that he "had seen things like that before," and indicated that he would consider it.

Contrary to the advice he received from the Prosecutor's Office, Parrott allegedly placed no limits on Condon and permitted him to take photographs without obscuring identifiable characteristics and without a plan to secure the photographs. As chief policymaker, Parrott was also in charge of the "trust-based" security policy at the Coroner's Office that permitted Condon to enter the facility even after Parrott claims to have cancelled the video project. Parrott does not specifically recall giving his staff any notice that he had "cancelled" the project, and his staff does not recall receiving such a notice.

Chesher also identifies several instances of an ongoing relationship between Parrott and Condon during Condon's continued presence at the Coroner's Office from August of 2000 to January of 2001. During Parrott's reelection campaign, for example, Condon received and distributed yard signs supporting Parrott's candidacy. Condon also sent Parrott a Christmas card and sent the Coroner's Office a spiral-sliced ham for its holiday party. Chesher further alleges that following the discovery of the offending photographs in January of 2001, Parrott engaged in a conspiracy with ***802** the prosecutors and others to cover up the involvement of the County with Condon's activities.

Our first task is to decide whether the district court erred in determining that Parrott's conduct as summarized above fell manifestly outside the scope of his employment. We conclude that the record does not support the district court's ruling. To the contrary, Parrott sought out and directed Condon's work in an effort to create an instructional video that was a legitimate work-related goal. Like the defendant in *Caruso,* Parrott's actions in this regard were motivated, even if in a misguided manner, toward promoting a state purpose rather than strictly personal concerns. *Caruso,* 737 N.E.2d at 567. We thus conclude that Parrott's actions fell within the scope of his employment under § 2744.03(A)(6)(a).

[10] This leaves the question of whether Parrott's actions were wanton or reckless under § 2744.03(A)(6)(b). The essence of Chesher's claim against Parrott is that he knew of Condon's desire to take artistic photographs and that Parrott's acts and omissions gave Condon free rein over a prolonged period of time to take such photographs, against the legal advice that Parrott had obtained from the Prosecutor's Office. Based on the existing record, a factfinder could reasonably determine that Condon's desire and ability to take artistic photographs amounted to a known risk. In the face of this danger, Parrott-the self-described top policymaker-permitted Condon to photograph Morgue subjects without restrictions or viable security measures in place, and failed to inform his staff that the video project had been cancelled.

We therefore affirm the district court's denial of Parrott's summary judgment motion regarding the intentional-infliction-of-emotional-distress claim because, as the court in *Thompson* concluded, a jury could find that Parrott's actions amounted to the disregard of a known risk "substantially greater than that necessary to make the conduct negligent." 2005 WL 940872, at * 11. The Coroner's Office has a duty to hold bodies placed in its custody in a safe and respectful manner. Unlike the state agency in *Jackson* that was not on notice of the father's dangerous propensities when it gave him custody of his child, Parrott knew of the great risk that Condon's artistic photography posed in the most straightforward possible way: Condon allegedly told Parrott of his intent and showed him

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

examples of similar photographs. *See* 602 N.E.2d at 366-367

We thus leave the determination of whether Parrott's actions amounted to wantonness or recklessness under § 2744.03(A)(6)(b) to a jury. *See Fabrey,* 639 N.E.2d at 35 (noting that "the issue of wanton misconduct is normally a jury question"). This conclusion is not at odds with the separate determination that Parrott's actions fell within the scope of his employment. *See Floyd v. Thomas,* No. CA99-07-016, 2000 WL 864990, at *5 (Ohio Ct.App. June 26, 2000) ("Although [the defendant] is correct in her statement that media statements are within the scope of her employment, the exception to immunity found in [Ohio Rev.Code Ann. § 2744.03(A)(6)(b)] for acts committed with malicious purpose, in bad faith and in a wanton and reckless manner would still apply.").

3. Pfalzgraf

[11] Pfalzgraf, like Parrott and Daly, attended the initial meetings with Condon at which the art project was discussed. As the deputy chief coroner, Pfalzgraf was assigned a supervisory role regarding Condon's activities. The district court concluded that a jury could find that Pfalzgraf also acted recklessly because (1) Pfalzgraf ***803** was Tobias's supervisor and did not require Tobias to note Condon's presence at the autopsies he witnessed, and (2) Pfalzgraf allowed Condon to witness the autopsy of Brady, during which Condon photographed Brady with a dollhouse ladder propped against his open skull. In his defense, Pfalzgraf explained that he left the room at certain points during the Brady autopsy and that he never saw Condon using any props or taking any propped photographs. He also said that he never had any contact with Condon after the Brady autopsy on August 16, 2000.

There is sufficient evidence for a jury to conclude that Pfalzgraf, like Daly and Parrott, knew of Condon's plan to take the offending photographs due to Pfalzgraf' s attendance at the initial meetings. Pfalzgraf also would have known of the instructions from the Prosecutor's Office to obscure identifiable features of any bodies photographed for the same reason. Once Parrott assigned Pfalzgraf to work with Condon, however, Pfalzgraf took no steps to ensure that any safeguards were followed and in fact testified that he left Condon alone in the autopsy suite. A factfinder could thus reasonably find that Pfalzgraf wantonly or recklessly permitted Condon to take offending photographs in the course of Brady's autopsy. We therefore conclude that Pfalzgraf' s actions, although within the scope of his employment under § 2744.03(A)(6)(a), could be found by a jury to fall within the § 2744.03(A)(6)(b) exception for recklessness. As a result, we affirm the district court's denial of summary judgment as to Chesher's intentional-infliction-of-emotional-distress claim against Pfalzgraf.

4. Tobias

Chesher alleges that Tobias, like Parrott, had knowledge of Condon's art project and yet continued to meet with Condon and permit him access to the Morgue and to Tobias's autopsy subjects. Tobias's own deposition testimony confirms that he likely had even greater knowledge of Condon's intentions than did Parrott because, on two separate occasions, Condon actually exhibited his offending photographs to Tobias. Nonetheless, Tobias did not object to Condon's continued access to the Morgue and to Tobias's autopsy subjects. In particular, Tobias acknowledged that even after seeing the offending photographs, he "left [Condon] alone in the morgue" in the course of conducting Senteney's autopsy.

Tobias not only permitted Condon to continue accessing the Morgue after viewing the offending photographs, but also began developing his own crime scene photographs at Condon's studio. Parrott questioned the propriety of these photographs by stating that they "simply shouldn't have been in a commercial photographer's studio." Although Tobias contends that his photographs were not improper and that Parrott permitted him to develop photographs at Condon's studio, Parrott disputes both of these assertions. In particular, he stated that Tobias's crime-scene photographs and

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

his work at Condon's studio could be seen as collecting "souvenirs" or an attempt at art.

[12] The record contains sufficient evidence to support a jury finding that Tobias acted recklessly under § 2744.03(A)(6)(b) with regard to both his own and Condon's photographs. He disregarded the great risk of harm posed by permitting Condon to continue the art project and by entrusting his own highly sensitive crime-scene photographs to Condon. Tobias asserts by way of defense that he consulted Parrott and Utz as his supervisors, that he warned Condon about taking the offending photographs, and that he permitted Condon to continue only because of what he perceived to be the approval of Parrott and Utz. Nevertheless, a jury could reasonably find that Tobias's continued acquiescence to ***804** Condon's presence at the Morgue, his act of leaving Condon alone with an autopsy subject even after viewing his offensive photographs, and his entrustment to Condon of the crime-scene photographs amounted to wanton or reckless conduct.

At the very least, we cannot say as a matter of law that no reasonable jury could make such a finding. This is where we disagree with our dissenting colleague. He concedes that "Tobias may have been negligent" (Dissenting Op. at 20), but has determined as a matter of law that no reasonable jury could find that Tobias's conduct crossed the line from negligence to recklessness. But such distinctions are almost always left for a jury-rather than appellate judges-to decide. *Whitfield v. Dayton,* 167 Ohio App.3d 172, 854 N.E.2d 532, 540 (2006) ("[W]hether particular acts demonstrate the presence of wantonness, recklessness, or merely negligence is normally a decision for the jury, based on the totality of the circumstances."). We see no basis on this record to take that determination away from the jury.

In reaching a contrary conclusion, our dissenting colleague focuses on the fact that Tobias held a relatively low-level position at the Coroner's Office. We fail to discern, however, why Tobias's position would have hindered his ability as a qualified physician to recognize the risks posed by Condon's alleged art project at the Morgue. Similarly, the dissent does not explain why Tobias's position should mitigate his responsibility for acts within the limited scope of his authority, such as allegedly leaving Condon alone to photograph Tobias's own autopsy subject after having seen examples of Condon's offending photographs. The district court thus properly denied Tobias's motion for summary judgment based on statutory immunity as to Chesher's
intentional-infliction-of-emotional-distress claim.

Just as Parrott's acts fell within the scope of his employment under *Caruso* and *Martin,* however, so too did Tobias's. *See Caruso,* 737 N.E.2d at 563; *Martin,* 590 N.E.2d at 417. Even though Tobias permitted Condon to continue taking the photos after Tobias realized that some of them were troubling, he likely believed that Condon was also conducting legitimate business. Tobias's actions cannot be said to have been personally motivated, as the court in *Caruso* required, particularly in light of Parrott's acknowledged failure to notify the staff that Condon's project had been cancelled. *See* 737 N.E.2d at 622. Similarly, Tobias's own crime-scene photos and his work at Condon's studio can be seen as work-related or, in any event, not motivated by strictly personal concerns. *See Jackson,* 602 N.E.2d at 366-367.

5. Utz

[13] Like Tobias, Utz also knew of the risk posed by Condon's artistic photography. Utz admits that Condon showed him several propped photographs sometime after December 25, 2000. According to Tobias, Utz responded by telling Condon that he thought the photographs were "kind of cool," which a jury could reasonably view as encouragement. Utz again described a particular propped photograph as "cool-looking" in an audiotaped conversation with Daly following the public discovery of the photographs. After seeing some of Condon's offending photographs, moreover, Utz did not object and in fact later permitted Condon to take additional photographs of an autopsy that Utz performed on Christina Folchi.

Utz admits that he saw the photograph of John

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Brady with a dollhouse ladder propped against his open skull, but claims that he thought it had been digitally enhanced. He further contends that he meant to inform Parrott about this photograph,***805** but that he failed to do so because he was either busy or sick. These explanations may well be true, but for the purposes of summary judgment we must view the evidence in the light most favorable to Chesher as the nonmoving party and draw all reasonable inferences in her favor. Application of that standard leads to the inferences that Utz (1) knew of Condon's offending photography, (2) encouraged Condon by referring to the photographs as "cool," (3) continued to permit Condon to photograph his autopsies, even after seeing the offending photographs, and (4) never reported Condon's offending photographs to any superior or law-enforcement authority.

For the same reasons as set forth above with regard to Parrott's and Tobias's claims, we affirm the district court's denial under § 2744.03(A)(6)(b) of Utz's motion for summary judgment on the intentional-infliction-of-emotional-distress claim. Chesher's allegations against Utz are sufficient to support a jury finding that he acted in a wanton or reckless manner and thus outside the bounds of Ohio's statutory grant of immunity. For the same reasons addressed above in discussing Parrott's immunity, however, we conclude that Utz's actions were not personally motivated and thus not manifestly outside the scope of his employment for the purposes of § 2744.03(A)(6)(a).

E. The conspiracy claim

[14][15] Under Ohio law, a civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Williams v. Aetna Fin. Co.,* 83 Ohio St.3d 464, 700 N.E.2d 859, 868 (1998). "The malice involved in the tort is that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another." *Id.* (citation and quotation marks omitted). Moreover, "[a]n underlying unlawful act is required before a civil conspiracy claim can succeed." *Id.*

The narrow question presented by this interlocutory appeal is whether the employee defendants acted either "manifestly outside the scope" of their employment or "with malicious purpose, in bad faith, or in a wanton or reckless manner" regarding the conduct alleged in Chesher's claims. *See* Ohio Rev.Code Ann. § 2744.03(A)(6)(a) and (b). As to the underlying "unlawful act" alleged in the conspiracy claim (the infliction of emotional distress), the district court ruled that Chesher's allegations, "if true," demonstrate that the defendants' actions fell outside the bounds of statutory immunity. The employee defendants' contentions to the contrary thus presented an issue of law appropriate for interlocutory review. As we concluded above, the employee defendants are not entitled to immunity regarding this "underlying act" element of Chesher's conspiracy claim.

The remaining element of Chesher's conspiracy claim requires that the defendants' actions amount to a "malicious combination." As to that determination, the district court explicitly held that " genuine issues of material fact are in dispute that could lead the jury to conclude that the individual Defendants acted maliciously as required by Ohio law in conspiring to damage the Plaintiffs."

The defendants' motions for summary judgment make clear that they rely on a version of the facts fundamentally at odds with the facts alleged by the plaintiffs regarding the alleged conspiracy. Such being the case, our jurisdiction is constrained by federal procedural law providing that if summary judgment is denied "based upon the district court's determination that a genuine issue of material fact exists, the decision will not be immediately appealable." ***806***Crockett v. Cumberland College,* 316 F.3d 571, 578 (6th Cir.2003) (citing *Johnson v. Jones,* 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995)). We thus have no occasion to presently review the district court's holding that genuine issues of material fact are in dispute regarding whether the defendants acted maliciously or in bad faith with respect to Chesher's conspiracy claim.

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

IV. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

CONCURRING IN PART, DISSENTING IN PART

ROGERS, Circuit Judge, concurring in part and dissenting in part.

Although I am in substantial agreement with the majority opinion, I dissent from the portion of the decision affirming the denial of summary judgment as to Dr. Tobias. The plaintiffs' allegations as they relate to Dr. Tobias do not rise to the level of wantonness or recklessness, and Dr. Tobias is entitled to immunity under § 2744.03(A)(6)(b) of the Ohio Revised Code.

Although the facts of this case are gruesome, the shocking details should not render any and all people in Condon's orbit liable simply because hindsight proves that something more could have been done or that certain individuals could have been more vigilant. The facts alleged by the plaintiffs simply do not support denying Dr. Tobias the immunity he is presumed to possess under Ohio law.

The plaintiffs do not allege that Dr. Tobias was at the initial meeting where Condon's plans for an art book were discussed. The plaintiffs themselves acknowledge that Parrott failed to share with personnel at the coroner's office that the planned video project had been cancelled and that "Condon remained a welcome figure at the morgue" throughout 2000. It is undisputed that Dr. Tobias's superiors told him that Condon was allowed access to the morgue. The plaintiffs acknowledge that Dr. Tobias was "the lowest person in the Coroner's office." The plaintiffs have not disputed that Dr. Tobias, after seeing a photo taken by Condon in January 2001, told Condon to show the photograph to someone at the coroner's office and that Condon complied by showing the photo to Dr. Utz. The plaintiffs simply claim that this was not enough.

Given Dr. Tobias's role and position in the coroner's office, I cannot conclude that the summary judgment evidence permits the conclusion that Dr. Tobias acted in such a way that he should be denied immunity under Ohio law. Tobias may have been negligent. Tobias probably could have done more or spoken out to his superiors. However, the fact that Dr. Tobias acted in a way he thought commensurate with his level of authority at the coroner's office, an admittedly negligible level of authority, does not render his actions reckless or wanton. Dr. Tobias's actions were consistent with those of a lower-rung employee with little or no authority over the operation of the coroner's office, who possessed a reasonable belief that those in charge approved of Condon's presence at the morgue. Dr. Tobias did not ban Condon from the morgue, but he did not have the authority to do so; it is undisputed that he was unaware of the cancellation of the project for which Condon was initially retained and demanded what he thought he could of Condon when he questioned the propriety of the photos.

Nor should Dr. Tobias's actions of developing the death scene photos at Condon's studio strip Dr. Tobias of his statutory immunity. It is undisputed that Dr. Tobias ***807** was using a camera borrowed from the coroner's office and that the coroner's office did not have film processing facilities. If Dr. Tobias had permission to borrow the film camera from the coroner's office and the coroner's office did not have processing facilities, it was entirely reasonable for Dr. Tobias to take the film somewhere for processing. Given Dr. Tobias's entirely reasonable perception that Condon was a trusted individual at the coroner's office, it was likewise reasonable for Dr. Tobias to take the film to Condon's studio rather than the corner drug store.

Dr. Tobias's actions simply do not reveal that he acted with a perverse disregard of a known risk or with consciousness that his conduct would, in all probability, result in injury. Therefore, he should have been granted summary judgment on the grounds of statutory immunity.

C.A.6 (Ohio),2007.
Chesher v. Neyer

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

477 F.3d 784, 2007 Fed.App. 0063P

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SCOTT *v.* HARRIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05–1631. Argued February 26, 2007—Decided April 30, 2007

Deputy Timothy Scott, petitioner here, terminated a high-speed pursuit of respondent's car by applying his push bumper to the rear of the vehicle, causing it to leave the road and crash. Respondent was rendered quadriplegic. He filed suit under 42 U. S. C. §1983 alleging, *inter alia*, the use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. The District Court denied Scott's summary judgment motion, which was based on qualified immunity. The Eleventh Circuit affirmed on interlocutory appeal, concluding, *inter alia*, that Scott's actions could constitute "deadly force" under *Tennessee* v. *Garner*, 471 U. S. 1; that the use of such force in this context would violate respondent's constitutional right to be free from excessive force during a seizure; and that a reasonable jury could so find.

Held: Because the car chase respondent initiated posed a substantial and immediate risk of serious physical injury to others, Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. Pp. 3–13.

(a) Qualified immunity requires resolution of a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier* v. *Katz*, 533 U. S. 194, 201. Pp. 3–4.

(b) The record in this case includes a videotape capturing the events in question. Where, as here, the record blatantly contradicts the plaintiff's version of events so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a summary judgment motion. Pp. 5–8.

(c) Viewing the facts in the light depicted by the videotape, it is clear that Deputy Scott did not violate the Fourth Amendment.

Pp. 8–13.

(i) *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." The Court there simply applied the Fourth Amendment's "reasonableness" test to the use of a particular type of force in a particular situation. That case has scant applicability to this one, which has vastly different facts. Whether or not Scott's actions constituted "deadly force," what matters is whether those actions were reasonable. Pp. 8–10.

(ii) In determining a seizure's reasonableness, the Court balances the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests allegedly justifying the intrusion. *United States* v. *Place*, 462 U. S. 696, 703. In weighing the high likelihood of serious injury or death to respondent that Scott's actions posed against the actual and imminent threat that respondent posed to the lives of others, the Court takes account of the number of lives at risk and the relative culpability of the parties involved. Respondent intentionally placed himself and the public in danger by unlawfully engaging in reckless, high-speed flight; those who might have been harmed had Scott not forced respondent off the road were entirely innocent. The Court concludes that it was reasonable for Scott to take the action he did. It rejects respondent's argument that safety could have been assured if the police simply ceased their pursuit. The Court rules that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. Pp. 10–13.

433 F. 3d 807, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. GINSBURG, J., and BREYER, J., filed concurring opinions. STEVENS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–1631

TIMOTHY SCOTT, PETITIONER *v.* VICTOR HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 30, 2007]

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking

lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Brief for Petitioner 4. Having radioed his supervisor for permission, Scott was told to "'[g]o ahead and take him out.'" *Harris* v. *Coweta County*, 433 F. 3d 807, 811 (CA11 2005). Instead, Scott applied his push bumper to the rear of respondent's vehicle.[1] As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy Scott and others under Rev. Stat. §1979, 42 U. S. C. §1983, alleging, *inter alia*, a violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." *Harris* v.

---

[1] Scott says he decided not to employ the PIT maneuver because he was "concerned that the vehicles were moving too quickly to safely execute the maneuver." Brief for Petitioner 4. Respondent agrees that the PIT maneuver could not have been safely employed. See Brief for Respondent 9. It is irrelevant to our analysis whether Scott had permission to take the precise actions he took.

Coweta County, No. 3:01–CV–148–WBH (ND Ga., Sept. 23, 2003), App. to Pet. for Cert. 41a–42a. On interlocutory appeal,[2] the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial.[3] Taking respondent's view of the facts as given, the Court of Appeals concluded that Scott's actions could constitute "deadly force" under *Tennessee* v. *Garner*, 471 U. S. 1 (1985), and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights." 433 F. 3d, at 816. The Court of Appeals further concluded that "the law as it existed [at the time of the incident], was sufficiently clear to give reasonable law enforcement officers 'fair notice' that ramming a vehicle under these circumstances was unlawful." *Id.*, at 817. The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. We granted certiorari, 549 U. S. __ (2006), and now reverse.

II

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do

---

[2] Qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985). Thus, we have held that an order denying qualified immunity is immediately appealable even though it is interlocutory; otherwise, it would be "effectively unreviewable." *Id.*, at 527. Further, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U. S. 224, 227 (1991) *(per curiam)*.

[3] None of the other claims respondent brought against Scott or any other party are before this Court.

the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Ibid.* Although this ordering contradicts "[o]ur policy of avoiding unnecessary adjudication of constitutional issues," *United States* v. *Treasury Employees*, 513 U. S. 454, 478 (1995) (citing *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring)), we have said that such a departure from practice is "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established." *Saucier*, *supra*, at 201.[4] We therefore turn to the threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment.

---

[4] Prior to this Court's announcement of *Saucier*'s "rigid 'order of battle,'" *Brosseau* v. *Haugen*, 543 U. S. 194, 201–202 (2004) (BREYER, J., concurring), we had described this order of inquiry as the "better approach," *County of Sacramento* v. *Lewis*, 523 U. S. 833, 841, n. 5 (1998), though not one that was required in all cases. See *id.*, at 858–859 (BREYER, J., concurring); *id.*, at 859 (STEVENS, J., concurring in judgment). There has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward. See, *e.g.*, *Brosseau*, *supra*, at 201 (BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring); *Bunting* v. *Mellen*, 541 U. S. 1019 (2004) (STEVENS, J., joined by GINSBURG and BREYER, JJ., respecting denial of certiorari); *id.*, at 1025 (SCALIA, J., joined by Rehnquist, C.J., dissenting). See also *Lyons* v. *Xenia*, 417 F. 3d 565, 580–584 (CA6 2005) (Sutton, J., concurring). We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is, as discussed in Part III–B, *infra*, easily decided. Deciding that question first is thus the "better approach," *Lewis*, *supra*, at 841, n. 5, regardless of whether it is required.

III

A

The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962) *(per curiam); Saucier, supra,* at 201. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.[5] For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F. 3d, at 815. Indeed, reading the lower court's opinion, one gets

---

[5] JUSTICE STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. See *post*, at 4 (dissenting opinion) ("In sum, the factual statements by the Court of Appeals quoted by the Court . . . were entirely accurate"). We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb and in Clerk of Court's case file.

the impression that respondent, rather than fleeing from police, was attempting to pass his driving test:

> "[T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." *Id.*, at 815–816 (citations omitted).

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.[6] We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in

---

[6] JUSTICE STEVENS hypothesizes that these cars "had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights," so that "[a] jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance." *Post*, at 3. It is not our experience that ambulances and fire engines careen down two-lane roads at 85-plus miles per hour, with an unmarked scout car out in front of them. The risk they pose to the public is vastly less than what respondent created here. But even if that were not so, it would in no way lead to the conclusion that it was unreasonable to eliminate the threat to life that respondent posed. Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.

the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.[7]

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 586–587 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 247–248 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury

---

[7] This is not to say that each and every factual statement made by the Court of Appeals is inaccurate. For example, the videotape validates the court's statement that when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly Scott *waited* for the road to be clear before executing his maneuver.)

could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

B

Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment. Scott does not contest that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a "seizure." "[A] Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means intentionally applied." *Brower* v. *County of Inyo*, 489 U. S. 593, 596–597 (1989) (emphasis deleted). See also *id.*, at 597 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure"). It is also conceded, by both sides, that a claim of "excessive force in the course of making [a] . . .'seizure' of [the] person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham* v. *Connor*, 490 U. S. 386, 388 (1989). The question we need to answer is whether Scott's actions were objectively reasonable.[8]

1

Respondent urges us to analyze this case as we analyzed *Garner*, 471 U. S. 1. See Brief for Respondent 16–29. We

---

[8] JUSTICE STEVENS incorrectly declares this to be "a question of fact best reserved for a jury," and complains we are "usurp[ing] the jury's factfinding function." *Post*, at 7. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, see Part III–A, *supra*, the reasonableness of Scott's actions—or, in JUSTICE STEVENS' parlance, "[w]hether [respondent's] actions have risen to a level warranting deadly force," *post*, at 7—is a pure question of law.

must first decide, he says, whether the actions Scott took constituted "deadly force." (He defines "deadly force" as "any use of force which creates a substantial likelihood of causing death or serious bodily injury," *id.*, at 19.) If so, respondent claims that *Garner* prescribes certain preconditions that must be met before Scott's actions can survive Fourth Amendment scrutiny: (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape;[9] and (3) where feasible, the officer must have given the suspect some warning. See Brief for Respondent 17–18 (citing *Garner*, *supra*, at 9–12). Since these *Garner* preconditions for using deadly force were not met in this case, Scott's actions were *per se* unreasonable.

Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham*, *supra*, at 388, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary sus-

---

[9]Respondent, like the Court of Appeals, defines this second precondition as "'necessary to prevent escape,'" Brief for Respondent 17; *Harris* v. *Coweta County*, 433 F. 3d 807, 813 (CA11 2005), quoting *Garner*, 471 U. S., at 11. But that quote from *Garner* is taken out of context. The necessity described in *Garner* was, in fact, the need to prevent "serious physical harm, either to the officer or to others." *Ibid.* By way of example only, *Garner* hypothesized that deadly force may be used "if necessary to prevent escape" when the suspect is known to have "committed a crime involving the infliction or threatened infliction of serious physical harm," *ibid.*, so that his mere being at large poses an inherent danger to society. Respondent did not pose that type of inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record. But in this case, unlike in *Garner*, it was respondent's flight itself (by means of a speeding automobile) that posed the threat of "serious physical harm . . . to others." *Ibid.*

pect, 471 U. S., at 21, by shooting him "in the back of the head" while he was running away on foot, *id.*, at 4, and when the officer "could not reasonably have believed that [the suspect] . . . posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape," *id.*, at 21. Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general . . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Adams* v. *St. Lucie County Sheriff's Dept.*, 962 F. 2d 1563, 1577 (CA11 1992) (Edmondson, J., dissenting), adopted by 998 F. 2d 923 (CA11 1993) (en banc) *(per curiam).* Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by respondent in this case. Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

2

In determining the reasonableness of the manner in which a seizure is effected, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U. S. 696, 703 (1983). Scott defends his actions by pointing to the paramount governmental interest in ensuring public safety, and respondent nowhere suggests this was not the purpose motivating

Scott's behavior. Thus, in judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate. Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. See Part III–A, *supra*. It is equally clear that Scott's actions posed a high likelihood of serious injury or death to respondent—though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, see *Garner*, *supra*, at 4, or pulling alongside a fleeing motorist's car and shooting the motorist, cf. *Vaughan* v. *Cox*, 343 F. 3d 1323, 1326–1327 (CA11 2003). So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.[10]

---

[10] The Court of Appeals cites *Brower* v. *County of Inyo*, 489 U. S. 593, 595 (1989), for its refusal to "countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any

But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas Scott's action—ramming respondent off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Cf. *Brower*, 489 U. S., at 594. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.[11]

Second, we are loath to lay down a rule requiring the

---

possible liability for all ensuing actions during the chase," 433 F. 3d, at 816. The only question in *Brower* was whether a police roadblock constituted a *seizure* under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant; a seizure occurs whenever the police are "responsib[le] for the termination of [a person's] movement," 433 F. 3d, at 816, regardless of the reason for the termination. Culpability *is* relevant, however, to the *reasonableness* of the seizure—to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them.

[11] Contrary to JUSTICE STEVENS' assertions, we do not "assum[e] that dangers caused by flight from a police pursuit will continue after the pursuit ends," *post*, at 6, nor do we make any "factual assumptions," *post*, at 5, with respect to what would have happened if the police had gone home. We simply point out the *uncertainties* regarding what would have happened, in response to *respondent's* factual assumption that the high-speed flight would have ended.

police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

* * *

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' decision to the contrary is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 05–1631

TIMOTHY SCOTT, PETITIONER *v.* VICTOR HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 30, 2007]

JUSTICE GINSBURG, concurring.

I join the Court's opinion and would underscore two points. First, I do not read today's decision as articulating a mechanical, *per se* rule. Cf. *post*, at 3 (BREYER, J., concurring). The inquiry described by the Court, *ante*, at 10–13, is situation specific. Among relevant considerations: Were the lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle? "[A]dmirable" as "[an] attempt to craft an easy-to-apply legal test in the Fourth Amendment context [may be]," the Court explains, "in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Ante*, at 10.

Second, were this case suitable for resolution on qualified immunity grounds, without reaching the constitutional question, JUSTICE BREYER's discussion would be engaging. See *post*, at 1–3 (urging the Court to overrule *Saucier* v. *Katz*, 533 U. S. 194 (2001)). In joining the Court's opinion, however, JUSTICE BREYER apparently shares the view that, in the appeal before us, the constitutional question warrants an answer. The video footage of the car chase, he agrees, demonstrates that the officer's conduct did not transgress Fourth Amendment limitations. See *post*, at 1. Confronting *Saucier*, therefore, is properly reserved for another day and case. See *ante*, at 4, n. 4.

SUPREME COURT OF THE UNITED STATES

No. 05–1631

TIMOTHY SCOTT, PETITIONER *v.* VICTOR HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 30, 2007]

JUSTICE BREYER, concurring.

I join the Court's opinion with one suggestion and two qualifications. Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion, *ante*, at 5, n. 5, and watch it. Having done so, I do not believe a reasonable jury could, in this instance, find that Officer Timothy Scott (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution.

Second, the video makes clear the highly fact-dependent nature of this constitutional determination. And that fact-dependency supports the argument that we should overrule the requirement, announced in *Saucier* v. *Katz*, 533 U. S. 194 (2001), that lower courts must first decide the "constitutional question" before they turn to the "qualified immunity question." See *id.*, at 200 ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged"). Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case. Although I do not object to our deciding the constitutional question in this particular case, I believe that in order to lift the burden from lower courts we can and should reconsider *Saucier*'s requirement as well.

Sometimes (*e.g.*, where a defendant is clearly entitled to qualified immunity) *Saucier*'s fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (*e.g.*, where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes, as here, the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944); see *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). In a sharp departure from this counsel, *Saucier* requires courts to embrace unnecessary constitutional questions not to avoid them.

It is not surprising that commentators, judges, and, in this case, 28 States in an *amicus* brief, have invited us to reconsider *Saucier*'s requirement. See Leval, Judging Under the Constitution: Dicta About Dicta, 81 N. Y. U. L. Rev. 1249, 1275 (2006) (calling the requirement "a puzzling misadventure in constitutional dictum"); *Dirrane* v. *Brookline Police Dept.*, 315 F. 3d 65, 69–70 (CA1 2002) (referring to the requirement as "an uncomfortable exercise" when "the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed"); *Lyons* v. *Xenia*, 417 F. 3d 565, 580–584 (CA6 2005) (Sutton, J., concurring); Brief for State of Illinois et al. as *Amici Curiae*. I would accept that invitation.

While this Court should generally be reluctant to overturn precedents, *stare decisis* concerns are at their weakest here. See, *e.g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules"). The order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it.

Third, I disagree with the Court insofar as it articulates a *per se* rule. The majority states: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante*, at 13. This statement is too absolute. As JUSTICE GINSBURG points out, *ante*, at 1, whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects. With these qualifications, I join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 05–1631

TIMOTHY SCOTT, PETITIONER *v.* VICTOR HARRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 30, 2007]

JUSTICE STEVENS, dissenting.

Today, the Court asks whether an officer may "take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders." *Ante*, at 1. Depending on the circumstances, the answer may be an obvious "yes," an obvious "no," or sufficiently doubtful that the question of the reasonableness of the officer's actions should be decided by a jury, after a review of the degree of danger and the alternatives available to the officer. A high speed chase in a desert in Nevada is, after all, quite different from one that travels through the heart of Las Vegas.

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of

Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him." *Ante*, at 7–8.

Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort," *ante*, at 7,[1] the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue. More important, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

Omitted from the Court's description of the initial speeding violation is the fact that respondent was on a four-lane portion of Highway 34 when the officer clocked his speed at 73 miles per hour and initiated the chase.[2] More significant—and contrary to the Court's assumption that respondent's vehicle "force[d] cars traveling in both directions to their respective shoulders to avoid being hit" *ante*, at 6—a fact unmentioned in the text of the opinion explains why those cars pulled over prior to being passed

---

[1] I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.

[2] According to the District Court record, when respondent was clocked at 73 miles per hour, the deputy who recorded his speed was sitting in his patrol car on Highway 34 between Lora Smith Road and Sullivan Road in Coweta County, Georgia. At that point, as well as at the point at which Highway 34 intersects with Highway 154—where the deputy caught up with respondent and the videotape begins—Highway 34 is a four-lane road, consisting of two lanes in each direction with a wide grass divider separating the flow of traffic.

by respondent. The sirens and flashing lights on the police cars following respondent gave the same warning that a speeding ambulance or fire engine would have provided.[3] The 13 cars that respondent passed on his side of the road before entering the shopping center, and both of the cars that he passed on the right after leaving the center, no doubt had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights before respondent or the police cruisers approached.[4] A jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance, and that their reactions were fully consistent with the evidence that respondent, though speeding, retained full control of his vehicle.

The police sirens also minimized any risk that may have arisen from running "multiple red lights," *ibid.* In fact, respondent and his pursuers went through only two intersections with stop lights and in both cases all other vehicles in sight were stationary, presumably because they had been warned of the approaching speeders. Incidentally, the videos do show that the lights were red when the police cars passed through them but, because the cameras were farther away when respondent did so and it is difficult to discern the color of the signal at that point, it is not entirely clear that he ran either or both of the red lights. In any event, the risk of harm to the stationary vehicles

---

[3] While still on the four-lane portion of Highway 34, the deputy who had clocked respondent's speed turned on his blue light and siren in an attempt to get respondent to pull over. It was when the deputy turned on his blue light that the dash-mounted video camera was activated and began to record the pursuit.

[4] Although perhaps understandable, because their volume on the sound recording is low (possibly due to sound proofing in the officer's vehicle), the Court appears to minimize the significance of the sirens audible throughout the tape recording of the pursuit.

was minimized by the sirens, and there is no reason to believe that respondent would have disobeyed the signals if he were not being pursued.

My colleagues on the jury saw respondent "swerve around more than a dozen other cars," and "force cars traveling in both directions to their respective shoulders," *ante*, at 6, but they apparently discounted the possibility that those cars were already out of the pursuit's path as a result of hearing the sirens. Even if that were not so, passing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction. In fact, at one point, when respondent found himself behind a car in his own lane and there were cars traveling in the other direction, he slowed and waited for the cars traveling in the other direction to pass before overtaking the car in front of him while using his turn signal to do so. This is hardly the stuff of Hollywood. To the contrary, the video does not reveal any incidents that could even be remotely characterized as "close calls."

In sum, the factual statements by the Court of Appeals quoted by the Court, *ante*, at 5–6, were entirely accurate. That court did not describe respondent as a "cautious" driver as my colleagues imply, *ante*, at 7, but it did correctly conclude that there is no evidence that he ever lost control of his vehicle. That court also correctly pointed out that the incident in the shopping center parking lot did not create any risk to pedestrians or other vehicles because the chase occurred just before 11 p.m. on a weekday night and the center was closed. It is apparent from the record (including the videotape) that local police had

blocked off intersections to keep respondent from entering residential neighborhoods and possibly endangering other motorists. I would add that the videos also show that no pedestrians, parked cars, sidewalks, or residences were visible at any time during the chase. The only "innocent bystanders" who were placed "at great risk of serious injury," *ante*, at 7, were the drivers who either pulled off the road in response to the sirens or passed respondent in the opposite direction when he was driving on his side of the road.

I recognize, of course, that even though respondent's original speeding violation on a four-lane highway was rather ordinary, his refusal to stop and subsequent flight was a serious offense that merited severe punishment. It was not, however, a capital offense, or even an offense that justified the use of deadly force rather than an abandonment of the chase. The Court's concern about the "imminent threat to the lives of any pedestrians who might have been present," *ante*, at 11, while surely valid in an appropriate case, should be discounted in a case involving a nighttime chase in an area where no pedestrians were present.

What would have happened if the police had decided to abandon the chase? We now know that they could have apprehended respondent later because they had his license plate number. Even if that were not true, and even if he would have escaped any punishment at all, the use of deadly force in this case was no more appropriate than the use of a deadly weapon against a fleeing felon in *Tennessee* v. *Garner*, 471 U. S. 1 (1985). In any event, any uncertainty about the result of abandoning the pursuit has not prevented the Court from basing its conclusions on its own factual assumptions.[5] The Court attempts to avoid the

---

[5] In noting that Scott's action "was *certain* to eliminate the risk that respondent posed to the public" while "ceasing pursuit was not," the

conclusion that deadly force was unnecessary by speculating that if the officers had let him go, respondent might have been "just as likely" to continue to drive recklessly as to slow down and wipe his brow. *Ante*, at 12. That speculation is unconvincing as a matter of common sense and improper as a matter of law. Our duty to view the evidence in the light most favorable to the nonmoving party would foreclose such speculation if the Court had not used its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment. There is no evidentiary basis for an assumption that dangers caused by flight from a police pursuit will continue after the pursuit ends. Indeed, rules adopted by countless police departments throughout the country are based on a judgment that differs from the Court's. See, *e.g.*, App. to Brief for Georgia Association of Chiefs of Police, Inc., as *Amicus Curiae* A–52 ("During a pursuit, the need to apprehend the suspect should always outweigh the level of danger created by the pursuit. When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated. . . . [P]ursuits should usually be discontin-

---

Court prioritizes total elimination of the risk of harm to the public over the risk that respondent may be seriously injured or even killed. *Ante*, at 12 (emphasis in original). The Court is only able to make such a statement by assuming, based on its interpretation of events on the videotape, that the risk of harm posed in this case, and the type of harm involved, rose to a level warranting deadly force. These are the same types of questions that, when disputed, are typically resolved by a jury; this is why both the District Court and the Court of Appeals saw fit to have them be so decided. Although the Court claims only to have drawn factual inferences in respondent's favor "*to the extent supportable by the record*," *ante*, at 8, n. 8 (emphasis in original), its own view of the record has clearly precluded it from doing so to the same extent as the two courts through which this case has already traveled, see *ante*, at 2–3, 5–6.

ued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public").

Although *Garner* may not, as the Court suggests, "establish a magical on/off switch that triggers rigid preconditions" for the use of deadly force, *ante*, at 9, it did set a threshold under which the use of deadly force would be considered constitutionally unreasonable:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." 471 U. S., at 11–12.

Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury.[6] Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. It chastises the Court of Appeals for failing to "vie[w] the facts in the light depicted by the videotape" and implies that no reasonable person could view the videotape and come to the conclusion that deadly force was unjustified. *Ante*, at 8. However, the three judges on the Court of Appeals panel ap-

---

[6]In its opinion, the Court of Appeals correctly noted: "We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury." *Harris* v. *Coweta County*, 433 F. 3d 807, 815 (CA11 2005).

parently did view the videotapes entered into evidence[7] and described a very different version of events:

> "At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, . . . Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force." *Harris* v. *Coweta County*, 433 F. 3d 807, 819, n. 14 (CA11 2005).

If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events. Moreover, under the standard set forth in *Garner*, it is certainly possible that "a jury could conclude that Scott unreasonably used deadly force to seize Harris by ramming him off the road under the instant circumstances." 433 F. 3d, at 821.

The Court today sets forth a *per se* rule that presumes its own version of the facts: "A police officer's attempt to terminate a dangerous high-speed car chase *that threatens the lives of innocent bystanders* does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante*, at 13 (emphasis added). Not only does that rule fly in the face of the flexible and case-by-case "reasonableness" approach applied in *Garner* and *Graham* v. *Connor*, 490 U. S. 386 (1989), but it

---

[7] In total, there are four police tapes which captured portions of the pursuit, all recorded from different officers' vehicles.

is also arguably inapplicable to the case at hand, given that it is not clear that this chase threatened the life of any "innocent bystande[r]."[8] In my view, the risks inherent in justifying unwarranted police conduct on the basis of unfounded assumptions are unacceptable, particularly when less drastic measures—in this case, the use of stop sticks[9] or a simple warning issued from a loudspeaker—could have avoided such a tragic result. In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.

I respectfully dissent.

---

[8] It is unclear whether, in referring to "innocent bystanders," the Court is referring to the motorists driving unfazed in the opposite direction or to the drivers who pulled over to the side of the road, safely out of respondent's and petitioner's path.

[9] "Stop sticks" are a device which can be placed across the roadway and used to flatten a vehicle's tires slowly to safely terminate a pursuit.