
IN THE SUPREME COURT OF OHIO

CASE NO.: 09-0014

Appeal from the Court of Appeals
Fourth Appellate District
Ross County, Ohio
Case No. 06CA002900

ESTATE OF JILLIAN MARIE GRAVES

Plaintiff-Appellee

v.

CITY OF CIRCLEVILLE, et al.

Defendants-Appellants

**MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANTS/APPELLANTS
PETER SHAW, WILLIAM J. EVERSOLE, AND BENJAMIN E. CARPENTER**

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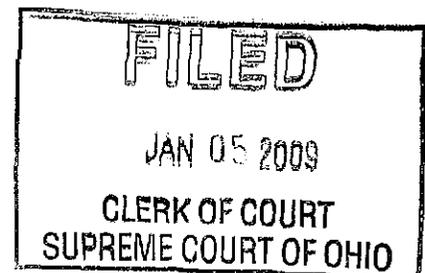


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I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

For the first time, an Ohio court has created an exception to the Public Duty Rule for “wanton and reckless” conduct. The Public Duty defense provides that a duty imposed by law upon a public official is not a duty to an individual, but a non-actionable duty to the public in general. In a divided decision, the Fourth District departs from two decades of Ohio jurisprudence that has never authorized such exception. Moreover, the new exception is fundamentally incompatible with Ohio Public Duty law. If the appellate court’s decision stands, this presents the illogical situation where a public official could be liable even when that official has no duty to that individual. The Fourth District improperly used an exception to immunity to create a duty.

This case arises out of the deadly consequences of non-party Cornelius Copley’s drunk driving. While intoxicated, Mr. Copley drove his car into Jillian Graves’ oncoming vehicle, killing them both. On July 4, 2003 and two days before the accident, the Circleville Police Department arrested Mr. Copley. Plaintiff alleges the improper release of Mr. Copley’s vehicle proximately caused Jillian Graves’ death on July 6, 2003. The Plaintiff theorizes that members of the Circleville Police Department can be held personally liable for failing to comply with R.C. § 4507.38 and R.C. § 4511.195.¹ These Sections require law enforcement to seize a drunk driver’s vehicle and plates until the operator’s initial court appearance.

¹ At the time of Copley's arrest, R.C. 4507.38(B)(1) required a law enforcement agency arresting a person for driving without a valid license to seize the vehicle and plates and hold them at least until the operator's initial court appearance. R.C. 4511.195 provides that, when arresting a person for driving under the influence of alcohol who had been convicted of a similar offense within the six previous years, a law enforcement agency must seize the vehicle the person was operating at the time of the alleged offense and its license plates. The law enforcement agency must hold the vehicle at least until the operator's initial court appearance. R.C. 4511.195(B)(2).

There is no serious question that the Fourth District erred. The Fourth District admits as much, acknowledging “the Estate’s claims can only proceed if it establishes the special relationship exception, which, we acknowledge, it cannot.” (Apx. “A” at pp. 11-12, ¶ 24.) Yet, the Fourth District went beyond its proper role of interpreting the law. In doing so, the appellate court created an exception that never existed in Ohio and is incompatible with the State’s Public Duty law. The Fourth District disregarded the critical fact that the Public Duty Rule deals only with the legal issue of duty, not culpability. It is irrelevant whether a plaintiff characterizes a public official’s conduct as negligent or reckless; if there is no duty, a public official cannot be liable and is otherwise immune under the non-liability provisions of R.C. § 2744.03.

The Public Duty Rule performs a vital function to shield public officials from potential liability for every oversight regarding a duty to the public that a plaintiff’s attorney can characterize as reckless. Here, the Estate claims that these Officers failed to protect Ms. Graves from the criminal conduct of Mr. Copley, even though the Officers did not have any contact with her. But, the court’s novel ruling transcends any dispute among the parties and creates potential liability for every public official in the state of Ohio. There are innumerable duties that public officials like police officers, firefighters, dispatchers, building inspectors, and others have to the public at large. The Fourth District’s new exception is not and should not be the law of Ohio. As the dissenting judge properly recognized, “where no legal duty is owed, there is no actionable tort.” (Apx. “A” at p. 21, ¶ 43.) The Public Duty Rule protects these public servants from potentially devastating personal liability for failing to comply with an overwhelming array of general duties.

The Fourth District also erred when it alternatively ruled that Ohio’s Political Subdivision Tort Liability Act abrogated the Public Duty Rule. The appellate court held that if a “wanton and

reckless” exception did not exist, the individual liability provision of R.C. § 2744.03(A)(6)(b) “amounts to a clear legislative repudiation of that segment” of the Public Duty Rule. (Apx. “A” at pp. 13, ¶ 26.) The impact of such holding is as widespread as it is wrong. The Fourth District’s alternative holding improperly eviscerates the Public Duty Rule statewide as to public officials. What’s more, R.C. § 2744.03(A)(6) and its subsections in R.C. § 2744.03(A)(6)(a-c) do not give any indication that the Legislature had a “clear intent” to supersede any common law defense. Clear intent is the standard for such abrogation. The express language of R.C. § 2744.03 not only grants immunity but also allows for a public official to raise common law defenses. The immunity defense and the Public Duty defense work together.

Finally, and inextricably intertwined with its previous findings, the Fourth District determined that the Officers were not entitled to immunity because there were genuine issues of material fact with regard to whether the Officers acted in a wanton and reckless manner. Of course, without a duty, the Officers could not act “wantonly and recklessly” and the lower courts have denied them the benefit of immunity under R.C. § 2744.03. It is legally impossible for a plaintiff to establish an exception to immunity when there is no duty.

This case presents an issue of critical importance to Ohio political subdivisions and their employees with respect to the application of the Public Duty Rule and immunity. The Fourth District’s newly created exception was wrong and creates an injustice to these and future litigants. Review by this Honorable Court will provide guidance to all Ohio courts in which public employees are litigants. Therefore, this matter is of great general or public interest warranting this Court’s review.

II. STATEMENT OF THE CASE AND FACTS

The relevant material facts are not in dispute. For the purposes of the appellate proceedings below and these proceedings, the Officers had not – and do not – dispute the basic facts that exist in the record.

On July 4, 2003, shortly before 6:44 p.m., Officer Peter Shaw learned that Cornelius Copley had been involved in a motor vehicle accident and fled the scene. Upon their arrival, officers located Mr. Copley and administered a field sobriety test. Mr. Copley failed the test and he was arrested. To conduct a timely Breathalyzer test, Officers Shaw and Anthony Haupt transported Mr. Copley to the station. At the time of the arrest, Officer Shaw could not confirm Mr. Copley's driving record because the Law Enforcement Automated Data System (LEADS) was unavailable – through no fault of his own or anyone at the City of Circleville.

Mr. Copley was eventually charged with violations of R.C. § 4511.19(A)(1) (driving while under the influence of alcohol or drugs), R.C. § 4507.02(D)(2) (operation without valid license prohibited) and two other offenses. On the date of the arrest, R.C. § 4507.38(B)(1) provided that vehicles impounded pursuant to violations of R.C. § 4507.02(D)(2) were not to be released until the arraignment. However, because of the need to obtain a timely Breathalyzer reading, the arresting officers had already left the scene when the towing company arrived, leaving the task of handling the impound procedure of Mr. Copley's vehicle to other officers, who are not parties to the case. When a vehicle is impounded in Circleville, the responsible officer contacts the dispatcher to request the next available wrecker. The officer fills out an impound slip. The officer then makes a "hold" notation on the slip if a court order is required for the release of the vehicle.

Officer Shaw took Mr. Copley to the station to conduct a Breathalyzer test. Officer Roar, who is not party to this litigation, remained at the scene to impound Mr. Copley's vehicle. Officer Roar could not obtain Mr. Copley's driving record because LEADS was inoperable. Because he did not know the charges against Mr. Copley, Officer Roar could not place a hold on Mr. Copley's vehicle. The only alternative to LEADS for determining an individual's driving record is a hand check, which takes several days.

On July 5, 2003, Officer William Eversole was on patrol when he got a call from the dispatcher to return to the station to release Mr. Copley. After Mr. Copley posted bond, Officer Eversole properly released him from jail at 1:19 p.m. on July 5, 2003. Officer Eversole was not involved in Mr. Copley's arrest the night before. He did not assist Mr. Copley in getting his vehicle from the impound lot. Officer Eversole's conduct in this case was confined to releasing Mr. Copley from jail.

After his bond was posted on July 5, 2003, Mr. Copley returned to the station to get the release form for his vehicle at about 3 p.m. Dispatcher Benjamin Carpenter examined the tow log and, finding no hold on the vehicle, gave Mr. Copley the appropriate paper. There is no dispute that Mr. Copley was not intoxicated or otherwise impaired at the time.

On July 6, 2003, and 1 ½ days after his arrest, Mr. Copley drove his vehicle while intoxicated and was involved in an automobile accident with Ms. Graves that resulted in both of their deaths.

The Officers filed a motion for summary judgment, which the trial court denied. The Fourth District affirmed the lower court. In doing so, the court determined that an actionable duty existed because the Officers' allegedly wanton and reckless conduct created that duty. The Fourth District "acknowledge[ed]" that the special relationship exception cannot be met and

there was no actionable duty under the Public Duty Rule. (Apx. "A" at pp. 11-12, ¶ 24.) Yet, the Fourth District avoided the result that was mandated by the Public Duty Rule by creating an exception for allegedly "wanton and reckless" conduct. Further, the Fourth District curiously held in the "alternative" that R.C. § 2744.03(A)(6)(b) "amounts to a clear legislative repudiation of that segment" of the Public Duty Rule. (Apx. "A" at pp. 13, ¶ 26.) The Court ultimately concluded that the Officers could be held liable and were not entitled to immunity under R.C. § 2744.03, despite under previous law there was no duty.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: When there is no duty under the Public Duty Rule, the wanton and reckless exception to employee immunity is not at issue.

A. Plaintiff could not establish an exception to immunity for "wanton and reckless" conduct without first establishing an actionable duty.

The Fourth District determined that the Officers were not entitled to immunity because there were genuine issues of material fact with regard to whether the Officers acted in a wanton and reckless manner.

Without a duty, the Officers could not act "wantonly and recklessly" within the meaning of R.C. § 2744.03(A) as a matter of law. Necessarily, a plaintiff cannot establish an exception under R.C. § 2744.03(A) unless the plaintiff establishes a defendant owes a duty. This is because the concept of duty is imbedded in the determination of whether a public official acted wanton or recklessly under 2744.03(A). This Court has stated that the term "reckless" is used interchangeably with the terms "willful" and "wanton." See Thompson v. McNeil (1990), 53 Ohio St.3d 102, 104, n. 1. One is reckless:

[I]f he does an act or intentionally fails to do an act **which it is his duty to the other to do**, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk

of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Jackson v. Butler Cty. Bd. of Cty. Comm'rs (1991), 76 Ohio App.3d 448, 454, *quoting Thompson*, 53 Ohio St.3d, at 104-105 (emphasis added).

There is a presumption of immunity that is afforded governmental acts carried out by political subdivisions and their employees. Lutz v. Hocking Technical College (4th Dist. 1999), 1999 WL 355187 *5 (observing the presumption of immunity pursuant to R.C. §2744.03(A)(6)). To establish the R.C. §2744.03(A)(6)(b) “wanton and reckless” exception, there must be a duty. Liability for conduct is predicated upon injury caused by the failure to discharge a duty owed to the injured party. Moncol v. Bd. of Edn. (1978), 55 Ohio St.2d 72, 75. To sustain this immunity exception, at the very least, the plaintiff must demonstrate: “the existence of a duty owing to the plaintiff[.]” (*Id.*) Plaintiff failed to do so. Consequently, the Fourth District erred in denying immunity.

Proposition of Law II: There is no “wanton and reckless” exception to the Public Duty Rule.

A. A “wanton and reckless” exception does not exist under Ohio law.

This Court and the intermediate appellate courts have consistently applied the Public Duty Rule and its one exception for two decades. Sawicki v. Village of Ottawa Hills (1988), 37 Ohio St.3d 222, 230. Until the Fourth District’s decision, no Ohio court has authorized an exception to the Rule for allegedly “wanton and reckless” conduct.

The appellate court’s error is not merely based on its departure from previously established precedent or its subjective determination of what “justice” requires. Rather, “wanton and reckless” culpability does not create a duty. If there is no duty under the Public Duty Rule, there can be no liability. So, whether alleged conduct is negligent or “reckless and wanton” is of

no import to the application of the Rule. Consequently, any exception to the Rule on this ground is illogical.

The Public Duty Rule provides that an employee cannot be held liable to an individual for breach of a duty owed to the general public. When a duty which the law imposes upon a public official is a duty to the public, a failure to perform it, or an inadequate or an erroneous performance, is generally a public and not an individual injury and is punishable by indictment only. Sawicki v. Village of Ottawa Hills (1988), 37 Ohio St.3d 222, 230. This Court noted that this rule is not absolute and there is a “special relationship” exception to the rule. To establish that narrow exception, a plaintiff must establish each of four elements:

- (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
- (2) knowledge on the part of the municipality’s agents that inaction could lead to harm;
- (3) some form of direct contact between the municipality’s agents and the injured party;
- and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking.

Sawicki, *supra* at 231-232.

Against the well-established law, the Fourth District “acknowledge[ed]” that the special relationship exception cannot be met. (Apx. “A” at pp. 11-12, ¶ 24.) Yet, the Fourth District avoided the result by creating an exception for allegedly “wanton and reckless” conduct. The Fourth District’s newly created exception cannot co-exist with the Public Duty Rule.

The Fourth District held the Public Duty Rule was limited to negligence. No Ohio case limits the doctrine to negligence or negligent culpability. What’s more, such limitation makes no sense because establishing a duty is a prerequisite to negligent conduct and “wanton and reckless” conduct. “Reckless and wanton misconduct” simply is not a recognized cause of action in Ohio. Wenzel v. Al Castrucci, Inc. (2nd Dist. 1999), 1999 WL 397366, *unreported*; Cincinnati Ins. Co. v. Oancea (6th Dist. 2004), 2004 WL 1810347, *unreported*. Wanton and

reckless misconduct is not a cause of action, but a level of intent. Griggy v. City of Cuyahoga Falls (9th Dist. 2006), 2006 WL 173134. “Wanton and reckless” conduct does not create a duty.

The Fourth District’s newly minted “wanton and reckless” exception improperly creates new law that is fundamentally incompatible with more than twenty years of Public Duty law.

Proposition of Law III: The “wanton and reckless” exception to immunity in R.C. § 2744.03(A)(6)(b) did not legislatively repudiate the Public Duty Rule.

A. The Public Duty Rule co-exists with R.C. § 2744.03.

The Fourth District’s “alternative” holding erroneously states that R.C. § 2744.03(A)(6)(b) “amounts to a clear legislative repudiation of that segment” of the Public Duty Rule. (Apx. “A” at p. 13, ¶ 26.) The Fourth District suggests that “The scheme set forth in R.C. 2744.03(A)(6) could be interpreted as a statement of the legislature’s clear intent to provide for the public duty doctrine’s continued viability in the negligence context, while repudiating it when dealing with rogue employees.” (Apx. “A” at p. 13, ¶ 26.)

This is wrong. This Court has explicitly stated that immunity and the public duty doctrine were separate, coexisting and complementary concepts. Sawicki, supra at 230; *see also Yates v. Mansfield Bd. of Edn.* (2004), 102 Ohio St.3d 205, 2004-Ohio-2491, fn. 2. (doctrine “remains viable” ... as applied to actions brought against political subdivisions pursuant to R.C. Chapter 2744”).

An employee of a political subdivision is entitled to immunity pursuant to R.C. § 2744.03(A)(6), which states in pertinent part:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

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

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to an employee."

R.C. § 2744.03(A)(6).

The Public Duty Rule is common law. The General Assembly will not be presumed to have intended to abrogate a common-law rule unless the language used in the statute clearly shows that intent. Carrel v. Allied Products Corp. (1997), 78 Ohio St.3d 284, *citing* State ex rel. Morris v. Sullivan (1909), 81 Ohio St. 79, 90 N.E. 146, paragraph three of the syllabus. Thus, in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force. Id. "There is no repeal of the common law by mere implication." Id. citing Frantz v. Maher (1957), 106 Ohio App. 465, 472.

The Public Duty Rule and R.C. § 2744.03(A)(6)(b) coexist in the proper analysis of a claim against governmental employee. Stated plainly, the Public Duty Rule is relevant to a plaintiff establishing the duty element of a negligence claim, which requires duty, breach, causation and damages. Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs. (2008), 118 Ohio St.3d 392 at ¶ 32. On the other hand, immunity under R.C. § 2744.03(A)(6)(b) is

relevant to a plaintiff establishing the high level of culpability that would constitute an exception to the broad immunity from liability. The public duty defense, when applicable, establishes non-liability based on the lack of a legal duty. The immunity defenses under Chapter 2744.03 establish non-liability based on immunity, despite the existence or nonexistence of a duty or even liability otherwise.

An employee of a political subdivision is entitled to immunity pursuant to R.C. § 2744.03(A)(6) unless that employee's conduct falls into one of three limited exceptions. Importantly, that Section does not impose liability on a public official but provides an "immunit[y] [that] may be asserted to establish nonliability." R.C. § 2744.03(A)(6). This immunity is in addition to any common law defense that a public official could raise. The Public Duty Rule is one of those defenses. The express language of R.C. § 2744.03(A)(6) and its subsections in R.C. § 2744.03(A)(6)(a-c) do not give any indication that the Legislature had a "clear intent" to supersede any common law defense.

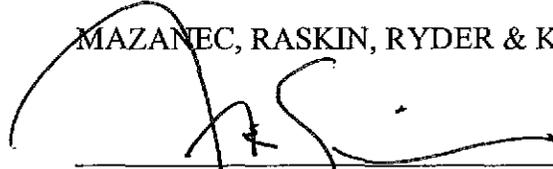
These two independent defenses work together. The Ohio Legislature in R.C. § 2744.03(A)(6)(b) did not "clearly intend" to abrogate the common law Public Duty Rule.

IV. CONCLUSION

This Honorable Court should accept jurisdiction.

Respectfully submitted,

MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.



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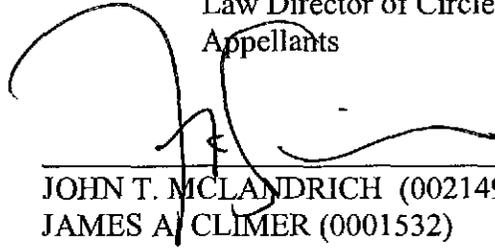
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APPENDIX

Decision and Judgment Entry, Fourth Appellate District1

COURT OF APPEALS

2009 NOV 21 PM 2:06

FILED
ROSS COUNTY COURT OF APPEALS
CLERK OF COURTS
JULIA D. HARRIS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

THE ESTATE OF JILLIAN MARIE GRAVES, :
 :
 Plaintiff-Appellee, :
 :
 v. :
 :
 THE CITY OF CIRCLEVILLE, et al., :
 :
 Defendants-Appellants. :

Case No. 06CA2900

DECISION AND
JUDGMENT ENTRY

APPEARANCES

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Rex H. Elliott, Charles H. Cooper, Jr., & Aaron D. Epstein, COOPER & ELLIOTT, LLC, Columbus, Ohio, and J. Jeffrey Benson, Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} The Estate of Jillian Marie Graves (the "Estate") sued Officers Peter Shaw, William Eversole, and Benjamin Carpenter (collectively, the "Officers") of the Circleville Police Department for the death of Ms. Graves. The Estate claims that the Officers wantonly or recklessly released the vehicle of Cornelius Copley from impound without a court order. While intoxicated, Mr. Copley drove the vehicle and collided with Ms. Graves's vehicle, killing her. The trial court denied the Officers' joint motion for summary judgment in which they argued they were not liable under R.C. 2744.03(A)(6) because they owed no duty to Jillian Graves, did not act in a wanton or reckless manner, and were not the proximate cause of Ms. Graves's death.

{¶2} The Officers argue that under the public duty doctrine, which provides that a

statutory duty owed only to the general public does not create a similar duty to an individual, the Estate cannot demonstrate that they owed a duty to Jillian Graves. We disagree. While we agree that Ohio's common law public duty doctrine remains viable, we conclude it does not apply to situations involving wanton or reckless conduct. The Officers also contend that as a matter of law, their conduct was not reckless or wanton. Because the Estate presented evidence that the Officers knew or should have known that Copley had a history of driving while drunk and that his vehicle could not be released without a court order, a reasonable trier of fact could find that the Officers acted in a wanton or reckless manner. Finally, the Officers contend that as a matter of law, their conduct was not the proximate cause of Ms. Graves's death. Because the Estate presented evidence that the Officers knew or should have known that Copley habitually drove while drunk and on a suspended license, a reasonable trier of fact could find that Ms. Graves's death was the natural and probable consequence of the Officers' conduct. Thus, we affirm the trial court's denial of the Officers' motion for summary judgment.

I. Facts

{13} On July 4, 2003, Officer Shaw arrested Cornelius Copley for driving under the influence of alcohol ("DUI") and driving under suspension ("DUS"). In his deposition, Officer Shaw admitted that he knew that proper procedure required a court order to release a vehicle to a person with (1) a charge of DUI and a prior DUI conviction¹; or (2) a charge of driving under a suspended license. In his deposition, Officer Shaw stated that at the scene of the arrest, Copley told him that he drove without a license because the court suspended it due to a prior DUI violation. Despite receiving this information, Officer

¹ A court order is required only if the conviction occurred within the last six years of the current DUI charge. It is unclear whether Officer Shaw knew of this limitation. However, based on the record, it is clear that Copley had a conviction within six years of his arrest by Shaw.

Shaw failed to remove Copley's license plates and send them to the BMV; failed to make sure the paperwork clearly stated that no one could release Copley's car from the impound lot until a court ordered the release; failed to properly complete the BMV immobilization form by not indicating that the car license plates were to be removed; and failed to inform the dispatcher that no one could release Copley's vehicle from the impound lot without a court order. Prior to the vehicle's release, Officer Shaw checked Copley's LEADS report showing Copley's license suspension and lengthy DUI history. Officer Shaw took no steps to ensure Copley's vehicle was not released. After Officer Shaw learned that someone had released the vehicle to Copley without a court order, he failed to do anything to secure the vehicle's return.

{¶4} Officer Eversole released Copley from jail. In his deposition, Officer Eversole admits that, at the time of release, he knew that an officer had arrested Copley for DUI and DUS. He further admitted that he knew that proper procedure required a court order to release a vehicle to a person with: (1) a charge of DUI and a prior DUI conviction within the last six years; or (2) a charge of driving under a suspended license. Regardless, without a court order, Officer Eversole gave Copley his keys to the vehicle. Though Officer Eversole claims he had no further involvement with Copley after his release, Mr. Copley's sister, Carolyn Brewer, states otherwise. Following his release, Copley went home for a short period of time. Then Ms. Brewer and Totie Rhodes, Copley's niece by marriage, accompanied him to the Circleville police station so he could obtain a release form to retrieve his car from the impound lot. After Copley received the form and they prepared to pull out from the station, an officer approached Copley's window. Ms. Rhodes recalls the officer stating, "Now, don't be going out and getting in

that car and drinking and kill someone." Ms. Brewer similarly recalls the officer telling Copley "don't take that car out and kill somebody tonight." Ms. Brewer identified the officer as Officer Eversole.

{15} Dispatcher Carpenter wrote "no hold" on Copley's vehicle release form and authorized the release of Copley's car by signing his name on the form. Dispatcher Carpenter testified at his deposition that, after reading the police department's standard operating procedures, he signed his name to indicate he had read them. He understood that there were certain circumstances where vehicles would be impounded and could not be released until the suspect had appeared in court. However, he further testified, "until this situation [arose], I didn't understand how vehicles are held for suspensions and DUI's." He stated, "I'd usually just wait for the officers to tell me what they needed as far as putting a hold on it or not." Dispatcher Carpenter printed out Copley's "lengthy" LEADS report, involving the history of Copley's criminal record, and was "sure he glanced at it" to find out what Copley's history was. Dispatcher Carpenter knew an officer arrested Copley for DUI, but failed to contact the officer before signing off to release the vehicle; knew Copley did not have a valid driver's license; and knew Copley had not yet appeared in court.

{16} After Copley retrieved his vehicle on the afternoon of July 5, 2003, and while intoxicated, Copley drove the wrong way on U.S. Route 23 in the early morning hours of July 6, 2003. He collided head-on with a vehicle driven by Jillian Marie Graves, killing her.

{17} The Estate brought an action against the City of Circleville ("City"), John and Jane Doe Officers of the Circleville Police Department, and others. In the original

complaint, the Estate alleged causes of action for negligence, wrongful death, Graves' pain and suffering before her death, and respondeat superior. The Estate amended its complaint to include allegations that the defendants acted wantonly, recklessly, and with complete disregard for the foreseeable consequences of their actions. After the City moved the trial court for judgment on the pleadings, the trial court found that the City and its officers were engaged in a governmental function and were, thus, immune from liability for their actions under R.C. 2744.02(A)(1). Accordingly, the court granted the City and John and Jane Doe Officers judgment on the pleadings and dismissed the Estate's amended complaint.² We affirmed the court's dismissal of the City, but reversed the dismissal of the John and Jane Doe Officers and remanded this cause to the trial court for further proceedings. *Estate of Graves v. City of Circleville*, Ross App. No. 04CA2774, 2005-Ohio-929.

{18} On remand, the Estate amended its complaint a second time and added three defendants: (1) Officer Peter Shaw; (2) Officer William Eversole; and (3) Officer Ben Carpenter. After several depositions, the Officers sought summary judgment, claiming immunity from any liability. When the court denied the Officers' motion, they filed this appeal. *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 873 N.E.2d 878, 2007-Ohio-4839 provides that such a judgment constitutes a final appealable order.

II. Assignment of Error

{19} Appellants present one assignment of error:

THE LOWER COURT ERRED IN DENYING THE
APPELLANTS/INDIVIDUAL OFFICERS' JOINT MOTION FOR
SUMMARY JUDGMENT BECAUSE THEY ARE IMMUNE AND
APPELLEE FAILED TO ESTABLISH A RELEVANT EXCEPTION TO

² The unnamed officers (identified as John and Jane Doe Officers) did not move for judgment on the pleadings.

THEIR IMMUNITY. [J. Entry of 05/01/06; Apx. "A."]

III. Standard of Review

{¶10} When reviewing a trial court's decision on a summary judgment motion, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment was appropriate and does not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153.

{¶11} Summary judgment is appropriate when the movant has established: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, with the evidence against that party being construed most strongly in its favor. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881.

{¶12} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294, 662 N.E.2d 264. However, once the movant supports the motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). See, also, *Dresher* at 294-295.

IV. The Existence of a Duty to Ms. Graves

{¶13} In their sole assignment of error, the Officers contend that they are immune

from liability. The Estate acknowledges that the Officers have immunity in certain circumstances, but asserts that the Officers have confused the concepts of duty and immunity. The Estate contends the officers are not immune here because their conduct was wanton or reckless under R.C. 2744.03(A)(6)(b), which provides:

In a civil action brought against * * * an employee of a political subdivision to recover damages for injury, death, or loss to person * * * allegedly caused by any act or omission in connection with a governmental or proprietary function * * * the employee is immune from liability unless one of the following applies * * * [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]

{¶14} Relying upon the doctrine of law of the case, the Estate initially argues that the Officers cannot raise the issue of duty or proximate cause because they failed to do so in the prior appeal. Because the prior appeal did not involve a motion for summary judgment (it involved a judgment on the pleadings) and because the Officers were not yet named parties, we disagree.

{¶15} The Officers contend that we should not reach the "wanton or reckless" issue because the Estate failed to show that the Officers owed a duty to Jill Graves. The Officers correctly point out that before there can be any liability in tort, the plaintiff must establish that the injury resulted from a failure to discharge a duty owed by the defendant to the injured party. See *Moncol v. Bd. of Edn. of North Royalton School Dist.* (1978), 55 Ohio St.2d 72, 75, 378 N.E.2d 155. However, we agree with the Estate that the public duty doctrine does not deal with questions of immunity. The application of immunity implies the existence of a duty. Immunity represents the freedom or exemption from a penalty, burden or duty. See *Black's Law Dictionary* (Abridged 6 Ed. 1991) 515. Immunity serves to protect a defendant from liability for a breach of an otherwise enforceable duty to the plaintiff. On the other hand, the public duty doctrine asks whether

there was an enforceable duty in the first place. *Zimmerman v. Village of Skokie* (1998), 183 Ill.2d 30, 46, 697 N.E.2d 699.

{¶16} In any event, the Estate claims that the Officers breached the duties owed to Ms. Graves established by R.C. 4507.38 and R.C. 4511.195. At the time of Copley's arrest, R.C. 4507.38(B)(1) required a law enforcement agency arresting a person for driving without a valid license to seize the vehicle and plates and hold them at least until the operator's initial court appearance.³ R.C. 4511.195 provides that, when arresting a person for driving under the influence of alcohol who had been convicted of a similar offense within the six previous years, a law enforcement agency must seize the vehicle the person was operating at the time of the alleged offense and its license plates. The law enforcement agency must hold the vehicle at least until the operator's initial court appearance. R.C. 4511.195(B)(2).

{¶17} However, the Officers assert that any duty they allegedly breached under R.C. 4507.38 and R.C. 4511.195 was owed to the public at large and not to any individual. This defense, known as the public duty rule or doctrine, prevents an individual from establishing the existence of a duty to the individual where the law simply imposes the duty for the benefit of the public at large. Because the existence of a duty presents a question of law, *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, we conduct a de novo review of this issue. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

{¶18} The Supreme Court of Ohio officially recognized the public duty doctrine in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468. *Sawicki* arose from

³ R.C. 4507.38 has since been amended by Am. Sub. S.B. 123 and recodified in R.C. 4510.41.

events that occurred after the Court judicially abrogated sovereign immunity for municipal corporations but before the legislature responded by enacting the Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744. *Id.* at 225. Under the public duty doctrine, “[w]hen a duty which the law imposes on a public official is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, is generally a public and not an individual injury.” *Id.* at paragraph two of the syllabus. Notably, the *Sawicki* Court found that the doctrine was “obscured by, yet was coexistent at common law with, the doctrine of sovereign immunity.” *Id.* at 230. “Rather than being an absolute defense, as was sovereign immunity, the public duty rule comported with the principles of negligence, and was applicable to the determination of the extent to which a statute may encompass the duty upon which negligence is premised.” *Id.*

{¶19} At common law, states formulated exceptions to the public duty doctrine. Many jurisdictions recognize a “special duty” or “special relationship” exception. See *Sawicki* at 231; *Ezell v. Cockrell* (Tenn. 1995), 902 S.W.2d 394, 401. But as the Tennessee Supreme Court notes, the “test varies from jurisdiction to jurisdiction.” *Ezell* at 401. For example, in Tennessee a special duty exists in three instances. *Id.* at 402. Connecticut recognizes at least four exceptions to the public duty doctrine. *Shore v. Town of Stonington* (1982), 187 Conn. 147, 153-155, 444 A.2d 1379.

{¶20} The Supreme Court of Ohio adopted New York’s formulation of the special relationship exception, which requires four elements: “(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and

the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." *Sawicki* at 232, quoting *Cuffy v. City of New York* (1987), 69 N.Y.2d 255, 260, 513 N.Y.Supp.2d 372, 505 N.E.2d 937. "If a special relationship is demonstrated, then a duty is established, and inquiry will continue into the remaining negligence elements." *Id.* at 230. Implicitly, this includes any analysis of whether an immunity exists to protect the defendant from any otherwise enforceable duties.

{¶21} The Officers argue that the public duty doctrine remains viable after the adoption of R.C. Chapter 2744, and we agree. Unlike the events giving rise to *Sawicki*, the events in this case arose after Ohio's Political Subdivision Tort Liability Act took effect. Once the Act took effect, the public duty doctrine's continued validity became questionable. Several appellate courts decided that the legislation superseded the doctrine. See, e.g., *Franklin v. Columbus* (1998), 130 Ohio App.3d 53, 59-60, 719 N.E.2d 592; *Sudnik v. Crimi* (1997), 117 Ohio App.3d 394, 397, 690 N.E.2d 925; *Amborski v. Toledo* (1990), 67 Ohio App.3d 47, 51, 585 N.E.2d 974; *Kendle v. Summit Cty.* (Apr. 15, 1992), Summit App. No. 15268, 1992 WL 80074.

{¶22} Granted, the Supreme Court of Ohio has not expressly overruled this line of cases. See *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, fn. 13. However, in dicta the Court has stated that the doctrine "remains viable as applied to actions brought against political subdivisions pursuant to R.C. Chapter 2744." *Yates v. Mansfield Bd. of Edn.*, 102 Ohio St.3d 205, 2004-Ohio-2491, 808 N.E.2d 861, fn. 2. In its most recent discussion of the doctrine, the Court found that the special relationship exception to the public duty doctrine did not constitute an independent exception to political subdivision immunity in the context

of negligence actions. *Rankin v. Cuyahoga Cty. Dept. of Children and Family Services*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521. The Court stated however, if the facts implicate one of the five enumerated exceptions to immunity in R.C. 2744.02(B), the public duty doctrine might be "relevant in establishing a claim." *Id.* at ¶32. In other words, whether a duty exists at all. This is especially so given the Supreme Court's explicit statement in *Sawicki* that immunity and the public duty doctrine were separate, coexisting concepts. While the doctrine is a judicially created rule and the Supreme Court may yet abrogate it, we are not so bold. Thus, we are reluctant to find the doctrine is no longer viable.

{¶23} Canons of statutory construction support the continued viability of the public duty doctrine. "The General Assembly is presumed to know the common law when enacting legislation." *Walden v. State* (1989), 47 Ohio St.3d 47, 56, 547 N.E.2d 962 (Resnick, J., concurring in part and dissenting in part), citing *Davis v. Justice* (1877), 31 Ohio St. 359, 364. "[T]he General Assembly will not be presumed to have intended to abrogate a common-law rule unless the language used in the statute clearly shows that intent." *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, 287, 677 N.E.2d 795, citing *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 90 N.E. 146, paragraph three of the syllabus. "There is no repeal of the common law by mere implication." *Id.*, quoting *Frantz v. Maher* (1957), 106 Ohio App. 465, 472, 155 N.E.2d 471. Because the legislature had authority to abrogate the common law public duty doctrine in R.C. Chapter 2744 and did not expressly do so, we conclude the Ohio common law public duty doctrine as outlined in *Sawicki* remains viable.

{¶24} The Officers contend the public duty doctrine precludes their liability

because the Estate relies upon general statutory provisions to create the Officers' duties. Therefore, the Officers argue that the Estate's claims can only proceed if it establishes the special relationship exception, which, we acknowledge, it cannot. However, we do not agree with the Officers' contention that the Estate cannot proceed with its claims. While it remains viable, the public duty doctrine was never intended to preclude liability for the wanton or reckless acts of rogue employees. There are good policy reasons for protecting public employees from liability where they act in good faith in performing their duties but do so negligently. The same cannot be said of rogue employees whose egregious conduct causes harm to individual citizens.

{¶25} We conclude that Ohio's public duty doctrine does not apply to wanton or reckless conduct. Both Tennessee and Connecticut recognize a "special duty" exists where the complaint alleges a cause of action involving malice, intent, or wantonness/recklessness. *Ezell* at 402; *Shore* at 155. Rhode Island recognizes an "egregious conduct" exception separate and apart from its "special duty" exception. See *L.A. Ray Realty v. Town Council of the Town of Cumberland* (R.I. 1997), 698 A.2d 202. Like a finding of negligence, a finding of wanton or reckless conduct requires a showing of duty. However, the *Sawicki* Court noted that the public duty doctrine "comported with principles of *negligence*." *Sawicki* at 230 (emphasis added). In *Universal Concrete Pipe Co. v. Bassett* (1936), 130 Ohio St. 567, 200 N.E. 843, the Supreme Court of Ohio distinguished wanton conduct from negligence. The Court found the term "wanton negligence" to be a misnomer and the difference between the concepts to be "one of kind, not merely of degree." *Id.* at 573-575. Given this distinction between wanton or reckless conduct and negligence, along with the *Sawicki* Court's implicit limiting of the

public duty doctrine to negligence, we believe that the public duty doctrine is not applicable to shield a rogue employee from wanton or reckless conduct. We have found no Ohio precedent that has allowed a government employee to escape liability for wanton or reckless conduct based on the public duty rule. All the Ohio caselaw is restricted to applying the public duty rule in the context of negligence, not wanton or reckless acts. Thus, we conclude that the trial court properly denied the Officers' motion for summary judgment. R.C. 4507.38 and R.C. 4511.195 may have created a duty to Ms. Graves in this case, depending upon the factual determination of whether the Officers' conduct was reckless or wanton.

{126} Alternatively, if the common law public duty rule does in fact apply to wanton or reckless conduct, we conclude that the enactment of R.C. 2744.03(A)(6)(b) amounts to a clear legislative repudiation of that segment of the doctrine. In other words, while there is no clear abrogation of the doctrine in the negligence context, the same cannot be said for wanton or reckless conduct. The legislature has explicitly provided in R.C. 2744.03(A)(6)(a) & (b) that rogue employees who act manifestly outside the scope of their employment, or act maliciously, in bad faith or in a reckless or wanton manner, are subject to liability. Under the current statutory scheme, employees who are merely negligent maintain their immunity absent an express imposition of civil liability in a separate section of the Revised Code. See R.C. 2744.03(A)(6)(c). The scheme set forth in R.C. 2744.03(A)(6) could be interpreted as a statement of the legislature's clear intent to provide for the public duty doctrine's continued viability in the negligence context, while repudiating it when dealing with rogue employees. Accordingly, we reject the Officers' arguments concerning their lack of duty to Ms. Graves. Of course, the Estate must still

prevail on the issues of breach, causation and damages.

V. Wanton or Reckless Conduct

{¶27} The Officers next argue that as a matter of law, their conduct was not wanton or reckless. Generally, whether conduct is wanton or reckless presents a question of fact for the jury. See *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. In *Rankin*, the Supreme Court of Ohio outlined its definitions of the terms “reckless” and “wanton”:

“This court has defined the term ‘reckless’ to mean that the conduct was committed ‘knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.’” *Cater [v. Cleveland]* (1998), 83 Ohio St.3d [24,] 33, 697 N.E.2d 610, quoting *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95, 96, 559 N.E.2d 699, fn. 2, quoting 2 Restatement of the Law 2d, Torts (1965) 587, Section 500. “‘[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.’ Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury.” *Fabrey* [at 356], quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 55 O.O.2d 165, 269 N.E.2d 420.

Rankin at ¶37.

{¶28} Construing the evidence most strongly in favor of the Estate, we examine the conduct of each officer in turn.

A. Officer Peter Shaw

{¶29} The Estate contends that Officer Shaw acted in a wanton or reckless manner when he failed to ensure that Copley’s vehicle would not be released without a court order and failed to take any steps to retrieve the vehicle after its premature release. Officer Shaw admitted in his deposition that when he arrested Copley for DUI and DUS, he knew that Copley’s license had been suspended due to a prior DUI violation. Officer

Shaw knew that under those circumstances Copley's vehicle could not be released without a court order. Yet Officer Shaw did nothing to ensure Copley's vehicle would not be released without a court order. Even after reviewing Copley's lengthy DUI history on the LEADS report, Officer Shaw did nothing to prevent Copley from retrieving the vehicle. Upon learning Copley in fact retrieved the vehicle, Officer Shaw did nothing to secure its return.

{¶30} Construing all the evidence presented in favor of the Estate, it is apparent that reasonable minds could reach different conclusions regarding whether Officer Shaw acted in a wanton or reckless manner. Based on Officer Shaw's knowledge of Copley's suspended license, extensive DUI record, and most recent arrest for DUI, we find that reasonable minds could conclude that Officer Shaw was aware of facts that would lead a reasonable person to realize not only that allowing Copley to access his vehicle without court permission created an unreasonable risk of physical harm to others on the roadway, but also that such risk was substantially greater than that which was necessary to make his conduct negligent. Reasonable minds could likewise conclude that given Copley's propensity to drive under the influence, Officer Shaw must have been conscious that his failure to follow the impound procedure would in all probability result in injury.

B. Officer William Eversole

{¶31} The Estate contends that Officer Eversole acted in a wanton or reckless manner when he failed to ensure that Copley's vehicle would not be released without a court order. Officer Eversole knew Copley was arrested on July 4, 2003 for DUI and DUS. He knew that proper procedure required a court order to release a vehicle to a person with: (1) a charge of DUI and a prior DUI conviction within the last six years; or (2)

a charge of driving under a suspended license. So he should have known that Copley's vehicle could not properly be released without a court order.

{¶32} Although Officer Eversole recalls no contact with Copley after his release, Carolyn Brewer offered a different version of events in her deposition. Ms. Brewer's testimony is supported by the deposition testimony of Totie Rhodes. Copley went home for a period of time after his release. He returned to the police station to obtain the release form to get his car from the impound lot. Ms. Brewer and Ms. Rhodes accompanied him to the station. Both women recall an officer approaching Copley's car window as they prepared to leave the station. Ms. Rhodes recalls the officer stating, "Now, don't be going out and getting in that car and drinking and kill someone." Ms. Brewer similarly recalls the officer telling Copley "don't take that car out and kill somebody tonight." Ms. Brewer identified the officer as Officer Eversole.

{¶33} While it is unclear from Officer Eversole's deposition testimony whether he knew that Copley's vehicle had not been properly impounded, a reasonable jury could conclude that he did based on Ms. Brewer's testimony. Construing all the evidence presented in favor of the Estate, it is apparent that reasonable minds could reach different conclusions regarding whether Officer Eversole acted in a wanton or reckless manner. Based on Officer Shaw's knowledge of the charges, knowledge that the vehicle had not been properly impounded, and concern that Copley would kill someone with the vehicle, we find that reasonable minds could conclude that Officer Eversole was aware of facts that would lead a reasonable person to realize not only that allowing Copley to have access to his vehicle without court permission created an unreasonable risk of physical harm to others on the roadway, but also that such risk was substantially greater than that

which was necessary to make his conduct negligent. Reasonable minds could likewise conclude that in light of Officer Eversole's verbalized concern that Copley would kill someone with the car, Officer Eversole must have been conscious that his failure to follow the impound procedure would in all probability result in injury.

C. Dispatcher Benjamin Carpenter

{¶34} The Estate contends that Dispatcher Carpenter acted in a wanton or reckless manner when he wrote "no hold" on Copley's vehicle release form and authorized the release of the vehicle by signing his name to the form. Dispatcher Carpenter knew that Copley was arrested for DUI and DUS. Dispatcher Carpenter acknowledged reading the department's standard operating procedures and knowing that there were circumstances where a vehicle could not be released from impound until the suspect appeared in court and received a court order. But he testified, "until this situation [arose], I didn't understand how vehicles are held for suspensions and DUI's." He stated, "I'd usually just wait for the officers to tell me what they needed as far as putting a hold on it or not." Dispatcher Carpenter printed out Copley's "lengthy" LEADS report, involving the history of Copley's criminal record. He was "sure he glanced at it" to find out what Copley's history was. Dispatcher Carpenter knew an officer arrested Copley for DUI, but failed to contact the officer before signing off to release the vehicle; knew Copley did not have a valid driver's license; and knew Copley had not yet appeared in court.

{¶35} Construing all the evidence presented in favor of the Estate, it is apparent that reasonable minds could reach different conclusions regarding whether Dispatcher Carpenter acted in a wanton or reckless manner. The Estate presented evidence that Dispatcher Carpenter knew of the charges, knew of Copley's criminal record, and should

have known the department's procedures for impounding vehicles. Based on this evidence, we find that reasonable minds could conclude that Dispatcher Carpenter was aware of or should have been aware of facts that would lead a reasonable person to realize not only that allowing Copley to have access to his vehicle without court permission created an unreasonable risk of physical harm to others on the roadway, but also that such risk was substantially greater than that which was necessary to make his conduct negligent. Reasonable minds could likewise conclude that in light of this evidence, Dispatcher Carpenter must have been conscious that ignoring proper impound procedure would in all probability result in injury.

VI. Proximate Cause

{¶36} The Officers next argue that as a matter of law, their conduct was not the proximate cause of Jill Graves's death. "Ordinarily, proximate cause is a question of fact for the jury." *Aldridge v. Reckart Equip. Co.*, Gallia App. No. 04CA17, 2006-Ohio-4964, ¶179. "However, 'where no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the jury [to decide], and, as a matter of law, judgment must be given for the defendant.'" *Id.*, quoting *Case v. Miami Chevrolet Co.* (1930), 38 Ohio App. 41, 45-46, 175 N.E.2d 224.

{¶37} "The rule of proximate cause 'requires that the injury sustained shall be the natural and probable consequence of the [breach of duty] alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his [breach].'" *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 143, 539 N.E.2d 614, quoting

Ross v. Nutt (1964), 177 Ohio St. 113, 114, 203 N.E.2d 118.

{¶38} “[I]n order to establish proximate cause, foreseeability must be found.” *Mussivand* at 321. “In determining whether an intervening cause ‘breaks the causal connection between [breach of duty] and injury depends upon whether that intervening cause was reasonably foreseeable by the one who was guilty of the [breach]. If an injury is the natural and probable consequence of a [breach of duty] and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the [breach]. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone.” *Id.*, quoting *Mudrich v. Std. Oil Co.* (1950), 153 Ohio St. 31, 39, 90 N.E.2d 859 (citations omitted).

{¶39} The Officers attempt to analogize this case to police pursuit cases in which courts have found that unless an officer acted in an extreme and outrageous manner, he is not the proximate cause of injuries to a third party struck by a vehicle fleeing from the officer. See, e.g., *Lewis v. Bland* (1991), 75 Ohio App.3d 453, 599 N.E.2d 814. We do not believe the situations are analogous. The decisions in police pursuit cases are based on the policy that “[t]he duty of police officers is to enforce the law and to make arrests in proper cases, not to allow one being pursued to escape because of the fear that the flight may take a course that is dangerous to the public at large.” *Id.* at 456, quoting *Nevill v. Tullahoma* (Tenn. 1988), 756 S.W.2d 226, 232. This policy consideration is not at issue where police have already impounded a vehicle and all that remains is to determine if and when that vehicle should be released.

{¶40} In this case, the Officers failed to ensure that Copley's vehicle remained

impounded until released by court order. In doing so, they gave a habitual drunk driver, known to drive on a suspended license, access to his vehicle without a judicial determination that it was safe to do so. The Officers argue that Copley's conduct was the superseding/intervening cause of Ms. Graves's death. However, we do not believe that Ms. Graves's death at Copley's hand was so remote that tort jurisprudence will excuse the officers' conduct as a matter of law. Under the circumstances, it was reasonably foreseeable that Copley would drive his vehicle drunk, cause an accident, and injure or kill another driver. A reasonable trier of fact could find that Ms. Graves's death was the natural and probable consequence of the Officers' premature release of Copley's vehicle. Thus, denial of the Officers' joint motion for summary judgment was appropriate. Therefore, we overrule the Officers' sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

Kline, J.:

I respectfully dissent.

The facts of this case are truly unfortunate. There really is no dispute that the acts and/or omissions of the officers involved were contrary to law and the death of Ms. Graves likely could have and, ultimately, should have been avoided. However, reluctantly, I cannot agree that, under Ohio law, an exception to the public-duty rule exists for willful, wanton or reckless conduct by virtue of R.C. 2744.03(A)(6)(b), or by virtue of the existence of such an exception at common law. While the public-duty rule initially arose from the principles of negligence, *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 230, the Supreme Court of Ohio has also noted that where the public-duty rule applies, there is no need to determine whether an officer is entitled to immunity, i.e., whether the officer's conduct was merely negligent or whether his conduct was willful or wanton. See *Wallace v. Ohio Depart. of Commerce, Div. of State Fire Marshal*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶131, fn. 9.

As a result, because the statutes involved herein create duties owed to the public at large, and not to certain individuals, I would find that the public-duty rule applies and the officers cannot be held liable for their allegedly wanton, willful or reckless conduct absent a duty owed to Ms. Graves individually. Where no legal duty is owed, there is no actionable tort. See 88 Ohio Jurisprudence 3d., Torts, Section 3.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellants shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

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

Abele, P.J.: Concurs in Judgment and Opinion.

Kline, J.: Dissents with Dissenting Opinion.

For the Court

BY: *William H. Harsha*
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry, and the time period for further appeal commences from the date of filing with the clerk.

