

IN THE SUPREME COURT OF OHIO

Estate of Jillian Graves, :  
 :  
 Plaintiff-Appellee, : Supreme Court Case No. 2009-0014  
 :  
 vs. : On Appeal from the Ross County  
 : Court of Appeals  
 City of Circleville, et. al. : Fourth Appellate District  
 :  
 Defendants-Appellants : Court of Appeals Case No. 06CA002900

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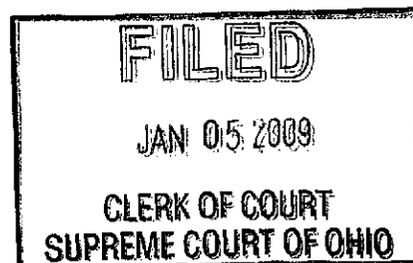
AMICUS MEMORANDUM OF THE COUNTY COMMISSIONERS' ASSOCIATION OF OHIO AND THE COUNTY RISK SHARING AUTHORITY AND IN SUPPORT OF THE MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS

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## **I. STATEMENT OF INTEREST OF AMICI CURIAE**

Until this decision came, a tort required a duty to the plaintiff. If allowed to stand, the duties of local governments will be decided by conduct rather than law. This creates the illogical possibility that a local government or local government employee could be liable in tort, even though no duty was owed to the plaintiff. This decision will allow anyone claiming harm to sue their local government for any misfortune that might befall them, so long as the harm could conceivably have been prevented by the government. This decision is wide ranging and will affect all of Ohio's 88 county governments and their employees in addition to countless municipal and local governments.

Amicus Curiae County Commissioners Association of Ohio ("CCAO") represents Ohio's 87 boards of county commissioners and the Summit County Executive and Council. CCAO promotes best practices in county government administration and management; advocates on behalf of counties at the state and federal level; provides training and technical assistance programs, and provides cost saving service programs for all of Ohio's 88 counties.

Amicus Curiae the County Risk Sharing Authority ("CORSA") is a public entity risk pool providing broad property and liability coverage as well as comprehensive risk management services. As of this filing, CORSA has 62 Ohio member counties and 15 multi-county facilities. CORSA represents counties, boards of county commissioners and other elected officials throughout Ohio. CORSA is responsible for providing a defense for lawsuits filed in state and federal court for its member counties.

Counties have an interest, as Ohio political subdivisions, in seeing both the Public Duty Rule and the Political Subdivision Tort Liability Act (R.C. 2744.01 et. seq.) interpreted properly. The decision of the Fourth District Court of Appeals improperly uses R.C. Chapter

2744.03(A)(6)(b) to create an exception to the common law Public Duty Rule. This decision affects CCAO's and CORSA's members who are engaged in every governmental activity from law enforcement to premises maintenance.

If allowed to stand, the court of appeal's opinion would extend liability to government employees even though there was no duty imposed upon them and even though an employee had no direct involvement in the conduct which gave rise to the alleged harm. All crimes could be turned into tort claims against the local government if it could be imagined that the local government might have prevented that crime. Amici Curiae respectfully submit this Memorandum to emphasize the legal error of the Fourth District Court of Appeals and specifically address that court's improper overlaying of the Public Duty Rule with Chapter 2744 immunity.

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

The Public Duty Rule, adopted by this Court in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, operates to limit the extent to which political subdivisions and their employees owe a duty which would be actionable under tort law. Under the Public Duty Rule, public officials are generally not held liable to individuals in discharging public duties because the duty is owed to the public at large and not to any one individual. Ohio law recognizes one exception to this rule called the special relationship exception<sup>1</sup>. *Id.* at 230. Nevertheless, on November 21, 2008, the Fourth District Court of Appeals judicially created a new exception to the Public Duty Rule. In a 2-1 decision, the Court held that allegations of "wanton or reckless conduct", which are relevant only to an immunity analysis under R.C. 2744.03(A)(6)(b), created an exception to the Public

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<sup>1</sup> This exception is not applicable to this case. See *Graves v. Circleville*, 4<sup>th</sup> Dist. No. 06CA2900, 2008-Ohio-6052, at ¶ 24 ("[t]herefore, the Officers argue that the Estate's claims can only proceed if it establishes the special relationship exception, which, we acknowledge, it cannot").

Duty Rule. No other Ohio court has ever held that such an exception exists. Having judicially created an actionable duty against governmental employees where none exists, the decision of the court of appeals will have a direct and substantial impact on every political subdivision and political subdivision employee in the State of Ohio.

The Fourth District's erosion of the Public Duty Rule will subject the entire panoply of policy and enforcement decisions routinely made by political subdivisions and their employees to judicial oversight every time a particular injured plaintiff finds that its employees failed to properly execute their public duties or ward against harm caused by a third party. See *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, Resnick, J., dissenting, at ¶ 56. More specifically, there will be a deluge of "failure to arrest," "failure to investigate," and "failure to enforce" claims against law enforcement officers since, under the Fourth District's reasoning, the plaintiffs do not have to show that a duty was owed to them. Moreover, summary judgment will be routinely be denied since the issue of duty will be a factual issue as opposed to a legal issue. *Id.* County governments will incur substantial expenses in defending these lawsuits at a time when their fiscal resources are already stretched thin.

The basic principle involved in this case concerns the liability of all governmental bodies and their associated taxpayers for the failure of law enforcement officers to protect their citizens from every type of criminal offense. While the facts of this case are tragic, there has never been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted to a law enforcement officer to enforce the law. A law enforcement officer's duty to protect citizens is a general duty owed to the public as a whole. A criminal offense, which might have been prevented through law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the

victim. Despite this well settled principle, the Fourth District bypassed this principle by eliminating the duty element altogether.

The Fourth District's decision abandons a common law rule that has been in use for over 150 years. The purpose of the Public Duty Rule is to preserve limited governmental resources available to protect the public health, safety and welfare of its people as well as to ensure the government officials can make decisions without worrying that they will be subjected to endless litigation. In a far ranging decision, the Fourth District's has undercut those purposes and principles. This Court needs to act to reverse the Fourth District's errors and help preserve the fiscal integrity of Ohio's counties.

### **III. STATEMENT OF THE CASE AND FACTS**

These Amici Curiae adopt and incorporate the statement of the case and facts set forth in the Appellants' Memorandum in Support of Jurisdiction. Appellants have accurately stated the facts and this Court would not benefit from a repetition or restatement by Amici.

### **IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

#### **A. Proposition of Law I: The Level of Culpability Affecting Immunity Under R.C. 2744.03(A)(6)(b) Is Not An Exception to the Public Duty Rule.**

Civil servants and other government officials are not personally liable for negligence. In most cases, the government itself is liable for the negligence of its agents. Individuals are only liable for a higher level of culpability: wanton, reckless, bad faith, and malice. R.C. 2744.03(A)(6)(b). However, in order for either the agent or entity to have liability, there must first be an actionable duty. *Rankin v. Cuyahoga Cty. Dep't. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567.

The Public Duty Rule is used to determine whether there is a duty of care which creates an actionable tort claim. In contrast, the immunity provisions of R.C. 2744.03(A)(6)(b) concern

the level of culpability needed to establish a breach of a duty against an employee of a political subdivision. However, R.C. 2744.03(A)(6)(b) does not create any new duties and is not an exception to the Public Duty Rule. The Fourth District's use of the reckless and wanton culpability language in R.C. 2744.03(A)(6)(b) to create a wholly new exception to the Public Duty Rule constitutes an impermissible blending, unsupported by any Ohio law, of two separate and distinct tort concepts. The Fourth District has declared a tort without a duty.

Over one hundred and fifty years ago, the United States Supreme Court enunciated a rule which remains the law: public officials, generally, may not be held liable for the breach of a public duty. *South v. Maryland* (1856), 59 U.S. 396. This rule is commonly referred to as the public duty rule, and it was adopted by the Ohio Supreme Court in *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222. Under the public duty rule, a duty imposed by law upon a public official is not a duty to an individual, but a duty to the public in general. *Sawicki*, supra. As the *Sawicki* court pointed out, the public duty rule had particular application in protecting law enforcement officers from alleged failures or deficiencies in the execution of their duties:

The public duty rule originated at English common law and was particularly applied to the office of sheriff. Although not the first American court to comment on the rule, the United States Supreme Court rendered the most significant early decision on the subject in the often quoted case of *South v. Maryland*. (1855), 59 U.S. (18 How.) 396. Therein, Sheriff South was sued upon his official bond by one who had applied to him for protection, but was subsequently abducted and held for ransom. More specifically, plaintiff alleged that the sheriff did not well and truly execute and perform the duties required of him by the laws of said State, thus giving rise to a cause of action.

The court pointed out that it is an undisputed principle of common law, that for a breach of a public duty, an officer is amenable to the public, and punishable by indictment only.

*Sawicki*, 37 Ohio St.3d at 229-230 (internal quotations omitted). In other words, if the duty which the law imposes upon a public official is a duty to the public, then a failure to perform it,

or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. *Id.* at 230, citing 2 Cooley, Law of Torts (4 Ed.1932) 385-386, Section 300.

There is a lone exception to the public duty rule. If a “special relationship” is demonstrated, then a duty is established, and inquiry will continue into the remaining tort elements.<sup>2</sup> *Id.* In the instant case, it is not disputed that the special relationship exception was not established. *Graves v. Circleville*, 4<sup>th</sup> Dist. No. 06CA2900, 2008-Ohio-6052, at ¶ 24. Lacking the special relationship exception, the Fourth District forged a new exception based on the reckless and wanton level of culpability contained in R.C. 2744.03(A)(6)(b), a statute governing the immunity, not the duty, of political subdivision employees.

In essence, the decision of the court of appeals says that if the level of culpability is alleged to be higher, a duty is created from nowhere. *Graves* at ¶ 25. This leads to the untenable conclusion that any reckless or wanton conduct by an employee of a political subdivision is actionable. This is not true: only reckless or wanton conduct for which there is a distinct *duty* is actionable. It is axiomatic that “plaintiffs seeking redress against a governmental entity [must] establish the requisite elements of the alleged tortious conduct. This includes the existence of a legal duty.” *Ruwe v. Bd. of Cty. Com'rs. of Hamilton Cty.* (1986), 21 Ohio St.3d 80, 82.

The decision of the court of appeals fails to recognize that the Public Duty Rule comprises a defense to an allegation of duty, independent of sovereign immunity. *Sawicki*, at paragraph three of the syllabus. It is used to determine the first element of a tort claim, the existence of a duty. By contrast the immunity defenses under Chapter 2744 establish non-

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<sup>2</sup> In order to demonstrate the existence of a special duty or relationship, the following elements must be established: “(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 ¶ 4 of the syllabus.

liability based on immunity, despite the existence of a duty. In other words, the possible inapplicability of immunity does not create a duty where none otherwise exists just as immunity is not overcome by the mere existence of an actionable duty. This point was recently made clear in *Rankin, supra*. In *Rankin*, this Court held that the special relationship exception to the Public Duty Rule did not overcome a political subdivision's general immunity from liability. *Id.* at ¶ 31. Similarly, the wanton or reckless exception to immunity for employees of political subdivisions does not overcome the Public Duty Rule and the court of appeals erred by holding contrary.

In Ohio, duties are imposed either by common law or statute. *Simko v. Miller* (1938), 133 Ohio St. 345, 355. The statute cited by the court of appeals, R.C. 2744.03(A)(6)(b), provides that an employee of a political subdivision is immune from liability unless "the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." It is clear that this statute defines the level of culpability for a breach of a duty, but does not independently impose any duty of care. *Griggy v. City of Cuyahoga Falls*, 6<sup>th</sup> Dist. No. 22753, 2006-Ohio-252, at ¶ 8. As such, not only did the Fourth District err in fashioning this statute as an exception to the Public Duty Rule, but it erred in holding that "wanton or reckless conduct" could constitute a duty of care.

When confronted with the fact that the established exception to the public duty defense was not available, the Fourth District's circumvented that defense by improperly creating a new exception to the Public Duty Rule based on an immunity statute. The Fourth District's holding contravenes Ohio's common law, case law and statutes and, as such, warrants review by this Court.

**B. Proposition of Law II: R.C. 2744.03(A)(6)(b) Did Not Repudiate Any Portion of the Public Duty Rule.**

Almost as if it were hedging a bet, the Fourth District Court of Appeals also held that even if the Public Duty Rule does apply to wanton or reckless conduct, “the enactment of R.C. 2744.03(A)(6)(b) amounts to a clear legislative repudiation of that segment of the doctrine.” *Graves* at ¶ 26. To support its holding, the court of appeals argues that the statutory scheme in R.C. 2744.03(A)(6)(b) “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.” *Id.* at 26.

First, neither the statutory nor case history of the Public Duty Rule support the Fourth District’s holding. From the beginning, this Court made it clear that the Public Duty Rule and sovereign immunity were partners, not competitors: “...this (the public duty) doctrine has been obscured by, yet was coexistent at common law with, the doctrine of sovereign immunity.” *Sawicki* at 230. Further, this coexistence is based upon the fact that the Public Duty Rule and immunity do not overlap each other in their application. See *Rankin*, *supra*. (holding that the public duty rule might be relevant in establishing a claim, but is irrelevant to claims against a political subdivision if the claim is actionable).

Second, the Public Duty Rule is common law. According to the principles of statutory construction, 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. *State ex. rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 80, 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. *Frantz v. Maher* (1957), 106 Ohio App. 465, 472.

Nothing in the text of R.C. 2744.03(A)(6)(b) shows any intent to abrogate the Public Duty Rule. The statute and the rule cover different legal ground. As stated above, the Public Duty rule, when applicable, establishes non-liability based on the lack of a legal duty. In contrast, the immunity defenses under Chapter 2744 establish non-liability based on immunity, despite the existence of a duty. Thus, the public duty rule is a doctrine of tort law, not of governmental immunity. Specifically, R.C. 2744.03(A)(6)(b) establishes immunity for employees of a political subdivision, unless the employee's acts were with malicious purpose, in bad faith, or in a wanton or reckless manner. These levels of culpability, relevant to whether an employee breached a duty of care, are irrelevant in determining whether a duty of care was owed to the public or an individual. Given that the Public Duty Rule and R.C. 2744.03(A)(6)(b) apply to different legal concepts, duty and breach, respectively, there can be no conclusion that the legislature had a "clear intent" to supersede a public duty defense.

C. **Proposition of Law III: When There is no Duty Under The Public Duty Rule, The Wanton And Reckless Exception to Employee Immunity Is Not At Issue.**

These Amici Curiae adopt and incorporate the argument set forth in the Appellant's Memorandum in support of Jurisdiction. Appellants have accurately stated the arguments and the Court would not benefit from a repetition or restatement by Amici.

## V. CONCLUSION

For the foregoing reasons, this case involves matters of public and great general interest, and, as such, amici curiae County Commissioners' Association of Ohio and the County Risk Sharing Authority respectfully request that this Court grant the jurisdictional memoranda, hear this matter on the merits, and reverse the judgment of the Court of Appeals.

Respectfully submitted,



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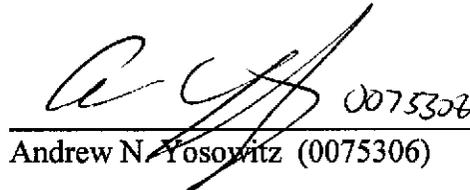
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