

IN THE SUPREME COURT OF OHIO

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

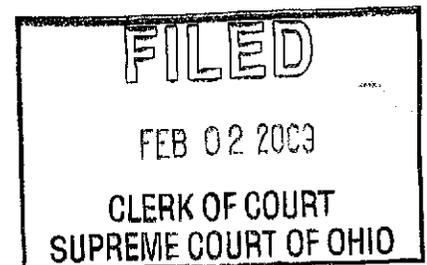
PLAINTIFF-APPELLEE'S MEMORANDUM
IN OPPOSITION TO JURISDICTION

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MEMORANDUM IN OPPOSITION TO JURISDICTION

I. INTRODUCTION: THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The decision by the Court of Appeals changes nothing. Appellants argue that the Fourth District's decision somehow created an unprecedented exception to the public-duty rule. This unfounded position is merely a transparent attempt to persuade this Court to believe there is some novel legal principle at issue when there is not. Appellants are unable to cite to a single case in the history of Ohio jurisprudence in which a plaintiff has argued that police officers are liable based on reckless and wanton misconduct, yet the court has shielded the officers from liability based on the public-duty doctrine. The Fourth District's decision was not novel; it was consistent with the entire panoply of Ohio case law which applied the public-duty doctrine only to negligent conduct, and never to wanton or reckless acts.

Perhaps even more importantly, as a threshold issue, this Court lacks jurisdiction over this appeal. The public-duty doctrine is distinct from the concept of immunity. Appellants' seek review over the former, but, at this interlocutory stage, this Court only possesses jurisdiction over the latter.

So desperate are Appellants to invent a reason for this Court to accept jurisdiction in this case, where no justifiable reason exists, that Appellants resort to outright deception in quoting the Court of Appeals decision. Appellants falsely state that the Fourth District admits error in its opinion by stating that "the Estate's claim can only proceed if it established the special relationship exception, which, we acknowledge, it cannot." [Appellants' Memorandum at p. 2.] The Court concluded nothing of the sort. In the full quote, conveniently truncated by Appellants, the Court of Appeals states: "Therefore, *the Officers argue that* the Estate's claim can only proceed if it establishes the special relationship exception, which, we acknowledge, it cannot."

[Ct. of App. Opinion at ¶24.] Thus, the Court of Appeals was not asserting that proof of a special relationship was required -- indeed, this would make no sense, as the Court of Appeals found that the public-duty doctrine did not apply. Rather, the Court of Appeals was merely recounting the argument of Appellants, which it then went on to properly reject. For Appellants to claim otherwise in an attempt to mislead this Court into accepting jurisdiction is frankly shameful.

In short, there is no novel legal issue for this Court to resolve. To the contrary, the only novel element of this appeal is that Appellants ask this Court to take the unprecedented step of accepting an appeal from the denial of summary judgment where there both parties concede that there is no issue of immunity being disputed.

II. STATEMENT OF THE CASE AND FACTS

This case arises out of the deadly consequences of the reckless and wanton misconduct of certain Circleville police officers, resulting in the unlawful release of a habitual drunk driver who, had the Officers not been reckless in their conduct, would not have been able to kill Jillian Marie Graves.

The tragic facts of this case have been well documented in the proceedings below. In short, on July 4, 2003, defendants arrested Cornelius Copley for OMVI and driving with a suspended license. The officers learned that Copley had been arrested numerous times for OMVI, and they knew that Ohio law and the policies of the Circleville Police Department required them to physically remove Copley's license plates from his car, send them to the BMV, and impound his car until a Court issued an Order releasing the vehicle. Ohio law and Circleville's own policies exist for the very purpose of protecting motorists from habitual drunk drivers until a Court deems it safe for them to get behind the wheel of a motor vehicle.

Nonetheless, within 18 hours of Copley's arrest, defendants released and returned his vehicle to him. When defendants provided Copley with the paperwork to retrieve his car, one of the defendants expressly told him not to kill someone before he appeared in Court two days later. Another of the arresting officers learned in the early afternoon hours of July 5, 2003 that defendants had released Copley's car to him in violation of Ohio law and Circleville's policies, yet took no steps to secure the return of the vehicle. Knowing that Ohio law has been violated and that there is a serious risk of harm to any motorist that is unfortunate enough to cross Mr. Copley's path -- yet taking no steps to remedy the discovered violation in the face of a known risk -- should be the very definition of reckless and wanton misconduct.

Copley began drinking almost immediately upon retrieving his car, and just before 5:30 a.m. on July 6, 2003, he drove head on into Jill Graves' vehicle. Copley was so drunk he had been driving on the wrong side of Route 23 for miles before he crashed into, and killed, Jill Graves.

In their Statement of the Case and Facts, Appellants falsely assert that, for purposes of appeal, they do not dispute the basic facts that exist in the record. Nevertheless, Appellants proceed even to make factual assertions that are either misleading or flatly false, but, in either event, speak to the factual issues that must be resolved by a trier of fact.

For instance, Appellants materially mislead this Court when they contend that "Officer Shaw could not confirm Mr. Copley's driving record because the Law Enforcement Automated Data System (LEADS) was unavailable." [Appellants' Memorandum at p.4.] However, Officer Shaw did not need to "confirm" Mr. Copley's driving record, because Officer Shaw admitted that Copley told him at the scene that his driving privileges were suspended due to a previous OMVI, and Officer Shaw confirmed through CPD dispatch that Mr. Copley was driving under a total of ten suspensions. R.C. §4507.38(B)(1), in effect at the time, provided that

the vehicle was not to be released until arraignment, and contained no requirement that the driving record be "confirmed" through LEADS.

Additionally, Appellants flatly misrepresent the record in asserting that Officer Eversole "did not assist Mr. Copley in getting his vehicle from the impound lot." [Appellants' Memorandum at p.5.] In fact, the evidence demonstrates that, despite knowing that Mr. Copley had been arrested for OMVI and driving on a suspended license, and despite knowing that proper procedures required a court order for the vehicle to be released, Officer Eversole gave Mr. Copley his keys and the paperwork necessary to retrieve his car, and warned him not to get drunk and kill anyone before his Court appearance the following Monday. As a result, Appellants continue to do precisely what they deny doing: argue disputed facts.

Procedurally, this case has an incredibly drawn-out history. This the harsh reality of immunity -- defendants will appeal at every turn in order to drag out the case as long as possible. While Ms. Graves was killed in July, 2003, and this case was filed in August, 2003, five and a half years later, her family still awaits their day in court. After the Trial Court's ruling on Defendants' motion to dismiss, the case was appealed to the Court of Appeals, and remanded to the Trial Court. After the Trial Court's ruling on Defendants' motion for summary judgment, the case was appealed to the Court of Appeals. The Court of Appeals granted Plaintiff's motion to dismiss the appeal, but this Court agreed to hear the appeal, and held the matter in abeyance while it considered a parallel case regarding the immediate appealability of denials of summary judgment where immunity defenses were presented. After ruling in the parallel case, *Hubbell v. Xenia, infra*, this Court remanded the matter to the Court of Appeals for a decision on the merits. The Court of Appeals has now affirmed on the merits the Trial Court's denial of summary judgment, and Appellants now appeal that decision to this Court.

III. THIS COURT LACKS JURISDICTION TO RULE ON THE ISSUES PRESENTED BY APPELLANTS AT THIS TIME

In the Ross County Court of Common Pleas, Appellants moved for summary judgment, and summary judgment was denied. An interlocutory appeal of the denial of summary judgment was permitted by virtue of R.C. §2744.02(C) and this Court's opinion in *Hubbell v. Xenia* (2007), 115 Ohio St.3d 77, 2007-Ohio-4839. As this Court explained in *Hubbell*, the ability to file an interlocutory appeal of the denial of an immunity defense is an exception from the general rule that appellate courts only have jurisdiction over final orders. 115 Ohio St.3d at 78. This Court made clear in *Hubbell*, however, that appellate jurisdiction over denials of Rule 56(C) motions is conferred where "a political subdivision or its employee seeks immunity." *Id.* at 81. Appellants are not seeking immunity.

In their memorandum in support of jurisdiction, Appellants assert three propositions of law for this Court's consideration, each centered on the application of the public-duty rule. Appellants' first argument is that they owed Appellee no duty as a result of the public-duty rule, and therefore the question of immunity should not even have been reached. Appellants' second argument is that, while there is a "wanton and reckless" exception to immunity, there is no "wanton and reckless" exception to the public-duty rule. Appellants' third argument is that the public-duty rule has not been legislatively repudiated. Each of these arguments deals with application of the public-duty rule, and not with the application of §2744 immunity. Appellants are seeking a ruling from this Court that they had no duty to Appellee under the public-duty rule; they are not seeking a ruling from this Court that they are immune from liability pursuant to §2744. As a result, this Court lacks jurisdiction over all of Appellants' propositions of law.

Appellants, Amici Curiae, Appellee, and the Court of Appeals all agree on one fundamental principle: The public-duty rule and immunity are separate concepts. The public-duty rule is a common law doctrine relevant to whether liability may be imposed under the common law. Political subdivision immunity is a legislative creation that protects political subdivisions from liability where liability may otherwise have been imposed under the common law. Indeed, Appellants' very own memorandum in support of jurisdiction explains clearly this distinction:

[T]he Public Duty Rule is relevant to establishing the duty element of a negligence claim, which requires duty, breach, causation and damages. On the other hand, immunity under R.C. §2744.03(A)(6)(b) is relevant to 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.

[See Appellants' Memorandum in Support of Jurisdiction at pp. 10-11 (internal citations omitted).]

Amici Curiae agree:

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. 2744.01(A)(6)(b) concern the level of culpability needed to establish a breach of a duty against an employee of a political subdivision.

[See Amicus Memorandum in Support of Jurisdiction at pp. 4-5.]

Indeed, the Court of Appeals also recognized this distinction:

[T]he 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 exemptions from penalty, burden or duty. 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.

[See Appellate Court Opinion, *Graves v. Circleville* (4th Dist. 2008), 2008-Ohio-6052, at ¶15 (internal citations omitted).]

Thus, there is total agreement among the parties, Amici Curiae, and the Court of Appeals that the public-duty doctrine is distinct from immunity. Appellants seek review of the question of whether they owed a duty to Appellee -- a question that, as explained above, is entirely distinct from the question of immunity. R.C. §2744.02(C) and *Hubbell* make clear that orders denying immunity are immediately appealable. Because Appellants seek review of public-duty issues, rather than immunity issues, jurisdiction does not exist.

IV. APPELLEE'S CLAIMS ARE FOR NEGLIGENCE PER SE, AND, AS A RESULT, CANNOT BE BARRED BY THE PUBLIC-DUTY RULE

Appellants ignore an additional fatal flaw in their memorandum in support of jurisdiction: Appellee's claims are for negligence per se. The law is clearly established that the public-duty doctrine is not applicable to claims of negligence per se. As a result, this case does not present the proper vehicle for addressing whether the public-duty doctrine applies to negligence actions where the level of culpability alleged is wanton and reckless conduct.

"The public-duty rule does not apply when a claim is based on negligence *per se*." *Swart v. Ohio Dept. of Rehab.* (10th Dist. 1999), 133 Ohio App.3d 420, 431; *see also Hurst v. Ohio Dept. of Rehab. & Correction* (1995), 72 Ohio St.3d 325, 327, *overruled on other grounds* (recognizing that the public-duty rule does not apply to claims for negligence per se). Where a statute contains a specific requirement to do or to omit to do a defined act, and an individual governed by that statute does not comport with the statute, the actions constitute negligence per se. *Reynolds v. State* (1984), 14 Ohio St.3d 68, 69 n.1; *Gressman v. McClain* (1988), 40 Ohio St.3d 359, 362.

In violating Ohio Revised Code §§4507.38 and 4511.195, defendants failed to observe a specific, statutorily imposed duty for the protection of others. As a result, while the level of culpability of the officers is properly characterized as wanton and reckless misconduct, as opposed to merely negligent misconduct, the causes of action asserted by Appellee are properly characterized as negligence per se, rather than negligence. Because there is no dispute that the public-duty rule is inapplicable to claims for negligence per se, the issue of how the public-duty rule applies to claims of pure negligence (rather than negligence per se) cannot be reached in this case.

V. **ARGUMENT OPPOSING PROPOSITIONS OF LAW**

Appellants' Proposed Proposition of Law No. I: When there is no duty under the public-duty rule, the wanton and reckless exception to employee immunity is not at issue.

Appellant's first proposition of law is hopelessly confused. Appellee agrees that an analysis of the public-duty rule does not require an immunity analysis. Nor did the Court of Appeals rule otherwise. This proposition of law, therefore, is not controversial in any way. It is fallacious to argue that either Appellee or the Court of Appeals believed otherwise.

The Court of Appeals, however, did correctly hold that, historically, the common law public-duty rule has only been applied where the defendants' state of mind was alleged to be merely negligent. As the Court of Appeals stated, "[T]he public duty doctrine is not applicable to shield a rogue employee from wanton or reckless conduct." [Ct. of App. Opinion at ¶25.] "All the Ohio case law is restricted to applying the public duty rule in the context of negligence, not wanton or reckless acts." *Id.*

While Appellees correctly note that Ohio law does not technically recognize a cause of action for wanton and reckless acts distinct from negligence, this point is of no consequence. Ohio has long recognized that there is a sharp distinction between mere

negligence and willful or wanton conduct -- a difference "of kind, not merely of degree." *Universal Concrete Pipe Co. v. Bassett* (1936), 130 Ohio St. 567, 575. This Court recently reaffirmed this distinction in the context of the public-duty doctrine, noting that the rule "comported with principles of *negligence*." *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 230 (emphasis added).

Thus, Appellants have created a straw man argument for their first proposition of law. The question is not whether an exception to *immunity* is implicated in an analysis of the applicability of the public-duty doctrine. Indeed, Appellants' proposition of law falsely assumes that there is no duty under the public-duty rule. The issue addressed by the Court of Appeals was not, as Appellants suggest, whether the wanton and reckless immunity exception was at issue when there is no duty under the public-duty rule. Rather, the issue addressed by the Court of Appeals was whether the public-duty rule itself shields officers from liability where their actions are wanton and reckless. The Court of Appeals properly held that 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." [Ct. of App. Opinion at ¶24.]

This error in Appellants' logic is evident where they argue that "[i]f 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 the individual." [Appellants' Memorandum at p.1.] This contention utterly misconstrues the appellate opinion, and improperly presupposes the validity of Appellants' own argument. That is to say, Appellants believe that there is no duty because they believe the public-duty doctrine applies. The Court of Appeals, however, properly found that the public-duty rule does not apply. Without application of the doctrine, a duty exists. Appellant's circular argument therefore does nothing to resolve the issue; it merely begs the question.

Appellants' Proposed Proposition of Law No. II: There is no "wanton and reckless" exception to the Public Duty Rule.

Once again, the very form of the proposition of law asserted by Appellants evidences their intense confusion. The Court of Appeals did not hold that there was a wanton and reckless exception to the public-duty doctrine. To the contrary, the Court of Appeals held that the public-duty rule applies only to negligent conduct, and not to wanton and reckless conduct. This is not a matter of mere semantics. Appellants would have this Court believe that the Court of Appeals carved out a new "exception" to the public-duty rule. The Court of Appeals did no such thing. The Court merely analyzed, and recognized, the appropriate scope of the public-duty rule. Recognizing that the public-duty doctrine does not extend beyond negligence to wanton and reckless conduct is not carving out an exception, it is simply stating the scope of the doctrine.

Appellants miss the point entirely when they argue that "wanton and reckless" culpability does not create a duty. [Appellants' Memorandum at p.7.] The wanton and reckless level of culpability, of course, is not what *creates* the duty, it is what *prevents* the application of the public-duty rule, which would function to remove an otherwise-existent duty. Because the doctrine is not invoked at the wanton and reckless level of culpability, the officers cannot avail themselves of the public-duty shield. The critical point, of course, is that wanton and reckless conduct is not the source of the duty. The duty has always existed. The wanton and reckless conduct simply prevents the public-duty protection from allowing individuals to avoid liability where the conduct extends beyond mere negligence, as it does in this case.

As the Court of Appeals recognized, the public-duty rule has always applied to merely negligent conduct, but not wanton and reckless conduct. Indeed, as previously noted, Appellants have failed to cite to so much as a single Ohio case in which a court ruled that the

public-duty doctrine compelled a finding that the defendant had no duty to the plaintiff where the plaintiff had alleged and provided factual support demonstrating that the defendant's conduct rose to the level of wanton and reckless.

Appellants' Proposed Proposition of Law No. III: The "wanton and reckless" exception to immunity in R.C. §2744.03(A)(6)(b) did not legislatively repudiate the Public Duty Rule.

Finally, Appellants attack the Appellate Court's alternative ruling that, even if the common law public-duty doctrine somehow applied to wanton and reckless acts, it was legislatively repudiated by R.C. §2744.03(A)(6)(b). The Court of Appeals undoubtedly got it right.

In R.C. §2744.02(A)(6)(b), the legislature provided that employees are not immune from liability where their "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." In so providing, the General Assembly has expressly stated that political subdivision employees who act in a wanton or reckless manner are subject to liability for the injuries that such conduct causes to Ohio citizens. Moreover, the General Assembly explicitly maintained that such employees are not subject to liability where their mere negligence causes harm, unless such liability is imposed elsewhere in the Revised Code. R.C. §2744.03(A)(6)(c). To the extent that the public-duty doctrine had held otherwise at the common law, the legislature's enactment of Chapter 2744 was an unequivocal repudiation of the doctrine. It is utterly untenable to contend otherwise.

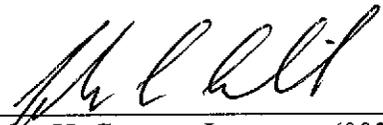
The legislature explicitly imposed liability on public officials for acts of wanton and reckless misconduct. Appellants' contention that imposing liability for wanton and reckless conduct does not repudiate protection from liability for wanton and reckless conduct simply does not even pass the straight-face test. Appellants attempt to deny the reality that the legislature has expressed that public officials can be liable for conduct rising to the level of wanton and reckless

misconduct, but the public-duty rule has never in the history of Ohio jurisprudence shielded anyone from liability for conduct that goes beyond mere negligence. There is simply no novel proposition of law here.

VI. Conclusion

As a threshold matter, this Court is without jurisdiction to hear this appeal. As an interlocutory appeal, Appellants are only permitted to appeal immunity issues under the provisions of Chapter 2744. Moreover, the scope of the public-duty rule cannot be properly assessed in this case, because Appellee's claims are for negligence per se, and it is established that the public-duty doctrine is inapplicable to claims for negligence per se. However, even if this Court should believe that it possesses jurisdiction to hear this appeal, and even if this Court should believe that this case properly presents public-duty issues, it presents no novel legal question, is of no great public import, and was properly decided by the Court of Appeals. For these reasons, this Honorable Court should not accept jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Opposition to Jurisdiction was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 2nd day of February, 2009:

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