

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO.: 2009-0014

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

**BRIEF OF DEFENDANTS/APPELLANTS PETER SHAW, WILLIAM J. EVERSOLE,
AND BENJAMIN E. CARPENTER**

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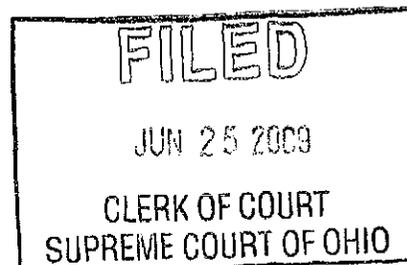


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I. STATEMENT OF THE CASE AND FACTS

This case is before this Court after the Fourth Appellate District entered judgment denying immunity to the individual officers on summary judgment. Factually, this case arises out of the criminal conduct 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, 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. These Sections require law enforcement to seize a drunk driver's vehicle and plates until the operator's initial court appearance.

Appellants/Defendants, Officers Peter Shaw, William Eversole and Benjamin Carpenter,¹ are presumed immune under the individual immunity provisions of Ohio's Political Subdivision Tort Liability Act, Chapter 2744, unless an exception applies. No exception applies in this case.

In this case, Plaintiff has invoked the immunity exception for, *inter alia*, wanton and reckless misconduct. R.C. § 2744.03(A)(6)(b). In order to establish wanton or reckless misconduct, a Plaintiff must show that a duty was owed. Without such duty a government actor cannot be reckless or wanton in a legally significant way.

Appellants/Defendants submit that the Public Duty Rule governs the issue of whether or not a public official performing his or her job owes a legally-enforceable duty to an individual member of the public. The Public Duty Rule provides that a duty imposed by law upon a public

¹ The City of Circleville is not part of the case. In the Estate's previous appeal, the Fourth District affirmed the trial court's grant of judgment as a matter of law in the City's favor. Graves v. City of Circleville (4th Dist. 2005), 2005 WL 503372, 2005 -Ohio-929.

official is not a duty owed to a particular individual, but a non-actionable duty to the public in general.

Circumventing established law of more than 20 years, a divided panel of the Fourth District created a novel exception that is fundamentally incompatible with Ohio Public Duty law and stripped these Officers of their immunity, subjecting them to potentially devastating personal liability. The majority of the appellate panel improperly held that “reckless and wanton” intent somehow creates a duty where only a non-actionable public duty would have previously existed under Ohio law. The appellate court improperly held that the standards for duty and immunity are the same. Under the majority’s decision, a determination of duty is a determination – and denial – of individual immunity.

In creating an exception based on a standard of intent, the appellate court majority created the illogical situation where a public official could be stripped of immunity, even when that official owes no duty of care. Police officers’ enforcement or failure to enforce criminal laws does not convert these Officers into the insurers of the public’s safety for the criminal acts of third parties.

A. Mr. Copley’s Arrest and the Impound of his Vehicle

On July 4, 2003, shortly before 6:44 p.m., Circleville Officer Peter Shaw learned that Cornelius Copley had been involved in a motor vehicle accident and fled the scene. (Dep. of Officer Shaw of 11/12/03 at 9-10.) Upon their arrival, officers located Mr. Copley and administered a field sobriety test. (*Id.* at 14.) Mr. Copley failed the test and he was arrested. (*Id.*) 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. (Second Am. Comp. at ¶10.) 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. (Apx. at 34)

B. Mr. Copley is Released From Jail and Gets His Vehicle Back

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. (Dep. of William Eversole of 11/12/03 at 51-53.) After Mr. Copley posted bond, Officer Eversole released him from jail at 1:19 p.m. on July 5, 2003. (Id. at 58.)

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. (Dep. of Carpenter at 63.) Dispatcher Benjamin Carpenter examined the tow log and, finding no hold on the vehicle, gave Mr. Copley the appropriate form. (Id. at 64.)

On July 6, 2003 at about 5:30 a.m., Mr. Copley drove his vehicle while intoxicated and was involved in an automobile accident with Ms. Graves that resulted in both of their deaths. (See Second Am. Comp. at ¶10.)

C. The Plaintiffs Sue the Officers for Failing to Protect Against a Drunk Driver

On August 28, 2003, the Plaintiff Estate of Jillian Graves sued these Officers, claiming that these Officers should be liable for improperly releasing Mr. Copley's car. The Estate theorized that by allowing Mr. Copley to have that car, these Officers should be personally liable for Mr. Copley's driving drunk a day and a half after his arrest and causing Ms. Graves' death. The Officers asked for an order granting summary judgment on the grounds that they were immune under R.C. § 2744.03(A)(6). The trial court denied the request and the Officers appealed.

D. Two Appellate Judges Misconstrue the Public Duty Rule and Deny the Officers Immunity

The majority of the panel hearing the Officers' appeal affirmed the trial court's denial of summary judgment. The majority "acknowledge[ed]" that the special relationship exception cannot be met and there was no actionable duty under the Public Duty Rule under existing Ohio law. (Apx. 14-15, App. Op. at 11-12, ¶ 24.)

Nevertheless, relying on another state's law, the majority theorized that an actionable duty existed because the Officers' purported wanton and reckless conduct created that duty. This "exception" adopted by the Fourth District was previously unheard of under Ohio law. 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. 16, App. Op. 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 the fact that no duty of care existed under previous law.

Judge Kline dissented, reasoning that "the officers cannot be held liable for their allegedly wanton, willful, or reckless conduct absent a duty owed to Graves individually. When no legal duty is owed, there is no actionable tort." (Apx. 24, App. Op. at 21, dissent.)

The Officers appealed the majority's decision, seeking review of the appellate court's denial of summary judgment.

II. LAW AND ARGUMENT

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.

Ohio R.C. § 2744.03(A)(6) provides that an individual employee is immune from liability, unless one of three narrow exceptions applies: (1) his acts or omissions are manifestly outside the scope of his employment; (2) his acts or omissions are malicious, in bad faith, or wanton or reckless; or (3) liability is expressly imposed upon the employee by another section of the Revised Code.

The first and third exceptions are not at issue here. As to the second exception, the Estate has alleged that the Officers acted in a “wanton or reckless” manner.

The law is well established that the question of whether an actionable duty is owed is an issue of law. *See, e.g., Keister v. Park Centre Lanes* (1981), 3 Ohio App.3d 19, 24. Without such duty a government actor cannot be reckless or wanton in a legally significant way. Thus, the immunity exception invoked by Plaintiff is not properly at issue in this case.

Wantonness and recklessness, which are alleged by Plaintiff in this case, are functional equivalents under Ohio law and courts use the term “reckless” interchangeably with “wanton.” *See Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705; *Whitfield v. City of Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, ¶ 34. Courts of this State have consistently held that recklessness is premised upon the essential element of a duty owed to a particular person. This Court has defined the term “reckless” to mean:

The actor’s conduct is in reckless disregard of the safety of others if 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. [Emphasis added.]

Thompson, supra, 104-05, citing 2 RESTATEMENT OF THE LAW 2D TORTS (1965) at 587, Section 500; *see e.g., O’Toole v. Denihan* (2008), 118 Ohio St.3d 374, 2008-Ohio-2574 at ¶ 73 (affirming the *McNeill* definition); *see further e.g., Marchetti v. Kalish* (1990), 53 Ohio St.3d

95, fn. 2 (employing same definition). Ohio intermediate appellate courts are equally consistent in recognizing that duty is required to establish recklessness. *See e.g., Jackson v. Butler Cty. Bd. of Cty. Comm'rs* (1991), 76 Ohio App.3d 448, 454; *Sicard v. Univ. of Dayton* (2nd Dist. 1995), 104 Ohio App.3d 27, 30; *Santho v. Boy Scouts of Am.* (10th Dist. 2006), 168 Ohio App.3d 27, 2006-Ohio-3656 at ¶ 19.

Here, there is no dispute that the Officers all raised the immunity defense. When immunity is raised, the Court begins with the presumption of immunity that is afforded governmental acts carried out by its employees. R.C. § 2744.03; *see also Cook v. City of Cincinnati* (1995), 103 Ohio App.3d 80, 85-86, 90 (observing that there is a presumption of immunity). The “burden lies with the plaintiff to show that one of the recognized exceptions apply” under R.C. § 2744.03. *See Maggio v. Warren* (11th Dist. 2006), 2006 WL 3772258, 2006-Ohio-6880 at ¶ 37. There is an un rebutted presumption that these Officers are immune in this case. The wanton and reckless exception to immunity cannot apply because there is no duty under the Public Duty Rule.

The Public Duty Rule determines whether a public official has a duty that is individually enforceable in a tort action as opposed to a general duty to the public that is non-actionable. 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. R.C. § 2744.02(C). The issue of whether or not a duty is owed is an issue of law which the lower courts have incorrectly decided in this case. Under the majority’s decision, a determination of duty is a determination – and denial – of individual immunity. It is legally impossible for a plaintiff to

establish an exception to immunity when there is no duty. Intent must be linked to an actionable duty. Because of the lower courts' incorrect determination that a duty of care was owed, they incorrectly determined that the "reckless and wanton" immunity exceptions could apply in this case and denied immunity to these Officers under R.C. § 2744.03(A)(6). Accordingly, the decisions of the lower courts should be reversed and judgment should be entered in favor of these officers.

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

A. A "wanton and reckless" exception does not and should not exist under Ohio law.

This Court and the intermediate appellate courts have consistently applied the Public Duty Rule and its one special relationship exception for more than two decades. Sawicki v. Village of Ottawa Hills (1988), 37 Ohio St.3d 222, 230. 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. A duty which the law imposes upon a public official is generally a duty owed to the public at large and 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 (1988), 37 Ohio St.3d at 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.

There is no dispute that the Estate could not establish the “special relationship” exception. In fact, the Fourth District expressly held that “the Estate’s claims can only proceed if it establishes the special relationship exception, which, we acknowledge, it cannot.” (Apx. at 15, App. Op. at 12, ¶ 24.)

Notwithstanding, the Fourth District inappropriately created a “wanton and reckless” exception to the public duty doctrine, and, as a result, effectively created a new exception to immunity.

1. A “wanton and reckless” exception is fundamentally incompatible with more than twenty years of Ohio Public Duty law.

The general rule of nonliability cannot be circumvented by allegations that the defendant's conduct was "wanton," or “reckless,” because if the only duty breached was one owed to the public generally, the defendant's state of mind is irrelevant. No Ohio court, including this one, has limited the Public Duty Rule to allegations of negligent culpability.

What is more, such limitation makes no sense because establishing a duty is a prerequisite to establishing liability for negligence or liability based on reckless and wanton misconduct. *See, Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705. “Reckless and wanton misconduct” is not a cause of action in Ohio, they are levels of culpability. *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 a level of intent. *Griggy v. City of Cuyahoga Falls* (9th Dist. 2006), 2006 WL 173134. To establish liability, a plaintiff must still establish an actionable duty.

Despite the Fourth District’s holding, “wanton and reckless” conduct does not create a duty. Intent does not create a duty. And a higher level of culpability does not transform

culpability into a duty – just as more damages do not create a duty. No matter how much culpability a defendant is alleged to have, it still does not create a duty where none exists.

Injecting a level of intent – “wanton and reckless” – into the public duty doctrine would render the public duty doctrine unnecessarily nebulous by allowing public officials to be held liable whenever a party characterizes conduct as “wanton and reckless.” Moreover, a reckless and wanton exception confuses and blurs the concepts of duty and intent – in essence, the appellate court’s decision allows intent to become duty when a party can characterize a governmental actor’s conduct as more than negligence.

2. Courts that recognize Ohio’s version of the public duty rule do not recognize a “wanton and reckless” exception.

The Ohio public duty rule is based on New York law, where there is no exception to the public duty doctrine for allegedly “wanton and reckless” or “egregious” conduct. Sawicki, *supra*, at 231, *citing* Cuffy v. City of New York (1987), 69 N.Y.2d 255, 505 N.E.2d 937; *see, also*, White v. Beasley (1996), 453 Mich. 308, 552 N.W.2d 1 (adopting the New York public duty rule/special relationship exception without providing exception for egregious conduct); (Wolfe v. City of Wheeling, 182 W.Va.253, 387 S.E.2d 307, 311 (1989) (adopting the Cuffy test)).

As a general rule in most United States jurisdictions, there is no duty on the part of a municipality or other governmental unit to provide police protection to a particular individual from crime absent a “special duty” of protection. *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection From Crime* (2009), 90 A.L.R.5th 273.

The court of appeals majority embraced a position taken by a very small minority of states where egregious or reckless conduct somehow formed an exception to the public duty doctrine. (Apx. at 16, App. Op. at pp. 13, ¶ 25, *citing* Rhode Island, Connecticut, and

Tennessee.) Neither the “Rhode Island exception” nor any other similar exception should be adopted here.

Any exception that provides that intent can create a duty is wrong. Intent does not create a duty under any circumstance. The Rhode Island exception would swallow Ohio Public Duty law, rendering it meaningless. Courts have observed that “no other jurisdiction has embraced the egregious conduct exception.” Siewert v. State, 142 Wash.App. 1021, 2008 WL 62567 (Wash.App. Div. 1, 2008). Further, and setting aside it is not the law of Ohio, legal commentators have recognized that Rhode Island’s egregious conduct exception “has been inconsistently applied to require no more than is necessary to make out a standard negligence claim, thereby effectively rendering the public duty doctrine meaningless.” Aaron R. Baker, Note, Untangling the Public Duty Doctrine, 10 Roger Williams U. L. Rev. 731 (2005). The majority decision improperly collapses the issue of intent into duty by holding that a “reckless and wanton” exception to the Public Duty Rule exists.

In the present case, the majority decision merged duty and intent, and improperly denied immunity by the mere fact that it found a duty by the purported “wanton and reckless” exception to the Public Duty Rule. This order denies the benefit of immunity under Chapter 2744. Under majority’s decision, a duty determination is a determination of individual immunity.

The majority’s nebulous “reckless and wanton” exception to the Public Duty Rule unnecessarily interjects confusion and uncertainty into the well established public duty analysis. The majority found no Ohio precedent where the wanton and reckless conduct has provided an exception to the Public Duty Rule (Apx. at 16, App. Op. at pp. 13, ¶ 26). Instead, the majority borrowed the law of another state that conflicts with the law as announced in this state. *See, e.g., Dearth v. Stanley* (2nd Dist. 2008), 2008 WL 344124, 2008-Ohio-487, (public duty doctrine

barred plaintiff's allegations of "reckless" conduct against a police officer who released an intoxicated man into the custody of his girlfriend, who warned the officer he was violent when drunk, and ended up killing her). Indeed, a motivated litigant could easily characterize as "reckless" many if not all of the public duty cases that have and will come before Ohio courts. Part of the purpose of the public duty doctrine is to avoid such inquiries.

3. The Fourth District's decision undermines the purposes behind the public duty doctrine and the immunity statute.

Law enforcement officers occupy a precarious position. They have embraced a dangerous profession where even minor omissions can have unforeseen consequences. The Public Duty Doctrine protects those officers from devastating civil liability for these omissions that can have far-reaching consequences that are impossible to foresee.

The Fourth District determined the Officers breached the duties established by R.C. §§ 4507.38 and 4511.195. These Sections express a duty to the general public to seize a vehicle and its license plates when the driver was arrested for driving under the influence. These statutes do not impose civil liability on police officers for failing to meet the requirements of the statutes. These statutes, like innumerable statutes contained in the Ohio Revised Code, are designed to protect the public at large and express the law an officer is to enforce in protecting the public.

Indeed, a search of the unannotated Ohio Revised Code under the search terms "shall" or "must" indicates thousands of citations, according to the Westlaw data base. While naturally all of these citations do not relate to public officials, they do reveal an overwhelming array of duties that could be used to hold public officials liable for general duties they have to the public. *See, e.g.,* R.C. § 2921.44 provides that "no law enforcement officer shall negligently ... fail to serve a lawful warrant without delay ..." [R.C. § 2921.44(A)(1)] or that "no officer, having charge of a detention facility shall negligently ... allow the detention facility to become littered or unsanitary

[R.C. § 2921.44(C)(1)] ... [or] allow a prisoner to escape” [R.C. § 2921.44(C)(4)] or that “no public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servant’s office [R.C. § 2921.44(E)].” This Court should not endorse a rule that makes the violation of innumerable general duties a basis for civil liability. To do so would place police officers in the position of insuring the personal safety of every member of the public, or face a civil suit for damages. It is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law and the unforeseen, even if tragic, consequences. The public duty doctrine as it exists eliminates this dilemma.

Further, there are mechanisms, other than civil legal actions, in which individual officers may be held accountable for dereliction of duty, such as internal disciplinary proceedings or formal criminal proceedings. In fact, if it believed it to be of sufficient concern to warrant imposing personal liability on an officer, the Legislature could enact a statute that granted an injured party a private cause of action when a police officer fails to meet his or her general duties under a particular statute.

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. The Public Duty Rule, in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant. *See* 18 McQuillin Mun. Corp. § 53.04.25 (3rd ed.). 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.

The Fourth District’s ruling 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 Public Duty Rule protects these public servants from potentially devastating personal liability for failing to comply with an overwhelming array of general duties. Exposure to liability for failure to adequately enforce laws designed to protect everyone will discourage municipalities from passing such laws in the first place. Exposure to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers.

Furthermore the basic policy consideration, that limited public resources need to be devoted to the provision of public services without unnecessary diversions, applies now more than ever. The government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them. The Public Duty Rule protects individual public officials like these Officers from potentially devastating personal liability and the rigors of trial when no duty exists. The Public Duty Rule ensures the early end to litigation against public employees for claims that assert the violation of public duties, which absent a special relationship, cannot establish liability.

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 even held as much: “the Officers argue that the public duty doctrine remains viable after the adoption of R.C. Chapter 2744, and we agree.” Graves, *supra*, at ¶ 21.

While the Court agreed that the public duty is viable, the majority panel tried to bolster its ultimate ruling by holding, 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. at 16, p. 13, ¶ 26.) The Fourth District speculated 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. at 16, p. 13, ¶ 26.)

The Fourth District’s alternative holding is wrong.

1. This Court’s precedent is consistent that the public duty doctrine coexists with immunity under Chapter 2744.

This Court has explicitly stated that immunity and the public duty doctrine were separate, coexisting and complementary concepts. *See 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”); *see also Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.* (2008), 118 Ohio St.3d 392, 2008-Ohio-2567 at ¶ 32.

2. The Legislature did not “clearly intend” for R.C. § 2744.03 to supersede the common law Public Duty Rule.

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.

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 and R.C. § 2744.03(A)(6)(b) coexist in the proper analysis of a claim against governmental employee. On one hand, 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 common law liability that would otherwise exist. While they coexist, the doctrines are complimentary to one another.

Nevertheless, the Public Duty Rule is highly relevant to determining whether reckless or wanton misconduct has occurred within the meaning of R.C. § 2744.03(A)(6)(b). In fact, the only proper means to determine whether a duty is owed by a public official for purposes of determining recklessness and wantonness under R.C. § 2744.03(A)(6)(b) is by reference to the Public Duty Rule. It would be illogical indeed to hold that the duty component of recklessness and wantonness for purposes of R.C. § 2744.03(A)(6)(b) should somehow be decided on a different standard than the Public Duty Rule which clearly governs the common law element of duty in a claim against a public official.

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) (emphasis added). Immunity under the Political Subdivision Tort Liability Act does not create new causes of action where none existed before – it only provides the shield of governmental immunity where a cause of action would exist if the tortfeasor were otherwise liable. 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 common law duty. These two concepts are complementary.

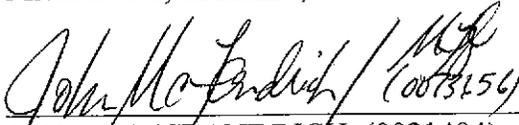
III. CONCLUSION

Under the majority's decision, a duty determination is a denial of individual immunity. For almost two decades, the Public Duty Rule has provided 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. The only exception to this Rule is if a special relationship exists. Not only did it improperly deny

immunity, but the majority decision erred by misinterpreting the very basis of the Public Duty Rule and improperly turning a level of intent (wanton and reckless) into a basis for creating a duty. For the foregoing reasons, this Court should reverse the majority decision below and grant judgment as a matter of law in favor of Officers William Eversole, Peter Shaw, and Benjamin Carpenter.

Respectfully submitted,

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



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A copy of the foregoing Brief of Defendants/Appellants has been sent by regular U.S.

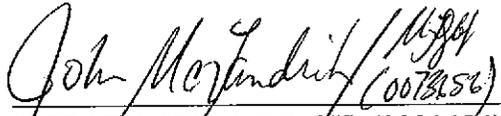
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A handwritten signature in cursive script that reads "John T. McLandrich" followed by a date "6/25/09" and a number "0075179" in parentheses.

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APPENDIX

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

THE ESTATE OF JILLIAN MARIE GRAVES

Plaintiff-Appellee

v.

THE CITY OF CIRCLEVILLE, et al.,

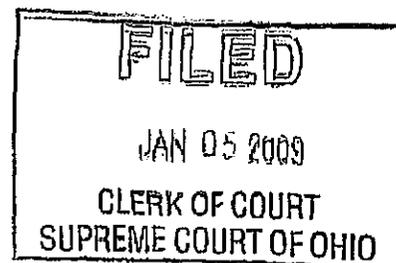
Defendants-Appellants

**NOTICE OF APPEAL OF OFFICERS PETER SHAW, WILLIAM EVERSOLE, AND
BENJAMIN CARPENTER**

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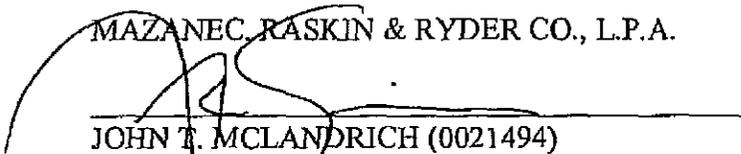


Pursuant to Supreme Court Rule II § 2(A)(3), Appellants/Defendants Officers Peter Shaw, William Eversole, and Benjamin Carpenter, hereby give notice of appeal to the Supreme Court of Ohio from the Fourth District Court of Appeals' November 21, 2008 decision and judgment entry. A copy of the court of appeals decision is attached to this Notice. (See Ex. "A.")

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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



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

THE ESTATE OF JILLIAN MARIE GRAVES, :

Case No. 06CA2900

Plaintiff-Appellee, :

DECISION AND
JUDGMENT ENTRY

v. :

THE CITY OF CIRCLEVILLE, et al., :

Defendants-Appellants. :

APPEARANCES

John T. McLandrich, James A. Climer, & Frank H. Scialdone, MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A., Cleveland, Ohio, and Gary D. Kenworthy, Circleville, Ohio, for appellants Peter Shaw, William J. Eversole, Benjamin E. Carpenter, and John/Jane Doe Officers of the Circleville Police Department.

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.

{11} 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.

{12} 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 Tolle 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 Royallon 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, ¶31, 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.

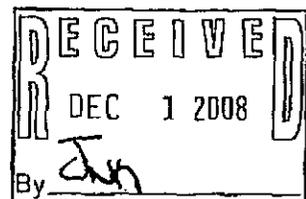
Kline, J.: Dissents with Dissenting Opinion.

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.



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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XLV. MOTOR VEHICLES--AERONAUTICS--WATERCRAFT
CHAPTER 4511. TRAFFIC LAWS--OPERATION OF MOTOR VEHICLES
OPERATION OF MOTOR VEHICLE WHILE INTOXICATED

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4511.195 SEIZURE OF VEHICLES UPON ARREST

<Note: See also following version of this section, eff. 1-1-04>

(A) As used in this section:

(1) "Vehicle operator" means a person who is operating a vehicle at the time it is seized under division (B) of this section.

(2) "Vehicle owner" means either of the following:

(a) The person in whose name is registered, at the time of the seizure, a vehicle that is seized under division (B) of this section;

(b) A person to whom the certificate of title to a vehicle that is seized under division (B) of this section has been assigned and who has not obtained a certificate of title to the vehicle in that person's name, but who is deemed by the court as being the owner of the vehicle at the time the vehicle was seized under division (B) of this section.

(3) "Municipal OMVI ordinance" means any municipal ordinance prohibiting the operation of a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse or prohibiting the operation of a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine.

(4) "Interested party" includes the owner of a vehicle seized under this section, all lienholders, the defendant, the owner of the place of storage at which a vehicle seized under this section is stored, and the person or entity that caused the vehicle to be removed.

(B)(1) The arresting officer or another officer of the law enforcement agency that employs the arresting officer, in addition to any action that the arresting officer is required or authorized to take by section 4511.191 of the Revised Code or by any other provision of law, shall seize the vehicle that a person was operating at the time of the alleged offense and its license plates if either of the following apply:

(a) The person is arrested for a violation of division (A) of section 4511.19 of the Revised Code or of a municipal OMVI ordinance and, within six years of the al-

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leged violation, the person previously has been convicted of or pleaded guilty to one or more violations of the following:

- (i) Division (A) or (B) of section 4511.19 of the Revised Code;
 - (ii) A municipal OMVI ordinance;
 - (iii) Section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section;
 - (iv) Division (A) (1) of section 2903.06 or division (A) (1) of section 2903.08 of the Revised Code or a municipal ordinance that is substantially similar to either of those divisions;
 - (v) Division (A) (2), (3), or (4) of section 2903.06, division (A) (2) of section 2903.08, or former section 2903.07 of the Revised Code, or a municipal ordinance that is substantially similar to any of those divisions or that former section, in a case in which the jury or judge found that the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse;
 - (vi) A statute of the United States or of any other state or a municipal ordinance of a municipal corporation located in any other state that is substantially similar to division (A) or (B) of section 4511.19 of the Revised Code.
- (b) The person is arrested for a violation of division (A) of section 4511.19 of the Revised Code or of a municipal OMVI ordinance and the person previously has been convicted of or pleaded guilty to a violation of division (A) of section 4511.19 of the Revised Code under circumstances in which the violation was a felony, regardless of when the prior felony violation of division (A) of section 4511.19 of the Revised Code and the conviction or guilty plea occurred.

(2) Except as otherwise provided in division (B) of this section, the officer making an arrest of the type described in division (B) (1) of this section shall seize the vehicle and its license plates regardless of whether the vehicle is registered in the name of the person who was operating it or in the name of another person or entity. This section does not apply to or affect any rented or leased vehicle that is being rented or leased for a period of thirty days or less, except that a law enforcement agency that employs a law enforcement officer who makes an arrest of a type that is described in division (B) (1) of this section and that involves a rented or leased vehicle of this type shall notify, within twenty-four hours after the officer makes the arrest, the lessor or owner of the vehicle regarding the circumstances of the arrest and the location at which the vehicle may be picked up. At the time of the seizure of the vehicle, the law enforcement officer who made the arrest shall give the vehicle operator written notice that the vehicle and its license plates have been seized; that the vehicle either will be kept by the officer's law enforcement agency or will be immobilized at least until the operator's initial appearance on the charge of the offense for which the ar-

rest was made; that, at the initial appearance, the court in certain circumstances may order that the vehicle and license plates be released to the vehicle owner until the disposition of that charge; that, if the vehicle operator is convicted of that charge, the court generally must order the immobilization of the vehicle and the impoundment of its license plates, or the forfeiture of the vehicle; and that, if the operator is not the vehicle owner, the operator immediately should inform the vehicle owner that the vehicle and its license plates have been seized and that the vehicle owner may be able to obtain their return or release at the initial appearance or thereafter.

(3) The arresting officer or a law enforcement officer of the agency that employs the arresting officer shall give written notice of the seizure to the court that will conduct the initial appearance of the vehicle operator. The notice shall be given when the charges are filed against the vehicle operator. Upon receipt of the notice, the court promptly shall determine whether the vehicle operator is the vehicle owner and whether there are any liens recorded on the certificate of title to the vehicle. If the court determines that the vehicle operator is not the vehicle owner, it promptly shall send by regular mail written notice of the seizure of the motor vehicle to the vehicle owner and to all lienholders recorded on the certificate of title. The written notice to the vehicle owner and lienholders shall contain all of the information required by division (B)(2) of this section to be in a notice to be given to the vehicle operator and also shall specify the date, time, and place of the vehicle operator's initial appearance. The notice also shall inform the vehicle owner that if title to a motor vehicle that is subject to an order for criminal forfeiture under this section is assigned or transferred and division (C)(2) or (3) of section 4503.234 of the Revised Code applies, the court may fine the vehicle operator the value of the vehicle. The notice to the vehicle owner also shall state that if the vehicle is immobilized under division (A) of section 4503.233 of the Revised Code, seven days after the end of the period of immobilization a law enforcement agency will send the vehicle owner a notice, informing the vehicle owner that if the release of the vehicle is not obtained in accordance with division (D)(3) of section 4503.233 of the Revised Code, the vehicle shall be forfeited. The notice also shall inform the vehicle owner that the vehicle owner may be charged expenses or charges incurred under this section and section 4503.233 of the Revised Code for the removal and storage of the vehicle.

The written notice that is given to the vehicle operator or is sent or delivered to the vehicle owner if the vehicle owner is not the vehicle operator also shall state that if the vehicle operator pleads guilty to or is convicted of the offense for which the vehicle operator was arrested and the court issues an immobilization and impoundment order relative to that vehicle, division (D)(4) of section 4503.233 of the Revised Code prohibits the vehicle from being sold during the period of immobilization without the prior approval of the court.

(4) At or before the initial appearance, the vehicle owner may file a motion re-

requesting the court to order that the vehicle and its license plates be released to the vehicle owner. Except as provided in this division and subject to the payment of expenses or charges incurred in the removal and storage of the vehicle, the court, in its discretion, then may issue an order releasing the vehicle and its license plates to the vehicle owner. Such an order may be conditioned upon such terms as the court determines appropriate, including the posting of a bond in an amount determined by the court. If the vehicle operator is not the vehicle owner and if the vehicle owner is not present at the vehicle operator's initial appearance, and if the court believes that the vehicle owner was not provided with adequate notice of the initial appearance, the court, in its discretion, may allow the vehicle owner to file a motion within seven days of the initial appearance. If the court allows the vehicle owner to file such a motion after the initial appearance, the extension of time granted by the court does not extend the time within which the initial appearance is to be conducted. If the court issues an order for the release of the vehicle and its license plates, a copy of the order shall be made available to the vehicle owner. If the vehicle owner presents a copy of the order to the law enforcement agency that employs the law enforcement officer who arrested the person who was operating the vehicle, the law enforcement agency promptly shall release the vehicle and its license plates to the vehicle owner upon payment by the vehicle owner of any expenses or charges incurred in the removal and storage of the vehicle.

(5) A vehicle seized under division (B)(1) of this section either shall be towed to a place specified by the law enforcement agency that employs the arresting officer to be safely kept by the agency at that place for the time and in the manner specified in this section or shall be otherwise immobilized for the time and in the manner specified in this section. A law enforcement officer of that agency shall remove the identification license plates of the vehicle, and they shall be safely kept by the agency for the time and in the manner specified in this section. No vehicle that is seized and either towed or immobilized pursuant to this division shall be considered contraband for purposes of section 2933.41, 2933.42, or 2933.43 of the Revised Code. The vehicle shall not be immobilized at any place other than a commercially operated private storage lot, a place owned by a law enforcement agency or other government agency, or a place to which one of the following applies:

(a) The place is leased by or otherwise under the control of a law enforcement agency or other government agency.

(b) The place is owned by the vehicle operator, the vehicle operator's spouse, or a parent or child of the vehicle operator.

(c) The place is owned by a private person or entity, and, prior to the immobilization, the private entity or person that owns the place, or the authorized agent of that private entity or person, has given express written consent for the immobilization to be carried out at that place.

(d) The place is a street or highway on which the vehicle is parked in accordance with the law.

(C) (1) A vehicle that is seized under division (B) of this section shall be safely kept at the place to which it is towed or otherwise moved by the law enforcement agency that employs the arresting officer until the initial appearance of the vehicle operator relative to the charge in question. The license plates of the vehicle that are removed pursuant to division (B) of this section shall be safely kept by the law enforcement agency that employs the arresting officer until the initial appearance of the vehicle operator relative to the charge in question.

(2) (a) At the initial appearance or not less than seven days prior to the date of final disposition, the court shall notify the vehicle operator, if the vehicle operator is the vehicle owner, that if title to a motor vehicle that is subject to an order for criminal forfeiture under this section is assigned or transferred and division (C) (2) or (3) of section 4503.234 of the Revised Code applies, the court may fine the vehicle operator the value of the vehicle. If, at the initial appearance, the vehicle operator pleads guilty to the violation of division (A) of section 4511.19 of the Revised Code or of the municipal OMVI ordinance or pleads no contest to and is convicted of the violation, the court shall impose sentence upon the vehicle operator as provided by law or ordinance; the court, except as provided in this division and subject to section 4503.235 of the Revised Code, shall order the immobilization of the vehicle and the impoundment of its license plates under section 4503.233 and section 4511.193 or 4511.99 of the Revised Code, or the criminal forfeiture of the vehicle under section 4503.234 and section 4511.193 or 4511.99 of the Revised Code, whichever is applicable; and the vehicle and its license plates shall not be returned or released to the vehicle owner. If the vehicle operator is not the vehicle owner and the vehicle owner is not present at the vehicle operator's initial appearance and if the court believes that the vehicle owner was not provided adequate notice of the initial appearance, the court, in its discretion, may refrain for a period of time not exceeding seven days from ordering the immobilization of the vehicle and the impoundment of its license plates, or the criminal forfeiture of the vehicle so that the vehicle owner may appear before the court to present evidence as to why the court should not order the immobilization of the vehicle and the impoundment of its license plates, or the criminal forfeiture of the vehicle. If the court refrains from ordering the immobilization of the vehicle and the impoundment of its license plates, or the criminal forfeiture of the vehicle, section 4503.235 of the Revised Code applies relative to the order of immobilization and impoundment, or the order of forfeiture.

(b) If, at any time, the charge that the vehicle operator violated division (A) of section 4511.19 of the Revised Code or the municipal OMVI ordinance is dismissed for any reason, the court shall order that the vehicle seized at the time of the arrest and its license plates immediately be released to the vehicle owner subject to the payment of expenses or charges incurred in the removal and storage

of the vehicle.

(D) If a vehicle is seized under division (B) of this section and is not returned or released to the vehicle owner pursuant to division (C) of this section, the vehicle or its license plates shall be retained until the final disposition of the charge in question. Upon the final disposition of that charge, the court shall do whichever of the following is applicable:

(1) If the vehicle operator is convicted of or pleads guilty to the violation of division (A) of section 4511.19 of the Revised Code or of the municipal OMVI ordinance, the court shall impose sentence upon the vehicle operator as provided by law or ordinance and, subject to section 4503.235 of the Revised Code, shall order the immobilization of the vehicle the vehicle operator was operating at the time of, or that was involved in, the offense and the impoundment of its license plates under section 4503.233 and section 4511.193 or 4511.99 of the Revised Code, or the criminal forfeiture of the vehicle under section 4503.234 and section 4511.193 or 4511.99 of the Revised Code, whichever is applicable.

(2) If the vehicle operator is found not guilty of the violation of division (A) of section 4511.19 of the Revised Code or of the municipal OMVI ordinance, the court shall order that the vehicle and its license plates immediately be released to the vehicle owner upon the payment of any expenses or charges incurred in its removal and storage.

(3) If the charge that the vehicle operator violated division (A) of section 4511.19 of the Revised Code or the municipal OMVI ordinance is dismissed for any reason, the court shall order that the vehicle and its license plates immediately be released to the vehicle owner upon the payment of any expenses or charges incurred in its removal and storage.

(E) If a vehicle is seized under division (B) of this section, the time between the seizure of the vehicle and either its release to the vehicle owner under division (C) of this section or the issuance of an order of immobilization of the vehicle under section 4503.233 of the Revised Code shall be credited against the period of immobilization ordered by the court.

(F) (1) The vehicle owner may be charged expenses or charges incurred in the removal and storage of the immobilized vehicle. The court with jurisdiction over the case, after notice to all interested parties, including lienholders, and after an opportunity for them to be heard, if the vehicle owner fails to appear in person, without good cause, or if the court finds that the vehicle owner does not intend to seek release of the vehicle at the end of the period of immobilization under section 4503.233 of the Revised Code or that the vehicle owner is not or will not be able to pay the expenses and charges incurred in its removal and storage, may order that title to the vehicle be transferred, in order of priority, first into the name of the person or entity that removed it, next into the name of a lien-

holder, or lastly into the name of the owner of the place of storage.

Any lienholder that receives title under a court order shall do so on the condition that it pay any expenses or charges incurred in the vehicle's removal and storage. If the person or entity that receives title to the vehicle is the person or entity that removed it, the person or entity shall receive title on the condition that it pay any lien on the vehicle. The court shall not order that title be transferred to any person or entity other than the owner of the place of storage if the person or entity refuses to receive the title. Any person or entity that receives title either may keep title to the vehicle or may dispose of the vehicle in any legal manner that it considers appropriate, including assignment of the certificate of title to the motor vehicle to a salvage dealer or a scrap metal processing facility. The person or entity shall not transfer the vehicle to the person who is the vehicle's immediate previous owner.

If the person or entity assigns the motor vehicle to a salvage dealer or scrap metal processing facility, the person or entity shall send the assigned certificate of title to the motor vehicle to the clerk of the court of common pleas of the county in which the salvage dealer or scrap metal processing facility is located. The person or entity shall mark the face of the certificate of title with the words "for destruction" and shall deliver a photocopy of the certificate of title to the salvage dealer or scrap metal processing facility for its records.

(2) Whenever a court issues an order under division (F)(1) of this section, the court also shall order removal of the license plates from the vehicle and cause them to be sent to the registrar of motor vehicles if they have not already been sent to the registrar. Thereafter, no further proceedings shall take place under this section or under section 4503.233 of the Revised Code.

(3) Prior to initiating a proceeding under division (F)(1) of this section, and upon payment of the fee under division (B) of section 4505.14 of the Revised Code, any interested party may cause a search to be made of the public records of the bureau of motor vehicles or the clerk of the court of common pleas, to ascertain the identity of any lienholder of the vehicle. The initiating party shall furnish this information to the clerk of the court with jurisdiction over the case, and the clerk shall provide notice to the vehicle owner, the defendant, any lienholder, and any other interested parties listed by the initiating party, at the last known address supplied by the initiating party, by certified mail or, at the option of the initiating party, by personal service or ordinary mail.

CREDIT(S)

(1999 S 107, eff. 3-23-00; 1998 S 213, eff. 7-29-98; 1997 S 60, eff. 10-21-97; 1996 S 166, eff. 10-17-96; 1996 H 676, eff. 10-4-96; 1996 H 353, eff. 9-17-96; 1994 H 687, eff. 10-12-94; 1994 H 236, eff. 9-29-94; 1994 S 82, eff. 5-4-94; 1993 S 62, § 1, eff. 9-1-93; 1993 S 62, § 4; 1992 S 275)

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<Note: See also following version of this section, eff. 1-1-04>

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XLV. MOTOR VEHICLES--AERONAUTICS--WATERCRAFT
CHAPTER 4507. DRIVER'S LICENSE LAW
ARREST PROCEDURES

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4507.38 SEIZURE OF VEHICLES UPON ARREST (SECOND VERSION)

<Note: See also preceding version, following repeal, and Publisher's Note.>

(A) As used in this section:

(1) "Arrested person" means a person who is arrested for a violation of division (B) (1) or (D) (2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code and whose arrest results in a vehicle being seized under division (B) of this section.

(2) "Vehicle owner" means either of the following:

(a) The person in whose name is registered, at the time of the seizure, a vehicle that is seized under division (B) of this section;

(b) A person to whom the certificate of title to a vehicle that is seized under division (B) of this section has been assigned and who has not obtained a certificate of title to the vehicle in that person's name, but who is deemed by the court as being the owner of the vehicle at the time the vehicle was seized under division (B) of this section.

(B) (1) If a person is arrested for a violation of division (B) (1) or (D) (2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code, the arresting officer or another officer of the law enforcement agency that employs the arresting officer, in addition to any action that the arresting officer is required or authorized to take by any other provision of law, shall seize the vehicle that the person was operating at the time of the alleged offense or that was involved in the alleged offense and its identification license plates. Except as otherwise provided in this division, the officer shall seize the vehicle and license plates under this division regardless of whether the vehicle is registered in the name of the person who was operating it or in the name of another person. This section does not apply to or affect any rented or leased vehicle that is being rented or leased for a period of thirty days or less or a vehicle described in division (E) of section 4503.235 of the Revised Code, except that a law enforcement agency that employs a law enforcement officer who makes an arrest of a type that is described in division (B) (1) of this section and that involves a rented or leased vehicle of this type or a

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vehicle described in division (E) of section 4503.235 of the Revised Code shall notify, within twenty-four hours after the officer makes the arrest, the renter or lessor or owner of the vehicle regarding the circumstances of the arrest and the location at which the vehicle may be picked up. At the time of the seizure of the vehicle, the law enforcement officer who made the arrest shall give the arrested person written notice that the vehicle and its identification license plates have been seized; that the vehicle either will be kept by the officer's law enforcement agency or will be immobilized at least until the person's initial appearance on the charge of the offense for which the arrest was made; that, at the initial appearance, the court in certain circumstances may order that the vehicle and license plates be returned or released to the vehicle owner until the disposition of that charge; that, if the arrested person is convicted of that charge, the court generally must order the immobilization of the vehicle and the impoundment of its license plates or the forfeiture of the vehicle; and that, if the arrested person is not the vehicle owner, the arrested person immediately should inform the vehicle owner that the vehicle and its license plates have been seized and that the vehicle owner may be able to obtain their return or release at the initial appearance.

(2) A law enforcement officer of the agency that employs the arresting officer shall give written notice of the seizure to the court that will conduct the initial appearance of the arrested person on the charges against the arrested person arising out of the arrest. The notice shall be given when the charges are filed against the arrested person. Upon receipt of the notice, the court promptly shall determine whether the arrested person is the vehicle owner and whether there are any liens recorded on the certificate of title to the vehicle. If the court determines that the arrested person is not the vehicle owner, it promptly shall send or deliver written notice of the seizure to the vehicle owner and to all lienholders recorded on the certificate of title. The written notice to the vehicle owner and lienholders shall contain all of the information required by division (B) (1) of this section to be in a notice to be given to the arrested person and also shall specify the date, time, and place of the arrested person's initial appearance on the charges against the arrested person arising out of the arrest.

The written notice that is given or delivered to the vehicle owner shall state that if the arrested person pleads guilty to or is convicted of the offense for which the arrested person was arrested and the court issues an immobilization and impoundment order relative to that vehicle, division (D) (4) of section 4503.233 of the Revised Code prohibits the vehicle from being sold during the period of immobilization without the prior approval of the court.

(3) A vehicle seized under division (B) (1) of this section either shall be towed to a place specified by the law enforcement agency that employs the arresting officer to be safely kept by the agency at that place for the time and in the manner specified in this section or shall be immobilized for the time and in the manner specified in this section. A law enforcement officer of that agency shall remove

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the identification license plates of the vehicle, and they shall be safely kept by the agency for the time and in the manner specified in this section. No vehicle that is seized and either towed or immobilized pursuant to this division shall be considered contraband for purposes of section 2933.41, 2933.42, or 2933.43 of the Revised Code. The vehicle shall not be immobilized at any place other than a commercially operated private storage lot, a place owned by a law enforcement or other government agency, or a place to which one of the following applies:

(a) The place is leased by or otherwise under the control of a law enforcement or other government agency.

(b) The place is owned by the arrested person, the arrested person's spouse, or a parent or child of the arrested person.

(c) The place is owned by a private person or entity, and, prior to the immobilization, the private entity or person that owns the place, or the authorized agent of that private entity or person, has given express written consent for the immobilization to be carried out at that place.

(d) The place is a public street or highway on which the vehicle is parked in accordance with the law.

(C) (1) A vehicle that is seized and towed under division (B) of this section shall be safely kept at the place to which it is towed by the law enforcement agency that employs the arresting officer until the initial appearance of the arrested person relative to the charge that the arrested person violated division (B) (1) or (D) (2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code. A vehicle that is seized and immobilized under division (B) of this section shall remain immobilized until the initial appearance of the arrested person relative to the charge in question. In either case, the identification license plates of the vehicle that are removed pursuant to division (B) of this section shall be safely kept by the law enforcement agency that employs the arresting officer until the initial appearance of the arrested person relative to the charge in question. The initial appearance shall be held within five days after the date of the person's arrest that resulted in the seizure of the vehicle.

(2) (a) At the initial appearance, the court shall inform the vehicle owner or a person acting on the owner's behalf that if a vehicle is immobilized under division (A) of section 4503.233 of the Revised Code, seven days after the end of the period of immobilization, a law enforcement agency will send the owner a notice, informing the owner that if the owner does not obtain the release of the vehicle in accordance with division (D) (3) of that section, the vehicle shall be forfeited. The court also shall inform the owner or a person acting on the owner's behalf that the owner may be charged expenses or charges incurred under this section or section 4503.233 of the Revised Code in the removal and storage of the

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vehicle. The vehicle owner or a person acting on the owner's behalf may file a motion requesting the court to order that the vehicle and its identification license plates be returned or released to the movant. Except as provided in this division or division (C)(2)(b) of this section, if such a motion is filed, the court, at the conclusion of the initial appearance and in its discretion, may issue an order requiring that the vehicle and its identification license plates be returned or released to the movant. If the arrested person is not the vehicle owner and the vehicle owner or a person acting on the owner's behalf is not present at the arrested person's initial appearance, if the arrested person does not plead guilty or no contest to the violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code with which the arrested person is charged, if the charge that the arrested person committed that violation is not dismissed at the arrested person's initial appearance, and if the court believes that the vehicle owner was not provided adequate notice of the initial appearance, the court, in its discretion, may allow the vehicle owner or a person acting on the vehicle owner's behalf to file a motion, at any time after the arrested person's initial appearance and before the final disposition of the charge against the arrested person, requesting the court to order that the vehicle and its identification license plates be returned or released to the movant. Upon the filing of such a motion, the court, in its discretion, may issue an order requiring that the vehicle and its identification license plates be returned or released to the movant. If the court allows the vehicle owner or a person acting on the owner's behalf to file such a motion after the arrested person's initial appearance, the extra time granted by the court does not extend the time within which the initial appearance must be conducted and the court shall proceed with all other aspects of the initial appearance in accordance with its normal procedures.

If, in any case, the court issues an order returning or releasing the vehicle and its identification license plates to the movant, the order shall indicate that the vehicle owner or a person acting on the owner's behalf shall bring the vehicle and its identification license plates to the court on the day on which the charges against the arrested person are to be resolved and that, if the arrested person is convicted of or pleads guilty to the violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code with which the arrested person is charged, the court, subject to section 4503.235 of the Revised Code, will issue an order for the immobilization of the vehicle and the impoundment of its license plates under section 4503.233 and section 4507.361 or 4507.99 of the Revised Code or for the criminal forfeiture to the state of the vehicle under section 4503.234 and section 4507.361 or 4507.99 of the Revised Code. The court also shall notify the arrested person, and the movant if the movant is not the arrested person, that if title to a motor vehicle that is subject to an order for criminal forfeiture under this section is assigned or transferred and division (C)(2) or (3) of section 4503.234 of the Revised Code applies, the court may fine the offender the

value of the vehicle. If the court issues an order for the return or release of a vehicle and its identification license plates under this division, the order shall be given to the movant. If the vehicle owner or a person acting on the owner's behalf presents the order for the return or release of the vehicle and license plates to the law enforcement agency that towed and is keeping the vehicle or that immobilized the vehicle, the agency promptly shall return or release the vehicle and its identification license plates to the person presenting the order.

(b) If, at the initial appearance, the arrested person pleads guilty to the violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code or pleads no contest to and is convicted of the violation, the court shall impose sentence upon the arrested person as provided by law or ordinance; the court, except as provided in this division and subject to section 4503.235 of the Revised Code, shall order the immobilization of the vehicle the arrested person was operating at the time of, or that was involved in, the offense and the impoundment of its license plates under section 4503.233 and section 4507.361 or 4507.99 of the Revised Code or the criminal forfeiture to the state of the vehicle under section 4503.234 and section 4507.361 or 4507.99 of the Revised Code, whichever is applicable; and the vehicle and its identification license plates shall not be returned or released to the vehicle owner under division (C)(2)(a) of this section. If the arrested person is not the vehicle owner and the vehicle owner or a person acting on the owner's behalf is not present at the arrested person's initial appearance and if the court believes that the vehicle owner was not provided adequate notice of the initial appearance, the court, in its discretion, may refrain for a reasonable period of time from ordering the immobilization of the vehicle and the impoundment of its identification license plates or the criminal forfeiture to the state of the vehicle so that the vehicle owner or a person acting on the owner's behalf may appear before the court to present evidence as to why the court should not order the immobilization of the vehicle and the impoundment of its license plates or the criminal forfeiture to the state of the vehicle. If the court refrains from ordering the immobilization of the vehicle and the impoundment of its license plates or the criminal forfeiture to the state of the vehicle, section 4503.235 of the Revised Code applies relative to the order of immobilization and impoundment or the order of forfeiture.

(c) If, at the initial appearance, the charge that the arrested person violated division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code is dismissed for any reason, the court shall order that the vehicle seized at the time of the arrest and its identification license plates immediately be returned or released to the vehicle owner or a person acting on the owner's behalf.

(D)(1) If a vehicle is seized under division (B) of this section, if at the initial appearance the arrested person does not plead guilty or no contest to the violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a

substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code with which the arrested person is charged, and if the vehicle and its identification license plates are not returned or released to the vehicle owner or a person acting on the owner's behalf pursuant to division (C) of this section, the vehicle and its license plates shall be retained or the vehicle shall remain under immobilization and its license plates shall be retained until the final disposition of the charge in question. Upon the final disposition of that charge, the court shall do whichever of the following is applicable:

(a) If the arrested person is convicted of or pleads guilty to the violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code, the court shall impose sentence upon the arrested person as provided by law or ordinance and, subject to section 4503.235 of the Revised Code, shall order the immobilization of the vehicle the arrested person was operating at the time of, or that was involved in, the offense and the impoundment of its license plates under section 4503.233 and section 4507.361 or 4507.99 of the Revised Code or the criminal forfeiture to the state of the vehicle under section 4503.234 and section 4507.361 or 4507.99 of the Revised Code, whichever is applicable.

(b) If the arrested person is found not guilty of the violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code, the court shall order that the vehicle and its identification license plates immediately be returned or released to the vehicle owner or a person acting on the owner's behalf.

(c) If the charge that the arrested person violated division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code is dismissed for any reason, the court shall order that the vehicle and its identification license plates immediately be returned or released to the vehicle owner or a person acting on the owner's behalf.

(2) If a vehicle and its identification license plates are seized under division (B) of this section, if at the initial appearance the arrested person does not plead guilty or no contest to the violation of division (B)(1) or (D)(2) of section 4507.02 a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code with which the arrested person is charged, and if the vehicle and its identification license plates are returned or released to the vehicle owner or a person acting on the owner's behalf pursuant to division (C) of this section, the vehicle owner or a person acting on the owner's behalf shall bring the vehicle and its identification license plates to the proceeding at which final disposition is to be made of the charge in question. If the arrested person is convicted of or pleads guilty to the violation of division (B)(1) or (D)(2) of section 4507.02, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code, the court shall impose sentence upon the arrested person as provided by law

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or ordinance and, subject to section 4503.235 of the Revised Code, shall order the immobilization of the vehicle the arrested person was operating at the time of, or that was involved in, the offense and the impoundment of its license plates under section 4503.233 and section 4507.361 or 4507.99 of the Revised Code or the criminal forfeiture to the state of the vehicle under section 4503.234 and section 4507.361 or 4507.99 of the Revised Code, whichever is applicable.

(E) If a vehicle is seized under division (B) of this section, the time between the seizure of the vehicle and either its release to the vehicle owner or a person acting on the owner's behalf pursuant to division (C) of this section or the issuance of an order of immobilization of the vehicle and the impoundment of its license plates under section 4503.233 and section 4507.361 or 4507.99 of the Revised Code shall be credited against the period of immobilization and impoundment required under the order.

(F) The vehicle owner may be charged expenses or charges incurred in the removal and storage of the immobilized vehicle. The court with jurisdiction over the case, after notice to all interested parties, including lienholders, and after an opportunity for them to be heard, if the vehicle owner fails to appear in person, without good cause, or if the court finds that the vehicle owner does not intend to seek release of the vehicle at the end of the period of immobilization under section 4503.233 of the Revised Code or that the vehicle owner is not or will not be able to pay the expenses and charges incurred in its removal and storage, may order that title to the vehicle be transferred, in order of priority, first into the name of the person or entity that removed it, next into the name of a lienholder, or lastly into the name of the owner of the place of storage.

Any person or entity that receives title under a court order shall do so on the condition that it pay any expenses or charges incurred in the vehicle's removal and storage. The court shall not order that title be transferred to any person or entity other than the owner of the place of storage if the person or entity refuses to receive the title. Any person or entity that receives title either may keep title to the vehicle or may dispose of the vehicle in any manner that it considers appropriate, including assignment of the certificate of title to the motor vehicle to a salvage dealer or a scrap metal processing facility under division (C) (2) of section 4505.11 of the Revised Code, but excluding transfer to the vehicle owner.

Whenever a court issues an order under division (F) of this section, the court also shall order removal of the license plates from the vehicle and cause them to be sent to the registrar if they have not already been sent to the registrar. Thereafter, no further proceedings shall take place under this section or under section 4503.233 of the Revised Code.

Prior to initiating a proceeding under division (F) of this section, and upon payment of the fee under division (B) of section 4505.14, any interested party may

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cause a search to be made of the public records of the bureau of motor vehicles or the clerk of the court of common pleas, to ascertain the identity of any lienholder of the vehicle. The initiating party shall furnish this information to the clerk of the municipal or county court, and the clerk shall provide notice to the vehicle owner, the defendant, any lienholder, and any other interested parties listed by the initiating party, at the last known address supplied by the initiating party, by certified mail, or, at the option of the initiating party, by personal service or ordinary mail.

As used in this section, "interested party" includes the vehicle owner, all lienholders, the defendant, the owner of the place of storage, and the person or entity that caused the vehicle to be removed.

If a vehicle is seized under division (B) of this section and if, in any of the circumstances described in division (C) or (D) of this section, the arrested person is convicted of or pleads guilty to the violation of division (B)(1) or (D)(2) of section 4507.02 of the Revised Code, a substantially equivalent municipal ordinance, or section 4507.33 of the Revised Code with which the offender was charged, the court may require the offender to pay the actual cost of any public or private entity transporting the vehicle after the seizure and the actual cost of any public or private entity storing the vehicle after the seizure.

CREDIT(S)

(1996 H 676, eff. 10-4-96; 1994 H 687, eff. 10-12-94; 1994 H 236, eff. 9-29-94; 1993 S 62, § 1, eff. 9-1-93; 1993 S 62, § 4; 1992 S 275)

<Note: See also preceding version, following repeal, and Publisher's Note.>

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Baldwin's Ohio Revised Code Annotated Currentness
 Title XXVII. Courts--General Provisions--Special Remedies
 Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)
 → 2744.03 Defenses and immunities

(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 any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

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

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(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 the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

CREDIT(S)

(2002 S 106, eff. 4-9-03; 2001 S 108, § 2.03, eff. 1-1-02; 2001 S 108, § 2.01, eff. 7-6-01; 2000 S 179, § 3, eff. 1-1-02; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1994 S 221, eff. 9-28-94; 1986 S 297, eff. 4-30-86; 1985 H 176)

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of *Kammeyer v City of Sharonville*, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

Current through 2009 File 1, of the 128th GA (2009-2010), apv. by 5/19/09 and filed with the Secretary of State by 5/19/09.

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R.C. § 2744.03

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