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IN THE SUPREME COURT OF OHIO

Case No. 09-0014

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APPEAL FROM THE ROSS COUNTY  
COURT OF APPEALS, FOURTH APPELLATE DISTRICT  
CASE NO. 06CA002900

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ESTATE OF JILLIAN MARIE GRAVES,

*Plaintiff-Appellee,*

v.

CITY OF CIRCLEVILLE, et al,

*Defendant-Appellants.*

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**BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS,  
IN SUPPORT OF DEFENDANTS/APPELLANTS PETER SHAW, WILLIAM J.  
EVERSOLE, AND BENJAMIN E. CARPENTER**

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## INTEREST OF *AMICUS CURIAE*

The Ohio Association of Civil Trial Attorneys (“OACTA”) is an organization devoted to the well-being of the civil justice system and the defense of civil lawsuits and claims against individuals and entities. Many OACTA members represent political subdivisions and political subdivision employees, and, as such, OACTA’s membership has observed the vitality and importance of the Public Duty Doctrine first-hand. The doctrine conserves limited public resources and permits political subdivision employees to focus on their performance of public duties as opposed to defending themselves against the risk of almost limitless potential civil liability. This Honorable Court has often recognized the important public policies underlying the Public Duty Doctrine. OACTA, as *amicus curiae*, asks this Court to renew and clarify its prior holdings and reverse the decision of the Fourth District Court of Appeals.

## STATEMENT OF THE CASE AND FACTS

This case is on appeal from the Fourth District Court of Appeals. That Court affirmed the denial of summary judgment to police officers Peter Shaw, William J. Eversole, and Benjamin E. Carpenter (“the Officers”). See *Graves v. Circleville* (Ohio App. 4<sup>th</sup> Dist. 2008), 179 Ohio App.3d 479, 902 N.E.2d 535. The Estate of Jillian Marie Graves sued the City and its police officers, alleging that these Officers wantonly and recklessly released a vehicle from impound to Cornelius Copley, a habitual drunk driver, without a court order.<sup>1</sup> Mr. Copley was arrested on July 4, 2003. (Dep. of Officer Shaw of 11/12/03 at 9-10). Officer Carpenter released the vehicle to him the following day, July 5, 2003. (Depo. of Carpenter at 63-4). In the early morning hours of July 6, 2003, Mr. Copley, while intoxicated, was involved in an automobile

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<sup>1</sup> The City was dismissed from the case on a Motion for Judgment on the Pleadings.

accident with Jillian Marie Graves that was fatal to both drivers. (See Second Am. Comp. at ¶10).

The Estate argues that the Officers may be held personally liable for failing to comply with R.C. §§ 4507.38 and 4511.195. At the time of Mr. 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 its license plates and hold them until the operator's initial court appearance. R.C. § 4511.195 required a law enforcement agency that arrested a person for driving under the influence of alcohol to seize the vehicle and its license plates and hold them at least until the operator's initial court appearance if the arrestee had been convicted of a similar offense within the six previous years. R.C. § 4511.195(B)(2). Pursuant to these statutes, Mr. Copley's vehicle should not have been released to him on July 5, 2003.

The Estate's theory of liability ignores the Public Duty Doctrine and over twenty years of Ohio legal precedent. The Doctrine prohibits the imposition of tort liability upon a public officer for the breach of a public duty. The obligation imposed by R.C. §§ 4507.38 and 4511.195 was such a public duty, the breach of which is not actionable in tort. Since the decision in *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468, this Court has recognized only one exception. The exception applies when the plaintiff has a special relationship with the public entity or officer. In this case, all agree that the special relationship exception does not apply.

In derogation of the settled case law on this subject, the Fourth District created a new exception to the Public Duty Doctrine. The Court incorrectly concluded that the Officers' alleged level of culpability, wanton and/or reckless conduct, transformed otherwise inactionable conduct into conduct that would support the imposition of a tort duty. The Fourth District's

analysis is hopelessly confused and puts the cart before the horse. Determining the existence or non-existence of a legally actionable duty must come first, before one considers the public servant's alleged level of culpability. Indeed, Ohio law is clear that "reckless and wanton misconduct" is not a cause of action. Simply stated, the Fourth District's holding is flat wrong, and it has effectively stripped the Public Duty Doctrine of its utility.

The Officers appealed the Fourth District's decision, seeking review of the appellate court's denial of summary judgment. On April 8, 2009, this Court accepted their appeal for discretionary review. See *Graves v. Circleville* (2009), 121 Ohio St.3d 1439, 903 N.E.2d 1222, 2009-Ohio-1638. OACTA hereby submits this brief as an *amicus curiae* asking the Court to reverse the decision of the Fourth District Court of Appeals, thereby upholding the important public policy concerns underlying the Public Duty Doctrine and over twenty years of Ohio legal precedent.

In urging reversal, the *amicus curiae* incorporates herein the Statement of the Case and Facts as set forth in the Merit Brief of Defendants/Appellants Peter Shaw, William J. Eversole, and Benjamin J. Carpenter.

## ARGUMENT

### **Appellant's Proposition of Law No. 1: When there is no duty under the Public Duty Rule, the wanton and reckless exception to employee immunity is not at issue.**

#### **I. In over twenty years of Ohio Public Duty Rule jurisprudence, Ohio courts have never recognized an exception to the Rule for wanton and/or reckless conduct.**

In 1988, this Court recognized the Public Duty Doctrine. See *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468, syllabus ¶ 2 ("When a duty which the law imposes upon a public official is a duty to the public, a failure to perform it, or an inadequate or erroneous performance is generally a public and not an individual injury."). Under this

doctrine, the breach of a public duty is redressable in the form of public prosecution, not in a civil action. This Court noted the origin of the doctrine in English common law: “[T]he public duty rule comported with 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.*, 37 Ohio St.3d at 230. As *Sawicki* made clear, the Public Duty Rule is part of the law of negligence. *Id.*

This Court has recognized only one exception to the Public Duty Rule: the special relationship doctrine. *Id.* at ¶¶ 3-4. The Officers did not have a special relationship with Jillian Marie Graves, so the Fourth District manufactured a new exception. However, this Court has never recognized, and should not now recognize, an exception to the Public Duty Rule for wanton or reckless conduct. The existence of wanton and reckless conduct does not and cannot create an actionable duty. Absent an actionable legal duty, one’s level of culpability is meaningless. A plaintiff simply cannot pursue a civil action against a defendant for being reckless and wanton when that individual has no duty not to be reckless or wanton as to that plaintiff.

The Fourth District offered an alternative basis for its conclusion. That basis, however, is difficult to articulate, as it reflects the Court’s fundamental misapprehension of the Public Duty Doctrine. The Fourth District essentially stated that, even if the Public Duty Doctrine applied to wanton or reckless conduct, the enactment of R.C. 2744.03(A)(6)(b) constituted a clear legislative repudiation of the Public Duty Doctrine as it relates to wanton or reckless conduct. *Graves v. Circleville*, 2008-Ohio-6052, ¶ 26. The Public Duty Doctrine applies to determine whether an actionable duty exists in the first instance. The immunity for public employees set forth in R.C. 2744.03(A)(6) applies to determine whether a public employee is shielded from an

otherwise actionable tort. Of course, the exception to immunity for reckless or wanton conduct cannot possibly apply absent an actionable legal duty. Thus, the determination of whether an actionable duty exists is a necessary part of the R.C. Chapter 2744 immunity analysis.

The Court must reject the Fourth District's newly crafted exception to the Public Duty Rule. This new exception strips the Public Duty Doctrine of its intended utility and will open a floodgate of new litigation. Expanding public employee liability in such an unprecedented manner will expose public servants to potential liability for every lapse regarding a duty to the public that a creative plaintiff's attorney can characterize as reckless or wanton.

**II. A court must first determine whether an actionable duty exists before finding a question of fact regarding the reckless or wanton conduct exception to R.C. Chapter 2744 immunity .**

Judge Kline, writing in dissent, got it right when he concluded:

[B]ecause 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 179 Ohio App.3d at 496, 902 N.E.2d at 548. Absent an actionable duty in tort, there can be no liability. Without the potential for liability in tort, the reckless and wanton conduct exception to immunity simply cannot apply, and the conduct of the public employee remains immunized. "Reckless and wanton misconduct" is not a recognized cause of action in Ohio. *Wenzel v. Al Castrucci, Inc.* (2d Dist. 1999), No. 17485, 1999 WL 397366; *Cincinnati Ins. Co v. Oancea* (6<sup>th</sup> Dist. 2004), 2004-Ohio-4272, 2004 WL 1810347. The terms wanton and reckless refer to a level of intent. *Griggy v. City of Cuyahoga Falls* (9<sup>th</sup> Dist. 2006), 2006-Ohio-252, 2006 WL 173134. In *Griggy*, the Ninth District Court of appeals noted, "[w]illful, wanton, and reckless conduct is technically not a separate cause of action, but a level of intent which negates certain defenses

which might be available in an ordinary negligence action.” *Id.*, at ¶ 8, quoting *Oancea, supra*; citing Prosser & Keeton on Torts (5<sup>th</sup> ed. 1984), 212-214. As a matter of Ohio law, allegations of wantonness or recklessness cannot create a duty.

The decision in *Coleman v. Greater Cleveland Regional Transit Authority* (8<sup>th</sup> Dist. 2008), 174 Ohio App.3d 735, 884 N.E.2d 648, confirms the obvious truism that, before an exception to political subdivision immunity may apply, there must first be an actionable duty upon which to base the claim. In that case, the plaintiff brought suit against the Regional Transit Authority and a bus driver for failing to call police when the plaintiff reported threats by another passenger. Because the operation of a transit system is a proprietary function, the RTA could be held liable for its bus driver’s negligence under an exception to the broad grant of immunity. In other words, the RTA was not immune from liability. However, in order to impose liability, the plaintiffs had to first establish a duty. In that case, the duty imposed upon common carriers by the common law created the duty. The mere existence of an applicable exception to political subdivision immunity did not ipso facto create a cognizable cause of action. Similarly, in the instant matter, just because the Estate alleged facts potentially implicating an exception to public employee immunity did not, in and of itself, create a duty in tort, where one otherwise did not exist.

**III. The history of the Public Duty Rule demonstrates that the Fourth District’s creation of a wanton and reckless exception is error.**

The United States Supreme Court adopted the Public Duty Rule in *South v. Maryland* (1855), 59 U.S. 396, 15 L.Ed. 433. In that case, the plaintiff brought an action against a sheriff alleging that “certain evil disposed persons” threatened him, demanded a large sum of money, and detained him by force for four days until he paid the ransom. The plaintiff alleged that the sheriff was present and that he asked the sheriff for protection, which the sheriff refused to

provide, in derogation of “the duties required of him by the laws of said State.” *Id.*, 59 U.S. at 401. The Court, in reaching its conclusion that the plaintiff had no cause of action, noted “[i]t is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment only.” *Id.*, 59 U.S. at 402. The Court found the plaintiff’s allegations insufficient as they failed to include any “special individual right, privilege, or franchise in the plaintiff, from the enjoyment of which he has been restrained or hindered by the *malicious* acts of the sheriff.” *Id.*, 59 U.S. at 403 (emphasis added).

In 1988, this Court officially recognized the Public Duty Rule. *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468. *Sawicki* noted the origin of the Public Duty Rule in the English common law and the *South* decision. It also recognized the sole exception to this Rule, as set forth in the English common law, known as the special duty doctrine. This Court cited the following explanation of the Rule from Cooley’s Treatise: “If the duty which the law imposes upon a public official is a duty to the public, then a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution.” *Id.*, 37 Ohio St.3d at 230, citing 2 Cooley, *Law of Torts* (4<sup>th</sup> Ed. 1932) 385-86, Section 300. The public policy rationales of conservation of scarce public resources and the recognition that police cannot possibly meet every need warrant this rule.<sup>2</sup> *Id.*, 37 Ohio St.3d at 231.

Of particular importance to the issue *sub judice*, *Sawicki* emphasized the coexistence of the Public Duty Rule and the doctrine of sovereign immunity at common law:

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<sup>2</sup> The Fourth District asserts that “the public-duty doctrine was never intended to preclude liability for the wanton or reckless acts of rogue employees.” 129 Ohio App. 3d at 490, 902 N.E. 2d at 543. However, it cites no legal authority recognizing this “intended” purpose of the Public Duty Rule.

Rather than being an absolute defense, as was sovereign immunity, the public duty rule comported with *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. If a special relationship is demonstrated, then a duty is established, and inquiry will continue into the remaining negligence elements.

*Id.* (emphasis added) Duty is a necessary consideration in the immunity analysis, and the decision in *Sawicki* is consistent with that proposition. The Officers were broadly immune from liability, with an exception for reckless or wanton conduct. That exception to immunity cannot apply, however, unless the Officers owed a duty to refrain from reckless or wanton conduct.

In the more than twenty years since *Sawicki*, cases involving the Public Duty Rule have come before this Court on several occasions. In *Delman v. Cleveland Hts.* (1989), 41 Ohio St.3d 1, 534 N.E.2d 835, this Court refused to permit the imposition of liability upon a city for its inadequate inspection of a home which was required by a city point of sale inspection ordinance. The ordinance imposed a duty to the public, the breach of which was not individually actionable in tort. Again, in *Williamson v. Pavlovich* (1989), 45 Ohio St.3d 179, 543 N.E.2d 1242, where the plaintiff could not establish the elements of the special relationship exception, the city could not be held liable for failing to enforce a parking ordinance which failure allegedly caused a child to be hit by a car. In *Anderson v. Ohio Dep't of Ins.* (1991), 58 Ohio St.3d 215, 569 N.E.2d 1042, this Court refused to permit a private cause of action against the Department of Insurance for failing to follow statutory procedures for the liquidation of a health maintenance organization. *Anderson* noted, “[t]he law is well-settled in Ohio that the breach of a general duty to the public by a governmental entity does not give rise to a private claim of relief.” *Id.*, 58 Ohio St.3d at 218, *citing Sawicki*.

In *Ashland Cty. Bd. of Commissioners v. Ohio Dep't of Taxation* (1992), 63 Ohio St.3d 648, 590 N.E.2d 730,<sup>3</sup> the Court applied the Public Duty Doctrine to bar an action brought by county boards of commissioners, county auditors, and boards of education against the Ohio Department of Taxation alleging misrepresentation, fraud, and neglect of statutory duties in assessing and apportioning tax values for personal property. Allegations of fraud, an intentional tort, undoubtedly involve a higher level of culpability than negligence or even reckless and wanton conduct. Nonetheless, the court concluded that the statutory scheme, R.C. Chapter 5727, which required the Tax Commission to assess property at its true value, imposed a public duty and created no duty to the plaintiffs.

This Court has also previously considered allegations of gross negligence, recklessness, willfulness, and wanton conduct in a case involving the Public Duty Doctrine. In *Brodie v. Summit Cty. Children Services Board* (1990), 51 Ohio St.3d 112, 554 N.E.2d 1301, a guardian ad litem brought a lawsuit on behalf of a minor child against a county children services board and caseworkers for allegedly failing or refusing to investigate reports of suspected child abuse or neglect as required by statute. At the time of the events giving rise to this suit, the General Assembly had not yet enacted R.C. 2744. The common law doctrine of good faith qualified immunity applied in that case, which provided immunity for a public official's actions conducted in the scope of his or her authority involving the good faith exercise of discretion and judgment. The *Brodie* court first determined whether the defendants were immune from the plaintiff's claims. The allegations of gross negligence, recklessness, willfulness, and wantonness were sufficient to challenge the employee's good faith.

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<sup>3</sup> This case was later abrogated by *Wallace v. Ohio Dep't of Commerce* (2002), 96 Ohio St.3d 266, which held that the public duty doctrine does not apply to suits against the state in the Court of Claims. This abrogation does not impact *Ashland Cty. Bd. of Commissioners'* public duty analysis.

The *Brodie* court then analyzed whether the Public Duty Doctrine applied to bar the plaintiff's claims. The Court cited *Sawicki* and the special relationship doctrine as the sole exception to the Public Duty Rule. The court, however, concluded that the Public Duty Doctrine did not apply because the abuse reporting statute at issue was not directed to nor intended to protect the public at large. Rather, it was intended to protect a specific child who is reported as abused or neglected. Otherwise stated, a special relationship existed between the child and the mandated reporter. The statute's "mandate is to take affirmative action on behalf of a specifically identified individual." *Id.*, 51 Ohio St.3d at 119. Thus, the reason for the inapplicability of the Public Duty Doctrine was the fact that the statute did not encompass a public duty. The allegations of recklessness, willfulness, and wantonness were relevant only to the issue of whether these defendants were entitled to immunity, not to the Public Duty Doctrine analysis.

**Appellant's Proposition of Law No. II: There is no wanton and reckless exception to the Public Duty Rule under Ohio law.**

- I. In over 20 years of Ohio jurisprudence, Ohio courts have recognized the special relationship doctrine as the sole exception to the Public Duty Rule in cases involving more culpable conduct than mere negligence.**

The Fourth District erroneously asserts that Ohio case law is restricted to applying the Public Duty Rule in the context of negligence. While it may be true that no Ohio court has expressly held that the Public Duty Rule still applies even in the presence of wanton and reckless conduct, this doctrine has been analyzed and applied in suits alleging more culpable conduct than mere negligence. As previously mentioned, *Ashland Cty. Bd. of Commissioners v. Ohio Dep't of Taxation* involved allegations of fraud and misrepresentation as well as neglect of statutory duties. The allegations of intentional conduct were no obstacle for this Court in applying the

Public Duty Doctrine as a bar to the plaintiff's claims. Similarly, in *Brodie*, the allegations of gross negligence, reckless, willful, and wanton conduct were relevant only to the issue of immunity, not the Public Duty Doctrine. The United States Supreme Court applied the Public Duty Rule to bar a plaintiff's suit arising from conduct the Court itself described as malicious. *See South, supra*.

The Fourth District's overly narrow search for precedent conveniently couching the precise legal and factual issues brought before it in the very same terms in which they were posed blinded it to the Ohio Supreme Court precedent that undercuts its analysis.

**II. Public policy considerations underlying the Public Duty Rule as well as precedent from the majority of states that have addressed this issue compel the conclusion that wanton and reckless conduct does not create an actionable duty in tort when the Public Duty Rule otherwise applies.**

Twenty years of Ohio Public Duty jurisprudence recognizes one and only one exception to the Public Duty Rule, the special relationship doctrine. The Fourth District's creation of a new exception for reckless and wanton conduct defies binding Ohio case law precedent. However, to the extent there is any doubt as to how Ohio law applies to this case – and there should be none – public policy and precedent from the majority of other states dictate that there should be no exception to the Public Duty Rule for reckless or wanton conduct.

Significant public policy concerns underlie Ohio's Public Duty Doctrine. The limited nature of public resources available to meet enormous public need is one such concern:

Various public policy rationales have been set forth to justify the public duty doctrine. One of the basic policy considerations has been that of finance. It is most often asserted that because the available public resources are limited by the resources possessed by the community, the deployment of them must remain in the realm of policy decision. Obviously, there are insufficient police resources to meet every need, particularly in high crime area and during times of higher crime rates. Police departments must be able to prioritize and create responses without the benefit of hindsight.

*Sawicki*, 37 Ohio St.3d at 231, 525 N.E.2d at 477. Protecting public servants from potentially vast liability is another important policy consideration underlying this doctrine. As pointed out by the Officers in their Merit Brief, law enforcement officers are engaged in a dangerous occupation and their actions in furtherance of the public welfare may have tragic and unforeseeable consequences. Ohio's Public Duty Rule serves an important function in protecting these public servants from civil liability – and the concomitant defense costs – that could arise if duties owed to the general public were to become civilly actionable.

Most other jurisdictions agree with Ohio – there is no wanton/reckless exception to the Public Duty Doctrine. See *Smith v. Jackson Cty. Bd. of Education* (N.C. App. 2005), 168 N.C. App. 452, 608 S.E.2d 452 (“Where the conduct complained of rises to the level of an intentional tort, the public duty doctrine ceases to apply. It is not, however, sufficient to avoid the doctrine that the conduct-otherwise alleged to be negligent- is also alleged to be grossly negligent, willful, or wanton.”) (internal citation and punctuation omitted); *Coleman v. City of Pagedale* (E.D. Mo. 2008), No. 4:06CV01376, 2008 WL 161897 (“If the acts of a public employee are covered under [the public duty] doctrine, the defendant’s state of mind becomes irrelevant, regardless of whether they acted with intent, malice, or gross negligence.”); *White v. Beasley* (Mich. 1996), 453 Mich. 308, 552 N.W.2d 1 (applying same public duty/special relationship test used in Ohio to dismiss plaintiff’s claim alleging the officer was grossly negligent in responding to a telephone request for aid). Thus, the Fourth District’s decision conflicts with both established Ohio law and the position adopted by the majority of other jurisdictions.

In *Cyran v. Ware* (1992), 413 Mass. 452, 597 N.E.2d 1352,<sup>4</sup> the plaintiffs brought an action against a town for damages after their home was destroyed by fire allegedly due to the gross negligence of the town's fire fighters. *Id.*, 412 Mass. at 453 (plaintiff alleged that fire fighters fought the fire "grossly negligently, unskillfully and carelessly"). In concluding that the Public Duty Rule barred the plaintiffs' claim, the court noted:

The allegation in the plaintiffs' complaint that the firefighters committed gross negligence does not change this conclusion. . . . A public duty rule, which excludes liability for ordinary negligence, also must logically exclude it for gross negligence. Were the rule otherwise, every complaint involving negligence in fire protection would allege gross negligence, to avoid dismissal, a situation which would, in effect, swallow the rule and encourage unpredictable results based on reactions by fact finders to which side of the "fuzzy line separating gross from simple negligence" given conduct might fall.

*Id.*, 413 Mass. at 456, n. 3, citing Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 837 (1981). Additionally, just like Ohio, New York, the state from which Ohio adopted its Public Duty Doctrine, recognizes only the special relationship exception. See, e.g., *Kadymir v. New York City Transit Authority* (N.Y. App. 2008), 55 A.D.3d 549, 865 N.Y.S.2d 269.

Should the Fourth's District's newly minted exception to the Public Duty Rule become a part of Ohio law, any breach of a public duty imposed by the General Assembly on public employees may spawn prolonged and expensive litigation. To survive a motion to dismiss, a plaintiff would need only allege reckless or wanton conduct, thereby forcing the employee to incur the expense associated with discovery. After discovery has been completed, that employee would then incur additional significant expense to file a motion for summary judgment.

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<sup>4</sup> Overruled on other grounds by *Jean W. v. Com.* (1993), 414 Mass. 496, 610 N.E.2d 305 (holding that public duty doctrine is inconsistent with the Massachusetts Tort Claims Act and abolished it prospectively after the next legislative session in order to give the legislature the opportunity to make preparations for changes that it deems appropriate).

However, whether conduct was wanton or reckless is often a question for the finder of fact, so summary judgment would probably not resolve most cases – jury trials would be necessary. *Shadoan v. Summit Cty. Children Serv. Bd.* (9<sup>th</sup> Dist. 2003), 9th Dist. No. 21486, 2003-Ohio-5775, at ¶ 14, *citing Fabrey v. McDonald Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. The defense costs alone would be staggering – and public servants and entities would still face the great uncertainty and risk of jury trials – all at the taxpayer’s expense. This is precisely why the Massachusetts Supreme Court reasoned that “[a] public duty rule, which excludes liability for ordinary negligence, also must logically exclude it for gross negligence.” *See Cyran, supra*, 413 Mass. at 465, n. 3.

The Fourth District’s decision, if permitted to stand, would contravene long standing Ohio public policy and discourage the enactment of laws intended to protect the public for fear that a public officer’s failure to carry out every last detail of such a law would result in great public expense and possible liability. It is a long-standing principle of Ohio law that the General Assembly’s enactment of legislation is intended to create no more than a public duty, unless the statute specifically states otherwise. *See Sawicki*, 37 Ohio St.3d at 230, 525 N.E.2d at 477. If the legislature intended that the breach of the statutes at issue in this case should give rise to civil liability, it would have expressly so stated.

Foreclosing the option of a civil lawsuit does not mean that public officers who have breached their duties to the public will go unpunished. These officers may be held accountable through internal disciplinary or criminal proceedings. As the United States Supreme Court noted in *South*, the breach of a public duty “is amendable to the public, and punishable by indictment only.” *South, supra*, 59 U.S. at 403.

The experience of the state of Kansas in addressing a similar issue is also instructive. In *Fudge v. Kansas City* (1986), 239 Kan. 369, 720 P. 2d 1093, the Supreme Court of Kansas held that a city and police officers could be liable under the Kansas Tort Claims Act for police officers' failure to take an intoxicated person into protective custody as required by police guidelines. The intoxicated individual subsequently was involved in a collision killing the plaintiff's husband. In *Fudge*, the court concluded that the mandatory nature of police guidelines requiring police to take incapacitated individuals into protective custody was the source of an actionable duty.

Following the *Fudge* decision, the Kansas legislature made a clear statement that the Kansas Supreme Court wrongly interpreted the Kansas Tort Claims Act and amended that statutory scheme to clarify that the failure of a governmental employee to enforce a written policy protecting health and safety is not actionable unless there is an independent source of a duty owed to the plaintiff. *Woodruff v. City of Ottawa* (1997), 263 Kan. 557, 951 P.2d 953. See also *Fetke v. City of Wichita* (1998), 264 Kan. 629, 957 P.2d 409 (municipality has no independent duty in tort law to protect police officer from risk of retaliation following fatal shooting incident, notwithstanding provision in police manual that officers' names would not be disclosed to media).

Consistent with the aforementioned public policy concerns, regardless of the specific Public Duty jurisprudence of a particular state, "[a] clear majority of states that have considered the exact question whether a police officer can be liable for failing to restrain a drunk driver have applied the same 'public duty' rationale . . . and have concluded that the police officer owed no duty to the injured plaintiff." *Crider v. United States* (5<sup>th</sup> Cir. 1989), 885 F.2d 294, 298 n. 10 and cases cited therein. See also *Landis v. Rockdale County* (1994), 212 Ga. App. 700, 445 S.E.2d

264, 267 (“A clear majority of states which have considered whether police officers have a duty to restrain a drunk driver have followed the rationale of the ‘public duty’ doctrine.”); *Ezell*, 902 S.W.2d at 403 (“[W]e join the clear majority of courts and conclude that statutes pertaining to drunk driving and public intoxication, do not, in conjunction with statutes authorizing warrantless arrests, give rise to a ‘special-duty’ of care where a plaintiff alleges that a police officer failed to arrest or detain an alleged drunk driver.”).

The Fourth District cited case law from three jurisdictions to support its creation of a reckless and wanton misconduct exception to the Public Duty Doctrine. It cited *Ezell v. Cockrell* (1995), 902 S.W.2d 394, and *Shore v. Stonington* (1982), 187 Conn. 147, 444 A.2d 1379, for the proposition that Tennessee and Connecticut recognize that a special relationship exists where there is malice, intent, or wantonness/recklessness. It also cited *L.A. Realty v. Town Council of the Town of Cumberland* (1997), 698 A.2d 202, for the proposition that Rhode Island recognizes an “egregious conduct” exception to the Public Duty Doctrine. Significantly, *Ezell* and *Shore* refused to impose liability for substantially similar conduct, the failure to detain a drunken driver.<sup>5</sup>

These cases do not support the Fourth District’s erroneous application of **clear Ohio law**. While the Fourth District may prefer to follow the law of these other jurisdictions, over twenty years of Ohio jurisprudence prevents it from properly doing so. Furthermore, sound public policy concerns underlie Ohio’s Public Duty jurisprudence. Ohio’s long standing public policy would be undermined if the decades of Ohio Public Duty law is discarded in favor of the law enunciated in these foreign cases.

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<sup>5</sup> *L.A. Realty* involved a completely different set of facts involving claims by developers against a town for, *inter alia*, claims of interference with prospective contractual relations.

In *Ezell v. Cockrell* (1995), 902 S.W.2d 394, the Tennessee Supreme Court held that a police officer owed **no duty of care** to a third party injured by a drunk driver whom a police officer failed to arrest. In arriving at this holding, *Ezell* discussed the different formulations of the public duty doctrine and the special relationship exception adopted by other states, including Ohio. The court concluded, “[a]fter considering the various formulations of the doctrine, we conclude that a special duty of care exists when (1) officials, by their actions, affirmatively undertake to protect the plaintiff, and the plaintiff relies upon the undertaking; (2) a statute specifically provides for a cause of action against an official or municipality for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws; or (3) the plaintiff alleged a cause of action involving intent, malice, or reckless conduct.” *Id.* at 402. Because the plaintiff only alleged negligence, this exception did not apply. Implicit in the Tennessee Supreme Court’s analysis was its consideration and rejection of Ohio law’s recognition of only one exception, the special relationship doctrine, to the Public Duty Rule.

The Fourth District also cited *Shore v. Town of Stonington* (1982), 187 Conn. 147, 444 A.2d 1379, for the proposition that, under Connecticut law, a “special duty” exists where the complaint alleges a cause of action involving malice, intent, or wantonness/recklessness. The decision in *Shore* pre-dates this Court’s decision in *Sawicki*. Presumably, this Court was aware of *Shore* when it decided *Sawicki*. The Court appears to have considered the law of other jurisdictions in deciding *Sawicki*, specifically referencing New York law. Absolutely clear, however, is this Court’s consistent recognition of only one exception (the special relationship exception) to the Public Duty Doctrine. A twenty-seven year old decision from Connecticut cannot overcome twenty years of clear Ohio precedent.

In short, the Fourth District has discarded binding Ohio case law supported by significant public policy considerations for the case law of a minority of jurisdictions. The foreign case law relied upon by the Fourth District was, as a matter of Ohio public policy, wrongly decided.

**Appellant’s Proposition of Law No. III: The “wanton and reckless” exception to immunity in R.C. § 2744.03(A)(6)(b) did not legislatively repudiate the Public Duty Rule. The Public Duty Rule co-exists with R.C. § 2744.03.**

As an alternative ground for its ruling, the Fourth District concluded that “the enactment of R.C. 2744.03(A)(6)(b) amounts to a clear legislative repudiation of that segment of the doctrine.” *Id.*, 179 Ohio App.3d at 491, 902 N.E.2d 535. Conspicuously absent from this novel interpretation of R.C. 2744.03(A)(6)(b) is citation to any supporting, recognized canon of statutory construction or any other relevant legal authority or principle. This absence is even more telling in light of the same Court’s citation to canons of statutory construction in the same opinion just four paragraphs before this discussion.

The case law holds that 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.2d 146, paragraph three of the syllabus. Therefore, in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force. *Id.* “There is no repeal of the common law by mere implication.” *Id.*, citing *Frantz v. Maher* (1957), 106 Ohio App. 465, 472. The Fourth District cites *Carrell* and *Sullivan* in the very same opinion to conclude that “[b]ecause the legislature had the authority to abrogate the common-law public-duty doctrine in R.C. Chapter 2744 and did not expressly do so, we conclude that the Ohio common-law public-duty doctrine as outlined in *Sawicki* remains viable.” 179 Ohio App. 3d at 490, 902 N.E. 2d at

543. In clear contradiction to this conclusion and case law, the same court finds “a clear legislative repudiation” of the Public Duty Rule as applied to wanton and reckless conduct.

The Fourth District’s interpretation of R.C. 2744.03(A)(6)(b) and its pronouncement of the legislative intent underlying this statutory enactment presupposes the necessity of statutory construction. “If a review of the statute conveys a meaning that is clear, unequivocal, and definite, the court need look no further.” *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland* (2005), 106 Ohio St.3d 70, 76, 831 N.E.2d 987, 995, quoting *Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St.3d 112, 80 N.E.2d 637. Resort to statutory construction is inappropriate when the text of a statute is unambiguous. See, e.g., *Id.*; *State v. Evans* (2004), 102 Ohio St.3d 240, 809 N.E.2d 11. When a statute is unambiguous, courts must apply it rather than interpret it. See, e.g., *BedRoc Ltd., LLC v. United States* (2004), 541 U.S. 176, 183, 124 S. Ct. 1587; *Specialty Restaurant Corp. v. Cuyahoga Cty. Bd. of Revision*, 96 Ohio St.3d 170, 772 N.E.2d 1165.

Mere examination of the actual language used in R.C. 2744.03(A)(6)(b) sounds the death knell for the Fourth District’s “construction” of this statute. Section 2744.03(A)(6)(b) provides:

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 of 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.

(emphasis added). The statute **does not** read, as the Fourth District suggests,<sup>6</sup> “the employee **is liable** if . . . the employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.” Moreover, R.C. 2744.03(A)(7), which is referenced by R.C. 2744.03(A)(6), provides:

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.

(emphasis added). According to the plain language of the statute, common law defenses are expressly retained and are in addition to the immunity defense available to police officers like these Defendants. Therefore, the Fourth District’s interpretation of R.C. 2744.03(A)(6)(b) as a “clear repudiation” of the Public Duty Doctrine with respect to wanton and reckless conduct is plainly erroneous.

In addition, since the adoption of the Public Duty Rule, this Court has held that the common law principle of negligence coexists with sovereign immunity. *Sawicki* is clear:

Rather than being an absolute defense, as was sovereign immunity, the public duty rule comported with 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. If a special relationship is demonstrated, then a duty is established, and an inquiry will continue into the remaining negligence elements.

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<sup>6</sup> The Fourth District wrote, “The legislature has explicitly provided in R.C. 2744.03(A)(6)(a) and (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.” 179 Ohio App. 3d at 491, 902 N.E. 2d at 544 (emphasis added). The plain language of the statute contradicts this interpretation. There is a significant difference between a statute that imposes liability and one that merely removes immunity.

*Sawicki*, 37 Ohio St.3d at 230. Under R.C. Chapter 2744, a plaintiff simply cannot overcome a public employee's immunity if the public employee did not owe the plaintiff an actionable duty in tort.

The recent decision in *Rankin v. Cuyahoga County Dep't of Children and Family Services* (2008), 118 Ohio St.3d 392, 889 N.E.2d 521, is also instructive. This Court overruled the appellate court's conclusion that a political subdivision may be liable based upon the existence of a "special duty" even if it was entitled to immunity for the same claims under R.C. 2744:

We need not go further in our immunity analysis, as R.C. 2744.02(A) prohibits the appellee's claims against the department, and there is no exception in R.C. 2744.02(B) that permits the claim to be resurrected. The special relationship exception is an exception to the public duty rule. The public-duty rule is relevant in the determination of whether a defendant owes a legal duty to a plaintiff, but duty is only one element in a claim for negligence. While the public duty rule and special relationship exception might be relevant in establishing a claim, these common law doctrines are irrelevant to a claim against a political subdivision unless the claim is permitted under R.C. 2744.02.

*Id.*, 118 Ohio St.3d at 397. Just as the special duty doctrine and R.C. 2744 cannot be read together to create another exception to political subdivision immunity, they cannot be read together to create a new exception to the Public Duty Rule.

This analysis is in conformity with case law from other jurisdictions. *See Watts v. North Carolina Dep't of Environment and Natural Resources* (N.C. App. 2007), 182 N.C. App. 178, 641 S.E.2d 811 ("The public duty doctrine is a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity"). *See also Wilson v. Miami-Dade County* (S.D. Fla. 2005), 370 F.Supp.2d 1250, 1253 ("The question of immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity."). As these cases make clear,

the applicability of an exception to immunity is dependent upon the existence of an actionable duty in tort.

The United States Court of Appeals for the Fifth District's decision in *Crider v. United States* (5<sup>th</sup> Cir. 1989), 885 F.2d. 294, is also instructive. In that case, the plaintiff motorcyclist brought an action under the Federal Tort Claims Act ("FTCA") seeking recovery for injuries he suffered in a collision between his motorcycle and a car driven by an intoxicated driver. The defendant rangers observed a vehicle driven by eighteen-year-old John Landry speeding along a beach with two teenage girls hanging off the hood of his car. When they stopped Landry, they detected alcohol on his breath and searched his car where they discovered approximately four ounces of marijuana butts and leaves, a homemade pipe for smoking marijuana, a partially empty bottle of whiskey, and eight bottles of beer. Landry also had extremely red eyes indicative of marijuana smoking. The rangers did not arrest Landry or charge him with driving while intoxicated. Instead, they issued him several citations that required him to appear before a United States magistrate the following Monday. The rangers instructed Landry not to drive for an hour and a half so he could sober up and took the two girls back to their stations to arrange for alternative transportation. Landry ignored the rangers' instruction and immediately left the scene. Later that day, after continued drinking and marijuana smoking, Landry collided with and severely injured the plaintiff motorcyclist. The plaintiff alleged that the rangers should have arrested Landry and the failure to arrest him was the proximate cause of his injuries.

The dispositive issue in that case, as it also should be in this case, is whether the defendant owed a duty to the plaintiff. Under the FTCA, the government is liable where a "private individual" would be liable "under like circumstances." Accordingly, the court concluded that the analysis hinged on "like circumstances" which best articulate a state's

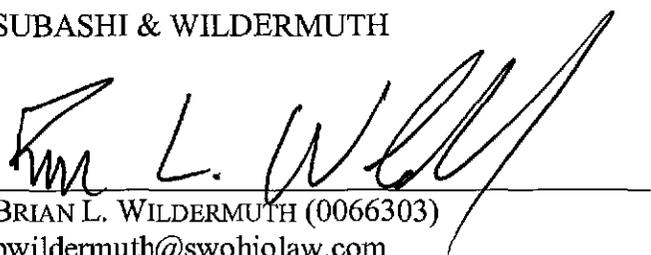
negligence law. Under this FTCA analysis, courts are required to disregard state rules of sovereign or official immunity. However, this did not require the court to ignore state law enunciating negligence principles under “like circumstances.” Applying the Public Duty Doctrine, a negligence principle, the Fifth Circuit concluded that the defendant rangers owed no duty to the plaintiff.

### CONCLUSION

For the foregoing reasons set forth herein and in the Merit Brief of Defendants/Appellants Peter Shaw, William J. Eversole, and Benjamin E. Carpenter, the *amicus curiae*, Ohio Association of Civil Trial Attorneys, respectfully requests that the Court reverse the decision of the Fourth District Court of Appeals and hold that the Public Duty Rule applies to wanton and reckless conduct. The facts of this case are truly tragic. Nevertheless, tragic facts should not lead to the creation of bad law that will undoubtedly have wide ranging consequences for public employees across the state.

Respectfully submitted,

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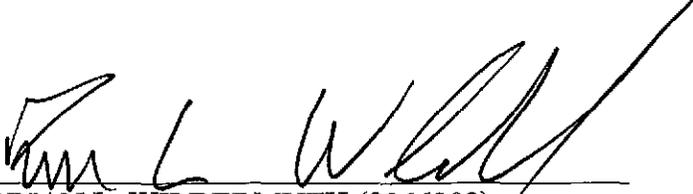
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