

IN THE SUPREME COURT OF OHIO

ORIGINAL

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

MERIT BRIEF OF APPELLEE THE ESTATE OF JILLIAN MARIE GRAVES

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I. INTRODUCTION

Where a public official engages in wanton or reckless misconduct that causes injury to an Ohio citizen, the law requires that they be held liable for their misconduct.

There are four independent reasons why this Court should not reverse the judgment of the Fourth District Court of Appeals. First, this Court lacks jurisdiction to hear this appeal, as it is an interlocutory appeal from a non-final Order, and is based on the public duty rule, rather than R.C. 2744. As a result, R.C. 2744.02(C), which provides that Orders denying *immunity* may be immediately appealed, is not applicable, and there is no basis for appellate jurisdiction at this juncture.

Second, this appeal should be dismissed as improvidently granted because the Estate of Jillian Marie Graves ("the Estate") has asserted a claim for negligence *per se*. The public duty rule applies only to claims of negligence, not to claims of negligence *per se*, and this case, therefore, is not the proper case for this Court to examine the applicability of the public duty rule.

Third, the Court of Appeals was correct in determining that the public duty rule, historically and currently, has not and does not protect public officials from liability for their wanton or reckless misconduct. As the Court of Appeals succinctly stated, "[T]he public duty rule 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." [Ct. of App. Opinion at ¶ 24.]

Finally, to the extent that the common law public duty rule did protect rogue employees from liability, (which, again, it did not), that portion of the common law rule has been abrogated by Ohio's immunity statute, which makes clear that rogue employees may, in fact, be held liable for their wanton or reckless misconduct.

II. STATEMENT OF FACTS

In the early morning hours of July 6, 2003, 23-year-old Jill Graves left her home in Chillicothe to go to work at the Sunbridge Retirement Center in Circleville. [Affidavit of Cecil Simmons at ¶3].¹ Jill Graves was an honor student in high school and worked as an assistant nurse in the Sunbridge Alzheimer's ward. [*Id.*]. Jill's dream was to return to school to become a Registered Nurse. [*Id.*]. As she began her trek to Circleville in the early morning hours of July 6, 2003, Jill left behind her 10-month old son, Garrett Simmons, and her fiancé, Cecil Simmons. [*Id.* at ¶5].

At approximately 5:00 a.m., Jill Graves began traveling north on Route 23 on her way to Circleville. [*Id.* at ¶4]. At the same time, an intoxicated Cornelius Copley was driving through the streets of Circleville sideswiping two cars and crashing into a Circleville convenience store. [Exhibit 1 to Appellee's Memorandum Opposing Summary Judgment]. Thereafter, Copley somehow entered Route 23 north on the wrong side of the highway. Shortly before 5:30 a.m. on July 6, 2003, Copley's car collided head on with Jill's vehicle at an extremely high rate of speed. [*Id.*]. Chris Caudill witnessed Copley's harrowing trek down Route 23 and arrived at Jill's car to observe her take her last breath. [Caudill Dep. at pp. 7-25]. Jill Graves

¹ The affidavit, exhibits and deposition testimony cited in the statement of facts were attached to Appellee's memorandum opposing summary judgment and are part of the record below.

was killed the morning of July 6, 2003, leaving behind her infant son, her fiancé, her mother Diana, her father Jack, and her sister Deanna. [Simmons Aff. At ¶5].

A. Copley's July 4, 2003 Arrest

Cornelius Copley had a long history of driving drunk, including two OMVIs in 2003, before he killed Jill Graves. [Exhibit 2 to Appellee's Memorandum Opposing Summary Judgment; Brewer Dep. at pp. 15-16]. For instance, in March, 2003, Copley, driving without a valid driver's license, was arrested for OMVI in Washington Courthouse, Ohio. [Exhibit 3 to Appellee's Memorandum Opposing Summary Judgment]. As a result of his March, 2003 OMVI arrest, Copley's driver's license was suspended until *July 1, 2008*. [Exhibit 4 to Appellee's Memorandum Opposing Summary Judgment]. Copley also had several prior OMVI offenses before 2003, including prior OMVIs in Circleville. [Exhibit 5 to Appellee's Memorandum Opposing Summary Judgment].

Yet, none of this had any impact on Copley. On July 4, 2003, Copley was arrested at 7:06 p.m. in Circleville for yet another OMVI. [Exhibit 6 to Appellee's Memorandum Opposing Summary Judgment]. That evening, Copley was observed swerving through the streets of Circleville until he hit a parked car and fled the scene of the crash. [*Id.*]. Copley was subsequently arrested by Circleville Police Officers Peter Shaw and Anthony Haupt. [*Id.*].²

There can be no dispute that Copley's severely intoxicated state on July 4, 2003, as he was driving through the streets of Circleville, presented an extremely dangerous condition for others on the road that evening. According to defendant Shaw's police report, Copley reeked

² Officer Haupt is not a defendant in this case because there is no evidence that he participated in the release of Copley's car or knew on July 5, 2003, that his car had been released to him in violation of Ohio law and Circleville's written policies.

of alcohol, was confused and disoriented, and failed multiple field sobriety tests. [*Id.*; Shaw Dep. at pp. 11-12].

There also is no question that Copley told defendant Shaw about his lengthy OMVI record and the fact that he was driving on a suspended license. Defendant Shaw described his conversation with Copley at the scene of his July 4, 2003 OMVI arrest:

At this point, Ofc. Haupt told him to turn around and place his hands behind his back because he was under arrest for OMVI. After placing him under arrest Cornelius advised that his driving privileges were suspended due to a previous OMVI offense. It was then confirmed through CPD dispatch that he was driving under suspension on a total of ten suspensions. Cornelius was placed into CPD cruiser 6191 and was transported to the city jail.

[*Id.*]. Defendant Shaw also told witnesses at the scene that Copley had prior OMVIs and that he was driving on a suspended license. [Phifer Dep. at pp. 12-13, 16-17]. Copley was charged with four criminal offenses: (i) driving under the influence of alcohol and/or drugs, (ii) driving under a suspended license, (iii) hit and run, and (iv) failure to maintain control of his vehicle. [Exhibit 7 to Appellee's Memorandum Opposing Summary Judgment].

Circleville Police Officers contacted Fletchers Towing Service to have Copley's vehicle impounded. [Roar Dep. at pp. 23-24]. In the case of repeat OMVI offenders or people who are driving on a suspended license, Ohio law and the policies of the Circleville Police Department required the suspect's vehicle to be impounded until a Court orders the car released. [Shaw Dep. at pp. 8-9; Eversole Dep. at pp. 9-22; Carpenter Dep. at p. 17; Haupt Dep. at pp. 11-13; Gray Dep. at pp. 35-37; Exhibit 8 to Appellee's Memorandum Opposing Summary Judgment]. Ohio law and Circleville's policies further required Officers to physically remove the suspect's license plates and send them to the BMV. [*Id.*]. The license plates are only returned when the BMV receives a copy of the Court Order demonstrating that the Court has deemed it

safe to release the vehicle to the repeat drunk driver. [*Id.*]. These laws and policies are in place to protect against the danger presented by repeat drunk drivers.

There is no dispute that Copley's license plates were never removed from his vehicle. There also is no dispute that Copley's vehicle was impounded in Fletcher's lot on the evening of July 4, 2003, that the car was not to be released except pursuant to a Court Order, and that no such Court Order had been issued when Copley's car was released to him less than eighteen hours after his July 4, 2003 OMVI arrest. This stands in marked contrast with the actions of the Washington Courthouse Police Department which arrested Copley for OMVI in March, 2003. As a result of that arrest, Copley's vehicle was impounded for a lengthy period, released only by Court Order, and immobilized by the use of a "club" even after it was released by the Court. [Brewer Dep. at pp. 42-44, 77-78; Exhibit 3 to Appellee's Memorandum Opposing Summary Judgment].

As shown below, Circleville Police Officers prematurely released Copley from jail on July 5, 2003, and literally handed him the keys to his car which he promptly used to claim the life of 23-year-old Jill Graves.

B. Defendants Knew Of Copley's Record And That Both Ohio Law And Circleville's Written Policies Mandated Impoundment Until A Court Ordered That The Car Be Released

There is no question that Appellants knew on July 4, 2003, that Copley was a multiple OMVI offender and that he was driving on a suspended license. The evidence establishes that Copley told Officer Shaw at the time of his July 4th arrest that he was driving on a suspended license due to prior OMVIs. [Shaw Dep. at p. 14]. Moreover, defendant Carpenter testified that he knew about Copley's record the night of July 4, 2003, and that he has a vivid recollection of the printout of Copley's driving record.

- Q. And your recollection is that at about 11:00 that night, you did the LEADS on Mr. Copley?
- A. Absolutely.
- Q. All right. Did you print or –
- A. Yes, sir.
- Q. -- what his prior driving record was?
- A. Yes sir.
- Q. What do you recall about what you learned at 11:00 that night?
- A. On his social security number?
- Q. Yes.
- A. Lengthy.
- Q. What do you mean "lengthy"?
- A. We have to print them. More than anything, I remember the noise, the production. I mean you have to deal with the noise while it prints. And that's the only thing I remember being that I was surprised at how long it was.

[Carpenter Dep. at pp. 40-41]. Defendant Eversole also admits that he knew that Copley had been arrested for OMVI and driving on a suspended license and that such an arrest would require impoundment and release only upon Court Order. [Eversole Dep. at pp. 39-40, 53-55]. Plainly, Defendants were well aware on July 4, 2003 of Copley's driving record, and the fact that his license plates were to be removed and his car impounded until a Court deemed it safe to release to Copley.

C. Copley's July 5, 2003 Release

Copley was able to make bail on July 5, 2003, after the Circleville Police Department repeatedly lowered his bond until Copley's family could afford to post it. [Brewer

Dep. at pp. 32-40]. The Circleville Police Department told Copley's sister that Copley was cold and drunk. [*Id.*]. At approximately 1:19 p.m. on July 5, 2003, Copley was released from the Circleville city jail. [Exhibit 9 to Appellee's Memorandum Opposing Summary Judgment]. He was scheduled to appear in Court the morning of July 7, 2003. [Exhibit 10 to Appellee's Memorandum Opposing Summary Judgment].

Even Copley's son, who was not a trained police officer, believed his father would not have access to his car following his release. [Conley Dep. at pp. 12-13, 19-20]. Indeed, Copley's son testified that he would not have bailed his father out of jail had he been told Copley would have access to his car.

Q. And it was your understanding at this point in time that he'd be getting out of jail, but you didn't think he'd be getting his car back?

A. Most definitely, because --

Q. Go ahead.

A. I'm sorry. Because my dad had an illness of drinking and driving, and I knew my dad, and if he's got access to a vehicle, he will drive it.

Q. And if somebody had told you that, you know, "we're going to let you bail him out and we're going to give him his car back," would you have signed those papers?

A. Definitely not.

[Conley Dep. at pp. 19-20].

Remarkably, upon leaving the jail, Circleville police officers gave Copley the keys to his impounded car. [Brewer Dep. at pp. 40-49]. Copley then went home for a short period of time before asking his sister to drive him back to the Circleville police station so he could get the release form necessary to retrieve his car from the Fletcher's impound lot. [*Id.*].

Copley's sister described her reaction when Copley told her the Circleville Police Department was releasing his vehicle to him:

- Q. What happened next? Did he come to you and ask you to take him somewhere?
- A. He came and asked me if I would go over, take him over to the police department to get a lease -- a release for his car.
- Q. Okay. At this point how surprised were you that he was going to be able to --
- A. I was totally shocked.
- Q. Did you tell him that?
- A. Yeah.
- Q. Did you tell him you still didn't think they were going to give him his car?
- A. Yeah. I didn't; I really didn't.

[*Id.* at p. 45].

Copley's sister further described the series of events when they reached the Circleville police station.

- Q. Okay. So you get to the Circleville Police Department, and as I understand it, Cornelius got out of the car and went inside?
- A. Yes. He was in the back seat.
- Q. Okay. You and Totie did not go inside with him?
- A. No.
- Q. How long was he inside? Do you recall?
- A. Five minutes at the most.
- Q. All right. What do you recall happening when he came out?
- A. He come out and handed me the paper, and I'm like "Huh-uh." I could not believe it.

- Q. Was he laughing?
- A. He was laughing; he was. He was in a good mood, "I'm going to get my car back."
- Q. Was he kind of telling you, "See, I'm going to show you; I told you I was going to get it out"?
- A. Yeah.
- Q. Okay. So he comes out. He's kind of laughing about the fact that they're going to give him his car back, and he gives you the release form --
- A. Yeah.
- Q. -- so you can see it for your own eyes?
- A. Yeah. I had to read it.
- Q. All right. Does he then get back in the car at that point in time?
- A. He got back in the back seat.

The paper Copley had received was the release form which was supposed to, but did not, have a "hold" designation on it. [Exhibit 11 to Appellee's Memorandum Opposing Summary Judgment].

Equally remarkable is the conversation Copley had with the Circleville Police Officer who released him when he returned to his sister's car.

- Q. Okay. And did you then -- did he then speak with any Circleville police officers before you left?
- A. One came out before I pulled out, and I really didn't look at him that good because I couldn't believe he had that paper.
- Q. Okay. You were still surprised?
- A. I was under the wheel. Oh.
- Q. So you were in the car. You were in the driver's seat. You were getting ready to leave the Circleville Police Department?

- A. Yeah, I was getting ready to pull out.
- Q. But you were still surprised they had given him the release form; is that right?
- A. Uh-huh, yeah.
- Q. Okay. And then at that point you observed a Circleville police officer coming out of the police station and approach your car?
- A. Yeah, on where [Cornelius] was sitting to the window here.
- Q. Was your brother in the back seat on the driver's side or the passenger side.
- A. Passenger side.
- Q. So he comes -- the police officer -- approaches the other side of the car and does what?
- A. He bent down and he said, "**Now, Cornelius, don't take that car out and kill somebody tonight.**" And me and Totie just looked at each other because I couldn't believe he said that. I mean I couldn't --
- Q. Did you know at this point in time that your brother's initial court appearance was Monday?
- A. Yeah, because I had to sign it that -- they said "Make sure he comes back to court on Monday." I said, "I'm going to stay here and take him."

[*Id.* at pp. 47-50]. The evidence establishes defendant Eversole was the Circleville Police Officer who released Copley on July 5, 2003, and Carolyn Brewer identified him as the Officer who foreshadowed the prospect that Copley would kill someone by driving drunk again. [*Id.* at p. 51; Eversole Dep. at pp. 50-55]. Carolyn Brewer also testified that Copley smelled like he had been drinking when Dispatcher Carpenter gave him the form to get his car. [Brewer Dep. at pp. 55-56].

Copley was able to retrieve his car from Fletcher's because Circleville Police Officers had given him his keys and release form and had failed to have the license plates

removed from his vehicle. Appellants did absolutely nothing to retrieve Copley's vehicle from him despite knowing of Copley's driving record, that his car was only to be released pursuant to Court Order, and that his car was illegally released to him the afternoon of July 5, 2003. There also is no question that Copley had no access to any car other than his own. [Brewer Dep. at pp. 29-30; Conley Dep. at pp. 25-26]. Simply put, it is the conduct of Appellants that put Copley in a position to drive his vehicle intoxicated in the early morning hours of July 6, 2003, thus causing the death of Jill Graves.

D. Appellants' Recklessness

Each Appellant knew that Ohio law and Circleville's written policies required impoundment of Copley's vehicle until a Court ordered it released. [Shaw Dep. at pp. 8-9; Eversole Dep. at pp. 9-22; Carpenter Dep. at p. 17; Exhibit 8 to Appellee's Memorandum Opposing Summary Judgment]. Yet, each Appellant knew Copley's vehicle was released to him on July 5, 2003, and each Appellant knew there was no Court Order authorizing the release. [Shaw Dep. at pp. 27-28; Eversole Dep. at pp. 53-56; Carpenter Dep. at pp. 63-67]. For instance, Appellant Carpenter was involved in the release and reviewed his LEADS report shortly after 11:00 p.m. the prior evening. [Carpenter Dep. at pp. 41-42]. Carpenter was responsible for providing Copley with the form that enabled him to get his car out of the impound lot. [Carpenter Dep. at pp. 63-71].

Officer Eversole released Copley from jail on July 5, 2003 and actually handed Copley the keys to his car. [Eversole Dep. at pp. 53-55]. Defendant Eversole also interacted with Copley when he returned to the station to obtain his vehicle release form. Rather than stop Copley from getting his car, Eversole did nothing more than caution Copley not to drive drunk and kill someone before he appeared in Court on July 7, 2003. [Brewer Dep. at pp. 47-51].

Finally, Officer Shaw arrested Copley and learned at the scene of the arrest that he was a repeat drunk driver and that he was driving on a suspended license. [Shaw Dep. at pp. 9-14]. Shaw also learned shortly before 3:00 p.m. on July 5, 2003, that Copley's vehicle had been released to him and here is how he responded:

Q. Okay, now, on July 4th, when Mr. Copley told you "I'm driving under suspension from a prior OMVI offense," did you believe that his vehicle should have been placed in impound and kept there until his first Court appearance?

A. Yes.

* * *

Q. All right. Now, when you learned on July 5th, 2003, that Mr. Copley had gotten out of jail and had gotten his car, what steps did you take to get the car back?

A. None.

Q. Did you approach the Chief and say "We've made an error; we need to get that car back here?"

A. No.

Q. Did you talk to anybody --

A. No.

Q. -- about taking steps to get that car back?

A. No.

[Shaw Dep. at pp. 26-28]. Appellants' knowledge that Copley's car had been released to him in violation of Ohio law and Circleville's written policies, and their failure to do anything to retrieve the car from Copley, is plainly reckless and wanton misconduct.

III. ARGUMENT

A. This Court Lacks Jurisdiction Over This Interlocutory Appeal

This is an interlocutory appeal from a non-final judgment, and there is no Revised Code section or Rule of Civil Procedure that permits the appeal to be heard at this pre-trial stage.

In the Ross County Court of Common Pleas, Appellants moved for summary judgment, and summary judgment was denied. An interlocutory appeal of the denial of summary judgment was permitted by virtue of R.C. 2744.02(C) and this Court's opinion in *Hubbell v. Xenia* (2007), 115 Ohio St.3d 77, 2007-Ohio-4839. As this Court explained in *Hubbell*, the ability to file an interlocutory appeal of the denial of an immunity defense is an exception from the general rule that appellate courts only have jurisdiction over final Orders. 115 Ohio St.3d at 78. This Court made clear in *Hubbell*, however, that appellate jurisdiction over denials of Rule 56(C) motions is conferred where "a political subdivision or its employee seeks immunity." *Id.* at 81. Appellants have made clear that they are not seeking immunity under §2744.

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

they are immune from liability pursuant to §2744. As a result, this Court lacks jurisdiction over all of Appellants' propositions of law.

Appellants, Amici Curiae, Appellee, and the Court of Appeals all agree on one fundamental principle: The public duty rule and immunity are separate concepts. The public duty rule is a common law rule relevant to whether a public defendant owed the plaintiff a duty, and therefore whether liability may be imposed. Political subdivision immunity is a legislative creation that protects political subdivisions from liability where liability may otherwise have been imposed under the common law. In other words, the public duty rule addressed whether the duty element of the tort is met, while the immunity statute addresses whether liability may be imposed, even where all of the elements of the tort have been met. Indeed, Appellants' very own memorandum in support of jurisdiction explains clearly this distinction:

[T]he Public Duty Rule is relevant to establishing the duty element of a negligence claim, which requires duty, breach, causation and damages. On the other hand, immunity under R.C. §2744.03(A)(6)(b) is relevant to plaintiff establishing the high level of culpability that would constitute an exception to the broad immunity from liability. The public duty defense, when applicable, establishes non-liability based on the lack of a legal duty. The immunity defenses under Chapter 2744.03 establish non-liability based on immunity, despite the existence or nonexistence of a duty or even liability otherwise.

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

Amici Curiae agree:

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

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

Indeed, the Court of Appeals also recognized this distinction:

[T]he public duty doctrine does not deal with questions of immunity. The application of immunity implies the existence of a duty. Immunity represents the freedom or exemptions from penalty, burden or duty. Immunity serves to protect a defendant from liability for a breach of an otherwise enforceable duty to the plaintiff. On the other hand, the public duty doctrine asks whether there was an enforceable duty in the first place.

[Ct. of App. Opinion at ¶15 (internal citations omitted).]

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

B. Appellee's Claims are for Negligence *Per Se*, and Therefore Do Not Implicate The Public Duty Rule

The Estate's claims are for negligence *per se*. The public duty rule does not apply to claims for negligence *per se*. As a result, this case does not present an opportunity for this Court to render an opinion regarding the scope of the public duty rule.

1. The Officers Violated Specific Safety Statutes

This Court, in *Hurst v. Ohio Dept. of Rehabilitation and Correction* (1995), 72 Ohio St. 3d 325, recognized that the public duty rule does not apply to claims for negligence *per*

se, and explained the circumstances in which a negligence *per se* claim arises – an explanation that makes clear that the present case constitutes a claim for negligence *per se*.³

This Court stated in *Hurst* that when there is a "legislative enactment commanding or prohibiting for the safety of others the doing of a specific act and there is a violation of such enactment solely by one whose duty it is to obey it, such violation constitutes negligence *per se*." *Id.* at 327. Conversely, "where the duty is defined only in abstract or general terms, leaving to the jury the ascertainment and determination of reasonableness and correctness of acts and conduct under the proven conditions and circumstances, the phrase negligence *per se* has no application." *Id.*

Prior to *Hurst*, this Court had ruled, in two furlough cases, that negligence *per se* applied to the plaintiffs' claims. In *Reynolds v. State, Division of Parole and Community Services* (1984), 14 Ohio St.3d 68, a rape victim filed suit against the State after she was assaulted by a furloughed prisoner, and this Court reversed the Court of Appeals opinion which had affirmed the decision to dismiss the complaint. This Court held that while an action could not be maintained against the State for the decision to furlough the prisoner, once the decision to do so was made, the State was required, by R.C. 2967.26(B), to confine the furloughed prisoner during nonworking hours. *Id.* at 69. A failure to comply with the duty imposed by §2967.26 to confine prisoners during nonworking hours was found by this Court to constitute negligence *per se*. *Id.* Moreover, the *Hurst* Court noted that "[t]he violation of a statute does not necessarily constitute negligence *per se*. The statute violated must contain a specific requirement to do or to

³ *Hurst* was overruled by *Wallace v. Ohio Dept. of Commerce* (2002), 96 Ohio St.3d 266, but only with regard to whether the public duty rule remained viable as to suits against the State in the Court of Claims. The Court's guidance regarding negligence *per se* and the inapplicability of the public duty rule to such claims remains good law.

omit to do a defined act. The statute need not, however, contain a specific civil penalty provision before its violation can constitute negligence *per se*." *Id.*, n.3.

In *Crawford v. Ohio Div. of Parole and Community Services* (1991), 57 Ohio St.3d 184, a woman whose husband was murdered by an offender who had escaped from a work furlough program filed suit against the State. The assailant was permitted to attend a meeting of Alcoholics Anonymous while on work furlough, and, rather than returning to the reintegration center following the meeting, he absconded, and eventually murdered the decedent. Following the reasoning in *Reynolds*, the *Crawford* Court found that the State's failure to confine the offender as required under R.C. 2967.26(B) constituted negligence *per se*.

The *Hurst* case, in contrast, involved a suit against the Department of Rehabilitation and Correction brought by the estate of a murder victim killed by a parolee. The estate claimed that the State was negligent *per se* for failing to promptly report and process a "parole violator at large" report for an escaped parolee who eventually killed the decedent. The estate's claim for negligence *per se* was based on statutes and administrative code provisions providing (1) that the adult parole authority shall supervise the parolee's rehabilitation; (2) that a parolee who violates the conditions of parole shall be declared a violator and may be arrested; (3) that the superintendent shall within a reasonable time order the parolee's return to incarceration; and (4) that the fact that a parolee has absconded shall be reported by the superintendent to the authority. *Hurst*, 72 Ohio St.3d at 327-28. This Court noted that, unlike in *Reynolds* and *Crawford*, the only affirmative duty imposed was to report the status of a parole violator as at-large and to note this fact in the official minutes. *Id.* at 328. And, this affirmative duty was met. *Id.* In order to find negligence in *Hurst*, therefore, the jury would have had to make determinations of reasonableness and discretion. *Id.* Because the jury would have to determine

"more than merely whether a specific safety was violated," negligence *per se* was deemed inapplicable. *Id.*

It requires little analysis to determine that this case falls into the *Crawford* and *Reynolds* category of "violating a legislative enactment commanding or prohibiting for the safety of others the doing of a specific act," *Hurst*, 72 Ohio St. 3d at 327, and not the *Hurst* category of defining the duty "only in abstract or general terms." *Id.* R.C. 4507.38(B)(1) required law enforcement officers arresting a person for driving without a valid driver's license to seize the vehicle and plates and hold them at least until the operator's initial court appearance.⁴ The statute stated, in pertinent part, that where a person is arrested for driving without a valid license

the arresting officer or another officer of the law enforcement agency that employs the arresting officer . . . 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. . . . 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; [and] 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

R.C. 4507.38(B)(1) (former).

In addition, R.C. 4511.195 provided (and continues to provide) that, when arresting a person for driving under the influence of alcohol who had been convicted of a similar offense in the past six years, the officers must seize the vehicle and its license plate, and hold the vehicle until at least the driver's initial court appearance. The statute states, in pertinent part, that an officer who arrests an individual for a second OVI in a six-year period

⁴ R.C. 4507.38 was in place and applicable at the time, but has since been amended by Am. Sub. S.B. 123 and recodified in R.C. 4510.41.

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. . . . 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 arrest was made; [and] 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

R.C. 4511.195(B)(2).

These statutes unequivocally command a specific act for the protection or safety of others. They require officers to impound the vehicles, remove the plates, and prevent the operator from retrieving the vehicle until the driver's initial court appearance. There is no discretion, nor any reasonableness component, to either of these directives. Moreover, these statutes, and particularly the OVI statute, are designed to protect Ohio citizens by keeping dangerous drivers off the road, where their proclivities can be lethal, as in this case. These statutes, and the conduct of the officers here, fall squarely within the well-defined scope of negligence *per se*.

2. The Public Duty Rule Does Not Apply to Negligence Per Se

Having established that the Estate's claims are for negligence *per se*, the question then becomes what impact that has on the issue of the public duty rule. The answer is clear: the public duty rule does not apply to claims for negligence *per se*. This is because application of negligence *per se* conclusively establishes that the duty and breach elements of the tort have been met, leaving only the questions of causation and damages to be determined. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565 ("Application of negligence *per se* in a tort action means that the plaintiff has conclusively established that the defendant breached the duty that he or she owed to the plaintiff. It is not a finding of liability *per se* because the plaintiff will

also have to prove proximate cause and damages."). Because the duty element of the tort is established by application of negligence *per se*, the public duty rule, which seeks to avoid the duty element of the tort, is inapplicable.

This Court has already recognized that negligence *per se* necessarily moots any applicability of the public duty rule. Indeed, this was the very issue in *Hurst*, where this Court held that the public duty rule applied precisely because negligence *per se* did not. *Hurst*, 72 Ohio St. 3d at 327-29. Specifically, the *Hurst* Court stated, "Since the finder of fact must determine the issue of liability by deciding more than whether a specific safety statute was violated, negligence *per se* is inapplicable. It follows that ordinary principles of negligence, including the public duty rule, apply to the conduct of [Defendant]." *Id.* at 328-29. Lower courts as well have recognized this fact. *See, e.g., Swart v. Ohio Dept. of Rehab.* (10th Dist. 1999), 133 Ohio App.3d 420, 431 ("The public duty rule does not apply when a claim is based on negligence *per se*.").

While the Estate should prevail on the arguments discussed below regarding the proper scope of the public duty rule, this Court need not and should not reach the merits of that argument. Not only does this Court lack subject matter jurisdiction due to the lack of a final appealable order, but this case, because it involves negligence *per se*, does not even implicate the public duty rule that Appellants are asking this Court to re-define. As such, even if this Court should find that it possesses subject matter jurisdiction, it should still dismiss this case as being improvidently granted because the public duty rule does not apply to the Estate's claims of negligence *per se*.

In sum, there is no way for this Court to rule on the Propositions of Law for which it accepted review of this case, and cause the case to be resolved in favor of Appellants. Even

should this Court rule that the common law public duty rule applies even where reckless or wanton misconduct is demonstrated, and that the immunity statute did not supersede that portion of the common law rule, the Estate will still proceed to trial against Appellants, because the public duty rule does not apply to its claims for negligence *per se*.

C. The Public Duty Rule Does Not Protect Officers From Liability For Wanton Or Reckless Misconduct

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

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

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

While Appellees correctly note that Ohio law does not technically recognize a cause of action for wanton and reckless acts distinct from negligence, this point is of no consequence. Ohio has long recognized that there is a sharp distinction between mere negligence and willful or wanton conduct -- a difference "of kind, not merely of degree." *Universal Concrete Pipe Co. v. Bassett* (1936), 130 Ohio St. 567, 575. This Court recently reaffirmed this distinction in the context of the public duty rule, noting that the rule "comported

with principles of *negligence*." *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 230 (emphasis added). The point is not the title of the cause of action, but the level of culpability involved.

In short, Appellants' first proposition of law is simply not disputed. The Estate agrees that *in those cases where the public duty rule applies and dictates that there is no duty*, the wanton and reckless exception to immunity is not at issue. This case, however, is not one of those cases. The Court of Appeals, in fact, could not possibly have even committed the error that Appellants claim. The condition precedent for Appellants' proposition of law is having a case where "there is no duty under the public duty rule." The Court of Appeals could not possibly have found that where "there is no duty under the public duty rule, the wanton and reckless exception to immunity applies," because the Court of Appeals found that this is a case where there was a duty, and that the public duty rule did not apply. The issue here is not mistakenly applying an immunity analysis despite the applicability of the public duty rule. The issue here is whether the public duty rule applies in the first place.

Thus, Appellants have created a straw man argument for their first proposition of law, because this proposition of law falsely assumes that there is no duty under the public duty rule. The issue addressed by the Court of Appeals was not, as Appellants suggest, whether the wanton and reckless immunity exception was at issue when there is no duty under the public duty rule. Rather, the issue addressed by the Court of Appeals was whether the public duty rule itself shields officers from liability where their actions are wanton and reckless. The Court of Appeals properly held that there "are good policy reasons for protecting public employees from liability where they act in good faith in performing their duties but do so negligently. The same

cannot be said of rogue employees whose egregious conduct causes harm to individual citizens."

[Ct. of App. Opinion at ¶24.]

Appellants' argument is the functional equivalent of asserting a proposition of law that "where there is no genuine issue of material fact supporting a plaintiff's claim, summary judgment must be granted." No litigant would ever dispute this principle. The issue in every such appeal, of course, is not whether summary judgment is appropriate where there is no genuine issue of material fact, but whether there actually was a genuine issue of material fact. Similarly, no litigant would ever dispute the proposition that where there is no duty, the wanton and reckless exception to immunity is not at issue. The question, however, is not whether the wanton and reckless exception to immunity is at issue where there is no duty. The question, rather, is whether or not there is a duty -- that is, whether or not the public duty rule applies in the first place.

Appellants argue that there is no duty because they believe the public duty rule applies. The Court of Appeals, however, properly found that the public duty rule does not apply. Without application of the rule, a duty exists. Appellants' circular argument therefore does nothing to resolve the issue; it merely begs the question.

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

Appellants have failed to cite to so much as a single Ohio case in which a court ruled that the public duty rule compelled a finding that the defendant had no duty to the plaintiff where the plaintiff had alleged and provided factual support demonstrating that the defendant's conduct rose to the level of wanton and reckless misconduct. This is because, as the Court of Appeals recognized, the public duty rule has always applied to merely negligent conduct, but not wanton and reckless conduct. The point is worth repeating. While Appellants vociferously

argue that Ohio's common law public duty rule applies to wanton or reckless misconduct, Appellants are unable to cite to a single case in the history of Ohio law in which a court so ruled.

1. **The wanton or reckless level of culpability delineates the limits of the scope of the public duty rule**

The Court of Appeals did not hold that there was a wanton and reckless *exception* to the public duty rule. To the contrary, the Court of Appeals held that the public duty rule applies only to negligent conduct, and not to wanton and reckless conduct. This is not a matter of mere semantics. Appellants would have this Court believe that the Court of Appeals carved out a new "exception" to the public duty rule. The Court of Appeals did no such thing. The Court merely analyzed, and recognized, the appropriate scope of the public duty rule. Recognizing that the public duty rule does not extend beyond negligence to wanton and reckless conduct is not carving out an exception; it is simply stating the scope of the rule.

Appellants miss the point entirely when they argue that "wanton and reckless" culpability does not create a duty. [Appellants' Brief at p. 8.] The wanton and reckless level of culpability, of course, is not what *creates* the duty, it is what defines the limits of the public duty rule, which functions to remove an otherwise-existent duty where the level of culpability is mere negligence. Because the rule is not invoked at the wanton and reckless level of culpability, the officers cannot avail themselves of the public duty shield. The critical point is that wanton and reckless conduct is not somehow the "source" of the duty. The duty has always existed. The wanton and reckless conduct simply prevents the public duty protection from allowing individuals to avoid liability where the conduct extends beyond mere negligence, as it does in this case.

In wrongly arguing that they had no duty to Jillian Graves, Appellants ignore vast Ohio case law discussing the duty element of a negligence claim. Under Ohio law, a "person is

to exercise that care necessary to avoid injury to others." *Mussivand v. David* (1989), 45 Ohio St.3d 314, 319. Indeed, this Court has recognized that "there is a duty to refrain from active misconduct working positive injury on others" *Estates of Morgan v. Fairfield Family Counseling Ctr.* (1997), 77 Ohio St.3d 284, 293 n.2. Appellants failed to exercise the care necessary for avoiding injury to others by, among other things, prematurely releasing a recidivist drunk driver, unlawfully permitting him to recover his vehicle, and returning his keys to him with an admonition not to go out and kill anyone. Under Ohio common law, standard negligence principles impose a duty on all members of society to "exercise that care necessary to avoid injury to others." *Mussivand v. David* (1989), 45 Ohio St.3d 314, 319. A duty is generally imposed "if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act." *Wallace v. Ohio Dept. of Commerce* (2002), 96 Ohio St.3d 266, 274. The facts of this case clearly meet this criterion.

The issue, then, is when the public duty rule applies to relieve public officials of this general duty, and when it does not. On this score, the Court of Appeals correctly held that, historically, the common law public duty rule has only been applied where the defendants' state of mind was alleged to be merely negligent. As the Court of Appeals stated, "[T]he public duty doctrine is not applicable to shield a rogue employee from wanton or reckless conduct." [Ct. of App. Opinion at ¶25.] Indeed, "All the Ohio case law is restricted to applying the public duty rule in the context of negligence, not wanton or reckless acts." *Id.*

Appellants are correct to note that law enforcement officers occupy a precarious position. They certainly do. For this reason, Ohio law – by virtue of the public duty rule as well as the immunity statute – protects public employees who perform their duties in good faith, but do so negligently. There is, however, neither a need nor a sufficient incentive to adopt a public

policy to protect law enforcement officers from liability when they act in bad faith, wantonly, or recklessly. From a public policy perspective, the law should be designed to discourage egregious misconduct by Ohio's public officials.

While Appellees correctly note that Ohio law does not recognize a specific cause of action for wanton and reckless acts distinct from negligence, this point is of no consequence. Ohio has long recognized that there is a sharp distinction between mere negligence and willful or wanton conduct -- a difference "of kind, not merely of degree." *Universal Concrete Pipe Co. v. Bassett* (1936), 130 Ohio St. 567, 575.

The Court of Appeals, therefore, has hit the nail on the head. The question of the scope of the public duty rule turns on the question of whether this common law rule was adopted by this Court to protect public officials from liability where they act in good faith in performing their duties, but do so negligently, or to protect rogue employees whose egregious conduct causes harm to Ohio citizens. Based on the underlying policy concerns, as well as the fact that there is not a single Ohio case permitting a public official to escape liability for wanton or reckless conduct based on the public duty rule, the answer is evident.

2. The special duty exception is a red herring

Appellants spend considerable time discussing the special duty exception to the public duty rule, despite the fact that it has no applicability to this case. The Estate has not argued that the special duty exception to the public duty rule applies, nor did the Court of Appeals find that it applied. In fact, the extra-jurisdictional cases on which Appellants rely in support of their position shed no light whatsoever on the scope of the public duty rule, but rather, simply explore the contours of the special duty exception. *See, e.g., Cuffy v. City of New York* (N.Y. 1987), 69 N.Y.2d 255, *Wolfe v. City of Wheeling* (W.V. 1989), 182 W.Va. 253.

The Court of Appeals determined, and Appellants appear to concede, that certain states that have addressed this issue have determined that wanton or reckless misconduct does indeed eliminate the public duty rule. *See, e.g., L.A. Ray Realty v. Town Council of the Town of Cumberland* (R.I. 1997), 698 A.2d 202, 208 (finding that the public duty rule does not apply where a political subdivision engages in "egregious conduct"), *Ezell v. Cockrell* (Tn. 1995), 902 S.W.2d 394, 402; *Shore v. Town of Stonington* (Ct. 1982), 187 Conn. 147, 155. In contrast, while Appellants assert that "courts" have observed that "no other jurisdiction [other than Rhode Island] has embraced the egregious conduct exception," in fact, only one court appears to have said that -- an intermediate appellate court in Washington. *Siewert v. State* (Wash.App. 1st Div. 2008), 142 Wash.App. 1-21, 2008 WL 62567.

Appellants proceed, strangely and improperly, to rely on *Dearth v. Stanley* (2nd Dist. 2008), 2008 WL 344124, 2008-Ohio-487, for the proposition that the "announced law of Ohio" is that the public duty rule applies even to claims for reckless misconduct. *Dearth*, however, provides no guidance whatsoever. First, the *Dearth* court only examined the public duty rule to determine whether the special duty exception applied, finding that it did not. *Id.* at *6-7, ¶¶ 38-43. As noted previously, the special duty exception is not at issue in this case, and not relevant to this Court's analysis. Second, and more importantly, the *Dearth* court found that the facts of the case did not rise to the level of recklessness. *Id.* at *5, ¶¶ 34-36. It is, of course, impossible for the *Dearth* court to have considered whether the public duty rule applies to reckless misconduct in a case where the defendant's conduct failed to rise to the level of recklessness. In sum, *Dearth* did not involve reckless misconduct, and did not contemplate the relationship between reckless misconduct and the special duty exception. It provides no support for Appellants' arguments.

Indeed, the fact that the *Dearth* court rejected the plaintiff's allegations of recklessness serves to underscore the mistake made by Appellants in focusing throughout their brief on how a plaintiff "characterizes" the defendant's conduct. For instance, Appellants argue that the appellate court's decision renders "the public duty doctrine unnecessarily nebulous by allowing public officials to be held liable whenever a party characterized conduct as 'wanton and reckless,'" [Brief at p. 9]; that "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," [Brief at p. 11]; and that 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." [Brief at p. 12.] This argument by Appellants is entirely mistaken, because how a plaintiff (or even a dreaded plaintiff's attorney) elects to "characterize" a case is, of course, not controlling. Indeed, Appellants go so far as to assert that a function of the public duty rule is to "shield public officials from *potential* liability." [Brief at p. 12 (emphasis added).]

The public duty rule, where it applies, has no such function. It serves not to shield public officials from *potential* liability, but to shield public officials from *actual* liability, where they are negligent in performing a public duty. If a plaintiff's complaint characterizes a defendant's conduct as reckless, but the facts as pled could not permit a reasonable trier of fact to find recklessness, then a defendant's motion to dismiss should be successful. If discovery proceeds, and the facts adduced during discovery would not permit a reasonable trier of fact to find that the defendant acted recklessly, then an award of summary judgment would be proper. Indeed, *Dearth* itself affirms the grant of a dispositive motion by the defense. This case, however, is different, as both the Trial Court and the Court of Appeals agreed that the facts adduced during discovery could support a reasonable jury in finding that the defendants acted

wantonly or recklessly. What is critical, as always, is not how the Estate, or its attorneys, "characterize" the misconduct, but how the court, and the jury, view the actual misconduct. If a jury finds that the officers here did not act wantonly or recklessly, there will be a defense verdict, and no liability will be imposed on any public official.

3. **Public policy favors holding rogue employees liable for reckless or wanton misconduct that causes injuries**

Finally, Appellants provide a misplaced public policy argument in an attempt to have this Court extend the public duty rule to wanton or reckless misconduct. Appellants argue that there are "thousands" of statutes that use the term "shall" or "must," and that, for some reason, this means that public officials have no duties for which a breach may be actionable, unless a cause of action is specifically provided by the statute. Appellants therefore ask this Court not to "endorse a rule that makes the violation of innumerable general duties a basis for civil liability." [Brief at p. 12.] Nonsense.

Here, Appellants are conflating the concepts of negligence *per se* with the public duty rule. A negligence claim against a public official need not be based on the violation of a statutory duty. And, a public official's misconduct can be deemed sufficient or insufficient to rise to the level of being wanton or reckless, regardless of whether the misconduct violates a statutory duty. Moreover, *Reynolds*, *Crawford*, and *Hurst* already provide clear guidance regarding when application of negligence *per se* is appropriate. This case is about whether public officials can be held liable for their wanton or reckless misconduct, not whether public officials can be held liable for every "violation of innumerable general duties." The Estate's position requires no such conclusion.

Moreover, Appellants' public policy concern for exposing public officials to liability is grossly overstated, as, even under the Estate's theory, public officials are not liable for

their negligent conduct in performing governmental functions, except where there are specific statutory provisions imposing liability (which no ruling rendered in the case at bar could alter). Regardless of whether a plaintiff's claims sound in negligence or negligence *per se*, a plaintiff will still have to overcome a public official's immunity defense before the public official is held liable. Chapter 2744 of the Revised Code provides immunity for political subdivisions and their employees except where their conduct is wanton or reckless. Thus, despite what Appellants argue, public officials are not held liable for failing to adequately enforce laws. Public officials are only held liable for wantonly or recklessly failing to adequately enforce laws. That Appellants have to mischaracterize the public policy concerns in order to attempt to make them persuasive demonstrates that the actual public policy concerns militate in favor of the Estate's position.

D. To the Extent That the Common Law Public Duty Rule Applied to Claims of Wanton or Reckless Misconduct, It has Been Superseded by Statute

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

Finally, Appellants attack the Appellate Court's alternative ruling that, even if the common law public duty rule somehow applied to wanton and reckless acts, it was legislatively repudiated by R.C. 2744.03(A)(6)(b). Because this Court lacks jurisdiction over this appeal, because the public duty rule is not implicated in this case, and because the common law public duty rule never was intended to apply to wanton or reckless conduct, this Court need not, and should not, reach the issue of whether the immunity statute superseded the public duty rule to the extent that it did apply to reckless misconduct. Should this Court choose to address this issue, however, the Court of Appeals undoubtedly got it right.

In R.C. 2744.02(A)(6)(b), the legislature provided that employees are not immune from liability where their "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." In so providing, the General Assembly has stated that political subdivision employees who act in a wanton or reckless manner are subject to liability for the injuries that such conduct causes to Ohio citizens. Moreover, the General Assembly explicitly maintained that such employees are not subject to liability where their mere negligence causes harm, unless such liability is imposed elsewhere in the Revised Code. R.C. 2744.03(A)(6)(c). To the extent that the public duty rule had held otherwise at the common law, the legislature's enactment of Chapter 2744 was an unequivocal repudiation of the rule. It is utterly untenable to contend otherwise.⁵

In Chapter 2744, the legislature explicitly permitted liability to be imposed on public officials for acts of wanton and reckless misconduct. Appellants' contention that a statute permitting liability for wanton and reckless misconduct does not repudiate a principle rejecting liability for wanton and reckless misconduct cannot be adopted. Appellants attempt to deny the reality that the legislature has expressed that public officials can be liable for conduct rising to

⁵ There is an additional jurisprudential point worth making here. In *Wallace v. Ohio Dept. of Commerce* (2002), 96 Ohio St.3d 266, this Court held that the public duty rule no longer remained viable in claims against the State. As the Court of Appeals noted, numerous appellate courts have similarly held that the public duty rule has been superseded by Chapter 2744 and is no longer applicable to claims against political subdivisions or their employees. This Court recognized the same thing in *Wallace*, yet did not have occasion to address the issue there. *Id.* at 281, n.13. In *Yates v. Mansfield Board of Education* (2004), 102 Ohio St.3d 205, 212, n.2, this Court stated, in dicta, that the public duty rule as applied to political subdivisions remained viable "at present." Here, because the Estate was successful below, there was no determination for the Estate to appeal. It seems wise for this Court to accept an appeal in another matter in an appropriate procedural posture to determine the threshold question of whether the public duty rule remains viable at all, as applied to political subdivisions or their employees, prior to determining the question of whether the immunity statute superseded just a portion of the public duty rule, which may or may not have even existed at common law.

the level of wanton and reckless misconduct, but the public duty rule has never in the history of Ohio jurisprudence shielded anyone from liability for conduct that goes beyond mere negligence.

IV. CONCLUSION

This Court must let the decision of the Court of Appeals stand. First, this Court does not have jurisdiction to hear this interlocutory appeal, as even Appellants admit that it is not an appeal from the denial of immunity under Chapter 2744. Second, this case involves negligence *per se*, and, because the public duty rule does not apply to negligence *per se*, this Court will be doing no more than rendering an advisory opinion if it addresses Appellants' propositions of law. Third, the common law public duty rule under Ohio law has never been applied to reckless or wanton misconduct, and the Court of Appeals was correct in determining that its scope was limited to a negligence level of culpability. Finally, even if the common law rule did apply to wanton or reckless misconduct, that portion of the rule has been legislatively repudiated by Chapter 2744.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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