

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF <i>AMICUS</i> INTERESTS.....	1
ARGUMENT.....	2
I. The public policy rationales offered by Appellants and the <i>amici curiae</i> in support of Appellants are not persuasive.....	2
II. Concerns about the "far-reaching consequences" of the Fourth District's decision are meritless.....	3
III. Adoption of Appellants' position is not necessary to preserve the public fisc	5
IV. It is Appellants' theory that would have dire, far-reaching consequences....	5
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Cook v. Hubbard Exempted Village Bd. of Educ.</i> (11 th Dist. 1996), 116 Ohio App.3d 564.....	6
<i>Sawicki v. Village of Ottawa Hills</i> (1988), 37 Ohio St.3d 222.....	5
<i>Scott v. Longworth</i> (1 st Dist. 2008), 180 Ohio App.3d 73.....	6
<i>Smith v. A.B. Bonded Locksmith, Inc.</i> (1 st Dist. 2001), 143 Ohio App.3d 321.....	6
<i>State ex rel. Hickman v. Capots</i> (1989), 45 Ohio St.3d 324.....	2
<i>Summers v. Slivinsky</i> (7 th Dist. 2001) 141 Ohio App.3d 82.....	6
<i>Wallace v. Ohio Dept. of Commerce</i> (2002), 96 Ohio St.2d 266.....	4, 5
<i>Webb v. Edwards</i> (4 th Dist. 2005), 165 Ohio App.3d 158.....	6
<i>Winegar v. Greenfield Police Dept.</i> (4 th Dist. March 27, 2002), 2002 WL 853460, 2002-Ohio-2173.....	4, 6
 <u>Other Authority</u>	
R.C. 2744.03.....	4, 6

STATEMENT OF *AMICUS* INTERESTS

This *Amicus Curiae* represents the interests of the Ohio Association for Justice ("OAJ"), formerly known as the Ohio Academy of Trial Lawyers. The OAJ comprises approximately two thousand attorneys practicing personal injury and consumer protection law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The OAJ urges the Court to carefully consider the implications of deciding that the public duty rule applies to prevent liability for wanton or reckless misconduct by public officials. As correctly decided by the Fourth District Court of Appeals below, the public duty rule was never intended to protect rogue employees who engage in reckless or wanton misconduct that injures Ohio citizens. The public good is far better served by holding public officials liable for such misconduct, creating an incentive for public officials to aspire to comply with their legal duties.

Ohio law does not permit anyone to avoid liability for intentional, reckless or wanton misconduct and there is no sound reason for allowing government officials to behave in such an egregious manner without being held accountable in all instances. The OAJ therefore urges this Court to affirm the Fourth District on this point.

ARGUMENT

Ohio public policy favors an interpretation of the public duty rule that provides civil recourse for victims of the wanton or reckless misconduct of public officials.

I. The public policy rationales offered by Appellants and the *amici curiae* in support of Appellants are not persuasive

Appellants, along with various *amici curiae*, offer various public policy rationales in favor of Appellants' position, none of which are persuasive. For instance, Appellants suggest that their improper interpretation of the public duty rule is necessary to "protect officers from devastating civil liability for . . . omissions that can have far-reaching consequences that are impossible to foresee." *Brief of Appellants, p. 11*. Appellants fail to note, however, that merely negligent omissions – of the sort that constitute the vast majority of tortious omissions committed by public officials – do not result in liability under Ohio law. The argument that the Appellants' version of the public duty rule is necessary to protect law enforcement officers and others is a necessary protection is significant hyperbole.

The *amicus* brief of the Ohio Association of Civil Trial Attorneys argues that, under the Fourth District's ruling, "any breach of a public duty imposed by the General Assembly on public employees may spawn prolonged and expensive litigation," and complains that "[t]o 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 the discovery." *Brief of Amicus Curiae, Ohio Association of Civil Trial Attorneys, p. 13*. This is not so. Allegations of reckless or wanton conduct are not, in fact, sufficient to survive a motion to dismiss. The law is clear that "[u]nsupported conclusions of a complaint are not considered admitted, and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324. Thus, of course, merely invoking the legal conclusion that a defendant's conduct is

wanton or reckless will not, in and of itself, be sufficient to overcome a motion to dismiss. The plaintiff will need to allege operative facts upon which a reasonable trier of fact may conclude that the defendant's conduct was wanton or reckless. If the plaintiff is not able to do that, the motion to dismiss will be granted. It is true that if a plaintiff does allege operative facts sufficient to support a finding of wanton or reckless misconduct, the defendant will have to engage in the discovery process. The OAJ, however, is at a loss as to how this could possibly be problematic, from a public policy perspective or otherwise. Why should public officials not have to participate in discovery where the facts alleged support a finding that they have wantonly or recklessly engaged in misconduct that injured another?

In another curious argument, the *amicus* brief of the Ohio Patrolmen's Benevolent Association ("OPBA") takes issue with holding the individual officers liable "despite the fact that none of them had ever met Jillian Graves." *Brief of Amicus Curiae, OPBA, p. 1*. The idea that a defendant can only be liable to plaintiffs whom they have met is a novel one. Though certain entities, such as manufacturers of dangerous and defective consumer products, would likely appreciate such a rule, it seems clear that Ohio law never has, and never will, adopt "personal acquaintance" as an element of liability in tort.

II. Concerns about the "far-reaching consequences" of the Fourth District's decision are meritless

Appellants wrongly contend that the Fourth District's decision exposes public officials "to liability for failure to adequately enforce laws designed to protect everyone" and "will discourage municipalities from passing such laws in the first place. Exposure to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers." *Brief of Appellants, p. 13*.

This Court grappled with, and rejected, similar concerns in *Wallace v. Ohio Dept. of Commerce* (2002), 96 Ohio St.2d 266. For instance, the Court noted that "there are already important safeguards in our jurisprudence that satisfy the public-policy concerns addressed by the public-duty rule." *Id.* at 278. For instance, the immunity statute provides significant protections, including protecting political subdivisions and their employees from liability relating to policy-making. R.C. 2744.03(A)(3). Additionally, just as "conventional negligence principles already provide some measure of protection against the possibility of the state's becoming the de facto guarantor of every injury somehow attributable to the actions of a state tortfeasor," *Wallace, supra*, at 280, the same is true for municipal employees. "A plaintiff must also shoulder the burden of establishing proximate cause, which could be exceedingly difficult in cases where the governmental conduct alleged to have caused injury is particularly attenuated or exacerbated by intervening circumstances." *Id.* at 280-81.

The supposed dire need to expand the protection of public officials, for these reasons, is simply not true. Indeed, over seven years ago, the very same Fourth District Court of Appeals found that a police officer could be held liable for recklessly releasing a drunk driver, who then caused a car accident killing an innocent driver. *Winegar v. Greenfield Police Dept.* (4th Dist. March 27, 2002), 2002 WL 853460, 2002-Ohio-2173. OAJ is unaware of any indication that, since the *Winegar* decision, public officials have been impacted in any way. Notably, *Winegar* did not invoke the public duty rule to find that the defendant officer owed no duty to the decedent – a ruling that is consistent with Ohio law. Thus, *Winegar* has most likely had no meaningful impact because it did not alter the law. Even if it did, however, there is no indication that the consequences on law enforcement officials across Ohio have been dire.

III. Adoption of Appellants' position is not necessary to preserve the public fisc

This Court recognizes, and other courts across the State recognize, the importance of the public duty rule, as well as the immunity statute, in preserving the public fisc. The concern related to the public fisc, however, is not, as one *amicus* brief suggested, "protecting public servants from potentially vast liability." *Brief of Amicus Curiae, Ohio Association of Civil Trial Attorneys*, p. 12. Rather, the public-fisc concern speaks to protecting governmental assets "from lawsuits tending to second-guess the allocation of scarce resources." *Wallace*, 96 Ohio St.3d at 270. There will always be insufficient resources to meet every public need, there will always be a need for police departments to prioritize, and juries and courts are ill-equipped to evaluate how governmental resources should have been allocated. *Id.* at 271. This concern is not implicated by the Fourth District's decision. Such policy-making decisions are already protected by the immunity statute, among other things, and the decision below does nothing to enable courts and juries to second-guess the manner in which a municipality allocated its scarce resources. Appellants in this case have not been sued for failing to staff the roadways with sufficient officers to curtail drunk driving – such a suit would be properly dismissed on a 12(B)(6) motion. The misconduct here was not based on any policy decision made by any employee, and does not place any governmental entity's policy-making power in jeopardy.

IV. It is Appellants' theory that would have dire, far-reaching consequences

The sweep of the position Appellants urge this Court to adopt is truly remarkable. The special-duty exception to the public duty rule is rarely invoked – it is not often that a municipality assumes an affirmative duty, has knowledge that inaction could lead to harm, has direct contact with the injured party, and has the injured party rely on the municipality's action for protection. *Sawicki v. Village of Ottawa Hills* (1988), 37 Ohio St.3d 222, 232 (listing

elements of special-duty exception). Under Appellants' theory, any time a public official is sued for negligence, regardless of the alleged level of culpability, a special-duty exception must be found in order to overcome the public duty rule, simply to move on to an immunity analysis. A review of Ohio's Chapter 2744 jurisprudence shows that this is simply not how courts analyze such cases. Rather, as is properly the case, where reckless or wanton misconduct is alleged, courts ignore the public duty rule, and determine instead whether the immunity statute permits or prevents liability. *See, e.g., Scott v. Longworth* (1st Dist. 2008), 180 Ohio App.3d 73 (conducting §2744.03(A)(6) immunity analysis on negligence cause of action against police officer without determining whether officer had a duty to the plaintiff under the public duty rule); *Webb v. Edwards* (4th Dist. 2005), 165 Ohio App.3d 158 (finding that public employee could be held liable if his conduct in operating car with shadow vehicle, which led to a collision between two other motorists, was wanton or reckless, without invoking the public duty rule); *Winegar, supra*; *Smith v. A.B. Bonded Locksmith, Inc.* (1st Dist. 2001), 143 Ohio App.3d 321 (applying immunity analysis under wanton or reckless standard without first determining whether special-duty exception applied to impose a duty in the first instance); *Summers v. Slivinsky* (7th Dist. 2001) 141 Ohio App.3d 82 (same); *Cook v. Hubbard Exempted Village Bd. of Educ.* (11th Dist. 1996), 116 Ohio App.3d 564 (same). Needless to say, adopting Appellants' view of the public duty rule would result in a sea change in the manner in which Ohio courts consider negligence actions against public officials where the misconduct is wanton or reckless.

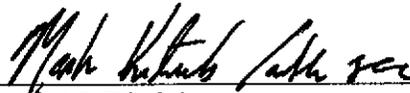
In fact, given that, under Appellants' theory, liability can never be imposed absent application of the special-duty exception, and given that one of the elements of the special-duty exception is knowledge by the municipality that its *inaction* could lead to harm, it appears that the logical consequence of Appellants' position is that public officials, even acting wantonly and

recklessly, can never be held liable for any affirmative actions they take, but only for certain circumscribed failures to act. The idea that Ohio law can impose liability on public officials for failing to act, but can never impose liability on public officials for affirmative misconduct, is absurd. This simply cannot be the law of the State.

CONCLUSION

For the foregoing reasons, the *Amicus Curiae* Ohio Association for Justice hereby urges this Court to reject the propositions of law suggested by Appellants and affirm the Fourth District Court of Appeals.

Respectfully submitted,



Mark M. Kitrick (0000021)
Kitrick, Lewis & Harris Co., LPA
515 East Main Street
Suite 515
Columbus, Ohio 43215
(614) 224-7711
(614) 225-8985 (Facsimile)

*Attorney for Amicus Curiae
Ohio Association for Justice*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of *Amicus Curiae* Ohio Association for Justice was served upon the following counsel of record, by ordinary U.S. mail, postage prepaid, this 17th day of August, 2009:

John T. McLandrich, Esq.
Frank H. Scialdone, Esq.
James A. Climer, Esq.
Mazanec, Raskin, Ryder & Keller Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139

Attorneys for Appellants

Rex H. Elliott, Esq.
Charles H. Cooper, Jr., Esq.
John C. Camillus, Esq.
Cooper & Elliott, LLC
2175 Riverside Drive
Columbus, Ohio 43221

Attorneys for Appellee
The Estate of Jillian Marie Graves

Brian L. Wildermuth, Esq.
Halli J. Brownfield, Esq.
Subashi & Wildermuth
50 Chestnut Street, Suite 230
Dayton, Ohio 45440

Attorney for Amicus Curiae
Ohio Association of Civil Trial Attorneys

Mark Landes, Esq.
Andrew N. Yosowitz, Esq.
Isaac, Brant, Ledman and Teetor, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215

Attorneys for Amicus Curiae
Cty. Commsrs.' Assoc of Ohio et al.

Joseph M. Hegedus, Esq.
92 Northwoods Boulevard
Suite B-2
Columbus, Ohio 43235

Attorney for Amicus Curiae
Ohio Patrolmen's Benevolent Association