

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 09-0014

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

ESTATE OF JILLIAN MARIE GRAVES,

Plaintiff-Appellee,

v.

CITY OF CIRCLEVILLE, et al,

Defendants-Appellants.

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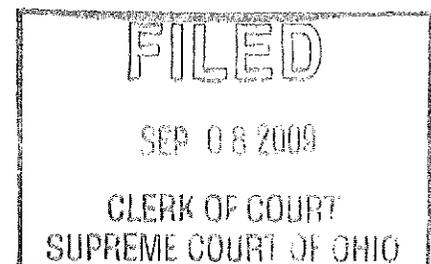
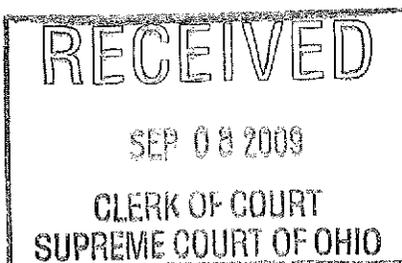


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ARGUMENT

I. This Court has already determined that the denial of summary judgment at issue on this appeal is an appealable order.

R.C. 2744.02(C) provides: “An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.” In *Hubbell v. City of Xenia* (2007), 115 Ohio St.3d 77, 873 N.E.2d 878, this Court interpreted the plain language of this statute and concluded:

[T]he use of the words “benefit” and “alleged” illustrates that the scope of this provision is not limited to orders delineating a “final” denial of immunity. R.C. 2744.02(C) defines as final a denial of the “benefit” of an “alleged” immunity, not merely a denial of immunity. Therefore, the plain language of R.C. 2744.02(C) does not require a final denial of immunity before the political subdivision has the right to an interlocutory appeal.

Accordingly, this Court has jurisdiction to hear these Officers’ appeal of the Fourth District’s decision denying them the benefit of an alleged immunity.

The statute immunizing public employees from suit, R.C. 2744.03(A)(6), operates as a presumption of immunity. *Jackson v. McDonald* (Ohio App. 5th Dist. 2001), 144 Ohio App.3d 301, 760 N.E.2d 24. The Estate argues that the exception to public employee immunity for wanton and reckless conduct set forth in R.C. 2744.03(A)(6)(b) applies. The application of this exception, however, presupposes the existence of a duty. One is reckless “if he does an act or intentionally fails to do an act **which it is his duty to the other to do**, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” *Jackson v. Butler Cty. Bd. of Comm’rs* (1991), 76 Ohio App.3d 448, 454, 602 N.E. 2d 363 quoting *Thompson v. McNeil*

(1990), 53 Ohio St.3d 102, 559 N.E. 2d 705 (emphasis added). The term “reckless” is used interchangeably with the terms “willful” and “wanton.” See *Thompson*, 53 Ohio St.3d at 104, n. 1. Accordingly, the Officers could not act “wantonly and recklessly” for purposes of establishing the exception to public employee immunity unless they owed a duty. The Public Duty Doctrine dictates that they do not. Thus, the appellate court’s erroneous determination that the Public Duty Doctrine does not apply to wanton and reckless conduct operates to deprive the Officers of the benefit of an alleged immunity.

Furthermore, whether the trial court’s decision denying the Officers summary judgment is appealable under R.C. 2744.02(C) is an issue that has already been decided in this case. Appellee filed a motion to dismiss this appeal in the appellate court. Before the appellate court, Appellee argued that R.C. 2744.02(C) did not provide the appellate court with jurisdiction to review the trial court’s entry denying the Officers summary judgment. The Fourth District Court of Appeals agreed and dismissed the appeal. See *Graves v. Circleville* (Ohio App. 4th Dist. 2006), 2006-Ohio-6626. The Officers filed a Notice of Appeal with this Court on December 29, 2006 challenging the propriety of this dismissal. See *Graves v. Circleville*, Case No. 2006-2395. In their Memorandum in Support of Jurisdiction filed on January 22, 2007, the Officers raised the following as their first proposition of law: “A trial court decision overruling a Rule 56(C) motion for summary judgment in which a governmental employee has sought immunity is an order denying ‘the benefit of an alleged immunity’ and is, therefore, a ‘final’ and appealable order under R.C. 2744.02(C).” This Court accepted the Officers’ first proposition of law for review on May 2, 2007 and stayed the appeal pending a decision in *Hubble*.

Following the *Hubble* decision, which was rendered on October 3, 2007, this Court entered an order reversing the Fourth District’s dismissal of the Officers’ appeal and remanded

the case to the Court of Appeals for a *de novo* review of the facts and law. See October 10, 2007 Entry. It is the decision issued by the Fourth District Court of Appeals upon remand that the Officers now appeal. Once again, Appellee argues that this is not an appealable order over which this Court has jurisdiction. Once again, Appellee is wrong. The Officers seek an order overruling the Fourth District's decision which has denied them the benefit of public employee immunity.

II. The negligence *per se* doctrine does not provide an exception to the operation of the Public Duty Rule.

Plaintiff/Appellee relies on three prisoner furlough/parole cases to support its argument that the Public Duty Rule does not bar its negligence *per se* claims. This line of cases (the first of which predates *Sawicki* and this Court's recognition of the Public Duty Rule in 1988) analyzes the liability of the **state**, not political subdivisions, under the Court of Claims Act. As explained below, these cases in no way support Plaintiff/Appellee's assertion that the Public Duty Doctrine does not apply to these claims. There is no negligence *per se* exception to the Public Duty Doctrine.

The first is *Reynolds v. State* (1984), 14 Ohio St.3d 68, 471 N.E.2d 776, a suit brought by the victim of a rape-assault and her husband against the state for injuries suffered in an attack by a prisoner on a work release furlough. Statutory law allowed the Adult Parole Authority to grant furloughs to prisoners, but also required that these furloughed prisoners be confined when they were not actually working. This Court interpreted R.C. 2743.02, part of the Court of Claims Act, as follows:

The language in R.C. 2743.02 that "the state" shall "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *" means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high

degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.

Id., 14 Ohio St.3d at 70. Applying that standard this Court concluded:

[P]laintiffs may not maintain an action against the state for its decision to furlough a prisoner. However, once such a decision has been made pursuant to R.C. 2967.26, a cause of action can be maintained against the state for personal injuries proximately caused by the failure to confine the prisoner during non-working hours in accordance with R.C. 2967.26(B).

Thus, principles applicable to suits involving private parties, including negligence *per se*, would apply to a cause of action arising from the state's failure to confine non-working furloughees. Accordingly, this Court concluded that state officials' breach of the duty to supervise furloughed prisoners is negligence *per se* and reversed the dismissal of the plaintiffs' action. It is important to note that the *Reynolds* majority never referred to or analyzed the Public Duty Rule.

Crawford v. State (1991), 57 Ohio St.3d 1233, 566 N.E.2d 1233, is the second prisoner furlough/parole case that applied negligence *per se*. In *Crawford*, the plaintiff brought suit against the state after her husband was murdered by an offender who escaped from a work furlough program. This Court concluded that the prisoner was not properly confined according to the terms of the statute and concluded: "In accordance with our decision in *Reynolds*, *supra*, we find that the state was negligent *per se* for not properly confining Maynard [the prisoner] under R.C. 2967.26(B)." The *Crawford* majority, as did the *Reynolds* majority, failed to make any mention of the Public Duty Rule.

Justice Wright's dissent in *Crawford*, however, specifically references *Sawicki* and found the majority's reasoning to be inconsistent with that decision. Justice Wright noted that negligence *per se* "requires that a statute be intended to protect a class of persons from a

particular risk.” *Id.* at 191, *citing* Prosser & Keeton, Law of Torts (5th Ed. 1984), 224-25. He concluded, citing *Sawicki*, that any statutory duty to confine furloughed prisoners is owed to the public in general and cannot be the basis for tort liability.

The final case in this line of prisoner cases is *Hurst v. Ohio Department of Rehabilitation and Correction* (1995), 72 Ohio St.3d 325, 650 N.E.2d 104, an action arising from an escaped parolee’s murder of the plaintiff’s decedent. The sole proposition of law addressed by the Court was the department’s argument that it was immune from liability under the Public Duty Rule and that the court of appeals incorrectly concluded that the department could be found negligent *per se*. The court concluded that *Reynolds* and *Crawford* were distinguishable in that the statutes in those cases imposed specific affirmative duties upon the state. The statute at issue in *Hurst*, however, imposed an affirmative duty to report parole violators to the Adult Parole Authority. It was not disputed that the parole violator was reported, the dispute was over the timeliness of the report. Because the determination of whether the statute was violated would require a determination of the reasonableness of the timing of the report and not simply whether a specific safety statute was violated, negligence *per se* was inapplicable. This Court further concluded that the Public Duty Rule barred recovery as the plaintiff had failed to establish a special relationship between the decedent and the state.

Hurst was overruled by *Wallace v. Ohio Dep’t of Commerce, Division of State Fire Marshall* (2002), 96 Ohio St.3d 266, 773 N.E.2d 1018, in which this Court held that the Public Duty Rule does not apply to suits against the state in the Court of Claims. Specifically, this Court held:

The public-duty rule is incompatible with R.C. 2743.02(A)(1)’s express language requiring that the state’s liability in the Court of Claims be determined ‘in accordance with the same rules of law applicable to suits between private parties.’ In negligence suits against the state, the Court of Claims must determine the

existence of a legal duty using conventional tort principles that would be applicable if the defendant were a private individual or entity.

Id. at syllabus ¶ 1. *Wallace* also reaffirmed *Reynolds v. State*:

The language of R.C. 2743.02 . . . means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties for the negligence of the actions of its employees and agents in the performance of that activity or function.

Id. at syllabus ¶ 2. There is no similar provision governing the liability of political subdivisions and their employees.

In sum, this line of cases does not support Appellee's argument that the Public Duty Rule does not apply to claims for negligence *per se*. This line of cases stands for the proposition that the **state** may be held liable for the negligence of its employees and agents in performing certain activities and functions under the same standards governing the liability of private parties.

Negligence *per se* is a principle governing the liability of private parties. Because the Public Duty Doctrine applies to public entities, and not private parties, and because the state may be liable "in the same manner as private parties," the Public Duty Rule has no application in suits against the state. However, there is not a statute like R.C. 2743.02 that applies to political subdivision employees. The Public Duty Doctrine provides a defense for political subdivisions and employees regardless of whether the complaining party's theory is negligence or negligence *per se*.

This line of cases does not stand for the proposition that claims for negligence *per se* constitute another exception to the Public Duty Rule. Such an exception would turn the Public Duty Rule on its head. As *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 566, 697 N.E.2d 198, explained "a duty may be established by common law, legislative enactment, or by

the particular facts and circumstances of the case.” Further, “[n]egligence *per se* is tantamount to strict liability for purposes of proving that a defendant breached a duty.” *Id.*, 82 Ohio St.3d at 566. This Court’s declaration in *Sawicki*, that “[w]hen 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,” cannot be interpreted to support Appellee’s argument that a public duty can be the source of an actionable duty in tort when it is imposed by statute, rather than the common law, in which case the breach of such statutory duty results in strict liability. The case law consistently recognizes as much. *See Scott v. Malcolm* (Ohio App. 8th Dist. 1989), 56 Ohio App.3d 166, 565 N.E.2d 869 (suit filed by the victim of a shooting perpetrated by a shooter who should not have been permitted to purchase the gun used in the assault under a handgun sales ordinance against, *inter alia*, the city and its police department was barred because “a police department’s noncompliance or inadequate compliance with any requirements that the criminal record of the purchaser be checked before he is entitled to purchase a hand gun is not actionable.”); *Williamson v. Pavlovich* (1989), 45 Ohio St.3d 179, 543 N.E.2d 1242 (city could not be held liable for failing to enforce parking ordinances).

The United States Court of Appeals for the Sixth Circuit recognized early on the proper limitation of *Reynolds* to suits involving the state. *See Texaus Investment Corp. v. Haendiges* (6th Cir. 1985), 761 F.2d 252. In that case the purchaser of a warehouse brought a tort action against a municipality alleging that it was liable for its employees’ negligent failure to properly enforce building ordinances. In this pre-*Sawicki* case, the Court applied Public Duty jurisprudence developed by Ohio appellate courts to conclude that liability could not be imposed on a municipality for the failure to enforce building code ordinances in the absence of a special relationship creating a duty for the benefit of the plaintiff. The Sixth Circuit specifically noted

Reynolds and the Ohio Supreme Court's failure to apply the Public Duty Rule in that action against the state and noted that *Reynolds* "merely reiterated its prior holding that because sovereign immunity had been abolished, the **state** could be held liable for its agents' negligence in the same manner as private parties." *Id.* at 258 (emphasis added).

Indeed, Appellee's position that the Public Duty Rule does not apply to claims for negligence *per se* is contrary to this Court's holdings in *Brodie v. Summit Cty. Children Services Bd.* (1990), 51 Ohio St.3d 112, 554 N.E.2d 1301, and *Yates v. Mansfield Bd. of Education* (2004), 102 Ohio St.3d 205, 808 N.E.2d 861. *Brodie* was a suit against a county children services board and caseworkers arising from their alleged failure or refusal to investigate reports of suspected child abuse. The defendants in that case raised defenses based on immunity and the Public Duty Doctrine. The claims in that case were based on R.C. § 2151.421's requirement that the defendants investigate reported child abuse or neglect within twenty-four hours of such report. This Court concluded that this statute was not intended to protect the public at large, but a specific child who is reported as abused or neglected. Accordingly, the Public Duty Rule did not apply.

Similarly in *Yates*, the parents of a high school student who was sexually abused by a teacher brought suit against the board of education based, in part, on the failure to report the teacher's alleged abuse of another student years earlier. *Yates*, citing *Brodie*, again concluded that the Public Duty Rule did not bar the plaintiff's suit. *Yates* and *Brodie* were not based on a negligence *per se* exception to the Public Duty Rule. Rather, they were based on the fact that the statutes in those cases did not create public duties, but duties owed to specific individuals.

That there is no exception to the Public Duty Rule for allegations of negligence *per se* is consistent with the case law from other jurisdictions. In *Donaldson v. City of Seattle* (Wash.

App. 1992), 65 Wash. App. 661, 831 P.2d 1098, a Washington appellate court analyzed the Public Duty Rule in a lawsuit arising from the death of a victim of domestic abuse. The decedent's estate brought claims alleging that the city's police officer's failure to arrest the decedent's boyfriend violated the Domestic Violence Protection Act's mandatory arrest requirement. The estate alleged that this failure permitted him to kill the decedent.

The *Donaldson* court noted that the violation of a statute may support a cause of action “[i]f the legislation evidences a clear intent to identify a particular and circumscribed class of persons.” *Id.* at 667. The statement of intent for the Domestic Violence Protection Act evidenced this clear intent: “The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. . . . It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated.” The court concluded that “[t]he law identifies the particular class of individuals to be protected and defines the specific duties of the police in this regard. The City's claim that the public duty doctrine bars any liability is accordingly rejected.” *Id.* at 667-68. Thus, as in *Brodie* and *Yates*, a statutory duty was actionable because the statute was intended to protect a particular class of individuals, not the general public.

The United States Court of Appeals for the Ninth Circuit came to a similar conclusion in *Saunders v. United States* (9th Cir. 2004), 99 Fed. Appx. 814, in that case the widow of a state trooper brought suit alleging that the Border Patrol failed to place an immigration hold on her husband's killer, a criminal alien, which permitted him to kill the decedent. The court assumed

that statutory law imposed a mandatory duty on Border Patrol to place an immigration hold on this alien, but concluded that the Public Duty Doctrine barred her claim. The court refused to allow this statute to serve as the basis for her claim “because there is no evidence that [the statute] was intended to protect anything other than the public at large.” *Id.* at 816.

Similarly, in this case, there is no evidence that the statutes at issue were intended to protect anything other than the public at large. The General Assembly has not expressed any clear intent that these statutes were intended to protect a particular class of persons. Accordingly, these statutes are not the source of an actionable duty on which Appellee can base its claims.

III. Appellee has failed to establish an exception to the Public Duty Rule or any source of an actionable duty on which to base its claims.

Appellee concedes that “Ohio law does not technically recognize a cause of action for wanton and reckless acts as distinct from negligence,” but asserts that “this point is of no consequence.” Appellee’s Merit Brief at p. 21. According to Appellee, the Public Duty Rule “functions to remove an otherwise-existent duty where the level of culpability is mere negligence.” *Id.* at 25. Essentially, Appellee argues that somehow these Officers always owed the decedent a duty and that the Public Duty Rule operates to protect them from liability for negligence in discharging this duty. However, according to Appellee, the Public Duty Rule does not protect the Officers from liability for wanton and reckless conduct in derogation of this always extant duty. According to Appellee, the source of these Officers’ duty is the common law duty to exercise ordinary care to avoid injury to others.

Appellee’s argument not only contradicts its prior assertion that its claims are for negligence *per se*, but are also clearly inconsistent with decades of Ohio Public Duty jurisprudence. Subsection III(B) of Appellee’s Merit Brief is entitled “Appellee’s Claims are for

Negligence *Per Se*, and Therefore Do Not Implicate the Public Duty Rule.” Appellee’s Merit Brief at p. 15. Subsection III(B)(1) is entitled “The Officers Violated Specific Safety Statutes.” *Id.* In this section, Appellee argues that the Officers’ violation of statutory duties constitutes negligence *per se*. Then, several pages later in its Brief, Appellee argues that common law negligence principles provide the source of the Officers’ duty. According to Appellee, the Officers breached duties imposed by the common law by allowing Mr. Copley to recover his vehicle and unlawfully operate a vehicle while under the influence of alcohol. This argument is utter nonsense.

The common law is clear that “there is no duty to control the conduct of a third person by preventing him or her from causing harm to another, except in cases where there exists a special relationship between the actor and the third person which gives rise to a duty to control, or between the actor and another which gives the other the right to protection.” *Federal Steel & Wire Corp. v. Ruhlin Const. Co.* (1989), 45 Ohio St.3d 171, 173, 543 N.E.2d 769. Appellee has not and cannot argue that there was any special relationship between the decedent and these Officers. Any duty to control necessarily must arise from the statutes that are the basis for Appellee’s negligence *per se* argument. Thus, Appellee clearly cannot base its claims on any common law duty. As made clear in other portions of its brief, it relies on statutory duties.

Finally, Appellee’s argument that the Public Duty Rule “functions to remove an otherwise-existent duty where the level of culpability is mere negligence” is contradicted by this Court’s holding in *Sawicki*. This Court held: “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.” *Id.* at syllabus ¶ 2. This holding is clear that a duty imposed by law on a public official, like the statutorily prescribed

duties at issue in this case, do not provide the source of actionable duty in the first instance, regardless of whether this duty was allegedly negligently or recklessly breached.

Finally, Appellee argues that there is no Ohio case law permitting a public official to escape liability for wanton and reckless conduct. While it may be true that no Ohio court has expressly stated 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. See *Ashland Cty. Bd. of Commissioners v. Ohio Dep't of Taxation* (1992), 63 Ohio St.3d 648, 590 N.E.2d 730; *Brodie v. Summit Cty. Children Services Bd.* (1990), 51 Ohio St.3d 112, 554 N.E.2d 1301; *South v. Maryland* (1855), 59 U.S. 396, 403, 15 L.Ed. 433 (Plaintiff's allegations insufficient to state a claim 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.") (emphasis added). These cases were fully briefed by the undersigned *amicus curiae*, yet Appellee has chosen to completely ignore them.

IV. The Public Duty Rule has not been superseded by R.C. § 2744.03(A)(6)(b).

In a last ditch effort to avoid the Public Duty Rule's bar of its claims, Appellee argues that the "wanton and reckless" exception to public employee immunity in R.C. § 2744.03(A)(6)(b) supersedes the Public Duty Rule. Appellee's argument and reliance on this provision of the Political Subdivision Tort Liability Act is yet another example of its internally inconsistent arguments. Appellee claims that this Court has no jurisdiction to hear this appeal arguing that it does not involve issues of immunity, but at the same time relies on the immunity statute to avoid dismissal of its claims.

Appellee is correct that this statute allows public employees to be held liable for the reckless or wanton breach of an actionable duty. However, Appellee simply cannot identify the source of an actionable duty. The exceptions to public employee immunity set forth in R.C. 2744.03(A)(6)(b) simply cannot be construed as a repudiation of the Public Duty Rule as it relates to willful, wanton, and reckless conduct. Completely devoid from Appellee's argument, as is true of the Fourth District's analysis on this point, is citation to any recognized canon of statutory construction. As previously set forth, the plain language of this statute as well as recognized canons of statutory construction belie Appellee's argument. *See* Brief of *Amicus Curious*, Ohio Association of Civil Trial Attorneys, at p. 18-20

V. *Amicus Curiae* misunderstand and misrepresent Appellant's theory.

Amicus curiae Ohio Association for Justice claims that “[u]nder 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.” *See* Brief of *Amicus Curiae* Ohio Association for Justice at p. 6. *Amicus curiae* cites to a series of cases in support of its argument that Appellants’ position would cause a “sea change” in the way courts analyze negligence actions against public officials in which there are allegations of wanton or reckless misconduct.

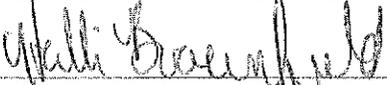
This is simply not true. The only time a plaintiff bringing suit against a public official must overcome the Public Duty Rule by demonstrating a special relationship is when that plaintiff's claims are based upon the breach of a public duty. Further, a court need not analyze the Public Duty Rule if a plaintiff is unable to overcome political subdivision immunity. As in this case, a court need only analyze the Public Duty Rule if a Plaintiff has made allegations that may be sufficient to overcome immunity.

VI. Conclusion.

Appellee bases its claims against the Officers on the breach of a public duty. Based upon more than twenty years of Ohio Public Duty jurisprudence, the breach of a public duty is not actionable in the absence of a special relationship between the plaintiff and defendant. No such special relationship existed between the Officers and the decedent. Moreover, the statutory duties at issue in this case were unquestionably duties owed to the general populace, and not to specific individuals. It is of no consequence that Appellee alleges that the Officers breach of duties owed to the public was wanton and reckless. The wanton and reckless breach of a non-actionable duty remains non-actionable. Therefore, 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.

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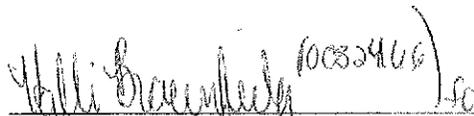
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