ORIGINAL

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

Appeal from the Court of Appeals
Fourth Appellate District
Ross County, Ohio
Case No. 06CA002900

ESTATE OF JILLIAN MARIE GRAVES

Plaintiff-Appellee

v.

CITY OF CIRCLEVILLE, et al.

Defendants-Appellants

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

JOHN T. MCLANDRICH (0021494)
JAMES A. CLIMER (0001532)
FRANK H. SCIALDONE (0075179)
Mazanec, Raskin, Ryder & Keller Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: jmclandrich@mrrklaw.com
jclimer@mrrklaw.com
fscialdone@mrrklaw.com

Counsel for Defendants/Appellants

REX H. ELLIOTT (0054054)
CHARLES H. COOPER (0037295)
JOHN C. CAMILLUS (0077435)
J. JEFFREY BENSON (0003819)
Cooper & Elliott, LLC
2175 Riverside Drive
Columbus, OH 43221
(614) 481-6000
(614) 481-6001 - Fax
Email: Rexe@cooperelliott.com

Counsel for Plaintiff-Appellee

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I. INTRODUCTION

In a transparent attempt to divert this Court from the legal issue posed by this appeal, the Estate offers a 10-page recitation of facts that is largely irrelevant. The Estate quite apparently wants the Court to know that it is arguing that the Officers acted with the culpability of "reckless." But without an actionable duty, the Estate could not establish an exception to the Officers' individual immunity under R.C. § 2744.03(A)(6)(b). That is what this case is about.

Turning to the legal issue, the fourth district's majority decision would strip a public official of his or her immunity when no tort duty exists. In doing so, the appellate court created an exception that never existed in Ohio and is incompatible with the State's Public Duty law. The fourth district disregarded the critical fact that the Public Duty Rule deals only with the legal issue of duty, not culpability. It is irrelevant whether a plaintiff characterizes a public official's conduct as negligent or reckless; if there is no duty, a public official cannot be liable and is otherwise immune under the non-liability provisions of R.C. § 2744.03.

When it does turn to the merits, the Estate's argument boils down to semantics and merely argues that the majority panel did not for the first time in Ohio create a reckless exception to the Public Duty Rule but really was applying established law all along. This is flat wrong. The majority even knew that it was creating new law when it stated "the Estate's claims can only proceed if it establishes the special relationship exception, which, we acknowledge, it cannot." (Apx. "A" at pp. 11-12, ¶ 24.) Yet, the court went on to create a "reckless" exception to the Public Duty Rule, relying on the minority view of another state.

The fourth district departs from two decades of Ohio jurisprudence and improperly creates a new exception that is fundamentally incompatible with Ohio Public Duty law and Ohio's Political Subdivision Tort Liability Act. This Court should reverse.

II. LAW AND ARGUMENT

A. Jurisdiction is Firmly Established.

Ohio 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 [emphasis added]." This Court has expressly concluded that "R.C. 2744.02(C) defines as final a denial of the 'benefit' of an 'alleged' immunity, not merely a denial of immunity." Hubbell v. City of Xenia (2007), 115 Ohio St.3d 77 at ¶ 12. The fourth district's order denies the Officers "the benefit of an alleged immunity." (Id.)

The Estate argues that the Public Duty Rule and immunity are two concepts. While this is true, the doctrines are complementary to one another and inextricably intertwined in this appeal. This Court has jurisdiction to hear this appeal. R.C. § 2744.02(C); Hubbell, *supra*, at *syllabus*.

1. The Determination of Whether the Reckless Exception to Immunity Applies is Inextricably Intertwined with the Issue of Duty.

Simply stated, the wanton and reckless immunity exceptions provided by R.C. § 2744.03(A)(6)(b) and relied upon by the Estate require a finding that a duty was owed. The issue of duty in the case of a public entity and its employees is governed by the Public Duty Rule. Because the Fourth District improperly interpreted the Public Duty Rule, it incorrectly denied the Officers the benefit of immunity under R.C. § 2744.03(A)(6), a matter over which this Court has jurisdiction R.C. § 2744.02(C).

This Court has defined the term "reckless" to mean:

> The actor's conduct is in reckless disregard of the safety of others if he does an act or **intentionally fails to do an act which <u>it is his duty to the other</u> to do**, knowing or having reason to know of facts which would lead a reasonable man to

> realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent. [Emphasis added.]

Thompson v. McNeill (1990), 53 Ohio St.3d 102, 104-05, citing 2 RESTATEMENT OF THE LAW 2D TORTS (1965) at 587, Section 500; *see e.g.,* O'Toole v. Denihan (2008), 118 Ohio St.3d 374, 2008-Ohio-2574 at ¶ 73(affirming the McNeill definition). This Court has indicated that the terms "reckless," "willful," and "wanton" are used interchangeably. *See* McNeill, *supra,* at 104, fn. 1.

The Public Duty Rule determines whether a public official has a duty that is individually enforceable in a tort action as opposed to a general duty to the public that is non-actionable. The Fourth District determined that the Officers were not entitled to immunity, claiming that there were genuine issues of material fact with regard to whether the Officers acted in a wanton and reckless manner. Of course, without a duty, the Officers could not act "wantonly and recklessly" and the lower courts have denied them the benefit of immunity under R.C. § 2744.03. R.C. § 2744.02(C).

It is legally impossible for a plaintiff to establish an exception to immunity when there is no duty. Intent must be linked to an actionable duty. Because of the lower courts' incorrect determination that a duty of care was owed, they incorrectly determined that the "reckless and wanton" immunity exceptions could apply in this case and denied the benefit of immunity under R.C. § 2744.02(C). Because the reckless exception is inextricably intertwined with the denial of immunity here, this Court has jurisdiction.

2. The Majority's Determination of Duty was a Determination – and Denial – of the Benefit of Individual Immunity.

The majority decision merged the Public Duty Rule with the individual immunity provision under R.C. § 2744.03(A)(6)(b). The appellate court improperly held that the standards for whether a duty exists and whether an exception to immunity exists are the same.

The majority held if a court finds "reckless and wanton" conduct, then the majority's newly minted "reckless and wanton" exception to the public duty doctrine applies. By creating this "reckless and wanton" exception, the court's purported "public duty" finding simultaneously denies the individuals immunity under R.C. § 2744.03(A)(6)(b)'s exception for "wanton or reckless" conduct. Under the R.C. § 2744.03(A)(6)(b), an employee of a political subdivision is immune unless the "employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

The standards are the same.

Under the majority's decision, a determination of duty *is* a determination – and denial – of individual immunity. Consequently, the court's decision denies these Officers the "benefit of immunity" under R.C. § 2744.02(C) and created a final order. *See* Hubbell, *supra*.

3. Assuming Jurisdiction Does Not Exist Here, this Court Should Vacate the Forth District's Decision.

This Court in Titanium Metals determined that if it does not have subject matter jurisdiction to review its order, an appellate court also does not have jurisdiction. *See* State Auto. Mut. Ins. Co. v. Titanium Metals Corp. (2006), 108 Ohio St.3d 540, 2006-Ohio-1713 at ¶12. The Court explained, "there being no final, appealable order, the court of appeals lacked jurisdiction to consider this matter. ... Therefore, we vacate the judgment of the court of appeals

in its entirety and all conclusions regarding the public-duty doctrine. We remand this matter to the trial court for further proceedings consistent with this opinion." (Id.)

In this case, the fourth district's order denies the benefit of immunity and jurisdiction exists under R.C. § 2744.02(C). But, should it disagree, this Court should vacate the lower court's order. Titanium Metals, *supra*; *see also* SCt R. XII(A)(the court may "summarily reverse or affirm on the basis of precedent").

B. A Purported Negligence Per Se Claim Does Not Somehow Make this Appeal Improvidently Allowed.

1. The Estate Waived its Negligence Per Se Argument.

The Estate tries to disrupt this appeal by arguing the Public Duty Rule has no application to cases involving allegations of negligence per se. Substantively, this claim has no merit. But, the Estate's claim faces a more immediate problem. The Estate did not properly preserve that argument in the trial court. Moreover, and not surprisingly, the fourth district did not rely on the doctrine in issuing its opinion and, in fact, did not mention it at all. The Estate waived that argument.

In opposing summary judgment in the trial court, the Estate did not mention negligence per se at all in its brief in opposition to the Officer's Public Duty arguments. Rather, the Estate took the erroneous position that the individual immunity provision of R.C. § 2744.03 somehow imposed liability and argued that Ohio's Political Subdivision Tort Liability Act abrogated the Public Duty Rule. (Pl.'s Br. in Op. to Summ. J. at 23.) While the Estate made cursory mention of negligence per se in a surreply, the trial court did not grant the Estate leave to file the surreply.[1] The Estate did not properly preserve its argument for appeal.[2] The appellant cannot

[1] While mentioning the vehicle seizure statutes, the Estate also did not specifically allege a negligence per se a count in the operative complaint. (Pl.'s Second Amended Comp.)

raise an issue for the first time in a reply brief and certainly not in a surreply. *See, e.g.,* Nemeth v. Nemeth (11th Dist. 2008), 2008 WL 2582517, 2007-Ohio-3263 at ¶ 22. The law is well-established that "A party who fails to raise an argument in the court below waives his or her right to raise it here." State ex rel. Zollner v. Indus. Comm. (1993), 66 Ohio St.3d 276, 278.

Not surprisingly given the Estate's failure to properly raise the issue, the trial court and the appellate court did not decide – or even mention – the issue of negligence per se's relationship with the Public Duty Rule and political subdivisions. And, this Court should not consider this argument now. *See* Mills-Jennings of Ohio, Inc. v. Liquor Control Com'n (9th Dist. 1984), 16 Ohio App.3d 290, 293-94, *overruled on other grounds* ("Inasmuch as the trial court did not decide this issue, this court should not address it for the first time on appeal.") Republic Steel Corp. v. Hailey (8th Dist. 1986), 30 Ohio App.3d 103, 108 ("an appellate court should not address issues which the trial court did not expressly decide").

2. Negligence Per Se Does Not "Moot" the Public Duty Rule.

The Estate improperly argues because this case involves negligence per se, the Public Duty Rule is not implicated or is moot. (Appellee's Br. at 20.)

Eschewing the public duty cases dealing with political subdivisions, the Estate exclusively relies on cases that involve the liability of the state under the Court of Claims Act, not political subdivisions and their employees. (Appellee's Br. at 15- 20, *citing* Hurst v. Ohio Dept. of Rehabilitation and Correction (1995), 72 Ohio St.3d 325, Reynolds v. State Div. of Parole and Community Services (1984), 14 Ohio St.3d 68, and Crawford v. Ohio Div. Of Parole and Community Services (1991), 57 Ohio St.3d 184.)

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[2] The Estate did give two cursory paragraphs to negligence per se in its intermediate appellate brief.

These cases merely stand for the proposition that the state may be held liable for certain acts under the same standards governing the liability of private parties. Private parties do not enjoy the protection of the Public Duty Rule. The Ohio Legislature expressly provided that the *state* may be held liable "in the same manner as private parties." R.C. § 2743.02. In sharp contrast, the Legislature has not passed a statute that similarly imposes liability on political subdivisions and their employees "in the same manner as private parties." The cases that the Estate cites are far afield of the issue before this Court and should be disregarded. In fact, the Estate's cases involving the state of Ohio are contrary to this Court's precedent involving political subdivisions. *See* Brodie v. Summit County Children Services Board (1990), 51 Ohio St.3d 112, and Yates v. Mansfield Bd. of Education (2004), 102 Ohio St.3d 205, 2004-Ohio-2491. 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 24 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.

The vehicle seizure statue at issue was designed to protect the public at large. There is no indication that the Legislature intended to protect a particular class of persons or impose liability on police officers. The Officers' duty to comply with the vehicle seizure procedure under R.C. § 4507.38 and R.C. § 4511.195 was a duty to the general public and did not create a special relationship with the Estate's decedent. It is hard to read it any other way. The vehicle seizure statute was enacted solely to protect the community and it was not intended to create any duty to any particular member of the community. In Eisenhuth, this Court noted that in negligence per se, "a legislative enactment which does not purport to define a civil liability but merely makes provision to secure the safety or welfare of the public is not to be construed as establishing such a liability." *See* Eisenhuth v. Moneyhon (1954), 161 Ohio St. 367. Further, the Estate's negligence per se argument also would improperly extend the immunity exceptions contained in R.C. § 2744.03(A)(6). The Legislature when it passed the immunity statute made clear that statutory liability only exists when "Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to an employee." R.C. § 2744.03(A)(6).

The Estate tries to circumvent this Court's definitive holdings about how the Public Duty Rule works as to political subdivisions. This Court has held that "a public duty does not give rise to a private duty **unless** a special duty or relationship is established [emphasis added]" with the political subdivision. Commerce & Industry Insurance Company v. City of Toledo (1989), 45 Ohio St.3d 96 at 100. To establish a "special relationship," a plaintiff must establish each of

four elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking. (Id.)

The significance of a statute in the Public Duty analysis is not to impose a duty on a political subdivision or its employee, like in the case of negligence per se. That would not make sense. That is because "a public duty does not give rise to a private duty **unless** a special duty or relationship is established [emphasis added]." Commerce at 100. That is not to say a statute is irrelevant. The statute is relevant to the first of the four elements for establishing the existence of a special relationship – that "an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured."

For instance, in Commerce, this Court analyzed the import of the statute that placed a duty on firefighters to protect lives and property under R.C. § 737.11. Rather than find that the Public Duty Rule did not apply, the Court properly analyzed the significance of the conduct of the public employees and the statute in the context of a Public Duty Rule analysis.

> Under the first prong of the test, the appellees claim Toledo assumed an affirmative duty to act on behalf of those injured by undertaking to fight the fire, by conducting regular inspections of the warehouse before the fire, and by preparing a detailed pre-fire plan of the warehouse.
>
> These actions are not sufficient. Under the "special relationship" exception to the public duty rule, the assumption of an affirmative duty on a municipality's part requires that the municipality do more than adhere to its statutory duty. It must voluntarily assume some additional duty. By conducting regular inspections of the warehouse property, preparing a detailed pre-fire plan to more effectively combat a fire, and responding to the need to fight the warehouse fire, the Toledo fire department was doing no more than its statutory duty under R.C. 737.11 to "protect the lives and property of the people in case of fire."

Commerce, *supra* at 100-01. The existence of a statute, and the claim of negligence per se, does not obviate or moot the public duty Rule. That statute merely becomes part of the special relationship analysis.

C. A Plaintiff Cannot Establish an Exception to Immunity for "Wanton and Reckless" Conduct Without First Establishing an Actionable Duty.

PROPOSITION OF LAW I: When there is no duty under the Public Duty Rule, the wanton and reckless exception to employee immunity is not at issue.

The Estate finds the first proposition of law not "controversial." (Appellee's Br. at 21.) But, the majority panel nevertheless found that the Officers are not immune, even in the absence of a duty. As the dissenting judge properly recognized, "where no legal duty is owed, there is no actionable tort." (Apx. "A" at p. 21, ¶ 43.) And, without establishing a duty, the Estate could not establish an exception to immunity for reckless conduct under R.C. § 2744.03(A)(6)(b) as a matter of law.

In an effort to defend the panel's improper creation of new law that is incompatible with the Ohio Public Duty Rule and the Political Subdivision Tort Liability Act, the Estate argues that the majority panel did not create an exception, but merely found that the doctrine does not apply to reckless conduct. No matter how the Estate tries to characterize the appellate court's decision, the result is the same. Under the fourth district's decision, there is a new exception to the public duty doctrine in Ohio. The Estate's semantic argument does not change what the majority court held.

The Estate concedes that "no litigant would ever dispute the proposition that were there is no duty, the wanton and reckless exception to immunity is not at issue," but then argues that the issue is "whether or not the public duty rule applies in the first place." (Appellee's Br. at 23.) This Court has held that "a public duty does not give rise to a private duty **unless** a special duty

or relationship is established" with the political subdivision. Commerce & Industry Insurance Company v. City of Toledo (1989), 45 Ohio St.3d 96 at 100. The vehicle seizure statute merely sets forth a public duty to protect the community at large and it was not intended to create any duty to any particular member of the community. It certainly does not impose tort liability on the officers who enforce it; it also does not grant a private claim; and it certainly does not create a special relationship with any particular member of the public.

In sum, the Officers assert that to establish the "wanton and reckless" exception to immunity, the Estate must first demonstrate that an actionable duty exists because it is a requirement imbedded in this Court's definition of "reckless" and its interchangeable term "wanton." By relying on the vehicle seizure statute, the Estate has done no more than rely on a nonactionable public duty and failed to demonstrate a special relationship existed. The Estate has failed to demonstrate an exception to immunity existed under R.C. § 2744.03(A)(6)(b), because there is no duty. Therefore, the issue of reckless culpability is not an issue.

D. A "Wanton and Reckless" Exception to the Public Duty Rule Does Not and Should Not Exist Under Ohio Law.

PROPOSITION OF LAW II: There is no "wanton and reckless" exception to the Public Duty Rule.

In its response to Proposition of Law II, the Estate repeatedly argues the fourth district did not change the law by creating an exception for "reckless" conduct. Of course, that is not true. Until the fourth district's decision, this Court and the intermediate appellate courts have consistently applied the Public Duty Rule and its one special relationship exception for more than two decades. Sawicki v. Village of Ottawa Hills (1988), 37 Ohio St.3d 222, 230.

The majority panel did not cite to any Ohio case that limited the public duty rule to negligent rather than reckless conduct. The majority, however, did expressly rely on out-of-state

case law that had adopted an exception to the public duty rule for egregious conduct. (Apx. at 16, App. Op. at pp. 13, ¶ 25, *citing* Rhode Island, Connecticut, and Tennessee.) Pleading that its argument is not mere "semantics" and that the Officers are "ignoring vast Ohio case law," the Estate also fails to cite any Ohio law that carves an exception to the public duty rule for reckless conduct. (Appellee's Br. at 24.)

The reason is clear. This limitation would make no sense because establishing a duty is a prerequisite to establishing liability for negligence or liability based on reckless and wanton misconduct. *See*, Thompson v. McNeill (1990), 53 Ohio St.3d 102. "Reckless and wanton misconduct" is not a cause of action in Ohio, they are levels of culpability. Wenzel v. Al Castrucci, Inc. (2nd Dist. 1999), 1999 WL 397366, unreported; Cincinnati Ins. Co. v. Oancea (6th Dist. 2004), 2004 WL 1810347, unreported. Wanton and reckless misconduct is a level of intent. Griggy v. City of Cuyahoga Falls (9th Dist. 2006), 2006 WL 173134. To establish liability and an exception to immunity, a plaintiff must still establish an actionable duty.

Despite the Fourth District's holding, "wanton and reckless" conduct does not create a duty. Intent does not create a duty. A reckless and wanton exception confuses and blurs the concepts of duty and intent – in essence, the appellate court's decision allows intent to become duty when a party can characterize a governmental actor's conduct as more than negligence.

The Estate repeatedly cites the 75-year-old case that states that the difference between negligence and recklessness is a difference "of kind, not merely degree." (*See, e.g.*, Appellee's Br. at 21 and 26, *citing* Universal Concrete Pipe Co. v. Bassett (1936), 130 Ohio St. 567, 575.) The Bassett court was explaining that there is a difference between the level of culpability for negligence and recklessness. But, the court certainly was not suggesting that reckless culpability

creates a duty or that in the absence of a duty a defendant could be liable for recklessness. Culpability simply does not create a duty.

As to the Estate's claim that the "special duty exception is a red herring," that is an argument of convenience. (Appellee's Br. at 26.) The Estate knows that it cannot establish a special relationship.

1. The Fourth District's Decision Undermines the Purposes Behind the Public Duty Rule and the Immunity Statute.

The Estate argues that "public policy favors holding rogue employees liable for reckless or wanton misconduct that causes injuries." (Appellee's Br. at 29.) The Estate's public policy argument merely tries to cloak its civil lawsuit for money against these Officers in the veil of protecting citizens from "rogue employees" that cause injuries.

The vehicle seizure statutes, like innumerable statutes contained in the Ohio Revised Code, are designed to protect the public at large and express the law an officer is to enforce in protecting the public. The government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them. Exposure to liability for failure to adequately enforce laws designed to protect everyone will discourage municipalities from passing such laws in the first place. Indeed, exposure to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers.

The Estate's narrow concern is well protected by mechanisms other than civil legal actions. Certainly, "rogue" officers may be held accountable for dereliction of duty through internal disciplinary proceedings and by formal criminal proceedings. In fact, if it is believed to be of sufficient concern to warrant imposing personal liability on an officer, the Legislature could enact a statute that granted an injured party a private cause of action when a police officer

fails to meet his or her general duties under a particular statute. Under its theory of the case, the Estate's argument imposes a tort duty on the Officers *vis a vis* the tortfeasor – the drunk driver – giving him a potential claim against these Officers for failing to comply with the vehicle seizure statute.

There is no evidence that the Legislature was trying to impose civil liability on the Officers entrusted with upholding the law when it passed the vehicle seizure law. Certainly, the express language of the statute gives no indication that the Legislature wanted to impose liability. It is impossible to conceive that the Legislature intended to impose liability on law enforcement officers when if passed the vehicle seizure laws.

E. The Public Duty Rule Co-Exists with and Is Complementary to R.C. § 2744.03.

1. The Legislature Did Not "Clearly Intend" to Abrogate the Public Duty Rule When It Enacted R.C. § 2744.03.

Eschewing any meaningful statutory analysis and the governing law, the Estate claims that the individual immunity provisions contained in R.C. § 2744.03 legislatively overruled the public duty rule. Even the fourth district did not believe this, holding "the Officers argue that the pubic duty doctrine remains viable after the adoption of R.C. Chapter 2744, and we agree." (Apx. "A" at p. 13, ¶ 21.) Nevertheless, the majority, in an apparent effort to prop up its creation of a wanton and reckless exception, argued in the alternative that the R.C. § 2744.03 abrogated the public duty doctrine.

In a vain effort to defend this alternative holding, the Estate ignores the governing standard for determining whether Legislative actions abrogate the common law. (*See* Appellants' Merits Br. at 13-16.) This Court has expressly established that standard:

> The General Assembly will not be presumed to have intended to abrogate a common-law rule **unless the language used in the statute clearly shows that intent**. [emphasis added]

Carrel v. Allied Products Corp. (1997), 78 Ohio St.3d 284, *citing* State ex rel. Morris v. Sullivan (1909), 81 Ohio St. 79, 90 N.E. 146, paragraph three of the syllabus. Thus, in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force. Id. "There is no repeal of the common law by mere implication." Id. *citing* Frantz v. Maher (1957), 106 Ohio App. 465, 472.

The express language of the Act does not "clearly show" the intent to overrule any common law defense an individual public employee would have. To the contrary, the section "clearly shows" that the individual immunity exists even if liability otherwise exists. That Section does not impose liability on a public official but provides an "**immunit[y]** [that] may be asserted to establish **nonliability**." R.C. § 2744.03(A)(6) (emphasis added). The Estate's argument that the individual immunity provision of R.C. § 2744.03(A) "imposes" liability on a public official is wrong. (Appellee's Br. at 31.)

Furthermore, this Court has held that immunity and the public duty doctrine were separate, coexisting and complementary concepts. *See* Sawicki, *supra* at 230; *see also* Yates v. Mansfield Bd. of Edn. (2004), 102 Ohio St.3d 205, 2004-Ohio-2491, fn. 2 (doctrine "remains viable" ... as applied to actions brought against political subdivisions pursuant to R.C. Chapter 2744"); *see also* Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs. (2008), 118 Ohio St.3d 392, 2008-Ohio-2567 at ¶ 32.

Based on the arguments above and those made in the Officers' merits brief (pages 13-16), the Legislature did not clearly intend to abrogate the Public Duty Rule when it enacted the

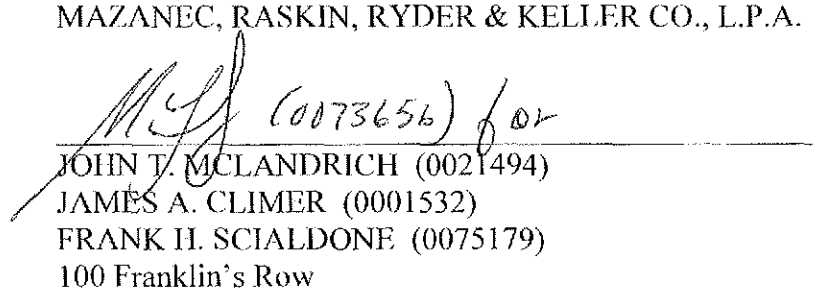
individual immunity provisions contained in R.C. § 2744.03(A). The majority's alternative holding is wrong and this Court should reject that holding.

III. CONCLUSION

For the foregoing reasons and those contained the Appellants' merits brief, this Court should reverse the majority decision below and grant judgment as a matter of law in favor of Officers William Eversole, Peter Shaw, and Benjamin Carpenter.

Respectfully submitted,

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



JOHN T. MCLANDRICH (0021494)
JAMES A. CLIMER (0001532)
FRANK H. SCIALDONE (0075179)
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 Fax
Email: jmclandrich@mrrklaw.com
jclimer@mrrklaw.com
fscialdone@mrrklaw.com

Counsel for Defendants/Appellants

CERTIFICATE OF SERVICE

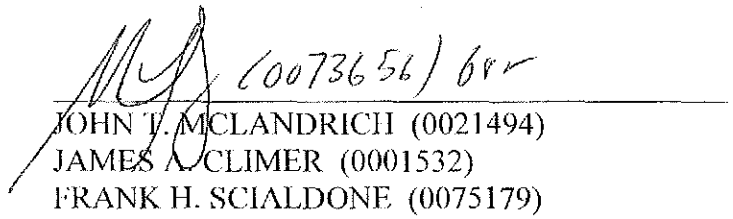
A copy of the foregoing Reply Brief of Defendants/Appellants has been sent by regular U.S. Mail, postage prepaid, September 8, 2009 to the following:

Rex H. Elliott, Esq.
Charles H. Cooper, Jr., Esq.
Cooper & Elliott, LLC
2175 Riverside Drive
Columbus, OH 43215

Counsel for Plaintiff/Appellee

Gary D. Kenworthy, Esq.
443 North Court Street
P.O. Box 574
Circleville, OH 43113

Law Director of Circleville - Of Counsel for Appellants



JOHN T. MCLANDRICH (0021494)
JAMES A. CLIMER (0001532)
FRANK H. SCIALDONE (0075179)

Counsel for Defendants/Appellants