

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0980

ALLEN BUSH, Adm., Etc. )  
 )  
 Plaintiff-Appellant )  
 )  
 -vs- )  
 )  
 COUNTY OF ASHLAND, et al. )  
 )  
 Defendants-Appellees )

On Appeal from the  
Ashland County Court  
of Appeals, Fifth  
Appellate District  
  
Court of Appeals  
Case No. 09-CA-25

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT, ALLEN BUSH, ADM., ETC.**

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## WHY THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF GREAT GENERAL AND PUBLIC INTEREST

Plaintiff-Appellant Allen Bush initiated a lawsuit to recover for the wrongful death of his 12-year-old son, Drew. That cause of action maintained that the Defendants were liable for the boy's death because of the reckless, willful and/or wanton conduct of Muskingum Watershed Conservancy District (MWCD) Deputy Ben Kennel and Park Ranger Jeff Keller. But for their recklessness in conjunction with an investigation they undertook on August 22, 2005, Drew Bush would still be alive today.

The trial court granted summary judgment in the officers' favor by ignoring genuine issues of fact, which should have prompted a trial. In ruling to the contrary, the trial court ignored or minimized contradictory evidence, and discarded outright the opinion and conclusions reached by the Plaintiff's police expert. The officers' conduct on August 22, 2005, and their complete failure to address the strange circumstances they discovered when they were called to investigate a break in at the Slater household, generated issues the parties disputed. Whether the Defendant officers acted properly or with reckless indifference to potential danger Sean Slater apparently posed was further a subject of dispute. These are considerations that a jury should have entertained.

When the Fifth District Court of Appeals affirmed, it held that Deputy Kennel and Ranger Keller owed no duty of care whatsoever to the plaintiff, Sean Slater, or anyone else for that matter. According to the Fifth District, even if the officers' conduct had been reckless, there was no duty owed here and they could not be held liable for their recklessness. *Bush v. Ashland*, 2010 Ohio 1732, ¶¶ 33-34. The Fifth District claimed to

have based that conclusion on this Court's decision in *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010 Ohio 168.

In *Graves*, this Court held that the public-duty rule it had once embraced in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468 (which addressed negligence claims against public entities), is not applicable in civil actions brought against employees of political subdivisions for their wanton or reckless conduct. Throughout this litigation, the plaintiff has maintained that the public duty rule did not apply to this case because it involved wanton and reckless conduct as opposed to negligence. This Court's decision in *Graves* would seem to vindicate that position. In ruling to the contrary, the Fifth District completely misread *Graves* and thereby expanded political subdivision immunity well beyond anything this Court or the General Assembly ever imagined.

This Court must accept review of this case, not merely to correct grave error, but to clarify *Graves* so that future courts of appeal will not read it, as the Fifth District just did, to stand for the proposition that political subdivision immunity now shields a public employee from even reckless conduct, as well as mere negligence.

## STATEMENT OF THE CASE AND FACTS

On September 3, 2005, Sean Slater shot and killed his friend, Drew Bush, while Bush was a guest in Slater's house. Sean's mother had previously given that shotgun to 12-year-old Sean to take hunting later that fall. Two weeks before the shooting, Defendant police officers had searched the Slater home and found that same shotgun, fully loaded, in Sean's bedroom. Under R.C. 2923.21(A)(3), it is illegal to furnish any firearm to a person who is under eighteen years of age except for lawful hunting, sporting, or educational purposes, under the supervision or control of a responsible adult.

The circumstances surrounding that discovery admittedly disturbed the officers. But they did not act on their concerns, and Sean shot and killed Drew two weeks later. Drew's father filed suit against the Defendants because, when presented with the opportunity to prevent his son's violent death, the police officers here did nothing. Their willful indifference to the risk Sean Slater presented was a proximate cause of Drew's death.

On August 22, 2005, Park Ranger Keller and Ashland County Deputy Kennel were called to the Slater residence to investigate a possible home invasion. The officers arrived at approximately 6:30 pm. to find Ms. Slater and her son outside waiting. The officers searched the house for intruders. During that search, the officers discovered a loaded shotgun lying on the floor in Sean's bedroom. The officers also found a sword and a pile of knives displayed on Sean's bed.

A sign on the outside of the door to Sean Slater's bedroom warned: "No Trespassers Violators Will Be Shot Survivors Will Be Shot Again." According to Sean, he bought the sign online and put it up some three months before the September 3rd shooting. A bedroom shelf held a collection of alcohol bottles containing Sean's urine. On

a bedside table the officers found a bag containing a dried herb-like material the officers initially believed to be marijuana.

The officers questioned Sean and his mother about the items they found in Sean's room. Ms. Slater told them that the substance the officers thought was marijuana was actually a natural herb 12-year-old Sean used to relax. Ms. Slater amplified that the substance was known as *Salvia divinorum*, which she allowed her son to purchase on the internet. It is smoked like marijuana, so to help her son ingest the substance, Ms. Slater bought him cigarette papers and a pipe. Sean testified that he smoked the herb once or twice a week to help him relax. According to Sean, every now and then when he used the herb he would see the walls move. *Salvia divinorum* is widely known to produce hallucinogenic effects. See, SALVIA DIVINORUM AND SALVINORIN A, United States Department of Justice, [http://www.deadiversion.usdoj.gov/drugs\\_concern/salvia\\_d/salvia\\_d.htm](http://www.deadiversion.usdoj.gov/drugs_concern/salvia_d/salvia_d.htm) (last visited, June 1, 2010).

When the police confronted Ms. Slater about the shotgun, she told them that it had been a gift to Sean from a family member, which he intended to use for hunting. It was later disclosed that Ms. Slater had purchased the gun; it had never been used for hunting; and Sean had not been instructed on how to safely use, handle or store the weapon. Sean had planned to take a hunting safety training course through school before the start of deer hunting season. Sean confided to the officers that he was hearing noises outside his window at night and had become afraid someone was going to come get him, so he kept the gun in his room for protection.

The officers learned that Ms. Slater allowed the boy to keep the gun in his room. Officer Keller recalled Ms. Slater had seemed fairly unconcerned when they told her that the shotgun Sean kept in his room was loaded. Specifically, Keller testified that Ms. Slater, "didn't seem too surprisingly alarmed that it was there, just kind of, you know, just gave him a little sco – scolding, like, I told you this – you shouldn't have it, and stuff like that."

The officers learned that the yellowish liquid in the liquor bottles they saw on his bedroom shelf was Sean's urine. Apparently Sean was too afraid to get out of bed at night, so instead of using the bathroom, he urinated into the empty bottles.

The officers unloaded the shotgun and returned it to Ms. Slater, who assured them that she would secure the ammunition. When asked at his deposition if he and Ms. Slater talked about whether Sean had any mental health issues, Kennell responded in this way:

A. Ah, I had spoken to her and asked if, ah, he had been, ah seeing a counselor or suggested that he might see a counselor.

Q. Did you suggest that?

A. I did, yes.

Q. What did she respond?

A. Um, I don't recall what exactly she said, I know, I believe that he had seen counselors in the past, I don't –

Q. That was it, was that pretty much it?

A. I believe so, yes, sir.

Records relating to the incident indicate that the officers spent approximately one hour at the Slater residence. Their written report memorializing the August 22, 2005 incident omits reference to the dangerous and disturbing items found in Sean Slater's

bedroom. The report merely noted that there was no sign of forced entry and nothing was missing.

On September 2, 2005, Drew Bush spent the night at the Slater residence. The next morning he remained at the house playing with Sean. At approximately 10:30 a.m., while Ms. Slater was out running errands, her son shot Drew Bush with the same shotgun Defendant police officers had discovered two weeks previously. Authorities found Drew on Sean's bedroom floor with a fatal gunshot wound to his neck.

On May 16, 2007, Allen Bush, the Administrator of the Estate of Drew Bush, filed a lawsuit against Ashland County, Ashland County Deputy Sheriff Ben Kennell, the Muskingum Watershed Conservancy District (MWCD), and District Park Ranger Jeffrey Keller for Drew's wrongful death. The Defendants moved for summary judgment.

The Plaintiff responded that summary judgment was not justified because bona fide factual disputes foreclosed resolving the case short of a jury trial. On June 26, 2009, the Court entered an order granting summary judgment in Defendants' favor. The Plaintiff appealed that decision to the Fifth District Court of Appeals. While the matter was pending, this Court decided *Graves v. Circleville*, 124 Ohio St.3d 339, 2010 Ohio 168. Relying heavily on that decision, the Fifth District issued an opinion affirming summary judgment on April 19, 2010. Because the Fifth District based its analysis on a gross misapplication of the *Graves*' decision, Plaintiff now seeks leave to appeal it in this Court.

## LAW AND ARGUMENT

### *Proposition of Law I:*

#### *GOVERNMENT EMPLOYEES ARE NOT IMMUNE FROM LIABILITY FOR ACTS UNDERTAKEN IN A WILLFUL, WANTON OR RECKLESS MANNER*

As noted above, R.C. 2923.21(A)(3) makes it illegal to furnish any firearm to a person who is under eighteen years of age except for lawful hunting, sporting, or educational purposes, under the supervision or control of a responsible adult. On August 22, 2005, when Officer Keller and Deputy Kennel found a loaded shotgun, a collection of knives and swords, hallucinogenic herbs, and bottles of urine in the bedroom of an emotionally troubled 12-year-old, they had probable cause to charge his mother under this provision, among others. They also had probable cause to institute a juvenile complaint against the minor for illegal possession of that weapon. They certainly had the authority to seize the shotgun, and probably the knives, in conjunction with these charges. In failing to do so - in failing to do anything at all to address this situation - the officers were not only derelict in their duties, but they put in motion the events that culminated in the Plaintiff decedent's death less than two weeks later.

Plaintiff has maintained that the Defendant officers' acts or omissions were reckless and willful or wanton. If a jury finds that to be the case, then the officers are not immune from liability. Accord, *Pearson v. Warrensville Heights City Schs*, Cuyahoga App. No. 88527, P34, 2008 Ohio 1102. This Court has described reckless conduct as that where the actor:

“ . . . 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.

*York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, and *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104- 105, 559 N.E.2d 705, quoting 2 Restatement of the Law 2d, Torts (1965) 587, Section 500.

The evidentiary weighing that the determination of a mental state requires is uniquely suited to a jury. Generally, "the issue of whether conduct was willful or wanton should be submitted to the jury for consideration in light of the surrounding circumstances when reasonable minds might differ as to the import of the evidence." *Brockman v. Bell* (1992), 78 Ohio App. 3d 508, 517. See also, *Thompson v. Bagley*, Paulding App. No. 11-04-12, 2005 Ohio 1921 (question of whether the defendants were reckless is reserved for the jury); *Edinger v. Allen Cty. Bd. of Commrs.* (Apr. 26, 1995), Allen App. NO. 1-94-84, 1995 Ohio App. LEXIS 1974 (the issue of wanton misconduct is normally a jury question.); *Chesher v. Neyer* (C.A. 6, 2007) 477 F.3d 784 (Whether defendants were reckless and wanton and therefore liable under 2744.03(A)(6)(b) immunity exception was a question of fact reserved to the jury).

The tragedy that stole Drew from his family was readily foreseeable. But for the officers' reckless acts or omissions, his shooting would not have occurred. Undoubtedly, Sean fired the shotgun, but this confused, poorly supervised 12-year-old would never have been in a position to do so, had the Defendants done their jobs as law enforcement officers on August 22<sup>nd</sup>. The intervention of a responsible human agency between a wrongful act and an injury does not absolve a defendant from liability if, as in this case, the prior misconduct and that of the intervening agency co-operated in proximately causing the

injury. *Berdyck v. Shinde* (1993), 66 Ohio St. 3d 573, 584. An injury can have more than one proximate cause. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St. 3d 585, citing, 2 Restatement of the Law 2d, Torts (1965) 432; 1 Ohio Jury Instructions (1988) 183, Section 11.10. When two factors combine to produce damage or illness, each is a proximate cause. *Norris v. Babcock & Wilcox Co.* (1988), 48 Ohio App.3d 66, 67.

The record in this case demonstrates that the officers' recklessness – in the performance of their duties, though not the only cause of Drew Bush's tragic death, constituted the "happening or event which as a natural and continuous sequence produced the injury without which the result would have not occurred." See, *Sandinsky v. EBCO Mfg. Co.*, Franklin App. Nos. 98AP-1642, 98AP-1643, 1999 Ohio App. LEXIS 5029. The fact that Drew was shot with a firearm the officers could and should have rendered inaccessible to the shooter rendered Drew's death foreseeable. Certainly a reasonable jury could reach that conclusion.

Because Plaintiff has alleged that the officers' conduct was wanton and/or reckless, they are not entitled to sovereign immunity under R.C. 2744 et seq. More importantly, as this Court explained in *Graves*, because this case necessarily involved conduct characterized as reckless, wanton and willful, the public duty doctrine does not apply. Finally, it simply makes no sense, both in light of public policy or the sovereign immunity statute itself, that our Courts and Legislature would allow the public duty doctrine or an over-expansive reading of the immunity statute to shield rogue public employees from their wanton or reckless behaviors.

By enacting R.C. Chapter 2744, the legislature provided broad statutory immunity to political subdivisions and their employees, subject to certain exceptions. *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 452-453, 639 N.E.2d 105. One of the stated exceptions is that employees of political subdivisions are not immune from liability when their acts or omissions are “manifestly outside the scope of the employee’s employment or official responsibilities,” or are taken “with malicious purpose, in bad faith, or in a wanton or reckless manner.” R.C. 2744.03(A)(6)(a) and (b). That is all that the Plaintiff has alleged in this case. *Graves* is entirely consistent with that notion. The Fifth District’s opinion affirming summary judgment, however, is not.

To the contrary, the Fifth District has distorted this Court’s holding in *Graves* to read the sovereign immunity exception for recklessness right out of the statute. According to the Fifth District, *Graves* stands for the proposition that police officers and other public officials have no duty to perform their jobs at all, let alone competently or well. But the record reflects that these officers were specially trained to carry out their duties. Their training required them to face situations like the investigation on August 22<sup>nd</sup> in specific ways. Ignoring what they confronted and pretending that it never happened by omitting reference to it in their reports were not options.

While the *Graves* decision should have clarified an area of some confusion surrounding the “public duty rule,” it did not alter, explicitly or otherwise, Ohio’s sovereign immunity statute. Both before and after *Graves*, police officers, like other public officials, were not immune from liability where the evidence demonstrates that they performed their jobs recklessly. The Fifth District’s decision, broadening the scope of statutory immunity

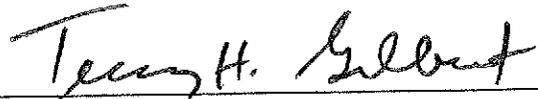
to cover reckless official misconduct is unprecedented, and is based on a misreading of the decision. This Court must take this appeal, not only to correct the Fifth District misapprehension of the law, but to provide necessary guidance to other courts, who might similarly misconstrue *Graves* in the wake of the Fifth District's decision.

## CONCLUSION

For the foregoing reasons, Petitioner-Appellant Allen Bush, Administrator for the Estate of Andrew Bush, asks this Court to accept jurisdiction over this matter because it presents substantial questions of constitutional magnitude and general public interest for review.

Respectfully submitted,

FRIEDMAN & GILBERT



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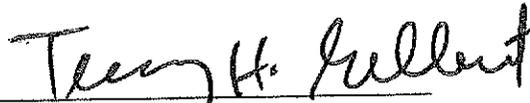
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## CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Allen Bush, Adm., Etc. has been sent by regular U.S. Mail, postage prepaid, this 2 day of June, 2010, to the following:

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## APPENDIX

COURT OF APPEALS  
ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

2010 APR 19 PM 12:13

ANNETTE SHAW  
CLERK OF COURTS  
ASHLAND, OHIO

ALLEN BUSH, Adm., Etc.

Plaintiff-Appellant

-vs-

COUNTY OF ASHLAND, et al.

Defendant-Appellees

JUDGES:

Hon. Julie A. Edwards, P.J.  
Hon. William B. Hoffman, J.  
Hon. Patricia A. Delaney, J.

Case No. 09-CA-25

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Court of  
Common Pleas Case No. 2007-CIV-160

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

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*Delaney, J.*

{¶1} Plaintiff-Appellant, Allen Bush, appeals the judgment of the Ashland County Common Pleas Court, granting summary judgment in favor of Defendants-Appellees, the County of Ashland, the Muskingum Watershed Conservancy District (MWCD), Deputy Ben Kennell, and Park Ranger Jeff Keller.

{¶2} The trial court found that Appellant failed to establish a genuine issue as to any material fact which would result in judgment in his favor on claims that Ashland County and Officers Kennell and Keller breached a duty to protect Appellant's deceased grandson, D.B., from the acts of a juvenile, S.S, which resulted in the death of D.B.

{¶3} The facts underlying the present action are as follows:

{¶4} On August 22, 2005, Ashland County Sheriff's Deputy Ben Kennell was dispatched to 979 Ashland County Road 3006 on a report of a possible residential break in at the home of Jennifer Heimbuch-Slater (Heimbuch). Heimbuch resided there with her son, S.S.

{¶5} Deputy Kennell arrived at the residence at approximately 6:30 p.m. and met with Heimbuch and her son, who were together in front of the house. Park Ranger Jeff Keller, from the MWCD, arrived at the scene and acted as a back-up officer to Deputy Kennell.

{¶6} The officers observed the outside of the residence and saw that one of the side doors to the residence was partially open. They went into the home to investigate the possible break in.

{¶7} Both officers checked each room of the house together. Inside one of the bedrooms, Ranger Keller found a shotgun lying on the floor. Upon further investigation,

the officers discovered that the gun was loaded. The officers further scanned the room and observed several knives, a sword, a baggie of a leafy substance, and several liquor bottles with a yellow substance in them. Further investigation determined that the leafy substance was not marijuana, but was in fact an herb that S.S. used to "relax" in the evening, and that the liquid in the liquor bottles was urine. These items were all contained within the bedroom of S.S., Heimbuch's twelve-year old son.

{¶8} After determining that no intruders were present in the home, the officers went back outside to discuss what they had discovered with Heimbuch. Deputy Kennell asked Heimbuch about the leafy substance first, and she stated that it was a natural herb that her son had ordered off of the internet with her permission. Deputy Kennell also questioned Heimbuch about the shotgun found in S.S.'s room. Heimbuch stated that the shotgun was used by her son for hunting. According to the officers, Heimbuch was shocked that the gun was loaded.

{¶9} Deputy Kennell informed Heimbuch that the ammunition for the shotgun should be secured separately from the gun, preferably under lock and key. Heimbuch advised that she kept the ammunition in her bedroom, separate from the gun. In the presence of the officers, she scolded S.S. for having the loaded shotgun in his bedroom. She also told the officers that she would secure the shotgun ammunition and that she was going to address the concerns about the gun and the knives in S.S.'s room. The officers then gave the shotgun to Heimbuch, having taken it out of S.S.'s room.

{¶10} Deputy Kennell additionally spoke with S.S. at the scene and asked him why he had a shotgun on the floor of his room and why there were knives on the bed.

S.S. replied that he had the weapons because he got scared at night when he would hear noises outside the bedroom window. S.S. also stated that he urinated in the liquor bottles because he was scared to leave his room and go to the bathroom in the middle of the night.

{¶11} When the officers left the residence, both the shotgun and the ammunition were in the possession of Heimbuch, not S.S.

{¶12} Two weeks later, on September 3, 2005, the Ashland County Sheriff's office was dispatched to the Heimbuch residence on report of a shooting. Deputies found the decedent, D.B., fatally wounded, having suffered a gunshot wound to his neck. The investigation concluded that S.S. had shot D.B. with a shotgun.

{¶13} On May 16, 2007, Appellant filed a complaint in the Ashland County Court of Common Pleas, asserting various claims against the County of Ashland, Deputy Ben Kennell, Ranger Jeff Keller, and MWCD. The complaint alleged five causes of action. In Count 1, Appellant asserted: "The Decedent [D.B.]'s suffering and death was proximately caused by the negligence, recklessness and deliberate indifference of the Defendants, jointly and severally, who failed in carrying out their lawful duties, which involved detecting, monitoring, protecting, and preventing [S.S.] from having unfettered access to a shotgun under circumstances which clearly warranted such precautions." Count 1 goes on to state, "The neglect and failure of the Defendants was so severe as to indicate deliberate indifference to a fundamental duty to protect the Decedent."

{¶14} Count 2 alleged that Defendants' "negligent and/or reckless, willful and wanton actions proximately caused the suffering and death of the Decedent in that Defendants did not exercise reasonable care in carrying out their lawful duties."

{¶15} Count 3 alleged a survival action under R.C. 2305.21. Count 4 asserted a loss of consortium claim. Count 5 alleged a failure to train claim against Defendant Ashland County only. Count 6 alleged a claim under R.C. 2125.02(B)(5).

{¶16} On May 14, 2008, Appellees Ashland County and Kennell filed a Motion for Summary Judgment, pursuant to Ohio Civ. R. 56(C), stating that summary judgment is appropriate because (1) the public duty rule precludes liability against Defendants; (2) Defendants are immune from Plaintiff's claims under R.C. Chapter 2744 et. seq., and (3) Plaintiff's claims fail as a matter of law because decedent's injury was not foreseeable and Defendants are not the proximate cause of decedent's injury.

{¶17} On May 30, 2008, Appellees MWCD and Keller filed a Motion for Summary Judgment as well, claiming that no genuine issue of material fact existed and that Defendants should be entitled to judgment as a matter of law.

{¶18} Appellant responded on July 15, 2008, and cited, as support, the report of their expert witness, James Meade, who specializes in police procedures, practices, and training. Mr. Meade opined that Deputy Kennell and Officer Keller failed in the performance of their duties based on "reckless indifference to existing conditions present in the home admittedly observed by these officers that created an unreasonable risk of serious physical harm or death to others including a minor. Both Deputy Kennell and Officer Keller if, for no other reason then [sic] the fact they are certified as Ohio Peace Officers and, having completed the required Basic Peace Officer Training of the Ohio Peace Officers Training Commission, Ohio Attorney Generals Office, [sic] knew or should have known circumstances existed in their presence that require immediate policy action."

{¶19} On August 15, 2008, the trial court granted Appellees' motions and dismissed the case. In so doing, the court ruled that Defendants Ashland County and MWCD were immune from liability under the Political Subdivision Tort Liability Act.

{¶20} Regarding Deputy Kennell and Ranger Keller, the trial court ruled that the Plaintiff failed to provide sufficient evidence that the officers acted recklessly when they were dispatched to the Heimbuch residence on August 22, 2005. The court determined that the opinion of Plaintiff's expert, Mr. Meade, which concluded that the officers acted recklessly was insufficient to create a material question of fact. Accordingly, the court found that "absent any objective evidence that Defendants perversely and deliberately ignored a known risk," the Plaintiff failed to meet their burden and did not provide sufficient evidence of recklessness to overcome their burden on summary judgment.

{¶21} Appellant now raises one Assignment of Error:

{¶22} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS BECAUSE THE FACTUAL UNDERPINNINGS OF THE CASE REMAIN CONTESTED AND A FACT FINDER COULD FIND FOR EITHER PARTY DEPENDING ON WHICH VERSION OF THE FACTS IT ADOPTED.

I.

{¶23} In his sole assignment of error, Appellant argues that the trial court erred in granting Appellees' motion for summary judgment.

{¶24} When reviewing the granting of a motion for summary judgment, an appellate court uses a de novo standard of review. *LaSalle Bank NA v. Tirado*, 5th Dist. No. 2009-CA-22, 2009-Ohio-2589, ¶14.

{¶25} Civil Rule 56(C) states in part:

{¶26} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

{¶27} Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶28} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶29} Appellees moved for summary judgment, arguing that they owed no duty to Appellant or the Decedent, and that they are immune from liability under R.C. 2744. Appellees also invoked the public duty rule, as set forth in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468.

{¶30} Recently, the Ohio Supreme Court held that the public duty rule, as set forth in *Sawicki*, does not apply to cases which arose after the passage of Ohio's political subdivision immunity statutes, R.C. 2744.01 et seq. *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 201.<sup>1</sup> In so doing, the Court stated that the public duty rule is incongruous with R.C. 2744.03(a)(6)(B), and accordingly, the rule does not shield an employee who is alleged to have acted recklessly or with wanton disregard. As such, the public duty rule is no longer a viable defense for Appellees in the case at bar.

{¶31} Nonetheless, we find that the trial court was correct in granting summary judgment, as Plaintiff failed to establish a duty owed by Defendants to the Plaintiff or the decedent. As the Supreme Court stated in *Graves*, repudiation of the public duty rule "does not automatically open the floodgates to excessive governmental liability." The absence of the public-duty rule will not automatically result in the creation of new duties and new causes of action. *Id.* Claimants who seek recovery in actions such as the present one based on purely statutory violations must still establish that the statute in question provides for a private right of action.

{¶32} "By way of example, in the present case, the estate must demonstrate that recovery is permissible against the officers for violating either R.C. 4507.38 or R.C. 4511.195. In other words, even though the public-duty rule does not repudiate the existence of a duty, the estate nevertheless has the burden of establishing that the officers owed Graves an actionable duty under R.C. 4507.38 and/or R.C. 4511.195. If a claimant cannot establish the existence of a duty, the political subdivision's employee is

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<sup>1</sup> This Court permitted the parties to file supplemental briefs in light of *Graves* which was decided shortly after oral argument was held in this case.

insulated from liability even in the face of allegations of wanton and reckless conduct. We believe that the public-policy objectives in adopting the public-duty rule remain safeguarded in the wake of this court's ruling." *Graves, supra*, at ¶¶24-25.

{¶33} Under Ohio law, there is no duty to "control the conduct of another person so as to prevent him from causing physical harm to another unless a special relation exists between the actor and that person which imposes a duty upon the actor to control the person's conduct." *Littleton v. Good Samaritan Hospital & Health Ctr.* (1988), 39 Ohio St.3d 86, 92 529 N.E.2d 449. A special relation exists when one person takes charge of another whom he knows or should know is likely to cause bodily harm to others if not controlled. *Id.* In the absence of this special relationship, a defendant cannot be held liable for failing to exercise control over the actions of a third party so as to protect others from harm.

{¶34} We do not find any evidence that was presented that a special relationship was forged between Deputy Kennell or Ranger Keller and S.S. A law enforcement officer does not "take charge" of another person unless the person is in custody. See *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 485 N.E.2d 287 (finding that once a suspect was released, any special relationship between the officer and suspect ended); see also *Leake v. Cain* (Colo. 1986), 720 P.2d 152 (holding that duty of police officers to a person does not extend past release from custody).

{¶35} Moreover, courts have determined that a special relationship establishing a legal duty to control cannot be established where an officer fails to take control of a third person absent a custodial situation at the time of the complained about conduct. See *Mills v. City of Roanoke* (2007) 518 F. Supp.2d 815 (holding that no duty owed to

estate of shooting victim by police officer who failed to arrest suspect for firearm possession two months prior to shooting); see also *Dore v. City of Fairbanks* (Alaska 2001), 31 P.3d 788 (finding no duty in tort to control suspect who killed childrens' mother and himself in a murder-suicide).

{¶36} "In our society it is foreseeable that crimes may occur and that the criminals perpetrating them may cause harm. Thus, in a general sense, it is foreseeable that anyone whose conduct may in any way facilitate the criminal in committing the crime has played some part in the resulting harm. But mere 'facilitation' of an unintended adverse result, where intervening intentional criminality of another person is the harm-producing force, does not cause the harm so as to support liability for it." *McAlpine v. Multnomah County* (Or. 1994), 131 Or.App. 136, 883 P.2d 869. Moreover, "[a] public official cannot be held civilly liable for violating a duty owed to the public at large because it is not in society's best interest to subject public officials to potential liability for every action undertaken." *Burdette v. Marks* (Va.1992), 244 Va. 309, 312, 421 S.E.2d 419.

{¶37} As such, we find that a law enforcement officer does not owe a general duty to protect an individual from the crimes of a third party absent a custodial situation wherein the officer takes charge of the party through seizure or arrest. In the present case, the officers did not take S.S. into custody, as he had not committed any crime; therefore no special relationship can be established that would impose a duty on Deputy Kennell or Ranger Keller to protect D.B. from the potential future actions of S.S.

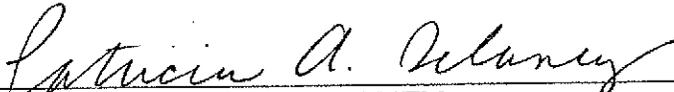
{¶38} Absent the establishment of a duty, Plaintiff's claims must fail. The trial court properly granted summary judgment.

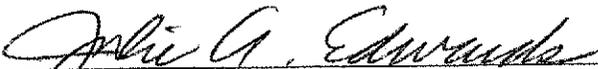
{¶39} The judgment of the Ashland County Court of Common Pleas is affirmed.

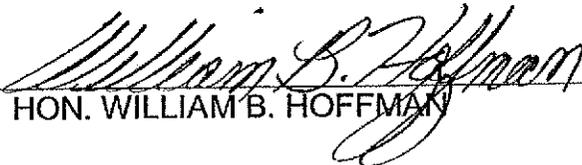
By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

  
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HON. PATRICIA A. DELANEY

  
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HON. JULIE A. EDWARDS

  
\_\_\_\_\_  
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

2010 APR 19 PM 12:13

FIFTH APPELLATE DISTRICT

ANNETTE SHAW  
CLERK OF COURTS  
ASHLAND, OHIO

ALLEN BUSH, Adm., Etc.

Plaintiff-Appellant

-vs-

COUNTY OF ASHLAND, et. al.,

Defendant-Appellees

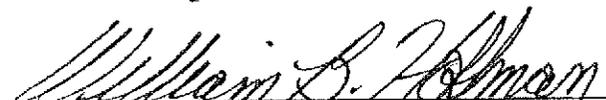
JUDGMENT ENTRY

Case No. 09-CA-25

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas is affirmed. Costs assessed to Appellant

  
HON. PATRICIA A. DELANEY

  
HON. JULIE A. EDWARDS

  
HON. WILLIAM B. HOFFMAN

JM # CA-1