ORIGINAL

IN THE SUPREME COURT OF OHIO

Allen Bush, Adm., Etc.,	:	
	:	
Plaintiffs-Appellants,	:	Supreme Court Case No. 2010-0980
	:	
vs.	:	On Appeal from the Ashland County
	:	Court of Appeals
County of Ashland, et. al.	:	Fifth Appellate District
	:	
Defendants-Appellees	:	Court of Appeals Case No. 09-CA-25

APPELLEES COUNTY OF ASHLAND AND DEPUTY BEN KENNELL'S MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

David G. Jennings (0040487)
E-Mail: davidjennings@isaacbrant.com
Andrew N. Yosowitz (0075306)
E-Mail: any@isaacbrant.com
Isaac, Brant, Ledman and Teetor, LLP
250 E. Broad Street, Suite 900
Columbus, Ohio 43215
Tel: (614) 221-2121; Fax (614)-365-9516
Attorneys for Appellees Ashland County, Ohio and Deputy Ben Kennell

Nick C. Tomino
Tomino and Latchney, LLC, LPA
803 East Washington Street, Suite 200
Medina, Ohio 44256

Terry H. Gilbert (0021948)
E-Mail: tgilbert@f-glaw.com
Gordon S. Friedman (0021946)
E-Mail: gorlaw@f-glaw.com
Friedman and Gilbert
1370 Ontario Street, Suite 600
Cleveland, Ohio 44113-1752
Tel: (216) 241-1430; Fax (216) 621-0427
Attorneys for Plaintiffs-Appellants

FILED
JUL 02 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

I. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 3

II. STATEMENT OF THE CASE AND FACTS 5

III. ARGUMENT 8

Restated Proposition of Law No. 1: No individual, including a public employee, can be liable for a tort without the existence of a legal duty.

IV. CONCLUSION 17

V. PROOF OF SERVICE 18

EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTERESTAND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellants' explanation of why this case is of public or great general interest is not convincing. Appellants have said, in essence: the appellate court failed to follow your clear precedent. This does not warrant jurisdiction. Moreover, the appellate court did in fact follow your precedent. Appellants have misstated the Court of Appeals' opinion with respect to its application of *Estate of Graves v. City of Circleville*, 124 Ohio St.3d 339, 2010 Ohio 168, 922 N.E.2d 201 in an effort to claim that the court below failed to follow precedent. In holding that Appellees owed no legal duty to Appellant's decedent, the Fifth District Court of Appeals did not make new law, it simply applied the correct law to determinative facts. Therefore, this is not a case of public or great general interest.

Appellants seek recovery for damages arising from the death of their son, Drew Bush, who was killed by a friend, Sean Slater, in Sean's home. Appellants contend that the Appellees did not properly investigate Sean Slater's possession of a shotgun purchased for deer hunting while Appellees were investigating an unrelated complaint of a possible break-in at the Slater residence two weeks before Sean killed Drew. In sum and substance, Appellants blame Appellees for not foreseeing the death of their son by the criminal act of a third party, Sean Slater.

The Court of Appeal's decision in this case hinged on two well settled propositions of law: (1) a tort requires a duty, and (2) 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..." *Littleton v. Good Samaritan Hospital & Health Ctr.* (1988), 39 Ohio St.3d 86, 92, 529 N.E.2d 449, citing *Restatement of the Law 2d, Torts* (1965)

122, Section 315. Both of these issues have been decided and upheld by this Court multiple times and there is no need to revisit those issues in this case.

In *Littleton*, this Court held that a special relation exists only when one takes charge of a person whom he knows or should know is likely to cause bodily harm to others if not controlled. *Id.*; Restatement, *supra*, at 129, Section 319; see Restatement, *supra*, at 123, Section 315, Comment c. The Court of Appeals found—and Appellants do not dispute—that there was no special relationship between Appellants' decedent and Sean Slater. *Bush v. Ashland*, 5th Dist. No. 09-CA-25, 2010 Ohio 1732, at ¶¶ 33-35. As such, Appellees owed no legal duty to Appellants' decedent. It is axiomatic that there is no tort liability without a legal duty. Even without the ruling that no duty existed under the facts of this case, this case is a straightforward application of immunity as Appellees were not wanton or reckless as a matter of law.[1]

Appellants argue that the Fifth District's decision stands for the proposition that political subdivision immunity now shields a public employee from even reckless conduct, as well as mere negligence. (Appellant's Memorandum in Support of Jurisdiction, p.2). Appellants' statement, aside from being a gross mischaracterization of the Fifth District's ruling, exposes the flaw in their argument. Recklessness does not define or create a legal duty and merely alleging reckless conduct does not entitle a claimant to a trial. Recklessness is a level of culpability relevant to a determination of whether a duty has been breached by a public employee. See R.C.

---

[1] In its findings of facts, the trial court stated, "In the hour the Defendants spent at Ms. Heimbuch-Slater's house, Defendants questioned Ms. Heimbuch-Slater about the gun, instructed Ms. Heimbuch-Slater on proper storage of the gun and its ammunition, unloaded the gun, and returned the gun to Ms. Heimbuch-Slater's possession. During the course of Defendants' conversation with Ms. Heimbuch-Slater, she appeared shocked that the gun was loaded and assured the Defendants that the ammunition was normally secured in her bedroom. Moreover, Ms. Heimbuch-Slater scolded her son in front of the officers for keeping the loaded gun in his bedroom. Based on these circumstances, it is not unreasonable to conclude that Sean's possession of the loaded gun was an isolated incident unlikely to repeat tself. The Court cannot find that the Defendants recklessly acted outside the bounds of their discretion or demonstrated a perverse disregard for a known risk." Tr. Ct. Judgment Entry, p. 8; See also *O'toole v. Denihan*, 118 Ohio St.3d 374, 2008 Ohio 2574, 889 N.E.2d 505.

2744.03(A)(6)(b). Before that determination is reached, however, a legal duty must be shown: "If a claimant cannot establish the existence of a duty, the political subdivision's employee is insulated from liability even in the face of allegations of wanton and reckless conduct." *Graves* at ¶¶ 25. Further, contrary to Appellant's argument, the Fifth District's decision was not an application of the public duty rule. Indeed, the Fifth District's expressly stated that the public duty rule was inapplicable in light of *Graves*. *See Bush*, at ¶ 30. Instead, the Fifth District's opinion was an application of well established conventional tort principles, namely, that an actionable tort requires a duty. *See Bush*, at ¶¶ 31-38.

For many years, our tort law has required that Plaintiff establish a duty for actions—like the instant case—based on failure to act or failure to control the conduct of a third person. See *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 2002 Ohio 4210, 773 N.E.2d 1018, at ¶ 38; *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 92, 529 N.E.2d 449; *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 39, 521 N.E.2d 780; see, also, 2 Restatement of the Law 2d, Torts (1965) 116-122, Sections 314-315. It is undisputed that no relationship existed between Appellees and Appellants decedent in this case that would give rise to a duty. As such, Appellants present no compelling reason for this Court to expend its scarce judicial resources to review his case. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE

Following discovery, Appellees moved for summary judgment as to all of Appellant's claims. Appellees Muskingum Watershed Conservancy District (MWCD) and Jeff Keller also moved for summary judgment. Plaintiff filed a brief in opposition. On June 26, 2009, the trial

court issued its Judgment Entry granting summary judgment to all Defendants. The trial court granted immunity to all Appellees, specifically holding that all individual Appellees were immune because their conduct was not reckless or wanton as a matter of law. The trial court also granted summary judgment to Appellee Ashland County. Appellants did not challenge—and do not challenge here—the trial court's finding that Ashland County and the Muskingum Watershed Conservancy District were entitled to immunity under R.C. 2744.02.

On appeal, the Fifth District Court of Appeals affirmed the trial court's granting of summary judgment. The Court of Appeals found that, under well established precedent from this Court, Appellees owed no duty of care to decedent and, as such, could not be liable in tort. Further, the Court of Appeals did not disturb the trial court's conclusion that, even if a duty was owed, Appellees were entitled to immunity as a matter of law because neither Deputy Kennell nor Officer Keller acted recklessly or wantonly.

B. STATEMENT OF FACTS

On or about 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. 979 Ashland County Road 3006 is the home of Jennifer Heimbuch.[2] Upon arrival, Kennell met with Ms. Heimbuch and her son, Sean Slater, who were together in front of the house.

Kennell began his investigation of the possible break-in by walking around the exterior of the house. He noticed that one of the side doors was partially open. At this point, Officer Jeff Keller ("Keller") from the Muskingum Watershed Conservancy District arrived as a backup officer. Together, Kennell and Keller went into the house to investigate the possible break-in and to ensure that nobody was inside the house.

[2] Jennifer Heimbuch also goes by the name Jennifer Slater or Jennifer Heimbuch-Slater.

Both officers checked each room of the house together. Inside one of the bedrooms, Keller found a shotgun laying on the floor. After completely clearing the house, Kennell and Keller returned to the room where Keller had seen the shotgun. Keller informed Kennell that the shotgun was loaded. They further investigated the room and also found some knives and a sword, a substance they thought might be marijuana and some alcohol bottles with a yellowish substance in them. Further investigation determined that the aforementioned items were found in the bedroom of Ms. Heimbuch's son, Sean Slater.

To follow up on what they saw in the room, Kennell went outside and started questioning Ms. Heimbuch about the items he had seen. First, Kennell asked Ms. Heimbuch about the suspected marijuana found in the room, and she stated that the substance was not marijuana. Rather, it was a natural herb that her son, Sean Slater, used to relax. Kennell later inspected the substance himself and determined it was not marijuana. Next, Kennell questioned Ms. Heimbuch about the loaded shotgun in the room. There is no dispute that Ms. Heimbuch indicated that the shotgun was used by her son for lawful hunting.[3] Ms. Heimbuch was surprised when told that the gun was loaded. Ms. Heimbuch told Kennell that she had no idea that the gun was loaded. In the conversation that followed, Deputy Kennell advised Ms. Heimbuch that the ammunition for the shotgun should be secured separately from the gun under lock and key and that the knives should be moved out of Sean's room. Ms. Heimbuch advised that she kept the ammunition in her bedroom, separate from the shotgun, and that Sean must have taken it out of her room. In front of the officers, Ms. Heimbuch scolded Sean about having a shotgun loaded in his bedroom.

Both Kennell and Keller determined that no burglary or breaking and entering crime had been committed at the Heimbuch residence. As stated above, before leaving the residence,

[3] Under R.C. 2923.21, it is lawful to furnish a firearm to a minor for hunting.

Kennell and Keller spoke with Ms. Heimbuch and Sean Slater regarding the items found in Sean's bedroom. Officer Keller unloaded the shotgun and gave custody and control over it to Ms. Heimbuch. Ms. Heimbuch told Kennell and Keller that she was going to secure the shotgun ammunition. Kennell felt that he had brought his concerns about the shotgun and knives to Ms. Heimbuch's attention, and she was going to address those concerns. Further, Deputy Kennell did not see any writings or papers that indicated that Sean Slater intended to harm any person with the gun. The shotgun was given to Ms. Heimbuch and was no longer in the possession of Sean Slater. Neither Kennell nor Keller felt that any crime had been committed by Ms. Heimbuch. Kennell left the Heimbuch house approximately one hour after he arrived. When Deputy Kennell left the residence, neither the shotgun nor the ammunition was in the possession of Sean Slater. His mother had possession and control of both.

Nearly two weeks later, on September 3, 2005, the Ashland County Sheriff's Office was dispatched to the Heimbuch home on the report of a shooting. Deputies found the decedent, Drew Bush, fatally wounded. The investigation determined that Sean Slater had shot Drew Bush with a shotgun.

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITION OF LAW

Restated Proposition of Law No. 1: No individual, including a public employee, can be liable for a tort without the existence of a legal duty.

A. APPELLEES OWED NO LEGAL DUTY TO PLAINTIFF'S DECEDENT

It is well settled that the elements of a tort claim are (1) the existence of a legal duty, (2) the defendant's breach of that duty, and (3) injury that is the proximate cause of the defendant's breach. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. Without a legal duty, there can be no actionable tort claim. In *Estate of Graves v. City of Circleville*, 124 Ohio St.3d 339, 2010 Ohio 168, 922 N.E.2d 201, the Ohio Supreme Court specifically stated that the

abrogation of the public-duty rule does *not* obviate the requirement of a plaintiff to show the existence of an actionable duty:

> Finally, it bears emphasis that like our rejection of the public-duty rule's application to suits in the Court of Claims in *Wallace*, our rejection of the doctrine in this case 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. 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.
>
> 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 insulated from liability even in the face of allegations of wanton and reckless conduct.*

Id. at ¶¶ 24-25 (internal quotations and citations omitted) (emphasis added).

In this case, there was no actionable duty for Appellees to prevent the harm caused by a third person, Sean Slater. In *Littleton v. Good Samaritan Hospital & Health Ctr.* (1988), 39 Ohio St.3d 86, 529 N.E.2d 449, the Ohio Supreme Court stated that "there is no duty under Ohio law 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." *Id.* at 92, citing *Restatement of the Law 2d, Torts* (1965) 122, Section 315. A special relation exists when one takes charge of a person whom he knows or should know is likely to cause bodily harm to others if not controlled. *Id.*; Restatement, *supra*, at 129, Section 319; see Restatement, supra, at 123, Section 315, Comment c. In the absence of a special relationship a defendant is not liable for failing, either intentionally or inadvertently, to exercise control over the actions of a third party so as to protect others from harm.

It is evident that no special relationship was forged between Appellees and Sean Slater because Appellees did not 'take charge' of Sean Slater. Courts from Ohio and other states have held that a law enforcement officer does not 'take charge' of an individual unless he/she is in custody. For example, in *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 485 N.E.2d 287, Clemets was stopped by Officer Thomas Heston for erratic driving and failing to stop at a stop sign. *Id.* at 134. Once stopped, Officer Heston determined that Clemets was intoxicated. *Id.* Officer Heston also saw a 20-gauge shotgun and several shotgun shells in Clemets vehicle. *Id.* Clemets was arrested for operating a motor vehicle while under the influence of alcohol and taken to the police station for the purpose of administering an intoxilizer test which Clemets refused. *Id.* After completing the required paperwork and issuing him a citation, the arresting officer drove Clemets back to his car, leaving Clemets in possession of the shotgun and ammunition. *Id.* After the officer left, Clemets shot himself. *Id.* Clemets' estate filed a wrongful death lawsuit against Officer Hester. *Id.* The Court of Appeals affirmed the dismissal of the case. The Court found that custody, under the Restatement, requires a Fourth Amendment seizure. *Id.* 137, 138. Since Clemets, at the time of his suicide, was not in custody, Hester owed no duty to Clemets: "Once released (*i.e., once Clemets was free to leave*), any special relationship between them [Clemets and Hester] ended. Heston thereafter owed no further duty to Clemets." *Id.* at 138.

Similarly, in *Leake v. Cain*, (Colo. 1986), 720 P.2d 152, police officers broke up an outdoor party following a complaint by neighbors. *Id.* at 153. One of the teenagers, Ralph Crowe, at the party became disruptive and was handcuffed and detained by officers. *Id.* Eddie Crowe, Ralph Crowe's younger brother (seventeen years old) asked that Ralph be released to him and that he would drive Ralph home. *Id.* Eddie Crowe appeared sober and the officers

agreed to the request. *Id.* Unfortunately, Eddie Crowe did not drive Ralph Crowe home. Eddie Crowe allowed Ralph to drive and they went to a new party. *Id.* At the site of the new party, the car driven by Ralph Crowe struck six persons, killing two of them. *Id.* Ralph Crowe's blood alcohol level was .20. *Id.* The estates of the decedents filed a wrongful death action alleging that police officers should have arrested Ralph Crowe because they had reason to believe he was intoxicated and, also, that the police officers were negligent in releasing Ralph Crowe to his younger brother. *Id.* The officers asserted that they were not liable because of the public-duty rule. The Colorado Supreme Court, rejected this defense and abolished the public-duty rule in Colorado. *Id.* at 155-160. Nevertheless, the Court granted summary judgment to the officers because there was no duty owed to the decedents under conventional tort principles. The Court followed the same principles that the Ohio Supreme Court, see *Littleton, supra*, has followed when determining whether a duty of care exists to prevent a third person from causing harm. *Id.* at 160-161. The Court found that the officers only owed a duty while Ralph Crowe was in custody:

> While the officers obviously had a duty to prevent Ralph Crowe from harming others while he was handcuffed at the party, the officer discharged their duty by restraining Crowe until he calmed down. The officers' duty, as it related to the conduct of Ralph Crowe, began and ended at the party. It did not extend to the period after Ralph Crowe was released to his younger brother, who assured officers that he would drive Ralph Crowe home. The officers did not assume a duty to the respondents' decedents, induce reliance, or create a peril or change the nature of an already existing risk.

Id. at 161. A number of other cases from various states have also concluded that, for law enforcement officers, there is no special relation sufficient for establishing a legal duty to control the acts of a third person absent the officer taking custody of the third person. *See Dore v. City of Fairbanks* (Alaska 2001), 31 P.3d 788 (police did not take charge of the father; thus they had no tort duty to control him and owed no duty for failing to arrest father who killed childrens'

mother and himself in a murder-suicide); *Mills v. City of Roanoake* (2007), 518 F.Supp.2d 815 (no state law duty owed to estate of shooting victim by police officer who did not arrest suspect for firearm possession two months prior to shooting. There was no special relationship since officer did not take custody of suspect.); *Gonzales v. City of Bozeman* (Mont. 2009), 217 P.3d 487, 2009 MT 277 (officers who had surrounded a convenience store while robbery was in progress could not be held liable for failing to protect the store clerk from the rape because, as a matter of law, the responding officers did not have custody or control of either the robber or the store clerk at the time the rape occurred, and they did not gain control of the robber until he exited the store and was placed under arrest). Thus, a law enforcement officer owes no duty to protect an individual from the crimes of a third party unless the officer takes charge of the third party through seizure, arrest or other form of custody. In this case, there is no dispute that Appellees did not take Sean Slater into custody and, as such, there was no special relation which imposed a duty on Appellees to protect Drew Bush. Further, the incident in this case was two weeks later which gives further support that there was no duty owed to Drew Bush, the existence of whom was not even known by Appellees.

In sum, *Estate of Graves v. City of Circleville* abrogated the public duty rule, but did not abrogate a plaintiff's fundamental responsibility to show an actionable duty under conventional tort principles. *Graves* and the cases cited above, all reinforce Appellees' argument that they owed no duty to Drew Bush. From *Graves*, it is not even clear as a matter of law that such duties are created by very specific statutes requiring the removal of license plates and the impounding of cars.[4][5] As discussed above, there is no special relation between Appellees and Sean Slater

[4] In *Graves*, the Supreme Court specifically stated that it was not ruling on whether there was an actionable duty presented by the facts. The question of duty was left for the trial court to determine. *Graves*, 2010 Ohio 168, fn. 6.
[5] The lack of a special relation notwithstanding, Plaintiff has identified no statute or law which could even arguably impose a duty in this case.

because Appellees did not have custody of Sean Slater. Therefore, Appellees had no duty to prevent Sean Slater from causing physical harm to Drew Bush, and the Court of Appeals correctly ruled as such.

The crux of Appellants argument is that by simply alleging wanton and/or reckless conduct, regardless of the existence of a duty, Appellees should be denied immunity: "Because Plaintiff has alleged that the officers' conduct was wanton and/or reckless, they are not entitled to immunity under R.C. 2744 et. seq." (Appellant's Memorandum in Support of Jurisdiction, p.9). Appellants' statement of law is completely wrong, and it directly contradicts this Court's statement in *Graves*: "If a claimant cannot establish the existence of a duty, the political subdivision's employee is insulated from liability *even in the face of allegations of wanton and reckless conduct*." *Graves*, at ¶ 25 (emphasis added). As this Court has directed, time and again, it is only once the existence of a duty is found that the level of culpability necessary to establish a breach of the duty becomes relevant. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265; *DiGildo v. Caponi* (1969), 18 Ohio St.2d 125, 127, 247 N.E.2d 732; *Gedeon v. East Ohio Gas Co.* (1934), 128 Ohio St. 335, 338, 190 N.E. 924; *Bellefontaine Ry. Co. v. Snyder* (1874), 24 Ohio St. 670, 676. Wantonness and recklessness are levels of culpability that relate to whether a public employee is entitled to immunity under R.C. Chapter 2744. *See Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 771, 663 N.E.2d 384 ("The terms "willful," "wanton," and "reckless" connote a mental state of greater **culpability** than negligence.") (emphasis added), citing *Brockman v. Bell* (1992), 78 Ohio App.3d 508, 515-16, 605 N.E.2d 445. *See also Lindsay v. City of Dayton* (Sept. 18, 1989), 2nd Dist. No. 11302 ("Liability of the employee under R.C. 2744.03(A)(6) presupposes plaintiff can establish a legal duty of the defendant to the plaintiff."); *Abdalla v. Olexia* (Oct. 6, 1999), 7th Dist. No. 97-JE-43, 1999 Ohio App. LEXIS 4806 ("When

looking at [Defendants'] supposed liability [under R.C. 2744.03(A)(6)(b)]...it is axiomatic that no liability for any injury exists without a duty which exists and breach of that duty which proximately causes damage to a given defendant."); *Gentile v. Mill Creek Metro. Park Dist.* (June 20, 2000), 7th Dist. No 98 C.A. 254 (holding that a park officer was not liable under R.C. 2744.03(A)(6)(b) for plaintiff's injuries sustained in an assault because plaintiff failed to show that officer owed any duty to plaintiff.). It is axiomatic that "plaintiffs seeking redress against a governmental entity [must] establish the requisite elements of the alleged tortious conduct. This includes the existence of a legal duty." *Ruwe v. Bd. Of Cty. Com'rs. of Hamilton Cty.* (1986), 21 Ohio St.3d 80, 82. Appellants did not establish the existence of a legal duty in this case. Therefore, the Fifth District Court of Appeals correctly affirmed Appellees' Motions for Summary Judgment.

B. EVEN ASSUMING *ARGUENDO* THERE WAS A DUTY, APPELLEES ARE ENTITLED TO IMMUNITY PER THE RULING OF THE TRIAL COURT.

Even if there were an actionable duty, summary judgment is still appropriate because Appellees are entitled to immunity. R.C. § 2744(A)(6)(b) removes the cloak of immunity only if an employee of a political subdivision acts with malicious purpose, in bad faith, or in a wanton or reckless manner. Appellants do not argue—and there are no facts to support such an argument—that Appellees were acting with a malicious purpose or in bad faith.[6] Assuming a legal duty exists, the levels of culpability at issue in this case are wantonness and recklessness. R.C. § 2744.03(A)(6)(b).

---

[6] "In order for a malicious purpose to exist, there must be ill will or enmity of some sort." *Shadoan v. Summit Cty. Children Serv. Bd.*, 9th Dist. No. 21486, 2003-Ohio-5775, at ¶ 12. Malice includes "the willful and intentional design to do injury, or the intention or desire to harm another * * * through conduct which is unlawful or unjustified." (Quotations omitted) *Id.* Bad faith "embraces more than a simple misjudgment or negligence." *Id.* " 'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, [or] breach of a known duty through some ulterior motive or ill will[.]" ' (Alterations in original). *Id.* citing *Jackson v. Butler Cty. Bd. of Cty. Commsrs.* (1991), 76 Ohio App.3d 448, 454.

One acts wantonly when there is a complete failure to exercise any care whatsoever. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 1994 Ohio 368, 639 N.E.2d 231. Importantly, "mere negligence will not be construed as wanton misconduct in the absence of evidence establishing a disposition of perversity on the part of the tortfeasor [.]" *Shadoan* at ¶ 13, citing *Fabrey,* 70 Ohio St.3d at 356, 639 N.E.2d 31.

One acts recklessly if: "[H]e 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." *Id.*

The standard for showing willful, wanton or reckless conduct is high. *Fabrey* at 356. As a result, summary judgment is appropriate in instances where the alleged tortfeasor's actions show "that he did not intend to cause any harm * * *, did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose.'" *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772. Moreover, mere inferences that an officer's conduct "rose to the crest of reckless, willful, or malicious conduct or that they acted in bad faith * * * are insufficient to defeat summary judgment" based upon statutory immunity. *Miskinis v. Chester Twp. Park Dist.* (1996), 112 Ohio App.3d 466, 470-471.

In *O'toole v. Denihan*, 118 Ohio St.3d 374, 2008 Ohio 2574, 889 N.E.2d 505, this Court specifically reaffirmed that showing recklessness is subject to a high standard: "[R]ecklessness is a perverse disregard of a known risk." *Id.*, at ¶ 73, citing *Fabrey*, supra. In finding that a social worker and her supervisor were entitled to immunity under R.C. § 2744.03, this Court stated that recklessness requires as finding that "the actor must be conscious that his conduct

will in all probability result in injury." *Id.*, at ¶ 74. Moreover, the individual employee will be entitled to summary judgment unless the conduct demonstrates a "disposition to perversity." *Id.* at ¶ 75. The Court stated in regards to the supervisor's liability:

> Although it is tempting to employ hindsight to blame [the supervisor], as he himself did on the day he learned of Sydney's death, there is no evidence that [the supervisor] consciously left Sydney in the home with the knowledge that it was substantially certain that she would be further injured.

Id., ¶ 78. In the instant case, there is no evidence that Appellees consciously left the firearm at the home with the knowledge that anyone, let alone Drew Bush, would be injured.

Contrary to Plaintiffs' assertions, Appellees' actions can hardly be characterized as a failure to exercise any care. The trial court's reasoned analysis shows that proof of recklessness is completely insufficient and lacking in this case as a matter of law:

> In the hour the Defendants spent at Ms. Heimbuch-Slater's house, Defendants questioned Ms. Heimbuch-Slater about the gun, instructed Ms. Heimbuch-Slater on proper storage of the gun and its ammunition, unloaded the gun, and returned the gun to Ms. Heimbuch-Slater's possession. During the course of Defendants' conversation with Ms. Heimbuch-Slater, she appeared shocked that the gun was loaded and assured the Defendants that the ammunition was normally secured in her bedroom. Moreover, Ms. Heimbuch-Slater scolded her son in front of the officers for keeping the loaded gun in his bedroom. Based on these circumstances, it is not unreasonable to conclude that Sean's possession of the loaded gun was an isolated incident unlikely to repeat itself. The Court cannot find that the Defendants recklessly acted outside the bounds of their discretion or demonstrated a perverse disregard for a known risk.

Tr. Ct. Judgment Entry, p. 8. The Court of Appeals did not disturb the factual findings of the trial court and there is no reason for this Court to do so either.

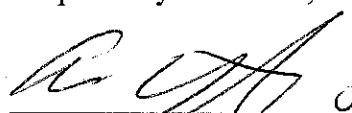
Although Drew Bush's death is very tragic, there is nothing that would indicate that Appellees acted with an intent to harm, with an ulterior motive or ill will, or that they intentionally violated any known duty. There is no evidence that Appellees knew that Sean Slater would shoot Drew Bush nearly two weeks later. Even presuming that Appellees made an

error in judgment and were negligent, which Appellees deny, that would be insufficient, as a matter of law, to rebut the presumption of immunity. Appellees actions in this case do not show a reckless disregard for human life as Appellants' suggest. Their actions show that they were concerned about the items in Sean Slater's room, in fact, took actions to address those concerns. Appellants contend that Appellees should have made different choices. Appellants' retrospective analysis is exactly why police decision making is entitled to discretion: "We do not think that the public interest is served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman's discretionary professional duty. Such discretion is no discretion at all." *Shore v. Town of Stonington* (1982), 444 A.2d 1379, 1384; *O'Toole, supra.* Since Appellees did not exercise their discretion in this case maliciously, in bad faith, or in a wanton or reckless manner, they are entitled to immunity under R.C. § 2744(A)(6) even if Appellants could show an actionable duty—which they cannot.

CONCLUSION

For the reason discussed herein, the Fifth District Court of Appeals did not err in affirming Appellees Motions for Summary Judgment. Appellees request that this Court deny jurisdiction in this case because there are no issues of great public interest and there is no substantial constitutional question. Further, the trial court and Court of Appeals decided this case correctly for two independent and mutually exclusive reasons that compelled dismissal of this case as a matter of law.

Respectfully submitted,



David G. Jennings (0040487)
E-Mail: davidjennings@isaacbrant.com
Andrew N. Yosowitz (0075306)
E-Mail: any@isaacbrant.com
Isaac, Brant, Ledman and Teetor, LLP
250 E. Broad Street, Suite 900
Columbus, Ohio 43215
Tel: (614) 221-2121; Fax (614)-365-9516
Attorneys for Appellees Ashland County, Ohio and Deputy Ben Kennell

PROOF OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular U.S. Mail, postage prepaid, this 2nd day of July, 2009 upon the following:

Terry H. Gilbert (0021948)
Gordon S. Friedman (0021946)
Friedman and Gilbert
1370 Ontario Street, Suite 600
Cleveland, Ohio 44113-1752
Attorneys for Plaintiffs-Appellants

Nick C. Tomino
Tomino and Latchney, LLC, LPA
803 East Washington Street, Suite 200
Medina, Ohio 44256

David G. Jennings (0040487)
Andrew N. Yosowitz (0075306)
Attorneys for Appellees Ashland County, Ohio and Deputy Ben Kennell