

ORIGINAL

IN THE SUPREME COURT OF OHIO

PAMELA ARGABRITE, : Case no. **15-0348**  
 Plaintiff-Appellant : On Appeal from the Montgomery County  
 : Court of Appeals, Second Appellate  
 : District  
 v. :  
 : Appellate Case No. 2014 CA 26220  
 JIM NEER, Individual and in his official :  
 Capacity Miami Township Police :  
 Department, et al, :  
 :  
 Defendants-Appellees :

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT  
 PAMELA ARGABRITE

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Joshua R. Schierloh, Esq (0078325)  
 Surdyk, Dowd & Turner Co., LPA  
 8163 Old Yankee Street, Suite C  
 Dayton, OH 45458  
 (937) 222-2333  
[jschierloh@sdtlawyers.com](mailto:jschierloh@sdtlawyers.com)  
 Attorney for Defendant-Appellee  
 Jim Neer, Gregory Stites

Kenneth J. Ignozzi, Esq. (0055431)  
 Dyer, Garofalo, Mann, & Schultz  
 131 N. Ludlow St., Suite 1400  
 Dayton, OH 45402  
 (937) 223-8888  
[kignozzi@dgmsslaw.com](mailto:kignozzi@dgmsslaw.com)  
 Attorney for Plaintiff-Appellant  
 Pamela Argabrite

Liza A. Luebke, Esq. (0081315)  
 Montgomery Cty Asst Prosecutor  
 301 West Third Street  
 P.O. Box 972  
 Dayton, OH 45422  
 (937) 225-5781  
[luebkel@mcoho.org](mailto:luebkel@mcoho.org)  
 Attorney for Defendant-Appellee  
 Anthony Ball, Daniel Adkins

Lawrence E. Barbieri, Esq. (0027106)  
 Schroeder, Maundrell, Barbieri & Powers  
 5300 Socialville Foster Rd., Suite 200  
 Mason, OH 45040  
 (513) 583-4200  
[lbarbieri@smbplaw.com](mailto:lbarbieri@smbplaw.com)  
 Attorney for Defendant-Appellee  
 John DiPietro

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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST**

High speed automobile chases by police officers have become a hot issue that has sparked nationwide controversy, including in Ohio. Yet, the Ohio Supreme Court has never addressed police officer civil liability for these chases. Instead, Ohio appellate courts have instituted and followed a “no proximate cause” rule, imposed in *Lewis v. Bland* when considering imposing liability on police officers during high speed chases. *Lewis v. Bland*, 75 Ohio App.3d 453, 456 (1991); *Whitfield v. City of Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, ¶ 59. According to the “no proximate cause” rule, an officer cannot be the proximate cause of injuries to innocent third-parties stemming from a police pursuit unless the officer’s conduct was “extreme or outrageous.” *Id.* This standard of liability, exceeds ORC 2744.03(A)(6)(b), which provides that employees of political subdivisions should be liable for acts that are committed in a wanton or reckless manner. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, ¶ 39. Thus, in the context of police pursuits, the Political Subdivision Tort Liability Act is inapplicable, and the court mandated “extreme and outrageous” standard is the true test of immunity and liability. In sum, in order to prevail against a pursuing officer, a plaintiff must prove that the officer’s conduct in pursuing the fleeing suspect surpassed “reckless and/or wanton” and amounted to “extreme or outrageous.” *Bland, supra; Whitfield, supra.*

First, this case is of great general or public interest because it is a case of first-impression before the Ohio Supreme Court. While Ohio’s appellate courts have continued to enforce the “extreme or outrageous” standard, the Supreme Court has not taken the opportunity to affirm whether or not this standard is proper. *Stare decisis* provides stability in the legal system by requiring consistency and predictability in the application of the law. *Westfield Ins. Co. v.*

*Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶1. Indeed, continuity and predictability are essential concepts in American jurisprudence. *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St. 3d 70, 2006-Ohio-1926, ¶26. Consistency in the law is necessary to thwart the arbitrary administration of justice and ensuring a clear rule of law upon which citizens can rely in managing their affairs. *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶133. As the ultimate legal authority in the state, this Honorable Court has an opportunity to clarify the proper standard for police pursuit liability in the State of Ohio.

Second, this case presents an important Constitutional issue. “The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives....” OH CONST Art. II, § 1. “The question of the wisdom of an act resides solely in the judgment of the legislature, provided always that it is within their constitutional right to enact; if the law complained of is legislative, it is the duty of the legislature to make the necessary changes. If, however, the law complained of is judicial, then it is up to the judiciary to make the necessary changes.” *Brinkman v. Drolesbaugh*, 97 Ohio St. 171 (1918). Here, the Ohio Legislature enacted O.R.C. 2744.01 et seq., The Political Subdivision Tort Liability Act, in order to set a firm and consistent standard for providing immunity to employees of a political subdivision, such as police officers. When it enacted this law, the legislature spoke and created a mandated legislative standard. The appellate courts, in creating the “extreme or outrageous” standard usurped the legislature by creating a heightened immunity standard, which the legislature expressly did not include in O.R.C. 2744.03. As stated by Judge Froelich of the Second District Court of Appeals, “If the legislature desired a different standard for immunity when police officers are pursuing fleeing suspects in their vehicles, the legislature could have expressly created such an exception.” *Argabrite v. Neer*, 2015-Ohio-125, ¶ 38 (Froelich,

dissenting). Because the legislature did not create such an exception, the appellate courts acted improperly by taking the place of the legislature and creating a law.

Third, a substantial majority of United States jurisdictions reject the *Lewis* holding and the “no proximate cause” rule. *Whittfield, supra*, at ¶ 121 (Brogan, dissenting); *See also Haynes v Hamilton Cty.*, 883 S.W.2d 606,612 (Tenn. 1994).<sup>1</sup> Most majority jurisdictions, focusing on the importance of public safety, adopt the longstanding, general rules of proximate causation in

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<sup>1</sup> See *Kembel v. City of Kent*, 138 Wash. App. 1052 (2007); *Harrison v. Town of Mattapoisett*, 78 Mass. App. Ct. 367, 374-75, (2010); *Jones v. Lathram*, 150 S.W.3d 50, 53-54 (Ky. 2004); *Day v. State ex rel. Utah Dep't of Pub. Safety*, 1999 UT 46, 980 P.2d 1171, 1181; *Eklund v. Trost*, 2006 MT 333, 151 P.3d 870, 881; *City of Caddo Valley v. George*, 340 Ark. 203, 210, (2000); *City of Pinellas Park v. Brown*, 604 So. 2d 1222, 1225-26 (Fla. 1992); *Seals v. City of Columbia*, 575 So.2d 1061 (Ala.1991); *Lowrimore v. Dimmit*, 310 Or. 291, 797 P.2d 1027 (1990); *Haynes v. Hamilton Cnty.*, 883 S.W.2d 606, 609 (Tenn. 1994); *Tetro v. Town of Stratford*, 189 Conn. 601, (1983) (holding negligent conduct by a police officer is sufficient to impose liability on a police officer where initiating and continuing pursuit was the proximate cause of the third party's injuries); *Clark v. S. Carolina Dep't of Pub. Safety*, 362 S.C. 377, 386-87, (2005); *Jones v. Crawford*, 1 A.3d 299, 302 (Del. 2010); *Eckard v. Smith*, 166 N.C. App. 312, 320, (2004); *D.C. v. Hawkins*, 782 A.2d 293, 300 (D.C. 2001); *Jones v. Ahlberg*, 489 N.W.2d 576 (N.D.1992); *Colby v. Boyden*, 241 Va. 125, (1991); *Peak v. Ratliff*, 185 W.Va. 548, (1991); *DeWald v. State*, 719 P.2d 643 (Wyo.1986) (holding that an officer's gross negligent conduct is sufficient to impose liability on a police officer where initiating and continuing pursuit was the proximate cause of the third party's injuries); *Cameron v. Lang*, 274 Ga. 122, 128, 549 S.E.2d 341, 348 (2001) (holding that conduct that constitutes reckless disregard for proper police pursuit policy procedures is sufficient to impose liability on a police officer where initiating and continuing pursuit was the proximate cause of the third party's injuries); *Seide v. State*, 875 A.2d 1259, 1269 (R.I. 2005); *Athay v. Stacey*, 142 Idaho 360, 364, (2005); *Wade v. City of Chicago*, 364 Ill. App. 3d 773, 783, (Ill. App. Ct. 2006); *Morris v. Leaf*, 534 N.W.2d 388, 389 (Iowa 1995); *Morais v. Yee*, 162 Vt. 366, 373, (1994); *Robbins v. City of Wichita*, 285 Kan. 455, 469, (2007); *Boyer v. State*, 323 Md. 558, (1991); *City of Jackson v. Law*, 65 So. 3d 821, 826 (Miss. 2011); *Nurse v. City of New York*, 56 A.D.3d 442, 443, 867 N.Y.S.2d 486, 487 (2008); *State ex rel. Oklahoma Dep't of Pub. Safety v. Gurich*, 2010 OK 56.; *Estate of Aten v. City of Tuscon*, 169 Ariz. 147, (App.1991) (holding that conduct that constitutes reckless disregard for the safety of others is sufficient to impose liability on a police officer where initiating and continuing pursuit was the proximate cause of the third party's injuries); *Univ. of Houston v. Clark*, 38 S.W.3d 578, 581-82 (Tex. 2000) (holding that where an officer engages and continues a pursuit in a situation where a prudent officer would not have engaged or continued the pursuit, the officer's conduct may be the proximate cause of injuries to a third party).

which a police officer may be liable for damages where his actions are a substantial factor in bringing about the end result, or at least when their conduct is reckless. Courts that reject the “no proximate cause rule” have urged that using the majority standard increases public safety and is generally more consistent with the policies of police agencies.

Fourth, high speed police pursuits are dangerous and present serious health and safety risks not only to third-parties, but to police officers as well. Statistical evidence supports the dissenting judge’s opinion in *Whittfield* that police pursuits are extremely dangerous and constitute a use of deadly force.<sup>2</sup> Police pursuits in the United States, on average, result in the death of one person each day. Approximately 150 of these deaths are made up of innocent bystanders, or innocent third-parties. This number surpasses the number of innocent bystanders killed by officer firearms each year. Additionally, approximately one officer is killed every six weeks from pursuing fleeing suspects. It is likely that the actual number of fatalities is higher because the National Highway Traffic Safety Administration “collects this data on a voluntary basis from law enforcement agencies.” In light of these statistics, it is evident high speed pursuits are dangerous, not only to innocent bystanders, but also to the pursuing officer. Requiring “extreme and outrageous” conduct for a police officer to be liable to bystanders injured by the high speed chase does nothing to discourage this dangerous conduct.

For the aforementioned reasons, this case is of great public or great general interest.

### **STATEMENT OF THE CASE**

As a result of the injuries that Pamela Argabrite sustained in a collision with a fleeing suspect of an automobile police pursuit, she filed a complaint against Jim Neer, Gregory Stites, John DiPietro, Anthony Ball, and Daniel Adkins (“Defendant-Appellees”), who were responsible

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<sup>2</sup> The statistical information for high speed pursuits was provided by <http://www.pursuitsafety.org/mediakit/statistics.html>.

for the pursuit of the fleeing suspect, Andrew Barnhart. Subsequently, Defendant-Appellees filed a motion for summary judgment, arguing they were immune under 2744.01 et seq. and their actions were not the proximate cause of Plaintiff's injuries. After the motion was briefed by both parties, the trial court on April 17, 2014 granted Defendant-Appellees' motion for summary judgment. See *Argabrite v. Neer*, Montgomery C.P.C. No. 2012 CV 07402 (April 17, 2014).

Following the trial court's grant of summary judgment, Argabrite appealed the trial court's decision. Subsequently, the Second District affirmed the trial court's decision, in an opinion and entry filed on January 16, 2015. Additionally, the Appellate Court refused to reconsider the "no proximate cause rule" and the "extreme or outrageous" standard. This appeal arises out of the Second District Court of Appeals' erroneous decision affirming the trial court's granting of the Defendant-Appellees' motions for summary judgment and refusing to revisit the "no proximate cause rule" and the "extreme or outrageous" standard.

### **STATEMENT OF FACTS**

On July 11, 2011, Miami Township Police Officer Gregory Stites ("Defendant Stites") overheard a report that someone was stealing a television from an unoccupied house. Deposition of Gregory Stites ("Stites Depo.") at 8. The witness reported that African-American males were carrying a television into a white Caprice motor vehicle with no hubcaps and missing a front license plate, which had left the scene. *Id.*; Deposition of Rex Thompson ("Thompson Depo.") at 12-13; Deposition of David Ooten ("Ooten Depo.") at 18-19. Miami Township police had been dealing with a rash of burglaries in the area. Stites Depo. at 19. Approximately three months prior, Defendant Stites and Miami Township Police Officer David Ooten had an interaction with a vehicle, which fled from Officer Ooten, that was registered to a woman that stated her relative, Andrew Barnhart, had been using the vehicle. *Id.* at 9-12; Ooten Depo. at 11,

15-16. Defendant Stites and Officer Ooten were suspicious of Barnhart being linked to the rash of burglaries in the area. Sites Depo at 18; Ooten Depo. at 16. When investigating Barnhart, Defendant Stites and Officer Ooten had learned that Barnhart's grandmother lived at 2037 Mardell in Miami Township. Sites Depo. at 12, 14-15. Between the April incident and July 11, 2011, Defendant Stites would drive past 2037 Mardell when he was on routine patrol. *Id.* at 16, Ooten Depo at 17. At the end of June, Defendant Stites informed Officer Ooten that he had observed a white Caprice model motor vehicle at the Mardell address. Sites Depo. at 16-17, 19. Ooten Depo. at 17. Defendant Stites had run the license plates on the white Caprice and it was registered as belonging to Andrew Barnhart. Sites Depo. at 16-17; Ooten Depo. at 17-18.

When Officer Ooten overheard the July 11<sup>th</sup> report of a burglary, he radioed Defendant Stites and told him to go to the Mardell address to see if Barnhart's white Caprice was at the Mardell address, as it matched the description in the burglary. Stites Depo. at 8-9; Ooten Depo. at 19-20. Defendant Stites arrived at the Mardell address, but the white Caprice was not present. Stites Depo. at 22. Defendant Stites' supervisor, Sergeant Rex Thompson, heard the conversation between Defendant Stites and Officer Ooten and also responded to the Mardell address. Deposition of Rex Thompson ("Thompson Depo.") at 15-17. While Defendant Stites was waiting nearby, observing the Mardell address, Andrew Barnhart drove into the driveway, in the white Caprice with no hubcaps, followed shortly thereafter by Sergeant Thompson. *Id.* at 16-18, Stites Depo. at 22-23. Thompson exited his vehicle and approached the Caprice on the driver's side. Thompson Depo. at 19-20; Stites Depo. at 26-27. Barnhart started to exit the Caprice but saw Thompson, turned back to his car, and backed it into Thompson's empty patrol car. Thompson Depo. at 19; Stites Depo. at 26. Barnhart continued to drive backwards and forwards, damaging the garage on his grandmother's house and Thompson's empty patrol car

until he was able to drive to the side of the garage, through a neighbor's backyard, and onto the roadway. Thompson Depo. at 21-23; Stites Depo. at 26-27.

Prior to initiating the motor vehicle pursuit, Defendants Stites and Neer knew Barnhart could be arrested via a warrant process rather than a motor vehicle pursuit. McDevitt Aff. at ¶5(b). First, both Defendants Stites and Neer were aware Barnhart was only wanted for a property offense, not for a crime in which anyone was physically injured. *Id.* at ¶5(m); Stites Depo. at 21; Neer Depo. at 11. Defendants Stites and Neer knew the vehicle was registered to Barnhart. Stites Depo. at 16-17, 19, 51; McDevitt Aff. at ¶5(b & p); Neer Depo. at 19. Defendants Stites and Neer knew, at least, Barnhart stayed at the Mardell address. Stites Depo. at 16-17; Neer Depo. at 12-13. Defendant Stites also knew the Miami Township Police knew Barnhart's mother's address. Stites Depo. at 1-12. Additionally, these Defendants knew Sergeant Thompson had seen the driver and thus, could identify Barnhart as the driver. McDevitt Aff. at ¶5(c). Finally, Defendants Stites and Neer were aware Sergeant Thompson had apprehended the passenger from the vehicle, who could also identify the driver. Deposition of Christopher McDevitt ("McDevitt Depo.") at 134; McDevitt. Aff. at ¶5(c). Thus, Defendants Stites and Neer both had sufficient information to know Barnhart could be taken into custody at a later date via a warrant being issued for his arrest without having to be chased in a motor vehicle pursuit. McDevitt Aff. at ¶5(b); McDevitt Depo. at 61.

Despite such knowledge, the officers engaged in a dangerous pursuit of Barnhart, a non-violent property crime offender, in order to apprehend him and recover the television. The chase spanned over 5.7 miles through a crowded residential area with multiple homes, parks, and hospitals. Ashton Aff. at ¶ 5, 6(l). During the chase, Barnhart committed at least 11 traffic violations including; speeding up to 80 mph, running red lights, ignoring stop signs, and driving

left of center. *Id.* at ¶ 6(k); McDevitt Aff. at ¶ 5(m). The pursuing officers violated their police pursuit policies in many ways, including: initiating pursuit when the suspect was non-violent and could have been later apprehended via a warrant; failing to terminate the pursuit when Barnhart drove left of center, traveled at excessive speeds of up to 80 mph, and drove through congested residential areas; and failing to correctly monitor or dispatch pertinent pursuit information. Ashton Aff. at ¶ 5-6; McDevitt Aff. at ¶ 5. The pursuit only ended when Barnhart swerved into oncoming traffic again and struck Pamela Argabrite’s vehicle. Neer Depo. at 44. At the time of impact, Barnhart was traveling 72 miles per hour. Ashton Aff. at ¶ 6(h).

In essence, the pursuit was dangerous and the officers continued to pursue the non-violent suspect though they could have apprehended him at a later time. In pursuing the suspect, the officers violated several aspects of their pursuit policy, which only increased the pursuit’s danger. The applicable pursuit policies commands they neither initiate nor continue pursuit when continuing the pursuit would create a greater risk to the public than terminating the pursuit. *Montgomery Sheriff’s Office Pursuit Policy; Miami Township Police Pursuit Policy.* The officers failed to properly balance these risks, and as a result, Pamela Argabrite was seriously injured in a head-on collision with the fleeing suspect, Barnhart.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

- I. **First Proposition of Law: In order for a police officer to be the proximate cause of injuries to innocent third-parties stemming from a high speed pursuit, an officer must have conducted himself in a reckless and/or wanton manner, but not necessarily in an “extreme or outrageous” manner.**

This Honorable Court should take this case as an opportunity to overturn the “no proximate cause” rule and the “extreme or outrageous” standard that currently governs police pursuit liability. For several reasons, this standard should be reconsidered. First, the Appellate

Courts usurped the legislature by adding the “extreme or outrageous” standard to the O.R.C. 2744.03 analysis in the context of police pursuits. Second, Ohio Courts are in the large minority of jurisdictions who impose the “no proximate cause” rule in police pursuit situations. Third, the “extreme or outrageous standard” has never been met in the history of Ohio jurisprudence and is too high of a burden for a plaintiff to meet. These reasons provide a strong and sensible incentive to reconsider the “no proximate cause” rule and to ultimately adopt the “reckless and/or wanton” standard mandated by the legislature in O.R.C. 2744.03.

**a. Ohio Appellate Courts usurped the legislature and violated the separation of powers by creating the “no proximate cause” rule and the “extreme or outrageous” standard.**

“The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives....” OH CONST Art. II, § 1. “The question of the wisdom of an act resides solely in the judgment of the legislature, provided always that it is within their constitutional right to enact; if the law complained of is legislative, it is the duty of the legislature to make the necessary changes. If, however, the law complained of is judicial, then it is up to the judiciary to make the necessary changes.” *Brinkman, supra*. The legislature created O.R.C. 2744.01 et seq., The Political Subdivision Tort Liability Act, in order to grant employees of political subdivisions immunity from liability under certain circumstances. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, ¶ 21. It is not disputed that police officers engaged in high speed pursuits are a class of people that are granted immunity from suit under the Political Subdivision Immunity Act. Under this act, the legislature stated those that fall under the protected class, such as police officers, are immune from suit unless their actions were performed, “with malicious purpose, in bad faith, or in a wanton or reckless manner.” O.R.C.

2744.03(a)(6)(b) . In sum, through O.R.C. 2744.03, the legislature has spoken and stated police officers engaged in a high speed pursuit will not be immune from suit where their conduct was malicious, in bad faith, or wanton and/or reckless.

The “no proximate cause” rule and the “extreme or outrageous” standard followed in *Lewis* and *Whitfield* usurps the legislative determination that “wanton and/or reckless” conduct is the required standard for removing political subdivision immunity under O.R.C. 2744.03. The Appellate Courts that have continued to institute the “extreme or outrageous” standard have engaged in judicial legislating. Instead of interpreting the law under O.R.C. 2744.03, they have added additional provisions to the law in the context of police officers engaged in high speed pursuits. Instead of merely requiring a showing of “wanton and/or reckless” conduct to impose liability, the Appellate Courts have added an additional hurdle, requiring a plaintiff to show “extreme or outrageous” conduct by the pursuing officer in order to impose liability. “If the legislature desired a different standard for immunity when police officers are pursuing fleeing suspects in their vehicles, the legislature could have expressly created such an exception.” *Argabrite v. Neer, supra* (Froelich, dissenting). If the legislature wished to carve out a special exception for officers engaged in a high speed pursuit, the legislature would have done so. Under Ohio’s appellate courts’ holdings, O.R.C. 2744.03 should read as follows, “employees of political subdivisions are immune from suit, unless their actions were performed with malicious purpose, in bad faith, or in a wanton or reckless manner, *except for police officers engaged in high speed pursuits.*” However, when it created O.R.C. 2744.03, the legislature did not state this, nor did it intend to.

**b. Only a small minority of jurisdictions agrees with Ohio courts and impose the “no proximate cause” rule in police pursuit situations.**

The majority of jurisdictions in the United States reject the “no proximate cause” rule in police pursuit liability.<sup>3</sup> Most jurisdictions adopt the standard negligence approach. Other jurisdictions adopt a standard in which an officer’s conduct must amount to “recklessness” or “gross negligence” in order to impose liability. The rationale behind these standards is that it will create officer accountability while still giving officers the necessary leeway needed to make split-second decisions in high pressure situations. The “extreme or outrageous” standard has provided near total immunity for Ohio police officers. In fact, there has not been an Ohio case to date in which a pursuing officer’s conduct has been found to be “extreme or outrageous.” The “extreme or outrageous” standard, therefore, has blanketed pursuing officers with near infinite immunity. Other jurisdictions adopt a standard which is more likely to impose liability because it increases officer accountability. Ohio’s appellate courts’ approach offers near total immunity, and therefore, acts to eliminate officer accountability. A lack of accountability creates a dangerous roadway environment; exactly the type of environment the majority of jurisdictions across the country seek to deter by declining to adopt the “extreme or outrageous” standard.

**c. The “extreme or outrageous standard” has never been met in the history of Ohio jurisprudence and is a nearly impossible burden for a plaintiff to meet.**

In his dissenting opinion in *Whitfield*, Judge Brogan warned of the dangerousness of the majority holding in *Whitfield*, which upheld the “extreme or outrageous” standard. *Whitfield, supra*, at ¶ 118-124. He cautioned the “extreme or outrageous” standard is much too high of a bar to meet. *Id.* at ¶ 124. As a result of such a high and difficult standard, there has not been an

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<sup>3</sup> At least 31 jurisdictions adopt a standard of liability which permits a pursuing officer liability upon a showing of conduct less than that of “extreme or outrageous”.

Ohio case to date in which an officer's conduct in pursuing a fleeing suspect has been deemed extreme and outrageous. *Id.*

Further, the U.S. Supreme Court prohibits the use of deadly force being used on all felony suspects, and states that pursuing a high speed vehicle is a use of deadly force just like firing a bullet. *Whitfield, supra* at ¶ 122. In fact, a high speed pursuit poses a greater threat to the general public than shooting a fleeing suspect because during a police chase it is much more likely an innocent third party will be harmed or killed. *Id.* at ¶ 122-123. Because police pursuits are a use of deadly force likely to end in harm or death to innocent third parties, in order to create incentive for safe behavior similar principals of liability and causation should apply to police pursuits as to other forms of deadly force used by police officers.

By applying the "no proximate cause rule", Ohio courts have essentially given police officers total immunity in pursuing fleeing suspects. This is illustrated by the fact that there has not been a single case in Ohio in which the "extreme and outrageous" standard has been met and liability imposed on police officers pursuing a fleeing suspect. Granting this near total immunity to police officers is contrary to policies adopted by police departments, such as the Miami Township Police Department and the Montgomery County Sherriff's Office. Similar to the Miami Township Police Department's Pursuit Policy, the Montgomery County Sherriff's Office pursuit policy reads as follows:

The Montgomery County Sherriff's Office recognizes that motor-vehicle pursuits pose a serious risk to the safety of citizens and to law enforcement personnel. It also recognizes that certain violent offenders pose the same risk if allowed to go without immediate apprehension. It is the intent of this policy to provide guidance to Road Patrol deputies in determining which is the greater risk to the community. In doing so, personnel can make an appropriate and defensible decision whether to engage in a motor vehicle pursuit or to seek apprehension later.

*Montgomery County Sherriff's Office Pursuit Policy.*

While the police departments' policy establishes a balancing process for officers to follow in weighing the danger of the pursuit against the danger of allowing the suspect to go unpursued, the courts render this policy meaningless by allowing officers to pursue fleeing suspects in any manner they please, no matter how dangerous it is to the public, just so long as their conduct does not amount to "extreme or outrageous". In fact, courts allow police officers to engage in reckless conduct and willful misconduct in pursuing suspects, just so long as it does not reach the level of "extreme or outrageous" conduct. *Whitfield, supra* at ¶ 41. The Supreme Court of Ohio defines "willful misconduct" as follows:

An intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety or purposely doing some wrongful acts with knowledge or appreciation of the likelihood of resulting injury.

*Id.* at ¶ 30 citing *Tighe v. Diamond*, 149 Ohio St. 520, 527, (1948).

Likewise the Ohio Supreme Court defines recklessness as follows:

[R]eckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

*Whitfield, supra* at ¶ 32 citing to *Thompson v. McNeill*, 53 Ohio St.3d 102, 104-105, (1990).

The *Whitfield* court has made it clear in their holding that willful or reckless misconduct is not enough to impose liability on police officers engaged in pursuits that result in harm to third parties. Willful and reckless misconduct by police officers, both, create a serious danger to the public and require more than a mere inadvertent act by the officer. Yet, Ohio courts refuse to impose liability on pursuing officers when their conduct surpasses the danger of willful and reckless misconduct so long as it does not reach the point of "extreme and outrageous".

Allowing this sort of dangerous conduct is counterproductive to the ultimate goal of the police system; keeping the public safe.

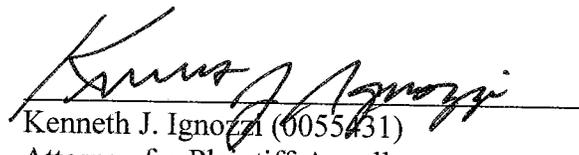
Prior Ohio holdings seem to illustrate that the elusive “extreme or outrageous” standard may simply be a convenient fiction, and courts are granting police officers total immunity in pursuing fleeing suspects. While the police pursuit policy provides some guidance to officers on how to keep the public safe, it has no force or authority, because the courts have established that officers may pursue suspects in any manner they please, regardless of the amount of danger to the public their conduct creates, so long as they are not acting in an “extreme or outrageous” fashion. Police agencies are created to protect the public; thus, this Court should join the majority of jurisdictions in adopting a standard, which furthers this goal of protection.

#### **CONCLUSION**

For the above stated reasons, this case involves matters of public or great general interest. This Court should therefore accept this discretionary appeal and accept jurisdiction.

Respectfully submitted,

**DYER, GAROFALO, MANN & SCHULTZ**



Kenneth J. Ignozzi (0055431)  
Attorney for Plaintiff-Appellant  
131 North Ludlow Street, Suite 1400  
Dayton, Ohio 45402  
(937) 223-8888  
Fax: (937) 824-8630  
kignozzi@dgmsslaw.com

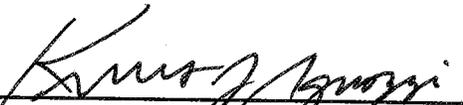
**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a copy of the foregoing has been served upon the following by regular U.S. mail this 26<sup>th</sup> day of February, 2015.

Joshua R. Schierloh, Esq.  
Surdyk, Dowd & Turner Co., LPA  
8163 Old Yankee Street, Suite C  
Dayton, OH 45458  
Attorney for Defendant-Appellee Jim Neer, Gregory Stites

Liza A. Luebke, Esq.  
Montgomery County Assistant Prosecuting Attorney  
301 West Third Street  
P.O. Box 972  
Dayton, OH 45422  
Attorney for Defendant-Appellee Anthony Ball, Daniel Adkins

Lawrence E. Barbieri  
Schroeder, Maundrell, Barbieri & Powers  
5300 Socialville Foster Rd., Suite 200  
Mason, OH 45040  
Attorney for Defendant-Appellee John DiPietro

  
Kenneth J. Ignozzi, Esq. (0055431)  
Attorney for Plaintiff-Appellant

**APPENDIX**

Case: CA 026220  
10015737212  
EXT: CHORSE

FILED  
COURT OF APPEALS

2015 JAN 16 AM 8:45

GREGORY A. BRUSH  
CLERK OF COURTS  
MONTGOMERY CO. OHIO

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

R

PAMELA ARGABRITE

Plaintiff-Appellant

v.

JIM NEER, et al.

Defendants-Appellees

: Appellate Case No. 26220  
: Trial Court Case No. 12-CV-7402  
: (Civil Appeal from  
: Common Pleas Court)  
: **FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 16th day  
of January, 2015, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery  
County Court of Appeals shall immediately serve notice of this judgment upon all parties and  
make a note in the docket of the mailing.

\_\_\_\_\_  
JEFFREY E. FROELICH, Presiding Judge

PLAINTIFF'S  
EXHIBIT  
1

  
MICHAEL T. HALL, Judge

  
JEFFREY M. WELBAUM, Judge

Copies mailed to:

Kenneth J. Ignozzi  
Dyer, Garofalo, Mann, & Schultz  
131 N. Ludlow Street, Suite 1400  
Dayton, OH 45402

Lisa A. Luebke  
John Cumming  
301 W. Third Street, 5th Floor  
Dayton, OH 45422

Lawrence E. Barbieri  
Schroeder, Maundrell, Barbieri & Powers  
5300 Socialville Foster Road, Suite 200  
Mason, OH 45040

Edward J. Dowd  
Joshua Schierloh  
1 Prestige Place, Suite 700  
Miamisburg, OH 45342

Hon. James A. Brogan  
(sitting for Judge Barbara P. Gorman)  
Montgomery County Common Pleas Court  
41 N. Perry Street  
Dayton, OH 45422



FILED  
COURT OF APPEALS

2015 JAN 16 AM 8:45

GREGORY A. DRAVISH  
CLERK OF COURTS  
MONTGOMERY CO., OHIO  
36

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

PAMELA ARGABRITE

Plaintiff-Appellant

v.

JIM NEER, et al.

Defendants-Appellees

Appellate Case No. 26220

Trial Court Case No. 12-CV-7402

(Civil Appeal from  
Common Pleas Court)

.....  
OPINION

Rendered on the 16th day of January, 2015.  
.....

KENNETH J. IGNOZZI, Atty. Reg. #0055431, Dyer, Garofalo, Mann, & Schultz, 131 North Ludlow Street, Suite 1400, Dayton, Ohio 45402  
Attorney for Plaintiff-Appellant, Pamela Argabrite

LISAA. LUEBKE, Atty. Reg. #0081315, and JOHN CUMMING, Atty. Reg. #0018710, 301 West Third Street, 5th Floor, Dayton, Ohio 45422  
Attorney for Defendants-Appellees, Tony Ball, Daniel Adkins, Julie Stephens and Karen Osterfield

LAWRENCE E. BARBIERE, Atty. Reg. #0027106, Schroeder, Maundrell, Barbieri & Powers, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040  
Attorney for Defendant-Appellee, John Dipietro

EDWARD J. DOWD, Atty. Reg. #0018681, and JOSHUA SCHIERLOH, Atty. Reg. #0078325, 1 Prestige Place, Suite 700, Miamisburg, Ohio 45342  
Attorneys for Defendants-Appellees, Jim Neer and Gregory Stites



HALL, J.

{¶ 1} Around noon on July 11, 2011, Miami Township police officers Jim Neer and Gregory Stites pursued fleeing burglary suspect Andrew Barnhart along streets in Miami Township and Washington Township while Deputy Chief John DiPietro supervised from the police department. Deputy Tony Ball and Sergeant Daniel Adkins of the Montgomery County Sheriff's Office were also providing assistance. The pursuit ended when the suspect pulled into the opposing traffic lane and crashed head-on into the oncoming vehicle driven by Pamela Argabrite. The suspect was killed, and Argabrite was seriously injured. Argabrite filed a negligence action against the five officers involved in the pursuit to recover damages for her injuries.

{¶ 2} The defendants all moved for summary judgment, contending that they are immune from liability under R.C. 2744.03(A)(6)(b) of the Political Subdivision Tort Liability Act, which "provides immunity to employees of a political subdivision for acts that are not committed in a wanton or reckless manner," *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 39. The defendants also contended that they were not the proximate cause of Argabrite's injuries under the rule applied by this Court in *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2d Dist.)<sup>1</sup>, which requires extreme or outrageous conduct by police officers before proximate cause is established in a pursuit where the injuries result from a crash by the pursued vehicle. The county officers also argued that they were not pursuing the suspect. Argabrite argued that the pursuit was wanton and reckless because the officers engaged in a high-speed chase

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<sup>1</sup> We note that *Whitfield* was effectively overruled, in part, on other grounds by *Anderson v. Massillon*, 134 Ohio St.3d 380, at ¶ 29-31.

through commercial and residential areas during heavy traffic when the suspect was not violent and could have been later apprehended with a warrant.

{¶ 3} The trial court granted the summary judgment motions on the proximate-cause issue. As to the county officers, the court concluded that no reasonable juror could find that the conduct of either officer was extreme or outrageous. Officer Adkins, said the court, was not involved in the pursuit, and Officer Ball's tracking of the suspect was at a distance and at reasonable speeds, breaking off well before the accident in favor of the Miami Township officers. As to the township officers, the trial court concluded that their conduct was reckless, but no reasonable juror could conclude that their conduct was extreme or outrageous.

{¶ 4} Argabrite appealed, alleging in the sole assignment of error that the trial court erred by granting summary judgment. Our review of a summary judgment decision is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). This means we use the same standard that the trial court should have used, and we determine whether the evidence presents a genuine issue of fact for trial. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). The trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist. 1993). Therefore, we could review and analyze whether the trial court's conclusion that Township officers Neer and Stites were reckless is supported by the record or, if a genuine issue of recklessness is found, whether that behavior was the proximate cause of Barnhart's collision with the Argabrite vehicle. If there is no genuine issue of either recklessness or proximate cause resulting from recklessness, then the officers are entitled to immunity under R.C. 2744.03(A)(6). But we

need not, and do not, engage in that analysis at this juncture because of our determination that the no-proximate-cause rule of *Whitfield v. Dayton*, requiring extreme or outrageous conduct, is dispositive of this appeal.

{¶ 5} Argabrite asks us to reconsider the proximate-cause rule applied in *Whitfield*. This rule comes from the Ninth District's "no proximate cause" holding in *Lewis v. Bland*: "When a law enforcement officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the officer's pursuit is not the proximate cause of those injuries unless the circumstances indicate extreme or outrageous conduct by the officer, as the possibility that the violator will injure a third party is too remote to create liability until the officer's conduct becomes extreme." 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist.1991). We adhered to this holding in *Whitfield* because we recognized it as "established law" in Ohio. *Whitfield*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 59. "Ohio appellate districts, including our own," we said, "\* \* \* apply the 'no proximate cause' holding of *Lewis* to cases where pursuits end in injury to innocent third parties or to occupants of the pursued vehicle without direct contact with a police vehicle." *Id.* at ¶ 57, citing *Jackson v. Poland Twp.*, 7th Dist. Mahoning Nos. 96 CA 261, 97 CA 13, and 98 CA 105, 1999 WL 783959 (Sept. 29, 1999); *Pylypiv v. Parma*, 8th Dist. Cuyahoga No. 85995, 2005-Ohio-6364; *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129 (9th Dist.); *Heard v. Toledo*, 6th Dist. Lucas No. L-03-1032, 2003-Ohio-5191, ¶ 12 (rejecting an argument that *Lewis* is "outdated, contrary to sound public policy and should no longer govern Ohio cases"); and *Sutterlin v. Barnard*, 2d Dist. Montgomery No. 13201, 1992 WL 274641 (Oct. 6, 1992) (a previous case in which this district followed *Lewis's* approach).

{¶ 6} According to Argabrite, the “no proximate cause” rule is the minority position in this country: “The majority of jurisdictions, focusing on the importance of public safety, adopt the longstanding, general rules of proximate causation in which a police officer may be liable for damages where his actions are a substantial factor in bringing about the end result, or at least when their conduct is reckless. Courts that reject the ‘no proximate cause rule’ have urged that using the majority standard increases public safety and is generally more consistent with the policies of police agencies.” (Brief of Plaintiff-Appellant, Pamela Argabrite, 25). Argabrite also cites the dissenting judge in *Whitfield*, Judge Brogan, who disagreed with the “no proximate cause” rule. He agreed with the dissenting judge in *Lewis* that the rule fails to recognize that “ ‘multiple actors can combine to provide causation in a given instance.’ ” *Whitfield* at ¶ 118 (Brogan, J., dissenting), quoting *Lewis* at 459 (Cacioppo, J., dissenting). Judge Brogan agreed with the majority view, that if a plaintiff alleges police negligence in a pursuit, the issue of proximate cause should be considered simply a question of fact. Rather, we should say that Judge Brogan *agrees* with the majority view. He is the trial judge in this case, and in his summary-judgment decision he urges us to reverse *Whitfield* on this point.

{¶ 7} The “no proximate cause” rule is still the established law in this state. Since *Whitfield*, no Ohio court has questioned the rule, and at least one has rejected an argument not to follow it, see *Perry v. Liberty Twp.*, 11th Dist. Trumbull No. 2012-T-0056, 2013-Ohio-741, ¶ 18-21. We are not convinced that this is the case in which to reconsider the rule.

{¶ 8} The remaining issue is whether the trial court applied the “no proximate cause” rule correctly in this case. To determine whether the police officers’ conduct was extreme

or outrageous in *Whitfield* we referred to the description of extreme and outrageous conduct adopted by the Ohio Supreme Court: The conduct is "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983), quoting 1 Restatement of the Law 2d, Torts, Section 46, Comment d (1965). "Obviously, this is an exceptionally difficult standard to meet." *Whitfield*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 61.

{¶ 9} "In a case decided on summary judgment, we must determine whether an issue of material fact remains to be litigated, whether the moving party is entitled to judgment as a matter of law, and whether when viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach a conclusion that is adverse to the nonmoving party." *Snyder v. Ohio Dept. of Natural Resources*, Slip Opinion No. 2014-Ohio-3942, ¶ 20, citing Civ.R. 56(C), and *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). The evidence here is primarily the depositions of the defendant police officers plus the depositions and affidavits of two experts retained by Argabrite. About the relevant facts the evidence shows no genuine dispute. The question here is whether a reasonable mind, viewing the evidence most strongly in Argabrite's favor, could find that the conduct of any of the officers was extreme and outrageous, that is, "atrocious, and utterly intolerable in a civilized society."

{¶ 10} At 11:37 a.m. on July 11, 2011, Sergeant Rex Thompson was sitting in his office at the Miami Township Police Department when he heard on his police radio dispatch that there was a burglary in progress in Washington Township. The suspects were identified as two black males who had just broken into a residence, taken some items, and were leaving in a white vehicle without a front license plate. About 15 minutes later, the suspects' vehicle was further described as a white, older model "box style" Chevy Caprice, missing its hubcaps. The suspects were said to be wearing white t-shirts and fleeing in the direction of Interstate 675.

{¶ 11} Sergeant Thompson was the shift supervisor of the Miami Township police road patrol division that day and was in charge of all the Miami Township police officers and responsible for any police pursuits. Thompson left his office and got into his cruiser so that he could monitor the roadways nearby in the event the suspects' vehicle drove past. While Thompson monitored the roadway, he heard on the radio one of his patrol officers tell officer Gregory Stites that the description of the car involved in the burglary sounded like a car last seen at a residence on Mardell Drive. Thompson radioed Stites that he would meet him on Mardell Drive to investigate.

{¶ 12} Thompson arrived first. Parked in the driveway at 2037 Mardell Drive, he saw an older, white Chevy Caprice with no hubcaps. The driver's side door was open and someone was sitting in the driver's seat with a leg draped out the door. Thompson pulled into the driveway and parked his cruiser 6 to 8 feet behind the car. Meanwhile, Stites had arrived and pulled up to the curb.

{¶ 13} Thompson got out and slowly approached the car, hoping to catch its occupant off-guard. Thompson was within 10 feet of the open driver's side door when the

person sitting in the driver's seat exited the car, talking on a cell phone. He startled when he saw Thompson and immediately turned around and got back into the car. Thompson, concerned that the man might be attempting to get a weapon, drew his gun and started shouting at the man to stop. But he didn't stop. Instead, he slammed the car door closed and started the engine. Thompson moved to within touching distance of the driver's side and continued to shout to the suspect through the open driver's side window, "Police, stop, don't do it." (Thompson dep. 21). The suspect didn't listen. He revved the engine, dropped the car into reverse, and tires spinning, slammed into Thompson's cruiser. The suspect then threw the car into drive and smashed into the brick garage in front of him. Again the suspect dropped into reverse and slammed into the cruiser. Suddenly, the passenger-side door opened and a man, who Thompson had not seen, leapt out and started to run. At the same time, the suspect threw the car into drive and cranked the steering wheel to the right. Its tires spinning, the car tore off a corner section of the brick garage and escaped down the side yard. The car drove through several back yards before making it back to Mardell Drive.

{¶ 14} Thompson called in the license plate of the fleeing car. Then, since there were other officers around, he turned his attention to the fleeing passenger. Thompson found the man laying in the ravine behind the house, where the man had broken his leg. After calling for medical assistance, Thompson stayed with the man and asked him the name of the driver, but the man refused to say.

{¶ 15} Miami Township police officer Jim Neer was on patrol a few blocks away from Mardell Drive when he heard the radio broadcast about the burglary and the white car on Mardell Drive. He headed that way, arriving on the street just in time to see the car going

through the side yard. Neer turned on his lights and sirens and told dispatch that he was in pursuit. Officer Stites, parked in front of the Mardell Drive house, joined Neer in the pursuit.

{¶ 16} John DiPietro was the Deputy Chief of Police for Miami Township. When the radio broadcast about the burglary went out, he was at the police service garage. Initially, DiPietro only heard a small portion of the information relayed over the radio as he was talking with people at the garage, and the radio did not have his full attention. DiPietro did hear a transmission from Thompson stating that he was on patrol looking for the suspects' vehicle. Then DiPietro thought he heard Thompson say that he had been hit. Shortly thereafter, when DiPietro heard Thompson say that he was out of service, he started paying attention. DiPietro was not entirely sure what had just occurred, but based on what he had heard, he assumed that some sort of violent encounter had taken place between Thompson and the suspect. After it became apparent to DiPietro that several officers were now pursuing the suspect, and that Thompson was out of service, DiPietro realized that it was his duty, as the next highest ranking officer listening to the radio, to assume control of the pursuit, which he did at 11:54 a.m. By then, DiPietro had left the service garage and was heading back to the police department. He began monitoring the pursuing officers' actions and asked them to keep calling out their locations and any other information. DiPietro's intention was to have other officers get ahead of the pursuit and deploy Stop Sticks to halt the suspect's vehicle. He also asked dispatch to issue an alert to surrounding agencies.

{¶ 17} From Mardell Drive the suspect's car headed south on Graceland Street and then east on State Route 725. At the Lyons Road intersection the light was red, and the

suspect slowed as he approached the intersection before going into the opposing lane, through the red light, and north on Lyons Road. Neer, then Stites, cautiously followed through the intersection. By the time Neer was on Lyons Road, the suspect was more than 100 yards ahead of him. At McEwen Road, the suspect slowed and turned south. As the suspect approached S.R. 725, he slowed and waited for traffic to clear before continuing. Neer and Stites also slowed before proceeding through the intersection, "inch[ing] [their] way through it as well." (Stites dep. 39). Captain Karen Osterfeld of the Montgomery County Sheriff's Office assisted by blocking westbound traffic from entering the S.R. 725-McEwen Road intersection.

{¶ 18} Further south of S.R. 725, on McEwen Road, is the Montgomery County Sheriff's Office Washington Township substation. Deputy Tony Ball was there when he heard over his radio that Miami Township officers were headed into Washington Township. Ball got into his cruiser and headed north on McEwen Road. Before he got to S.R. 725, a white car that matched the description of the vehicle being driven by the suspect passed him in the opposite lane, traveling "faster than normal" and going into opposing lanes of travel. (Ball dep. 14-15). Ball could not see any police vehicles in pursuit, though he saw their lights in the distance and figured that they had gotten "held up" at an intersection. (*Id.* at 17). He decided to follow the suspect to at least keep eyes on it until the Miami Township officers caught up. Ball turned on his lights and siren, made a u-turn, and immediately turned off the lights and siren. At Spring Valley Pike intersection, Ball again turned on his lights and siren briefly and followed the suspect west. Ball looked back to see whether the Miami Township officers were close enough so that he could "get out of their way," (*Id.* at 22), as he was only trying to keep the suspect in sight and did not intend to pursue. They

hadn't caught up yet. As he followed the suspect, Ball activated either his lights or his lights and siren when he was passing vehicles or going through intersections in order to warn motorists that he and the Miami Township officers were coming through the area. Finally, Ball saw that the Miami Township police officers had caught up, so he began looking for a place to pull over to allow them to pass. Fearing that if he pulled over or tried to maneuver out of their way, they would follow him, Ball radioed the officers to pass him when he was just east of Washington Church Road. When he pulled into the middle lane and slowed, Neer and Stites passed him. Ball continued west on Spring Valley Pike without his lights or siren, though he occasionally turned on his lights to pass a vehicle.

{¶ 19} After Neer and Stites passed Ball, they accelerated because the suspect was now well ahead of them. They slowed as they crested a hill to see if the suspect had gone down a side street, but Neer saw the white car ahead of them, at the S.R. 741 intersection. The suspect slowed, or stopped, and waited for traffic to clear the intersection before going through a red light and turning south.

{¶ 20} Sergeant Daniel Adkins of the Montgomery County Sheriff's Office heard the radio broadcast about the burglary while he was on patrol in Washington Township. While driving to the scene of the burglary, Adkins heard that the suspects had left the area in an older white car, so Adkins started driving around the general area, hoping to find it. When he heard over the radio that Miami Township officers were in pursuit, Adkins began to follow the pursuit from the north, thinking that they might need him to assist in clearing intersections or to wait for the suspect to flee on foot. He worked his way over to S.R. 741, reasoning that if the suspect went north on that road, he (Adkins) would need to help direct traffic because at that time of the day traffic would be "horrendous." (Adkins dep. 12). But

the suspect went south, and Adkins never saw him.

{¶ 21} When Neer reached the Spring Valley Pike and S.R. 741 intersection, he slowed, then stopped, and made sure no traffic was coming in either direction before proceeding. Once on S.R. 741, Neer accelerated in order to catch up to the suspect, who was well ahead of him and cresting a hill near Waldruhe Park. Neer and Stites lost sight of the suspect until they crested the same hill. When they caught sight of him again, they watched him move left into the opposing lane of traffic and crash head-on into Argabrite. The crash was announced over the radio at 11:57 a.m. When Ball heard the announcement, he was stopped at a red light at the S.R. 741 intersection. When the light turned green, he turned on his lights and siren and responded to the crash to assist.

{¶ 22} Argabrite contends that the pursuit was extreme or outrageous because the officers pursued at high speeds through residential areas, because the police officers violated their respective policies on motor vehicle pursuits, and because they knew who the suspect was and could have arrested him with a warrant.

{¶ 23} In all, the pursuit covered just under 6 miles and lasted just under 7 minutes. The speed limits along the route ranged from 25 m.p.h. on Graceland Street to 45 m.p.h. on S.R. 725 to 35 m.p.h. on Spring Valley Road to 55 m.p.h. on S.R. 741. Ball estimated that while on McEwen Road he drove 45-50 m.p.h. Stites testified that on Spring Valley Road, before he reached Washington Church Road, he was traveling at 45-50 m.p.h. Neer testified that, after he passed Ball, he accelerated to between 60 and 80 m.p.h. because the suspect was now well ahead of him. Stites said that on S.R. 741 he never went over 70 m.p.h. The weather during the pursuit was clear, dry, and sunny. Neer and Stites both testified that the traffic during the pursuit was generally light. Stites said that he was able

to negotiate it without any problems. Under the described circumstances, no reasonable juror could conclude that the officers' speeds during the pursuit were extreme or outrageous.

{¶ 24} The Miami Township Pursuit of Motor Vehicles Policy allows an officer to pursue a fleeing suspect who the officer has probable cause to believe committed a burglary or felonious assault. (Miami Township Pursuit of Motor Vehicles Policy, 41.2.8(C)). But the policy also states that "[i]f the risk to the public from the initiation or continuation, of a pursuit outweighs the risk from not initiating the pursuit or discontinuation, the pursuit shall be terminated." (*Id.*). An officer "must terminate a pursuit" when "[t]he risks to personal safety and/or the safety of others outweigh the dangers presented if the suspect is not apprehended" or when "[t]he identity of the offender is known and risk of escape poses less threat than risk from attempt to capture." (*Id.* at 41.2.8(C)(7)(b)(1) and (2)). An officer must also terminate a pursuit "when the probability of harm to the officer or general public is increased by the actions of the suspect vehicle," which occurs when "[t]he suspect vehicle travels into oncoming traffic" or when "[s]peeds increase to a level unsafe for conditions." (*Id.* at 41.2.8(C)(8)(a)(1) and (4)). According to the Montgomery County Sheriff's Office pursuit policy, the only offense for which a deputy may pursue a suspect is a "felony involving the infliction or threatened infliction of serious physical harm." (General Orders Manual, 5.1.4(A)(2) (5th Ed.)).

{¶ 25} Even if it is assumed for the sake of analysis that the officers did violate their respective pursuit policies, their conduct was not extreme or outrageous. The most that can be said of a violation of a "departmental policy enacted for the safety of the public" is that it "may be relevant to determining the culpability of a course of conduct." *Anderson*, 134

Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at ¶ 37; *see also Shalkhauser*, 148 Ohio App.3d at 51, 772 N.E.2d 129 (saying, “a violation of an internal departmental procedure is irrelevant to the issue of whether appellees’ conduct constituted willful or wanton misconduct”). “Without evidence of an accompanying knowledge that the violations “will in all probability result in injury,” *Fabrey [v. McDonald Village Police Dept.]*, 70 Ohio St.3d [351] at 356, 639 N.E.2d 31 [ (1994) ] evidence that policies have been violated demonstrates negligence at best.” *Anderson* at ¶ 38, quoting *O’Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 92. Here, even if there is a factual question as to whether either Neer or Stites violated their pursuit policy, there is no evidence to conclude that either knew that the violation would probably cause someone injury. Neer testified that he knew that under the pursuit policy he could pursue a fleeing suspect who had committed a burglary or felonious assault. DiPietro testified that he did not believe that any of the information that he received from his officers during the pursuit warranted terminating the pursuit. Although DiPietro never asked for the speeds of the vehicles, we note that, in all, he was in control of the pursuit for only about 3 minutes. With regard to Ball and Adkins not only is there is no evidence that either of them knew of any violation of their pursuit policy, but if there was a violation, there is no evidence that either knew that the violation would probably cause someone injury and, regardless of the standard applied, their actions were not the proximate cause of the eventual crash. Each of Argabrite’s experts states in his affidavit that the defendants intentionally disregarded their respective pursuit policies. (See *McDevitt Aff.* ¶ 5; *Ashton Aff.* ¶ 6). This evidence, though, “does not create any issues of *fact*, but merely states appellant’s position with respect to appellees’ culpability, which is a legal conclusion.” (Citation omitted.) (Emphasis

sic.) *Shalkhauser* at 51.

{¶ 26} Neer and DiPietro each testified that he did not know who the suspect was until after the crash. But Stites knew early on. Three months earlier, the same white car had failed to stop for another officer, and Stites and that officer discovered that the car was registered to Andrew Barnhart's mother. One could speculate whether the officers should have discontinued the pursuit, and at what point that decision should be made. But that's not the right question here. The question is, was the pursuit extreme or outrageous? We do not think that a reasonable person could fairly say that it was.

{¶ 27} None of the officers' conduct may fairly be characterized as "atrocious, and utterly intolerable in a civilized society." Certainly, nothing about Ball's or Adkins' conduct comes close. While one of Argabrite's experts states in his affidavit that Neer's, Stites's, DiPietro's, and Ball's conduct was outrageous and unconscionable, (see *McDevitt Aff.* ¶ 5), such evidence, as we said above, states a legal conclusion, not a factual assertion. The trial court disagreed and so do we.

{¶ 28} Lastly, we need not address whether the officers are immune under the Political Subdivision Tort Liability Act. As we said in *Whitfield*, "since there must always be a causal connection between disputed conduct and an injury, a plaintiff would have to satisfy proximate-cause requirements even if an officer's conduct is wanton or reckless." *Whitfield*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532, at ¶ 44. That issue is dispositive.

{¶ 29} The sole assignment of error is overruled.

{¶ 30} The trial court's judgment is affirmed.

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WELBAUM, J., concurs.

FROELICH, P.J., dissenting.

{¶ 31} I dissent from the majority's conclusion that *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2d Dist.), should continue to be followed.

{¶ 32} A claim for personal injuries requires the existence of a duty, the defendant's breach of that duty, and injury or damages that are proximately caused by that breach. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 22. Without proximate cause, there can be no liability.

{¶ 33} Proximate cause is the law's distinction between the injury's cause in fact and causation for which society holds an actor responsible.<sup>2</sup> The Supreme Court of Ohio has discussed proximate cause, stating:

The term, "proximate cause," is often difficult of exact definition as applied to the facts of a particular case. However, it is generally true that, where an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act, proximate cause is established, and the fact that some other act unites with

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<sup>2</sup> Everything causes everything. As we stated in *Didier v. Johns*, 114 Ohio App.3d 746, 684 N.E.2d 337 (2d Dist.1996):

In our universe, all events can be analyzed as caused by all other events. It is a weary truism now, thanks to the explorations of chaos theory, that "but for" the flapping of a butterfly's wings in Mexico, Dorothy would never have been blown to Oz.

On the scale of human (not just physical) events, historical interactions have been thoroughly revealed and explored. In short, the "but for" analysis casts a net so wide that conceivably all events are traceable to all other events, and the touchstone of individual responsibility sinks beneath a sea billowing with enumerable occurrences all jostling each other. (Footnotes omitted.) *Id.* at 753 (Young, J.).

the original act to cause injury does not relieve the initial offender from liability.

*Clinger v. Duncan*, 166 Ohio St. 216, 222, 141 N.E.2d 156 (1957). An injury is the natural and probable consequence of an act if the injury complained of "could have been foreseen or reasonably anticipated" from the conduct. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 287, 423 N.E.2d 467 (1981).

{¶ 34} According to *Lewis v. Bland*, 75 Ohio App.3d 454, 599 N.E.2d 814 (9th Dist.1991), and the cases that follow it, police officers must engage in "extreme or outrageous conduct" before there can be proximate cause. *Id.* at 456. This approach is contrary to traditional notions of proximate cause, which focus on the foreseeability of the consequence, not on the wrongfulness of the conduct that produces the result.

{¶ 35} Ohio's sovereign immunity statute sets forth standards imposing liability of governmental entities and their employees for wrongful conduct. R.C. 2744.03(A)(6) grants employees of political subdivisions immunity from liability, unless any of three exceptions to that immunity applies. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 21. Those exceptions are (1) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (2) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; and (3) civil liability is expressly imposed upon the employee by a section of the Revised Code. R.C. 2744.03(A)(6)(a)-(c). Thus, of relevance here, police officers involved in police chases have a duty not to proximately cause injury by acting maliciously, in bad faith, or in a wanton or reckless manner. R.C. 2744.03(A)(6)(b). They are immune from suit, unless their actions were performed "with malicious purpose,

in bad faith, or in a wanton or reckless manner." *Id.*

{¶ 36} As we stated in *Moon v. Trotwood Madison City Schs.*, 2014-Ohio-1110, 9 N.E.2d 541 (2d Dist.):

The terms "wanton" and "reckless" describe different and distinct degrees of care and are not interchangeable. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph one of the syllabus. They are sometimes described "as being on a continuum, i.e., willful conduct is more culpable than wanton, and wanton conduct is more culpable than reckless." *Id.* at ¶ 42 (Lanzinger, J., concurring in judgment in part and dissenting in part).

Recklessness is a high standard. *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶ 37. "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson* at ¶ 34, adopting 2 Restatement of the Law 2d, Torts, Section 500 (1965).

*Moon* at ¶ 20-21.

{¶ 37} By requiring extreme and outrageous conduct to establish proximate cause (which is required for liability), *Lewis* usurps the legislative determination as to the type of conduct that is required of employees of political subdivisions for immunity from liability. Under *Lewis*, even if a police officer is reckless, the officer would still be immune from liability unless the conduct is extreme or outrageous. The argument that *Lewis* involves

"proximate cause" as opposed to "duty" could devolve into a historical or pedagogical discussion of duty versus proximate cause. See, e.g., *Palsgraf v. Long Island R.Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). Suffice it to say, the bottom-line concerning potential responsibility is the same. It may or may not be good public policy to require "extreme or outrageous" conduct to remove immunity and impose liability upon police officers who pursue a fleeing suspect, but that question has been decided by the legislature when it only required "reckless" conduct.

{¶ 38} If the legislature desired a different standard for immunity when police officers are pursuing fleeing suspects in their vehicles, the legislature could have expressly created such an exception. The legislature has created an exception to political subdivision liability for negligent operation of a motor vehicle when a police officer "was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct." R.C. 2744.02(B)(1)(a). No specific immunity provision exists for police officers regarding their pursuit of a fleeing suspect other than that found in R.C. 2744.03(A)(6)(b).

{¶ 39} I concede that *stare decisis* weighs in favor of following *Whitfield*, which followed *Lewis*. However, *Anderson* has since clarified certain definitions regarding the degrees of care for purposes of the sovereign immunity statute. Moreover, I believe that *Whitfield* was wrongly decided at the time, the decision defies practical workability, and abandoning the precedent would not cause undue hardship for those who have relied on it. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 215, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 48 (adopting a standard to determine when courts may vary from established precedent).

Copies mailed to:

Kenneth J. Ignozzi  
Liza J. Luebke  
John Cumming  
Lawrence E. Barbieri  
Edward J. Dowd  
Joshua R. Schierloh  
Hon. James A. Brogan  
(sitting for Judge Barbara P. Gorman)

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION

PAMELA ARGABRITE,

CASE NO.: 2012 CV 07402

Plaintiff(s),

JUDGE JAMES A. BROGAN

-vs.-

JIM NEER, et al,

Defendant(s).

**DECISION, ORDER AND ENTRY  
SUSTAINING MOTION FOR  
SUMMARY JUDGMENT OF  
DEFENDANTS JIM NEER AND  
GREGORY STITES ; AND  
SUSTAINING MOTION FOR  
SUMMARY JUDGMENT OF  
DEFENDANT, JOHN DIPIETRO;  
AND SUSTAINING MOTION FOR  
SUMMARY JUDGMENT OF  
DEFENDANTS TONY BALL AND  
DANIEL ADKINS**

On July 11, 2011, Pamela Argabrite was severely injured when the vehicle she was driving was struck by Andrew Barnhart who was fleeing from various police officers. On June 7, 2013, Argabrite filed an amended complaint against Jim Neer, Gregory Stites, John DiPietro of the Miami Township Police Department and Karen Osterfeld, Tony Ball, and Daniel Adkins of the Montgomery County Sheriff's Office. The plaintiff alleged that these officers were acting within the scope of their duties as law enforcement officers but were not protected by governmental immunity because they were engaged in willful, wanton and reckless conduct with a malicious purpose in pursuing a non-violent suspect. The plaintiff alleged that these defendants engaged in a

Montgomery County Common Pleas Court  
General Division

PLAINTIFF'S  
EXHIBIT

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high speed chase through commercial and residential areas during a time of heavy traffic at excessive speeds causing severe injury to her. She sought compensatory and punitive damages.

The defendants all answered and denied liability for Ms. Argabrite's injuries. They claimed, *inter alia*, that the plaintiff's injuries were caused by the superseding and intervening actions of a third person over whom they had no control. They also raised the defense of sovereign immunity.<sup>1</sup>

All of the defendants have moved for summary judgment. The township officers state they cannot be liable for the injuries caused to Ms. Argabrite because they were directly caused by the actions of the fleeing suspect, Andrew Barnhart. The township officers contend that Ohio's "no proximate cause" holding insulates them from liability when a pursuit ends in injury to an innocent third person from a collision with a vehicle that is being pursued without any direct contact with a police vehicle. They cite *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917 (2<sup>nd</sup> Dist.). In that case, the court held that when a law enforcement officer pursues a fleeing violator and the violator injures a third person as a result of a police chase, the officer's pursuit is not the proximate cause of those injuries unless circumstances indicate extreme or outrageous conduct by the police officer. These officers contend that the facts are not in dispute and no reasonable person could find their conduct in chasing Barnhart was extreme or outrageous.

The Montgomery County Sheriff's Deputies contend they are entitled to summary judgment because the material facts are not in dispute and that neither of them actively engaged in the pursuit of Andrew Barnhart. These defendants point to Deputy Ball's testimony that this pursuit would not have been justified under the Sheriff's Department's pursuit policy, and that he never intended to actively engage the suspect vehicle. The Sheriff's Deputies note that both of plaintiff's experts agreed that Sgt. Adkins played no active role in the pursuit. The Sheriff's Deputies also assert the defense of sovereign immunity under the "no proximate cause" holding in *Whitfield*.

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<sup>1</sup> The plaintiff has dismissed her complaint against Karen Osterfeld pursuant to Civ. R. 41.

The court has reviewed the depositions of all the police officers. The facts surrounding the pursuit of Andrew Barnhart's vehicle are set out in the briefs and are not seriously disputed.

On July 11, 2011, a police dispatch radio broadcast was sent out which indicated to all concerned police agencies that a burglary-in-progress was occurring at 802 Congress Park Drive in Washington Township at 11:37 a.m. (Thompson depo., pp. 12-13). The suspects were identified as two black males who had just broken into a residence, stolen items and were leaving in a white vehicle with no front license plate. (Thompson depo., pp. 12-13).

Washington Township police arrived on the scene at 11:42 a.m., but the suspects had already fled. (DiPietro Affidavit, Exhibit A). At 11:51 a.m., the suspect vehicle was further described as a white older model box-style Chevy Caprice missing hubcaps. (Thompson depo., p. 13). The suspects were also described as wearing white t-shirts, and they had fled in the direction of Interstate 675 (Thompson depo., p. 12).

The shift supervisor of the Miami Township Police road patrol division that day was Sgt. Rex Thompson. (Thompson depo., pp. 7, 11-12; Neer depo., p. 61; Stites depo., p. 7). Thompson was working the day shift (7:00 a.m. to 3:30 p.m.) on July 11, 2011, and was in charge of all the Miami Township Police officers during that shift. (Thompson depo., p. 7). Thompson's duties included responsibilities for any police pursuits conducted during the shift. (Thompson depo., p. 7).

Thompson was in his office at the time the radio dispatch call was broadcast. (Thompson depo., p. 12). Thompson then left his office and got into his cruiser so he could monitor a nearby roadway in the event the suspect's vehicle drove past it. (Thompson depo., p. 13). While Thompson monitored the roadway, one of his patrol officers used the Miami Township "talk-around-channel" on his radio to communicate directly with another Miami Township Police Officer. (Thompson depo., pp. 14-15). During this communication, Thompson heard Officer David Ooten tell Officer Gregory Stites that the description of the car involved in the burglary sounded similar to a car they had seen at an address on Mardell Drive. After hearing this, Thompson got on the radio and told

Stites he would meet him on Mardell Drive to investigate. Thompson did not know who owned the vehicle involved in the burglary or who lived at the house on Mardell Drive. (Thompson depo., pp. 15-16).

When Thompson arrived at 2037 Mardell Drive, he noticed that there was an older style, white boxy Chevy Caprice with no hubcaps parked in the driveway. He also noticed that the driver's side door was open and that someone was sitting in the driver's seat and had a leg draped out of the open car door. (Thompson depo., p. 17). Thompson decided to investigate further and pulled in the driveway behind the white vehicle. (Thompson depo., p. 18). Thompson parked his cruiser about 6 to 8 feet behind the white vehicle and then exited his cruiser. (Thompson depo., p. 18). During that time, Stites had arrived, parked his cruiser on the street, and remained in it. (Thompson depo., p. 19; Stites depo., p. 22).

Thompson approached the white vehicle slowly so as to catch its occupants off-guard. As he was doing so, the driver exited the white vehicle and was talking on a cell phone. As the driver turned, he saw Thompson, and they were within 10 feet of one another at this point. Upon seeing Thompson, the driver immediately turned and got back in to the white vehicle. (Thompson depo., pp. 19-20). Thompson was concerned that the suspect might be attempting to get a weapon so he immediately drew his own weapon and started shouting at the suspect. (Thompson depo., pp. 19-20). But, the suspect closed the driver's side door on the white vehicle and started the engine. (Thompson depo., p. 20).

Thompson then moved closer to the white vehicle and continued to shout, "police!", "stop!", and "don't do it!", to the suspect through the open driver's side window. At this point, Thompson was very close to the white vehicle, in fact he was just a couple of feet away from it. Thompson had his weapon drawn and was screaming at the suspect to stop, when the driver revved the white vehicle's engine and reversed the car into Thompson's police cruiser. (Thompson depo. pp. 20-22; Stites depo., p. 26). Then, as Thompson was still within touching distance of the white vehicle and

still screaming at the suspect to stop, the driver threw the white vehicle into drive and accelerated ramming the brick garage in front of it. (Thompson depo., p. 21). The white vehicle was then thrown back into reverse, and, as its tires were spinning, the suspect rammed it in to Thompson's cruiser a second time. Suddenly, a young man that was a passenger in the white vehicle, unbeknownst to Thompson, opened the passenger side door and started to run from the vehicle. As this happened, the white vehicle was thrown into drive again, its tires started spinning and, as it moved forward and to the right, it tore off a section of the brick garage in front of it. (Thompson depo., pp. 22-23). Thompson immediately feared that the white vehicle might run over the person that moments before ran from its passenger's side door. (Thompson depo., pp. 22-23). The driver of the white vehicle continued through several residential back yards until he made it to a roadway and then turned onto Graceland Street. Since there were other Miami Township police officers in the immediate vicinity, Thompson turned his attention to the fleeing passenger. (Thompson depo., pp. 23-25). Thompson called in the license plate of the fleeing car.

As it turned out, the fleeing passenger ended up breaking his leg in a ravine behind the house. Thompson, upon locating the injured passenger, immediately called for medical assistance. (Thompson depo., pp. 26, 30). He stayed with the injured passenger while waiting for medical assistance and tried, unsuccessfully, to get the passenger to name the driver of the white vehicle. (Thompson depo., pp. 31-32; 34-35).

Miami Township Police Officer Jim Neer was working the patrol day shift on the date of this incident. Upon hearing the radio dispatch broadcast from other officers responding to Mardell Drive to investigate, Neer decided to head that way since he was just a few blocks away at the time. When he arrived on Mardell Drive, Neer saw a white Chevy Caprice going through the side yard of a residence (Neer depo., p. 14). He also saw one Miami Township Police cruiser parked on the street and another parked in the driveway of the residence. Neer then activated his lights and sirens,

and began to pursue the suspect. (Neer depo., pp. 15, 40). In doing so, Neer contacted dispatch and advised them that he was going to pursue the suspect.

Neer testified he did not know the identity of the suspect. (Neer depo. pp. 15-16). Pursuant to Miami Township Police policies, Neer knew that he could engage in pursuit when certain enumerated violent felonies had occurred, which include both burglary and the felonious assault. (Neer depo., p. 55, Exhibit 1). According to Neer, the traffic during the course of the pursuit was, in general, light. (Neer depo., p. 58). On Route 725, Neer said he got behind the suspect vehicle and got its license number. He testified the vehicle was registered to Andrew Barnhart. In particular, Neer testified that there was light traffic at the intersections of Lyons Road and Route 725, Lyons Road and McEwen Road, McEwen Road and Route 725, and McEwen Road and Spring Valley Pike. (Neer depo., p. 62). Stites described the traffic on Route 725 as "fairly light," which he was able to negotiate without any problems. (Stites depo., p. 31). Weather conditions were dry, clear and sunny. (Neer depo., p. 58; Stites depo., p. 31). Neer testified that he has concern for everyone on the roadway when he decides to engage in a pursuit. (Neer depo., p. 64).

The pursuit began on Graceland Street in Miami Township and continued eastbound on Route 725. (Neer depo., pp. 18-19). Initially, Neer was the only officer involved in the pursuit. As the pursuit continued over the Interstate 675 bridge and past the intersection with Yankee Street, Neer noticed that Stite's cruiser was following him as they approached Lyons Road. (Neer depo., p. 19). At this point, the suspect's vehicle was more than 100 yards ahead of Neer. (Neer depo., p. 20). Neer noticed the suspect's vehicle slowed as it approached the Lyons Road intersection as the traffic was stopped by a red light. (Neer depo., p. 21). Neer said the suspect vehicle went into the westbound lane of traffic because no westbound traffic was approaching and then turned north onto Lyons Road. On Lyons Road, the suspect vehicle went around the bend in the road and again slowed to make a right hand turn on McEwen Road and headed south. (Neer depo. pp. 22-23). Neer testified that traffic on these roadways wasn't heavy during this time frame. (Neer depo., p.

23). Neer testified that the suspect vehicle was going fast on McEwen, and he was having a hard time trying to keep up with him. (Neer depo., p. 24).

As Neer pursued the suspect, Stites followed and was calling out the street names on the radio so that other police officers knew which direction the pursuit was headed. (Neer depo., p. 24; Stites depo., p. 35). The pursuit proceeded south on McEwen and approached the intersection with Route 725. (Neer depo., pp. 24-25). The speed limit there is 45 miles per hour. (Stites depo., p. 38). As the suspect approached the intersection, he slowed and waited for traffic to clear before continuing. (Neer depo., pp. 24-25). Neer and Stites also slowed down so that they could proceed through that intersection. (Neer depo. pp. 25-26; Stites depo., pp. 37-38). Captain Karen Osterfeld of the Montgomery County Sheriff's Office provided assistance to Neer and Stites by blocking westbound traffic from entering the 725 and McEwen intersection. She testified the suspect vehicle was going about 40 mph as it crossed St. Route 725.

On the other side of the McEwen and Route 725 intersection, Montgomery County Sheriff's Deputy Tony Ball spotted the suspect's white vehicle and joined the pursuit. (Neer depo., pp. 24-26). After this point, the Sheriff's Deputy's cruiser became the vehicle immediately following the suspect's car, and Neer and Stites were trying to catch up to the Deputy's cruiser. (Neer depo., pp. 26-27). Eventually, near the intersection of McEwen Road and Spring Valley Pike, Neer caught up to the Sheriff Deputy's cruiser. (Neer depo., p. 27). At Spring Valley Pike, Neer assumed the suspect's vehicle turned right and headed westbound because the Sheriff's Deputy in front of him went that direction. (Neer depo., p. 28). Neer followed the Sheriff's Deputy and turned right on Spring Valley Pike. (Neer depo., pp. 28, 30). On Spring Valley Pike, he maintained a safe distance of 25 to 50 yards behind the Deputy's cruiser. (Neer depo., p. 30). Neer did not see the suspect's vehicle again until he passed through the intersection of Spring Valley Pike and Washington Church Road. ( Neer depo., p. 32). Neer testified he drove slowly on Spring Valley Pike while following the Sheriff's Deputy. Neer testified that at the intersection of Washington Church Road and Spring

Valley Pike, the Sheriff's Deputy pulled his cruiser over, and Neer and Stites passed him. (Neer depo., at 35-36). Because the suspect's vehicle was now well ahead of him, Neer accelerated his cruiser to a speed between 60 and 80 miles per hour on Spring Valley Pike. As Neer and Stites reached the crest of a hill on Spring Valley Pike, they slowed to see if the suspect had driven down a side street. (Neer depo., pp. 39-40).

As Neer approached the intersection of Spring Valley Pike and Arbor Ridge Lane, he noticed the suspect's white vehicle ahead of him on Spring Valley Pike at the intersection with Route 741 (N. Springboro Pike). (Neer depo., p. 40). The suspect's vehicle slowed down or stopped to wait for traffic to clear that intersection before it turned left onto route 741 and headed southbound after going through a red light. (Neer depo., p. 41). When Neer made it to that intersection, he slowed down, stopped, and made sure no traffic was coming in either direction before turning left onto Route 741. (Neer depo., pp. 41-42).

Once on Route 741, Neer accelerated in order to catch up to the suspect vehicle, which was ahead of him and cresting on a hill near Miami Valley Drive. (Neer depo., p. 43). Neer and Stites again lost sight of the suspect's vehicle until they crested the same hill near Waldruhe Park. (Neer depo., pp. 43-44; Stites depo., p. 48). As soon as Neer and Stites crested the hill, they saw the suspect drive left of center and hit another vehicle head on in the opposing lane of traffic. (Neer depo., p. 44; Stites depo., p. 49). At this time, Neer was approximately a half mile from where the collision occurred. (Neer depo., p.44). Neer and Stites were the first two officers on the scene of the crash and immediately called to report the crash to dispatch and request medical assistance. (Neer depo. pp. 46-47; Stites depo., p. 49). Neer was asked whether he ever considered calling off the pursuit, and he said he would have if the suspect's vehicle had made it through the Austin Pike intersection. He said there was too much traffic at that time at that intersection. (Neer depo., pp. 57-58.

Officer Gregory Stites gave essentially the same testimony as Neer in his deposition. He acknowledged that he knew the burglary suspect's name early on during the pursuit.<sup>2</sup> He testified that the suspect proceeded very slowly through the McEwen and Route 725 intersection, and he and Neer "inched our way through it as well." (Stites depo., p. 39). He said he was traveling 45-50 miles per hour on Spring Valley Pike before he reached Washington Church Road. He stated he never went over 70 miles per hour on Route 741 and didn't see the suspect vehicle until he crested the hill on Route 741. He testified that this pursuit was the first one he ever engaged in. (Stites depo., at 55).

On July 11, 2011, John DiPietro was the Deputy Chief of Police for Miami Township. (DiPietro depo., p. 5). He had served in this capacity since 2001. On July 11, 2011, at the time of the radio broadcast concerning a burglary-in-progress in Washington Township, DiPietro was at the Miami Township Police service garage. (DiPietro depo., pp. 10, 13). Initially, DiPietro only heard a small portion of the information relayed over the radio as he was engaged in discussions with persons at the service garage, and the radio did not have his full attention. (DiPietro depo., pp. 17-18). DiPietro recalled hearing a transmission by Thompson stating that he was on patrol looking for the suspect's vehicle. (DiPietro depo. pp. 10-11). Thompson was the shift supervisor in charge of the Miami Township Police road patrol division at the time and normally would have been in charge of the pursuit. Over the radio, the suspect's vehicle had been described as a white box-style Chevy Caprice without hubcaps. (Dipetro depo. p. 11). DiPietro did not know the identity of the suspect until after the crash.

In a subsequent radio transmission from Thompson, it sounded to DiPietro as though Thompson stated that he had been "hit." Shortly thereafter, Thompson broadcast that he was "out of service." At the time, DiPietro was not entirely sure what had just occurred. But, based on

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<sup>2</sup> Stites learned of Barnhart due to a previous incident in December 2010. He learned that Barnhart's grandmother lived at 2037 Mardell Drive. A few weeks before the pursuit, he observed the Caprice and learned it was registered to Barnhart.

Thompson's radio transmissions, DiPietro assumed some sort of violent encounter had taken place between Thompson and the suspect. (DiPietro depo., pp. 13-14).

After it became apparent to DiPietro that several officers were now pursuing the suspect, and that Thompson was "out of service," DiPietro got on the radio and took control of the pursuit at 11:54 a.m. (DiPietro depo., p. 14; DiPietro Affidavit Para. 6). By now, DiPietro had left the service garage and was heading back to the police department. (DiPietro depo., pp. 14-15). Once Thompson indicated he was "out of service," DiPietro realized it was his duty to assume control of the pursuit as the next highest ranking officer listening to the radio. (DiPietro depo., p. 15). He immediately asked the pursuing officers for information and began monitoring their actions. (DiPietro depo., p. 14). Specifically, DiPietro asked the officers to keep calling out their locations and additional information. (DiPietro depo., p. 15). He did not ask for the speeds of the vehicles during the pursuit. His intention was to have other officers get ahead of the pursuit and deploy Stop Sticks to halt the suspect's vehicle. (DiPietro depo., p. 9, Exhibit 2). DiPietro also requested dispatch to issue an alert to surrounding agencies. (DiPietro depo., p. 9, Exhibit 2). Shortly after he took these actions, however, DiPietro heard Stites announce that there had been a crash. (DiPietro depo., p. 9 Exhibit 2). That announcement was made at 11:57 a.m. (DiPietro Affidavit, Para. 7).

DiPietro testified that he was concerned for public safety during this pursuit, as he always is during every police pursuit. (DiPietro depo., p. 26). Based upon the specific information he received from his officers during the course of the pursuit, as described above, DiPietro did not believe any of the information warranted terminating the pursuit. (DiPietro depo., p. 26). DiPietro was in control of the pursuit for approximately three minutes. (DiPietro Affidavit, Para. 8).

Sergeant Daniel Adkins of the Montgomery County Sheriff's Department was on patrol somewhere in Washington Township when he learned of a burglary in progress within the Township. (Adkins Depo., p. 7.) While proceeding to the address of the burglary, Adkins received updates that the suspect and vehicle, which was identified as an older white Caprice Classic, had

left the area. (Id., at 7-8.) He then began patrolling around the general area hoping to find the suspect vehicle. (Id., at 8.)

While patrolling the general area, he heard radio traffic from the Miami Township Police Department stating that they had found the vehicle, that one suspect fled on foot and the vehicle fled from somewhere within Miami Township. (Id., at 9.) When Adkins learned that Miami Township police were pursuing the vehicle, he proceeded to the area mentioned in their radio traffic. (Id., at 11.) He determined that he might be needed to assist in clearing intersections or to wait for the suspect in the vehicle to flee on foot. (Id.) He then traveled from the area of the burglary to the area of Lyons and State Route 741 ("741"), anticipating that if the suspect vehicle traveled north onto 741, the traffic at that time of the day would have been "horrendous," and Adkins would need to stop traffic near that intersection to let them through the area. (Id.) When the pursuit continued south on 741, instead of north, Adkins never observed the suspect vehicle during the course of the pursuit. (Id., at 12). During the pursuit, Adkins was unaware of whether anyone from Miami Township had knowledge of the identity of the suspect or the license number of the vehicle he was driving.

Montgomery County Sheriff's Deputy Tony Ball was at the Washington Township substation when he heard a "burst of radio traffic" and realized "something was happening," and the Miami Township officers were heading toward the Washington Township area. (Ball Depo., at 12-13.) Upon hearing that Miami Township officers were headed into the Washington Township jurisdiction, he got into his cruiser. (Id., at 13-14.) Ball tried to bring up the mobile data terminal in his vehicle to find out more details of the situation. (Id., at 13.) He then exited the substation parking lot and headed north on McEwen Road toward 725. While heading north, the white vehicle driven by the suspect passed Ball's vehicle heading the opposite direction -southbound - on McEwen Rd. As Ball turned around to see the car, he noticed that the suspect vehicle, which was

driving "faster than normal," went into the opposing lanes of travel, heading southbound in the northbound lanes. (Id., at 14-15.)

Ball could not see other police vehicles in pursuit at that time, but could see lights in the distance, which appeared to him as though they may have gotten "held up" at an intersection. (Id., at 17.) Once he determined that Miami Township officers were still at the intersection, he activated his vehicle's emergency equipment and made a U-turn on McEwen Rd. Following the U-turn, he deactivated his vehicle's emergency equipment. (Id., at 25.) He then moved over into the right portion of the road, "thinking that Miami Township would be a little bit closer" to him, expecting them to come around him and continue their pursuit. (Id., at 18-20.) Ball's focus was trying to find out where Miami Township officers were. (Id.) When he realized they were not as close as he originally thought, Ball noticed that he was losing sight of the suspect vehicle, so he proceeded to follow the direction of the vehicle to keep some sight of him. (Id., at 20.)

Heading south on McEwen toward Spring Valley Pike, Ball estimated that he was traveling approximately 45 to 50 miles per hour. He lost sight of the suspect vehicle on McEwen until he neared Spring Valley Pike, at which time he saw the suspect vehicle traveling west on Spring Valley Pike. (Id., at 19.) At the intersection of McEwen and Spring Valley Pike, Ball activated his vehicle's emergency equipment and turned west onto Spring Valley Pike. (Id., at 21.) After turning onto Spring Valley Pike, Ball looked back to see whether the Miami Township officers were close enough so that he could "get out of their way," as Ball was only trying to keep the suspect vehicle in sight rather than engage in pursuit of the suspect. (Id., at 22.)

Ball was able see the suspect for "bits and pieces of time," which is how he knew to continue west on Spring Valley Pike. (Id., at 23.) Ball continued west on Spring Valley Pike, through the intersection of Spring Valley Pike and Yankee Street. During that time, Ball activated his vehicle's emergency equipment, either lights only or lights and sirens, when he was passing vehicles or in intersections, mainly to warn motorists that he and the Miami Township officers were

coming through the area. (Id., at 26.) He turned off the lights and sirens after crossing through the intersection of Yankee and Spring Valley Pike. (Id., at 32.)

On Spring Valley Pike, Ball noted that the Miami Township police cruisers were close behind him, and he began looking for places to pull over, waiting for the opportunity for Miami Township cruisers to pass him. (Id., at 33.) He feared that if he pulled over or tried to maneuver out of their way, they would follow him. (Id.) Finally, Ball made his one and only communication over the radio telling Miami Township officers to pass him when he was just east of the intersection of Spring Valley Pike and Washington Church Road. (Id., at 27- 28.) He made this communication because he had no intention of pursuing the suspect vehicle. (Id., at 35.) He had only put himself "in a position to where, to try to keep a visual on [the suspect vehicle]." (Id.) Ball felt as though he was impeding the Miami Township officers' progress, so he wanted them to pass him "so they could continue on and do what they needed to do or had to do." (Id.)

Ball pulled over into the middle of the road and slowed down. At that point, on Spring Valley Pike, near the Washington Church Road intersection, Miami Township officers passed him. (Id., at 34-36.) After the Miami Township officers passed him in their cruisers, Ball continued westbound on Spring Valley Pike without his emergency equipment activated. (Id., at 36.) There were occasions where vehicles were already pulled over from the Miami Township cruisers passing them in which Ball activated his lights only to pass those vehicles. (Id.) Ball did stop at the red light in the intersection of Spring Valley Pike and 741 and waited out the red light. (Id.) His vehicle's emergency equipment was off at that time. (Id., at 37.) At the same time the light turned green, the Miami Township police broadcast over the radio that "they had crashed." (Id., at 37.) At that point, Ball activated his vehicle's emergency equipment again and responded to the crash to assist with traffic. (Id.)

The Miami Township Pursuit of Motor Vehicles policy was attached in pertinent part to the plaintiff's response to the defendants' motion for summary judgment as Plaintiff's Exhibit 1.

#### 41.2.8 Pursuit of Motor Vehicles

Purpose: To establish guidelines for motor vehicle pursuits.

- A. Definition-Pursuit is an active attempt by one or more police officers operating a motor vehicle(s) and utilizing audible and visible emergency equipment simultaneously to apprehend one or more occupants of a motor vehicle while the driver of the pursued vehicle attempts to avoid capture by using high speed driving or other evasive tactics or by maintaining normal speed, but willfully ignoring the officer's signal to stop.
- B. The purpose of pursuit is the apprehension of a person who refuses to voluntarily comply with the law requiring drivers to stop upon command. Among the stated goals of this Department is the protection of life and property. To the extent that if a pursuit exposes any officer, suspect, or the general public to an unnecessary risk of harm or injury then pursuit is inconsistent with this goal.
- C. A pursuit is initiated when a violator/criminal makes the decision not to stop for an officer after receiving proper notice. At this point officers must decide whether the proper action is to engage in pursuit or to terminate the situation. Pursuits shall be limited to incidents where an officer has probable cause to believe the fleeing suspect has committed or is about to commit a violent felony. If the suspect's flight poses a serious risk to the safety of the officer or citizens of the community, supervisor's authorization is required for a pursuit.

The term "violent felony" would include the following:

Sec. 2903.01	Aggravated Murder
Sec. 2903.02	Murder
Sec. 2903.03	Voluntary Manslaughter
Sec. 2903.04	Involuntary Manslaughter
Sec. 2903.06	Aggravated Vehicular Homicide
Sec. 2903.11	Felonious Assault
Sec. 2903.12	Aggravated Assault
Sec. 2905.01	Kidnapping
Sec. 2905.02	Abduction
Sec. 2907.01	Rape
Sec. 2907.03	Sexual Battery
Sec. 2907.12	Felonious Sexual Penetration
Sec. 2909.02	Aggravated Arson
Sec. 2909.03	Arson
Sec. 2911.01	Aggravated Robbery
Sec. 2911.02	Robbery
Sec. 2911.11	Aggravated Burglary
Sec. 2911.12	Burglary
Sec. 2917.01	Inciting to Violence
Sec. 2917.02	Aggravated Riot

Even in incidents of violent felonies, the officer should view the initiation and continuation of a pursuit as a potential use of deadly force. If the risk to the public from the initiation or continuation of a pursuit outweighs the risk from not initiating the pursuit or discontinuation, the pursuit shall be terminated.

#### 1. Engagement of Pursuit

An officer must evaluate the seriousness of the situation and determine if a pursuit is warranted.

- a. What is the possibility of apprehension?
- b. In what environment will the pursuit take place (residential area, school zone, business area, etc.)?
- c. What are the traffic conditions (light, heavy)?
- d. What are the weather conditions (clear, rain, snow)?
- e. Time of day (daylight, dark)?
- f. What is the condition of the police vehicle?
- g. Is there assistance available to the officer?
- h. Is the violation/situation serious enough to warrant a pursuit?
- i. Unmarked vehicles are prohibited from engaging in pursuits.

#### 2. Initiating Officer(s) Responsibilities

- a. When the operator of a vehicle fails to stop as notified, the pursuing officer will insure the emergency lights, headlights, and siren are activated.
- b. The officer initiating a pursuit shall, in all cases, notify the Communications Center as soon as pursuit is initiated and provided the following information:
  - unit's identifying number
  - location, speed and direction of travel
  - vehicle description and license number (if known)
  - number of occupants and driver's description (if known)
  - specific reason for pursuit, to include laws violated
- c. Failure to provide the above information may be the cause for supervisor or officer-in-charge to order termination of the pursuit.

- d. During the pursuit, a safe distance should be maintained from the pursued vehicle to permit the officer to duplicate any turns or actions and lessen the possibility of collision with the vehicle.
- e. Officers are required to keep the supervisor informed of any changes in the pursuit.
- f. Seat belts shall be worn when operating a motor vehicle. Pursuant to O.R.C. 4513.263(B).

### 3. Secondary Units Responsibilities

- a. During a pursuit, no more than two (2) police vehicles should be operated in close pursuit.
- b. The second unit should relay information to dispatch, regarding the pursuit while the initiating unit maintains visual contact with the suspect vehicle.
- c. Only a supervisor or officer-in-charge may authorize more than two (2) units to be in active pursuit. All other units will remain aware of the direction and progress of the pursuit, but shall not respond or parallel the pursuit unless specifically authorized to do so.
- e.(sic) The secondary unit will maintain a safe distance behind the primary unit, but close enough to render assistance, if, and when necessary.
- f. Additional officers should move to the area of their beat that is closest to the pursuit to afford assistance if called upon. Additional officers are not to engage in pursuit unless directed to do so by a supervisor.

### 4. Communications Responsibilities

- a. The dispatcher must attempt to maintain contact with the pursuit and notify the supervisor of changes.
- b. Receive and record all incoming information on the pursuit.
- c. If the shift supervisor or officer-in-charge is not aware of a pursuit, to immediately notify him that a pursuit is in progress.
- d. Clear the radio of any unnecessary traffic and advise all other units that a pursuit is in progress, providing all relevant information.
- e. Perform relevant record and motor vehicle checks.
- f. Maintain control of all radio communications during the pursuit.

- g. Coordinate assistance under the direction of a supervisor or officer-in-charge.
- h. If the pursuit appears to be leaving the Township, the dispatcher must notify the jurisdiction(s) affected as soon as possible by telephone or Inter-City radio traffic.
- i. Anytime a pursuit is engaged, the dispatcher will issue a CODE "R" restriction enabling the officers engaged in the pursuit, dispatcher, and supervisor free access to the radio channel.
- j. Continuously monitor the pursuit until its conclusion.

5. Supervisor's Responsibilities

- a. The Shift Supervisor will take an active role in all pursuits by monitoring all radio activity and advising involved officers of any actions or decisions to terminate.
- b. Upon being notified of the pursuit, the Shift Supervisor or Officer-in-Charge shall verify the following:
  - no more than the required or necessary units are involved in the pursuit
  - any outside agency which may become involved in the pursuit is notified
- c. If a Shift Supervisor is nearby and is able to act as the second unit, he/she should engage the pursuit and determine whether to continue or terminate.
- d. Shift Supervisors should not engage a pursuit or initiate a CODE III response if they are not near enough to act as a second unit.
- e. Anytime a Shift Supervisor determines the risks in a pursuit are too great for the situation, he/she shall order the pursuit terminated.
- f. Shift Supervisors will assign additional officers to assist in a pursuit if warranted.
- g. Shift Supervisors will respond to the scene when a pursuit has ended or if a crash is involved.

\* \* \*

7. Termination of Pursuit

Definition-Terminate is to put an end to; stop; cease. No longer pursue, tail or follow.

a. An officer should continually evaluate a pursuit situation and judge the inherent dangers to decide if a pursuit should be terminated. Personal pride should not have an effect on the judgment process.

b. Officers must terminate a pursuit when:

- 1) The risks to personal safety and/or the safety of others outweigh the dangers presented if the suspect is not apprehended.
- 2) The identity of the offender is known and risk of escape poses less threat than risk from attempt to capture.
- 3) When directed to do so by a higher ranking officer.
- 4) Environmental conditions indicate the futility or danger of continued pursuit.

d. When the pursued vehicle leaves the roadway, containment rather than pursuit should be initiated unless a violent crime is involved.

#### 8. Immediate Termination

a. Pursuits generated from traffic violations or misdemeanor crimes shall not be initiated. Pursuits will be terminated when the probability of harm to the officer or general public is increased by the actions of the suspect vehicle. Harm is increased when:

- 1) The suspect vehicle travels into oncoming traffic.
- 2) Traffic congestion increases to an unsafe level.
- 3) Environmental conditions indicate the futility or danger of continued pursuit.
- 4) Speeds increase to a level unsafe for conditions.
- 5) When directed to do so by the O-I-C, or Supervisor.
- 6) When the suspect and/or officer(s) actions could create a greater risk than is reasonable for the circumstances. See Section C of this order.

(emphasis added).

Stephen Ashton was deposed by plaintiff's counsel. He testified he is a self-employed auto accident reconstruction consultant. He testified he was certified through the Institute of Police Training and Management in 2003. He testified he retired as a police officer in 2008. He testified

he participated in high speed chases as a police officer many times. (Ashton depo., p. 28). Ashton testified he drove the pursuit route on December 13, 2011 at 9:30 a.m. He testified it took him twelve minutes and forty-six seconds going the speed limit. (Ashton depo., at 440. He testified he reviewed the pursuit policy of both the Montgomery County Sheriff's Department as well as Miami Township's. He testified that the Deputy Sheriffs' violated their pursuit policy related to interjurisdictional pursuits as well as the section related to the requirement for written reports and critiques of pursuits. (Ashton depo., p. 46).

Ashton was not specific as to how Deputy Ball violated the Township pursuit policy. He testified that Ball was involved in the pursuit briefly. He did not state Ball was speeding at any time. He admitted Ball stopped pursuing the suspect when he reached the Miami Township line. He testified that Adkins had a responsibility under the Sheriff's pursuit policy to monitor the pursuit, and he had a duty to insure that the video on Ball's cruiser was preserved.

O.R.C. 2744.03(A)(6) sets forth the immunity of political subdivision employees and the exceptions thereto:

[I]n addition to any immunity or defense referred to in division (A)(2) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

\*\*\*

(b) the employee's acts or omissions were with a malicious purpose, in bad faith, or in a wanton or reckless manner.

In *Anderson v. City of Massillon*, 134 Ohio St. 3d 380, the Ohio Supreme Court held that the terms "willful," "wanton," and "reckless" describe different and distinct degrees of care and are not interchangeable for purposes of statutes relating to defenses available to a political subdivision and to immunity for employees of political subdivisions. The court held that:

1. "Wanton misconduct" is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that

harm will result. *Hawkins v. Ivy*, 50 Ohio St. 2d 114 (1977), approved and followed.

2. "Reckless conduct" is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. Restatement (Second) of Torts, Sec. 500 (1965) adopted.

In *Anderson*, the court held that the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct.

If the victim's vehicle was struck by a fleeing suspect, the employees' conduct must be more than wanton or reckless. It must be extreme or outrageous under all the circumstances. *Whitfield v. City of Dayton*, supra; and *Shalkhauser v. City of Medina*, 148 Ohio App.3d 41, 772 N.E.2d 129 (2002).

The Second District in *Whitfield* relied on a Ninth District case to-wit: *Lewis v. Bland*, 75 Ohio App.3d 453 at 456, in adopting the "no proximate cause" rule in police pursuit cases. In that case, the Court stated:

Again, '[t]he duty of police officers is to enforce the law and to make arrests proper cases, not to allow one being pursued to escape because of the fear that the flight may take a course that is dangerous to the public at large.' *Lewis* (supra), 75 Ohio App.3d at 456. An opposite rule would be an unnecessary restriction on the ability of police officers to carry out their duties. *Id.* A police officer cannot 'hesitate to make an arrest involving a moving automobile within or close to a city for fear that the subject being arrested would flee and cause harm to others for which the officer might be held responsible.' *Id.*

The proximate cause of an accident in such a situation is the reckless driving of the pursued, notwithstanding recognition of the fact that police pursuit may have contributed to the suspect's reckless driving. *Id.* When a law enforcement officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the officer's pursuit is not the proximate cause of those injuries unless the circumstances indicate extreme or outrageous conduct by the officer, as the possibility that the violator will injure a third party is too remote to create liability until the officer's conduct becomes extreme. *Id.*

The Ohio Supreme Court has described such conduct as follows:

'[S]o outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"' *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 375, 6 OBR 421, 453 N.E.2d 666.

See also, *Whitfield* (supra), 167 Ohio App. 3d at 187.

Counsel in this matter are aware that this judge dissented in *Whitfield* and its adoption of the "no proximate cause rule." The statement in *Lewis*, that the possibility that the violator will injure a third party is too "remote" to create liability until the officer's conduct becomes extreme is unreasonable at best. Department regulations regarding high speed police chases reflect the dangers these chases entail. Some experts suggest that a third or more of high speed chases lead to injury or death of innocent citizens. Federal officials say one person dies each day in America as a result of a high speed chase. See Bolton: *High Speed Chases Kill*, the State, Columbia S.C., (February 14, 2014).

Indeed, the Montgomery County Sheriff's Office pursuit policy notes that the operation of a police vehicle while pursuing another vehicle is one of the most hazardous situations law enforcement officers routinely confront. The safety of citizens and personnel is the first concern in a pursuit.

No reasonable juror could conclude that Sgt. Adkins or Deputy Ball engaged in extreme or outrageous conduct during the pursuit that led to the plaintiff's injuries. Adkins was not involved in the pursuit at all. Ball engaged in the pursuit only at a distance and only at reasonable speeds. He broke off the pursuit in favor of the Miami Township officers well before the accident. Adkins' and Ball's motion for summary judgment in their favor is SUSTAINED.

The actions of the Miami Township officers are more problematic.

Ashton testified he reviewed a number of materials provided to him by plaintiff's counsel and marked as Exhibit A. He testified that the Miami Township officers violated their township

pursuit policy by initiating and continuing the pursuit because the risk to the public outweighed the risk of not starting and continuing the pursuit of the suspect. He stated he arrived at that opinion because the route of the pursuit was heavily traveled, traveling through neighborhoods where the posted speed limit is 25 miles per hour, and the fact that the suspect went through stop signs, stop lights, and left of center. Ashton testified DiPietro violated the Township policy by not taking control of the pursuit. Ashton said he never heard DiPietro's voice over the police radio during the chase. Finally, Ashton estimated the suspect was traveling 72 mph when he struck the victim's car. He estimated Neer and Stites were traveling 65-70 mph one half mile from the crash site.

Gerald McDevitt was also deposed by the defense. He testified he is an expert accident reconstructionist and Emergency Vehicle Operations pursuit expert. He testified he worked as a police officer in Charleston, South Carolina from 1992 to 2010. He testified he reviewed the incident reports involved in the accident and witness statements and reviewed a video of the route of the pursuit. He also drove the pursuit route and reviewed the depositions of the all the police officers involved.

McDevitt testified that in his opinion Neer and Stites intentionally disregarded their departmental policy by engaging in the pursuit because they knew the suspect could easily have been apprehended or identified through the warrant process. McDevitt pointed out that Stites knew from information gathered two weeks before the incident who the suspect vehicle at the Mardell address was registered to. He testified that Neer knew that other township officers knew the name of the suspect early on in the pursuit of him. (McDevitt depo., p. 71). He noted that Sergeant Thompson could visually identify the suspect, and other officers knew who the registered owner was, and where he lived. He stated he would have the same opinion even if Neer didn't know who the driver of the suspect vehicle was. McDevitt stated in his opinion Neer wasn't justified in a pursuit over a non-violent property crime.

Counsel for Neer and Stites argue that the plaintiff makes no attempt to distinguish these actions from those of the Dayton police officers in *Whitfield* where the Court found Officers Abney's and Smith's conduct could not be characterized as "atrocious and utterly intolerable in a civilized community." In *Whitfield*, Sergeant Abney was working patrol when he observed a subject driving his vehicle over the speed limit on North Main Street. When another citizen reported the suspect vehicle had just driven erratically on the freeway, Abney decided to pull the suspect vehicle over. He had already given the dispatcher the license number of the vehicle. After Abney stopped the vehicle, the driver suddenly pulled away, and he pursued him in his police vehicle. Abney continued to pursue the suspect because he said the suspect drove left of center as if intentionally trying to force an accident.

Abney chased the suspect for another five minutes with lights and sirens on through several miles of urban and residential streets. Later, Officer Smith joined the pursuit as the lead car. Both officers chased the suspect vehicle at speeds as fast as 55 mph in residential neighborhoods with which Smith was unfamiliar. The officers chased the suspect knowing he was running stop signs where the speed limit was 25 mph. The road in the area of the accident was near a steep hill. The suspect ran a stop sign and struck a car driven by Steven Whitfield, who was killed, and his passenger Shawntell Bernard was injured.

In *Whitfield*, the Dayton Police had a more restrictive pursuit policy than that of Miami Township or the Sheriff's department. The city had a policy prohibiting officers from pursuing a suspect unless the felony for which arrest was sought involved an actual or threatened attack against another person which the officers had reasonable cause to believe could result in death or serious bodily harm. Both the police chief and assistant chief testified that none of the conditions required for the pursuit was present. The police officers in *Whitfield* chased the suspects because they were engaged in erratic driving, at best a misdemeanor.

The court of appeals held that because willful and reckless misconduct are used interchangeably, the trial court's finding that the police were reckless required a finding of willfulness as well. Furthermore, the court of appeals held the police officers' conduct in Whitfield may have been wanton because wantonness involves failure to use "any" care. But finally, the court of appeals in *Whitfield* held that Abney's and Smith's conduct could not fairly be characterized as "atrocious and utterly intolerable in a civilized community." There court said, "[o]bviously, this is an exceptionally difficult standard to meet." Accordingly, the court of appeals upheld the trial court's grant of summary judgment in the City's favor.

Neer and Stites argue that their conduct was not outrageous and extreme because it is undisputed that the weather conditions on July 11, 2011 were sunny, clear and dry, traffic conditions were light during the pursuit, the officers used their overhead lights and sirens during the entirety of the pursuit, and they called out their locations to their supervisor as the pursuit progressed.

In addition, Neer and Stites note they remained behind Deputy Ball for a large portion of the pursuit of Barnhart. They note they followed Ball at a slower rate of speed which at most reached 45-50 mph on Spring Valley Pike. Of critical importance, they note that they and the fleeing vehicle slowed at several intersections when they proceeded through them. They also note they slowed even further on several occasions to look down side streets associated with main thoroughfares to look for the Caprice. They note they were anywhere between 200 yards and one-half mile away when the accident occurred. They note plaintiff's own expert, Stephen Ashton, estimated they were traveling between 65-70 mph when the accident occurred. (Ashton depo., pp. 50-54). Neer and Stites note that they pursued the Caprice because it matched the description of a vehicle involved in a felony offense, burglary and felonious assault. See Township Pursuit Policy 41.2.8(c).

Neer and Stites argue there is no indication they knew that Andrew Barnhart was driving the Caprice on July 11, 2011. Stites had never met Barnhart, and he followed the Caprice because of its erratic driving initially. In any event, they argue that a violation of the Township's policies would not create an issue of fact for the jury. They argue that without evidence that the violations of the policy will in all probability result in injury, it is evidence of negligence at best. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356 (1994).

The vast majority of high speed police chases are ill-advised. The fact that danger inheres in high speed chases alone is not sufficient to present a genuine issue of fact concerning whether an officer acted with malicious purpose, in bad faith, or in a wanton or reckless manner. *Shalkhauser v. City of Medina*, 148 Ohio App.3d 44, 50-51 (9<sup>th</sup> Dist. 2002). To find otherwise would effectively impose a duty on police to refrain from ever pursuing criminal suspects. Courts have refused to impose such a limitation. *Sparks v. Klempler*, 2011-Ohio-6456. The restrictive pursuit policy adopted by the Dayton Police Department brought it in line with the best police practices across the country (see *Whitfield*, supra). Officers Neer and Stites were authorized to initiate the chase of Barnhart's vehicle under the Township's more liberal police pursuit policy. They had information Barnhart had just committed a burglary in a neighboring jurisdiction. Neer and Stites had also just observed very erratic driving by Barnhart as he sought to evade capture.

During the initial phase of the pursuit, Barnhart appears to have kept the speed of his vehicle generally within the posted speed limits and slowed at all major intersections. He entered the westbound lane at Route 725 to turn onto northbound Lyons while no traffic was coming westbound. This may have been the result of Captain Osterfeld blocking traffic at the Route 725 and McEwen intersection to the west of Lyons Road.

Neer and Stites temporarily lost sight of Barnhart on McEwen Road. In Neer's statement to the Ohio State Patrol, he stated Barnhart continued southbound on McEwen at a high rate of speed and then slowed down at Spring Valley Pike to clear the intersection. Deputy Ball testified that

Barnhart was traveling faster than normal on McEwen and went into opposing lanes of travel. Ball followed Barnhart on Spring Valley Pike at 45-50 mph to keep sight of Barnhart for the trailing Township officers. Neer stated in the report that Barnhart ran the red light at Washington Church Road and Spring Valley Pike. Neer stated Ball pulled over at that point, and he continued to follow Barnhart on Spring Valley Pike. He stated in his report to the Highway Patrol that Barnhart ran a red light at Spring Valley Pike and Route 41 and then continued at a high rate of speed on Route 741 going left of center to get around other vehicles. Neer said Barnhart ran a red light at Miami Village Road and then went into the center lane to pass other vehicles, struck a blue van and then hit Ms. Argabrite's vehicle head on near Austin Landing Boulevard.

The defendants are immune from liability under O.R.C. Section 2744.03(A)(6) unless their acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner. Wanton misconduct is a failure to use any care toward those to whom a duty of care is owed under which there is a great probability of harm. Reckless conduct is characterized by the conscious disregard of or of indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct.

The Miami Township pursuit policy provided that "[i]f the risk to the public from the initiation or continuation of a pursuit outweighs the risk from not initiating the pursuit or discontinuation, the pursuit shall be terminated. Both plaintiff's experts testified that the Township officers should have terminated the pursuit of Barnhart because they knew who the driver was, had his license number, speeds during the pursuit rose to unsafe conditions, the suspect drove into oncoming traffic, and Barnhart was suspected only of a property crime. They testified that both Neer and Stites intentionally violated their departmental policy.

After the summary judgments were filed, the plaintiff then added affidavits of her experts. In these two affidavits, the experts added the language that Neer and Stites had intentionally

disregarded the pursuit policy in an "outrageous and unconscionable manner." These affidavits apparently were added to meet the heightened culpability requirements of *Whitfield*, supra.

The defendants argue that these statements in the affidavits are merely legal conclusions, not factual statements. See *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772 and *Shalkhauser v. City of Medina*, supra. The court agrees that these statements are legal conclusions. In *O'Toole v. Denihan* (2008), 118 Ohio St.3d 374, the Ohio Supreme Court held that the violation of various policies does not rise to the level of reckless conduct that would exempt an employee of a political subdivision from immunity unless a claimant can establish that the violator acted with a perverse disregard of the risk, and that the violations will, in all probability, result in injury. Evidence that policies have been violated demonstrates negligence at best.

In *Whitfield*, the Second District defined outrageous and extreme conduct as follows:

So outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375.

In *Whitfield*, this judge stated in his dissent:

After reviewing the Ohio cases that have applied *Lewis*, I have trouble visualizing any set of circumstances in which an officer's conduct would be considered outrageous, short of deliberately running a pursued car off the road or into another vehicle. I am compelled to this conclusion because I have not been able to find an Ohio case in which an officer's conduct has been held outrageous or extreme, regardless of the circumstances of the pursuit. If courts intend to hold officers immune regardless of their conduct, we might as well admit that fact and concede that the exception to immunity is simply a convenient fiction. Accordingly, I dissent from the court's opinion on proximate cause.

The most problematic part of the pursuit occurred on Route 741. Neer and Stites were experienced officers who stated they were familiar with all the roads on the pursuit. Their supervisor DiPietro had not called off the pursuit at that point. Neer acknowledged that he would have called off the pursuit if Barnhart had made it through the Austin Pike intersection. He said

there was too much traffic there. That intersection is close to Interstate 75 and has its own interchange. It's not clear whether Barnhart would have slowed down if Neer and Stites stopped chasing him after Barnhart cleared the Spring Valley Pike and Route 741 intersection. They did know that Barnhart had always slowed down before going through red lights at the previous intersections.

Ohio Rule of Civil Procedure 56(C) states:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Ohio Rule of Civil Procedure 56(E) provides in relevant part:

When a motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Upon a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. See *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. Any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 269, 1993-Ohio-12, 617 N.E.2d 1068; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

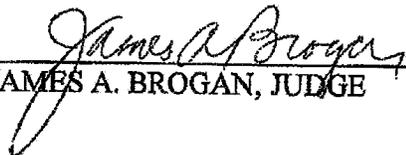
The burden then shifts to the non-moving party to set forth specific facts which show that there is a genuine issue of fact for trial. *Harless*, 54 Ohio St.2d at 65-66, 375 N.E.2d 46. The non-moving party has the burden "to produce evidence on any issue for which that party bears the

burden of production at trial." *Leibreich*, 67 Ohio St.3d at 269, 1993 Ohio 12, 617 N.E.2d 1068; *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108, 111, 570 N.E.2d 1095, citing *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322-323. Therefore, the non-moving party may not rest upon unsworn or unsupported allegations in the pleadings. *Harless*, 54 Ohio St.2d at 66, 375 N.E.2d 46. The non-moving party must respond with affidavits or other appropriate evidence to controvert the facts established by the moving party. *Id.* Further, the non-moving party must do more than show there is some metaphysical doubt as to the material facts of the case. *Matsushita Electric Ind. Co. v. Zenith Radio* (1980), 475 U.S. 574.

A reasonable juror could conclude that Officers Neer and Stites engaged in reckless conduct in violating their own department pursuit policy and in pursuing Barnhart toward the Austin Pike intersection. A reasonable juror could conclude that Lt. DiPietro was negligent in not monitoring the speed of all the vehicles involved in the pursuit. No reasonable juror, however, could conclude that the Township officers engaged in extreme or outrageous conduct as contemplated in the Supreme Court's decision in *Yeager*. This court hopes the Second District will review its previous *Whitfield* holding. It is a license for police officers to engage in reckless conduct in pursuing fleeing suspects.

Neer's, Stites' and DiPietro's motion for summary judgment in their favor is SUSTAINED.

A separate entry will follow. It is so Ordered.

  
JAMES A. BROGAN, JUDGE

The following persons were notified of this Decision, Order and Entry through the electronic notification system of the Clerk of Courts.

Kenneth Ignozzi  
Joshua R. Schierloh  
Edward J. Dowd  
John A. Cumming  
Liza Luebke  
Lawrence E. Barbieri

Phyllis Treat, Bailiff (937) 225-4392 [treatp@montcourt.org](mailto:treatp@montcourt.org)

DATE: 2/11/2015

MONTGOMERY COUNTY COMMON PLEAS COURT

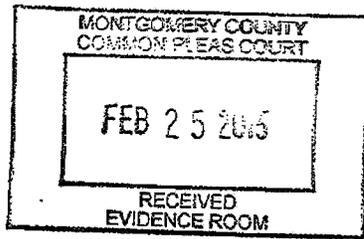
WEBBER, TIMOTHY R

Plaintiff,

-vs-

CHEEK, DANIEL L

Defendant



CASE NO: 2013CV04069

*Michael Tucker*

Judge/Magistrate: Judge Name Unavailable

ENTRY  
EXHIBIT/EVIDENCE RECEIPT

Trial/Hearing Date: 02/09/2015

Indictment/Complaint: N/A

Verdict/Judgement: N/A

Sentence Date/Pending: N/A

SMALLEY, JOHN A

Trial Attorney for Plaintiff(s)  
or Appeal Attorney

PEDUZZI, EDWARD J

Trial Attorney for Defendant(s)  
or Appeal Attorney

This is to certify that DAWNYELL E./ JUDGE MICHAEL L TUCKER, Court Reporter/Judicial Assistant/Court Technician/Magistrate's Staff for Judge/Magistrate Michael Tucker, delivered to me the evidence in the within case. See attached.

A handwritten signature in cursive script, appearing to read "Danyell E. Stettin".

(Name), Court Reporter/Judicial Assistant/  
Magistrate's Staff

A handwritten signature in cursive script, appearing to read "April J. Post".

Property Room Specialist

Deputy Clerk, if applicable

Deputy Sheriff, if applicable

Transfer From: DAWNYELL E./ JUDGE MICHAEL L TUCKER

Transfer to: ESTELLE, DAWNYELL

New Location: /MCC/EVIDENCE/VAULT/SECTION EVIDENCE PROCESSING//SHELF 1 - LL ROOM 11 EVIDENCE PERSO

ID#	Exhibit	Description
COURT'S EXHIBIT COURT EXHIBITS		
598295	I	JURY TRIAL-- 02/09/2015--CHARGE TO THE JURY
598296	II	JURY TRIAL-- 02/09/2015--JURY INTERROGATORY NO. 1 (SIGNED BY JURY); JURY INTERROGATORY NO. 2 (SIGNED BY JURY); JURY INTERROGATORY NO. 3 (SIGNED BY JURY); VERDICT FORM FOR PLAINTIFFS ( NOT SIGNED BY JURY); VERDICT FORM FOR DEFENDANTS ( NOT SIGNED BY JURY)
DEFENDANT CHEEK, DANIEL L		
598270	D1	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598279	D12	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598280	D13	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598281	D14	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598282	D15	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598283	D16	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598284	D17	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598285	D18	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598271	D2	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598272	D3	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598273	D4	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598274	D5	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598275	D6	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598276	D7	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598277	D8	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598278	D9	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598297	E	JURY TRIAL-- 02/09/2015-- TRIAL TRANSCRIPT FROM DAYTON MUNICIPAL COURT ( NOT ADMITTED)
598298	F	JURY TRIAL-- 02/09/2015-- DEPOSITION OF PLAINTIFF TIMOTH WEVVER, WITH EXHIBITS 1-14 ( NOT ADMITTED)
JOINT JOINT		
598299	I	JURY TRIAL-- 02/09/2015-- FLASHDRIVE OF VIDEO OF ACCIDENT
PLAINTIFF WEBBER, TIMOTHY R		
598286	1	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598287	2	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598288	3	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598289	4	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598290	5	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598291	6	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598292	7	JURY TRIAL-- 02/09/2015-- PHOTOGRAPH
598293	8	JURY TRIAL-- 02/09/2015--DEFENDANT STATEMENT

Evidence Transfer Receipt for : 2013CV04069

February 11,2015 13:21

Transfer From: DAWNYELL E./ JUDGE MICHAEL L TUCKER

Transfer to: ESTELLE, DAWNYELL

New Location: /MCC/EVIDENCE/VAULT/SECTION EVIDENCE PROCESSING//SHELF 1 - LL ROOM 11 EVIDENCE PERSO

ID#	Exhibit	Description
PLAINTIFF WEBBER, TIMOTHY R		
598294	9	JURY TRIAL- 02/09/2015-SCENE DIAGRAM