

IN THE SUPREME COURT OF OHIO

PAMELA ARGABRITE, : CASE NO. 2015-0348
Plaintiff / Appellant, :
vs. : [Appeal from Montgomery County
Court of Appeals, Second Appellate
District Case No. 2014 CA 26220]
JIM NEER, et al., :
Defendants / Appellees. :

**MEMORANDUM OF DEFENDANTS / APPELLEES
JIM NEER AND GREGORY STITES
IN OPPOSITION OF JURISDICTION**

Edward J. Dowd (0018681)
Joshua R. Schierloh (0078325)
Surdyk, Dowd & Turner Co., L.P.A.
One Prestige Place, Suite 700
Miamisburg, Ohio 45342
Tel: (937) 222-2333
Fax: (937) 222-1970
edowd@sdtlawyers.com
jschierloh@sdtlawyers.com
*Attorneys for Defendant / Appellees
Jim Neer and Gregory Stites*

Lawrence E. Barbieri (0027106)
Schroeder, Maundrell, Barbieri & Powers
5300 Socialville-Foster Road, Suite 200
Mason, Ohio 45040
Tel: (513) 583-4200
Fax: (513) 583-4210
lbarbieri@smbplaw.com
*Attorney for Defendant / Appellee
John DiPietro*

Kenneth J. Ignozzi (0055431)
Dyer, Garofalo, Mann & Schultz
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
Tel: (937) 223-8888
Fax: (937) 824-8630
kignozzi@dgmslaw.com
*Attorney for Plaintiff / Appellant
Pamela Argabrite*

Laura G. Mariani (0063284)
R. Lynn Nothstine (0061560)
Assistant Prosecuting Attorneys
Montgomery County Prosecutor's Office
301 West Third Street, P.O. Box 972
Dayton, Ohio 45422
Tel: (937) 225-5781
Tel: (937) 225-4822
marianil@mcohio.org
Nothstine@mcohio.org
*Attorneys for Defendants / Appellees
Tony Ball and Daniel Adkins*

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POSITION STATEMENT

THE PRESENT REQUEST FOR JURISDICTION DOES NOT INVOLVE ISSUES OF PUBLIC AND GREAT GENERAL INTEREST

Section 6, Article IV of the Ohio Constitution provides that judgments of the Courts of Appeals of this state shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction, and cases of public or great general interest. *Williamson v. Rubick*, 171 Ohio St. 253, 253-254, 168 N.E.2d 876 (1960). Except in these special circumstances, a party to litigation has a right to but one appellate review of his cause. *Id.* Section 2, Article IV of the Constitution, provides in part:

* * * In cases of public or great general interest the supreme court may * * * direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals * * *.

The sole issue for determination herein is whether this case presents a question of public or great general interest, as distinguished from questions of interest primarily to the parties. *Williamson*, 171 Ohio St. at 254. Plaintiff / Appellant Pamela Argabrite (“Appellant”) is asking this Court to lessen the burden of establishing liability against law enforcement officers who are duty-bound to engage themselves in the vehicle pursuit of a fleeing felon. Appellant moves this Court to review whether law enforcement officers have been insulated too far beyond penetration for their role in high speed pursuits, even when an injury to a third party is caused by the fault of the fleeing suspect. Whether this question is, in fact, one of public or great general interest certainly rests within the discretion of the Court. *Id.*

As it stands, Ohio adheres to the “no proximate cause” rule determined by *Lewis v. Bland*, 75 Ohio App.3d 453, 599 N.E.2d 814 (9th Dist.1991). The “no proximate cause” rule protects police officers from liability when a pursuit ends in an injury to an innocent third party

from a collision with a vehicle that was being pursued without any direct contact with a police vehicle. See, generally, *Id.* at 456; see also, *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2nd Dist.) This longstanding rule promotes an officer's duty to enforce the law and make arrests in proper cases, and not to allow those being pursued to escape because of the fear that the flight may take a course that is dangerous to the public at large. *Lewis*, 75 Ohio App.3d at 456. In *Lewis*, the Ninth District adopted the following logic underlying this rule:

The opposite would, we think, be an unnecessary restriction on the ability of police officers to carry out their duties. In every case where a police officer sought to stop a motorist for a traffic violation, it would become a jury question whether the act of the officer was the proximate cause of any harm the motorist might cause in trying to avoid arrest. In our judgment any police officer would 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 overall importance of apprehending criminals as rapidly as possible is obvious, thus eliminating the possibility of continued criminal acts. Police officers faced with an occasion that calls for fast action are confronted with obligations that tend to pull against each other. An officer's duty is to restore and maintain lawful order, while not increasing disorder. They are required to act decisively and utilize restraint, while at the same moment their decisions have to be made swiftly, under pressure, and frequently without the luxury of deliberation. A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and demonstrate that flight from the law is no way to freedom, and, on the other hand, the high-speed threat to other motorists and bystanders.

The proximate cause of an accident similar to the incident herein is the reckless driving of the suspect being pursued. *Lewis* (supra), 75 Ohio App.3d at 456. When a law enforcement

officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the law in Ohio is that the officer's pursuit is not the proximate cause of those injuries. *Id.* The police officer is not faced with the potential for liability unless the circumstances indicate extreme or outrageous conduct by the officer. *Id.* The possibility that the violator will injure a third party is too remote to create liability until the officer's conduct becomes extreme. *Id.* To find otherwise would make the police the insurers of the dangerous conduct of the culprits they chase.

In support of jurisdiction, Appellant advances four arguments: (1) this case is a matter of first-impression before the Ohio Supreme Court; (2) the appellate courts have usurped the legislature by creating a heightened immunity standard, which was not expressly included in R.C. § 2744.03; (3) the “no-proximate cause” rule announced by *Lewis* has been rejected by a number of jurisdictions in the United States, and (4) high speed police pursuits are dangerous and present safety risks to the public. (See, Appellant’s Memorandum in Support of Jurisdiction, pp. 3-6.)

There is no question that vehicle pursuits are considered dangerous. Almost every aspect of being a law enforcement officer presents some degree of risk and danger. Just because a vehicle pursuit includes an element of risk does not warrant reconsideration of the decision in *Lewis*. The same is true regardless of whether this case presents a matter of first impression for the Court. Appellant has framed her appeal as a case of public or great general interest, and this burden is not established by virtue of the issues herein being novel.

Appellant desires this Court to reconsider *Lewis* as a method to permit the continuation of her personal injury lawsuit. She champions a new rule that would expose police officers to liability for the unexpected actions of fleeing suspects. Such is not a matter of public interest;

rather, a change from the “no proximate cause” rule – which has existed as the law in Ohio for the past 24 years – is certainly advantageous to her personal injury action only. And, Appellant’s position would ultimately cause greater harm to general public. Instead of acting instinctively, law enforcement officers will pause and choose a course of action that presents the least amount of exposure to a courtroom. The present issues are not matters of public and great general interest and represent questions only of interest to Appellant. In turn, jurisdiction over Appellant’s appeal should be denied for the reasons that follow.

ARGUMENTS IN OPPOSITION TO APPELLANT’S PROPOSITIONS OF LAW

Appellant’s Sole 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.

- A. **Ohio common law has not usurped the Ohio General Assembly’s authority to create exceptions to the statutory immunity afforded to police officers under R.C. § 2744.03(A)(6).**

By enacting R.C. Chapter 2744, the legislature clearly rejected the judicial abrogation of common-law sovereign immunity and provided broad statutory immunity to political subdivisions and their employees, subject to certain exceptions. *Wilson v. Stark County Department of Human Services*, 70 Ohio St.3d 450, 452–453, 1994-Ohio-394, 639 N.E.2d 105; R.C. 2744.02 et seq. One of the stated exceptions is that an employee of a political subdivision is not immune from liability when the employee's acts or omissions are committed “with malicious purpose, in bad faith, or in a wanton or reckless manner.” R.C. § 2744.03(A)(6)(b).

A law enforcement officer’s immunity under R.C. § 2744.03(A)(6) is a defense that exists even if there is duty, breach, proximate cause, and damages. See, *McCleary v. Leech*, 11th Dist. No.2001–L–195, 2003–Ohio–1875, ¶ 31 (the issue of whether there is immunity is a totally separate issue from whether there is proximate cause). Under Ohio’s Political Subdivision

Immunity statutes, even if a duty otherwise exists and is breached, and there is proximate cause which results in damages, there is still no liability. *Nationwide Mut. Ins. Co. v. Kanter Corp.*, 102 Ohio App.3d 773, at 776, 658 N.E.2d 26 (1995). Consequently, the issue of immunity is a totally separate issue from whether there is proximate cause.

Appellant confuses proximate cause with the exceptions to an officer's immunity under R.C. § 2744.03(A)(6). By synergizing these two concepts, Appellant has crafted an argument wherein she claims that the "no proximate cause" rule has created a heightened standard for imposing liability than was intended by the legislature when R.C. § 2744.03(A)(6) was enacted. Appellant's argument falls short of establishing an issue necessitating this Court's intervention herein.

The typical progression for a claim against a law enforcement officer under state law, is to first evaluate whether immunity applies. Assuming the officer is immune, no consideration is given to resolving issues related to proximate cause; such burden has been eliminated by virtue of R.C. § 2744.03(A)(6). Should there be evidence to conclude that an exception to the officer's statutory immunity does apply, such as wanton and/or reckless conduct, the officer may be deprived of the immunity granted by R.C. § 2744.03. However, the absence of immunity does not automatically impute liability to police officers for their alleged actions. 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. To suggest that the "no proximate cause" rule has usurped the General Assembly's authority to script the circumstances for establishing a law enforcement officer's liability under R.C. § 2744.03 is simply inaccurate.

The “no proximate cause” rule is established as part of Ohio’s common law. Such rule is not an additional layer to the immunity analysis set forth by statute. Again, immunity and proximate cause are two separate, coexisting concepts. Whereas immunity represents an exemption to certain conduct, proximate cause focusses on the foreseeability of the harm. The “no proximate cause” rule exists not to establish the standard for proving liability but to protect an officer from the unpredictable conduct of dangerous suspects fleeing from arrest. Unlike immunity, application of the “no proximate cause” rule does not foreclose the possibility of liability against the employees of a political subdivision. The rule does not amount to total immunity for police officers engaged in vehicle pursuits.

The “no proximate cause” rule is not incompatible with the provisions of R.C. § 2744.03. And, this rule does not render the exception to immunity under R.C. § 2744.03(A)(6) meaningless. If an officer does not act recklessly while pursuing a fleeing suspect, then she will be protected by immunity. If evidence exists to establish differently, the officer is not immune and it will be incumbent upon the injured party to establish that the officer’s conduct in deciding to pursue a fleeing suspect were extreme and outrageous. If such burden is satisfied, the officer is exposed to liability despite the unpredictability of the criminal suspect desperately evading arrest. Appellant’s argument is tempered by traditional principles of negligence and does not amount to an issue of public and great general interest. This Court should decline jurisdiction.

B. Even if the “no proximate cause” rule is a minority opinion among the United States, it remains the law in the State of Ohio and does not amount to total immunity to police officers.

Appellant rationalizes her position by applying the stance of the United States Supreme Court on deadly force to vehicle pursuits. (See, Appellant’s Memorandum in Support of Jurisdiction, p. 14.) Seemingly, Appellant is utilizing this approach to demonstrate the need for a

change from the “no proximate cause” rule. (See, *Id.*, pp. 13-16.) The Appellant ignores that the United States Supreme Court has adopted a view similar to the rationale that underlies Ohio’s “no proximate cause” rule. When it comes to high speed vehicle pursuits, the United States Supreme Court has stated:

we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

Scott v. Harris, 550 U.S. 372, 385-6, 127 S.Ct. 1769, 1779 (2007).

Similarly, a § 1983 claim may be brought against a police officer under the Fourteenth Amendment for death or injury to innocent third parties where the injury results from the pursuit. *Meals v. City of Memphis, Tenn.*, 493 F.3d 720, 729 (6th Cir.2007), citing *City of Sacramento v. Lewis*, 523 U.S. 833, 845–49, 118 S.Ct. 1708 (1998). To prevail on such a claim, a plaintiff must prove that the police officer's conduct “shocks the conscience.” *Meals*, 493 F.3d at 729, *Lewis*, 523 U.S. at 846–47. In *Lewis*, the Supreme Court significantly restricted, but did not foreclose, the right to recover damages for constitutional violations stemming from police pursuits. “[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.” *Meals*, 493 F.3d at 729, citing *Lewis*, 523 U.S. at 836. “[H]igh-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.” *Meals*, 493 F.3d at 729, citing *Lewis*, 523 U.S. at 854. Although formed in a different context, the “shock the conscience”

standard has established a similar threshold as the “no proximate cause” rule.

Abdicating this rule will effectively illuminate the concern addressed by the Supreme Court in *Scott* – “[e]very fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights.” *Scott* (supra) 550 U.S. at 385-6. In essence, without the rule established by the Ninth District’s decision in *Lewis*, a starting-line will be drawn for suspects to dangerously accelerate beyond neck-breaking speeds, fully aware that the law has collared law enforcement from engaging in their pursuit. Instead of apprehending a suspect before any harm occurs, officers will be left in idle as the suspects heedlessly speed away, obviously aware that the more traffic regulations they offend, the more certain their freedom becomes. Eliminating the “no proximate cause” rule will effectively create a perverse incentive for suspects to flee apprehension and make the police the insurers of the dangerous conduct of the culprits they chase.

Despite what other jurisdictions have done, the “no proximate cause” rule has remained the law in Ohio for the past 24 years. The Ninth District’s decision in *Lewis* provides a similar level of protection to police officers involved in vehicle pursuits as the United States Supreme Court announced in its own *Lewis* decision. The purpose of the “no proximate cause” rule has never been to thwart recovery for the reckless actions made by police officers. Officers have a professional obligation to apprehend the individuals engaged in lawless behavior. If an accident occurs during a pursuit, the proximate cause of the accident is not the manner in which the police officers operate their vehicles, but rather the manner in which the pursued acts dangerously. It is the suspect who makes the decision to drive left of center; it is the suspect who makes the decision to drive off the travelled portion of the roadway; and, police officers are not the proximate cause of any harm that results simply by choosing to perform their obligation to

apprehend criminal suspects.

For the reasons stated above, the “no proximate cause” rule does not provide total immunity to officers. To say that the “extreme and outrageous” standard announced in *Lewis* has never been satisfied in the history of Ohio’s jurisprudence only shows how critical a change in this rule is to Appellant’s personal injury action alone. Such statement does not illustrate that the issues herein are a matter of general and great public interest.

Whether or not this Court accepts jurisdiction over this matter, criminals will continue to flee the scenes of their wicked acts. And, the acts of such criminals to evade their arrest may still result in harm to innocent motorists and bystanders. The only change that can come from a review of the instant matter is whether a lesser the degree of culpability will apply to police officers acting in the performance of their law enforcement duties. Without the “no proximate cause” rule, a fleeing criminal is guaranteed freedom by operating a vehicle in a manner so dangerous that a law enforcement officer would risk being held personally liable for the acts of the criminal by giving chase. Adopting the Appellant’s position would have a chilling effect on law enforcement, and society as a whole. Therefore, it cannot be said that the instant matter presents issues of public and great general interest necessitating the Supreme Court’s review. In turn, jurisdiction over Appellant’s appeal should be denied.

CONCLUSION

For the reasons stated herein, this case does not involve issues of public and great general interest. The Appellees hereby request that this Court deny jurisdiction in this case.

Respectfully submitted,

SURDYK, DOWD & TURNER CO., L.P.A.

/s/ Joshua R. Schierloh
Edward J. Dowd (0018681)
Joshua R. Schierloh (0078325)
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458
Tel.: (937) 222-2333
Fax: (937) 222-1970
edowd@sdtlawyers.com
jschierloh@sdtlawyers.com
Trial Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2015, this document was electronically filed via the Court's authorized electronic filing system and was served via U.S. Mail upon the following:

Kenneth J. Ignozzi, Esq.
DYER, GAROFALO, MANN & SCHULTZ
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
Attorney for Plaintiff / Appellant

Lawrence E. Barbieri, Esq.
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
5300 Socialville Foster, Suite 200
Mason, Ohio 45040
Attorney for Defendant / Appellee, John DiPietro

Laura G. Mariani, Esq.
R. Lynn Nothstine, Esq.
Assistant Prosecuting Attorneys
Montgomery County Courts Building
301 W. Third Street, Suite 500
P.O. Box 972
Dayton, Ohio 45422
*Attorneys for Defendants / Appellees,
Tony Ball and Daniel Adkins*

/s/ Joshua R. Schierloh
Joshua R. Schierloh (0078325)