

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-0348

APPEAL FROM THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY, OHIO
CASE NO. 2014 CA 26220

PAMELA ARGABRITE

Plaintiff-Appellant,

vs.

JIM NEER, ET AL.

Defendants-Appellees

FILED
MAR 27 2015
CLERK OF COURT
SUPREME COURT OF OHIO

**MEMORANDUM IN RESPONSE REGARDING JURISDICTION OF
DEFENDANT-APPELLEE, JOHN DIPIETRO**

Kenneth J. Ignozzi (0055431)
DYER, GAROFALO, MANN & SCHULTZ
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
(937) 223-8888 (tel.)
kignozzi@dgmslaw.com
Counsel for Appellant Pamela
Argabrite

Lawrence E. Barbieri (0027106)
SCHROEDER, MAUNDRELL, BARBIERE &
POWERS
5300 Socialville-Foster Road, Suite 200
Mason, Ohio 45040
(513) 583-4200 (tel.)
lbarbieri@smbplaw.com
Counsel for Appellee, John DiPietro

Joshua R. Schierloh (0078325)
SURDYK, DOWD & TURNER CO., LPA
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458
(937) 222-2333 (tel.)
jschierloh@sdtlawyers.com
Counsel for Appellees, Jim Neer and
Gregory Stites

Laura G. Mariani (0063284)
R. Lynn Nothstine (0061560)
MONTGOMERY COUNTY PROSECUTOR'S
OFFICE
301 W. Third Street, Suite 500
P.O. Box 972
Dayton, Ohio 45422
(937) 225-5780 (tel.)
Counsel for Appellees Anthony Ball and
Daniel Adkins

RECEIVED
MAR 27 2015
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW	7
 <u>Proposition of Law:</u>	
Evidence of extreme and outrageous conduct by the police is essential to proximate cause in a claim where a third-party is injured by a suspect fleeing the police; it is distinct from the defense of statutory immunity afforded under O.R.C. Chapter 2744	7
A. Ohio courts have not usurped the legislature or violated the separation of powers	7
B. Simply because other states apply different rules does not justify changing Ohio's established law	10
CONCLUSION	12
PROOF OF SERVICE	13

TABLE OF AUTHORITIES

Page

Cases

Argabrite v. Neer, 2015-Ohio-125 (2nd Dist. 2015) 5

Helvering v. Hallock, 309 U.S. 106 (1940) 3

Heard v. Toledo, 2003-Ohio-5191 (6th Dist. 2003) 9, 10

Jackson v. Poland Twp., 1999-Ohio-998 (6th Dist. 1999) 9

Johnson v. Patterson, 1994 WL 590526 (Ohio 8th Dist. 1994) 9

Leach v. City of Toledo, Lucas App. No. L-98-1227 (6th Dist. 1999) 9

Lewis v. Bland, 75 Ohio App.3d 453 (9th Dist. 1991) 8, 9, 10

Lowrey v. Drennen, 1993 WL 50874 (Ohio 10th Dist. 1993) 10

Perry v. Liberty Twp., 2013-Ohio-741 (11th Dist. 2013) 2, 10

Pylypiv v. Parma, 2005-Ohio-6364 (8th Dist. 2005) 9

Rocky River v. State Emp. Relations Bd., 43 Ohio St.3d 1 (1989) 3

Scott v. Harris, 127 S. Ct. 1769 (2007) 2, 11

Shalkhauser v. Medina, 2002-Ohio-222 (9th Dist. 2002) 10

Sutterlin v. Barnard, 1992 WL 274641 (Ohio 2nd Dist. 1992) 9

Westfield Insurance Co. v. Galatis, 100 Ohio St.3d 216 (2003) 3

Whitfield v. Dayton, 2006-Ohio-2917 (2nd Dist, 2006) 2, 4, 8, 10

Statutes

R.C. Chapter 2744 1, 4, 5, 11

R.C. 2744.03 7

R.C. 2744.03(A)(6)(b) 4, 5

**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC
OR GREAT GENERAL INTEREST**

Plaintiff-Appellant, Pamela Argabrite, incorrectly argues this case presents a substantial constitutional question. In making this argument, Appellant conflates the affirmative defense of statutory immunity, applicable to employees of a political subdivision and set forth in O.R.C. Chapter 2744, with a plaintiff's burden of proof in a tort action against a police officer involved in a pursuit when the fleeing suspect injures a third party. To recover on a tort claim, a plaintiff must prove the existence of a duty, a breach of duty, that the breach was the proximate cause of the plaintiff's injuries, and that damages resulted. Whereas, O.R.C. Chapter 2744 concerns immunity from suit raised as an affirmative defense in certain instances by a political subdivision and/or its employee. There is a clear distinction between the elements of a cause of action in tort and the statutorily prescribed defense of immunity. Accordingly, it is erroneous for Plaintiff to argue that Ohio appellate courts have "usurped the legislature by creating a heightened immunity standard" when such is not the case. (Appellant's Memo., p. 4).

Moreover, the requirement here is that there be a substantial constitutional question. Appellant argues "this case presents an important Constitutional issue," but then seems to suggest that proof of causation and statutory immunity are one and the same. There must be a causal connection between the duty allegedly breached and the injuries to a third party. When the facts demonstrate that the alleged causal connection is so remote or tenuous in nature as to present no genuine issue of material fact for trial, this issue is properly addressed by a court on summary judgment. Thus, the legal analysis of Ohio's

statutory immunity provisions are not implicated in a court's consideration of proximate cause. Simply put, proximate cause is a threshold issue.

The United States Supreme Court discussed the duty of police officers engaged in a pursuit in *Scott v. Harris*, 127 S.Ct. 1769 (2007). When faced with the assertion that the innocent public may have been better protected if the police officer had not engaged in the pursuit, the United States Supreme Court stated:

We are loathe 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.

Scott v. Harris, 127 S.Ct. 1769, 1779 (2007)

Clearly, the United States Supreme Court is cognizant of the duty of police officers to pursue criminal suspects and reckless motorists when such persons endanger the public. As the Supreme Court cautioned, it is counterproductive to develop a rule whereby a suspect's actions force the police to abdicate their duties. Police engaged in a call to duty should not be hampered by such strictures.

Importantly, as Ohio's Second District Court of Appeals noted: "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."

Furthermore, this Court has declared, "we adhere to *stare decisis* as a means to

thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs.” *Westfield Insurance Co. v. Galatis*, 100 Ohio St.3d 216, 226 (2003), citing *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 4-5 (1989). “Those affected by the law come to rely upon its consistency.” *Id.*, citing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

In addition, this case is not of public or great general interest. Appellant argues this case is of public or great general interest “because it is a case of first-impression before the Ohio Supreme Court.” However, as set forth herein, the Ohio Supreme Court has passed upon or declined jurisdiction over similar cases involving this issue raised in prior appeals. Moreover, as discussed below, all of Ohio’s appellate courts which have ruled on the issue are in unison as to the result. There is simply no inconsistency among the appellate courts to warrant the Supreme Court’s review.

Furthermore, whether the “no proximate cause” rule applies is case specific. Each case has to be examined on its own set of facts. The case specific nature of the inquiry belies the notion that this case presents issues of public or great general interest.

STATEMENT OF THE CASE AND FACTS

Since Appellant did not address any facts with respect to Appellee, John DiPietro, in her memorandum, a brief recitation of those facts follows. The allegations in Appellant’s Amended Complaint stem from the police pursuit on July 11, 2011, of a suspect wanted for burglary and felonious assault. While fleeing the police, the suspect, Andrew Barnhardt, drove his vehicle into oncoming traffic and crashed into a vehicle operated by Appellant, Pamela Argabrite. Appellant sustained physical injuries in the

accident and Barnhardt was killed in the collision.

It should be noted that Appellant specifically alleged that Appellee John DiPietro was acting within the scope of his authority at the time while “supervising and/or controlling” the Miami Township police officers engaged in the pursuit of Andrew Barnhardt. (Amended Complaint, ¶ 23). DiPietro was not in a vehicle pursuing the suspect, Andrew Barnhardt, at any time during this incident, and did not witness the pursuit itself. (DiPietro depo., p. 17).

After the parties conducted extensive discovery, including multiple depositions, Appellee John DiPietro filed a Motion for Summary Judgment on January 28, 2014. DiPietro’s Motion for Summary Judgment was based on the fact that his conduct on July 11, 2011 was neither wanton nor reckless, and therefore, he was entitled to statutory immunity pursuant to O.R.C. Chapter 2744. In addition, DiPietro contended that his conduct was neither extreme nor outrageous and that, as a matter of law, he was not the proximate cause of Appellant’s injuries.

After the motions for summary judgment were fully briefed, the trial court ruled on April 17, 2014 that John DiPietro was entitled to summary judgment in his favor. In doing so, the trial court determined that no reasonable juror could conclude that the conduct of John DiPietro on July 11, 2011 was wanton, reckless, or extreme and outrageous. (See Decision, p. 29). Therefore, the trial court effectively determined that DiPietro was immune from liability under O.R.C. §2744.03(A)(6)(b), and also that DiPietro was not liable pursuant to the holding in *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917 (2nd Dist. 2006). (See Decision of the Trial Court, filed April 17, 2014). The trial court stated that a “reasonable juror could conclude that Lt. DiPietro was negligent in not monitoring

the speed of all the vehicles involved in the pursuit.” (Decision, p. 29). Appellee DiPietro respectfully disagrees with what the trial court believes a reasonable juror could conclude; nonetheless, it is quite clear that the trial court actually determined the alleged actions or omissions of DiPietro were, at most, negligent. (Decision, p. 29). And, pursuant to O.R.C. §2744.03(A)(6)(b), a finding of negligence does **not** provide an exception to the statutory immunity afforded to Appellee John DiPietro in O.R.C. Chapter 2744. Thereafter, the Court of Appeals for Ohio’s Second Appellate District affirmed the trial court’s decision on January 16, 2015.

The following facts concerning Appellee, John DiPietro, are undisputed. John DiPietro was the Deputy Chief of Police for Miami Township at this time of this incident. (DiPietro depo., p. 5). He had served in this capacity since 2001. (DiPietro depo., p. 5). During his 26 year career at Miami Township, DiPietro had served as a patrolman, a detective, a sergeant, and a staff sergeant, before being promoted to deputy chief. (DiPietro depo., pp. 5-6).

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 Sgt. Rex Thompson stating that he was on patrol looking for the suspect’s vehicle. (DiPietro depo., pp. 10-11). Sgt. Rex 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. (DiPietro depo., pp. 10-11).

Over the radio, the suspect's vehicle had been described as a white box-style Chevy Caprice without hubcaps. (DiPietro depo., p. 11). However, at no time, either prior to or during the pursuit, did DiPietro have any knowledge of the suspect's identity or any other information about the vehicle being pursued. (DiPietro depo., pp. 11-13).

In a subsequent radio transmission from Sgt. Thompson, it sounded to DiPietro as though Thompson stated that he had been "hit." (DiPietro depo., pp. 13-14). Shortly thereafter, Thompson broadcast that he was "out of service." (DiPietro depo., pp. 13-14). At the time, DiPietro was not entirely sure what had just occurred. (DiPietro depo., pp. 13-14). But, based on Thompson's radio transmissions, DiPietro assumed some sort of violent encounter had taken place between Sgt. 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 ¶ 6). By now, DiPietro had left the service garage and was heading back to the police department. (DiPietro depo., pp. 14-15). Once Sgt. 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). In taking control, 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). 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). However, shortly after he took these actions, DiPietro heard Officer 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, ¶ 7). Upon receiving this information, DiPietro immediately responded to the accident scene to assume “incident command” and direct the first aid, traffic control, and criminal investigation. (DiPietro depo., pp. 21-22).

DiPietro testified that he was concerned for public safety during this pursuit, as he always is during every police pursuit. (DiPietro depo., p. 26). But based upon the specific information he received from his officers during the course of the pursuit, 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 3 minutes. (DiPietro Affidavit, ¶ 8).

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

Proposition of Law: Evidence of extreme and outrageous conduct by the police is essential to proximate cause in a claim where a third-party is injured by a suspect fleeing the police; it is distinct from the defense of statutory immunity afforded under O.R.C. Chapter 2744

A. Ohio courts have not usurped the legislature or violated the separation of powers.

As set forth above, evidence of extreme and outrageous conduct is necessary to satisfy proximate cause where the facts indicate an injury was caused to a third party by the erratic driving of suspect fleeing the police. This issue is fact specific and more particularized than the analysis concerning the immunity afforded to employees of a political subdivision pursuant to O.R.C. §2744.03. Moreover, the legal analysis is distinct:

one is an element of a cause of action in tort, the other is an affirmative defense to suit.

Significantly, Appellant is unable to articulate much less support her argument that if a third party is injured by the erratic driving of a fleeing suspect, a police supervisor, not involved in the actual pursuit itself, is a proximate cause of the injuries resulting from the collision caused by the fleeing suspect. There is simply no case in Ohio that has ever made such a tenuous connection.

Moreover, every Ohio appellate court which has had the opportunity to confront the particular issue here has reached the very same conclusion. As held by Ohio's Ninth Appellate District:

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 and 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.

Lewis v. Bland, 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist. 1991).

Since the 1991 decision in *Lewis v. Bland*, every Ohio appellate court addressing the issue of proximate cause in this particular factual scenario has concluded the same. In fact, the holding in *Lewis v. Bland* was recognized by the Second Appellate District in 2006 as "established law." *Whitfield v. Dayton*, 167 Ohio App.3d 172, 854 N.E.2d 532, 2006-Ohio-2917 at ¶59 (2nd Dist. 2006), appeal not allowed, 111 Ohio St.3d 1433, 855 N.E.2d 497 (2006). "Ohio appellate districts . . . have continued to 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. The public policy in support of this proximate cause determination is that law enforcement officers have a duty to apprehend criminals and reckless motorists who make the roadways dangerous to others and, thus, the proximate cause of an accident is the reckless driving of the pursued. See *Lewis v. Bland*, 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist. 1991) (“the duty of police officers is to enforce the law and to make arrests in 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.”); see also *Sutterlin v. Barnard*, 1992 WL 274641 (2nd Dist. 1992) (noting “other states have found that police officers have a duty to apprehend motorists whose driving renders the highways dangerous to others.”).

In addition to the Second Appellate District, the following Ohio appellate districts have reached the same conclusion: (1) the Sixth Appellate District in *Heard v. Toledo*, 2003-Ohio-5191 at ¶11-12, appeal not allowed, 101 Ohio St.3d 1467 (2004), held that there was no proximate cause where a third party was killed in a collision with the pursued vehicle, and also rejected the argument that *Lewis v. Bland* was “outdated”; see also *Leach v. City of Toledo*, Lucas App. No. L-98-1227 (6th Dist. 1999); (2) the Seventh Appellate District in *Jackson v. Poland Twp.*, 1999-Ohio-998 at *7, held there was no proximate cause where the pursued vehicle crashed into a tree killing the passenger; (3) the Eighth Appellate District in *Pylypiv v. Parma*, 2005-Ohio-6364 at ¶33, determined the pursuit was not the proximate cause of an accident that killed two persons on a motorcycle that was being pursued; see also *Johnson v. Patterson*, 1994 WL 590526 (8th Dist. 1994), appeal not allowed, 71 Ohio St.3d 1480 (1995); (4) the Ninth Appellate

District in *Shalkhauser v. Medina*, 2002-Ohio-222 at ¶45-49, reaffirmed its decision in *Lewis v. Bland* and held no proximate cause where the pursued vehicle collided with a third party; (5) the Tenth Appellate District in *Lowry v. Drennen*, 1993 WL 50874 (10th Dist. 1993), jurisdictional motions overruled, 67 Ohio St.3d 1411 (1993), motion on rehearing denied, 68 Ohio St.3d 1474, found that the conduct of the police officers in pursuing the suspect was not a proximate cause in the death of the person struck by the suspect's vehicle; and (6) the Eleventh Appellate District in *Perry v. Liberty Twp.*, 2013-Ohio-741, held that the plaintiff failed to show that the injuries were proximately caused by the actions of the police department in pursuing the subject.

Ohio's Second, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Appellate Districts have all weighed in on this subject and have all reached the same result. Appellant appears to argue that despite the fact there is no disagreement among Ohio's appellate courts as to the application of the "no proximate cause" rule, the rule should be replaced. Clearly, there is no reasonable justification for doing so.

Appellant also argues that this is a matter of first impression and that it is unsettled law. However, as mentioned, every Ohio appellate court that has had the opportunity to confront this issue has ruled the same way. Moreover, when similar cases were previously appealed to the Ohio Supreme Court in 2004 (*Heard v. Toledo*) and in 2006 (*Whitfield v. Dayton*), this Court declined jurisdiction and dismissed each appeal.

B. Simply because other states apply different rules does not justify changing Ohio's established law.

Appellant argues that Ohio must replace the "no proximate cause" rule in order to become more like "other jurisdictions." Appellant further argues that Ohio should adopt

a standard that “is more likely to impose liability because it increases officer accountability.” (Appellant’s Memo., p. 13). Yet, there is simply no support for such a statement. If that argument had any merit it would be logical for Ohio to do away with O.R.C. Chapter 2744 in the name of increasing liability in order to increase accountability. Appellant also asks the Court to assume that an alleged lack of police officer accountability in Ohio has led to “a dangerous roadway environment.” This argument is specious and lends no support to the claim that a substantial constitutional question or matter of great general interest is at issue here.

Appellant is incorrect in assuming that simply adopting a standard which is more likely to impose liability on police who engage in a pursuit will make the roadways in Ohio safer. As the United States Supreme Court stated in *Scott v. Harris*, simply ceasing a police pursuit is not certain to eliminate the risk a fleeing suspect poses to the public. *Scott v. Harris*, 127 S.Ct. 1769, 1778-1779 (2007). The Supreme Court also pointed out that there is no way to convey convincingly to the fleeing suspect that the chase is over, and that he is free to go. *Scott v. Harris*, 127 S.Ct. 1769, 1779 (2007). Given such uncertainty, a fleeing suspect might be “just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.” *Scott v. Harris*, 127 S.Ct. 1769, 1779 (2007) (“We simply point out the *uncertainties* regarding what would have happened, in response to respondent’s factual assumption that the high-speed flight would have ended.”).

In short, simply because Ohio jurisprudence on this subject appears to differ with the jurisprudence in other states is not a valid reason to abandon Ohio’s established law.

Moreover, Appellant presents no justification to change what has been established law for the past 24 years based on the decisions of each Ohio appellate court that has confronted the issue.

CONCLUSION

For the foregoing reasons, Appellee John DiPietro respectfully requests the Court deny jurisdiction to review this matter because it clearly does not involve issues of public or great general interest, or a substantial constitutional question. The law concerning the “no proximate cause” rule is well-settled and does not require clarification. It is decided on a case-by-case basis.



Lawrence E. Barbieri (#0027106)
Attorney for Defendant, John DiPietro
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
5300 Socialville Foster, Suite 200
Mason, OH 45040
(513) 583-4200
(513) 583-4210
Email: lbarbieri@smbplaw.com

CERTIFICATE OF SERVICE

I hereby certify that on **March 26th, 2016**, I filed the foregoing with the Clerk of the Ohio Supreme Court and served it via regular mail: **Kenneth J. Ignozzi, Esq., Attorney for Appellant-Plaintiff**, Dyer, Garafalo, Mann & Schultz, 131 N. Ludlow Street, Suite 1400, Dayton, OH 45402, email: kignozzi@dgmslaw.com, **Joshua Schierloh, Esq., Attorney for Appellee-Defendants Jim Neer and Gregory Stites**, 8163 Old Yankee Street, Suite C, Dayton, Ohio 45458, email: jschierloh@sdtlawyers.com and **Laura G. Mariana and R. Lynn Northstine, Esq., Attorney for Appellee-Defendants, Karen Osterfeld, Tony Ball and Daniel Adkins** Assistant Montgomery County Prosecuting Attorney, 301 West Third Street, Suite 500, P.O. Box 972, Dayton, OH 45422.



Lawrence E. Barbieri