

**IN THE SUPREME COURT OF OHIO**

**PAMELA ARGABRITE,**

Plaintiff-Appellant

vs.

**JIM NEER, Individual and in  
his official capacity Miami  
Township Police Department, et al.**

Defendant-Appellees

**CASE NO. 2015-0348**

**ON APPEAL FROM THE  
MONTGOMERY COUNTY  
COURT OF APPEALS,  
SECOND DISTRICT**

**COURT OF APPEALS  
CASE NO. 26220**

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**MEMORANDUM IN RESPONSE OF APPELLEES DEPUTY ANTHONY BALL AND  
SERGEANT DANIEL ADKINS**

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**STATEMENT AS TO WHY THIS COURT SHOULD DECLINE  
JURISDICTION IN THIS MATTER**

This case involves a series of events that caused a criminal suspect, Andrew Barnhart (“Barnhart”), to flee from law enforcement in his vehicle, completely disregarding any care for his safety, the safety of the law enforcement officers, and the safety of the public. The pursuit ended tragically when Barnhart’s vehicle collided with the vehicle operated by Appellant, Pamela Argabrite, who was an innocent third party. Barnhart died as a result of the crash, and Appellant was seriously injured. Despite the tragic nature of the case, this Court should decline jurisdiction as there is no substantial constitutional question involved, nor has an issue that is of public or great general interest been presented. As discussed below, Appellant’s arguments in support of her assertion that the so-called no-proximate-cause rule, which governs the issue of proof of causation in cases where an innocent third party is injured by a criminal suspect fleeing police pursuit, lack merit. Moreover, adoption of Appellant’s proposition of law would endanger the public, law enforcement officers, and fleeing suspects at least as much as does the current law that limits an officer’s liability to only those instances where his conduct is extreme or outrageous. For these reasons, Appellees Deputy Anthony Ball and Sergeant Daniel Adkins respectfully urge this Court to decline jurisdiction over this matter.

**STATEMENT OF THE CASE AND THE FACTS**

The incident in which Andrew Barnhart fled from law enforcement occurred on July 11, 2011 and took place in Montgomery County, Ohio. On that date, Appellees Deputy Anthony Ball (“Ball” or “Deputy Ball”) and Sergeant Daniel Adkins (“Adkins” or “Sgt. Adkins”) were on duty with the Montgomery County Sheriff’s Department,

stationed at the Washington Township substation located on McEwen Road. It is undisputed that Ball and Adkins did not initiate the pursuit of Andrew Barnhart that gave rise to this case. The following statement of facts speaks only to the involvement, and lack thereof, of Deputy Ball and Sgt. Adkins after pursuit of the suspect they later learned to be Barnhart had commenced.

**A. Sergeant Adkins**

Sergeant Adkins was patrolling somewhere within Washington Township on July 11, 2011 when he learned of a burglary in progress within the Township. While proceeding to the address of the burglary, Sgt. Adkins received updates that the suspect and vehicle, identified as an older white Caprice Classic, had fled. He then began patrolling around the general area hoping to find the suspect vehicle.

While doing so, Adkins heard radio traffic from the Miami Township Police Department stating that they had found the suspect vehicle within Miami Township, one of the burglary suspects fled on foot and a second suspect, later learned to be Andrew Barnhart, fled in the vehicle. When Sgt. Adkins learned that Miami Township officers were pursuing the vehicle, he proceeded to the area mentioned in Miami Township Police Department's radio traffic. He determined at that time that he may be needed to assist in clearing intersections or to wait for the suspect in the vehicle to flee on foot.

Adkins then traveled from the area of the burglary to the area of Lyons Road and State Route 741. He reasoned that, if the suspect vehicle traveled north on 741, he would need to stop traffic near that intersection because the traffic at that time of the day would have been "horrendous." However, the pursuit of Barnhart continued by going southbound on 741, instead of northbound. Thus, Sgt. Adkins never personally observed

the suspect vehicle during the course of the pursuit. In addition, at no time relevant to this incident did Sgt. Adkins know or learn that anyone from the Miami Township Police Department may have had knowledge of the identity of the suspect or license plate number of the suspect vehicle.

### **B. Deputy Ball**

Deputy Ball was at the Washington Township substation on July 11, 2011 when he heard a “burst” of radio traffic and realized something was happening. Upon hearing that Miami Township Police Department officers were headed into the Washington Township jurisdiction, Ball got into his cruiser. He tried to bring up the mobile data terminal in his vehicle to find out more details of the on-going situation and then exited the substation parking lot heading north on McEwen Road toward State Route 725. While heading north, the white vehicle driven by Barnhart passed Deputy Ball’s vehicle going 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.

Deputy 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 the officers in pursuit might have gotten “held up” at an intersection. Once he determined that Miami Township officers were still at the intersection, Ball 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. Thinking that the Miami Township officers were closer to him, Ball then moved over into the right portion of the road, expecting them to come around him and continue their pursuit. At that point, Deputy Ball’s main focus was trying to find

out where Miami Township officers were. When he realized the Miami Township officers were not as close as he originally thought, Deputy Ball followed the direction of Barnhart's vehicle in an attempt to avoid losing sight of it.

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

Deputy Ball was able to see the suspect intermittently, which is how he knew to continue west on Spring Valley Pike. He continued driving west on Spring Valley Pike, through the intersection of Spring Valley and Yankee Street. During that time, Ball only 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. After crossing through the intersection of Yankee and Spring Valley, Deputy Ball turned off the lights and sirens. Ball did not encounter any issues with motorists.

While on Spring Valley, Ball noticed that the Miami Township police cruisers were close behind him. Deputy Ball then began looking for places to pull over to give the Miami Township cruisers an opportunity to pass him. But he feared that if he pulled over

or tried to maneuver out of their way, they would follow him. Finally, Deputy Ball made his one and only communication over the radio telling the Miami Township officers to pass him when he was just east of the intersection of Spring Valley Pike and Washington Church Road. Ball made this communication because he had no intention of pursuing the suspect vehicle. Rather, Ball had only sought to put himself in a position where he could attempt to keep "a visual" on the suspect vehicle. In fact, Deputy Ball felt as though he was impeding the Miami Township officers' progress.

Eventually, Miami Township officers passed Deputy Ball on Spring Valley Pike near the intersection with Washington Church Road, after Ball pulled over into the middle of the roadway. At that point, Deputy Ball and the officers were near the jurisdictional boundary line of Miami and Washington Townships, although that location was incidental to Deputy Ball, as he has jurisdiction throughout the county. Once the Miami Township officers passed him in their cruisers, Deputy Ball continued westbound on Spring Valley generally without his emergency equipment activated.

Occasionally, Deputy Ball did activate his lights after the Miami Township officers passed him but only to facilitate his passing of certain vehicles that had already pulled over to get out of the way of the Miami Township cruisers. When he reached the intersection of Spring Valley Pike and State Route 741, Deputy Ball stopped at the red light and waited for the light to change. While sitting stationary at the traffic light, his vehicle's emergency equipment was turned off. At approximately the same time that the traffic light turned green, the Miami Township officers broadcasted over the radio that a crash had occurred. Deputy Ball then activated his vehicle's emergency equipment again and responded to the crash scene to assist with traffic.

On October 16, 2012, Appellant Pamela Argabrite initiated a lawsuit against members and former members of the Miami Township Police Department and against members and former members of the Montgomery County Sheriff's Office seeking damages for her injuries sustained when Andrew Barnhart crashed his automobile into the Appellant's vehicle near the intersection of State Route 741 and Austin Boulevard in Montgomery County. The trial court's case number was 2012 CV 7402. In her Amended Complaint, filed June 7, 2013, Appellant alleged that, while acting in their official and individual capacities, Appellees engaged in a reckless high-speed police chase without just cause resulting in injury to Appellant.

Appellees filed separate motions for summary judgment pursuant to Civ.R. 56(C), which the trial court granted on April 17, 2014. With regard to Appellees Deputy Ball and Sgt. Adkins, the trial court ruled that no reasonable juror could conclude that either Ball or Adkins engaged in extreme or outrageous conduct during the pursuit that led to Appellant's injuries. Appellant Argabrite appealed to the Second District Court of Appeals in case number CA 26220. On January 16, 2015, the court of appeals issued an Opinion and Final Entry affirming the trial court's judgment. In a split decision, the court of appeals held that the no-proximate-cause rule of *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2d Dist.) was dispositive of Argabrite's appeal and concluded that, "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." *Whitfield*, ¶27. From the Second District Court of Appeals' decision, Pamela Argabrite now appeals to this Honorable Court.

## ARGUMENT

### Response To Appellant's Proposition of Law

**Eliminating the no-proximate-cause rule of *Whitfield, supra* and *Lewis v. Bland*, 75 Ohio App.3d 453, 599 N.E.2d 814 (1991) would impede police officers in their duty to enforce the law and make arrests in proper cases and further would create an incentive for fleeing suspects to drive so recklessly that other people's lives are endangered.**

According to the no-proximate-cause rule, “[w]hen 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.” *Lewis, supra*, at 456, citation omitted. This Court has described extreme or outrageous conduct as conduct, “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.” *Whitfield, supra*, at ¶60, citing *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983).

Appellant urges abandonment of the no-proximate-cause rule on the theory that the rule undermines the legislature’s intent to permit police officers to be sued when their conduct is wanton or reckless and that it endangers the public by allowing officers to engage in reckless pursuit of fleeing criminal suspects. Appellant’s contentions are without merit.

Revised Code 2744.03(A)(6)(b) certainly makes clear that an employee of a political subdivision will not be immune from suit when his conduct is committed with a malicious purpose, in bad faith, wantonly or recklessly. But the fact that a plaintiff can

maintain a lawsuit under those circumstances in no way guarantees the lawsuit will succeed. Appellant must still prove her case, and that includes proving the law enforcement officers were the proximate cause of her injuries. Thus, because the no-proximate-rule deals strictly with the merits of Appellant's case, it in no way undermines R.C. 2744.03(A)(6)(b), which merely sets forth the circumstances under which a lawsuit against an employee of a political subdivision may be brought.

Moreover, abandoning the no-proximate-cause rule would not protect the public, officers, or fleeing suspects as Appellant asserts. On the contrary, creating a rule that requires the police to allow a fleeing suspect driving recklessly to get away would, according to the United States Supreme Court, create a perverse incentive: "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." *Scott v. Harris*, 550 U.S. 372, 385-386, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). In *Lewis*, the court quoted the Supreme Court of Tennessee with the following: "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...The opposite would...be an unnecessary restriction on the ability of police officers to carry out their duties." *Lewis, supra*, at 456.

### **CONCLUSION**

The no-proximate-cause rule does not undermine the legislature's intent, expressed in R.C. 2944.03(A)(6)(b), to permit a police officer who acts wantonly, or recklessly, to be sued by an innocent third-party who is injured as a result of a police pursuit of a fleeing suspect. The rule applies to the merits of such a case, which the

immunity statute does not address. Further, the no-proximate-cause rule does not endanger the public, the officers, or suspects any more than the rule Appellant is advocating would endanger them. The no-proximate-cause rule is predicated upon the recognition that the possibility a fleeing suspect will injure a third party is too remote to create liability until the pursuing officer's conduct becomes extreme, and it therefore allows law enforcement officers to carry out their duty to enforce the law. For these reasons, this Court should decline to accept jurisdiction over this appeal.

Respectfully submitted,

**MATHIAS H. HECK, JR.**  
PROSECUTING ATTORNEY

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice was sent by ordinary mail on the 27<sup>th</sup> day of March, 2015 to Opposing Counsel: Kenneth J. Ignozzi, Dyer, Garofalo, Mann & Schultz, 131 N. Ludlow Street, Suite 1400, Dayton, Ohio 45402; Joshua R. Schierloh, Surdyk, Dowd & Turner Co., L.P.A., 8163 Old Yankee Street, Suite C, Dayton, Ohio 45458; and Lawrence E. Barbieri, Schroeder, Maundrell, Barbieri & Powers, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040.

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