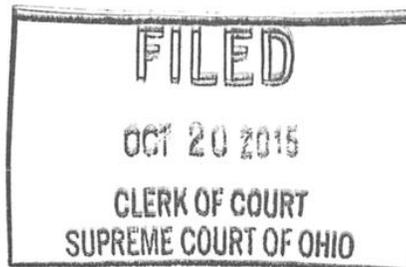


IN THE SUPREME COURT OF OHIO

PAMELA ARGABRITE,	:	Case No.: 2015-0348
Appellant,	:	
v.	:	
JIM NEER, Individual and in his official Capacity Miami Township Police Department, et al.,	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
Appellees.		

MERIT BRIEF OF PLAINTIFF-APPELLANT, PAMELA ARGABRITE

Kenneth J. Ignozzi, Esq. (0055431)
 Dyer, Garofalo, Mann & Schultz, LPA
 131 N. Ludlow Street, Suite 1400
 Dayton, Ohio 45402
 (937) 223-8888
 Fax No. (937) 824-8630
kignozzi@dgmslaw.com
Attorney for Plaintiff-Appellant



Joshua R. Schierloh, Esq. (0078325)
Edward J. Dowd, Esq. (0018681)
Surdyk, Dowd & Turner Co., LPA
8163 Old Yankee Street, Suite C
Dayton, OH 45458
(937) 222-2333
jschierloh@sdtlawyers.com
edowd@sdtlawyers.com
Attorneys for Defendant-Appellees Jim Neer and Gregory Stites

Laura G. Mariani (0063284)
Roberta L. Nothstine (0061560)
Mat H. Heck (0014171)
Montgomery County Assistant Prosecuting Attorney
301 West Third Street,
P.O. Box 972
Dayton, OH 45422
(937) 225-5781
MarianiL@mcohio.org
Nothstine@mcohio.org
Attorney for Defendant-Appellees Anthony Ball and 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
Attorney for Defendant-Appellee John DiPietro

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INTRODUCTION

It is fundamental in our nation and in our state that the legislature creates law and the judiciary interprets it. When the Ohio Legislature created the Political Subdivision Tort Liability Act (RC 2744 et seq.), it mandated clear standards by which agents of governmental entities may be held liable for tortious conduct. The Act explicitly addresses the operation of emergency vehicles in emergency situations, such as police pursuits. Under RC 2744.03, the Legislature explicitly stated that government agents, such as police officers, may be held liable for their conduct in operating an emergency vehicle where their conduct was wanton or reckless.

However, courts across the state have opted not to use the standard of liability mandated by the Legislature in the Political Subdivision Tort Liability Act. Instead, in police pursuit situations, courts have ignored the Legislature's mandate that wanton or reckless conduct is sufficient for liability and created their own, heightened standard of liability – the “extreme or outrageous” standard. If the legislature wished to carve out an exception for police pursuits, they could have easily done so - but they did not. Rather, Ohio courts have taken it upon themselves to take the place of the legislature and judicially-impose the “extreme or outrageous” standard and render RC 2744.03 obsolete in police pursuit situations. The balance of powers and democratic process are the foundation of our government - by usurping the legislature and judicially-imposing the “extreme or outrageous” standard, Ohio courts have defied that democratic foundation.

Additionally, the “extreme or outrageous” standard is a small minority position in our country. A majority of states reject the “extreme or outrageous” standard and only impose liability on police officers in police pursuit situations where their conduct is negligent or reckless. These states believe that the negligence and reckless standards strike a better balance between officer accountability and allowing officers to act with exigency. The Ohio law has no

balance. No plaintiff in the history of Ohio jurisprudence has been able to meet the “extreme or outrageous” standard. It is a convenient legal fiction, couched under the guise of proximate cause, which has disallowed plaintiffs to recover for injuries where an officer’s pursuing conduct was “reckless” but not “extreme.”

For these reasons, Plaintiff, Pamela Argabrite, asks this Court to abandon the judicially-imposed “extreme or outrageous” standard. Instead, this Court should abide by the General Assembly’s unambiguous statutory mandate that police officers be held liable for injuries caused by their “reckless or wanton” conduct. However, in the event that this court decides to continue to apply the “extreme or outrageous” standard, Argabrite’s claims should not be dismissed as a matter of law. Both the Trial Court and the Appellate court erred in holding no genuine issue of material fact existed as to whether the defendant officers’ conduct amounted to “extreme or outrageous.” The decision of the appellate court, therefore, should be reversed.

STATEMENT OF THE 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; Supp. at 55). The witness reported 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; Supp at 55, 73, 81-82). Miami Township police had been dealing with a rash of burglaries in the area. (Stites Depo. at 19; Supp at 58). Approximately three months prior, Defendant Stites and Miami Township Police Officer David Ooten had had an interaction with a vehicle, which fled from Officer Ooten, that the officers learned was being used by Andrew Barnhart. (*Id.* at 9-12; Ooten

Depo. at 11, 15-16; Supp. at 56, 71-72). 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; Supp. at 58, 72). When investigating Barnhart, Defendant Stites and Officer Ooten had learned Barnhart's grandmother lived at 2037 Mardell in Miami Township. (Sites Depo. at 12, 14-15; Supp. at 56, 57). In the three months before July 11, 2011, Defendant Stites would drive past this address when he was on routine patrol. (*Id.* at 16, Ooten Depo. Depo. at 17; Supp. at 57, 73). At the end of June, Defendant Stites informed Officer Ooten he had observed a white Caprice model motor vehicle at the Mardell address. (Sites Depo. at 16-17, 19. Ooten Depo. at 17; Supp. at 57-58, 73). 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; Supp. at 57-58, 73).

When Officer Ooten overheard the July 11th 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; Supp. at 55-56, 73). Defendant Stites arrived at the Mardell address, but the white Caprice was not present. (Stites Depo. at 22; Supp. at 59). Defendant Stites' supervisor, Sergeant Rex Thompson, had 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; Supp. at 82-83). While Defendant Stites was waiting nearby, observing the Mardell address, Barnhart drove into the driveway of his grandmother's house on Mardell, in the white Caprice with no hubcaps, followed shortly thereafter by Sergeant Thompson. (*Id.* at 16-18, Stites Depo. at 22-23; Supp. at 59, 82-83). Thompson exited his vehicle and approached the Caprice on the driver's side. (Thompson Depo. at 19-20; Stites Depo. at 26-27; Supp. at 60, 83).

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; Supp. at 60, 83).

Barnhart continued to drive backwards and forwards, damaging the corner of 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 and into a neighbor's backyard. (Thompson Depo. at 21-23; Stites Depo. at 26-27; Supp. at 60, 84). A passenger in Barnhart's car fled the car on foot as Barnhart drove into the neighbor's backyard. (*Id.*). Sergeant Thompson chased the passenger on foot and apprehended him. (Thompson Depo. at 23-26; Supp. at 84-85).

Barnhart continued to drive through the neighbor's backyard and back out onto Mardell. (Thompson Depo. at 23; Stites Depo. at 28-30; Supp. at 61, 84). He proceeded down Mardell and turned south onto Graceland. (Thompson Depo. at 23; Stites Depo. at 29-30; Deposition of Jim Neer ("Neer Depo.") at 17; Supp. at 61, 84, 93). At the same time, Miami Township Police Officer Jim Neer ("Defendant Neer") had overheard the conversation between Defendant Stites and Officer Ooten and was approaching Mardell. (Neer Depo. at 12-13,17; Supp. at 91-93). Defendant Neer had overheard the radio conversation between Officer Ooten and Defendant Stites and therefore, he knew the burglary suspect was possibly at the Mardell address. (*Id.* at 12-13; Affidavit of Gerald McDevitt ("McDevitt Aff.") at ¶5(c); Supp. at 91-92, 202). When Defendant Neer saw Barnhart drive south on Graceland away from the Mardell address, he activated his lights and sirens to pursue Barnhart. (Neer Depo. at 17; Supp. at 93). Additionally, Defendant Stites followed Defendant Neer and the two officers pursued Barnhart's motor vehicle. (Stites Depo. at 28-29; Supp. at 60-61).

At the time, Miami Township Police Department had a pursuit policy in place which provided a motor vehicular pursuit of a subject should not be initiated or should be discontinued

if already initiated if the risk to the public outweighed the risk from not initiating or discontinuing the pursuit.

7. Termination of Pursuit

...

a. An officer should continually evaluate a pursuit situation and judgment 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 risk 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.

...

8. Immediate Termination

a. ... 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.

...

- 4.) speeds increase to a level unsafe for conditions.

(Miami Township Police Department Pursuit Policy (“Miami Twp. Policy”); Supp. at 45-53)¹.

Prior to initiating the motor vehicle pursuit, Defendant Stites and Defendant Neer were aware Barnhart could be arrested via a warrant process rather than a motor vehicle pursuit.

(McDevitt Aff. at ¶5(b); Supp. at 202). First, both Defendant Neer and Defendant Stites 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; Supp. at 59, 91, 203).

Defendant Stites and Defendant 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; Supp. at 57, 58, 66, 93, 202, 204). Defendant Stites and Defendant Neer knew, at least, that Barnhart stayed at the Mardell address. (Stites Depo. at 16-17; Neer Depo. at 12-13; Supp. at 57-58, 91-92). Defendant Stites

¹ The Miami Township Police Department Pursuit Policy was also exhibit “1” to Defendant Neer’s deposition.

also knew the Miami Township Police further knew Barnhart's mother's address. (Stites Depo. at 1-12; Supp. at 56). Additionally, these Defendants knew Sergeant Thompson had seen the driver and thus, could identify Barnhart as the driver. (McDevitt Aff. at ¶5(c); Supp. at 202). Moreover, in the previous incident just three months earlier, Barnhart had come into the police station when asked. (Stites Depo. at 17-18; Ooten Depo. at 17; Supp. at 58, 73). Finally, Defendant Stites and Defendant 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); Supp. at 175, 202). Thus, Defendant Stites and Defendant Neer both had sufficient information to know that 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; Supp. at 157, 202).

Yet, Defendant Stites and Defendant Neer continued pursuing Barnhart as he turned from Graceland onto State Route 725 heading east. (Affidavit of Stephen Ashton ("Ashton Aff.") at ¶4; See also Ashton Pursuit Video, filed in the Common Pleas Court on 2/10/2014; Neer Depo. at 17-18; Neer Depo. at 29-30; Supp. at 93, 95-96, 206-207). While on State Route 725 before crossing Yankee Street, Defendant Neer was able to observe the license plate on the vehicle and called the license plate number into dispatch. (Neer Depo. at 18; Stites Depo. at 30; Supp. at 61, 93). When Barnhart approached the intersection at Yankee Street and State Route 725, Barnhart drove into oncoming traffic at the intersection. (Defendant Neer's typed statement to Ohio State Patrol); McDevitt Aff. at ¶ 5(e)(i); Supp. at 106-108, 202).

The Miami Township police department policy clearly provided Defendant Neer and Defendant Stites should terminate the pursuit if the vehicle being pursued traveled into oncoming

traffic. (Supp. at 45-54). Yet, neither Defendant Stites nor Defendant Neer terminated the pursuit. Both Defendant Stites and Defendant Neer would continue the pursuit over several more miles and four additional roads. (Ashton Aff. at ¶4, 6 (l & n); Supp. at 206, 208-09). Defendant Neer and Defendant Stites would observe Barnhart committing 11 traffic violations, including running stop lights, stop signs, and driving into oncoming traffic. (Ashton Aff. at ¶6(k); Supp. at 208).

Additionally, Barnhart would drive at high rates of speed well in excess of the speed limit. (McDevitt Aff. at ¶5(e)(iii); Supp. at 202). Shortly after the July 11th pursuit, Defendant Neer, when asked about the speed of the vehicles, stated he was going 80 miles per hour and could not keep up with Barnhart. (Defendant Neer's handwritten statement to the Ohio State Patrol; Supp. at 106-108).

Yet, neither Defendant Stites nor Defendant Neer terminated the pursuit.

At the time Defendant Stites and Defendant Neer were pursuing the suspect, their Supervisor with the Miami Township police was supposed to be monitoring and supervising the pursuit. (Deposition of John DiPietro ("DiPietro Depo.") at 15; Supp. at 112). Defendant Stites and Defendant Neer's immediate supervisor was Sergeant Thompson. (DiPietro Depo. at 8; Supp. at 110). However, when Sergeant Thompson had to chase the passenger that fled from Barnhart's vehicle, John DiPietro had the responsibility of supervising and monitoring Defendant Neer and Defendant Stites' pursuit of Barnhart. (DiPietro Depo. at 15; Thompson Depo. at 31; Supp. at 86, 112). However, DiPietro never asked Defendant Neer or Defendant Stites what their speeds were, or the traffic conditions during the chase, and likewise Neer and Stites failed to relay that information to DiPietro. (McDevitt Aff. at ¶5(i, f, & g); Thompson Depo. at 33; Supp. at 87, 201-205). Instead, he only asked what roads the officers were on and what direction they

were traveling. (McDevitt Depo. at 124-125; Thompson Depo. at 33; Supp. at 87, 172-73). But, this information was insufficient to make a determination under Miami Township's pursuit policy as to whether the pursuit needed to be terminated or not. (McDevitt Aff. at ¶(5)(k); Supp. at 203). Moreover, Defendant DiPietro has indicated he was not sure of the reasons for the pursuit, and he never inquired about the reasons for the pursuit. (McDevitt Aff. at ¶5(I & k); Supp. at 203). Additionally, he knew Sergeant Thompson was not injured in the altercation at the Mardell address and Sergeant Thompson had the passenger from the vehicle in custody. (McDevitt Aff. at ¶5(l); Supp. at 203). Thus, although Defendant DiPietro was aware of Miami Township Police Department's pursuit policy, he intentionally violated the policy by failing to monitor or supervise Defendant Neer and Defendant Stites' pursuit by not seeking the necessary information. (McDevitt Aff. at ¶5(i, j, & k); Supp. at 203).

As Defendant Stites and Defendant Neers' pursuit of Barnhart continued, Montgomery County Sheriff's Deputy, Anthony Ball ("Defendant Ball"), overheard on his radio while inside a police station that Miami Township was pursuing a burglary suspect in a vehicle in a motor vehicle chase. (Deposition of Anthony Ball ("Ball Depo.") at 12-13; Supp. at 129-30). Defendant Ball drove from the station and was traveling north on McEwan Road. (Ball Depo. at 14; Supp. at 130). As he was driving, he saw Barnhart's vehicle driving in the opposite direction on McEwan. (Ball Depo. at 15; Supp. at 130). Defendant Ball activated his lights and sirens and made a U-turn to pursue Barnhart. (Ball Depo. at 19-20; Neer Depo. at 25-26; Supp. at 95, 131). Although Defendant Ball claimed in this lawsuit he was not pursuing Barnhart, the evidence indicates he was. (McDevitt Aff. at ¶(5)(o); Supp. at 204). Defendant Ball followed Barnhart for approximately two miles. (Ashton Aff. at ¶6(n); Supp. at 209). During this time, Defendant Ball was not merely following Barnhart, but was traveling sufficiently fast to keep up with

Barnhart. (Ball Depo. at 17-18; Supp. at 131). Further, Defendant Ball was turning on his lights and passing other vehicles, including going into the center turning lane to pass vehicles. (Ball Depo. at 25-26; Neer Depo. at 30.; Supp. at 96, 133). Moreover, he was not traveling slower than the other pursuit vehicles, who did not notice Defendant Ball “holding them back.” (Neer Depo. at 34; Supp. at 97). In fact, Defendant Neer believed Defendant Ball was pursuing the vehicle. (Neer Depo. at 65; Supp. at 105).

While Defendant Ball was engaging in this pursuit, he was intentionally disregarding the Montgomery County Sheriff’s pursuit policy, which states in relevant part:

A. Evaluating Circumstances

CALEA 41.2.2

...

2. 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. Therefore, the Montgomery County Sheriff’s Office authorizes deputies in a patrol vehicle to initiate a vehicular pursuit when:

a. The suspect menaces a law enforcement officer by means of a weapon or other device capable of inflicting physical harm;

or

b. The pursuing deputy has probable cause to believe that the suspect has committed a felony involving the infliction or threatened infliction of serious physical harm, as defined in §2901.01 of the *Ohio Revised Code*, to a law enforcement officer or others;

or

c. The pursuing deputy has probable cause to believe that the suspect has committed the offense of kidnapping, abduction, or child enticement, and the victim is at large or presumed to be held by the suspect and the matter is not a child custody dispute;

and

d. The pursuit is **reasonable** in light of the facts and circumstances because if the deputy does not apprehend the suspect immediately, the suspect would pose a **clear and present** threat to the safety of law enforcement officers or others.

...

D. Initiating Deputy's Responsibilities

CALEA 41.2.2

1. The deputy initiating the pursuit must conduct the pursuit with his emergency lights and siren in continuous operation.
2. The initiating deputy immediately notifies the dispatcher of the pursuit and gives the following information:
 - a. His car number.
 - b. The reason for the pursuit.
 - c. A description of the fleeing vehicle, including the license number, color, make, model, or unique characteristics.
 - d. A description of occupants, where possible.
 - e. The location and direction of travel.
 - f. An estimate of the fleeing vehicle's speed.

...

Responsibilities of Road Patrol Supervisor

CALEA 41.2.2

1. The Road Patrol supervisor must do the following:
 - a. Acknowledge his awareness of the pursuit.
 - b. Assume control of the pursuit as far as ordering specific units into or out of the pursuit, if necessary.
 - c. Authorize the use of a stationary roadblock and roadspike devices.
 - d. End the pursuit if he decides the danger to the public or the pursuing deputies becomes too dangerous.

...

Inter-jurisdictional Pursuits

CALEA 41.2.2

1. Montgomery County Sheriff's deputies must comply with only the Montgomery County Sheriff's Office pursuit policy in a pursuit involving other agencies. (For example, if the "Alpha" Police Department initiates a pursuit, Montgomery County Sheriff's deputies must follow the Montgomery County Sheriff's pursuit policy to engage in the pursuit, and not the Alpha Police Department's policy.) The pursuing agency must request assistance and specify the assistance they require. The on-duty supervisor will then evaluate the circumstances and instruct deputies as to the type and extent of their involvement.

Deputies must receive authorization from a Road Patrol supervisor before engaging in a pursuit involving personnel from another agency or jurisdiction. The initiating agency should remain in charge of the pursuit until they can relinquish control to another agency with jurisdictional authority that is in a position to take control.

(Montgomery County Sheriff's Office Pursuit Policy (Sheriff's Dept. Policy); Supp. at 36-44).

Defendant Ball was never requested by a supervisor to engage in this pursuit, nor did he even radio to his dispatch that he was engaging in this pursuit. (Ball Depo. at 27-28; Deposition of Daniel Adkins ("Adkins Depo.") at 11; Supp. at 120, 133). Further, Defendant Ball was aware the Montgomery County Sheriff's Department Pursuit Policy would not even authorize a pursuit for a mere burglary suspect. (McDevitt Aff. at ¶5(o); Supp. at 204). Yet, he intentionally disregarded these clear rules and engaged in this pursuit. (Id.). Although he eventually withdrew from the pursuit, it was only after he had engaged in the unauthorized pursuit at high speeds through a residential area. Further, Defendant Adkins had a duty to monitor and supervise Defendant Ball, but he failed to do so. (Sheriff's Dept. Policy. at 5.1.4.6; Supp. at 204). Defendant Ball was not instructed to immediately terminate the pursuit. (Adkins Depo. at 11-12; Supp. at 120).

Defendant Ball allowed Defendant Neer and Defendant Stites to take the lead in the pursuit near the intersection of Washington Church Road and Spring Valley. (Neer Depo. at 38; Ball Depo. at 35; Supp. at 98, 135). Defendant Stites and Defendant Neer continued their pursuit of Barnhart on Spring Valley to State Route 741, where Barnhart traveled south. (Ashton Aff. at ¶4; Neer Depo. at 42; Supp. at 99, 206). Neer witnessed the suspect turn off of Spring Valley road and onto southbound State Route 741. (Neer Depo. at 40; Supp. at 98). As Barnhart drove south on 741, he was traveling at speeds of approximately 80 mph. and the traffic was becoming increasingly congested as he neared Austin Pike. (Neer Depo. at 57; Ashton Aff. at ¶6(i); Supp.

at 103, 208). Barnhart crossed into oncoming traffic again to pass vehicles. (Neer Depo. at 44; Supp. at 99). When he did, he struck the back of a blue van that was also traveling southbound then veered into the northbound lanes of traffic and hit Pamela Argabrite's station wagon head on. (Id.). At the time of impact with Ms. Argabrite, Barnhart was traveling 72 miles per hour. (Ashton Aff. at ¶6(h); Supp. at 208). Neer claims if the suspect had made it through the crowded Austin Pike intersection, he would have terminated the pursuit, but Neer never terminated the pursuit. (Neer Depo. at 57; Supp. at 103). Barnhart died upon colliding with Argabrite.

As a result of the collision, Mrs. Argabrite was seriously injured and had to be taken to Miami Valley Hospital in Dayton. In order to recover for her substantial injuries, Ms. Argabrite has had to bring this lawsuit against Defendants Neer, Stites, DiPietro, Ball and Adkins. However, Defendants have denied liability for Argabrite's injuries under the theory that that they are immune to liability under R.C. 2744.01 et seq. and that their conduct was not the proximate cause of the collision between Mrs. Argabrite and Barnhart.

First, the "no proximate cause" rule, also known as "extreme or outrageous" standard, should have never been applied to the facts of our case. When the legislature passed R.C. 2744.01 et seq. it created and communicated a clear standard of liability for political subdivisions and its agents – that standard was "wanton or reckless." The court usurped the legislature by creating a new, heightened standard of liability, the "extreme or outrageous" standard – a standard that is a minority position in our nation and one that no Ohio plaintiff has ever been able to meet. Therefore, the "extreme or outrageous" standard should be removed, and the standard originally created and intended by the legislature under R.C. 2744.01 et seq. should be reinstated.

Second, even if this court decides to uphold the "extreme or outrageous" standard, a genuine issue of material fact exists as to whether the Defendants' conduct rose to that level as to

impose liability on the Defendants. Therefore, even under the heightened, judicially-imposed standard, Plaintiff's case should not be dismissed as a matter of law.

ARGUMENT

I. First Proposition of Law: When establishing a police officer's conduct was a proximate cause of injuries to innocent third-parties stemming from a high speed pursuit, a plaintiff need not prove the officer's conduct was "extreme or outrageous".

This Honorable Court should overturn the "no proximate cause" rule and the "extreme or outrageous" standard that currently governs Ohio police pursuit liability. For several reasons, this standard should be reconsidered. First, the Appellate Courts of this State usurped the legislature by adding the "extreme or outrageous" standard to the RC 2744.03 analysis; creating an additional, judicially-imposed hurdle for overcoming political subdivision immunity in the context of police pursuits. Put simply, the Appellate Courts, by legislating from the bench, have rendered RC 2744.03 obsolete in the context of police pursuits. Second, Ohio Courts are in the small 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. Finally, Ohio adopted the extreme and outrageous standard by relying on Tennessee law that has since been overturned due to the state's adoption of a Governmental Immunity statute. 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 RC 2744.03.

a. Ohio Appellate Courts usurped the legislature and violated 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. *Brinkman v. Drolesbaugh*, 97 Ohio St. 171, 182, 119 N.E. 151 (1918). If, however, the law complained of is judicial, then it is up to the judiciary to make the necessary changes. *Id.* The legislature created RC 2744 et seq. (The Political Subdivision Tort Liability Act) in order to grant immunity from liability to political subdivisions and their employees under certain circumstances. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶19-23. It cannot be disputed that police officers engaged in high speed pursuits are a class of people addressed under the Political Subdivision Immunity Act. Under this act, the legislature stated that 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.” RC 2744.03(a)(6)(b). Most importantly, RC 2744.03(a)(6)(b) is unambiguous and mandates the standard for liability and immunity for employees of political subdivisions; and therefore, it cannot be contravened by additional common law principals of immunity. *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 983 N.E.2d 266, ¶21-23. Simply put, a defendant may not rely on an additional limitation of liability that the General Assembly has not provided for in RC 2744. et seq. *Id.*

In *Estate of Graves v. Circleville*, the Ohio Supreme Court held that a defendant being sued under RC 2744.03(a)(6)(b) may not raise additional common law limitations on liability which are not expressly provided for in RC 2744 et. seq. *Id.* In that case, the plaintiff’s estate brought an action against Circleville police officers alleging the officer’s acted wantonly and recklessly while performing under their official capacity, in violation of RC 2744.03(a)(6)(b), and that such wanton and reckless conduct caused her injury. *Id.* at ¶4-6. The defendant officers

stated they were immune from suit because: 1) their conduct was not wanton or reckless in violation of 2744.03(a)(6)(b); and additionally, 2) the common law public-duty rule, not provided for in RC 2744 et seq., barred the plaintiff's claim. *Id.* at ¶6. The Supreme Court held that: 1) the defendants could not raise its public duty rule common-law defense; and 2) the only defense available to the defendants was that they were immune from suit because their conduct was not wanton or reckless. *Id.* at ¶28. In regards to defendants' inability to raise common law defenses not explicitly listed in RC 2744.03, The Court reasoned:

Our holding adheres to our deference to valid legislative enactments and is consistent with RC Chapter 2744's purpose. By enacting RC 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. 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 "manifestly outside the scope of the employee's employment or official responsibilities," or are taken "with malicious purpose, in bad faith or in a wanton or reckless manner. (citing RC 2744.03(a)(6)(a) and (b)). A holding that the public-duty rule—a common-law principle—bars liability of an employee who allegedly has acted in a wanton or reckless manner would contravene an unambiguous statutory mandate and render RC 2744.03(A)(6)(b) meaningless.

...

It logically follows that application of the public-duty rule in a lawsuit against an employee of a political subdivision who is alleged to have acted wantonly or recklessly is tempered by the legislative dictate in RC 2744.03(A)(6)(b) that an employee who acts wantonly or recklessly has no immunity.

...

Our determination that the public-duty rule is inapplicable to lawsuits alleging wanton and reckless conduct against political subdivision employees preserves the public policy that justified our adoption of the rule—maintaining the integrity of public finance and the necessity of avoiding judicial intervention into policy decisions. The General Assembly, however, legislatively sets forth the public policy of this state. That policy, as expressed in R.C. Chapter 2744, permits suits against employees of political subdivisions who engage in wanton and reckless conduct. As we noted in *Wallace*, we will not "engraft the public-duty rule as an additional limitation on liability that the General Assembly has not provided."

(quoting *Wallace*). This rationale is even more appropriate here because application of the rule would directly contravene the legislature's expressed policy. "It is not this court's role to apply a judicially created doctrine when faced with statutory language that cuts *against* its applicability." (Emphasis sic.)

Id. at ¶21-23. Put simply, this Court made clear that a defendant being sued under RC 2744.03(A)(6)(b), may not raise common law defenses, which are not specifically stated in the RC 2744 et seq. and act as additional limitations on liability. *Id.*

Contrary to the Supreme Court precedent in *Estate v. Graves*, lower courts across the state have allowed defendants, like those in our case, to raise the common law "no proximate cause rule" defense in addition to the immunity already given to it under RC 2744 et seq. These courts are judicially legislating and contravening the General Assembly's unambiguous statutory mandate. As a result, RC 2744.03(A)(6)(b) is being rendered meaningless in the context of police pursuits.

This case before the Court is a perfect example of this phenomenon. In its opinion, the Second District Court of Appeals, itself, stated that applying the "no proximate cause rule" renders RC 2744.03(A)(6)(b) meaningless:

[W]e could review and analyze whether the trial court's conclusion that the 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 RC 2744.03(A)(6). *But we need not, and do not, engage in that analysis at this juncture because our determination that the no-proximate-cause rule of Whitfield v. Dayton, requiring extreme or outrageous conduct, is dispositive of this appeal.*"

Opinion of the Second District Court of Appeals at ¶ 4 (Emphasis added).. The Second District clearly stated that that RC 2744.03(A)(6)(b) was rendered meaningless by the application of the "no proximate cause rule." The court did not even consider its application. The Second District, along with other courts across the state, has engrafted the "no proximate cause rule" as an

additional limitation on liability that the General Assembly has not provided for in RC 2744 et seq. This act of judicial legislating is not permissible.

Because courts across the state have usurped the legislature by creating and applying the “no proximate cause rule,” that rule should be abandoned and abolished. Instead, courts should apply RC 2744 et seq. as it was written and intended by the General Assembly. Therefore, in the context of police pursuit cases pursued under RC 2744.03(A)(6)(b), an officer should be held liable for a plaintiff’s injuries if his conduct was “wanton or reckless.”

b. Ohio Courts are in the small minority of jurisdictions who impose the “no proximate cause” rule in police pursuit situations.

The majority of jurisdictions across the country reject the “no proximate cause rule” in regards to police pursuit liability.^{2,3} Most jurisdictions adopt the standard negligence approach.

² At least 33 jurisdictions adopt a standard of liability which allows a pursuing officer to be liable upon a showing of conduct less negligent than that of “extreme or outrageous.”

³ See *Athay v. Stacey*, 142 Idaho 360 (2005); *Boyer v. State*, 323 Md. 558 (1991); *Cameron v. Lang*, 274 Ga. 122 (2001); *City of Caddo Valley v. George*, 340 Ark. 203 (2000); *City of Jackson v. Law*, 65 So.3d 821 (Miss. 2011); *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992); *Clark v. S. Carolina Dep’t of Pub. Safety*, 362 S.C. 377 (2005); *Colby v. Boyden*, 241 Va. 125 (1991); *D.C. v. Hawkins*, 782 A.2d 293 (D.C. 2001); *Day v. State ex rel. Utah Dep’t. of Pub. Safety*, 1999 Utah 46 (1999); *Eckard v. Smith*, 603 S.E.2d 134 (N.C. App. 2004); *Eklund v. Trost*, 335 Mont. 112 (2006); *Estate of Aten v. City of Tuscon*, 817 P.2d 951 (Ariz. App. 1991); *Estate of Cavanaugh by Cavanaugh v. Andrade*, 202 Wis.2d 290 (1996); *Harrison v. Town of Mattapoisett*, 937 N.E.2d 514 (Mass. App. 2010); *Haynes v. Hamilton Cty.*, 883 S.W.2d 606 (Tenn. 1994); *Henry v. City of Omaha*, 641 N.W.2d 644 (Neb. 2002); *Jones v. Ahlberg*, 489 N.W.2d 576 (N.D. 1992); *Jones v. Crawford*, 1 A.3d 299 (Del. 2010); *Jones v. Chieffo*, 549 Pa. 46 700 A.2d 417 (1997); *Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004); *Kembel v. City of Kent*, Wash. App. No. 57069-2-I, 2007 WL 15565583 (May 29, 2007); *Lowrimore v. Dimmit*, 797 P.2d 1027 (Or. 1990); *Mason v. Bitton*, 534 P.2d 1360 (Wash. 1975); *Morais v. Yee*, 162 Vt. 366 (1994); *Morris v. Leaf*, 534 N.W.2d 388 (Iowa 1995); *Mumm v. Mornson*, 708 N.W.2d 475 (Minn. 2006); *Nurse v. City of New York*, 56 A.D.3d 442 (N.Y. App. 2008); *Patrick v. Mirosso*, 848 N.E.2d 1083 (Ind. 2006); *Peak v. Ratliff*, 185 W.Va. 548 (1991); *Richard v. Miller*, 867 So.2d 983 (La. App. 2004); *Robbins v. City of Wichita*, 285 Kan. 455, (2007); *Seals v. City of Columbia*, 575 So.2d 1061 (Ala. 1991); *Seide v. State*, 875 A.2d 1259 (R.I. 2005); *State ex rel. Oklahoma Dep’t of Pub. Safety v. Gurich*, 238 P.3d 1 (Okla. 2010); *Tetro v. Town of Stratford*, 189 Conn. 601 (1983); *Univ. of Houston v. Clark*, 38 S.W.3d 578 (Tex. 2000); *Wade v. City of Chicago*, 783, 847 N.E.2d 631 (Ill. App. Ct. 2006).

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 flexibility 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, Argabrite has been unable to find an Ohio case to date in which a pursuing officer's conduct has been found to be "extreme or outrageous." *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 at ¶ 118-124 (2d. Dist.) ¶124. The "extreme or outrageous" standard, therefore, has blanketed pursuing officers with what seems to be infinite immunity. Other jurisdictions adopt a standard which is more likely to increase officer accountability because it imposes liability. Ohio's law 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 refuse to accept by declining to adopt the "extreme or outrageous" standard. For these reasons, the court should abandon the "no proximate cause" rule and join the majority of jurisdictions who use a less stringent standard.

c. The "extreme or outrageous standard" is too high of a 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 that 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 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. *Id.* 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 that an innocent third party will be harmed or killed. *Id.* at ¶ 122-123. Because police pursuits are a use of deadly force that is likely to end in harm or death to innocent third parties, it would seem that, in order to create incentive for safe behavior, similar principals of liability and causation should apply to police pursuits just as they do 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 Argabrite has been unable to find 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.

(Sheriff’s Dept. Policy; Supp. at 36).

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, Ohio courts render this policy meaningless by allowing officers to pursue fleeing suspects in any manner they please, regardless of how dangerous it is to the public, just so long as the conduct does not amount to "extreme or outrageous". In fact, Ohio 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, 80 N.E.2d 122 (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, 559 N.E.2d 705 (1990).

The *Whitfield* court held 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 may be 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 Ohio courts are simply 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, no matter 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, we urge the court to consider joining the majority of jurisdictions, which do not use the “extreme or outrageous” standard.

d. The Appellate Court, in *Lewis v. Bland*, which adopted the “extreme or outrageous” standard in Ohio relied on Tennessee law in adopting the “no proximate cause” rule; Tennessee law has since been overturned due to the Tennessee Legislature’s adoption of a Governmental Immunity statute.

In adopting the “no proximate cause” rule and the “extreme or outrageous” standard, the Ninth District relied, in part, on *Nevill v. Tullahoma*, a Tennessee Supreme Court case. *Lewis v. Bland*, 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist. 1991). In *Nevill*, the Tennessee Supreme Court decided that a pursuing officer could not be held liable for injuries to third-parties because his conduct could not be the proximate cause of such injuries as a matter of law. *Nevill v. Tullahoma*, 756 S.W.2d 226, 233 (Tenn. 1988). However, the Tennessee Supreme Court later overturned *Nevill* and abandoned the no proximate cause rule in its decision in *Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994). In abandoning the “no proximate cause” rule, the Court stated:

Unlike the *Nevill* court, we are unable to conclude, that in all cases, all reasonable persons must agree, as a matter of law, that the conduct of police in commencing or continuing pursuit is superseded by the negligence of a fleeing suspect.”

...

Moreover, the *Nevill* Court was applying Tennessee law as it existed prior to the 1986 amendment, by which the General Assembly determined that public policy requires that police officers be liable to innocent third parties for negligent conduct which proximately causes injury. The *Nevill* holding was also, in large degree, based on court decisions from other jurisdictions refusing to impose liability on police as a matter of public policy.”

...

Our research reveals that today only a minority of jurisdictions afford police officers complete immunity, either by statute or by virtue of the per se “no proximate cause rule,” when a police officer or the officer’s employer is sued by an innocent third party who sustained injuries in an accident with a fleeing suspect.”

...

In the majority of jurisdictions, proximate cause is considered to be a question of fact if the plaintiff alleges negligence on the part of police in commencing or continuing pursuit.”

...

We are convinced that the majority rule is the better-reasoned and more persuasive rule, because it recognizes that public safety is the ultimate goal of law enforcement, and that when the risk of injury to members of the public is high, that risk should be weighed against the police interest in immediate arrest of a suspect. The per se rule of “no proximate cause,” as a matter of law, adopted in *Nevill* is inconsistent with the existing law in Tennessee as it relates to proximate cause and superseding and intervening causation and with the critical public policy considerations. General principles of proximate and superseding intervening causation previously adopted in Tennessee are to be applied when determining whether police conduct is a proximate cause of an accident between a fleeing suspect and an innocent third party.

Haynes v. Hamilton County, 883 S.W.2d 606, 612-13 (Tenn. 1994).

Thus, the Haynes Court held that the “no proximate cause” rule was improper because 1) the Tennessee Legislature explicitly mandated what the law should be in regards to police

liability in pursuit situations⁴; 2) public policy considerations; and 3) the law was in conflict with general principles of proximate causation. *Id.* Judge Frolich, in his dissenting opinion at the appellate level, in this case, likewise determined Ohio’s “extreme or outrageous” and “no proximate cause” rule usurped the Ohio legislature and defied general principles of duty and proximate cause. In regards to the duty and proximate cause issue, he explained:

According to *Lewis v. Bland*, and the cases that follow it, police officers must engage in “extreme or outrageous conduct” before there can be the proximate cause. 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.

Opinion of the Second District Court of Appeals at ¶ 34.

Put simply, the basis of Ohio’s adoption of the “no proximate cause” rule is not grounded in firm legal principals. This point is illustrated by Tennessee’s abandonment of the “no proximate cause” rule. First, the law ignores the Ohio General Assembly’s specific mandate as to police officer liability in automobile pursuit situations. Second, Ohio’s law contravenes the generally accepted principals of duty and proximate causation. Third, the law is against public policy. For these reasons, Ohio’s “no proximate cause” and “extreme or outrageous” rule should be abandoned.

⁴ Tenn. Code § 55-8-108 was the statute adopted by the Tennessee Legislature that governs the liability of those who operate authorized emergency vehicles in emergency situations. That law states that officers may be liable for injuries caused by their negligence in operating an emergency vehicle.

II. Second Proposition of Law: Under Ohio’s current “no proximate cause rule”, a pursuing police officer’s conduct is extreme or outrageous where, in violation of his pursuit policy, he: 1) engages in deadly force by pursuing a suspect known to have committed only a property crime who could have later been apprehended though the warrant process; 2) pursues and continues to pursue a suspect for over seven miles at high speeds, through residential areas, and despite the offender driving into oncoming traffic; 3) pursues and continues to pursue a suspect without necessary authorization from a superior officer; 4) pursues and continues to pursue a suspect outside appropriate jurisdiction; and/or 5) pursues and continues to pursue a suspect with knowledge that an unjustified, known danger to the public was present.

Even if the current “no proximate cause” rule is used, there is a genuine issue of material fact as to whether the Defendants’ conduct was the proximate cause of Argabrite’s injuries.

Where it is established that the Defendant officers’ conduct in pursuing a fleeing suspect was “extreme or outrageous” their actions may be the proximate cause of injuries to third parties.

Whitfield, supra at ¶ 48. The Supreme Court of Ohio has defined extreme and outrageous 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, 453 N.E.2d 666; *Whitfield*, supra at ¶ 160.

The conduct of the Defendants in pursuing the suspect meets the threshold of extreme and outrageous. Thus, there is at least a genuine issue of material fact as to whether the conduct of each Defendant rose to the level of “extreme or outrageous”. Therefore, even if this Court applies the current “no proximate cause” rule, the Defendants’ Motion for Summary Judgment should have been denied.

a. Defendants' Neer and Stites conduct in pursuing a known suspect constituted extreme and outrageous conduct and proximately caused the collision between Argabrite and Barnhart.

A genuine issue of material fact exists as to whether the Defendants' conduct in pursuing a known suspect proximately caused the collision between Argabrite and Barnhart. By pursuing a known suspect, who could have been apprehended at a later date, Defendants' Jim Neer and Gregory Stites' conduct rose to a level that was extreme and outrageous and proximately caused the collision between Argabrite and Barnhart.

Unlike in *Whitfield*, the officers in this case, in violation of the Miami Township Police Pursuit Policy, chose to put the public in danger by pursuing a known suspect that could have been easily taken into custody at a later date via the warrant process. (McDevitt Aff. at ¶5(b); Supp. at 202). Additionally, Neer and Stites were aware Barnhart was only wanted for a property offense, and not for a crime in which anyone was physical injured. (McDevitt Aff. at ¶5(l & m); Supp. at 203). First, because Neer and Stites knew Barnhart was not wanted for a violent offense, their use of deadly force in pursuing the suspect was not justified from the start. The two officers chose to put the lives of the suspect and the lives of innocent third parties in danger for mere property. Not only is this in violation of Supreme Court precedent, but it is in violation of the Miami Township Police Pursuit Policy. *Tennessee v. Garner*, 47 U.S. 1, 11, 105 S.Ct. 1694 (1985)(holding that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable... Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”). Neer and Stites could have taken the suspect into custody at any time without posing a danger to the community, but instead chose to put others in danger by initiating and continuing a dangerous high speed pursuit for over

five miles, where the suspect was running multiple stop lights and stop signs, driving into oncoming traffic early in the pursuit, and speeding up to 80 mph. through a residential area with schools, apartment buildings, daycares, parks, and churches. (Ball Depo. at 34; McDevitt Aff. at ¶4; Supp. at 201, 206-08). The pursuit could have been disengaged at any time and the suspect apprehended at a later date, but officers Neer and Stites refused to do so, and continued to allow others to be put at risk. Ultimately, instead of ensuring the safety of others by waiting to take the known suspect into custody at a later date, Neer and Stites' acted extremely and outrageously by choosing to put others at risk when they decided to ignore their own pursuit policy and initiated and continued the dangerous pursuit that caused Argabrite's serious injuries. Therefore, a genuine issue of material fact exists as to whether the Defendants' extreme and outrageous conduct in pursuing a known suspect proximately caused the collision between Argabrite and Barnhart.

b. Defendants' conduct in continuing the pursuit constituted extreme and outrageous conduct and proximately caused the collision between Argabrite and Barnhart.

A genuine issue of material fact exists as to whether the Defendants' conduct in continuing the pursuit proximately caused the collision between Argabrite and Barnhart. By continuing to pursue the suspect despite his erratic and dangerous driving, which put the suspect and the public at great risk, the Defendants' conduct rose to a level that was extreme and outrageous and proximately caused the collision between Argabrite and Barnhart.

In *Whitfield*, the court held that after looking at the circumstances of a police pursuit that resulted in injuries to a third party, the police officers engaging in the pursuit could not be held liable for the third party's injuries because their conduct was not "extreme or outrageous".

Whitfield, supra at ¶ 62. In that case, police officers pursued an unknown suspect who was

driving in an erratic manner that put the public at an immediate risk. *Id.* at ¶ 3-5. The pursuit stretched over several miles, reached a top speed of 55-60 mph, and included several traffic violations. *Id.* at ¶ 8-13. During the pursuit, the officers maintained contact with the proper authorities and witnessed the fleeing suspect throw a shotgun out of his window. *Id.* at ¶ 4-10.

The level of danger and risk created by the circumstances of the police pursuit in this case surpasses that of *Whitfield*, and the continuing of the pursuit by the defendants was extreme and outrageous conduct. The pursuit in this case stretched over 7.6 miles, a much greater distance than in *Whitfield*. *Whitfield*, supra at ¶ 8; (Ashton Aff. at ¶ 6(l); Supp. at 208). The pursuit occurred through an area with multiple residences, apartment buildings, schools, parks, and a hospital. (McDevitt Aff. at ¶ 4; Supp. at 201). Additionally, the suspect in this case was driving at a rate of up to 80 mph, which is more than 20-25 mph faster than the top speed of the suspect in *Whitfield*. *Whitfield*, supra at ¶ 12; (Ashton Aff. at ¶ 6(i); Neer Depo. at 57; Supp. at 103, 208). The suspect in this case committed at least 11 traffic violations. *Whitfield*, supra at ¶ 12; (Ashton Aff. at ¶ 6(k); Supp. at 208). Additionally, engaging in the dangerous pursuit was totally unnecessary from its inception because the suspect could have been taken into custody at a later date. Further, Neer and Stites continued to pursue the suspect without authorization, help, or aid of any of their authorities who had the proper authorization to make the judgment to continue or disengage pursuit. (McDevitt Aff. at ¶ 5(i, j, k); Supp. at 203). DiPietro had the duty to collect the necessary information from Neer and Stites to determine whether to continue or discontinue the pursuit, but he failed to give or receive the necessary information. (McDevitt Aff. at ¶ 5(i, j, k); Supp. at 203). Therefore, under the totality of the circumstances, it is clear that the pursuit of the suspect created an extremely dangerous situation and put the public at risk. By knowingly ignoring their own policy and making the decision to allow the public to be put at

great risk by allowing the pursuit to continue, Neer, Stites, and DiPietro, acted in an “extreme and outrageous” fashion that caused the collision between Argabrite and Barnhart.

Additionally, Defendants Ball and Adkins also engaged in extreme and outrageous conduct during their two mile pursuit of the suspect. (Ashton Aff. at ¶ 6(n), 6(a-f); Supp. at 207-09). Defendant Ball physically pursued the suspect at excessive speeds through residential areas. (Ball Depo. at 17-18; McDevitt Aff. at ¶ 4; Supp. at 131, 201). Ball also switched his lights on and off in order to pass other vehicles, including going into the center turning lane to pass vehicles. (Ball Depo. at 30-31; Supp. at 134). The engagement of the pursuit itself was a violation of the Montgomery County Sheriff’s Office Pursuit Policy. (McDevitt Aff. at ¶ 5(o, p); Supp. at 204). Ball engaged in the pursuit without authorization from his superior officer, Adkins, he never radioed that he was engaging in the pursuit, and he was not in the proper jurisdiction to engage in pursuit. (Ball Depo. at 27-28; McDevitt Aff. at ¶5(o); Supp. at 133, 204). Likewise, Adkins failed to instruct Ball in regards to the pursuit despite the fact that he had a clear duty to do so. (*Id.*). Further, Ball and Adkins both failed to terminate the pursuit when they had no reason to believe that the suspect had committed a violent offense. (McDevitt Aff. at ¶(o)(iii); Supp. at 204). By pursuing Barnhart, Ball and Adkins put the public and the suspect in danger when it was unnecessary and when they failed to have authority to do so. The two Defendants engaged in extreme and outrageous conduct that caused the collision between Argabrite and Barnhart by knowingly creating an unjustified danger to others and violating their own pursuit policy.

Therefore, a genuine issue of material fact exists as to whether the Defendants’ extreme and outrageous conduct in continuing the pursuit proximately caused the collision between Argabrite and Barnhart.

III. Even standing alone, Defendant Neer's conduct in continuing the pursuit when a known danger was present constituted extreme and outrageous conduct and proximately caused the collision between Argabrite and Barnhart.

A genuine issue of material fact exists as to whether Defendant Neer, in continuing the pursuit when a known danger was present, proximately caused the collision between Argabrite and Barnhart. By continuing to pursue the suspect when there was a known danger approaching, Neer engaged in conduct that rose to the level of extreme and outrageous.

During the pursuit, Neer witnessed the suspect turn left off of Spring Valley Road and onto southbound State Route 741. (Neer Depo. at 40; Supp. at 98). The Austin Pike Intersection is about 1.1 miles from Spring Valley Road on State Route 741. Neer stated that if the suspect would have gotten "through" the Austin Pike intersection he would have called off the pursuit. (Neer Depo. at 57; Supp. at 103). Neer stated that there was just too much traffic at that time right there at that intersection. (Neer Depo. at 57-58; Supp. at 103). Officer Neer and the suspect were traveling at a rate somewhere in the vicinity of 70-80 mph. (Neer Depo. at 43; Ashton Aff. at ¶ 6(i); Supp. at 99, 208). Driving at a speed of 80 mph, one would reach the Austin Pike intersection in approximately 49.5 seconds after turning off of Spring Valley Road onto State Route 741.

Austin Pike is a major intersection that Officer Neer knew was likely to be busy, and even confirmed that it was busy when he was traveling on State Route 741. (Neer Depo. at 57; Supp. at 103). Knowing that the suspect would be approaching a major, typically busy intersection, Neer ignored the upcoming danger and allowed the pursuit to continue. Considering the high speeds being traveled Neer would have had to apprehend Barnhart in less than a minute after Barnhart reached State Route 741 before Barnhart would have reached the dangerous "busy" Austin Pike intersection. Neer himself conceded the pursuit would have had

to cease at that point. Yet, rather than cease the pursuit when he turns onto State Route 741 and realizes he has less than a minute until the dangerous intersection, Neer continued to pursue Barnhart at 70 to 80 miles per hour until he collided with Argabrite. By allowing the suspect to approach the dangerous intersection, knowing that he less than a minute to apprehend the suspect before he would have to call off the pursuit, Neer's conduct rose to the level of extreme and outrageous.

a. Defendants intentionally increased the risk of harm to third parties through their conduct and knowingly violating their pursuit policy, which evidences extreme or outrageous conduct.

i. Defendants Neer and Stites

Neer and Stites violated their own pursuit policy including: (1) improperly initiating pursuit of a known suspect, (2) failing to properly terminate the pursuit, (3) traveling at excess speeds through congested residential areas, (4) traveling left of center during the pursuit, (5) failing to report the proper information to their supervisor to allow him to evaluate the danger of the pursuit, and a number of others. (Miami Twp. Police Policy at 38-47, McDevitt Aff. at ¶5(a-m), Ashton Aff. at ¶4-5; Supp. at 45-53, 201-03, 207).

In regards to the importance of following the policy and the overall danger of high speed pursuits, the Miami Township Pursuit Policy states:

[t]he officer should view the initiation and continuation of a pursuit as a potential use of deadly force.”

...

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.”

...

If the risk to the public from initiation or continuation of a pursuit outweighs the risk from not initiating the pursuit or discontinuation, the pursuit shall be terminated.

(Miami Twp. Policy; Supp. at 45-53). Defendant Neer has been a member of the Miami Township Police Department for 20 years. (Neer Depo. at 5; Supp. at 90). Defendant Stites has been a member of the Miami Township Police Department for 18 years. (Stites Depo. at 5; Supp. at 55). Both Neer and Stites testified that they are familiar with the pursuit policy and its provisions. (Stites Depo at 57 Neer Depo. at 7-8; Supp. at 68, 90). Neer and Stites had a combined 38 years of experience and were familiar with the language and procedures contained in the pursuit policy. Further, the pursuit policy, quoted above, reads as a warning that pursuits are dangerous and are to be approached with caution. The procedures outlined in the pursuit policy are to ensure the safety not only of the pursuing officers, but the general public. When the pursuit policy procedures are not followed the level of dangerousness of the pursuit increases.

Despite knowing of the pursuit policy, Defendant Neer and Defendant Stites violated it many times as they pursued the fleeing suspect. By traveling at excess speeds of 70 mph through residential areas, creating an unneeded danger by pursuing a known suspect, failing to terminate the pursuit when speeds increased and the suspect swerved into the oncoming traffic lane, as well as other violations, Neer and Stites increased the risk of harm to themselves and the general public. As long term veterans of the police force, Neer and Stites knew and understood the policy and its provisions. Thus, any violation of the policy was a knowing violation. Likewise, as they are quite familiar with the policy, Neer and Stites understand that a violation of the policy increases the risk of harm to themselves and the public and is reason to further evaluate the overall danger of the pursuit.

Argabrite has brought forth ample evidence that Neer and Sties violated their own pursuit policy and were aware of the fact that violating the policy was likely to result in an increased risk of harm to others. The overall dangerousness of a pursuit situation is clear, and is equated in the

policy as a “[p]otential use of deadly force.” (Miami Twp. Policy; Supp. at 46). Misusing and mishandling “deadly force” by violating the policy and increasing the risk of the pursuit certainly creates an unnecessary risk of harm, which amounts to “extreme or outrageous” conduct.

ii. Defendant DiPietro

DiPietro was a knowledgeable and experienced officer who violated his own pursuit policy by failing to monitor and supervise the pursuit. DiPietro was a member of the Miami Township police department for 26 years. (DiPietro Depo. at 5; Supp. at 110). For about 12 of those years, DiPietro was the Deputy Chief of Police for the department. (DiPietro Depo. at 5; Supp. at 110). DiPietro testified that at the time of the accident he was aware of and familiar with the Miami Township Pursuit Policy. (DiPietro Depo. at 7; Supp. at 110). Therefore, DiPietro had years of experience with the pursuit policy and was familiar with the language and procedures contained in it. As is discussed above, the Miami Township police pursuit policy warns that pursuits are dangerous and are to be approached with caution. Further, the pursuit policy procedures are to ensure both the pursuing officers and the general public’s safety. Thus, failing to follow the policy increases the dangerousness of the pursuit.

DiPietro stated that it was his duty to monitor and supervise the pursuit. (DiPietro Depo. at 15; Supp. at 112). The Miami Twp. Pursuit Policy clearly states, “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.” (Miami Twp. Pursuit Policy at 39; Supp. at 46). As DiPietro felt he was required to supervise/authorize the pursuit, he must have felt that the suspect’s flight posed a serious risk to the safety of the officers and/or citizens of the community. Yet, by failing to collect the necessary information from the pursuing officers, he violated the policy and further increased the risk of the situation. DiPietro stated he was familiar with the pursuit policy, was a

veteran of the police force, and a deputy chief for 12 years. DiPietro understood the policy. Thus, DiPietro's violation of the policy was a knowing violation.

Argabrite has brought forth evidence DiPietro knowingly violated Miami Township police pursuit policy, which he was aware increased risk of harm to others. In fact, because DiPietro failed to get the required information from the pursuing officers, the dangerousness of the pursuit could not be properly evaluated and the pursuit, which should have been terminated because the risk involved, continued. (McDevitt Depo. at ¶5(i-1); Supp. at 203). DiPietro's conduct in violating the pursuit policy and failing to supervise the pursuit amounted to "extreme or outrageous" conduct.

iii. Defendants Ball and Adkins

Defendants Ball and Adkins were governed by the Montgomery County Sheriff's Office's pursuit policy, which stated:

The Montgomery County Sheriff's Office recognizes that motor-vehicle pursuits pose a serious risk to the safety of citizens and to law enforcement personnel... It is the intent of this policy to provide guidance to Road Patrol deputies in determining which is the greater risk to the community, [pursuing the suspect or not pursuing the suspect]. In doing so, personnel can make an appropriate and defensible decision whether to engage in a motor-vehicle pursuit or to seek apprehension later.

(Sheriff's Dept. Policy; Supp. at 36).

As discussed above, Ball and Adkins both violated their own pursuit policy. Ball failed to adhere to this policy by initiating pursuit of the fleeing suspect when: the suspect had not menaced a law enforcement officer, (2) he did not have probable cause to believe the suspect committed a felony involving the infliction or threatened infliction of serious physical harm, and (3) he did not have probable cause to believe the suspect committed the felony of kidnapping, abduction, or child enticement. (Ball Depo. at 23-24; McDevitt Aff. at ¶5(o); Supp. at 132, 204).

Likewise, Defendant Adkins intentionally disregarded his duty to supervise and monitor Defendant Ball in the pursuit.

Both Ball and Adkins were experienced officers who understood the Montgomery County Sheriff's Office's pursuit policy. Adkins has been a member of the Montgomery County police force for 20 years. (Adkins Depo. at 4-5; Supp. at 118-19). Ball has been a member for 12 years and was a deputy sheriff. (Ball Depo at 4; Supp. at 127). Both Ball and Adkins testified that they were familiar with the Montgomery County Pursuit Policy. (Adkins Depo. at 29; Ball Depo. at 9-11; Supp. at 125, 129). Therefore, Ball and Adkins had many years of experience with the pursuit policy and were familiar with the language and procedures contained in it.

When Ball and Adkins failed to adhere to the policy, they increased the risk of harm to public and the dangerousness of the pursuit. As veterans of the police force, Ball and Adkins understood the pursuit policy, and that failure to abide by its procedure increases the risk of the already dangerous activity of pursuing a fleeing suspect. Thus, Argabrite presented evidence Ball and Adkins violated their applicable pursuit policy and that they were aware of the fact that violating the policy was likely to result in an increased risk of harm to others. Thus, Ball and Adkins complete disregard of the pursuit policies requirement and the dangers it sought to avoid demonstrated "extreme or outrageous" conduct.

CONCLUSION

For these reasons, the court should abandon the "extreme or outrageous" standard and remand Argabrite's case for further proceedings under the "wanton or reckless" standard prescribed under RC 2744.03. However, if the court applies the "extreme or outrageous" standard, it should hold that an issue of fact exists as to whether Defendants' conduct was

“extreme or outrageous” and the proximate cause of Argabrite’s injuries, reversing the trial court’s grant of summary judgment.

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@dgmslaw.com

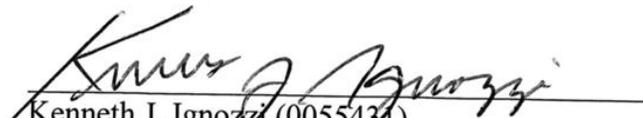
CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing has been served upon the following by regular U.S. mail this 19th day of October, 2015.

Joshua R. Schierloh, Esq. (0078325)
Edward J. Dowd, Esq. (0018681)
Surdyk, Dowd & Turner Co., LPA
8163 Old Yankee Street, Suite C
Dayton, OH 45458
(937) 222-2333
jschierloh@sdtlawyers.com
edowd@sdtlawyers.com
Attorneys for Defendant-Appellees Jim Neer and Gregory Stites

Laura G. Mariani (0063284)
Roberta L. Nothstine (0061560)
Mat H. Heck (0014171)
Montgomery County Assistant Prosecuting Attorney
301 West Third Street,
P.O. Box 972
Dayton, OH 45422
(937) 225-5781
MarianiL@mcohio.org
Nothstine@mcohio.org
Attorney for Defendant-Appellees Anthony Ball and 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
Attorney for Defendant-Appellee John DiPietro


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

IN THE SUPREME COURT OF OHIO

PAMELA ARGABRITE, : Case No.: 2015-0348
Appellants, :
v. :
JIM NEER, Individual and in his official :
Capacity Miami Township Police :
Department, et al., :
Appellees.

APPENDIX OF PLAINTIFF-APPELLANT, PAMELA ARGABRITE

Kenneth J. Ignozzi, Esq. (0055431)
Dyer, Garofalo, Mann & Schultz, LPA
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
(937) 223-8888
Fax No. (937) 824-8630
kignozzi@dgmslaw.com
Attorney for Plaintiff-Appellant

Joshua R. Schierloh, Esq. (0078325)
Edward J. Dowd, Esq. (0018681)
Surdyk, Dowd & Turner Co., LPA
8163 Old Yankee Street, Suite C
Dayton, OH 45458
(937) 222-2333
jschierloh@sdtlawyers.com
edowd@sdtlawyers.com
Attorneys for Defendant-Appellees Jim Neer and Gregory Stites

Laura G. Mariani (0063284)
Roberta L. Nothstine (0061560)
Mat H. Heck (0014171)
Montgomery County Assistant Prosecuting Attorney
301 West Third Street,
P.O. Box 972
Dayton, OH 45422
(937) 225-5781
MarianiL@mcohio.org
Nothstine@mcohio.org *Attorney for Defendant-Appellees Anthony Ball and 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
Attorney for Defendant-Appellee John DiPietro

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2744.02 Governmental functions and proprietary functions of political subdivisions.

(A)

(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

Effective Date: 04-09-2003; 2007 HB119 09-29-2007

2744.03 Defenses - immunities.

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) 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:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

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

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a

criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

Effective Date: 04-09-2003

ARTICLE II: LEGISLATIVE

ARTICLE II: LEGISLATIVE

IN WHOM POWER VESTED.

§1 The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as herein after provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

(1851, am. 1912, 1918, 1953)

INITIATIVE AND REFERENDUM TO AMEND CONSTITUTION.

§1a The first aforesaid power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to one hundred twenty-five days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: "Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors."

(1912, am. 2008)

INITIATIVE AND REFERENDUM TO ENACT LAWS.

§1b When at any time, not less than ten days prior to the commencement of any session of the General Assembly, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law,

the full text of which shall have been set forth in such petition, the secretary of state shall transmit the same to the General Assembly as soon as it convenes. If said proposed law shall be passed by the General Assembly, either as petitioned for or in an amended form, it shall be subject to the referendum. If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon within four months from the time it is received by the General Assembly, it shall be submitted by the secretary of state to the electors for their approval or rejection, if such submission shall be demanded by supplementary petition verified as herein provided and signed by not less than three per centum of the electors in addition to those signing the original petition, which supplementary petition must be signed and filed with the secretary of state within ninety days after the proposed law shall have been rejected by the General Assembly or after the expiration of such term of four months, if no action has been taken thereon, or after the law as passed by the General Assembly shall have been filed by the governor in the office of the secretary of state. The proposed law shall be submitted at the next regular or general election occurring subsequent to one hundred twenty-five days after the supplementary petition is filed in the form demanded by such supplementary petition which form shall be either as first petitioned for or with any amendment or amendments which may have been incorporated therein by either branch or by both branches, of the General Assembly. If a proposed law so submitted is approved by a majority of the electors voting thereon, it shall be the law and shall go into effect as herein provided in lieu of any amended form of said law which may have been passed by the General Assembly, and such amended law passed by the General Assembly shall not go into effect until and unless the law proposed by supplementary petition shall have been rejected by the electors. All such initiative petitions, last above described, shall have printed across the top thereof, in case of proposed laws: "Law Proposed by Initiative Petition First to be Submitted to the General Assembly." Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors. Any proposed law or amendment to the constitution submitted to the electors as provided in section 1a and section 1b, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state. If conflicting



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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. 28220

Trial Court Case No. 12-CV-7402

(Civil Appeal from
Common Pleas Court)

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OPINION

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

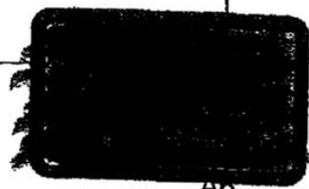
KENNETH J. IGNOZZI, Atty. Reg. #0055431, Dyer, Garofalo, Mann, & Schultz, 131 North Ludlow Street, Suite 1400, Dayton, Ohio 45402
Attorney for Plaintiff-Appellant, Pamela Argabrite

LISA A. 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 Stiles

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THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT



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.)¹, 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

¹ 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 686 (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.

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.² 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

² 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)

ORIGINAL

IN THE SUPREME COURT OF OHIO

15-0348

PAMELA ARGABRITE,

Appellants,

v.

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

Appellees.

Case No.:
On Appeal from the Montgomery
County Court of Appeals
Second Appellate District

Court of Appeals
Case No. 2014 CA 26220

NOTICE OF APPEAL
OF APPELLANT PAMELA ARGABRITE

Kenneth J. Ignozzi, Esq. (0055431) (COUNSEL OF RECORD)
Dyer, Garofalo, Mann & Schultz, LPA
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
(937) 223-8888
Fax No. (937) 824-8630
kignozzi@dgmsslaw.com
COUNSEL FOR APPELLANT, PAMELA ARGABRITE

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FEB 27 2015
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SUPREME COURT OF OHIO

Joshua R. Schierloh, Esq. (0078325) (COUNSEL OF RECORD)
Edward J. Dowd, Esq. (0018681)
Surdyk, Dowd & Turner Co., LPA
8163 Old Yankee Street, Suite C
Dayton, OH 45458
(937) 222-2333
jschierloh@sdtlawyers.com
edowd@sdtlawyers.com
COUNSELS FOR APPELLEE JIM NEER & GREGORY STITES

Liza A. Luebke, Esq. (0081315) (COUNSEL OF RECORD)
Montgomery County Assistant Prosecuting Attorney
301 West Third Street,
P.O. Box 972
Dayton, OH 45422
(937) 225-5781
luebkel@mcoho.org
COUNSEL FOR APPELLEE ANTHONY BALL & DANIEL ADKINS

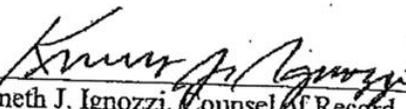
Lawrence E. Barbieri, Esq. (0027106) (COUNSEL OF RECORD)
Schroeder, Maundrell, Barbieri & Powers
5300 Socialville Foster Rd., Suite 200
Mason, OH 45040
(513) 583-4200
lbarbieri@smbplaw.com
COUNSEL FOR APPELLEE JOHN DIPIETRO

NOTICE OF APPEAL OF APPELLANT, PAMELA ARGABRITE

Appellant, Pamela Argabrite, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 2014 CA 26220 on January 16, 2015.

This case is one of public or great general interest.

Respectfully submitted,

By: 
Kenneth J. Ignozzi, Counsel of Record
Sup. Ct. No. 0055431
COUNSEL FOR APPELLANT
PAMELA ARGABRITE

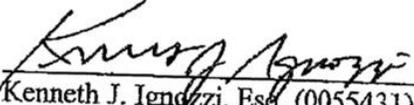
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by regular U.S. mail, postage paid, this 26th 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