

**IN THE SUPREME COURT OF OHIO**

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Case No. 15-0348

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**PAMELA ARGABRITE,**

Appellant,

vs.

**JIM NEER, Individually and in his Official Capacity,  
Miami Township Police Department, et al.,**

Appellees.

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On Appeal from the Montgomery County Court of Appeals  
Ohio Second Appellate District

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**BRIEF OF AMICUS CURIAE OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF THE APPELLANT, PAMELA ARGABRITE**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** .....i

**STATEMENT OF INTEREST**..... 1

**STATEMENT OF THE CASE & FACTS**..... 2

**LAW AND ARGUMENT**.....2

**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.

**I. THE “EXTREME OR OUTRAGEOUS” STANDARD CANNOT BE RECONCILED WITH THE LANGUAGE OF R.C. § 2744.03(A)(6).** ..... 2

**II. MULTIPLE OTHER JURISDICTIONS HAVE ABANDONED THE “NO PROXIMATE CAUSE” RULE.** ..... 5

**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 through the warrant process; 2) pursues and continues to pursue a suspect for over five 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.

**CONCLUSION** .....9

**CERTIFICATE OF SERVICE**..... 10

## TABLE OF AUTHORITIES

<i>Anderson v. City of Massillon</i> , 134 Ohio St.3d 380, 2012-Ohio-5711 . . . . .	3-4
<i>Argabrite v. Neer</i> , 2015-Ohio-125, 26 N.E.3d 879 (2nd Dist.) . . . . .	4-5
<i>Burlingame v. Estate of Burlingame</i> , 134 Ohio St.3d 490, 2012-Ohio-5698 . . . . .	4
<i>Dent v. Dallas</i> , 729 S.W.2d 114 (Tex. App. Dallas 1986) . . . . .	8
<i>Estate of Aten v. Tucson</i> , 169 Ariz. 147, 817 P.2d 951 (Ariz. Ct. App. 1991) . . . . .	7
<i>Haynes v. Hamilton County</i> , 883 S.W.2d 606 (Tenn. 1994) . . . . .	6
<i>Lowrimore v. Dimmitt</i> , 310 Ore. 291, 797 P.2d 1027 (Or. 1990) . . . . .	5
<i>Mason v. Bitton</i> , 85 Wash. 2d 321, 534 P.2d 1360 (Wash. 1975) . . . . .	5
<i>Meyer v. State</i> , 264 Neb. 545, 550, 650 N.W.2d 459 (Neb. 2002) . . . . .	6
<i>Miami v. Horne</i> , 198 So. 2d 10 (Fla. 1967) . . . . .	7
<i>Moyer v. St. Francois County Sheriff Dep't</i> , 449 S.W.3d 415 (Mo.App. 2014) . . . . .	5
<i>Nevill v. Tullahoma</i> , 756 S.W.2d 226 (Tenn. 1988) . . . . .	6
<i>Oswald v. Connor</i> , 16 Ohio St.3d 38 (1985) . . . . .	2
<i>Pinellas Park v. Brown</i> , 604 So. 2d 1222 (Fla. 1992) . . . . .	7
<i>Seals v. City of Columbia</i> , 575 So.2d 1061 (Ala. 1991) . . . . .	5
<i>Smith v. City of Stillwater</i> , 2014 OK 42, 328 P.3d 1192 . . . . .	6
<i>Strength v. Lovett</i> , 311 Ga. App. 35 (Ga.App. 2011) . . . . .	5
<i>Strother v. Hutchinson</i> , 67 Ohio St.2d 282 (1981) . . . . .	2
<i>Tetro v. Town of Stratford</i> , 189 Conn. 601, 458 A.2d 5 (Conn. 1983) . . . . .	5
<i>Travis v. Mesquite</i> , 830 S.W.2d 94 (Tex. 1992) . . . . .	8
<i>Wilson v. Tucson</i> , 446 P.2d 504, 8 Ariz. App. 398 (Ariz. Ct. App. 1968) . . . . .	7
R.C. § 2744 . . . . .	passim
R.C. § 2744.03(A)(6) . . . . .	passim

## STATEMENT OF INTEREST

The Amicus Curiae the Ohio Association of Justice is the largest bar association in the State of Ohio dedicated to advocacy for the rights of injured persons. OAJ's members are consulted all too frequently, when innocent third parties are injured by a suspect fleeing the police. The consequences of pursuing a fleeing suspect at high speed can be tragic, as shown by the facts of this case.

This case presents a legal issue that is central to whether Ohio's Political Subdivision Tort Liability Act, R.C. § 2744 et seq., can function as written when innocent persons are injured as a result of police chases. By close analogy, virtually all case law on Fourth Amendment issues requires Courts to engage in a balancing test. Most legal issues around police conduct are evaluated, in both criminal and civil cases, by weighing the nature and extent of the police conduct against the law enforcement need being pursued. Both competing concerns are manifest: law enforcement officers are carrying out the public's business when they aggressively pursue a fleeing suspect, particularly where there is good reason to believe the person is dangerous. At the same time, members of the public who are using the same roads, or whose children are walking home from school, legitimately expect that law enforcement will not engage in decisions that increase the danger of bodily harm in the community, when only a crime against property is suspected. Obviously combatting criminal activity is dangerous. But the danger to the public that the law will tolerate must always be balanced against the exigency of what law enforcement is attempting to do.

The "extreme and outrageous" standard is simply irreconcilable with the language of R.C. § 2744.03(A)(6), and with this Court's decisions construing the statute.

Similarly, the “no proximate cause” rule adopted by several Ohio District courts takes a facile approach to a legal inquiry that is important and complicated. Since the early nineties, Ohio Courts have been very reluctant to acknowledge that whether police decision making was a proximate cause of injury is often a question of fact for the jury. By so doing, many of Ohio’s Courts have tilted away from the important balancing approach shown in so many cases involving disputed police conduct. Moreover, the Court of Appeals’s approach in this case imposes by judicial action standards of conduct that the General Assembly rejected when it enacted R.C. §2744.

Amicus OAJ asks this Court to restore the functioning of the Political Subdivision Tort Liability Act, and to preserve the protections of the public codified therein. This Court should Reverse the judgment of the Second District Court of Appeals, and announce a decision consistent with the dissenting opinion of that Court.

### **STATEMENT OF THE CASE & FACTS**

Amicus Curiae OAJ defers to the facts as stated by the Appellant.

### **LAW AND ARGUMENT**

**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”**

#### **I. THE “EXTREME OR OUTRAGEOUS” STANDARD CANNOT BE RECONCILED WITH THE LANGUAGE OF R.C. § 2744.03(A)(6).**

“[T]he proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred.” *Oswald v. Connor*, 16 Ohio St.3d 38, 42 (1985); *see also Strother v. Hutchinson*, 67 Ohio St.2d 282, 287 (1981) (“[W]here 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 the original act to cause injury does not relieve the initial offender from liability. One is thus liable for the natural and probable consequences of his negligent acts.”).

Thus, the test for causation is whether or not the defendant’s acts led, logically and sequentially, to the plaintiff’s injury. The test for causation has nothing to do with the degree of culpability of the defendant or the defendant’s mental state—that is, it has nothing to do with whether the defendant was negligent, reckless, wanton, willful, or “extreme or outrageous.” The appellate court’s decision imports a standard of *conduct* into the test for *causation*. This is contrary to the fundamental way in which the common law treats the elements of a tort claim and their relationship to each other.

Why a political subdivision’s employee, like a police officer, would wish to graft a standard of *conduct* onto the test for *causation* is not a mystery. Under the Political Subdivision Tort Liability Act, R.C. 2744.03(A)(6)(b), “the legislature expressly removed immunity from employees of a political subdivision for wanton or reckless conduct.” *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, at ¶23. “Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result,” and “[r]eckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm that is unreasonable under the circumstances and is substantially greater than negligent conduct.” *Id.* at ¶¶33-34. This Court has recently

twice held—in the context of municipal first-responders—that the question *was the conduct under the given circumstances “wanton or reckless”* is a jury question.

In *Anderson*, this Court affirmed an intermediate court’s decision that there was a genuine issue of material fact for trial on the question of whether a firefighter’s conduct could be found “wanton or reckless” under the circumstances of that case. *Id.* at ¶¶15, 17 (*inter alia*, fire truck was driven at high rate of speed through a blind intersection, violating internal policies). At the same time, this Court reversed an intermediate court’s decision that there were no genuine issues of material fact for trial on the same question. *See Burlingame v. Estate of Burlingame*, 134 Ohio St.3d 490, 2012-Ohio-5698, at ¶1 (remanding case involving fire-truck driver entering intersection at high speed under a red light without a siren)

Given this Court’s recent decisions in *Anderson* and *Burlingame*, the legal question—whether the employee was “wanton or reckless” under the particular circumstances of the case—must be decided by the jury.

As ably summarized by the dissenting member of the Court of Appeals:

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. (Emphasis added.)

*Argabrite v. Neer*, 2015-Ohio-125, P37, 26 N.E.3d 879, 889 (2nd Dist.), Froelich, P.J., dissenting.

## **II. MULTIPLE OTHER JURISDICTIONS HAVE ABANDONED THE “NO PROXIMATE CAUSE” RULE.**

Ohio Courts are not the only ones that have needed to revise the standards of conduct under which law enforcement officers may be held liable.

Jurisdictions around the country permit a jury to determine whether a police officer proximately caused injuries to a third-party injured in a police pursuit. *See, e.g., See, e.g., Seals v. City of Columbia*, 575 So.2d 1061 (Ala. 1991) (“a lack of due care on the part of a police officer in operating his vehicle could be the proximate cause of the injuries sustained by, or the death of, a third party involved in a collision with the fleeing offender.”); *Tetro v. Town of Stratford*, 189 Conn. 601, 458 A.2d 5 (Conn. 1983) (“The intervention of negligent or even reckless behavior by the driver of the car whom the police pursue does not, under the emergent majority view, require the conclusion that there is a lack of proximate cause between police negligence and an innocent victim’s injuries.”); *Lowrimore v. Dimmitt*, 310 Ore. 291, 797 P.2d 1027 (Or. 1990) (“A trier of fact might reasonably find that the pursued driver would injure third persons as a foreseeable consequence of the pursuit by the police officer.”); *Mason v. Bitton*, 85 Wash. 2d 321, 534 P.2d 1360 (Wash. 1975)(That a fleeing suspect acted negligently does not relieve police of potential liability “since the law does not require that there be but one proximate cause for any given event.”); *Strength v. Lovett*, 311 Ga. App. 35, 41-42 (Ga.App. 2011) (police officer may be proximate cause of third-party injuries in police pursuit if officer acted recklessly); *Moyer v. St. Francois County Sheriff Dep’t*, 449 S.W.3d 415, 418 (Mo.App. 2014) (in ten-mile chase at speeds of 120 miles-per-hour, it

was reasonable to infer that had police officers abandoned their pursuit, the driver would have ceased driving recklessly); *Meyer v. State*, 264 Neb. 545, 550, 650 N.W.2d 459 (Neb. 2002) (a police officer may be liable for a third party's injuries sustained during a vehicular pursuit if the officer's actions are "merely a proximate cause of the damage, and not the sole proximate cause."); *Smith v. City of Stillwater*, 2014 OK 42, 328 P.3d 1192, ¶¶ 32-33 (Oklahoma permits liability for officers engaged in police pursuits in cases of reckless disregard to balance law enforcement effectiveness with risk of injury to innocent public.).

While the Appellant has provided extensive citation to exemplary cases, Amicus submits that the experiences of the following states are particularly noteworthy.

#### Tennessee

In 1988, the Tennessee Supreme Court held police officers are not liable when a vehicle being pursued by police injures an innocent third person because, as a matter of law, the police conduct in initiating or continuing the pursuit is not the proximate cause of the accident. *Nevill v. Tullahoma*, 756 S.W.2d 226, 233 (Tenn. 1988)

Six years later, Tennessee reversed course, holding that whether a police officer's conduct in initiating or continuing a high-speed chase was the proximate cause of injuries to a third person is a question of fact. *Haynes v. Hamilton County*, 883 S.W. 2d 606, (Tenn. 1994). *Id.*, 612-613. The *Haynes* Court noted that only a minority of states—including Ohio—follow the "no proximate cause rule." *Id.*, 612. The Tennessee Supreme Court followed the majority rule because "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 and superseding intervening causation and with the critical public policy considerations.” *Id.*, 613.

### Florida

The Florida Supreme Court in 1967 held that a police officer using due care is not responsible for the acts of a suspect in a police pursuit. *Miami v. Horne*, 198 So. 2d 10, 13 (Fla. 1967). It noted that a police officer has the right to do whatever necessary to make an arrest. *Id.*

But in 1992, the Florida Supreme Court held that where reasonable persons could find that a third person’s injuries were foreseeable, proximate cause is a jury question in police pursuit cases. *Pinellas Park v. Brown*, 604 So. 2d 1222, 1228 (Fla. 1992). Although the suspect’s vehicle, not a police vehicle, was the one that caused the collision that killed the plaintiffs, the suspect would not have been driving recklessly if he were not being pursued by police.

### Arizona

Arizona Courts have recognize that police have the right to undertake high-speed chases of suspects. *Wilson v. Tucson*, 446 P.2d 504, 509-510 (Ariz. Ct. App. 1968) 8 Ariz. App. 398, 403-404.

But a subsequent Arizona Courts of Appeals too has abandoned the no proximate cause rule. It held that a suspect’s reckless conduct does not negate proximate cause between police negligence and an innocent victim’s injuries. *Estate of Aten v. Tucson*, 169 Ariz. 147, 150, 817 P.2d 951 (Ariz. Ct. App. 1991). Under Arizona law (like Ohio law), proximate cause is a question ordinarily left to a jury. *Id.*

## Texas

Texas courts also formerly adhered to the “no proximate cause rule.” *Dent v. Dallas*, 729 S.W.2d 114, 116-117 (Tex. App. Dallas 1986)

But Texas also abandoned the “no proximate cause” rule several years later. “The intervention of negligent or even reckless behavior by the driver of the car whom the police pursues does not, under the emergent majority view, require the conclusion that there is a lack of proximate cause between police negligence and an innocent victim’s injuries.” *Travis v. Mesquite*, 830 S.W.2d 94, 99 (Tex. 1992). The Texas Supreme Court’s rationale for abandoning the “no proximate cause” rule was to “preserve not only the public safety, but also the lives of the officers entrusted to protect it.” *Id.*

Ohio is not alone in recognizing the necessity to revisit the rules for holding the police liable in tort. But Ohio is clearly in the minority of jurisdictions, albeit among the District Courts of Appeals. This Court should take this opportunity to hold that Ohio’s own statute states the law applicable to this matter, and that it does not leave room for the common law standards relied upon by the Court of Appeals.

**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 through the warrant process; 2) pursues and continues to pursue a suspect for over five 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.**

OAJ defers to the position of the Appellant with respect to this Proposition of Law. By way of summary, and as the Appellant notes, it is telling that no Ohio case law has been found by the parties where a court has found an issue of fact as to whether a law enforcement officer's conduct was "extreme and outrageous." This case presents a compelling question whether the "extreme or outrageous" standard can be met.

Most importantly, whether the extreme or outrageous exception to the no proximate rule can ever be satisfied, the issue here is whether it can be reconciled. These doctrines are common law rules that have been superseded by the Political Subdivision Tort Liability Act.

### **CONCLUSION**

For the reasons stated, the Amicus joins with the Appellant and asks that the judgment of the Second District Court of Appeals herein be reversed.

Respectfully submitted,

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