

IN THE SUPREME COURT OF OHIO

PAMELA ARGABRITE )  
 ) CASE NO.: 2015-0348  
 )  
 Appellant, )  
 ) ON APPEAL FROM THE  
 ) MONTGOMERY COUNTY  
 vs. ) SECOND DISTRICT COURT  
 ) OF APPEALS  
 )  
 JIM NEER, *et al.* )  
 ) CASE NO.: 2014CA26220  
 Appellees. )

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**MERIT BRIEF OF *AMICUS CURIAE***  
**THE OHIO EMPLOYMENT LAWYERS ASSOCIATION**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... 3

STATEMENT OF INTEREST OF AMICUS CURIAE ..... 4

STATEMENT OF THE CASE AND FACTS ..... 5

ARGUMENT ..... 5

*Proposition of Law No. 1:*..... 5

**A Police Officer, Who Uses A Motor Vehicle In A Bad Faith, Malicious, Wanton, or Reckless Manner To Pursue A Suspect Will Be Liable For Injuries Caused In Fact By The Pursuit When The Injuries Are The Kind Of Harm That The Police Officer Should Have Acted To Avoid.** ..... 5

**I. The duty owed to third parties by a police officer in a motor vehicle chasing a suspect is established by R.C. 2744.03(A)(6)** ..... 6

**II. Adopting The Restatement (Third) Torts standards for cause in fact and legal cause places reasonable limits on the scope of liability without infringing on the General Assembly’s policy determination regarding the police officer’s duty and immunity** ..... 8

CONCLUSION..... 9

CERTIFICATE OF SERVICE ..... 11

**TABLE OF AUTHORITIES**

**Cases**

*Anderson v. Massillon*, 134 Ohio St.3d 380, 386, 2012-Ohio-5711.....6

*Colbert v. Cleveland*, 99 Ohio St.3d 215 (2003) .....7

*CSX Transp., Inc. v McBride*, 131 S. Ct. 2630 (2011).....8

*Lewis v. Bland*, 75 Ohio App. 3d 453 (1991) .....7

*Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) .....9

*Whitfield v. Dayton*, 167 Ohio App. 3d 172 .....7

**Statutes and Regulations**

R.C. 2744.01(A).....7

R.C. 2744.02(B)(1)(a).....7

R.C. 2744.03(A)(6).....5, 6, 7, 8

R.C. 2744.03(A)(6)(a)–(c) .....6

**Other Authorities**

*Restatement (Third) of Torts: Liab. For Physical & Emotional Harm* § 29 (2010).....8, 9

Sperino, Sandra F., *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. Ill. L. Rev. 1 .....8

**STATEMENT OF INTEREST OF AMICUS CURIAE**

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment, and civil rights matters. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the interests of workers who are subjected to unlawful discrimination, OELA has an abiding interest in ensuring the integrity of our system of civil adjudication of disputes. Our system needs to provide remedies that fairly compensate those subjected to discrimination; doing so can effectively deter such unlawful discrimination in the future. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in a given case, but also on the practical effect and impact the decision in that case may have on access to the Courts for people who have been unlawfully treated in the workplace.

OELA has an interest in this case to protect Ohio employees from having their statutory and common law rights potentially eroded by lower courts which may apply similar principles as the lower appellate court did in raising the immunity bar.

## STATEMENT OF THE CASE AND FACTS

The *Amicus Curiae* adopts the Statement of the Case and the Statement of Facts contained in the brief of Plaintiff-Appellant Pamela Argabrite.

## ARGUMENT

The judgment below should be reversed. Courts should not interfere with the Ohio General Assembly's policy determination regarding immunity for police officers pursuing suspects who cause injury to others because of the pursuit. To preserve the policy, the standard of care set forth in R.C. 2744.03(A)(6)(b) must be left alone. Traditional applications of proximate cause concepts to limit liability should not encroach on the General Assembly's policy determination of a police officer's duty. Instead, the reach of factual causation can be circumscribed by requiring that the harm alleged by a plaintiff was the same general kind of harm that is at risk when the officer breaches the standard of care established by R.C. 2744.03(A)(6)(b).

### *Proposition of Law No. 1:*

**A Police Officer, Who Uses A Motor Vehicle In A Bad Faith, Malicious, Wanton, or Reckless Manner To Pursue A Suspect Will Be Liable For Injuries Caused In Fact By The Pursuit When The Injuries Are The Kind Of Harm That The Police Officer Should Have Acted To Avoid.**

Ironically, the "no proximate cause rule" applied by the appellate court below is no proximate cause rule. In fact, the rule is a duty rule in proximate cause clothing. The Ohio legislature has spoken on the duty owed by police officers to bystanders when, within the scope of the officers' employment, the officers engaged in high-speed pursuits. So the common law should not usurp the legislature's declaration. Yet that is precisely what the "no proximate cause

rule” does. This Court now has the opportunity and should clarify that: a) the duty owed is established by R.C. 2744.03(A)(6); and b) liability is limited to damages which were: 1) caused in fact by the officers’ breach of duty; and 2) arose from a harm that was a risk that the police officers should have acted to avoid.

**I. The duty owed to third parties by a police officer in a motor vehicle chasing a suspect is established by R.C. 2744.03(A)(6).**

R.C. 2744.03(A)(6) provides immunity to police officers pursuing suspects who injure third parties unless the injured third party can demonstrate one of three exceptions to the immunity. Those exceptions are: 1) the defendant’s acts or omissions were manifestly outside the scope of the his employment or official responsibilities; 2) the defendant’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 defendant by a section of the Revised Code. R.C. 2744.03(A)(6)(a)–(c). The parties neither dispute that the Defendants were acting within the scope of their employment nor contend that civil liability is imposed by a section of the Revised Code. Thus, the duty owed here is not to engage in a motor vehicle pursuit with a malicious purpose, in bad faith, or in a wanton or reckless manner. *See, e.g., Anderson v. Massillon*, 134 Ohio St.3d 380, 386, 2012-Ohio-5711, ¶23 (“In the foregoing statutes, the General Assembly set forth different degrees of care that impose liability on . . . an employee of a political subdivision.”).

This duty is the General Assembly’s declaration of Ohio’s applicable public policy. The judicial standard for determining whether injuries were caused by malicious, bad faith, wanton,

or reckless pursuits should not impact the General Assembly's public policy decision. Yet that is precisely what the "no proximate cause rule" applied by the court below does.

Under the "no proximate cause rule", a police officer, who pursues a fleeing suspect who injures a third party, is entitled to judgment as a matter of law if the officer's conduct was not extreme or outrageous. *See Lewis v. Bland*, 75 Ohio App. 3d 453 (1991), *cited by, Whitfield v. Dayton*, 167 Ohio App. 3d 172, 180 ("when police officers pursue a fleeing violator who injures a third party, the officers' pursuit is not the proximate cause of the injuries unless their conduct was outrageous or extreme.") Thus, contrary to the General Assembly's intent to permit liability for malicious, bad faith, wanton, or reckless car chases by police officers, the rule's effect further immunizes police officers from liability unless the manner in which the officers engage in the chase is "extreme and outrageous."

If that were the duty Ohio's public policy demanded, the General Assembly could have easily substituted the words "in an extreme and outrageous manner" for the words "with malicious purpose, in bad faith, or in a wanton or reckless manner" in R.C. 2744.03(A)(6)(b). But it did not, and this Court should declare that Ohio's courts will not.

In *Colbert v. Cleveland*, 99 Ohio St.3d 215 (2003), this Court was asked to expand the scope of liability for the City of Cleveland by interpreting R.C. 2744.02(B)(1)(a). Under that statute, "a political subdivision will not be liable for damages caused by a police officer's negligent operation of a motor vehicle if the officer was responding to an emergency call at the time of the accident." 99 Ohio St. 3d at 215. Colbert argued that "emergency call" required an inherently dangerous situation to be present. The City argued that "emergency call" merely required a call to duty. Refusing to alter the General Assembly's policy determination, the

*Colbert* Court agreed with the City: “Had the General Assembly intended to limit an emergency call to only those situations that were inherently dangerous, it could have expressly imposed that limitation. Because no such limiting language exists in R.C. 2744.01(A), we will not add it by judicial fiat.” Likewise, this Court should reject the lower court’s judicial fiat which imposed the “extreme and outrageous” limitation on the duty owed by the Defendant police officers to the Plaintiff Argabrite.

**II. Adopting The Restatement (Third) Torts standards for cause in fact and legal cause places reasonable limits on the scope of liability without infringing on the General Assembly’s policy determination regarding the police officer’s duty and immunity.**

When R.C. 2744.03(A)(6)(b) applies, courts should focus proximate cause questions on issues other than the alleged tortfeasor’s standard of care. Further limiting liability by changing the standard of care through the proximate cause lens is merely policy-based gap filling by the court. As one scholar has noted: “Rather than pretend to apply the common law, the judges should explain that they are engaging in policy-based gap filling and explain why they have the authority to do so.” Sperino, Sandra F., *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. Ill. L. Rev. 1, 34.<sup>1</sup> Indeed, The United States Supreme Court has likewise explained, “the phrase ‘proximate cause’ is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes.” *CSX Transp., Inc. v McBride*, 131 S. Ct. 2630, 2642 (2011).

The concern that remains when determining whether victims like Plaintiff Argabrite should be able to recover damages is not about clarifying what constitutes tortious conduct by

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<sup>1</sup> Also available on the internet at: [http://scholarship.law.uc.edu/fac\\_pubs/223](http://scholarship.law.uc.edu/fac_pubs/223).

the police officers. That has already been done by the General Assembly. The concern is whether the harm arose from the risk that made the police officers' conduct tortious (if it was). *Cf. Restatement (Third) of Torts: Liab. For Physical & Emotional Harm* § 29 (2010).

In other words, the question is “whether the plaintiff’s harm was the same general type of harm that the defendants’ should have acted to avoid.” *See id.* at cmt. b, Reporter’s note; *see also Thompson v. Kaczinski*, 774 N.W.2d 829, 838 (Iowa 2009) (citing *Restatement (Third) of Torts: Liab. For Physical & Emotional Harm* § 29 cmt. d (Proposed Final Draft No. 1, 2005)). Focused this way, the inquiry leaves the General Assembly’s policy determination regarding the officers’ duty wholly intact while permitting courts and juries to insure reasonable limitations on factual causation.

And that is why The Ohio Employment Lawyers Association appears now as *amicus curiae*. Ohio’s employees – especially employees of political subdivisions – should not see bars to their claims raised beyond the standards for immunity and defenses provided in Chapter 2744. If the “no proximate cause rule” is endorsed by this Court, the doors will open for lower courts to continue to make policy decisions trumping those made by the General Assembly. Before this Court is a question concerning police chases in motor vehicles. But unless this Court now reigns in the doctrine, no principle or declaration of law prevents the courts from continuing to fashion additional “no proximate cause” rules for other contexts, including those involving employment claims and claims arising in the employment context.

### **CONCLUSION**

As *amicus curiae*, the Ohio Employment Lawyers Association does not suggest that the foregoing reasons are the only reasons to reverse the decision below. Instead, the foregoing

reasons are merely highlights of the reasons why the appellate court decision below should be reversed. In any event, the Ohio Employment Lawyers Association urges this Court to reverse the decision of the court below and remand this dispute to the trial court.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on this 20<sup>th</sup> day of October 20, 2015, a copy of the foregoing was sent, via regular U.S. mail, postage pre-paid, to:

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