

**IN THE SUPREME COURT OF OHIO**

PAMELA ARGABRITE, : CASE NO. 2015-0348  
Plaintiff / Appellant, :  
vs. : [Appeal from the Montgomery County  
Court of Appeals, Second District,  
Case No. 2014 CA 26220]  
JIM NEER, et al., :  
Defendants / Appellees. :

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**BRIEF OF DEFENDANTS / APPELLEES JIM NEER, GREGORY STITES,  
AND JOHN DIPIETRO**

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## INTRODUCTION

It is customary for police officers to take an oath to uphold the law. Such an oath is typically of the following form or a variation thereof:

**I DO SWEAR, THAT I WILL WELL AND TRULY SERVE OUR SOVEREIGN COUNTRY AND STATE AS A POLICE OFFICER, WITHOUT FAVOR OR AFFECTION, MALICE, OR ILL-WILL UNTIL I AM LEGALLY DISCHARGED; THAT I WILL SEE AND CAUSE OUR COMMUNITY'S PEACE TO BE KEPT AND PRESERVED AND THAT I WILL PREVENT TO THE BEST OF MY POWER ALL OFFENSES AGAINST THAT PEACE, AND THAT WHILE I CONTINUE TO BE A POLICE OFFICER I WILL TO THE BEST OF MY SKILL AND KNOWLEDGE DISCHARGE ALL THE DUTIES THEREOF FAITHFULLY ACCORDING TO LAW. SO HELP ME GOD.**

These are not merely words; the foregoing recites an obligation imposed upon police officers to uphold the law and make arrests when proper. And, despite the dangers undoubtedly linked with their efforts, police officers willingly accept the threat to their own personal safety so as to continually protect the residents of their respective communities during all hours of the day and night. Law enforcement officers are thrust into situations that others fear and are routinely confronted with the dangers of their job each time they report for duty.

Certainly the law is deferential to law enforcement for these very reasons. Police officers must be able to execute their duties without the fear of excessive or unwarranted litigation by those who scrutinize their actions, which were likely performed in the midst of tense and rapidly unfolding circumstances. Hence, the very reason why an officer's conduct should not be judged by using hindsight. To condemn an officer's discretion after the smoke clears is patently unfair and severely discounts the fast-paced decisions that law enforcement officers are forced to make.

In an effort to preserve an officer's duty to make legitimate arrests without being held accountable for the dangerous and unpredictable actions of criminal culprits, Ohio jurisprudence adheres to the "no proximate cause" rule that was announced in *Lewis v. Bland*, 75 Ohio App.3d

453, 599 N.E.2d 814 (9th Dist.1991). This rule has remained a viable defense for police officers for the past 24 years and only applies to one limited, specific, isolated situation involving police officers: a police pursuit of a fleeing vehicle that ends in an injury to an innocent third party from a collision with the vehicle that was being pursued without any direct contact with a police vehicle. The “no proximate cause” rule protects police officers from liability when a pursuit ends in an injury to an innocent third party from a collision with a vehicle that was being pursued without any direct contact with a police vehicle. See, generally, *Id.* at 456; see also, *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2nd Dist.) This longstanding rule promotes an officer’s duty to enforce the law and make arrests in proper cases, and not to allow those being pursued to escape because of the fear that the flight may take a course that is dangerous to the public at large. *Lewis*, 75 Ohio App.3d at 456. The reasoning behind the “no proximate cause” holding is simple:

1. it is the duty of police officers to apprehend law breakers;
2. the proximate cause of an accident during a vehicle pursuit is the reckless conduct of the culprit being pursued and not the officer.

To alter this rule and lessen the burden for holding police officers accountable as a result of the unpredictable actions of fleeing criminals will do nothing but embolden criminals to act ever more dangerously to evade arrest and ultimately produce a chilling effect on law enforcement. For the reasons that follow, this Court should affirm the “no proximate cause” rule and uphold the decisions of the trial court and Second District Court of Appeals herein.

### **STATEMENT OF FACTS**

#### **A. Operative Facts for Defendants-Appellees Jim Neer and Gregory Stites.**

Shortly before the noon hour on July 11, 2011, Defendant-Appellee Gregory Stites (“Stites”) was sitting in his cruiser writing a report. (Transcribed deposition of Gregory Stites

[hereafter “Stites dep.”] pp. 7-8.) Stites overheard radio traffic about a burglary. (Id.) It was reported that the suspect was seen operating a “White Chevy Caprice.” (Id.) Stites was then contacted by Miami Township police officer David Ooten (“Ooten”) and told to switch to a “local channel” on the Township’s radio. (Id. p. 8.) Ooten then asked Stites to go to a residence located in Miami Township on Mardell Drive to search for the Caprice. (Id. pp. 8, 21-22; transcribed deposition of David Ooten [hereafter “Ooten dep.”] p. 28.) Ooten remembered Stites discussing a white Caprice that was located on Mardell Drive a couple weeks earlier. (Ooten dep. pp. 19, 20; Stites dep. p. 18.) It was at that time that Stites learned that the Caprice belonged to Andrew Barnhart (“Barnhart”).<sup>1</sup> (Stites dep. pp. 16-17.)

When Stites arrived at 2037 Mardell Drive, the driveway to the residence was empty. (Id. p. 22.) Stites parked around the corner from the home. (Id.) Shortly thereafter, the Caprice pulled into the driveway associated with the Mardell Drive residence. (Id. p. 23.) Despite the previous incident in December 2010, Stites had never met or seen Barnhart and was unfamiliar with his appearance. (Stites dep. pp. 23, 51.) Furthermore, Stites was unaware if Barnhart was still the registered owner of the Caprice. (Id. p. 30.) Moments later, Miami Township Sergeant Rex Thompson (“Thompson”) pulled up to the driveway of the home and parked behind the Caprice. (Id. p. 24.)

Thompson was aware of the burglary report and learned of the description of the suspect’s vehicle — a white four-door Chevy Caprice, older, box style, no hubcaps or front plate. (Transcribed deposition of Rex Thompson [hereafter “Thompson dep.”] p. 13.) Also, Thompson

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<sup>1</sup> Stites and Ooten learned of Barnhart due to a previous incident in December 2010. (Stites dep. pp. 9-11; Ooten dep. pp. 7-13.) As a result of this incident, Stites learned that Barnhart’s grandmother resided at 2037 Mardell Drive. (Stites dep. pp. 11-16.) Stites occasionally passed this residence during his shift and had researched the registered owner of vehicles seen parked at this residence. (Id. pp. 16-19.) It was on one of these occasions a few weeks prior to July 11, 2011, that Stites observed the Caprice. (Id.)

overheard the discussion between Ooten and Stites on the Township's local channel. (Id. p. 14.) He therefore told Stites that he would likewise respond to 2037 Mardell Drive. (Id.) Thompson observed the Caprice in the driveway as he approached the home. (Id. p. 17.) The driver's side door was opened and Thompson could see the driver's leg draped outside the vehicle. (Id.) Thompson parked behind the Caprice and boxed this vehicle between his cruiser and the garage of the residence. (Id. p. 18.) Stites then parked on the street in front of the home. (Stites dep. pp. 15-26.)

As Thompson approached on foot, he observed the driver of the Caprice – Barnhart – exit the vehicle while talking on a cell phone. (Thompson dep. p. 18.) Barnhart was startled once he finally became aware of Thompson's presence. (Id.) Barnhart jumped back inside the Caprice and started the car. (Id. p. 20.) Thompson screamed at Barnhart to stop with his sidearm drawn. (Id. pp. 19-20.) The Caprice flew backwards striking Thompson's cruiser. (Id. p. 21; Stites dep. p. 26.) Thompson was within reaching distance of the Caprice when it collided with his vehicle. (Thompson dep. p. 21.) Still jammed in the driveway, Barnhart shot the Caprice forward hitting the garage to the home. (Id.) With its tires screeching, the Caprice then went backwards once more and struck Thompson's cruiser a second time. (Id. p. 22.) A passenger from the Caprice exited the vehicle and fled on foot right before the Caprice went forward again, striking the southeast corner of the garage. (Id.)

Thompson stood helpless as Barnhart accelerated and slammed the Caprice through the corner of the garage and ripping the brick facade from the home. (Id. p. 23.) The Caprice then travelled through the back yard of the neighboring house before reappearing on the east side of this residence and back onto Mardell Drive. (Id.; Stites dep. p. 28.) Thompson pursued the passenger who fled from the Caprice and Stites returned to his police vehicle. (Thompson dep.

p. 24; Stites dep. p. 27.)

Defendant-Appellee Jim Neer (“Neer”) was responding to Mardell Drive as the foregoing events were occurring. When Neer arrived at the scene, he observed a lot of smoke and the Caprice travelling through the backyard of a home. (Transcribed deposition of Jim Neer [hereafter “Neer dep.”] pp. 14-15.) Neer had never been to the residence at 2037 Mardell Drive and did not previously have contact with anyone associated with that residence, including Barnhart. (Id. pp. 15-16.) Further, Neer had no previous contact with the Caprice and was unaware of what led the other officers to Mardell Drive on July 11, 2011. (Id. pp. 13, 15-16.) As he approached the home, it was apparent that the Caprice was attempting to flee. (Id. p. 14.) Neer activated the lights and siren on his police cruiser and pursued the Caprice. (Id. p. 15.)

Neer followed the Caprice as it travelled south on Graceland Avenue. (Neer dep. pp. 17-18.) Neer was directly behind the Caprice as it reached S.R. 725. (Id. p. 18.) Neer provided the license plate number for the Caprice to the dispatcher and did not recall receiving any information about the registered owner. (Id.) Neer followed the Caprice as it travelled east on S.R. 725. (Id. p. 19.) Traffic conditions were light as Barnhart and Neer crossed the I-675 overpass and continued through the Yankee Road intersection. (Id. p. 19.) In fact, Neer did not observe any westbound traffic as the vehicles continued towards the Lyons Road intersection. (Id.) The absence of westbound traffic allowed the Caprice to enter the westbound lane while performing a left hand turn onto northbound Lyons Road. (Id.) Although Barnhart travelled through a red light at this intersection, he did slow down and proceeded with caution. (Id. p. 21.) Neer changed the tone of his siren to a higher pitch to further warn motorists in this immediate area. (Affidavit of Jim Neer [hereafter “Neer aff.”], attached as Exhibit 1 to Defendants Neer and Stites’ Motion for Summary Judgment.) According to Neer, it appeared that the Caprice was

travelling in excess of the posted speed limit as it travelled from S.R. 725 to Lyons Road. (Id. pp. 19-20.) Neer was approximately 100 yards behind the Caprice at that time. (Id. p. 20.) He likewise slowed his vehicle and cautiously proceeded through the red light controlling eastbound and westbound traffic at the intersection of S.R. 725 and Lyons Road. (Id. p. 22.) Once again, Neer changed the tone of his siren as he travelled through this intersection. (Neer Aff.)

Stites caught up with Neer as the pursuit reached Lyons Road. (Stites dep. p. 31.) He also had the lights and sirens to his cruiser activated. (Id. p. 38.) Stites also described the traffic conditions as light as there were no traffic conditions that kept him from catching up with Neer. (Id. p. 31.) Stites operated his vehicle at approximately 60 mph in order to reach Neer's location. (Id. p. 33.)

Neer and Stites followed Barnhart onto northbound Lyons Road. (Neer dep. p. 23; Stites dep. p. 35.) Neer was unaware of his speed at that time; however, the traffic conditions remained light. (Neer dep. p. 23.) As the second officer in the pursuit, Stites began calling out the various locations of their vehicles to the dispatcher once he reached Lyons Road. (Id. p. 24; Stites dep. pp. 35-36.) A short distance later, the Caprice turned right on to southbound McEwen Road. (Neer dep. p. 23; Stites dep. 34.) Once again, Barnhart slowed his vehicle as it travelled through the intersection of Lyons Road and McEwen Road. (Neer dep. p. 23.)

Barnhart continued south on McEwen Road and crossed over S.R. 725. Although Barnhart went through another red light, he did slow his pace as he travelled through this intersection. (Neer dep. p. 24; Stites dep. pp. 38-39.) Neer and Stites also used due caution and slowed their vehicles as they travelled through this same intersection. (Neer dep. p. 25; Stites dep. p. 37.) And, once again, Neer changed the tone of his siren to a higher pitch to further warn other motorists in the area. (Neer aff.) Additionally, Montgomery County Sheriff's Deputy

Karen Osterfeld (“Osterfeld”) was positioned at the intersection of McEwen Road and S.R. 725 as the Caprice and the officers passed. (Transcribed deposition of Karen Osterfeld [hereafter “Osterfeld dep.”] pp. 7-8.) Osterfeld was a Captain at the Washington Township substation on July 11, 2011. (Id. pp. 5-6.) She overheard the radio traffic, which described the pursuit as it approached McEwen Road. (Id. p. 6.) Osterfeld went to the intersection of S.R. 725 and McEwen Road and controlled all westbound traffic with the use of the lights and sirens on her police vehicle. (Id. p. 8.) Osterfeld was able to stop all traffic travelling towards the west from intersecting either the Caprice or its pursuit by Neer and Stites. (Id.) According to Osterfeld, the Caprice was not travelling very fast as it went by her. (Id. p. 8-9.) She estimated that it was going approximately 40 mph as it crossed S.R. 725 and continued south on McEwen Road.

Neer and Stites observed another Deputy with the Montgomery County Sheriff’s Department stationed on McEwen Road beyond S.R. 725. As the Caprice passed, Deputy Tony Ball (“Ball”) activated his overhead lights and continued southbound on McEwen Road in the same direction as Barnhart. (Neer dep. p. 26; Stites dep. p. 40; transcribed deposition of Anthony Ball [hereafter “Ball dep.”] pp. 17-18.) Ball lost sight of the Caprice due to a sweeping curve in the roadway. (Ball dep. p. 18.) He did not see the Caprice again until he reached Spring Valley Pike. (Id. pp. 18-19.)

Neer and Stites eventually caught up with Ball somewhere toward the south end of McEwen Road as it met with Spring Valley Pike. (Neer dep. p. 27.) Stites was the third officer in line and he slowed his vehicle on several occasions while travelling on McEwen Road to look down residential side streets. (Stites dep. p. 41.) Stites did not see the Caprice as he travelled on McEwen Road and was concerned that it may have turned down a side street to avoid detection. (Id. pp. 41-42.) Neer was also unaware of which direction the Caprice turned onto Spring Valley

Pike. (Neer dep. p. 28.) Neer turned right in order to stay in line with Ball. (Id.) Stites followed Neer onto eastbound Spring Valley Pike. (Stites dep. p. 43.)

Neer and Stites stayed behind Ball as they proceeded on Spring Valley Pike. Neer was approximately 20-25 yards behind Ball. (Neer dep. p. 30.) And, Neer and Stites remained 50-75 yards apart while travelling on Spring Valley Pike. (Stites dep. p. 46.) The three officers were not travelling at a high rate of speed and estimated their travel to be at 45-50 mph.<sup>2</sup> (Neer dep. p. 33; Stites dep. pp. 43-44; Ball dep. p. 41.) Ball was periodically using his lights and sirens to warn other motorists of their pursuit and traffic was moving to the side of the road to allow the officers to proceed. (Neer dep. pp. 31-32; Ball dep. p. 26.) The officers did not encounter any problems with other motorists while travelling on Spring Valley Pike. (Ball dep. pp. 26-27; Stites dep. p. 44.) Generally, the officers had light traffic conditions while travelling on Spring Valley Pike. (Ball dep. p. 27; Stites dep. p. 44.)

The officers continued on Spring Valley Pike and travelled past the Yankee Road intersection at a slower rate of speed. (Neer dep. p. 33.) The officers were still utilizing the overhead lights and sirens to their vehicles, and traffic was stopped in all directions at this intersection. (Neer dep. p. 31; Ball dep. p. 31.) Once again, Neer changed the tone of his siren to a higher pitch to provide an additional warning to other motorists. (Neer aff.) The officers continued past Yankee Road and continued at a slower rate of speed. (Neer dep. p. 36.) Neer could not see the Caprice ahead of him and did not observe the Caprice again until they reached the Washington Church Road intersection. (Id.) Upon reaching the intersection of Spring Valley Pike and Washington Church Road, Ball pulled into the left lane to allow Neer and Stites to pass. (Neer dep. p. 36; Stites dep. p. 47.)

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<sup>2</sup> The legal speed limit on Spring Valley Pike is 55 mph. (Ball dep. p. 41.)

After passing Ball, Neer accelerated as he proceeded on Spring Valley Pike. (Neer dep. p. 39.) Although he briefly observed the Caprice at that time, the officers once again lost visual sight of this vehicle due to a hill in the roadway. (Id.) The officers once again slowed down and were searching side streets to verify that the Caprice did not turn off from Spring Valley Pike. (Id.) Eventually, Neer observed the Caprice turn left on to southbound S.R. 741 as the officers neared this intersection. (Id. p. 40.) Barnhart did not blast through this intersection; rather, he stopped and then turned on to S.R. 741 at a slow rate of speed. (Id. p. 41.) Neer and Stites also slowed their cruisers as they reached this same intersection and proceeded through using due caution. (Id.) Neer provided yet another warning to motorists by changing the tone of his siren to a higher pitch. (Neer aff.)

After turning onto S.R. 741, Neer and Stites could see that the Caprice was far ahead. (Neer dep. p. 42.) Neer observed Barnhart go through a red light at the intersection of S.R. 741 and Miami Village Drive. (Id. p. 42-43.) The officers eventually lost sight of the Caprice as it reached the crest of the hill in the roadway near the entrance of Waldruhe Park. (Id. p. 43; Stites dep. p. 48.) The officers did not see the Caprice until after cresting this same hill. (Id.) While continuing on S.R. 741 after cresting the hill, the officers observed the Caprice travel left of the center line painted on the roadway and strike another vehicle. (Neer dep. p. 46; Stites dep. p. 49.) Neer estimated that his vehicle was approximately 200 yards from the site of the collision when the accident occurred. (Stites dep. p. 44.) However, he was informed by the Ohio State Patrol that his vehicle was likely one-half mile back when the crash occurred. (Id.) The officers estimated that they were travelling at speeds of 60 to 80 mph while pursuing the Caprice on S.R. 741. (Stites dep. pp. 43-44; Stites dep. p. 49.) According to Stites, it was unlikely that the speed of their vehicles exceeded 70 mph though. (Stites dep. pp. 49-50.) Furthermore, it was only

after the collision occurred that Neer and Stites determined that Barnhart was the driver of the Caprice. (Thompson dep. pp. 34-35; Neer dep. pp. 53-54.)

Former Deputy Chief of Police John DiPietro (“DiPietro”) took control of the pursuit after Thompson’s vehicle was “out of service.” (Transcribed deposition of John DiPietro [hereafter “DiPietro dep.”] pp. 13-14.) Thompson was unable to monitor the pursuit because he pursued the passenger who fled from the pursuit and DiPietro was the highest-ranking officer listening on the radio. (Id. p. 15.) DiPietro instructed Neer and Stites to call out their locations during the course of the pursuit and Stites complied. (Id. p. 15.) DiPietro never instructed either Neer or Stites to terminate the pursuit. (Id. p. 26.) After the accident, DiPietro performed a supervisory review of this incident. (See, Id. at Exhibit 2.) DiPietro made the following finding, which was incorporated into his report:

A review of the pursuit indicates that Officers Neer and Stites were aware of the active burglary (aggravated) complaint. Officer Stites was witness to the suspect’s vehicle, which purposely struck Sgt. Rex Thompson’s marked police vehicle after he gave orders to stop. This appears to meet the elements of Aggravated Vehicular Assault, Felonious Assault, etc.

(Id.) DiPietro also found:

Based upon all information available, it is my opinion that the Officers involved in this incident and subsequent pursuit, operated within the guidelines of the Miami Township Police Department’s General Orders, section 41.2.8 Pursuit of Motor Vehicles.

(Id.)

**B. Operative Facts for Defendant-Appellee John DiPietro**

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

sergeant, before being promoted to Deputy Chief. (DiPietro dep. pp. 5-6.)

On July 11, 2011, at the time of the radio broadcast concerning a burglary-in-progress in Washington Township, DiPietro was at the Miami Township Police service garage. (DiPietro dep. pp. 10, 13.) Initially, DiPietro only heard a small portion of the information relayed over the radio as he was engaged in discussions with persons at the service garage and the radio did not have his full attention. (DiPietro dep. pp. 17-18.) DiPietro recalled hearing a transmission by Thompson stating that he was on patrol looking for the suspect's vehicle. (DiPietro dep. pp. 10-11.) Thompson was the shift supervisor in charge of the Miami Township Police road patrol division at the time and normally would have been in charge of the pursuit. (DiPietro dep. pp. 10-11.) Over the radio, the suspect's vehicle had been described as a white box-style Chevy Caprice without hubcaps. (DiPietro dep. p. 11.) However, at no time, either prior to or during the pursuit, did DiPietro possess any knowledge of the suspect's identity or any other information about the suspect's vehicle. (DiPietro dep. pp. 11-13.)

In a subsequent radio transmission from Thompson, it sounded to DiPietro as though Thompson stated he had been "hit." (DiPietro dep. pp. 13-14.) Shortly thereafter, Thompson broadcast that he was "out of service." (DiPietro dep. pp. 13-14.) At the time, DiPietro was not entirely sure what had just occurred. (DiPietro dep. pp. 13-14.) But, based on Thompson's radio transmissions, DiPietro assumed some sort of violent encounter had taken place between Thompson and the suspect. (DiPietro dep. pp. 13-14.)

After it became apparent to DiPietro that several officers were now pursuing the suspect, and that Thompson was "out of service," DiPietro got on the radio and took control of the pursuit at 11:54 a.m. (DiPietro dep. p. 14; DiPietro Affidavit ¶ 6.) By now, DiPietro had left the service garage and was heading back to the police department. (DiPietro dep. pp. 14-15.) Once

Thompson indicated he was “out of service,” DiPietro realized it was his duty to assume control of the pursuit as the next highest-ranking officer listening to the radio. (DiPietro dep. p. 15.) In taking control, he immediately asked the pursuing officers for information and began monitoring their actions. (DiPietro dep. p. 14.) Specifically, DiPietro asked the officers to keep calling out their locations and additional information. (DiPietro dep. p. 15.) His intention was to have other police officers get ahead of the pursuit and deploy Stop Sticks to halt the suspect’s vehicle. (DiPietro dep. p. 9, Exhibit 2.) DiPietro also requested dispatch to issue an alert to surrounding agencies. (DiPietro dep. p. 9, Exhibit 2.) However, shortly after he took these actions, DiPietro heard Stites announce that there had been a crash. (DiPietro dep. p. 9, Exhibit 2.) That announcement was made at 11:57 a.m. (DiPietro Affidavit, ¶ 7.) Upon receiving this information, DiPietro immediately responded to the accident scene to assume “incident command” and direct the first aid, traffic control, and criminal investigation. (DiPietro dep. pp. 21-22.)

Appellant’s expert opined that the entire pursuit lasted 6 minutes and 41 seconds. (Ashton Affidavit, ¶6(o).) DiPietro does not dispute that the estimated time frame was twice as long as his actual involvement. He was not the supervisor during the first half of the pursuit. DiPietro only assumed the role of supervisor at the time that the shift supervisor, Thompson, advised he was “out of service.” (DiPietro Affidavit, ¶6; DiPietro dep. pp. 13-15.) This occurred at 11:54 a.m., which was more than half way through the pursuit. (DiPietro Affidavit, ¶6.)

DiPietro testified that he was concerned for public safety during this pursuit, as he always is during every police pursuit. (DiPietro dep. p. 26.) But based upon the specific information he received from his officers during the course of the pursuit, DiPietro did not believe any of the

information warranted terminating the pursuit. (DiPietro dep. p. 26.) DiPietro was in control of the pursuit for approximately 3 minutes. (DiPietro Affidavit, ¶ 8.)

### ARGUMENT

**First Proposition of Law: Police officers are not the insurers of the behavior of fleeing criminals and the “no proximate cause” holding remains a viable defense to liability for law enforcement absent extreme and outrageous conduct.**

As stated herein, Ohio adheres to the “no proximate cause” rule determined by *Lewis v. Bland*, 75 Ohio App.3d 453, 599 N.E.2d 814 (9th Dist.1991). The “no proximate cause” rule protects police officers from liability when a pursuit ends in an injury to an innocent third party from a collision with a vehicle that was being pursued without any direct contact with a police vehicle. See, generally, *Id.* at 456; see also, *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2nd Dist.) This longstanding rule promotes an officer’s duty to enforce the law and make arrests in proper cases, and not to allow those being pursued to escape because of the fear that the flight may take a course that is dangerous to the public at large. *Lewis*, 75 Ohio App.3d at 456. In *Lewis*, the Ninth District adopted the following logic underlying this rule:

The opposite would, we think, be an unnecessary restriction on the ability of police officers to carry out their duties. In every case where a police officer sought to stop a motorist for a traffic violation, it would become a jury question whether the act of the officer was the proximate cause of any harm the motorist might cause in trying to avoid arrest. In our judgment any police officer would hesitate to make an arrest involving a moving automobile within or close to a city for fear that the subject being arrested would flee and cause harm to others for which the officer might be held responsible.

*Id.*

The overall importance of apprehending criminals as rapidly as possible is obvious, thus eliminating the possibility of continued criminal acts<sup>3</sup>. Police officers faced with an occurrence that calls for fast action are confronted with obligations that tend to pull in opposite directions. An officer's duty is to restore and maintain lawful order. They are required to act decisively and utilize restraint, while at the same moment, their decisions have to be made swiftly, under pressure, and frequently without the luxury of deliberation. A police officer deciding whether to give chase must balance on one hand the need to stop a suspect – thereby demonstrating that flight from the law does not assure freedom – and, on the other hand, the high-speed threat to other motorists and bystanders.

When a law enforcement officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the law in Ohio is that the officer's pursuit is not the proximate cause of those injuries. *Lewis* (supra), 75 Ohio App.3d at 456. Rather, the proximate cause of an accident similar to the incident herein is the reckless driving of the criminal culprit. *Id.* The police officer is not faced with the potential for liability unless the circumstances indicate extreme or outrageous conduct by the officer. *Id.* The possibility that the violator will injure a third party is too remote to create liability until the officer's conduct becomes extreme. *Id.* To find otherwise would certainly make the police the insurers of the dangerous conduct of the culprits they chase.

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<sup>3</sup> “It is hardly necessary to point out the overriding public policy of apprehending criminals as rapidly as possible, thus eliminating continued criminal acts, as a factor outweighing the undesirable consequences of hold an officer liable for damages sustained by a third party as a result of such negligence such as described in the complaint.” *DeWald v. State of Wyoming*, 719 P.2d 643, 649-650 (1986).

**A. Ohio common law has not usurped the Ohio General Assembly’s authority to create exceptions to the statutory immunity afforded to police officers under R.C. § 2744.03(A)(6).**

By enacting R.C. 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. *Wilson v. Stark County Department of Human Services*, 70 Ohio St.3d 450, 452–453, 1994-Ohio-394, 639 N.E.2d 105; R.C. 2744.02 et seq. 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 committed “with malicious purpose, in bad faith, or in a wanton or reckless manner.” R.C. § 2744.03(A)(6)(b).

The immunity that protects a law enforcement officer from suit under R.C. § 2744.03(A)(6) exists even if there is duty, breach, proximate cause, and damages. See, *McCleary v. Leech*, 11th Dist. No.2001–L–195, 2003–Ohio–1875, ¶ 31 (the issue of whether there is immunity is a totally separate issue from whether there is proximate cause). Under Ohio’s Political Subdivision Tort Liability Act, even if a duty otherwise exists and is breached, and there is proximate cause which results in damages, there is still no liability. *Nationwide Mut. Ins. Co. v. Kanter Corp.*, 102 Ohio App.3d 773, at 776, 658 N.E.2d 26 (1995). Consequently, the issue of immunity is a totally separate issue from proximate cause.

Appellant confuses proximate cause with the exceptions to an officer’s immunity under R.C. § 2744.03(A)(6). By synergizing these two concepts, Appellant has crafted an argument wherein she claims that the “no proximate cause” rule has created a heightened standard for imposing liability other than what was intended by the legislature when R.C. § 2744.03(A)(6) was enacted. Appellant’s argument is incorrect.

The typical progression for a claim against a law enforcement officer under state law, is to first evaluate whether immunity applies. Assuming the officer is immune, no consideration is given to resolving issues related to proximate cause; such burden has been eliminated by virtue of R.C. § 2744.03(A)(6). Should there be evidence to conclude that an exception to the officer's statutory immunity does apply, such as wanton and/or reckless conduct, the officer may be deprived of the immunity granted by R.C. § 2744.03. However, the absence of immunity does not automatically impute liability to police officers for their alleged actions. 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. To suggest that the "no proximate cause" rule has usurped the General Assembly's authority to script the circumstances for establishing a law enforcement officer's liability under R.C. § 2744.03 is simply inaccurate.

The "no proximate cause" rule is established as part of Ohio's common law. Such rule is not an additional layer to the immunity analysis set forth by statute. Again, immunity and proximate cause are two separate, coexisting concepts. Whereas immunity represents an exemption to certain conduct, proximate cause focuses on the foreseeability of the harm. The "no proximate cause" rule exists not to establish the standard for proving liability but to protect an officer from the unpredictable conduct of dangerous suspects fleeing from arrest. Unlike immunity, application of the "no proximate cause" rule does not foreclose the possibility of liability against the employees of a political subdivision. Contrary to the Appellant's arguments, the rule does not amount to total immunity for police officers engaged in vehicle pursuits.

In a sense, the "no proximate cause" rule supersedes an officer's immunity in one specific and isolated scenario: a police pursuit of a fleeing vehicle that ends in an injury to an

innocent third party from a collision with the vehicle that was being pursued without any direct contact with a police vehicle. The “no proximate cause” holding safeguards a police officer’s duty to arrest offenders without making them the insurers of the culprit’s dangerous conduct. This rule simply holds that an officer is not liable for the conduct of the fleeing criminal suspect because there is a disconnection between the harm caused by culprit’s vehicle and the police officer’s participation in the pursuit. A connection to the third party’s injuries results only if the police officer did something extreme or outrageous to be considered a component of an accident that causes harm to a third party. Again, this is separate and distinct from immunity, which can assume that the officer was the proximate cause of the harm to another.

The “no proximate cause” rule is not incompatible with the provisions of R.C. § 2744.03. And, this rule does not render the exception to immunity under R.C. § 2744.03(A)(6) meaningless. Section 2744.03(A)(6) will provide immunity to police officers during a pursuit should they cause an accident during a pursuit by acting other than simply following the culprit. Such immunity is breached should officers act in a reckless manner. If the officer is not immune then the “no proximate cause” rule is a defense to liability when the fleeing culprit unexpectedly collides with a third party during the course of a pursuit. Police officers are not the responsible parties for the accident unless their conduct was so extreme and outrageous that the unpredictable nature of the culprit is outweighed by the dangers created by law enforcement. If such burden is satisfied, the officer is exposed to liability despite the unpredictability of the criminal suspect desperately evading arrest.

**B. Even if the “no proximate cause” rule is a minority opinion among the United States, it remains the law in the State of Ohio and does not amount to total immunity to police officers.**

Appellant urges the court to follow suit and mimic other jurisdictions that no longer follow the “no proximate cause” approach, similar to *Lewis v. Bland*. However, a number of jurisdictions still apply this approach to collisions involving third parties and fleeing culprits<sup>4</sup>. Most notably, the United States Supreme Court has adopted a view similar to the rationale that underlies Ohio’s “no proximate cause” rule. When it comes to high speed vehicle pursuits, the United States Supreme Court has stated:

we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

*Scott v. Harris*, 550 U.S. 372, 385-6, 127 S.Ct. 1769, 1779 (2007).

A claim under 42 U.S.C. § 1983 may be brought against a police officer under the Fourteenth Amendment for death or injury to innocent third parties where the injury results from the pursuit. *Meals v. City of Memphis, Tenn.*, 493 F.3d 720, 729 (6th Cir.2007), citing *City of Sacramento v. Lewis*, 523 U.S. 833, 845-49, 118 S.Ct. 1708 (1998). To prevail on such a claim, a plaintiff must prove that the police officer's conduct “shocks the conscience.” *Meals*, 493 F.3d at 729, *Lewis*, 523 U.S. at 846-47. In *Sacramento v. Lewis*, the Supreme Court significantly

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<sup>4</sup> *Chambers v. Ideal Pure Milk, Co.*, Ky.Ct.App., 245 S.W.2d 589 (1952); *Plummer v. Lake*, Ky.Ct.App. 2014 WL 1513294 (Dec. 10, 2014); *Reenders v. City of Ontario*, 68 Cal.App.3d 1045 (1977); *Huddleston v. City of Charleston*, 144 Ill.App.3d 1077 (1986); *Estate of Warner v. United States*, 754 F.Supp.1271 (N.D.Ill. 1990); *Armstrong v. Mudd*, 655 F.Supp. 853 (C.D.Ill. 1987); *Roll v. Timberman*, 94 N.J.Super 530, 229 A.2d 281 (1991).

restricted, but did not foreclose, the right to recover damages for constitutional violations stemming from police pursuits. “[O]nly a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.” *Meals*, 493 F.3d at 729, citing *Lewis*, 523 U.S. at 836. “[H]igh-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.” *Meals*, 493 F.3d at 729, citing *Lewis*, 523 U.S. at 854. Although formed in a different context, the “shock the conscience” standard has established a similar threshold as the “no proximate cause” rule.

Abdicating this rule will illustrate the concern addressed by the Supreme Court in *Scott* – “[e]very fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights.” *Scott* (supra) 550 U.S. at 385-6. In essence, without the rule established by the Ninth District’s decision in *Lewis*, a starting-line will be drawn for suspects to dangerously accelerate beyond neck-breaking speeds, fully aware that the law enforcement has been collared from engaging in their pursuit. Instead of apprehending a suspect before any harm occurs, officers will be left in idle as the suspects heedlessly speed away, obviously aware that the more traffic regulations the culprits offend, the more certain their freedom becomes. Eliminating the “no proximate cause” rule will effectively create a perverse incentive for suspects to flee apprehension and make law enforcement officials the insurers of the culprits’ dangerous conduct.

Despite what other jurisdictions have done, the “no proximate cause” rule has remained the law in Ohio for the past 24 years. The Ninth District’s decision in *Lewis* provides a similar level of protection to police officers involved in vehicle pursuits as the United States Supreme

Court announced in its own *Lewis* decision. The purpose of the “no proximate cause” rule has never been to thwart recovery for the reckless actions made by police officers. Rather, it correctly positions the blame for the harm caused to a third party during a pursuit on the responsible party – the fleeing culprit. Officers have a professional obligation to apprehend the individuals engaged in lawless behavior. If an accident occurs during a pursuit, the proximate cause of the accident is not the decision of a police officer to give chase, but rather the manner in which culprits act in attempting to avoid their arrest. It is the criminal suspect who makes the decision to drive left of center; it is the suspect who makes the decision to drive off the travelled portion of the roadway; and, police officers are not the proximate cause of any harm that results simply by choosing to perform their obligation to apprehend criminal suspects.

For the reasons stated above, the “no proximate cause” rule does not provide total immunity to officers and should remain a viable defense for law enforcement when accused of harm that results in the unpredictable conduct of criminal culprits who flee from the police.

**C. The “extreme and outrageous” standard is the appropriate standard to judge a police officer’s conduct as a result of a pursuit that caused harm to a third party motorist.**

The extreme and outrageous standard is certainly intended to be a difficult standard to establish because it would otherwise be far too simple to hold a police officer liable for a motor vehicle accident caused by a criminal culprit. Again, an officer has a duty to pursue and apprehend criminals. *United States v. Hutchins*, 268 F.2d 69, 72 (6th Cir.1959). And, surely, criminals will always flee the scenes of their wicked acts. It would be illogical to assume that notorious bank robber John Dillinger ever cautiously walked away from elements of his crimes. When individuals commit criminal offenses, presumably their very first thought is to escape and get as far away from the scene of their illicit acts as possible. The farther that criminals are able

retreat from their criminal acts, the easier it becomes to deny any involvement in the commission of such offenses. Despite the absence of a police officer's pursuit, criminals are still likely to cause harm to other motorists and pedestrians while escaping the scenes of the unlawful endeavors. Under these circumstances, no one would question that the criminal culprit is to blame for any harm caused to innocent third parties.

The hope of law enforcement is to capture criminals before they can cause any further harm. Should a vehicle pursuit occur, a police officer utilizes his overhead lights and sirens to warn motorists of their efforts during the course of pursuing a fleeing criminal. Law enforcement will use such implements to advise motorists to take caution as a dangerous situation is occurring. Unfortunately, police officers have no way of predicting and announcing the dangerous efforts a culprit may use to avoid apprehension. A culprit attempting to escape arrest may drive recklessly. While the pursuit by police officers may contribute to the recklessness of the culprit, law enforcement is under no duty to allow the culprit to make a leisurely escape. *Roll v. Timberman*, 94 N.J.Super 530, 536 (1967), citing *Draper v. City of Los Angeles*, 91 Cal.App.2d 315, 205 P.2d 46, 48 (D.Ct.App. 1949).

The policy of denying liability of a police officer when the pursuit of a fleeing culprit results in harm to a third party is well expressed in *Wrubel v. State of New York*, 11 Misc.2d 878, 174 N.Y.S.2d 687, 689 (1958):

Claimants' predication of liability on the State is founded on the novel position that the trooper, in attempting to halt one increasing the danger on the highway, did by his attempt alone increase the danger himself. To extend this position to the ultimate would require a police officer to pursue, at an otherwise lawful rate of speed, a lawbreaker traveling at an unlawful rate of speed, or to ignore him in the first place.

An operator who is speeding, or who is a reckless driver on the highway, would know that all he had to do was to go faster – and under claimants' theory escape would be possible – there would be no chase. A burglar, bank robber or any other

felon could threaten to shoot and under claimants' theory escape would be possible and arrest avoided. It is fantastic to further expend claimants' theory – such thinking would place a police officer in the same category as the Marquis of Queensbury in a pier six brawl.

Appellant champions a new rule that reduces the standard for holding police officers culpable for the harm caused by fleeing criminals. The only change that can come from enforcing a lesser degree of culpability is to effectively restrict an officer's efforts to arrest a fleeing criminal culprit. Without the "no proximate cause" rule, a fleeing criminal is guaranteed freedom by operating a vehicle in a manner so dangerous that a law enforcement officer would risk being held personally liable for the acts of the criminal by giving chase. Adopting Appellant's position would have a chilling effect on law enforcement, and society as a whole. It will effectively cause police officers to be the insurers of the dangerous culprits they pursue or otherwise influence police officers to disregard their sworn duty to make arrests when proper. Either way, without the "no proximate cause" rule, police officers must choose between: (1) giving chase and apprehending the criminals at the cost of being held responsible for the acts of the culprits they chase or (2) ignore the culprits who flee from their crimes. Either scenario drastically inhibits law enforcement.

**D. The public policy behind apprehending criminals supports the continued application of the "no proximate cause" rule.**

Appellant relies upon a shift in Tennessee jurisprudence in an attempt to establish that the policy considerations that underlie both *Lewis v. Bland* and *Whitfield v. Dayton* are outdated. Essentially, Appellant maintains that a police officer's duty to apprehend is distinct and secondary to the officer's duty to protect the public. Time has not diminished the overriding policy considerations enunciated in both *Lewis v. Bland* and *Whitfield v. Dayton*. As discussed herein, jurisdictions still recognize the public policy expressed in these cases that a law

enforcement officer's pursuit of fleeing offenders is inherent in the officer's duty to protect the public.

In denying a claim asserted by passengers injured in a vehicle as a result of a high-speed police chase, the Seventh Circuit Court of Appeals eloquently observed:

“Death and disability haunt law enforcement. Lax law enforcement emboldens criminals and leads to more crime. Zealous pursuit of suspects jeopardizes bystanders and persons accompanying the offender. Easy solutions rarely work, and *ex post* assessments—based on sympathy for those the criminal has injured, while disregarding the risks to society at large from new restrictions on how the police work—are unlikely to promote aggregate social welfare.” *Mays v. City of East St. Louis, Ill.*, 123 F.3d 999, 1004 (1997).

Suffice it to say, the duty of protecting the public is coextensive with the duty of apprehending suspected criminals. To sacrifice a police officer's duty to make lawful arrests due to the speculative harm that may arise from pursuing a fleeing culprit is not sound public policy. The “no proximate cause” rule should remain in effect to allow police officers to discharge their duties as law enforcement officials without being held accountable for the unpredictable actions of the criminals they chase.

**II. Second Proposition of Law: Both the Trial Court and the Appellate Court correctly determined that Defendants-Appellees were not liable to the Plaintiff-Appellant for her injuries and damages under the No Proximate Cause rule and summary judgment was properly granted to them.**

The “no proximate cause” holding of *Lewis v. Bland*, 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist. 1991) bars any right of the recovery against Appellees in the instant matter. Pursuant to this holding, the proximate cause of an accident similar to the incident herein is the reckless driving of the pursued, notwithstanding recognition of the fact that police pursuit may have contributed to the suspect's reckless driving. *Lewis* (supra), 75 Ohio App.3d at 456. 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. *Id.*

The Ohio Supreme Court has described such 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*, 6 Ohio St.3d 369, 375, 6 OBR 421, 453 N.E.2d 666 (1983), see also, *Whitfield* (supra), 167 Ohio App. 3d at 187.

The issue raised in Appellant’s memorandum in support of jurisdiction concerned the current viability of the No Proximate Cause rule that was announced in *Lewis v. Bland* and affirmed in *Whitfield v. Dayton*, among other Ohio Appellate cases. Whether review of this issue also includes an analysis of whether such rule was correctly applied by the lower courts herein is certainly left to the discretion of this honorable Court. As discussed hereafter, neither Neer nor Stites can be liable for the injuries sustained by Appellant. Her injuries and damages were directly caused by the actions of the criminal culprit, Barnhart. And, Appellees’ involvement in the pursuit of Barnhart’s vehicle cannot be attributed to the cause of the underlying accident. At no time did the vehicles operated by Neer or Stites have any direct contact with the Barnhart’s vehicle and thus, the prevailing law in Ohio insulates these officers from liability absent any indication that their conduct was extreme and outrageous.

Unlike the fast-paced, heedlessly rampaging version of events recited by Appellant, the undisputed facts actually revealed a drastically different incident. Appellant would have this Court believe that Neer and Stites operated their police cruisers at a speed of 80 mph during the entirety of the pursuit, all while snarling down the spine of the suspect and dodging oncoming

motorists. The undisputed testimony of the officers and witnesses was that the pursuit occurred on a sunny, dry day through light traffic conditions. Both Neer and Stites used a significant amount of caution while proceeding through intersections, which included changing the tone of their siren and reducing the speed of their vehicles. More importantly, Neer and Stites remained behind a Montgomery County Deputy Sheriff for a large portion of the pursuit and were travelling no faster than 45 mph. When the collision finally occurred, Neer and Stites were approximately one-half mile away from the crash. In short, Appellees drove defensively throughout the pursuit and the facts do not support a finding extreme or outrageous conduct.

“The duty of police officers is to enforce the law and to make arrests in proper cases, not to allow one being pursued to escape because of the fear that the flight may take a course that is dangerous to the public at large.” *Lewis v. Bland*, 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist. 1991). The actions of Neer and Stites aligned with this well-accepted law enforcement principle and they are not exposed to any liability. While the tragedy of this case truly is the harm suffered by Appellant, it cannot be said that either Neer or Stites are liable for her injuries. Accordingly, Appellees remain entitled to summary judgment.

**A. Defendant-Appellees were permitted to engage in the pursuit of the fleeing culprit, Andrew Barnhart.**

The Township’s policy permits its officers to initiate a pursuit for a number of criminal offenses referred to as a “violent felony.” (Neer dep., Exhibit 1, Pursuit Policy, Section 41.2.8, p. 39.) Included within such list of felonies is “Burglary” and “Felonious Assault.” (Id.) Accordingly, Neer and Stites were permitted to initiate the pursuit of the Barnhart considering that probable cause existed to implicate him with both of the foregoing criminal offenses. And, despite Appellant’s continued insistence that the officers were fully aware of Barnhart’s identity, the evidence established otherwise. While Stites learned that the Caprice belonged to Barnhart

when he observed it weeks earlier, he was unaware if Barnhart was still the registered owner of this vehicle on July 11, 2011. (Stites dep. pp. 16-17, 30.) Stites had never met or seen Barnhart and was unaware of his appearance. (Stites dep. pp. 23, 51.) Stated differently, Stites was unable to identify Barnhart as the driver of the Caprice on July 11, 2011.

Similarly, Neer had never been to the residence at 2037 Mardell Drive on a previous occasion and had no contact with anyone associated with that residence, including Barnhart. (Neer dep. pp. 15-16.) Further, Neer had no previous contact with Barnhart and was essentially unaware of what led the other officers to Mardell Drive on July 11, 2011. (Id. pp. 13, 15-16.) Neer provided the license plate number for the Caprice to the dispatcher as he followed the vehicle on S.R. 725 and did not recall receiving any information about the registered owner. (Id. p. 18.) Neer learned that Barnhart was the driver of the Caprice only after the collision occurred. (Thompson dep. pp. 34-35; Neer dep. pp. 53-54.) So, to assume that Neer and Stites violated a departmental policy when they initiated the pursuit of a “known suspect” is not supported by the record.

Furthermore, in *Whitfield* (supra), the officer pursuing the suspect had the fleeing vehicle’s identification information (i.e., license plate number), which was provided to the dispatcher. *Whitfield*, 167 Ohio App.3d at 176, 854 N.E.2d at 534. The fact that the officer had information related to the driver of the vehicle did not preclude this Court from finding that the officer was not the proximate cause of the accident that stemmed from the pursuit. Besides, Appellant’s argument suggests that law enforcement should never attempt to apprehend a known suspect that flees apprehension. Rather, the police should allow the suspect to flee, and potentially harm other members of the public until such time that the suspect can be located and arrested on a later date.

Therefore, it cannot be said that Neer and Stites pursued a “known suspect” who could have been arrested on a later date, and the lower courts correctly found that the conduct of these officers did not reach the level of extreme and outrageous.

**B. In reviewing their actions during the pursuit, either individually or as a pair, neither Neer nor Stites was the proximate cause of the accident, which caused harm to Appellant and the lower courts correctly found the same.**

Both Neer and Stites pursued Barnhart in a manner that aligned with the “no proximate cause” rule. The trial court correctly found that the conduct of Neer and Stites cannot be fairly characterized as “atrocious and utterly intolerable in a civilized community.” Obviously, this is an exceptionally difficult standard to meet. *Whitfield* at 187. The pursuit of the Caprice was initiated because it matched the description of the vehicle involved in a felony offense and because of the driver’s erratic and aggressive behavior. (Thompson dep. pp. 19-24; Stites dep. pp. 26-28; Neer dep. pp. 14-15, 22.) The driver nearly struck Thompson while trying to escape from the driveway of the residence located at 2037 Mardell Drive. (Id.) As DiPietro determined, the driver’s conduct satisfied the elements of “Vehicular Assault, Felonious Assault, etc.” (DiPietro dep., Exhibit 2.)

It remains undisputed that the weather conditions on July 11, 2011, were sunny, clear, and dry. (Neer dep. p. 58; Stites dep. p. 31.) Further, there is no dispute that traffic conditions were light during the course of this pursuit. (Neer dep. pp. 19, 23, 32, 58, 62; Stites dep. pp. 31, 44; Ball dep. pp. 26-27.) As stated, the officers utilized the overhead lights and sirens to their police vehicles during the entirety of the pursuit to warn other motorists of the chase. (Neer dep. pp. 15, 26, 31; Stites dep. p. 38.) Stites complied with DiPietro’s command by calling out the locations of the pursuit as it progressed and neither officer was advised to terminate the pursuit by his commanding officer. (DiPietro dep. pp. 15, 26.) Additionally, Osterfeld provided

assistance to the Neer and Stites as the pursuit reached the intersection of S.R. 725 and McEwen Road. (Osterfeld dep. pp. 5-9.) She blocked westbound traffic from entering this intersection and enhanced the safety of the pursuit for both motorists and the individuals involved in the pursuit.

In addition, Neer and Stites remained behind Ball for a large portion of their pursuit of Barnhart. (Neer dep. pp. 26-27, 30; Stites dep. pp. 40, 43, 46; Ball dep. pp. 17-18, 19.) The officers followed Ball at a slower rate of speed which, at most, reached 45-50 mph while travelling on Spring Valley Pike. (Neer dep. pp. 43-44; Stites dep. pp. 33, 36; Ball dep. p. 41.) And, according to Ball, the legal speed limit on Spring Valley Pike is 55 mph. (Ball dep. p. 41.) Thus, the officers were travelling at a speed under the legal speed limit for an extended portion of the pursuit. Notwithstanding, Neer and Stites slowed even further on several occasions to look down side streets associated with the main thoroughfares to eliminate the possibility that Barnhart went down such roads to avoid detection. (Neer dep. p. 39; Stites dep. pp. 41-42.) And, when the collision occurred, Neer and Stites were anywhere between 200 yards to one-half mile from the accident scene. (Neer dep. p. 44.)

In *Whitfield*, the Second District Court of Appeals determined the lack of proximate cause even though the officers proceeded in their pursuit up a rather steep hill, in a residential area with which they were unfamiliar, knowing that the individual they were pursuing was driving excessively fast at speeds of 55 to 60 mph in a 25 mph neighborhood, and running stop signs. *Id.* at 175-77. Further, the pursuit occurred in the early evening of a summer night near parks, playgrounds, homes, and apartment buildings. *Id.* at 177. The officers claimed that they drove slowly at times, kept a substantial distance between themselves and the fleeing suspect, and proceeded with care through intersections. *Id.* But, a witness who observed the pursuit

testified that the three police cars were following the suspect within one car length away and travelling at speeds “between 55 and 60 or even higher.” *Id.* at 178. The pursuit ended when the suspect collided with another vehicle after running three stop signs on a residential street at a speed of approximately 55 mph. *Id.* An innocent third party, Steven Whitfield, was killed as a result of the accident. *Id.* The officers in *Whitfield* were granted summary judgment under Ohio’s “no proximate cause” holding because their conduct was not determined to be “outrageous or extreme” as a matter of law. *Id.* at 187.

In comparing the instant matter to *Whitfield*, an important distinction still remains critical. Here, the officers **and Barnhart** slowed at several intersections and used due caution when they proceeded through traffic lights. (Neer dep. pp. 21, 23-24, 41; Stites dep. p. 37.) The fact that the individuals involved in both fleeing and pursuing were using due caution at the intersections encountered during the course of this pursuit obviously fails to support a finding that the conduct of Neer and Stites was “extreme and outrageous.” Consider the officer in *Whitfield*, who travelled at speeds well in excess of the posted speed limit while blasting through stop signs in a residential neighborhood. *Whitfield*, 167 Ohio App. 3d 175-77. His conduct certainly demonstrated a lessened degree of care than presented herein and yet, proximate cause was still lacking. Neer, unlike the officer in *Whitfield*, was familiar with the area involved in this pursuit and took the extra step of changing the tone of his siren to a higher pitch as he passed through certain traffic intersections to provide an additional warning to motorists in such areas. (Neer aff.)

Similarly, *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 2002-Ohio-222, 772 N.E.2d 129 (9th Dist.) represents another occasion where police officers were granted summary judgment as a result of the lack of proximate cause. In *Shalkhauser*, the officer initiated a pursuit after

observing the suspect commit a traffic violation when he operated his vehicle into the opposite lane of traffic. *Id.* at 43. The officer entered the suspect's license plate number and learned his identity, along with the fact that he had an outstanding warrant. *Id.* The officer activated his overhead lights and attempted to initiate a traffic stop. *Id.* Instead of stopping, the suspect swerved left of center and accelerated past other vehicles. *Id.*

The pursuit continued for approximately eleven minutes and reached speeds in excess of 85 mph. *Id.* at 44. The officer used his lights and siren throughout the entirety of the pursuit and only encountered light traffic conditions. *Id.* at 49. The officer followed at a safe distance and slowed or stopped his cruiser at stop signs and railroad crossings to ensure that he could clear them safely. *Id.* The pursuit ended when the suspect's vehicle collided with an innocent third party. *Id.* at 44. In line with the "no proximate cause" ruling announced in *Lewis*, the Ninth District Court of Appeals determined that reasonable minds could only conclude that the officer's conduct was not extreme or outrageous. *Id.* at 52.

Based upon an application of *Lewis* – and its progeny that followed – to the facts of this matter, both the Trial Court and the Second District Court of Appeals properly determined that neither Neer nor Stites were the proximate cause of the accident that caused harm to Appellant. The cause of this accident was the fleeing suspect - Barnhart. Accordingly, summary judgment was properly award to the Appellees and the decisions of the lower courts should be affirmed.

**C. Departmental policy violations allegedly committed by Appellees do not amount to extreme and outrageous conduct.**

Appellant was harmed as a result of the conduct of Barnhart, not the so-called policy violations alleged by Appellant. As discussed herein, Neer and Stites were permitted to initiate and continue the pursuit of Barnhart. Both officers used caution and restraint while pursuing Barnhart and travelled at appropriate speeds throughout the chase. Any violation of the Miami

Township's departmental policies and procedures governing vehicle pursuits after the initiation of the pursuit has no effect on whether Neer and Stites were the proximate cause of the underlying motor vehicle accident. In *Whitfield*, the commanding officers of the pursuing officer determined that his conduct was a violation of the City's pursuit policy. *Whitfield* at 176-77. However, the Court failed to associate an arguable policy violation with the proximate cause analysis. The result should be no different here.

As it relates to DiPietro, Appellant contends that he failed to effectively monitor and evaluate the risk associated with the pursuit of Barnhart, which also constituted a violation of the Township's pursuit policy. DiPietro obviously contends differently.

As the Second District Court of Appeals correctly determined herein, even if it is assumed that the officers did violate their respective policy, their conduct was not extreme and outrageous. Evidence that departmental policies have been violated demonstrates negligence at best. *Argabrite v. Neer, et al.*, 26 N.E.3d 879, 2015-Ohio-125, ¶25, citing, *Anderson v. Massillon*, 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; *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994); *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶92.

Furthermore, the policy violations alleged by Appellant were conceived by the expert witnesses that she retained to review this matter. Appellant's experts have previously opined that Neer and Stites violated the police department's pursuit policy, failed to exercise any care for the public during the pursuit, and engaged in conduct that was wanton, reckless, extreme, and outrageous. Appellant has yet to appreciate that this testimony does not create any issues of *fact*, but merely states appellant's position with respect to Defendants' culpability, which is a legal

conclusion. *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 51, 2002-Ohio-222, 772 N.E.2d 129 (9th Dist. 2002), citing *Hackathorn v. Preisse*, 104 Ohio App.3d 768, 772, 663 N.E.2d 384 (9th Dist. 1995), appeal not allowed (1995), 74 Ohio St.3d 1456, 656 N.E.2d 951. The lower courts were free to award summary judgment to Appellees despite the opinions of her experts.

Finally, even if such policy violations occurred, DiPietro – Appellees’ commanding officer – never instructed either Neer or Stites to terminate the pursuit. (DiPietro dep. p. 26.) Both Neer and Stites were proceeding with the pursuit and their supervising officer was not directing them to the contrary. After the accident, DiPietro performed a supervisory review of this incident. (See, *Id.* at Exhibit 2.) DiPietro made the following finding, which was incorporated into his report:

A review of the pursuit indicates that Officers Neer and Stites were aware of the active burglary (aggravated) complaint. Officer Stites was witness to the suspect’s vehicle, which purposely struck Sgt. Rex Thompson’s marked police vehicle after he gave orders to stop. This appears to meet the elements of Aggravated Vehicular Assault, Felonious Assault, etc.

(*Id.*) DiPietro also found:

Based upon all information available, it is my opinion that the Officers involved in this incident and subsequent pursuit, operated within the guidelines of the Miami Township Police Department’s General Orders, section 41.2.8 Pursuit of Motor Vehicles.

(*Id.*)

Any policy violations allegedly committed by Neer and Stites did not elevate their conduct to the level of extreme and outrageous. Once again, the lower courts properly granted summary judgment to the Appellees and the judgment of these courts should not be overruled.

### **CONCLUSION**

For the reasons stated herein, this honorable Court should not abandon the “no proximate cause” rule announced in *Lewis v. Bland* and affirmed by *Whitfield v. Dayton* and other appellate

decisions. This rule remains a viable defense for law enforcement officials in Ohio, which comports with public policy and all applicable statutory enactments of the Ohio General Assembly pertaining to a police officer's immunity. The decisions of the Trial Court and the Second District Court of Appeals should be affirmed and this matter should be dismissed with prejudice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of November, 2015, this document was electronically filed via the Court's authorized electronic filing system and was served via U.S. Mail upon the following:

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