Supreme Court of Ohio Clerk of Court - Filed December 08, 2015 - Case No. 2015-0348

IN THE SUPREME COURT OF OHIO

PAMELA ARGABRITE,	:	No. 2015-0348
Appellant,	:	
v.	:	On Appeal From the Second District Court of Appeals, Montgomery County
JIM NEER, ET AL.,	:	
Appellees.	:	Court of Appeals Case No. 26220

BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEES

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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association ("OPAA") is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecuting attorneys. Its mission is to assist county prosecuting attorneys in the pursuit of justice and the promotion of public safety. One way in which the OPAA strives to achieve this mission is by advocating for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities.

The OPAA offers this amicus brief in support of the Appellees' merit briefs. The OPAA argues herein that abandoning the "no proximate cause" rule adopted in *Lewis v. Bland*, 75 Ohio App.3d 453, 599 N.E.2d 814 (9th Dist.1991), a rule which remains the law in a number of states, would thwart Ohio public policy and jeopardize the safety of Ohio's citizens by causing officers not to pursue fleeing suspects. A holding in favor of the Appellant in this case would therefore likely result in the apprehension of fewer offenders by law enforcement. This would, in turn, inhibit the ability of Ohio's county prosecuting attorneys to bring such offenders to justice.

STATEMENT OF THE CASE AND FACTS

The OPAA joins in the Appellees' Statements of the Case and Facts.

ARGUMENT

***Amicus Curiae*'s First Proposition of Law: The "no proximate cause" rule remains the law in a number of states.**

The Appellant and *Amicus Curiae* the Ohio Association for Justice (the "OAJ") assert that Ohio is in the small minority of jurisdictions that imposes the "no proximate cause" rule in police pursuit situations. Appellant and the OAJ claim that a total of thirty-seven states, and the District of Columbia, have rejected the rule. To support this claim, Appellant and the OAJ cite to a total of forty-three out-of-state cases, each of which, they assert, rejects the "no proximate

cause" rule. Although Appellant and the OAJ are correct that a minority of jurisdictions applies the "no proximate cause" rule, Appellant and the OAJ overstate their argument. A number of states continue to apply the rule. The states that apply the "no proximate cause" rule include Wyoming, the state from which Ohio adopted the "extreme or outrageous conduct" standard of Ohio's "no proximate cause" rule. In addition, in four of the states that Appellant and the OAJ assert have rejected the "no proximate cause" rule—Kentucky, Minnesota, Indiana, and Missouri—the rule in fact remains good law.

A. The "No Proximate Cause" Rule is Still the Law in Wyoming and has been Expanded in Wyoming to Cover Factual Situations Other than Pursuits.

As the Second District Court of Appeals noted in its decision below, an Ohio state court first adopted the "no proximate cause" rule in 1991, when the Ninth District Court of Appeals decided *Lewis v. Bland*, 75 Ohio App.3d 453, 599 N.E.2d 814 (9th Dist.1991). *Argabrite v. Neer*, 2015-Ohio-125, 26 N.E.3d 879, ¶ 5 (2d Dist.), citing *Lewis* at 456. Relying on a Supreme Court of Wyoming case, *DeWald v. State*, 719 P.2d 643 (Wyo.1986), the court in *Lewis* adopted an "extreme or outrageous conduct" standard for police pursuit cases:

> 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.

Lewis at 456, citing *DeWald* at 650.

In *DeWald*, officers pursued a drunk driving suspect, who collided with a vehicle stopped at a red light, killing the driver of the vehicle. *DeWald* at 645. The decedent's wife brought suit, and the trial court granted summary judgment to the defendant officers. *Id.* at 645-646. On appeal, the Supreme Court of Wyoming reviewed the case law of other states and found that such case law supported a "no proximate cause" rule for police pursuits, when the officer is not

involved in the accident. *Id.* at 649. In adopting the "no proximate cause" rule, the Court found instructive the following policy justifications for the rule:

> [T]hat the officer has a duty to apprehend, arrest and remove from the highways drunk drivers; that if, in the performance of his job as a patrolman, he must choose whether to pursue or allow a lawbreaker to escape, he should not be liable for either choice in the absence of gross or wanton conduct almost amounting to bad faith; that he should be responsible only for the careful operation of his own car; and that he should not be liable for the unpredictable actions of the driver being pursued for that would make him an insurer of the wrongful acts of a lawbreaker.

Id. Applying an "extreme or outrageous conduct" standard, the Court in *DeWald* held that the plaintiff could not prove that the officers' actions were the proximate cause of the accident, and the Court affirmed the trial court's grant of summary judgment to the officers. *Id.* at 651-652.

Since the Supreme Court of Wyoming decided *DeWald* in 1986, the Court has expanded the "no proximate cause" rule to apply not only to officers who pursue a fleeing suspect, but also to officers who fail to warn those in the path of the fleeing suspect of the danger posed by the fleeing suspect, and to officers who operate a roadblock intended to stop the fleeing suspect. In *Bd. of Cty. Commrs. of Teton Cty. ex rel. Teton Cty. Sheriff's Dept. v. Bassett*, 8 P.3d 1079 (Wyo.2000), the plaintiff drivers were injured at a roadblock, which officers had set up to stop a fleeing suspect. *Id.* at 1082. On their way towards the roadblock, the plaintiffs passed several officers who were just off the road; these officers did not warn the plaintiffs that a suspect was fleeing from the police at a high speed. *Id.* When the plaintiffs approached the roadblock, officers at the roadblock gestured for the plaintiffs to go through an opening in the roadblock. *Id.* The suspect, driving at one hundred miles per hour or more, went through the same opening and struck the plaintiffs' vehicle. *Id.*

The trial court in *Bassett* refused the defendant officers' proposed jury instruction that the officers could only be held liable if their conduct was extreme and outrageous. *Id.* The Supreme

Court of Wyoming reversed, holding that the officers were entitled to the requested instruction. *Id.* at 1086. The Court held that the actions of the officers, both those who failed to warn the plaintiffs and those who operated the roadblock, could not be distinguished from the actions of an officer in pursuit of a fleeing vehicle, which was involved in a collision that did not involve the officer's vehicle. *Id.*, citing *DeWald*, 719 P.2d at 649. The "no proximate cause" rule remains the law in Wyoming.

B. The "No Proximate Cause" Rule is the Law in a Number of Other States.

The "no proximate cause" rule is also the law in a number of other states, including in a number of states that Appellant and the OAJ assert do not apply the rule. In particular, in four states—Kentucky, Minnesota, Indiana, and Missouri—contrary to the assertions of Appellant and the OAJ, the "no proximate cause" rule is still good law.[1,2]

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[1] In the Illinois and New York cases to which Appellant cites in support of the proposition that Illinois and New York reject the "no proximate cause" rule, the Illinois and New York courts in fact found a *lack* of proximate causation as a matter of law. *See Wade v. City of Chicago*, 364 Ill.App.3d 773, 784, 847 N.E.2d 631 (2006) ("Plaintiff's argument that [an officer's] continued pursuit of the station wagon after seeing it run a red light proximately caused his injuries is illogical and against sound public policy. If a police officer could be held liable for his honest miscalculation, it would encourage criminals to flee from the police more dangerously, knowing that the more recklessly they drive, the less likely the officer will continue to pursue them due to the risk of a potential civil liability * * *"); *Nurse v. City of New York*, 56 A.D.3d 442, 443, 867 N.Y.S.2d 486 (2008) ("[T]he proximate cause of the accident was the independent recklessness of the driver of the Oldsmobile, and not the police officers' conduct in initiating the pursuit of the Oldsmobile * * *"). The holdings in these cases as to proximate causation are representative of the general position of Illinois and New York courts: the states' courts generally find, as a matter of law, that the actions of officers are not the proximate cause of accidents in pursuit cases. *E.g.*, *Morton v. City of Chicago*, 286 Ill.App.3d 444, 455, 676 N.E.2d 985 (1997) ("The absence of a siren did not impact on [the suspect's] actions in driving through a red light and into oncoming traffic. While the officers' initial actions in stopping behind [the suspect's] car may have served as the impetus for [the suspect] to act as he did in speeding from the scene, [the suspect's] subsequent actions, alone, caused this tragedy. There is no evidence that the actions of the officers were a proximate cause of the plaintiff's injuries * * *"); *Jessop v. City of Niagara Falls*, 247 A.D.2d 902, 903, 669 N.Y.S.2d 110 (1998) ("While the intoxication of the driver increased the hazards of the pursuit, it also increased the need for his immediate apprehension

i. Kentucky, Minnesota, and Indiana

Courts in Kentucky, Minnesota, and Indiana apply the "no proximate cause" rule. Appellant asserts, however, that each of these states rejects the rule. Appellant is incorrect. Each of the cases to which Appellant cites is distinguishable—either legally, factually, or both legally and factually—from the Kentucky, Minnesota, and Indiana decisions that adopted the "no proximate cause" rule. Two common threads run through the Kentucky, Minnesota, and Indiana cases to which Appellant cites: the court in each case decided the case on immunity grounds, and in each case, an officer was involved in the accident.

The Kentucky case to which Appellant cites for the proposition that Kentucky rejects the "no proximate cause" rule is *Jones v. Lathram*, 150 S.W.3d 50 (Ky.2004). In *Jones*, the Supreme Court of Kentucky held that an officer responding to an emergency call was not entitled to qualified immunity when the officer's vehicle collided with the vehicle of the plaintiff's decedent. *Id.* at 53. The officer in *Jones* was not pursuing a suspect but was rather responding to another officer's call for assistance. *Id.* at 51.

The Court in *Jones* did not overrule prior Kentucky precedent adopting the "no proximate cause" rule because the facts in *Jones* were different from those under which the "no proximate cause" rule is applied: an officer pursues a fleeing suspect, and the suspect's vehicle strikes and injures a third party. Kentucky's highest court first adopted the "no proximate cause" rule in *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky.1952), holding that an officer's pursuit of

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* * *. The proof establishes that the sole proximate cause of the accident was the intoxicated driver's dangerous operation of an automobile * * *").

[2] In the Louisiana case to which Appellant cites, *Richard v. Miller*, 867 So.2d 983 (La.App.2004), the court held that it was the actions of the fleeing suspect, and not of the pursuing officer, that were the cause-in-fact of the collision. *Id.* at 988.

a fleeing suspect did not proximately cause the fleeing suspect to crash into the plaintiff's milk wagon. *Id.* at 590-591.

The "no proximate cause" rule remains the law in Kentucky. In 2014, a Kentucky appellate court relied on *Chambers* when it affirmed a grant of summary judgment to defendant police officers in a pursuit case. *Plummer v. Lake*, Ky.App. No. 2012-CA-001559-MR, 2014 WL 1513294, *11 (Apr. 18, 2014). The court in *Plummer* held that the officers were not the proximate cause of the death of the plaintiff's decedent, who was struck and killed by the fleeing suspect's vehicle. *Id.* The court distinguished *Jones*: in *Jones*, the officer was not pursuing a suspect, and in *Jones*, it was the officer himself, and not the suspect, who collided with another vehicle. *Id.* at *8. The court in *Plummer* held that *Chambers* was dispositive on the issue of causation: "'To argue that the officers' pursuit caused [the suspect] to speed may be factually true, but it does not follow that the officers are liable at law for the results of [the suspect's] negligent speed. Police cannot be made insurers of the conduct of the culprits they chase.'" *Id.* at *11, quoting *Chambers* at 591.

Similarly, Appellant's assertion that Minnesota rejects the "no proximate" cause rule is incorrect. In the case to which Appellant cites, *Mumm v. Mornson*, 708 N.W.2d 475 (Minn.2006), the Supreme Court of Minnesota affirmed in part and reversed in part a trial court's denial of summary judgment as to claims involving a crash following a police pursuit. *Id.* at 493. The Court based its holding on immunity grounds and did not address proximate causation. *See id.* In *Mumm*, the officers rammed their vehicle into the fleeing suspect's vehicle, resulting in a crash in which the suspect's vehicle struck and killed a pedestrian. *Id.* at 479.

Prior to the decision in *Mumm*, a Minnesota appellate court had held that an officer's decision to pursue a fleeing suspect could not, as a matter of law, be the proximate cause of an

accident between a fleeing suspect and an innocent third party. *Pletan v. Gaines*, 481 N.W.2d 566, 569-570 (Minn.App.1992). The court in *Pletan*, affirming the trial court's grant of summary judgment to the defendant officer, held that the officer's driving was not the proximate cause of the death of the plaintiffs' decedent. *Id.* at 570. The court followed what it described as the rule in "the majority of jurisdictions" that had addressed the issue: "an officer's decision to pursue is not the proximate cause of an accident." *Id.* As the plaintiffs in *Pletan* failed to offer any evidence that the officer's driving, and not the driving of the pursued suspect, was the cause of the death of their decedent, summary judgment was appropriate. *Id.*

The Supreme Court of Minnesota did not abandon the "no proximate cause" rule in *Mumm*. The Court in *Mumm* ruled only on immunity and not on proximate causation. Moreover, in *Mumm*, unlike in *Pletan*, the officers were involved in the crash, and the officers' driving directly contributed to the death of the plaintiffs' decedent. The "no proximate cause" rule adopted by the court in *Pletan* remains good law in Minnesota.

Appellant's assertion that Indiana rejects the "no proximate cause" rule is also incorrect. In support of this assertion, Appellant cites to *Patrick v. Miresso*, 848 N.E.2d 1083 (Ind.2006). The Court in *Patrick* affirmed, on immunity grounds and without ruling on proximate causation, the denial of a defendant officer's motion for summary judgment in a police pursuit case. *See id.* at 1084. In *Patrick*, it was the officer, and not the fleeing suspect, who collided with the plaintiff's vehicle. *Id.*

Just as the Supreme Court of Minnesota in *Mumm* did not overrule the appellate court in *Pletan*, the Supreme Court of Indiana in *Patrick* did not overrule an earlier Indiana appellate court case, *Bailey v. L. W. Edison Charitable Found. of Grand Rapids, Inc.*, 152 Ind.App. 460, 284 N.E.2d 141 (1972), which had applied the "no proximate cause" rule. The court in *Bailey*

held, as a matter of law, that the police officers' pursuit of a fleeing vehicle was reasonable and was not the proximate cause of the death of the passengers of the fleeing vehicle. *Bailey* at 469. The "no proximate cause" rule adopted by the court in *Bailey* remains good law in Indiana.

ii. Missouri

Finally, it is incorrect for the OAJ to assert that in Missouri, proximate causation is an issue for the jury. In fact, the Supreme Court of Missouri has adopted the "no proximate cause" rule. In *Stanley v. City of Independence*, 995 S.W.2d 485 (Mo.1999), the Court, affirming a grant of summary judgment to the defendant officer, held that the pursuing officer's conduct was not a proximate cause of the collision between the fleeing suspect and the plaintiffs' decedents:

> The suspects in the van made the initial decision to flee, sped through red lights and in the wrong lane of traffic, and collided with the decedents. Any negligence by [the officer] is connected to the plaintiffs' injury solely through the conduct of the fleeing van. Thus, the only conceivable causal link between the officer's alleged negligence and the collision is the conjectural effect of his pursuit on the pursued vehicle. * * * There is nothing other than speculation to reach a conclusion that the officer's conduct was a "cause" of the collision.

Id. at 488.

In the case to which the OAJ cites, *Moyer v. St. Francois Cty. Sheriff Dept.*, 449 S.W.3d 415 (Mo.App.2014), a Missouri appellate court reversed a grant of summary judgment to a county sheriff's department in a police pursuit case, finding that there was a genuine issue of material fact as to causation. *Id.* at 418-419. The court in *Moyer* distinguished *Stanley* on its facts, noting that the Court in *Stanley* had stated that it "'need not address other fact situations where the alleged negligence of a police officer may in fact proximately cause a collision between the fleeing vehicle and a third party.'" *Moyer* at 418, quoting *Stanley* at 488. In *Moyer*, the court noted that the pursuit at issue in that case was longer and involved higher maximum speeds than the pursuit in *Stanley*. *Id.*

The precedential value of *Moyer* in Missouri is questionable at best. As the dissenting judge in *Moyer* noted, the cases that the Supreme Court of Missouri cited in *Stanley* as examples of factual situations in which an officer's negligence might proximately cause a collision between a fleeing suspect and a third party did not "turn on issues of the speed, distance, or duration of the high speed chase." *Moyer* at 419 (Ahrens, J., dissenting). Moreover, another Missouri appellate court, in *Frazier v. City of Kansas*, 467 S.W.3d 327 (Mo.App.2015), recently declined to follow *Moyer* and instead applied the "no proximate cause" rule set forth in *Stanley*. In *Frazier*, the court held that although the pursuit at issue in that case was longer than the pursuit in *Stanley*, the holding of the Supreme Court of Missouri in *Stanley* was controlling on the issue of proximate causation. *Frazier* at 337. The court in *Frazier* therefore held, as a matter of law, that the trial court did not err in finding that the actions of the fleeing suspect, and not those of the pursuing officer, were the proximate cause of the suspect's collision with the plaintiff's vehicle. *Id.* at 337-338. In Missouri, the "no proximate cause" rule adopted in *Stanley* remains the law.

The "no proximate cause" rule remains the law in a number of states, including in Wyoming, the state from which Ohio's Ninth District Court of Appeals adopted the "extreme or outrageous conduct" standard of Ohio's "no proximate cause" rule. Accordingly, this Court should not abandon the "no proximate cause" rule merely because a minority of the states in this country applies the rule.

<u>*Amicus Curiae*'s Second Proposition of Law</u>: The General Assembly has set forth public policy supporting police pursuits of suspected offenders.

The Appellant and *amici curiae* writing in support of Appellant claim that the "no proximate cause" rule is irreconcilable with Ohio law. However, Ohio Revised Code provisions reflect a strong public policy in support of police pursuits of suspected offenders. This public

policy is evident in Revised Code provisions that (1) require police officers to arrest suspects found violating the law; (2) hold officers criminally liable for failing to prevent or halt the commission of an offense, or to apprehend an offender; and (3) excuse officers from obeying traffic laws when responding to emergency calls.

As this Court recently noted, under Ohio law, officers have a mandatory duty to enforce criminal laws and apprehend offenders:

> R.C. 2935.03(A)(1) mandates that peace officers "shall arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the political subdivision * * * a law of this state" or a municipal ordinance. Further, R.C. 2921.44(A)(2) makes it a second-degree misdemeanor for a law enforcement officer to negligently fail to prevent or stop the commission of an offense or to negligently fail to apprehend an offender.

State v. White, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 32.

Ohio courts have noted that R.C. 2935.03 and R.C. 2921.44(A)(2) set forth a public policy requiring an officer to act to prevent offenses, even when the officer is off-duty or is outside of his jurisdiction. In *Luketic v. University Circle, Inc.*, 134 Ohio App.3d 217, 730 N.E.2d 1006 (8th Dist.1999), the Eighth District Court of Appeals considered whether an off-duty officer, who was injured while attempting to prevent the commission of a violent felony, was entitled to workers' compensation benefits. *Id.* at 220. In holding that the officer was entitled to such benefits, the court held that pursuant to R.C. 2935.03 and R.C. 2921.44(A)(2), "[a]s a matter of public policy and statutory mandate, a police officer is required to prevent an offense, in particular a violent felony, when it is in the officer's ability to do so." *Id.* at 222.

Similarly, in *State v. Beckwith*, 38 Ohio App.3d 30, 526 N.E.2d 105 (11th Dist.1987), the Eleventh District Court of Appeals affirmed the trial court's denial of a motion to suppress evidence obtained in an OVI stop, even though the officer had arrested the suspect outside of the officer's jurisdiction. *Id.* at 32. The court held that the officer was in substantial compliance

with R.C. 2935.03(D), which permits an officer, under certain circumstances, to pursue, arrest, and detain a suspect outside of the officer's jurisdiction. *Id.* at 31-32, citing R.C. 2935.03(D). The court noted that the following public policy considerations supported its holding:

> "The public policy of this state suggests that when a law enforcement officer sees a clear violation of law—albeit a misdemeanor offense—the officer ought to do what is *reasonable*, under the circumstances, to prevent the public from being injured. An officer should not be placed in the position where he or she must view drivers who are endangering the lives of others, without having the authority to stop the drivers and their conduct."

Id. at 32, quoting *State v. Pruey*, 11th Dist. Lake No. 11-246, 1987 WL 6236, at *2 (Feb. 6, 1987) (Emphasis sic.)

In addition to requiring officers to act to apprehend suspected offenders, Ohio Revised Code provisions also excuse "public safety vehicles" from obeying traffic laws when responding to emergency calls. *See* R.C. 4511.03(A) (public safety vehicles not required to stop at red light or stop sign); R.C. 4511.041 (general exception from forty-three traffic statutes for public safety vehicles); R.C. 4511.24 (public safety vehicles not required to obey the posted speed limit); R.C. 4511.37 (public safety vehicles exempt from statute prohibiting any vehicle from turning so as to proceed in the opposite direction upon curves or upon approaches to or near the crest of a grade, if the vehicle cannot be seen within five hundred feet by the driver of any other vehicle approaching from either direction); R.C. 4511.451(B) (public safety vehicles not required to yield the right of way to vehicles in a funeral procession).

The term "public safety vehicle" is defined to include motor vehicles used by law enforcement officers. R.C. 4511.01(E)(2). Each of the five statutes cited above applies when an officer is responding to an emergency call and provides that an officer is not relieved of his duty

to drive with due regard for the safety of all persons and property on the highway.[3] R.C. 4511.03(A); R.C. 4511.041; R.C. 4511.24; R.C. 4511.37; R.C. 4511.451(B), citing R.C. 4511.45.

Although the term "emergency call" is not defined in Chapter 4511 of the Revised Code, it is defined in Ohio's Political Subdivision Tort Liability Act. Pursuant to R.C. 2744.01(A), "'[e]mergency call' means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer." This Court has construed the term "emergency call" to refer to "a situation to which a response by a peace officer is required by the officer's professional obligation." *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, syllabus.

Pursuant to R.C. 2935.03 and R.C. 2921.44(A)(2), police officers are duty-bound to apprehend suspected offenders. Chapter 4511 of the Revised Code exempts officers from obeying Ohio's traffic laws when officers are performing their required duties. Under these statutes, when an officer fulfills his statutory duty and pursues a suspected offender, the officer is not bound to follow Ohio's traffic laws. As such, the General Assembly has set forth a public policy in support of police pursuits of suspected offenders.

[3] With the exception of R.C. 4511.03, each of the five statutes exempts the officer from the applicable traffic law when the vehicle's overhead lights and siren are on, and there are normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle. R.C. 4511.041; R.C. 4511.24; R.C. 4511.37; R.C. 4511.451(B), citing R.C. 4511.45. Under R.C. 4511.03(A), an officer who is responding to an emergency call "upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway."

***<u>Amicus Curiae</u>*<u>'s Third Proposition of Law</u>: Abandoning the "no proximate cause" rule would thwart the public policy set forth by the General Assembly and would jeopardize public safety.**

The Appellant and *amici curiae* writing in support of Appellant argue that the "extreme and outrageous conduct" standard of Ohio's "no proximate cause" rule fails to hold officers accountable for their dangerous conduct when officers pursue fleeing suspects. They assert that this Court should abandon the "no proximate cause" rule and permit officers to be held liable under a recklessness standard, pursuant to R.C. 2744.03(A)(6). Abandoning the "extreme and outrageous conduct" standard in police pursuit cases and permitting officers to be held liable for reckless conduct would thwart Ohio public policy supporting police pursuits and would jeopardize public safety.

Because police pursuits are indeed dangerous, if this Court abandoned the "extreme and outrageous conduct" standard, plaintiffs would be able to plausibly argue that police pursuits of fleeing suspects are *per se* reckless. This lower recklessness standard would expose officers to a high risk of liability for the split-second decisions they must make in pursuit situations. Under a recklessness standard, it is likely that law enforcement agencies, to avoid this increased likelihood of liability, would either impose more restrictive pursuit policies or perhaps even ban pursuits altogether. Reducing the number of police pursuits, or eliminating police pursuits altogether, would jeopardize public safety by ensuring that offenders would remain on the streets if they only fled from officers at a high rate of speed.

Recklessness is too low of a standard for police pursuits because pursuits are inherently dangerous. "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-

Ohio-5711, 983 N.E.2d 266, ¶ 34, citing *Thompson v. McNeill*, 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705 (1990). This Court has noted that recklessness is a high standard. *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶ 37. However, it is not high enough of a standard to permit officers to fulfill their statutory duty to apprehend suspects who flee from them.

In any police pursuit, the pursuing officer will necessarily be consciously disregarding a known or obvious risk of harm to another. *See* O'Connor & Norse, *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L.Rev. 511, 511 (2006) (NHTSA data for 2003 showed that nearly forty percent of an estimated 35,000 police pursuits resulted in crashes, at least half of which resulted in injuries). Because police pursuits involve such a high risk of injury, under a recklessness standard, any plaintiff in a police pursuit case would be able to make a plausible argument that an officer's conduct in pursuing a fleeing suspect was both unreasonable under the circumstances and substantially greater than negligent conduct.

As Appellant suggests in her merit brief, jurisdictions that adopt a standard lower than "extreme and outrageous conduct" are more likely to impose liability on an officer who chooses to pursue a fleeing suspect. Abandoning the "extreme and outrageous conduct" standard in Ohio would indeed increase the liability risk to officers who engage in pursuits. Abandoning this higher standard would thereby make an officer who pursued a fleeing suspect an insurer of the suspect's wrongful acts. It would also likely increase the number of lawsuits in Ohio that stemmed from police pursuits. *See* O'Connor & Norse, 57 Mercer L.Rev. at 515, 517 (in the years prior to 2006, states lowered their standards of liability in police pursuit cases, and lawsuits stemming from police pursuits proliferated).

This increased liability risk would likely prompt law enforcement agencies to impose more restrictive pursuit policies or to perhaps even ban pursuits altogether. Many law enforcement agencies, including the agencies that employ the officers in this case, have written pursuit policies. *See id.* at 514. While some pursuit policies leave room for officers to apply their own discretion to the varying factual circumstances of police pursuits, some agencies' policies caution or discourage any pursuit, except under the most severe of circumstances. *Id.* If this Court abandoned the "extreme and outrageous conduct" standard, law enforcement agencies in Ohio would likely adopt policies that eliminated officer discretion and that either severely limited pursuits or banned them altogether. The likely result would be a corresponding drop in the number of police pursuits.

Studies have shown that policing is effective at reducing crime. *See* Weisburd & Telep, *Hot Spots Policing: What We Know and What We Need to Know*, 30(2) J. Contemporary Crim. Justice 200, 200-202 (2014) ("hot spots policing," which involves focused police response to high-crime areas, can have significant beneficial impact on crime in such areas); Erke et al., *The effects of drink-driving checkpoints on crashes—A meta-analysis*, 41 Accident Analysis and Prevention 914, 922 (2009) (analysis of forty studies examining the effects of DUI checkpoints and traffic crashes in multiple countries, including the United States, shows that such checkpoints reduce alcohol-involved traffic crashes by 17 percent, and reduce traffic crashes by 10 to 15 percent overall). The authors of one such study, which showed a reduction in violent gun crime in two cities' neighborhoods in response to proactive traffic patrolling, suggested that the results they observed could be attributed either to a deterrent effect of proactive patrolling, or to an incapacitation effect based on the arrest, prosecution, and incarceration of dangerous

individuals. McGarrell et al., *Reducing Firearms Violence Through Directed Police Patrol*, 1 Criminology & Pub. Pol'y 119, 144 (2001).

Regardless of the cause of crime reduction in response to policing, effective policing methods such as proactive traffic patrolling and DUI checkpoints will lose their effectiveness if officers are unable or unwilling to pursue fleeing suspects. The effect on incapacitation is clear: if the police cannot pursue a fleeing suspect, the suspect cannot be arrested, prosecuted, and potentially brought to justice. And the effect on deterrence is equally as clear: if suspects know that they will not be arrested if they flee from the police, more suspects will flee.

In *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), the United States Supreme Court noted that if it were to impose a rule requiring the police to allow fleeing suspects to get away, the deterrent effect of policing on criminal behavior would be eroded. In *Scott*, the Court held that an officer did not violate a fleeing suspect's Fourth Amendment rights when the officer terminated his pursuit of the suspect by ramming the suspect's vehicle from behind. *Id.* at 381. The Court described the potential effects of a rule that would have subjected the officer to liability:

> [W]e 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.

(Emphasis sic.) *Id.* at 385.

If this Court abandoned the "no proximate cause" rule for police pursuits, the streets of Ohio would likely experience the same effect that the United States Supreme Court predicted in *Scott*. Suspects flee from the police on a frequent basis. Under a recklessness standard, officers would be subject to an increased risk of liability and would therefore be less likely to initiate

pursuits of fleeing suspects. Those suspects who fled from the police would be more likely to get away, and more suspects, emboldened by the knowledge that escape was within their grasp, would attempt to get away. As a result, fewer offenders would be brought to justice. Abandoning the "no proximate cause" rule for police pursuits would therefore thwart Ohio's public policy in support of police pursuits and would endanger public safety.

CONCLUSION

For the foregoing reasons, the OPAA asks the Court to affirm the judgment of the Second District Court of Appeals.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon each party of record in this case by U.S. mail on the 8th day of December, 2015 addressed to:

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