

IN THE SUPREME COURT OF OHIO

PAMELA ARGABRITE,

Plaintiff-Appellant

vs.

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

Defendant-Appellees

CASE NO. 2015-0348

**ON APPEAL FROM THE
MONTGOMERY COUNTY
COURT OF APPEALS,
SECOND DISTRICT**

**COURT OF APPEALS
CASE NO. 26220**

MERIT BRIEF OF APPELLEES DANIEL ADKINS AND ANTHONY BALL

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STATEMENT OF THE FACTS

Introduction

On July 11, 2011, Andrew Barnhart, a man suspected of having committed a burglary in Miami Township, Ohio, fled from law enforcement officers in a white Caprice Classic. A pursuit of Barnhart's vehicle ensued - the result of which was a collision between Barnhart's Caprice and the vehicle then operated by Appellant Pamela Argabrite, who was an innocent third party. Barnhart died as a result of the crash, and Appellant was seriously injured.

That same day, Appellees Sergeant Daniel Adkins ("Adkins" or "Sergeant Adkins") and Deputy Anthony Ball ("Ball" or "Deputy Ball") were on duty with the Montgomery County Sheriff's Department and were stationed at the Washington Township substation located on McEwen Road. It is undisputed that Adkins and Ball did not initiate the pursuit of Andrew Barnhart's vehicle. The following statement of facts speaks to the involvement, or lack thereof, of Sergeant Adkins and Deputy Ball in the incident giving rise to this case.

Radio Traffic Alerts Sergeant Adkins To A Burglary In Progress

Sergeant Adkins was on patrol in Washington Township on July 11, 2011 when he learned via radio broadcast of a burglary in progress within the township. (Adkins Depo., at p. 7) While proceeding to the address of the burglary, Adkins received updates that one of the suspects, later identified as Andrew Barnhart, had fled in a vehicle described as an older white Caprice Classic. (Id., at 7-8) Adkins began patrolling around the general area hoping to find the suspect vehicle. (Id., at 8) While doing so, Adkins heard radio traffic from the Miami Township Police Department indicating they found the suspect vehicle within Miami Township and had begun a pursuit of the Caprice. (Id., at 9)

After learning that Miami Township officers were pursuing the suspect, and thinking that he might be needed to assist in clearing intersections or to wait for the suspect in the vehicle to flee on foot, Sergeant Adkins left the area of the burglary. (Id., at 11) He headed to an area mentioned in Miami Township Police Department's radio traffic – the area of Lyons Road and State Route 741. (Id.) Adkins reasoned that, if the suspect vehicle traveled north on 741, he would need to stop traffic near the intersection with Lyons Road because vehicular traffic at that time of the day would have been “horrendous.” (Id.)

However, the pursuit of Barnhart did not turn to go northbound on State Route 741; instead, the pursuit of Barnhart continued by going southbound on that road. (Id., at 12) Thus, Sergeant Adkins did not participate in the actual pursuit of Barnhart and never observed the Caprice Classic during the course of the pursuit. (Id.)

Deputy Ball Sees Andrew Barnhart In Washington Township

Deputy Ball was at the Washington Township substation on July 11, 2011 when he heard a “burst” of radio traffic and realized something was happening. (Ball Depo., at pp. 12-13) Upon hearing that Miami Township Police Department officers were headed into the Washington Township jurisdiction, Ball got into his cruiser. (Id., at 13-14) He tried to bring up the mobile data terminal in his vehicle to find out more details of the on-going situation and then exited the substation parking lot heading north on McEwen Road toward State Route 725. (Id., at 13) While heading northbound, the white vehicle driven by Barnhart passed Deputy Ball's vehicle going the opposite direction on McEwen Road. (Id., 13-14) When Ball turned around to see the car, he noticed that the suspect vehicle was driving faster than normal, and that it went into the opposing lanes of travel, heading southbound in the northbound lanes. (Id., at 14-15)

Deputy Ball could not see other police vehicles in pursuit at that time but could see lights in the distance, which appeared to him as though the officers in pursuit might have gotten delayed at an intersection. (Id., at 17) Once he determined that Miami Township officers were still at an intersection, Ball activated his vehicle's emergency equipment and made a U-turn on McEwen Road. After turning around, he deactivated his cruiser's emergency equipment. (Id., at 25) Thinking that the Miami Township officers were closer to him than they actually were at that point, Ball then moved over into the right portion of the road, expecting them to come around him and continue their pursuit. (Id., at 18-20) However, Deputy Ball soon realized the Miami Township officers were farther away than he originally thought, so he followed the direction of Barnhart's Caprice Classic in an attempt to avoid losing sight of it. (Id., at 20)

Deputy Ball estimated that he was traveling approximately 45 to 50 miles per hour while heading southbound on McEwen Road toward Spring Valley Pike. (Id., at 19) He temporarily lost sight of the suspect vehicle while on McEwen, but when he approached Spring Valley Pike, Ball noticed Barnhart's vehicle traveling westbound on that road. (Id.) Consequently, at the intersection of McEwen Road and Spring Valley Pike, Deputy Ball activated his vehicle's emergency equipment and turned west onto Spring Valley. (Id., at 21) Then Deputy Ball, whose goal was to keep the Caprice Classic in sight rather than to pursue with a view toward apprehending the suspect, looked back to see whether the Miami Township officers were close enough so that he could "get out of their way." (Id., at 22)

Ball was able to see the suspect vehicle intermittently, which is how he knew to continue west on Spring Valley Pike through the intersection with Yankee Street. (Id., at 23) During that time, Deputy Ball only activated his vehicle's emergency equipment - sometimes just lights and sometimes lights and sirens - when he was passing vehicles or in intersections. (Id., at 26)

Ball's main purpose in activating the emergency equipment was to warn motorists that he and the Miami Township officers were coming through the area. (Id.) After crossing through the intersection of Yankee and Spring Valley, Deputy Ball turned off the lights and sirens. (Id., at 32)

Eventually, while traveling on Spring Valley, Ball noticed that the Miami Township police cruisers were close behind him. Deputy Ball then began looking for places to pull over to give the Miami Township cruisers an opportunity to pass him. (Id., at 33) Concerned that the Miami Township officers would follow him if he pulled over or tried to maneuver out of their way, Deputy Ball made his one and only communication over the radio. (Id., at 27-28; 33) He told the Miami Township officers to pass him when he was just east of the intersection of Spring Valley Pike and Washington Church Road. (Id., at 27-28) Ball made this communication because he had no intention of pursuing the suspect vehicle but had only sought to put himself in a position where he could attempt to keep "a visual" on the suspect vehicle until the other officers caught up to him. (Id., at 35) Actually, Deputy Ball felt as though he was impeding the Miami Township officers' progress. (Id.)

After Ball pulled over into the middle of the roadway near the intersection with Washington Church Road, Miami Township officers passed him and continued pursuing the Caprice. (Id., at 34-36) At that point, Deputy Ball and the officers were near the jurisdictional boundary line of Miami and Washington Townships, although that location was incidental to Deputy Ball, as he has jurisdiction throughout the county. (Id., at 36) Once the Miami Township officers passed him in their cruisers, Deputy Ball continued westbound on Spring Valley generally without his emergency equipment activated. Occasionally, Deputy Ball did activate his lights after the Miami Township officers passed him but only to facilitate his passing of

certain vehicles that had already pulled over to get out of the way of the Miami Township cruisers. (Id., at 36)

Andrew Barnhart Crashes Into Appellant Pamela Argabrite's Vehicle

When he reached the intersection of Spring Valley Pike and State Route 741, Deputy Ball stopped at the red light and waited for the light to change. (Id.) While sitting stationary at the traffic light, his vehicle's emergency equipment was turned off. (Id., at 37) At approximately the same time that the traffic light turned green, Ball heard a broadcast over the radio from the Miami Township officers stating that a crash had occurred. (Id.) Andrew Barnhart had crashed his vehicle into Appellant Pamela Argabrite's vehicle near the intersection of State Route 741 and Austin Boulevard. After hearing the radio broadcast, Deputy Ball activated his vehicle's emergency equipment again and responded to the crash scene to assist with traffic. (Id.)

History Of The Case

On October 16, 2012, Appellant Pamela Argabrite initiated a lawsuit against members and former members of the Miami Township Police Department and against members and former members of the Montgomery County Sheriff's Office seeking damages for the injuries she sustained. The trial court's case number was 2012 CV 7402. In her Amended Complaint, filed June 7, 2013, Appellant alleged that, while acting in their official and individual capacities, Appellees engaged in a reckless high-speed police chase without just cause resulting in injury to Appellant.

Thereafter, Appellees filed separate motions for summary judgment pursuant to Civ.R. 56(C), which the trial court granted on April 17, 2014. With regard to Appellant Argabrite's claims against Appellees Deputy Ball and Sergeant Adkins, the trial court ruled that Ball and Adkins were entitled to summary judgment as a matter of law because of the so-called no-

proximate-cause rule of *Whitfield v. Dayton*, 167 Ohio App.3d 172, 2006-Ohio-2917, 854 N.E.2d 532 (2d Dist.). In other words, since no reasonable juror could conclude that either Ball or Adkins engaged in extreme or outrageous conduct during the pursuit of Barnhart that led to Appellant's injuries, she could not prove the causation element of her claim.

Appellant Argabrite subsequently appealed to the Second District Court of Appeals in case number CA 26220. On January 16, 2015, the court of appeals issued an Opinion and Final Entry affirming the trial court's judgment. In a split decision, the court of appeals held that *Whitfield, supra*, was dispositive of Argabrite's appeal and concluded that there was no evidence of outrageous or extreme conduct on the part of the Appellees, saying: "None of the officers' conduct may fairly be characterized as 'atrocious, and utterly intolerable in a civilized society.' Certainly, nothing about Ball's or Adkins' conduct comes close." *Whitfield*, ¶27. From the Second District Court of Appeals' decision, Appellant Pamela Argabrite now appeals to this Honorable Court.

ARGUMENT

Response To Proposition of Law No. I:

Ohio courts did not usurp the legislature's authority or violate the separation of powers doctrine by adopting the "no proximate cause" rule for proving causation in cases where a suspect fleeing from police collides with a vehicle driven by a third-party. Moreover, a rigorous test for causation requiring proof that the police acted in an extreme or outrageous manner before they may be held liable in such cases is based upon sound policy considerations.

Political Subdivision Tort Liability Act

With the enactment of the Political Subdivision Tort Liability Act, R.C. 2744, et seq., the General Assembly has set forth the circumstances under which political subdivision employees are immune from suit. R.C. 2744.03(A)(6); *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶19. In pertinent part, the statute provides that an employee is

immune from liability unless one of the following applies: (a) The employee's acts or omissions were manifestly outside the scope of the employer's employment or official responsibilities; (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (c) civil liability is expressly imposed upon the employee by a section of the Revised Code. R.C. 2744.03(A)(6).

Appellant Argabrite contends that by adopting the "no proximate cause" rule in certain police pursuit cases Ohio appellate courts have usurped the legislature's authority to determine when political subdivision employees will be immune from suit. More specifically, she claims the statute's reckless conduct exception to immunity is obviated by a rule that predicates the causal connection between police pursuit and a collision involving two *other* drivers upon extreme or outrageous police conduct. Although Argabrite has couched her argument in terms of a usurpation of legislative authority, it is evident that the "no proximate cause" rule in no way modifies or otherwise affects the legislature's statute governing political subdivision employee immunity from suit. Revised Code 2744.03 (A)(6). Instead, the "no proximate cause" rule is a rule governing proof of causation - which, as pointed out in other briefs before this Court, is a separate issue from the immunity question, and not governed by R.C. 2744.03(A)(6). Consequently, the rule does not encroach upon legislative authority in any manner. Thus, Argabrite's contention that the judicially created "no proximate cause" rule must be rejected as a usurpation of legislative authority is without merit, and this Court should therefore decline to adopt her first proposition of law.

Policy Considerations

Not only should Argabrite's first proposition of law be rejected for want of merit, it should also be rejected because the "no proximate cause" rule is based upon sound policy. As

noted in *Lewis v. Bland*, (1991) 75 Ohio App.3d 453, 456, 599 N.E.2d 814, the possibility that a fleeing suspect will injure a third party as a result of police pursuit is too remote to create liability until the officer's conduct becomes extreme. If police officers can easily be held liable for vehicle collisions between other drivers, there would likely be a chilling effect upon the officers' ability to apprehend suspects and thus to protect the public from potential harm. To avoid such a chilling effect, Ohio courts have wisely adopted the "no proximate cause" rule, which ensures liability will not be based upon mere speculation that a police pursuit caused an accident between a fleeing suspect and a third driver. Rather, police officers' will only be liable in situations where the causal link between the officers' conduct and the harm caused by a collision between other drivers can be firmly established.

Response To Proposition of Law No. II:

The conduct of Sergeant Adkins and Deputy Ball was not "so 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." *Yeager v. Local Union 20*, (1983) 6 Ohio St.3d 369, 375, 453 N.E.2d 666. Therefore, under the "no proximate cause" rule, Adkins and Ball did not cause Andrew Barnhart to collide with Appellant Argabrite's vehicle.

Summary Judgment

The Second District Court of Appeals' decision affirming summary judgment in Sergeant Adkins and Deputy Ball's favor should be affirmed by this Court. Summary judgment is appropriate when "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein*, (1996) 76 Ohio St.3d 383, 385, 667

N.E.2d 1197. In this case, application of the “no proximate cause” rule to the facts pertinent to the activities of Adkins and Ball can result only in the conclusion that they did not cause Andrew Barnhart to crash into Appellant Argabrite’s vehicle.

Sergeant Adkins’ Role

Sergeant Adkins had no active role in the police pursuit of Andrew Barnhart when he fled from officers investigating the reported burglary. After learning that Miami Township officers were in pursuit of one of the burglary suspects, Sergeant Adkins headed toward the intersection of Lyons Road and Route 741 to assist with heavy traffic in the event the pursuit headed north on Route 741. (Adkins Depo., at 12) However, the pursuit did not turn in his direction, and Adkins never even observed the suspect fleeing in the Caprice Classic. (Id.) Furthermore, Sergeant Adkins had no opportunity to permit, monitor, or call off Deputy Ball’s activity because he did not know that Ball was keeping “a visual” on the suspect vehicle until Ball communicated that he intended to pull over to get out of the Miami Township officers’ way. (Id., at 13)

The inescapable conclusion here – with which even Argabrite’s purported experts agreed – is that Sergeant Adkins played no active role in the pursuit of Barnhart’s vehicle and had no way of knowing during the pursuit that a deputy might be involved. (McDevitt Depo., at p. 139; Ashton Depo., at p. 76) Thus, Sergeant Adkins did not breach any alleged duty owed to Appellant Argabrite and did not permit, or fail to call off, any police pursuit of Andrew Barnhart’s vehicle. Far from engaging in extreme or outrageous conduct, Sergeant Adkins’ non-active role in the pursuit of Barnhart was entirely appropriate under the circumstances. Because Adkins did not engage in a pursuit of Barnhart’s vehicle, could not have permitted, monitored, or ended the alleged active pursuit engaged in by Deputy Ball, and did not engage in any extreme or outrageous conduct that resulted the collision between Barnhart and Appellant, Sergeant Adkins

was undoubtedly entitled to summary judgment on all claims. That being the case, this Court should affirm the court of appeals' decision to affirm summary judgment in the sergeant's favor.

Deputy Ball's Role

Similarly, Deputy Ball is entitled to summary judgment on all of Appellant Argabrite's claims. Although he followed Barnhart's vehicle for a time, Ball's conduct cannot be deemed a "pursuit" as that term is generally used. But even if Deputy Ball is deemed to have actively participated in the police pursuit of the suspect vehicle, summary judgment is still appropriate. Like Sergeant Adkins, Deputy Ball did not engage in any conduct that might legitimately be called extreme or outrageous and therefore, under the "no proximate cause" rule, he did not cause the accident at issue herein.

Simply following a criminal suspect's car does not equate with pursuing the suspect. Rather, "pursuit" is "[t]he act of chasing to overtake or apprehend." *State v. Henderson*, 2nd Dist. No. 22831, 2009-Ohio-4122, ¶9, citations omitted. With that definition in mind, there is no question that Deputy Ball did not engage in active pursuit of Andrew Barnhart's vehicle. He left the Washington Township substation when he heard radio traffic about a pursuit already in progress coming into the Washington Township area. (Ball Depo., at p. 14) Shortly after he pulled out of the substation parking lot onto McEwen Road, Barnhart's vehicle passed Deputy Ball heading southbound. (Id., at 16) Believing the Miami Township officers to be "held up" at an intersection, Deputy Ball reversed course to head in the same direction as the suspect vehicle. (Id.) However, Ball's purpose was merely to keep "a visual" on the suspect vehicle; he was not using the cruiser's emergency equipment while following Barnhart's car. (Id., at 16, 24) In fact, after turning around to follow the Caprice Classic, Deputy Ball's activation of his emergency

equipment occurred on Spring Valley Pike when he approached intersections or needed to get around another vehicle. (Id., at 25)

Importantly, Deputy Ball never actively attempted to catch up to the suspect vehicle; he traveled at speeds up to 45-50 mph and intermittently lost sight of Barnhart's vehicle, which appeared to be moving at a higher rate of speed. (Id., at 21-22) And, once he noticed the Miami Township officers catching up to him, Deputy Ball looked for a chance to pull over so they could pass him. Ball was concerned that he was hindering the other officers' pursuit because he was traveling more slowly than the suspect and not trying to catch up to Barnhart's vehicle. (Id., at 33) On the other hand, Ball was worried that if he maneuvered out of the officers' way, they might follow him, thinking the suspect headed in that direction. (Id.) Knowing that Spring Valley Pike widened into almost four lanes near the Washington Church Road intersection, Deputy Ball realized that would be the "perfect opportunity" for him "get out of their way." (Id.) So, he made his one and only radio communication at that time instructing the Miami Township officers instructing them to pass him. (Id., 27-28; 35)

These facts show that, like Sergeant Adkins, Deputy Ball did not actively pursue Andrew Barnhart's vehicle. Ball knew that a pursuit under the circumstances herein would not have been justified under the Sheriff's Department policy, and he never intended to actively engage in a pursuit. (Id., at 35; 39) Therefore, Deputy Ball did not breach any alleged duty owed to Appellant Argabrite. However, even if this Court determines that Deputy Ball was engaged in the pursuit of the suspect vehicle, summary judgment in Ball's favor is still the correct result because Ball did not cause the accident between Barnhart and Appellant.

Deputy Ball's last view of the suspect vehicle occurred when he was near the Spring Valley Pike/Yankee Street intersection, heading west. (Id., at 40) He saw Barnhart's vehicle

cresting the hill on Sprig Valley just west of Washington Church Road. (Id.) Shortly thereafter, Ball pulled into the center of Spring Valley and let the Miami Township officers pass him. (Id., at 27-28; 33; 35) Even Argabrite's purported expert, Gerald McDevitt, agreed that Deputy Ball disengaged from the pursuit (assuming he was in pursuit) when he pulled into the middle of the road, deactivated any emergency lights, and resumed following traffic laws -- including stopping at the red light at the intersection of Spring Valley Pike and Route 741. (McDevitt Depo., at pp. 138-139) In fact, Deputy Ball ended any purported pursuit of the suspect vehicle about two miles before the suspect crashed into Argabrite's vehicle.

Nothing about Dep. Ball's conduct in this matter can be characterized as extreme or outrageous: his actions did not go beyond all possible bounds of decency, and were neither atrocious nor utterly intolerable in a civilized community. *Yeager, supra*, at 375. Thus, under the "no proximate cause" rule, Deputy Ball cannot be deemed to have caused the collision between Barnhart and Appellant Argabrite. This Court should therefore affirm the Second District Court of Appeals' decision to affirm summary judgment in Ball's favor.

CONCLUSION

Ohio courts' adoption of the "no proximate cause" rule for proving causation in cases where a suspect fleeing from the police crashes into a third-party motorist does not usurp the legislature's authority to make exceptions to political subdivision employee immunity under R.C. 2744.03(A)(6). That statute merely governs immunity from suit and does not govern proof of causation in personal injury cases. Moreover, sound policy supports adoption of the "no proximate cause" rule in cases like the one herein because officers must be permitted to perform their duty to apprehend suspects without being held liable for damages caused by the fleeing suspect's driving. Finally, Sergeant Adkins and Deputy Ball were both entitled to summary

judgment because their conduct with respect to the pursuit of Andrew Barnhart's vehicle did not breach any duty owed to Appellant Argabrite, and neither Adkins or Ball caused the accident that resulted in injuries to Appellant. For these reasons, the decision of the Second District Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice was sent by ordinary mail on the 9th day of December, 2015 to Opposing Counsel: Kenneth J. Ignozzi, Dyer, Garofalo, Mann & Schultz, 131 N. Ludlow Street, Suite 1400, Dayton, Ohio 45402; Joshua R. Schierloh, Surdyk, Dowd & Turner Co., L.P.A., 8163 Old Yankee Street, Suite C, Dayton, Ohio 45458; and Lawrence E. Barbieri, Schroeder, Maundrell, Barbieri & Powers, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040.

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